

COURTS AND THE POLITICS OF BACKLASH: MARRIAGE EQUALITY LITIGATION, THEN AND NOW

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ABSTRACT

Groundbreaking decisions on same-sex marriage, particularly those from the Hawaii, Massachusetts, and California supreme courts, have generated widespread political backlash in the form of state constitutional amendments and statutes, the federal Defense of Marriage Act (“DOMA”), a proposed federal constitutional amendment, and more. By contrast, the first state supreme court decision to strike down a ban on interracial marriage—Perez v. Sharp, decided by the California Supreme Court in 1948—was met with barely a political whimper, even though it made international headlines and came decades before broad public acceptance of interracial marriage. This Article identifies that puzzling difference, tells the political story of the cases, explores factors that might explain the disparity in political and public reactions, and uses the contrasting case studies to elucidate the political dynamics that surround courts today and to suggest directions for the future study of antijudicial backlash.

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I. INTRODUCTION

When the California Supreme Court overturned a statute banning same-sex marriage in May 2008,¹ its ruling triggered national and international headlines.² The blockbuster decision, *In re Marriage Cases*, was only the second state supreme court ruling to affirm a constitutional right to marry, following, as it did, the Massachusetts Supreme Judicial Court's 2003 landmark decision in *Goodridge v. Department of Public Health*.³ *In re Marriage Cases* not only brought same-sex marriage to the nation's most populous state, but unlike *Goodridge*, it also found a right to marry even in the face of a state domestic partnership law granting same-sex partners virtually the same rights as married couples,⁴ and it found sexual orientation to be a suspect classification.⁵

Along with the headlines that followed *In re Marriage Cases* came swift backlash in the form of Proposition 8, which proposed amending the state constitution to wipe out the decision. Proposition 8 was approved by votes less than six months after the ruling and was later upheld against legal challenge.⁶ The backlash to *In re Marriage Cases* could have surprised no one who has been paying attention to the same-sex marriage debate over the last decade and a half. Ever since the Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*,⁷ portending the legalization of same-sex marriage in that state, backlash measures have been a mainstay of the controversy. Indeed, same-sex marriage was not ultimately legalized in Hawaii because of a constitutional amendment approved by the state's

1. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, California Marriage Protection Act, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

2. *E.g.*, Robert Barnes & Ashley Surdin, *California Supreme Court Strikes Bans on Same-Sex Marriage*, WASH. POST, May 16, 2008, at A1; *California Supreme Court Decision Is Significant Gay Rights Gain*, IRISH TIMES, May 17, 2008, at 12; Crystal Carreon, Bill Lindelof & Andy Furillo, *Court Backs Gay Marriage Ruling Faces Fight in California*, AUGUSTA CHRON. (Ga.), May 16, 2008, at A1; Jim Christie, *Gays in California Win Right to Wed Court Overturns Ban on Same-Sex Marriages, but Critics Vow to Contest Ruling with Statewide Ballot Measure*, GLOBE & MAIL (Toronto), May 16, 2008, at A19; Maura Dolan, *Same-Sex Marriage Ruling: The Decision; Gay Marriage Ban Overturned*, L.A. TIMES, May 16, 2008, at 1; Adam Liptak, *California Court Overturns a Ban on Gay Marriage*, N.Y. TIMES, May 16, 2008, at A1; Ian Munro, *Tears of Joy as California Court Ruling Marks Same-Sex Marriage Milestone*, AGE (Melbourne), May 17, 2008, at 16; David Osborne, *California Ban on Gay Marriage Thrown Out*, INDEP. (London), May 16, 2008, at 24.

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

4. *In re Marriage Cases*, 183 P.3d at 413–18.

5. *Id.* at 440–44.

6. *See Strauss*, 207 P.3d 48.

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

voters.⁸ In all, forty-one states and the U.S. Congress have enacted measures restricting the protections afforded same-sex couples since 1995,⁹ and twenty-six states have passed constitutional bans just since the *Goodridge* decision in 2003.¹⁰ And while 2009 also saw pathbreaking new victories for same-sex marriage around the country, the overwhelming majority of backlash measures throughout the country remain, for now, securely in place.¹¹

Seen in this context, the political aftermath of the California Supreme Court's decision is smoothly continuous with what followed *Baehr* and *Goodridge*. But the aftermath of *In re Marriage Cases* stands in stark contrast to what followed another earthshaking decision on marriage equality decided by the California Supreme Court—a decision that, on its face, bears uncanny similarities to both *In re Marriage Cases* and *Goodridge*. The California court's 1948 ruling in *Perez v. Sharp*¹² was the first state supreme court decision to invalidate a ban on interracial marriage. Like both *In re Marriage Cases* and *Goodridge*, *Perez* was decided by a bare 4-3 majority, featured a pitched debate between majority and dissent about whether it is institutionally appropriate for courts to impose controversial new rules about marriage, triggered widespread press coverage, and came in the face of negative public opinion about the form of marriage it sanctioned. Notwithstanding these similarities, however, there is a crucial point of difference: *Perez* triggered no backlash at all. To the contrary, *Perez* marked the beginning of the end of state antimiscegenation laws. When the case was decided in 1948, thirty states had miscegenation bans on the books.¹³ By 1967, when the U.S. Supreme Court decided *Loving v. Virginia*,¹⁴ the number was sixteen, and the high Court's decision provoked little public resistance. Viewed from the perspective of 2009—in the rearview mirror and with the same-sex marriage debate in mind—the absence of a backlash is striking. This is especially so given that there had been no organized political movement to dislodge antimiscegenation laws before *Perez* was decided, and therefore none of the public advocacy or

8. WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, *SEXUAL ORIENTATION AND THE LAW* 612 (3d ed. 2008).

9. NAT'L GAY & LESBIAN TASK FORCE, *ANTI-GAY MARRIAGE MEASURES IN THE U.S.* (2009), http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_05_09.pdf.

10. *Id.*

11. *Id.* (noting that Maine and Iowa had eliminated their backlash measures but showing that other such measures were still in place).

12. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

13. *See infra* note 24.

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

education efforts that would have accompanied such a movement. Nevertheless, no real opposition materialized.

It is a fair question to ask, at the outset, whether one would necessarily *expect* these two historical episodes to play out similarly. They are, after all, separated by nearly a half century and involve different kinds of controversies about marriage. Still, it is not as if backlash to a judicial decision was entirely out of the question in 1948. *Perez* was decided only six years before *Brown v. Board of Education*,¹⁵ which famously triggered “massive resistance.”¹⁶ And there are credible threshold reasons to suspect that *Perez* would similarly have generated a backlash.

Consider, for example, what the small, but emerging, literature on antijudicial backlash might predict. Although most of this literature has been normative in nature,¹⁷ some scholarly work has been empirically focused and oriented to understanding the dynamics that produce backlash.¹⁸ Recent work by Michael Klarman, for example, undertakes to identify the circumstances that lead to backlash.¹⁹ Building on his prior work on *Brown*, Klarman juxtaposes *Brown*, *Lawrence v. Texas*,²⁰ and *Goodridge* and distills three criteria for predicting backlash:

15. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

16. See generally NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S* (La. Paperback ed. 1999) (discussing social and political responses in the wake of *Brown*).

17. Much of this scholarship laments backlash and counsels courts to avoid it. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1310 (2005) (arguing that courts should not “raise the stakes of politics by taking issues away from the political system prematurely”); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 33 (1996) (“[The Court] may produce an intense social backlash, in the process delegitimizing both the Court and the cause it favors.”). More recently, Robert Post and Reva Siegel have suggested that backlash ought to be embraced as a generative part of democratic politics rather than treated as evidence of institutional pathology. See Robert Post & Reva Siegel, Essay, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 376 (2007) (“Backlash can promote constitutional solidarity and invigorate the democratic legitimacy of constitutional interpretation.”).

18. In the realm of public opinion backlash, see generally PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (collecting analyses of public opinion on various matters of constitutional controversy over the past half century). For a good overview of the literature in both law and political science on the broader question of the extent to which judicial decisions track public opinion, see Barry Friedman, William Howard Taft Lecture, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004), and Thomas M. Keck, Review Essay, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511 (2007).

19. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473–482 (2005).

20. *Lawrence v. Texas*, 539 U.S. 558 (2003).

Court rulings such as *Brown* and *Goodridge* produce political backlashes for three principal reasons: They raise the salience of an issue, they incite anger over “outsider interference” or “judicial activism,” and they alter the order in which social change would otherwise have occurred.²¹

Under these criteria, a post-*Perez* backlash would have been expected. First, as will be set out in more detail in the pages that follow, *Perez* raised the salience of interracial marriage by triggering widespread press coverage about the decision. Similarly, the case would seem to satisfy the outsider interference/judicial activism criterion because it was rendered at a time when there was neither any organized movement to eliminate bans on interracial marriage, nor any judicial precedent for doing so. Likewise, Klarman’s third point would seem to tilt toward a predicted post-*Perez* backlash. In the face of unfriendly public opinion and the absence of any discernible movement to repeal the bans, *Perez* rather plainly “alter[ed] the order in which social change would otherwise have occurred.”²² Yet as I will describe in detail, no backlash ensued.

In this Article, I try to make sense of the disparity between these historical episodes of marriage equality litigation.²³ I focus on *Perez* and *Goodridge* because each was the first state supreme court decision to invalidate a well-established ban on marriage. *Goodridge*, however, was crucially preceded by the Hawaii Supreme Court’s *Baehr* decision, which ignited the national backlash against same-sex marriage several years before *Goodridge* was decided. Thus, the most instructive point of comparison to the aftermath of *Perez* is the corresponding, combined aftermaths of *Baehr* and *Goodridge*. And while *In re Marriage Cases* is less central to my comparative analysis because it was decided several years after *Baehr* and *Goodridge*, I devote some attention to its aftermath as well, given that the California court’s opinion placed heavy reliance on *Perez*, was explicitly cast as a contemporary counterpart to *Perez*, and produced a continuation of the post-*Baehr* and post-*Goodridge* backlash.

I begin by laying out the decisions and then turn to telling the political stories of these landmark cases by tracing their origins and, especially, their different aftermaths. I then explore a wide range of legal, political, and

21. Klarman, *supra* note 19, at 473.

22. *Id.* Indeed, Klarman notes that “neither [*Brown* nor *Lawrence*] was at the vanguard of a social reform movement, as was the California Supreme Court decision in 1948 striking down a ban on interracial marriage.” *Id.* at 445.

23. For a treatment of another *Perez*-related puzzle—why *Perez* has been so eclipsed in the legal canon by *Loving v. Virginia*—see R. A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp*, in *RACE LAW STORIES* 343 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

cultural dimensions of these controversies in search of factors that might explain the varying responses. In teasing out these factors, I cast a wide net but pay particular attention to what the historical analysis of *Perez* can teach us about the milieu in which courts operate today and, more specifically, about the environment that has surrounded the same-sex marriage decisions and shaped public response to them. I argue that comparing *Perez* with the same-sex marriage cases usefully underscores elements of the modern politics surrounding courts that were absent in 1948. Moving beyond explanatory differences, I close by probing the implications of the comparative analysis of these cases for thinking about backlash more generally. I conclude, first, that the case studies support the idea that backlash against courts is best understood within the larger category of political backlash rather than as being *sui generis*. Second, I conclude that the very idea of backlash needs to be disaggregated and particularized. Varying the metric for backlash, as well as the time frame for analysis, can change the inquiry in significant ways.

II. THE DECISIONS

A. *PEREZ*

1. The History and Context of Litigation Challenging Antimiscegenation Laws

When *Perez* was decided in 1948, thirty states banned interracial marriage.²⁴ These states included all the southern states, but the ban on interracial marriage was by no means a regional phenomenon. As of 1948, most—more than two-thirds—of the states west of the Mississippi had a ban on the books.²⁵ A substantial majority of African Americans lived in states that banned interracial marriage.²⁶ The extensive statutory coverage in the South and the West left only the Northeast and parts of the Midwest without bans. And although the statutory picture around the country was mixed, it was nevertheless a settled and static picture. There had not been a repeal of a statute for over sixty years (since Ohio had repealed its ban in

24. These states were Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. See PHYL NEWBECK, *VIRGINIA HASN'T ALWAYS BEEN FOR LOVERS: INTERRACIAL MARRIAGE BANS AND THE CASE OF RICHARD AND MILDRED LOVING* app. C (2004).

25. The five exceptions were Iowa, Kansas, Minnesota, New Mexico, and Washington. *Id.*

26. RENEE C. ROMANO, *RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA* 15 (2003).

1887), and the last new statute passed was Wyoming's ban in 1913.²⁷ There had been constitutional challenges to the bans over the years, but the state and federal courts had delivered a consistent string of victories to the states defending these laws.²⁸ With the exception of a lone Reconstruction-era case that was overruled a few years after it was decided, every litigated challenge to antimiscegenation laws had failed.²⁹

At the time *Perez* came before the California Supreme Court, there had been recent victories in race cases decided by the U.S. Supreme Court. *Shelley v. Kraemer*,³⁰ declaring racially restrictive covenants unenforceable in court, had been decided only a few months before *Perez* and was cited in the majority opinion.³¹ *Smith v. Allwright*,³² striking down the white primary, had been decided earlier in the decade, much to the resentment of many white southerners and with significant consequences for voting and elections.³³ Some other important cases had been litigated as well,³⁴ including some involving California.³⁵ But *Brown* was still six years away,

27. See PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY* 146 (2002). There was a string of repeals in the late nineteenth century, with Maine, Michigan, New Mexico, Ohio, and Rhode Island repealing their laws in the 1880s. At about the same time, however, new or strengthened laws were enacted in Louisiana, Oregon, Utah, and the District of Columbia. NEWBECK, *supra* note 24, at 46.

28. In the federal courts, see *Stevens v. United States*, 146 F.2d 120 (10th Cir. 1944), and *State v. Tutty*, 41 F. 753, (C.C.S.D. Ga. 1890). In the state courts, see *Green v. State*, 58 Ala. 190 (1877); *Ford v. State*, 53 Ala. 150 (1875); *Kirby v. Kirby*, 206 P. 405 (Ariz. 1922); *Dodson v. State*, 31 S.W. 977 (Ark. 1895); *Jackson v. City of Denver*, 124 P.2d 240 (Colo. 1942); *State v. Gibson*, 36 Ind. 389 (1871); *State v. Jackson*, 80 Mo. 175 (1883); *In re Takahashi's Estate*, 129 P.2d 217 (Mont. 1942); *Eggers v. Olson*, 231 P. 483 (Okla. 1924); *Blake v. Sessions*, 220 P. 876 (Okla. 1923); *In re Estate of Paquet*, 200 P. 911 (Or. 1921); *Frasher v. State*, 3 Tex. Ct. App. 263 (1877); and *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858 (1878).

29. In 1872, a decision in Alabama struck down an antimiscegenation law that had been applied to preclude a minister from marrying a mixed-race couple. *Burns v. State*, 48 Ala. 195 (1872), overruled by *Green v. State*, 58 Ala. 190. That decision, however, proved short lived and was reversed five years later by *Green v. State*.

30. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

31. *Perez v. Sharp*, 198 P.2d 17, 20, 27, 46 (Cal. 1948). *Shelley* was decided on May 3, 1948; *Perez* was decided on October 1, 1948.

32. *Smith v. Allwright*, 321 U.S. 649 (1944).

33. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 236 (2004) (suggesting that *Smith* is “the most practically significant ruling thus far considered in this book” and arguing that “the Court’s intervention was critical to [the] dramatic increase” in voter registration among adult southern blacks, which grew from 3 percent in 1940 to 20 percent in 1952).

34. For a good overview, see *id.* at 236–89.

35. For a close analysis of litigation in California challenging school segregation of Latinos (*Mendez v. Westminster Sch. Dist. of Orange County*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947)) and citizenship-based discrimination against Asian Americans (*Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), and *Oyama v. California*, 332 U.S. 633 (1948)), see Mark Robert Brilliant, *Color Lines: Civil Rights Struggles on America’s “Racial Frontier,” 1945–1975*, at

and *Plessy*³⁶ was still on the books. More to the point, perhaps, the Supreme Court had not yet decided *McLaughlin v. Florida*,³⁷ the 1964 case that struck down a Florida criminal statute that barred an unmarried interracial couple from cohabiting. In 1948, the case that *McLaughlin* later overruled—*Pace v. Alabama*—was still good law. *Pace* had upheld an Alabama statute that classified fornication between mixed-race partners as a felony, but treated the same act between same-race partners as only a misdemeanor.³⁸

We can see the same pattern in evidence on a broader social scale: genuinely consequential developments in the 1940s in the emerging civil rights struggle, but no real movement on interracial marriage in particular. Several leading scholarly accounts argue that the then-recent atrocities of World War II and the unfolding Cold War drove progressive change on domestic racial policy by exposing racist American practices to powerful charges of hypocrisy.³⁹ In a more specific sense, Truman had signed the executive order desegregating the military a few months before *Perez* was decided,⁴⁰ Jackie Robinson had recently integrated baseball,⁴¹ and some civil rights language had been included in political party platforms in 1948.⁴² The Democratic party's embrace of civil rights language at its convention had famously led to the Dixiecrat revolt, though that move had not prevented Truman's victory.⁴³

73–127 (Aug. 2002) (unpublished Ph.D. dissertation, Stanford University) (on file with Stanford Auxiliary Library, Stanford University).

36. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

37. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

38. *Pace v. Alabama*, 106 U.S. 583, 584–85 (1883), *overruled by McLaughlin*, 379 U.S. 184.

39. See, e.g., MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (examining how Cold War foreign affairs and international developments affected U.S. domestic civil rights policy); KLARMAN, *supra* note 33, at 182–84 (describing how the U.S.-Soviet competition for allegiance engendered during the Cold War heightened the stakes of how other countries perceived U.S. race relations and created an imperative for racial change); RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 177–233 (1999) (describing how political commitments forged during World War II shaped notions of rights in the United States after the war).

40. Exec. Order No. 9981, 3 C.F.R. 722 (1943–1948) (1948). While Truman had been willing to desegregate the military, he took no action on the marriage issue. Indeed, as late as 1963, when asked whether he expected interracial marriage to become popular, Truman famously answered that he “hope[d] not” and asked, “Would you want your daughter to marry a Negro?” JOSEPH R. WASHINGTON, JR., *MARRIAGE IN BLACK AND WHITE* 33 (1970).

41. Timothy Davis, *Race and Sports in America: An Historical Overview*, 7 VA. SPORTS & ENT. L.J. 291, 302 (2008).

42. See KLARMAN, *supra* note 33, at 181.

43. See KARI FREDERICKSON, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932–1968*, at 2–4, 184–86 (2001).

Yet these political and intellectual dynamics did not translate into any real concerted movement to eliminate laws banning interracial marriage. Take 1946 as an example. Senator Theodore Bilbo, a fiery racist senator from Mississippi, published a book entitled *Take Your Choice: Separation or Amalgamation*.⁴⁴ In it, he harshly condemned desegregation, arguing that racial integration would surely lead to racial mixing. At one point, he suggested that nuclear annihilation would be preferable to “slow destruction in the maelstrom of miscegenation, interbreeding, intermarriage and mongrelization.”⁴⁵ Truman appointed a commission on race to study civil rights policy in the same year Bilbo published his book, but the commission did not touch the question of interracial marriage. The commission’s report addressed segregation, lynching, poll taxes, and federal funding for discriminatory institutions—many of the things that Bilbo and his book highlighted—but the report was silent on intermarriage.⁴⁶ This was typical of the times: the marriage issue was simply not on the reform agenda.

One of the reasons that the marriage issue did not come to the fore at this time was that the National Association for the Advancement of Colored People (“NAACP”), the leading civil rights group in the country, had consciously steered clear of the issue. Part of this was, perhaps, attributable to the normative primacy given other issues, like school segregation. But there was a strategic dimension, as well. Dating to at least the early 1940s, Thurgood Marshall, as counsel, had taken the position that the miscegenation issue should be avoided.⁴⁷ The group cited the “danger of creating an unfavorable Appellate Court precedent” in declining to assist in a pending federal case in 1943.⁴⁸ When the plaintiff’s lawyer in that case protested to William Hastie, then teaching at Howard Law School and active in NAACP litigation, Hastie took the same position.⁴⁹ When the *Perez* case was litigated, in fact, the NAACP had no public involvement and instead limited its assistance to lending plaintiff’s counsel some

44. ROMANO, *supra* note 26, at 30.

45. *Id.* at 42 (internal quotation marks omitted).

46. *See id.* at 44.

47. NEWBECK, *supra* note 24, at 90; Deb Price, *Civil Rites: Arguments Against Same-Sex Marriage Mirror Those That Kept the Races Apart*, DETROIT NEWS, Apr. 18, 1997, at 1E. *See also* Chang Moon Sohn, *Principle and Expediency in Judicial Review: Miscegenation Cases in the Supreme Court 84* (1970) (unpublished Ph.D. dissertation, Columbia University) (on file with University Microfilms, Inc.).

48. NEWBECK, *supra* note 24, at 92. The case at issue was *Stevens v. United States*, 146 F.2d 120 (10th Cir. 1944), which involved an attempt to invalidate Oklahoma’s antimiscegenation law.

49. Indeed, he went as far as to say that it was a state’s legitimate prerogative to decide whether to permit interracial marriages. NEWBECK, *supra* note 24, at 92.

research materials.⁵⁰ The NAACP adhered to this position for many years to come. Its position became, if anything, more emphatic once *Brown* had been decided and fears of undermining the effort to desegregate schools became more focused.⁵¹ The American Civil Liberties Union (“ACLU”) also declined to participate in *Perez*, apparently taking a skeptical view of its likely outcome.⁵²

In sum, in 1948 there was little in the legal landscape to predict that a court was about to invalidate a miscegenation ban for the first time in the modern era.

2. The *Perez* Decision

The *Perez* case arose when the Los Angeles county clerk denied a marriage license to Andrea Perez and her longtime boyfriend, Sylvester Davis.⁵³ Perez, a Latina, was classified as “white” under the state’s law, and she sought to marry a black man.⁵⁴ Under California law, they were ineligible to marry.⁵⁵ The California ban on miscegenation had been on the books since California’s first legislative session in 1850.⁵⁶ In its first iteration, the law prohibited whites from marrying “blacks or mulattoes.” It was later amended to extend the prohibition to whites marrying “Mongolians” (in 1901) and “Malays” (in 1933).⁵⁷ Before *Perez* was decided, the expanded law had been recodified and signed into law by then-Governor Earl Warren.⁵⁸ The California statute declared interracial marriages void, but did not impose criminal penalties, as did the laws in all the other states that banned the practice.

Perez sought help from her former employer, whose husband, Daniel Marshall, was an attorney for the liberal Catholic Interracial Council in

50. Sohn, *supra* note 47, at 129 (citing a March 31, 1948, letter from Constance Baker Motley of the NAACP to American Civil Liberties Union counsel Cliff Forster).

51. *See id.* at 130, 133–34.

52. Brilliant, *supra* note 35, at 135, 141. *See also id.* at 131 (quoting a story in the *NATION*, published shortly after *Perez* was decided, indicating that major civil rights organizations had decided to play no role in the litigation).

53. *See Perez v. Sharp*, 198 P.2d 17, 17–18 (Cal. 1948).

54. For an excellent exploration of the personal story of Perez, Davis, and their lawsuit, see generally Lenhardt, *supra* note 23 (chronicling the *Perez* decision and the lives and experiences of the plaintiffs).

55. The statutes, then codified as California Civil Code sections 60 and 69, provided that “[a]ll marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void” and that no licenses would be issued for such marriages. *See Perez*, 198 P.2d at 18.

56. NEWBECK, *supra* note 24, at 75.

57. *Id.*

58. *Id.*; FRANK F. CHUMAN, *THE BAMBOO PEOPLE: JAPANESE-AMERICANS, THEIR HISTORY AND THE LAW* 333 (1981).

California, a small group that had been looking for a test case on the antimiscegenation law.⁵⁹ Represented by Marshall, Perez and Davis challenged the ban in the state courts. Perhaps attributable to the lawsuit's backers, the plaintiffs' attorneys stressed their First Amendment claim, premised on the theory that Perez and Davis were practicing Roman Catholics whose free exercise of religion was impaired by their inability to marry.⁶⁰ The California Supreme Court did not think much of that claim, quickly dismissing it. But the court did find the ban to violate the Equal Protection Clause. In his majority opinion, Justice Traynor foreshadowed (and perhaps helped to shape) the doctrinal approach later used by the U.S. Supreme Court in *Loving v. Virginia*. Traynor blended a due process-based rationale, stressing the centrality of the right to marry, with an equal protection-based rationale, stressing the odious racial distinction at work:

Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means.

. . . .

Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry. It must therefore be determined whether the state can restrict that right on the basis of race alone without violating the equal protection of the laws clause of the United States Constitution.⁶¹

The court went on to reject the justifications proffered by the State in defense of the law. These defenses, one more unapologetically racist than the next, relied on a set of assertions about the adverse effects that interracial marriage would produce. Justice Traynor characterized the State as arguing (1) that "the prohibition of intermarriage between Caucasians and members of the specified races prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians"; (2) that statistics proved the "physical inferiority of certain races" and that "Negroes, and impliedly the other races specified in section 60, are inferior mentally to Caucasians"; (3) that

59. See Lenhardt, *supra* note 23, at 354–56; Brilliant, *supra* note 35, at 131–34; Veronica Marshall-Varela, *The Miscegenation Law in California Was Overturned*, VOICES, http://www.voicesofcivilrights.org/Approved_Letters/00198.html (presenting Daniel Marshall's daughter's description of the case).

60. *Perez*, 198 P.2d at 18.

61. *Id.* at 18–19.

“persons wishing to marry in contravention of race barriers come from the ‘dregs of society’”; (4) that “the statute can be justified as a means of diminishing race tension”; and (5) that “interracial marriage has adverse effects not only upon the parties thereto but also upon their progeny.”⁶²

Traynor’s opinion found the State’s claims unsupported, the statute vague and uncertain, and the fit between means and ends insufficient to justify what the majority said was an “arbitrary” restriction of the right to marry based on race.⁶³ There were two concurring opinions, including one that raised the temperature of the issue by equating sections of the State’s brief with quoted passages from Hitler’s *Mein Kampf*.⁶⁴

In dissent, three justices aggressively countered these characterizations. The dissent emphasized a number of themes, including the sheer longevity of miscegenation bans,⁶⁵ the lack of precedent to support invalidation,⁶⁶ and the legislature’s institutional prerogative to decide matters of marital policy.⁶⁷ While going on at some length about the primacy of political recourse, however, the dissent did not restrict itself to the essentially proceduralist notion that the legislature, not the court, should decide the controversy. Instead, it went on to offer a fairly robust substantive defense of the statute. The dissent suggested, for example, that “there is not only some but a great deal of evidence to support the legislative determination (last made by our Legislature in 1933) that intermarriage between Negroes and white persons is incompatible with the general welfare and therefore a proper subject for regulation under the police power.”⁶⁸ The opinion referenced the proposition “that the crossing of the primary races leads gradually to retrogression and to eventual

62. *Id.* at 23–26.

63. *Id.* at 29.

64. *Id.* at 33–34 (Carter, J., concurring).

65. *See id.* at 35 (Shenk, J., dissenting) (“It will be shown that such laws have been in effect in this country since before our national independence and in this state since our first legislative session.”).

66. *See id.* (“[The antimiscegenation laws] have never been declared unconstitutional by any court in the land although frequently they have been under attack. It is difficult to see why such laws, valid when enacted and constitutionally enforceable in this state for nearly one hundred years and elsewhere for a much longer period of time, are now unconstitutional under the same Constitution and with no change in the factual situation.”); *id.* at 41 (citing “an unbroken line of judicial support” for antimiscegenation laws).

67. *See id.* at 42 (“The Legislature is, in the first instance, the judge of what is necessary for the public welfare. Earnest conflict of opinion makes it especially a question for the Legislature and not for the courts.”); *id.* at 43 (“The courts have no power to determine the merits of conflicting theories, to conduct an investigation of facts bearing upon questions of public policy or expediency, or to sustain or frustrate the legislation according to whether they happen to approve or disapprove the legislative determination of such questions of fact.”).

68. *Id.* at 45.

extinction of the resultant type unless it is fortified by reunion with the parent stock.”⁶⁹ It lamented what it branded the “sociological” problems caused by intermarriage—problems traced by writers to “the great difference of condition which is usually experienced by the members of the respective groups.”⁷⁰ And it made particular reference to children, crediting as “a principle widely expressed in modern eugenic literature” the idea that “where two [widely distinct races] are in contact the inferior qualities are not bred out, but may be emphasized in the progeny,”⁷¹ and noting that “[w]hen children enter the scene the difficulty is further complicated.”⁷²

B. GOODRIDGE/SAME-SEX MARRIAGE LITIGATION

1. The History and Context of Litigation Leading Up to *Goodridge*

*Goodridge*⁷³ was the first American case to legalize same-sex marriage, but neither it nor the *Baehr*⁷⁴ decision in 1993 was the first lawsuit to challenge the limitation of marriage to heterosexuals. Indeed, within a few years of the Stonewall Riots in Greenwich Village in June 1969—the date usually cited as the birth of the modern gay rights movement—three test cases asserting a constitutional right to same-sex marriage had been brought and decided by appellate courts in Kentucky, Minnesota, and Washington.⁷⁵ All three were won handily by the state governments, and none of them seems to have generated much real national attention. There was another case in Pennsylvania in 1984,⁷⁶ but the issue did not make it onto the national radar screen until 1993.

In 1993, the Hawaii Supreme Court produced shock waves with a decision that seemed to come out of nowhere. Several same-sex couples challenged the state’s denial of marriage licenses to them, claiming that state law violated, among other provisions in the Hawaii state constitution, the equal rights clause, which barred sex discrimination and triggered strict scrutiny of sex-based classifications.⁷⁷ With shades of Thurgood Marshall’s tactical judgment about avoiding the miscegenation issue, litigators at the

69. *Id.* at 44.

70. *Id.* at 45 (quoting sociological writing by Father John LaFarge, S.J.).

71. *Id.* at 44.

72. *Id.* at 45 (quoting sociological writing by Father John LaFarge, S.J.).

73. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

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

75. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

76. *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984).

77. *Baehr*, 852 P.2d at 50.

major national gay rights organizations had declined to bring the suit, believing that the introduction of the marriage issue was premature.⁷⁸ But Dan Foley, a former ACLU attorney who had moved into private practice, agreed to take the case.⁷⁹ It is fair to say that Foley shocked both the gay rights bar and the world with the ruling he obtained in 1993.

In *Baehr v. Lewin*, the Hawaii Supreme Court rejected other constitutional claims made by the plaintiffs,⁸⁰ but accepted the argument that denying marriage licenses to same-sex couples was a form of sex discrimination that triggered strict scrutiny under the state constitution.⁸¹ Based on that conclusion, the court remanded the case for trial on the question whether the State could show that it had a compelling state interest in preventing same-sex couples from marrying.⁸² Given that the application of strict scrutiny usually means that the government loses, most observers expected the plaintiff couples to prevail on remand.

That prediction proved correct in 1996, when a trial court judge heard testimony from competing experts about whether there was a compelling state interest in limiting marriage to opposite-sex couples. The State had asserted an array of such interests,⁸³ stressing in particular the idea that limiting marriage to opposite-sex couples would promote the optimal development of children. Judge Kevin Chang found for the plaintiffs but stayed his ruling while a proposed constitutional amendment was pending.⁸⁴ Hawaiian voters later amended the state constitution to require legislative authorization of same-sex marriage.⁸⁵ The legislature decided to restrict marriage to one man and one woman, while providing limited benefits to same-sex couples under a new “reciprocal beneficiaries” law.⁸⁶ That ended the Hawaii litigation. At about the same time, there was also same-sex marriage litigation in Alaska that followed a similar course.⁸⁷

78. See David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 281, 290 (John D’Emilio, William B. Turner & Urvashi Vaid eds., 2000).

79. *Id.* at 291.

80. *Baehr*, 852 P.2d at 57 (rejecting the argument that there is a fundamental right to same-sex marriage).

81. *Id.* at 67.

82. *Id.* at 68.

83. These included protecting the welfare of children, encouraging procreation in marriage, ensuring that Hawaiian marriages would be recognized in other states, conserving the state fisc, and protecting civil liberties from the effects of same-sex marriage on Hawaiian citizens. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Ct. App. Dec. 3, 1996).

84. RUBENSTEIN ET AL., *supra* note 8, at 612.

85. See *id.*

86. *Id.*

87. A trial judge had found that the privacy protections in the Alaska state constitution required

The other major litigation before *Goodridge* took place in Vermont, where same-sex couples sought the right to marry under the common benefits clause of the Vermont state constitution.⁸⁸ The state supreme court ruled that this clause prevented the state from denying the benefits of marriage to couples based on the sex of the partners.⁸⁹ The court did not mandate that marriage itself be offered to same-sex couples but gave the legislature the remedial discretion to determine how to address the constitutional violation.⁹⁰ The public debate that followed was noisy and raucous by Vermont standards, and it featured imported cultural conservative activists to compensate for the lack of an organized Religious Right in Vermont.⁹¹ The legislature later approved, and then-Governor Howard Dean quietly signed, the first state law in the country to allow civil unions.⁹² That law gave same-sex couples all the rights and responsibilities that the state gave married couples, but civil unions lack the portability associated with marriage because they do not generally trigger recognition by other states. The law was controversial enough to generate losses for several legislators in the next election, but the partisan effects were wiped out within a few years when the losses were later reversed.⁹³

The other pre-*Goodridge* judicial development of great significance was the U.S. Supreme Court's decision in *Lawrence v. Texas* in 2003.⁹⁴ In *Lawrence*, the Supreme Court struck down Texas's ban on same-sex sodomy and reversed its 1986 decision upholding the ability of states to criminalize consensual sex between same-sex partners.⁹⁵ *Lawrence* came down only a few months before *Goodridge*, and it did not concern marriage per se. In fact, the majority opinion repeatedly distinguished the sodomy

that same-sex couples be allowed to marry, and the voters promptly amended the state constitution to restrict the definition of marriage to "one man and one woman," with 68 percent of the voters supporting the measure. See Lyle Denniston, *Voters in Alaska, Hawaii Defeat Initiatives on Homosexual Marriage*, BALT. SUN, Nov. 5, 1998, at 15A.

88. That clause provides 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." VT. CONST. ch. 1, art. 7.

89. See *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

90. See *id.* at 886–87.

91. See Ann LoLordo, *Gay Rights Issue Draws a Fiery Foe to Vermont: Anti-Abortion Leader Organizes Opposition to Same-Sex Unions*, BALT. SUN, Mar. 6, 2000, at 1A.

92. Lee Banville, *The Battle over Same-Sex Marriage*, ONLINE NEWSHOUR, Apr. 30, 2004, http://www.pbs.org/newshour/bb/law/gay_marriage/vermont.html.

93. *Id.*

94. *Lawrence v. Texas*, 539 U.S. 558 (2003).

95. *Id.* at 578–79.

issue from marriage and bracketed the latter.⁹⁶ Nevertheless, the opinion included strong rhetoric about the constitutional obligation of respect owed to same-sex partners and to their intimate connections.⁹⁷ This language, at the very least, had clear implications for the marriage question as, indeed, Justice Scalia aggressively flagged in protest in his *Lawrence* dissent.⁹⁸

2. The *Goodridge* Decision

There are many similarities in the intellectual form and structure of the *Goodridge* and *Perez* decisions, but there are differences as well. One prominent difference is that *Perez* employed the federal Constitution, while *Goodridge* relied on the state constitution.⁹⁹ Another is that *Perez* seems to have applied an early version of strict scrutiny,¹⁰⁰ but *Goodridge* applied rational basis review—albeit a version of the “heightened rational basis” review that has emerged over the last several years.¹⁰¹ Another difference is that *Goodridge* was decided after *Lawrence*, which is widely regarded as a watershed case on gay equality and same-sex relationships, while *Perez* was decided before *Brown*, the landmark case on race and equal protection. The doctrinal significance of this difference is, I suspect, less important than the political and cultural significance it has, for reasons that I set out below.¹⁰² The doctrinal significance is limited because the *Lawrence*

96. See *id.* at 567 (“The statutes do seek to control a personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose . . .” (emphasis added)); *id.* at 578 (“[This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

97. *Id.* at 567 (“When sexuality finds overt expression in intimate conduct with another person . . . [there is] a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”); *id.* at 578 (“[Homosexuals] are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).

98. See *id.* at 590 (Scalia, J., dissenting) (stating that state laws against same-sex marriage are “called into question by today’s decision”); *id.* at 604 (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”); *id.* at 601 (noting that Justice O’Connor’s concurring opinion would leave laws banning same-sex marriage on “pretty shaky grounds”).

99. See *Perez v. Sharp*, 198 P.2d 17, 18–19 (Cal. 1948) (involving the First and Fourteenth Amendments); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (involving the Massachusetts constitution and claiming that it is, “if anything, more protective of individual liberty and equality than the Federal Constitution”).

100. See *Perez*, 198 P.2d at 19–22 (suggesting that racial distinctions could not be upheld in the absence of emergency circumstances like those that had been relied on in the Supreme Court’s internment cases).

101. See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 515–16 (2004); Emily Bazelon, *The Same-Sex Marriage Argument That Justice Scalia Fears*, BOSTON GLOBE, May 16, 2004, at E1 (discussing what has been termed “rational basis-plus”).

102. See *infra* Parts III.B.1, IV.B–C.

majority opinion addressed sodomy, not marriage, and expressly waved off the marriage question in ways that limited the formal use the *Goodridge* majority could make of *Lawrence*. Nevertheless, the Massachusetts court could and did rely on *Lawrence* for general rhetorical support; the *Perez* court lacked analogous Supreme Court authority.

Notwithstanding these distinctions, however, there are strong similarities in the cases and—most relevant for our purposes—in the way the respective courts framed the issues for public debate. Like *Perez*, *Goodridge* was decided 4-3. Like *Perez*, *Goodridge* was the first decision of its kind. And in many respects, the *Goodridge* majority opinion followed the form of the Traynor opinion in *Perez*. Like Justice Traynor’s opinion in *Perez*, Chief Justice Margaret Marshall’s majority opinion in *Goodridge* blended due process (stressing the importance of the right to marry to individuals) and equal protection (stressing the categorical distinction made by the State).¹⁰³ Indeed, the opinion did so with explicit nods toward *Perez* and other cases.¹⁰⁴ In setting out the basic theory of the opinion, Marshall said:

Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual’s liberty and due process rights. And central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations. “Absolute equality before the law is a fundamental principle of our own Constitution.”¹⁰⁵

Also tracking *Perez*, the *Goodridge* opinion considered and discounted the policy bases offered by the State and found them inadequate to support the restriction. Undeterred by the State’s and the dissenters’ claims that the issue of same-sex marriage should be decided by the legislature, the majority opinion marched through the State’s list of justifications, rejecting in seriatim the ideas that inability to procreate together supplied a reason to exclude same-sex couples; that promoting the welfare of children was inconsistent with allowing same-sex marriage; that conservation of resources justified the ban; and that allowing same-sex

103. *Goodridge*, 798 N.E.2d at 953 (stating that “[i]n matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do here”).

104. *Id.* at 958 (“[I]n this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.”).

105. *Id.* at 959 (citations omitted) (quoting Opinion of Justices, 98 N.E. 337 (1912)).

couples to marry would trivialize or devalue the institution of marriage.¹⁰⁶ The issue of children's welfare, in particular, played prominently in both the majority and dissenting opinions in *Goodridge*. In Marshall's majority opinion, she essentially turned the State's argument against it. Acceding to the premise that marriage was a preferred setting for raising children, the court emphasized the unfairness of categorically denying those benefits to the children of same-sex couples:

The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage "is the foremost setting for the education and socialization of children" precisely because it "encourages parents to remain committed to each other and to their children as they grow."

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.¹⁰⁷

The dissenting opinions in *Goodridge* were strikingly like the *Perez* dissent in some points of emphasis, but different in others. The themes of longevity¹⁰⁸ and the absence of precedent¹⁰⁹ were both pressed, as they had been in *Perez*. But the dominant theme that drew together the three separate *Goodridge* dissents, and that was most strikingly like the *Perez* dissent, was the institutional competence point. Each of the three dissenters in *Goodridge* argued that the legislature, not the court, should decide whether to open up marriage to same-sex couples.¹¹⁰ One dissent, by Justice Cordy,

106. See *id.* at 961–65.

107. *Id.* at 964 (citation omitted) (quoting *id.* at 996 (Cordy, J., dissenting)).

108. See *id.* at 984 (Cordy, J., dissenting) ("[T]he institution of marriage is 'the legal union of a man and woman as husband and wife,' and it has always been so under Massachusetts law, colonial or otherwise." (citation omitted) (quoting *id.* at 952 (majority opinion))).

109. See *id.* at 976 (Spina, J., dissenting) ("Except for the occasional isolated decision in recent years same-sex marriage is not a right, fundamental or otherwise, recognized in this country." (citation omitted)).

110. Justice Spina said that what was at stake in the case was "not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts." *Id.* at 974. Justice Sosman stressed a variant of the same theme by arguing that research on the effects of same-sex marriage, especially on children, was at an early point and was, in her mind, subject to differing interpretations. In the absence of a scientific consensus and in light of the rational basis standard that the court was applying, she argued, the legislature was not required to share the belief that same-sex marriage would cause no adverse effects and might, "as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution." *Id.* at 980 (Sosman, J., dissenting). Justice Cordy elaborated on the same point at greater length, defending the rightful priority of the legislative branch to set policy on marriage, emphasizing that the rational basis standard requires the court to "make deferential assumptions about the information that [the legislature] might consider," and arguing that "[t]here is no reason to believe that legislative processes are inadequate to effectuate legal

at points verged on endorsing the State's conclusions, rather than merely preferring to remit the decision to the legislative process. Justice Cordy, for example, called the marital family "the foremost setting for the education and socialization of children,"¹¹¹ and said that "[a]s long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor."¹¹² Still, his rhetoric did not overtly demonize gays and lesbians,¹¹³ and none of the dissenting opinions approached the virulence of the *Perez* dissent in its seeming endorsement of racist positions on interracial marriage.

One last point of thematic overlap merits mention. Like the *Perez* dissenters, the *Goodridge* dissenters paid explicit attention to the potential effects on children of opening marriage to same-sex couples. Justice Cordy pressed this point at length:

It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute continues to serve this important State purpose.¹¹⁴

Along similar lines, Justice Sosman said:

Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. . . . Our belief that children raised by same-sex couples should fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.¹¹⁵

changes in response to evolving evidence, social values, and views of fairness on the subject of same-sex relationships." *Id.* at 998, 1003–04 (Cordy, J., dissenting).

111. *Id.* at 996.

112. *Id.* at 1002.

113. *See id.* at 1003 ("There is no question that many same-sex couples are capable of being good parents, and should be (and are) permitted to be so."); *id.* at 1004 ("The advancement of the rights, privileges, and protections afforded to homosexual members of our community in the last three decades has been significant, and there is no reason to believe that that evolution will not continue.").

114. *Id.* at 997.

115. *Id.* at 980 (Sosman, J., dissenting) (emphasis omitted).

3. Post-*Goodridge* Cases in State Supreme Courts

For nearly five years after *Goodridge* came down, no other state supreme court followed the lead of Massachusetts. A few lower courts in some states ruled in favor of same-sex marriage but were overturned on appeal,¹¹⁶ and several state supreme courts rejected *Goodridge*-style claims that asserted a state constitutional right of same-sex couples to marry.¹¹⁷ In addition, the New Jersey Supreme Court, following the path taken by the Vermont Supreme Court in 1999, ruled in 2006 that all the rights and benefits of marriage must be extended to same-sex couples but that the legislature need not call it marriage.¹¹⁸

The first state to follow Massachusetts's lead in the wake of *Goodridge* was California. The litigation that culminated in the dramatic ruling in May 2008 granting same-sex couples the right to marry is traceable to the controversial efforts by San Francisco mayor Gavin Newsom to advance same-sex marriage in 2004. Newsom drew international attention by ordering city officials to issue marriage licenses to same-sex couples, arguing that his oath of office to uphold the California constitution required him not to discriminate in issuing marriage licenses.¹¹⁹ Newsom acted unilaterally at that time; California had a statute on the books, passed by initiative in 2000, that limited marriage to one man and one woman.¹²⁰ The California Supreme Court ultimately invalidated the Newsom-era marriages, but it left the door open for the constitutional challenge to the California ban on same-sex marriage that was later filed.¹²¹

In re Marriage Cases invalidated the statutory initiative that had been passed by voters in 2000.¹²² Like both *Perez* and *Goodridge*, *In re*

116. See, e.g., *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006), *rev'd*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct.), *rev'd*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

117. See *Conaway*, 932 A.2d at 624–27; *Hernandez*, 821 N.Y.S.2d at 361; *Andersen v. King County*, 138 P.3d 963, 979 (Wash. 2006) (en banc).

118. *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006). Following that decision, the New Jersey legislature enacted a civil union law. See N.J. STAT. ANN. § 37:1-28 (West 2009).

119. See, e.g., Lee Romney & Patrick Dillon, *S.F. Judge Won't Halt Marriages*, L.A. TIMES, Feb. 18, 2004, at A1.

120. Proposition 22 provided that “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. FAM. CODE § 308.5 (West 2000).

121. See *Lockyer v. City of S.F.*, 95 P.3d 459, 464, 494–95 (Cal. 2004).

122. See *In re Marriage Cases*, 183 P.3d 384, 452–53 (Cal. 2008), *superseded by constitutional amendment*, California Marriage Protection Act, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). See, e.g., Ben Arnoldy, *California High Court Overturns Gay Marriage Ban*, CHRISTIAN SCI. MONITOR, May 16, 2008, at 25; Liptak, *supra* note 2; Osborne, *supra* note 2.

Marriage Cases was a 4-3 ruling with vigorous dissenting opinions. The majority opinion, which checked in at 121 pages and was written by the California Supreme Court's chief justice, was explicitly written in the shadow of *Perez*. The majority called *Perez* a "landmark decision . . . whose legitimacy and constitutional soundness are by now universally recognized"¹²³ and cited it some thirty-two times.

Though lacking the pure pathbreaker status of *Perez*, *In re Marriage Cases* was nevertheless a historic ruling. As in *Goodridge*, state constitutional concepts of both liberty and equality were invoked by the court. The decision went beyond *Goodridge*, however, in two principal ways. First, the court invalidated the exclusion of same-sex couples from marriage even in the face of a broadly drawn domestic partnership statute that afforded same-sex couples virtually all the benefits that the state gave married couples.¹²⁴ In doing so, the court devoted considerable attention to an issue not raised in *Goodridge*: the constitutional implications of legislatively creating a separate institution for same-sex couples. The court framed the right possessed by same-sex couples in these terms:

These core substantive rights include, most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.¹²⁵

The second pathbreaking feature of the decision was that it made the California Supreme Court the first high court in the country to hold that sexual orientation is a suspect classification.¹²⁶ Whereas *Goodridge* had applied some form of rational basis review, *In re Marriage Cases*' dramatic embrace of strict scrutiny gave the decision doctrinal significance that extended well beyond the issue of marriage.

The *In re Marriage Cases* ruling drew two separate dissents, each of which partially concurred with the majority. The opinion by Justice Baxter stressed the traditional definition of marriage and argued that the democratic process, not the court, should determine who may marry.¹²⁷ This dissent also assailed the application of strict scrutiny to sexual

123. *In re Marriage Cases*, 183 P.3d at 399.

124. *See id.* at 399–401.

125. *Id.* at 399 (emphasis omitted).

126. *See id.* at 441–42 & n.60 (finding sexual orientation to be a suspect classification and citing other cases that had dealt with that issue).

127. *See id.* at 456–58 (Baxter, J., concurring in part, dissenting in part).

orientation-based classifications.¹²⁸ The concurrence and dissent by Justice Corrigan focused on the institutional question, argued that the political process was proceeding effectively to deal with questions of sexual orientation equality, and questioned the majority's determination that the domestic partnership statute constituted a mark of "second-class citizenship."¹²⁹

Some five months after *In re Marriage Cases*, the Connecticut Supreme Court followed suit, and that state became the third in the nation to legalize same-sex marriage.¹³⁰ As had been true in California, Connecticut offered comprehensive protections to same-sex couples through a statutory alternative to marriage. Following the California Supreme Court's lead, the Connecticut court found the civil union statute wanting under the state constitution and ruled that marriage must be available to same-sex couples. Like *Goodridge* and *In re Marriage Cases*, *Kerrigan v. Commissioner of Public Health* was a 4-3 decision. Many of the themes in the majority opinion were familiar, including the emphasis on the legal and social importance of marriage,¹³¹ the view that the State's proffered justifications fell short,¹³² and the conclusion that meaningful equality is inconsistent with limiting same-sex couples to a separate institution.¹³³ The dissenting opinions criticized the application of heightened scrutiny,¹³⁴ defended the civil union law under rational basis review,¹³⁵ and challenged the idea of an equal protection violation based on the claim that same-sex couples are not similarly situated to heterosexuals because of procreative differences.¹³⁶ Unlike *Goodridge*, which applied some form of rational basis review, and *In re Marriage Cases*, which used strict scrutiny, *Kerrigan* charted a third course by employing intermediate scrutiny.¹³⁷ Iowa followed Connecticut in 2009, when its supreme court became the fourth to find a right to marry in a state constitution.¹³⁸ As had the Connecticut Supreme Court, the Iowa court applied intermediate

128. *See id.* at 465.

129. *See id.* at 468-69 (Corrigan, J., concurring in part, dissenting in part).

130. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

131. *See id.* at 416-17.

132. *See id.* at 476-81.

133. *See id.* at 417-20.

134. *See id.* at 506 (Borden, J., dissenting); *id.* at 514-15 (Vertefeuille, J., dissenting).

135. *See id.* at 514 (Borden, J., dissenting).

136. *See id.* at 516-23 (Zarella, J., dissenting).

137. *See id.* at 476 (majority opinion).

138. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

scrutiny.¹³⁹ Unlike any of the preceding decisions, however, the Iowa ruling was unanimous.¹⁴⁰

III. THE AFTERMATHS OF THE DECISIONS

In this part, I trace what followed the interracial marriage and same-sex marriage decisions. I emphasize the contrasting degrees to which these cases ignited policy countermeasures. I also consider, however, the evolution in public opinion on interracial marriage and same-sex marriage, respectively, in the wake of these decisions. It is reasonable to expect that policy and public opinion responses to judicial decisions will be related, but the overlap is not always perfect, and the strength and character of the linkages merit study. For that reason, I separate out the policy and the public opinion aftermaths of these decisions and return in the final sections of the Article to consider how these different elements might figure into thinking about backlash.

A. THE AFTERMATH OF *PEREZ*

1. Policy Aftermath

Because *Perez* was the first judicial decision to strike down an antimiscegenation law, it was uncertain what would follow in its wake. The newspaper coverage proved to be extensive.¹⁴¹ Perhaps unsurprisingly, the California newspapers gave it prominent coverage.¹⁴² But this was not just a local story. The day after *Perez* was decided, it was front-page news in papers such as the *Washington Post*¹⁴³ and the *New York Herald-Tribune*,¹⁴⁴ and it received prominent play in major papers like the *New York Times* and *Chicago Daily Tribune*.¹⁴⁵ *Time* magazine ran a story on

139. *Id.* at 896.

140. As discussed below, close to the time that Iowa acted, a new chapter in the same-sex marriage controversy appeared to open, as Vermont became the first state in the country to recognize same-sex marriage as a matter of legislation and was followed in rapid succession by New Hampshire and Maine. See Eric Moskowitz, *In R.I., Some Wary as Tide of Gay Marriage Rises at Border*, BOSTON GLOBE, June 15, 2009, at 1; *infra* notes 225–27 and accompanying text.

141. See Lenhardt, *supra* note 23, at 364 (“*Perez* made headline news.”).

142. See *Intermarriage Legal*, DAILY REV. (Hayward, Cal.), Oct. 2, 1948, at 2; *Inter-Racial Marriage Ban Ruled Invalid*, LONG BEACH PRESS-TELEGRAM, Oct. 1, 1948, at 1; *Interracial Marriages Ruled Legal*, OAKLAND TRIB., Oct. 1, 1948, at 1; *State High Court Rules Out Race as Barrier to Marriage*, L.A. TIMES, Oct. 2, 1948, at A5.

143. *Interracial Marriage Ban Voided by California Court*, WASH. POST, Oct. 2, 1948, at 1.

144. *California Mixed-Marriage Ban Voided, 4-3, by State’s High Court*, N.Y. HERALD-TRIB., Oct. 2, 1948, at 1.

145. Lawrence E. Davies, *Mixed Marriages Upheld by Court*, N.Y. TIMES, Oct. 2, 1948, at 1; *Negro-White Marriage Gets California O.K.*, CHI. DAILY TRIB., Oct. 2, 1948, at 8. Indeed, the NEW

the decision entitled “The Person of One’s Choice,” and it noted that “[l]aws prohibiting the intermarriage of whites and Negroes [had previously] survived every legal test.”¹⁴⁶ Nor was this a story of interest only to elite national publications. The decision received coverage—sometimes on page one—in many newspapers around the country, including many small and southern papers.¹⁴⁷ Stories about the decision made it to Canada¹⁴⁸ and to the American military newspaper in Europe.¹⁴⁹ The story was also featured in black newspapers, like the *Chicago Defender*, which had run several earlier stories about the case and then covered the decision itself as front-page news.¹⁵⁰ The *American Bar Association Journal* reported on the case, calling the decision “unprecedented.”¹⁵¹ The local, national, regional, and specialty paper coverage shared certain themes, with stories about the case commonly noting the long pedigree of the California statute, the lack of precedent for the ruling, the numerous states with bans on the books, and the closeness of the vote, and also supplying some sense of the majority’s and dissent’s respective theories of the case. Although news stories about the decision

YORK TIMES had covered the filing of the suit in 1947, see *Marriage Ban Challenged*, N.Y. TIMES, Aug. 12, 1947, at 25, and continued to track the story after the decision, see, e.g., *Interracial Wedding Set*, N.Y. TIMES, Dec. 14, 1948, at 37.

146. *The Person of One’s Choice*, TIME, Oct. 11, 1948, available at <http://www.time.com/time/magazine/article/0,9171,887888,00.html>.

147. See, e.g., *California Court Kills Ban on Mixed Marriage*, LINCOLN J. (Neb.), Oct. 2, 1948, at 4; *California Court Rules White and Negro Can Marry*, DENTON REC.-CHRON. (Tex.), Oct. 3, 1948, at 1; *California Court Says Mixed Marriages Valid*, INDEP.-REC. (Helena, Mont.), Oct. 1, 1948, at 1; *Color Line Taboo*, ANNISTON STAR (Ala.), Oct. 1, 1948, at 1; *High Court Voids Calif. Law Banning Marriage of Whites, Colored Persons*, YUMA DAILY SUN (Ariz.), Oct. 1, 1948, at 1; *Intermarriage Ruled Lawful in California*, FLORENCE MORNING NEWS (S.C.), Oct. 2, 1948, at 1; *Mixed Marriage Ban Overruled*, CHARLESTON DAILY MAIL, Oct. 2, 1948, at 2; *Mixed Marriage Ban Thrown Out by Court*, SAN ANTONIO EXPRESS, Oct. 2, 1948, at 4; *White-Negro Union OK’d*, DALLAS MORNING NEWS, Oct. 2, 1948, at 2.

148. *White-Black Marriage Ban Tossed Out, Calif.*, LETHBRIDGE HERALD (Alta.), Oct. 2, 1948, at 13.

149. *California Intermarriage Ban Ruled Out by State High Court*, STARS & STRIPES (European ed.), Oct. 3, 1948, at 6.

150. *Fight California Law Barring Mixed Marriage*, CHI. DEFENDER, Aug. 23, 1947, at 2; *Mixed Marriage Ban Faces Test in California*, CHI. DEFENDER, Sept. 20, 1947, at 1; *Outlaw California’s Ban on Interracial Marriage*, CHI. DEFENDER, Oct. 9, 1948, at 1; *Sue for Right of Two to Wed: Negro, Mexican Denied License*, CHI. DEFENDER, Oct. 18, 1947, at 4. Unsurprisingly, newspapers that concentrated on race and racial issues gave the case the most extensive and sustained coverage. See Dara Orenstein, *Void for Vagueness: Mexicans and the Collapse of Miscegenation Law in California*, 74 PAC. HIST. REV. 367, 402 (2005).

151. *Courts, Departments and Agencies: Constitutional Law*, 34 A.B.A. J. 1128 (1948) [hereinafter A.B.A. J.].

were common, they were not followed up by many editorials or opinion pieces.¹⁵²

The local mood about the decision appears to have been fairly subdued.¹⁵³ I have found no suggestion in the local media of real public agitation. But the evidence about how the case was received is mixed in some respects. On the one hand, the State decided not to appeal,¹⁵⁴ and the city clerk in Los Angeles was instructed to give licenses to mixed-race couples.¹⁵⁵ A story published six weeks after the ruling indicated that an interracial couple had “secured the first marriage license to be issued a white man and Negro woman” in Los Angeles “since [*Perez*].”¹⁵⁶ Another story published a year after the decision reported that eighty licenses for interracial unions had been issued in Los Angeles County.¹⁵⁷ On the other hand, some clerks continued to insist that applicants identify themselves by race.¹⁵⁸ A former state bar president chided the court for “wandering” outside its legitimate domain.¹⁵⁹ And, more visibly, the state legislature conspicuously refused to repeal the law in the wake of the decision, with the senate choosing by affirmative vote in 1951 to leave it on the books.¹⁶⁰ In defending this choice, state senator Earl Desmond, Democrat of Sacramento, said that mixed marriages might have a “dire effect” on public welfare and asserted that he did not “believe we should break down the barriers of intermarriage despite the Supreme Court ruling” because “[a]nother State Supreme Court may hold the statute completely constitutional.”¹⁶¹

152. Orenstein, *supra* note 150, at 401.

153. *See id.* at 400 (“[I]n California’s corridors of power, *Perez v. Sharp* was met with silence.”).

154. A.B.A. J., *supra* note 151, at 1129. The State did seek rehearing in the state supreme court, without success. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), *reh’g denied* (Oct. 28, 1948).

155. A.B.A. J., *supra* note 151, at 1129.

156. *L.A. Scene of Mixed Marriage*, LONG BEACH INDEP., Nov. 25, 1948, at 8.

157. *Licenses Given 80 Couples for Mixed Marriage*, L.A. TIMES, Sept. 26, 1949, at 4. In the thirty months following *Perez*, the number climbed to 455, a figure deemed “actually very small” by one commentator given that 78,266 total licenses were issued in this time period. BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* 41 (2003).

158. *See Brilliant*, *supra* note 35, at 129.

159. *High Court “Wandering” Hit by Cal. Bar Ex-Head*, L.A. EVENING HERALD EXPRESS, Nov. 19, 1948.

160. *Racial Bill Retained, California Senate Vote Keeps Ban on “Mixed” Marriages*, N.Y. TIMES, May 17, 1951, at 33. *See also ROMANO*, *supra* note 26, at 41.

161. *Racial Bill Retained*, *supra* note 160. California did not, in fact, repeal its statute until 1959. Michelle Brattain, *Miscegenation and Competing Definitions of Race in Twentieth-Century Louisiana*, 71 J. S. HIST. 621, 638 n.44 (2005).

This defiant legislative gesture aside, I have uncovered no sign of attempts in California, in the South, or elsewhere to organize against the decision. In the wake of the first ruling to strike down a ban, no states added a new ban or strengthened an existing ban, no federal constitutional amendment was proposed, and no substantial public figures outside California seem to have made any statement against the decision in any published venue that I have been able to locate.

In fact, what organizing there was in other states after *Perez* went in the opposite direction. Immediately after *Perez*, the national ACLU took a leadership role and began seeking out states for new constitutional challenges.¹⁶² The Japanese American Citizen's League played some role in organizing and supporting new litigation, and later in the 1950s was actively searching—without success—for a test case involving Korean “war brides.”¹⁶³ This new activity, however, did not extend to the NAACP, which continued to steer clear of the interracial marriage issue for many years after *Perez* had been decided. By the mid-1950s, the group's concern with litigating against the antimiscegenation statutes had shifted to a fear of disrupting the desegregation efforts related to *Brown*, but the posture remained the same.¹⁶⁴ It was not until well into the 1960s that the NAACP joined the fight.¹⁶⁵

After *Perez*, there were efforts in some other states to repeal bans. Some of these efforts bore fruit as three states repealed their laws in the seven years following the *Perez* decision. In 1951, Oregon became the first state since 1887 to repeal a ban; Montana followed in 1953, as did North Dakota in 1955.¹⁶⁶ And notwithstanding the NAACP's studied reticence, it looked for a time like the U.S. Supreme Court would decide the constitutionality of banning interracial marriage within a few years of

162. NEWBECK, *supra* note 24, at 90; Sohn, *supra* note 47, at 128 (citing the ACLU 29th Annual Report).

163. NEWBECK, *supra* note 24, at 90.

164. See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 270 (2003); Sohn, *supra* note 47, at 133–34; *supra* notes 47–51 and accompanying text.

165. The NAACP played a central role in litigating *McLaughlin v. Florida*, 379 U.S. 184 (1964), the case challenging the statute that banned cohabitation by unmarried interracial couples. See Sohn, *supra* note 47, at 94–107. The group also filed an amicus brief and actively supported the ACLU in the *Loving* litigation. See *id.* at 115.

166. In 1957, Colorado and South Dakota followed suit. Between *Perez* and *Loving*, fourteen states in all repealed their laws, two others (North Carolina and South Carolina) eliminated only their prohibitions of marriages between Indians and whites, and four others repealed laws that had mandated racial disclosures on licenses and other forms (New York, Rhode Island, Virginia, and Washington). Byron Curti Martyn, *Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation* 1210 (June 1979) (unpublished Ph.D. dissertation, University of Southern California) (on file with author).

Perez. In *Naim v. Naim*,¹⁶⁷ the white wife of an Asian man sought to annul their North Carolina marriage because Virginia, their home state at the time of their wedding, banned interracial marriage.¹⁶⁸ The husband claimed the Virginia antimiscegenation statute was unconstitutional, and Virginia's highest court upheld the statute. Pursuant to what was then its nondiscretionary appellate jurisdiction, the Supreme Court was obliged to review the Virginia court's determination, unless the case posed no "substantial federal question." Although it was widely acknowledged that the case did, in fact, present such a question, the Court went through some acrobatic maneuvers to avoid review. It was, if not an open secret, then at least widely speculated that the Court engaged in these maneuvers because public opinion was strongly hostile to interracial marriage and the Court was wary of antagonizing the South only a year after *Brown*.¹⁶⁹

The next court after *Perez* to invalidate a ban on interracial marriage was a trial court in Arizona in 1959.¹⁷⁰ The ACLU and American Jewish Congress were involved with that lawsuit, but the NAACP kept its distance.¹⁷¹ While that case was on appeal to the Arizona Supreme Court, the legislature repealed the Arizona law being challenged.¹⁷² By the time the U.S. Supreme Court decided *Loving v. Virginia* in 1967, the count of thirty states with bans at the time of the *Perez* decision had fallen to sixteen.¹⁷³

2. Public Opinion Aftermath

Turning from policy to public opinion, what can we say about developments in public attitude toward interracial marriage after *Perez*? The polling evidence is somewhat sparse but offers a basis for some general observations.

It would be helpful to have some pre-*Perez* evidence of public opinion in order to establish a baseline. Unfortunately, there do not appear to have been published surveys of attitudes toward miscegenation before 1948. I

167. *Naim v. Naim*, 87 S.E.2d 749 (Va.), *vacated*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (Va.), *appeal dismissed*, 350 U.S. 985 (1956) (mem.).

168. The couple lived in Virginia but had gone to another state to marry in order to evade the Virginia ban. See KLARMAN, *supra* note 33, at 321.

169. See *id.* at 321–23.

170. NEWBECK, *supra* note 24, at 78.

171. *Id.* at 84.

172. *Id.* at 83.

173. The last states to retain their bans were Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See *id.* app. C.

have found pre-*Perez* polling evidence only on the related (though meaningfully different) question of whom respondents would consider marrying. This evidence is consistent with strong public hostility to interracial marriage. In general, respondents expressed little willingness to intermarry, with certain groups reflecting the greatest reluctance.¹⁷⁴ But this is a different question from whether respondents either approved of miscegenation or supported its legalization.

The earliest national poll I have found on public attitudes toward interracial marriage is a Gallup poll that dates to 1958—ten years after *Perez*.¹⁷⁵ This poll seems to provide the basis for the frequently cited fact that, at the time of *Perez*, a whopping 94% of respondents disapproved of “marriage between whites and non-whites,” with only 4% approving.¹⁷⁶ As the poll taken closest in time to the *Perez* decision, this poll surely suggests that there was substantial public hostility to interracial marriage in 1948. Yet there are reasons not to overread this one poll or what it can tell us about public sentiment toward interracial marriage at the time of *Perez*.

First, the poll tested attitudes among whites only. Black opinion on interracial marriage (or other race-related issues) was apparently not generally tested until years later.¹⁷⁷ Later surveys of black opinion, taken from 1972 on, show that black respondents have approved of interracial

174. A November 1942 poll in *FORTUNE* magazine asked respondents if there were any groups on a list that “you would not consider marrying.” The responses were grouped by religion—Protestants, Catholics, and Jews—except in the case of African Americans, who were grouped on their own as “Negroes.” The results were that 95% of Jews, 92.8% of Catholics, and 91.6% of Protestants would not consider marrying a Negro. The group with the next highest rate of rejection as a marital partner was “Chinese,” who would not be considered by 71.9% of Protestants, 75.5% of Catholics, and 80% of Jews. When polled, 57.8% of “Negroes” said they would not consider marrying a Jew, and 54.1% would not consider marrying someone “Chinese.” See *Gallup and Fortune Polls*, 7 *PUB. OPINION Q.* 161, 167 (1943). A November 1942 Roper poll asked high school students, “Which, if any, would you refuse to marry?” and found 92% saying “Negroes,” 73% “Chinese,” 51% “Jews,” 16% “Catholics,” and all other groups less than 10%. No racial or other demographic information is available about the makeup of the respondent pool. See Hazel Erskine, *The Polls: Interracial Socializing*, 37 *PUB. OPINION Q.* 283, 289 (1973).

175. See Joseph Carroll, *Most Americans Approve of Interracial Marriages*, *GALLUP NEWS SERV.*, Aug. 16, 2007, <http://www.gallup.com/poll/28417/Most-Americans-Approve-Interracial-Marriages.aspx> (reporting the historical results of polls).

176. *Id.* For references to the overwhelming public opposition to interracial marriage at the time of *Perez*, see, for example, Brief of Plaintiffs-Appellants at 29 n.14, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860), and KLARMAN, *supra* note 33, at 321 (“[O]pinion polls in the 1950s revealed that over 90 percent of whites, even outside the South, opposed interracial marriage.”).

177. HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 238–39 (rev. ed. 1997) (noting that those polling in the 1940s and 1950s never thought to poll blacks “because Myrdal’s dilemma was a white dilemma and it was white attitudes that demanded study” (quoting a researcher of black racial attitudes)).

marriage at higher rates than whites.¹⁷⁸ Still, at the time the 1958 Gallup poll was taken, blacks comprised only about 11% of the population¹⁷⁹ and, of course, wielded little power and influence. Thus, it is reasonable, though imperfect, to use the results of a white-only poll to shed some light on the question of where public opinion stood at the time.

A second limitation of the 1958 Gallup poll relates to what it measured. The poll asked respondents if they *approved* of interracial marriage, as opposed to whether they *avored a legal ban* on it. These two questions are not the same, and comparisons of later polling evidence suggest that respondents who disapprove of interracial marriage are not always inclined to make it illegal. Consider the gap reflected in table 1 between the results from a series of Gallup polls over time, asking about approval/disapproval of interracial marriage,¹⁸⁰ and a series of similarly timed National Opinion Research Center (“NORC”) polls, testing support for legally banning interracial marriage¹⁸¹:

TABLE 1. Approval/Disapproval v. Support for Legal Ban

Year	Gallup Polls:			NORC Polls:	
	Attitude Toward Interracial Marriage			Support of Legal Ban	
	Approve	Disapprove	No Opinion	Yes	No
1968	20%	73%	8%	56%	44%
1972	29%	60%	11%	40%	60%
1991	48%	42%	10%	20%	80%

Even taking into account possible interpoll disparities, these results do suggest some gap between those who disapprove of interracial marriage (the higher number) and those inclined to ban it legally. Care should thus be taken to distinguish between what is being measured by these different questions. The 1958 poll reflects widespread public disapproval but does not necessarily offer a clear window on public attitudes toward the legalization of interracial marriage—the issue *Perez* placed on the public agenda for political contemplation.

178. *See id.* at 245.

179. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970: PART I, at 9 (bicentennial ed. 1975), available at <http://www.census.gov/prod/www/abs/statab.html> (estimating the U.S. population in 1958 as 154,922,000 “white” and 19,219,000 “Negro” or “other”).

180. *See Carroll, supra* note 175.

181. These polls are collected in SCHUMAN ET AL., *supra* note 177, at 106 tbl.3.1B.

The third limitation of the 1958 poll is that it was taken ten years after *Perez* was decided. Ideally, we would have a basis to compare pre- and post-*Perez* public opinion. In the absence of a pre-*Perez* poll, that comparison is impossible. There are, nevertheless, reasons to believe that baseline public opinion in 1948 was not all that different from what the 1958 poll showed. For one thing, in the absence of any evidence showing any organized opposition to *Perez*, it is implausible to believe that the decision itself would have triggered a spike in negative public opinion to the 94% disapproval rate ten years later. In addition, scholarship in this area treats it as uncontroversial that national public opinion was overwhelmingly hostile to interracial marriage in the late 1940s. For example, the influential—and contemporaneous—volume on race by Gunnar Myrdal argued:

The ban on intermarriage has the highest place in the white man's rank order of social segregation and discrimination. Sexual segregation is the most pervasive form of segregation, and the concern about "race purity" is, in a sense, basic. No other way of crossing the color line is so attended by the emotion commonly associated with violating a social taboo as intermarriage and extra-marital relations between a Negro man and a white woman. No excuse for other forms of social segregation and discrimination is so potent as the one that sociable relations on an equal basis between members of the two races *may possibly* lead to intermarriage.

... In practice there is little intermarriage even where it is not prohibited, since the social isolation from the white world that the white partner must undergo is generally intolerable even to those few white people who have enough social contact and who are unprejudiced enough to consider marriage with Negroes.¹⁸²

Other assessments of public opinion in the 1940s are consistent with the picture sketched by Myrdal.¹⁸³ Finally, the strong public disapproval reflected in the 1958 Gallup poll is consistent with the results of the 1942

182. 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 606 (Transaction Publishers ed. 1996) (1944) (footnotes omitted). See also 1 *id.* at 57 ("[I]t is a rare case to meet a white American who will confess that, if it were not for public opinion and social sanctions not removable by private choice, he would have no strong objection to intermarriage.").

183. For a similar assessment, see ROMANO, *supra* note 26, at 45 ("The arguments whites mounted against interracial marriage in the immediate postwar period were similar to those articulated in earlier periods. The bulk of white Americans, one scholar notes 'were just as horrified at the thought of interracial marriage in 1950 as they had been in 1900 or 1850.' In the 1940s and 1950s southern whites, as they had in earlier decades, expressed great concern about white racial purity and the mingling of white and black 'blood'. . . ." (footnote omitted) (quoting PAUL R. SPICKARD, *MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA* 288–289 (1989))). See also NEWBECK, *supra* note 24; KLARMAN, *supra* note 33, at 321.

polls showing high resistance among whites to considering interracial marriage for themselves.¹⁸⁴ This is a different question, to be sure, but the results are what one would expect given the high rates of white disapproval suggested in the 1958 poll.

In the years after the 1958 Gallup poll, surveys suggest that public opinion gradually warmed to interracial marriage, but at a conspicuously slow pace. For example, approval of interracial marriage rose from the 4% shown in 1958 to 20% in 1968, the year *after* the Supreme Court decided *Loving v. Virginia*. Approval rose to 36% in 1978 and, perhaps surprisingly, did not near 50% in the Gallup poll until 1991. Thereafter, it increased to 64% in 1997.¹⁸⁵ On the question whether respondents supported legalization, the upward movement was also quite gradual. Support in NORC polls for laws banning interracial marriage dropped from 62% in 1963 to 56% in 1968 (the year after *Loving*), 40% in 1972, and 35% in 1974.¹⁸⁶

B. THE AFTERMATH OF THE SAME-SEX MARRIAGE DECISIONS

1. Policy Aftermath

In comparison to what followed *Perez*, the aftermath of the 2003 decision in *Goodridge* looks very different. The November 2003 decision was met with an ever-intensifying backlash that I will describe below, but the backlash story begins ten years earlier with the *Baehr* decision.

National press coverage of the Hawaii Supreme Court's 1993 decision was extensive.¹⁸⁷ Opponents of the decision moved quickly even though *Baehr* itself had rendered no final judgment in the case. Local groups in Hawaii pressed the state legislature for, and received, a statute clarifying that marriage was only intended to be available to opposite-sex couples.¹⁸⁸

184. See *supra* note 174 and accompanying text.

185. Carroll, *supra* note 175.

186. SCHUMAN ET AL., *supra* note 177, at 106 tbl.3.1B.

187. See, e.g., Joan Biskupic, *Ruling by Hawaii's Supreme Court Opens the Way to Gay Marriages*, WASH. POST, May 7, 1993, at A10; Bettina Boxall, *Hawaii Court Revives Suit on Gay Marriages*, L.A. TIMES, May 7, 1993, at A3; *Hawaii May Recognize Homosexual Marriages*, CHI. TRIB., May 9, 1993, at C27; *Hawaii Ruling May Open Door to Gay Marriages*, ORLANDO SENTINEL, May 7, 1993, at A12; John Leo, *Gay Marriage and the Courts*, TIMES-PICAYUNE (New Orleans), May 19, 1993, at B7; Eloise Sankolz et al., *For Better or For Worse*, NEWSWEEK, May 24, 1993, at 69; Jeffrey Schmalz, *Hawaii Court Ruling Takes Step Toward OK of Gay Marriages*, DALLAS MORNING NEWS, May 7, 1993, at 1A.

188. See Chambers, *supra* note 78, at 291–92; Gregory B. Lewis & Jonathan L. Edelson, *DOMA and ENDA: Congress Votes on Gay Rights*, in THE POLITICS OF GAY RIGHTS 193, 200 (Craig A. Rimmerman, Kenneth D. Wald & Clyde Wilcox eds., 2000); JASON PIERCESON, COURTS, LIBERALISM,

A few years later, they pressed for a constitutional amendment reserving to the state legislature the power to determine who is eligible to marry, and ultimately that amendment was carried by a large margin.¹⁸⁹ Religious groups provided substantial financial support for local antimarriage activism.¹⁹⁰ Many local groups were affiliated with national groups such as Focus on the Family.¹⁹¹ These local/national opposition groups were countered by local and national gay rights groups. Although the national gay rights groups had initially declined to enter the *Baehr* litigation, the Lambda Legal Defense Fund joined the case as co-counsel once the state supreme court issued its ruling, and the major national gay rights groups participated in attempts to counter the opposition's political efforts.¹⁹²

Thus, the local battle was quickly engaged by contending national forces. The Hawaii battle, moreover, did not remain confined to that state for long. It quickly went national, as organized groups associated with traditional values joined the fray to "preserve" traditional marriage.¹⁹³ These groups had long since been mobilized against gay rights.¹⁹⁴ Dating roughly to Anita Bryant's 1977 "Save Our Children" crusade in Florida to repeal a local antidiscrimination law that had been extended to cover sexual orientation claims, cultural conservatives had made sexual orientation issues a focal point.¹⁹⁵ As the Religious Right became a more organized, familiar, and well-funded player in national politics in the late 1970s and 1980s, these groups tracked gay issues closely. They swooped in quickly after the *Baehr* decision.

Claiming that Hawaii was on the verge of legalizing same-sex marriage, anti-gay rights forces pressed three related points. First, they argued that same-sex marriage would destroy the traditional institution of

AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA 112–15 (2005).

189. See Chambers, *supra* note 78, at 295; Lewis & Edelson, *supra* note 188, at 200; PIERCESON, *supra* note 188, at 124.

190. See Kathleen E. Hull, *The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii*, 44 SOC. PERSP. 207, 214–16 (2001).

191. *Id.* at 214.

192. See Chambers, *supra* note 78, at 293; PIERCESON, *supra* note 188, at 107.

193. See PIERCESON, *supra* note 188, at 115–17 (describing the aftermath of the decision and asserting that "the litigation in Hawaii struck a national political nerve").

194. See Chambers, *supra* note 78, at 291–92. See also Clyde Wilcox & Robin Wolpert, *Gay Rights in the Public Sphere: Public Opinion on Gay and Lesbian Equality*, in THE POLITICS OF GAY RIGHTS, *supra* note 188, at 409, 409–10. For a good historical overview, see John C. Green, *Antigay: Varieties of Opposition to Gay Rights*, in THE POLITICS OF GAY RIGHTS, *supra* note 188, at 121.

195. See, e.g., Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 428–32 (1999); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 288 (1994).

marriage.¹⁹⁶ Second, they argued that a victory for the plaintiff couples would trigger a national chain reaction through the Full Faith and Credit Clause.¹⁹⁷ Absent preemptive action, they argued, other states would be obligated to recognize Hawaiian same-sex marriages. Opponents of same-sex marriage proved themselves to be well organized in pursuing this line of attack. They supplied conservative lawmakers in every state with proposed legislation to block recognition of same-sex marriage¹⁹⁸ and, as described below, were able to secure such legislation in many states and in Congress. Third, they attacked the Hawaiian court for illegitimate judicial activism.¹⁹⁹

The nationalization of the conflict was highly successful. In 1995, two years after the *Baehr* decision and before the Hawaii trial court had even ruled on remand, Utah passed a law declaring marriages between same-sex couples to be void. Between 1995 and November 2003, when *Goodridge* was decided, an additional thirty-six states followed Utah's lead and passed measures restricting marriage for same-sex couples in one way or another, and the measures generally passed by wide margins. The dominant form was a statute, passed by a state legislature, that defined marriage within the state as between one man and one woman, banned recognition of any same-sex marriage performed in another state, or did both.²⁰⁰ A few of these

196. See PIERCESON, *supra* note 188, at 115.

197. See, e.g., David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A13 (noting that groups including the Christian Coalition, Concerned Women for America, and Eagle Forum were supporting efforts in states around the country to "seek[] an exemption from the 'full faith and credit' provision on the grounds that same-sex marriages would violate the public policies of [those] states as defined by law").

198. Chambers, *supra* note 78, at 294.

199. See, e.g., Kim A. Lawton, *Ruling Easing Gay Marriages Creates Furor*, PLAIN DEALER (Cleveland), Dec. 7, 1996, at 6E (quoting counsel for the National Association of Evangelicals criticizing the "proclivity of unelected judges, both state and federal, to discover ever-expanding constitutional rights" not explicit in constitutional text); Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. TIMES, Sept. 11, 1996, at A1 (quoting Senator Trent Lott as characterizing the Defense of Marriage Act as "not mean-spirited or exclusionary" but instead as a "preemptive measure to make sure that a handful of judges, in a single state, cannot impose a radical social agenda upon the entire nation"). Conservative columnists pursued a similar line of attack. See, e.g., Don Feder, *Rule by Judges' Whim Is Not Democracy*, BOSTON HERALD, Dec. 11, 1996, at 35 ("[N]owhere is public opinion more clearly in conflict with judicial dogma than in the matter of gay marriage."); Charles Krauthammer, *Election Year "Diversion"?*, WASH. POST, May 31, 1996, at A23 (criticizing same-sex marriage as the "most radical change in the nation's social and moral structure" and decrying its anticipated enactment "by three willful unelected judges").

200. Statutes of this kind were passed in 1995 by Utah; in 1996 by Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, Missouri, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee; in 1997 by Arkansas, Indiana, Maine, Minnesota, Mississippi, North Dakota, and Virginia; in 1998 by Alabama, Hawaii, Iowa, Kentucky, and Washington; in 1999 by Louisiana; in 2000 by California, Colorado, and West Virginia; and in 2001 by Missouri. NAT'L GAY &

initial measures diverged from the norm: a handful were constitutional amendments enacted by voters,²⁰¹ and five others were either statutory or constitutional measures that went beyond marriage per se to impose broader restrictions on partner recognition.²⁰²

The sweep and speed of the reaction in the states was quite something, but it did not end there. At an early point in the battle—in 1996—Congress stepped in and passed, and President Bill Clinton signed, the Defense of Marriage Act (“DOMA”).²⁰³ DOMA had two key substantive sections. Section 2 of the Act provided that no state would be obligated to recognize a same-sex marriage performed elsewhere.²⁰⁴ Section 3 provided, for the first time, a federal definition of marriage.²⁰⁵ As was true with respect to the state campaigns that led to the enactment of the “junior” or “mini-DOMAs” in many states, DOMA itself passed by a wide margin: 342-67 in the House and 85-14 in the Senate. In an election year, it was signed by Clinton with no talk of a veto.

In December 1996, some three years after the Hawaii Supreme Court had ignited this debate, and at just the time that Congress was considering DOMA, Hawaii trial court judge Kevin Chang was trying the question whether the state had a compelling state interest in restricting marriage to opposite-sex couples.²⁰⁶ Recall that the judge ultimately found that the state lacked a compelling state interest but stayed his ruling pending the progress

LESBIAN TASK FORCE, *supra* note 9.

201. Before *Goodridge*, amendments were passed by Alaska and Hawaii in 1998, Nebraska in 2000, and Nevada in 2002. *Id.*

202. *Id.* The broadest was Nebraska’s constitutional amendment in 2000, which provided that “[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.” NEB. CONST. art. I, § 29. The constitutionality of the Nebraska measure was upheld in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). Other states with broad measures or constitutional amendments include Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Virginia, Utah, and Wisconsin. NAT’L GAY & LESBIAN TASK FORCE, *supra* note 9.

203. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

204. 28 U.S.C. § 1738C (2006) (“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”).

205. 1 U.S.C. § 7 (2006) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

206. Chambers, *supra* note 78, at 292.

of a state constitutional amendment.²⁰⁷ Before the Hawaii Supreme Court could issue a final ruling, the state legislature, in 1997, passed a compromise bill of sorts that authorized a ballot measure to amend the state constitution to say that only the state legislature—and not the court—could define eligibility for marriage. The proposal, however, also created a “reciprocal beneficiaries” law that extended certain benefits to same-sex couples, as well as other specified pairs.²⁰⁸ The constitutional amendment passed in 1998 by a 69-20% margin.²⁰⁹

After *Baehr*, but before *Goodridge*, the Vermont lawsuit was litigated, and the Vermont legislature enacted the first statewide civil union law.²¹⁰ Vermont’s move was decidedly against the national grain. Indeed, when Vermont adopted comprehensive civil union legislation, with a judicial mandate coercing the policy, it was highly controversial.²¹¹

As reflected by the involvement of Congress and by the fact that so many states enacted restrictive measures, the reaction to *Baehr* was national in scope. But the backlash escalated further after *Goodridge* was decided in November 2003. The case generated enormous national and international publicity.²¹² Massachusetts itself had a protracted debate about whether to amend the state constitution to overrule *Goodridge*, but various efforts to do so failed.²¹³

The post-*Goodridge* backlash, however, was far more significant outside Massachusetts. The issue assumed new national prominence after two significant developments in 2004. First, as alluded to earlier, San Francisco mayor Gavin Newsom unilaterally ordered city officials to issue marriage licenses.²¹⁴ A few other local officials around the country

207. See *supra* text accompanying note 84.

208. See WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 23–25 (2002).

209. See Denniston, *supra* note 87. The same-sex marriage dispute in Alaska followed a similar course in 1998. *Id.*

210. See *supra* notes 88–92 and accompanying text.

211. See Banville, *supra* note 92.

212. See, e.g., *Gays Can Marry*, DAILY POST (Liverpool), Nov. 19, 2003, at 25; *Gay Couples Take a Step Farther up the US Aisle*, BELFAST TELEGRAPH, Nov. 19, 2003; Stephen Henderson & Ron Hutcheson, *Ban on Gay Marriage Unconstitutional, Court Rules*, CHATTANOOGA TIMES FREE PRESS, Nov. 19, 2003, at A1; Steve Lash, *Massachusetts Court Upholds Gay Marriage*, ATLANTA J.-CONST., Nov. 19, 2003, at 1A; Judy Nichols, *Same-Sex Marriage Advances: Mass. Ruling May Aid Ariz. Couple’s Appeal*, ARIZ. REPUBLIC, Nov. 19, 2003, at 1A; *Massachusetts Supreme Court Rules in Favour of Gay Marriage*, CHANNEL NEWSASIA, Nov. 18, 2003.

213. See *Looking Back at the Bay State’s Gay-Marriage Fight*, LOWELL SUN (Mass.), June 15, 2007.

214. See *supra* text accompanying notes 119–20.

followed Newsom's lead.²¹⁵ The San Francisco marriages produced both extensive press coverage and extensive controversy, even within the Democratic party.²¹⁶ Second, shortly thereafter, President George W. Bush endorsed a federal constitutional amendment to outlaw same-sex marriage, and the issue became a salient one in the 2004 presidential election.²¹⁷ In addition, well over half the states in the country enacted some form of an anti-same-sex marriage measure after *Goodridge*.²¹⁸ Many of these states already had a restrictive law on the books but took action to strengthen the existing provision.

The post-*Goodridge* measures had two salient characteristics. The first was the turn toward constitutionalizing the restrictive policy. Only three states—Alaska, Nebraska, and Nevada—had enacted constitutional amendments banning same-sex marriage before 2004.²¹⁹ After *Goodridge*, however, twenty-six additional states passed constitutional amendments—

215. Other local officials issued same-sex marriage licenses in Sandoval County, New Mexico; New Paltz, New York; Multnomah County, Oregon; and Asbury Park, New Jersey. John Cloud, *How Oregon Eloped*, TIME, May 17, 2004, at 56.

216. See, e.g., *Gay Unions Overwhelm Frisco: Officials Expect More Marriage Applications Today and Monday*, GRAND RAPIDS PRESS, Feb. 15, 2004, at A2; Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24; *Thousands Join San Francisco Valentine's Gay Wedding Rush*, CHANNEL NEWSASIA, Feb. 15, 2004; *Valentines Present for Gay Couples*, SUNDAY MAIL (Queensland, Austl.), Feb. 15, 2004, at 54. Senator Diane Feinstein (D-CA) and Representative Barney Frank (D-MA) were critical of Newsom's actions. See *California Plans Swift Defense of Its Marriage Law: Governor Wants to Stop Gay Weddings*, CHI. TRIB., Feb. 22, 2004, at C16.

217. See President's Radio Address, 40 WEEKLY COMP. PRES. DOC. 1253 (July 10, 2004), available at <http://frwebgate5.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=311725283397+0+2+0&WAIAction=retrieve>. See also Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1. The leading version of the Federal Marriage Amendment, proposed by Representative Marilyn Musgrave (R-CO), provided that

[m]arriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

See Alan Cooperman, *Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text*, WASH. POST, Feb. 14, 2004, at A1.

218. NAT'L GAY & LESBIAN TASK FORCE, *supra* note 9.

219. *Id.* The 1998 Hawaiian constitutional amendment was different because it authorized the legislature to decide who may marry instead of banning same-sex marriage as a matter of constitutional rule. See PIERCESON, *supra* note 188, at 123–24.

thirteen states in 2004,²²⁰ two states in 2005,²²¹ eight states in 2006,²²² and three states in 2008.²²³

The second salient feature of post-*Goodridge* measures was the move toward broadening the restriction to reach more than marriage alone. Many of the measures enacted after 2003 were worded expansively and banned not only same-sex marriage but also, for example, arrangements “substantially similar” to marriage (Wisconsin) or that “intend[] to approximate the design, qualities, significance or effect of marriage” (Ohio).²²⁴

Even as these backlash measure were proliferating, however, the post-*Baehr/Goodridge* legislative landscape was by no means one of uniform defeat. There was, for example, significant legal progress in securing civil union or domestic partnership protections for same-sex couples. Indeed, between 2004 and June 2009, ten states and the District of Columbia joined Hawaii, Vermont, and New Jersey in offering statewide civil union or domestic partnership statutes that conferred some or all of the rights of marriage that an individual state can confer.²²⁵ Vermont and New Jersey had acted under judicial compulsion,²²⁶ but California, Colorado, Connecticut, Hawaii, Maine, Maryland, Nevada, New Hampshire, Oregon,

220. Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. NAT'L GAY & LESBIAN TASK FORCE, *supra* note 9.

221. Kansas and Texas. *Id.*

222. Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin. *Id.*

223. Arizona, California, and Florida. *Id.*

224. OHIO CONST. art. XV, § 11; WIS. CONST. art. XIII, § 13. This breadth was, in fact, a feature of the 2006 Arizona measure that represents the only anti-same-sex marriage initiative to have been defeated in a state election. The claim that the Arizona law would have barred domestic partnership benefits became an issue in connection with its effect on the large population of senior citizens in the state. See Glenn Greenwald, *Uncle Sam, Keep Out*, SALON, Nov. 15, 2006, http://www.salon.com/opinion/feature/2006/11/15/az_gay_marriage/print.html.

225. The following enacted laws granting all, or nearly all, the rights a state can confer: Vermont (2000), California (2005), New Jersey (2006), New Hampshire (2007), Oregon (2007), District of Columbia (2008), Washington (2008), Connecticut (2009), and Nevada (2009). NAT'L GAY & LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION MAP FOR SAME-SEX COUPLES IN THE U.S. (2009), http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_07_09.pdf. Other states enacted partnership laws, affording a more limited set of rights: Hawaii (1997), Maine (2006), Maryland (2008), Colorado (2009), and Wisconsin (2009). *Id.*; RUBENSTEIN ET AL., *supra* note 8, at 701–02, 705–06. Four of these states—Connecticut, Maine, New Hampshire, and Vermont—went on to legislate in favor of full marriage equality in 2009. See *Legislature at Its Best: Same-Gender Marriage, Lawmakers Keep Equality in Mind*, HARTFORD COURANT, May 2, 2009, at A2; Moskowitz, *supra* note 140. A long list of other countries have adopted civil unions and domestic partnerships, in addition to those that currently recognize same-sex marriage. See RUBENSTEIN ET AL., *supra* note 8, at 636; *Norway Passes Law Approving Gay Marriage*, L.A. TIMES, June 17, 2008.

226. See *supra* text accompanying notes 89–92, 118.

Washington, Wisconsin, and the District of Columbia acted without a court order.

The enactment of broad civil union/domestic partnership protections by California and Connecticut²²⁷ did not prevent significant litigation victories in pursuit of full marriage equality in those states, as supreme courts in both states ruled in 2008 that it was unconstitutional to deny same-sex couples the right to marry, even if a comprehensive marriage substitute were offered.²²⁸ The two decisions, however, had very different aftermaths.

In re Marriage Cases was the subject of prompt backlash in the form of Proposition 8. Indeed, there was something in the nature of a “pre-backlash” to the decision given that proponents of the initiative had begun the process of gathering signatures and certifying their measure for the ballot well in advance of the decision,²²⁹ with the intent of turning the 2000 statutory initiative banning same-sex marriage into a state constitutional amendment, whether or not the state supreme court ruled for the plaintiffs in the pending marriage cases. This advance planning and organization meant that within a few weeks of *In re Marriage Cases* California officials could certify Proposition 8 for the November 2008 ballot.²³⁰ The ballot measure proposed to amend the state constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California.”²³¹ After the signatures were approved, the state supreme court rejected ballot-related petitions filed by the opposing forces. The court denied the petition of same-sex marriage opponents to stay the effective date of the ruling until after election day,²³² and also denied a preelection challenge by proponents of same-sex marriage arguing that the initiative should not be placed on the ballot because it amounted to a constitutional

227. CAL. FAM. CODE §§ 297, 297.5 (West 2009); CONN. GEN. STAT. §§ 46b-38bb to 46b-38pp (2008).

228. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, California Marriage Protection Act, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

229. Matthew Yi, *Effort Heats Up to Ban Same-Sex Marriage*, S.F. CHRON., Apr. 25, 2008, at A1.

230. Jack Leonard, *Voters Will Decide on Gay Marriage*, L.A. TIMES, June 3, 2008, at 1.

231. See Letters from Proponents of a Proposed Constitutional Amendment to the Initiative Coordinator, Office of the Cal. Attorney Gen. (Oct. 1, 2007), *available at* http://ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf (submitting a request for title and summary of a proposed initiative).

232. Deborah Bulkeley, *Stay on Same-Sex Marriages Denied*, DESERET MORNING NEWS (Salt Lake City), June 5, 2008.

“revision” immune from voter review, rather than a constitutional “amendment” properly subject to the initiative.²³³

Proposition 8 went on to pass with approximately 52% of the vote.²³⁴ Combined spending in the ballot campaign reached an astounding \$85 million.²³⁵ Proponents ran advertising claiming that legalizing same-sex marriage would harm children and threaten churches with litigation.²³⁶ Opponents countered with advertisements that challenged these claims²³⁷ and that drew parallels to past episodes of state-sanctioned race discrimination.²³⁸ The passage of the measure was widely covered around the country and was said by some to be the second most salient event on election night 2008.²³⁹ The enactment of the measure quickly generated a new round of litigation focused on the revision/amendment challenge that had been denied preelection review and, more broadly, on whether the California constitution permitted a popular majority, acting through the initiative process and without legislative approval, to change the constitution in ways that implicate core constitutional protections.²⁴⁰ In May 2009, the California Supreme Court upheld Proposition 8 against these challenges.²⁴¹

In contrast to the backlash that followed *In re Marriage Cases*, the 2008 *Kerrigan* decision from the Connecticut Supreme Court was met with relatively mild opposition. To the extent there was opposition, it was largely local, perhaps because the California battle over Proposition 8 dominated the national spotlight leading up to the election.²⁴² Local

233. Bob Egelko, *Challenge to Marriage Measure Tossed*, S.F. CHRON., July 17, 2008, at B3.

234. See Randal C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES, Nov. 5, 2008.

235. John Wildermuth, *Prop. 8 Among Costliest Measures in History*, S.F. CHRON., Feb. 3, 2009, at B1 (noting that the campaign generated “the most money ever raised for a social-issue campaign in the nation”).

236. See William M. Welch, *Californians Go to “War” over Proposed Gay-Marriage Ban*, USA TODAY, Oct. 29, 2008, at 7A.

237. *Id.*

238. See Lornet Turnbull, *California Vote May Undo Gay Marriages Here*, SEATTLE TIMES, Nov. 3, 2008, at B1 (noting that actor “Samuel L. Jackson lent his voice to a campaign message comparing a gay-marriage ban to the roundup of Japanese Americans during World War II and to miscegenation laws that once outlawed interracial marriages”).

239. See Welch, *supra* note 236 (quoting a spokesperson for the “Yes on 8” campaign as saying, “This is the second-biggest race in the country”).

240. See Maura Dolan & Jessica Garrison, *State Supreme Court Sets Hearing on Prop. 8*, L.A. TIMES, Feb. 4, 2009, at B3; *supra* text accompanying note 233.

241. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

242. See Michael Levenson & Gregory B. Hladky, *Conn. Ruling Allows Same-Sex Marriage: Activists Rejoice Following Sharply Divided Opinion*, BOSTON GLOBE, Oct. 11, 2008, at A1 (quoting an anti-same-sex marriage religious leader as saying, “I don’t want to hurt Connecticut’s feelings . . . [b]ut

activists condemned the court decision as illegitimate activism,²⁴³ but no serious movement to repeal it took shape. This owes, in part, to the fact that it was decided only twenty-five days before the election and was difficult to organize against quickly. On the other hand, even before the decision was announced, Connecticut voters were scheduled to vote on a referendum about whether to convene a constitutional convention.²⁴⁴ State law requires such a vote every twenty years. Some opponents of the decision tried to use the pending referendum to organize against the marriage decision,²⁴⁵ but they were unsuccessful. By a 59-41% margin, Connecticut voters rejected a constitutional convention.²⁴⁶

The 2009 Iowa court ruling upholding the right of same-sex couples to marry was met with some opposition, coming down, as it did, in a state where over 60% of those polled opposed same-sex marriage.²⁴⁷ But Iowa makes it far more difficult than California does to enact a measure like Proposition 8. Iowa requires legislative involvement to amend the state constitution, and early reactions to the ruling suggested that Democratic officeholders in control of the state legislature were not eager to advance an antimarriage amendment on the legislative agenda.²⁴⁸ Thus, any backlash there would take several years to ripen.

The period from 2008 to 2009 was thus an active one, as three more state supreme courts ruled in favor of marriage equality, and Proposition 8 became perhaps the best-known backlash measure since the same-sex marriage controversy began. But 2009 may be most significant for another reason: it was the year in which four states, for the first time, *legislated* in

all eyes are on California"); *id.* (stating that the elation and anticipation surrounding *Kerrigan* were "overshadowed by [the] ballot battle . . . in California").

243. *Id.* (quoting opponents who characterized the court as "a handful of judges acting as if they were rogue masters usurping the democratic process in Connecticut and radically redefining marriage by judicial fiat").

244. See OFFICE OF THE SEC'Y OF STATE, QUESTIONS ON THE BALLOT FOR THE NOVEMBER 4, 2008 STATE ELECTION (2008), available at http://www.sots.ct.gov/sots/lib/sots/electionservices/misc/2008_ballot_quest_and_returns.pdf.

245. The Family Institute of Connecticut "would focus on the constitutional convention as a way to place a gay marriage question before voters." Rachael Scarborough King, *Special Interests Push For State Constitutional Convention*, NEW HAVEN REG., Oct. 12, 2008.

246. OFFICE OF THE SEC'Y OF STATE, *supra* note 244.

247. Monica Davey, *Same-Sex Ruling Belies the Staid Image of Iowa*, N.Y. TIMES, April 26, 2009, at A14 (noting a 2008 poll indicating 62% opposition in the state to same-sex marriage).

248. *Id.* (noting that efforts to reverse the decision through constitutional amendment "would take at least two years, two votes by state lawmakers and approval by voters," and that such efforts "have been blocked by the Democrats, who only recently gained majorities in both chambers").

favor of same-sex marriage.²⁴⁹ Legislative protection of same-sex marriage injects a new element into the post-*Baehr/Goodridge* policy picture. One of these states—Connecticut—took legislative action only after its supreme court had ruled. Still, the codification of marriage after a judicial decision stands in stark contrast to Proposition 8’s imposition of a postdecision constitutional bar. These new same-sex marriage laws remain outnumbered by antimarriage backlash measures around the country, but they do reflect a new and very different development in the debate.

2. Public Opinion Aftermath

There is considerable evidence about public opinion on same-sex marriage at the time *Baehr* and *Goodridge* were decided, and thereafter.²⁵⁰ This stands in contrast to the paucity of polling evidence on interracial marriage when *Perez* was decided. And whereas there does not seem to have been a pre-*Perez* poll to establish a baseline, there is some pre-*Baehr* polling on same-sex marriage.

The earliest poll I have located measuring attitudes toward same-sex marriage is from the General Social Survey (“GSS”) and dates to 1988, five years before *Baehr*. This poll showed very low levels of support. Respondents were asked whether “homosexuals should have the right to marry.”²⁵¹ Less than 12% of respondents either agreed or strongly agreed with the statement that homosexuals should have the right to marry, with 73% disagreeing or strongly disagreeing.²⁵² By 2004, after *Goodridge*, the agree/strongly agree number was up to 31%, with disagree/strongly disagree at 55%.²⁵³ By 2006, the agree/strongly agree numbers ticked up a bit more to 35%, and disagree/strongly disagree dropped to 51%. Other polls in this time frame suggest opinion slightly more favorable to same-sex marriage, including 38% favoring the legalization of marriage in one 2008 poll, with 49% opposed.²⁵⁴ Thus, within a few years of *Goodridge*,

249. See *supra* note 225 and accompanying text (noting legislation by Connecticut, Maine, New Hampshire, and Vermont).

250. The best treatment is Patrick J. Egan, Nathaniel Persily & Kevin Wallsten, *Gay Rights, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY*, *supra* note 18, at 234. For a good historical compilation of polling information, see generally Karlyn Bowman & Adam Foster, Am. Enter. Inst., Attitudes About Homosexuality and Gay Marriage (June 3, 2008), http://www.aei.org/publications/pubID.14882/pub_detail.asp (surveying a variety of polls addressing public opinion on homosexuality and gay marriage).

251. General Social Survey, 1972–2006 Cumulative Dataset (on file with author).

252. *Id.*

253. *Id.*

254. Pew Research Ctr. for the People & the Press, May 2008 Political/Believability Survey 21 (May 21–25, 2008), <http://people-press.org/reports/questionnaires/425.pdf>. In 1996, three years after

somewhere between 35% and 38% of the public registered some level of support for same-sex marriage, evidenced by a belief that the law should protect it. Supporters were far from achieving majority status in most polls, and there is some evidence suggesting that the more salient the same-sex marriage dispute is in the public's mind, the lower the level of public support is for same-sex marriage and for issues perceived by the public to implicate same-sex marriage.²⁵⁵ Still, the historical trajectory was upward over this period of time.

Moreover, public support for same-sex marriage appeared to increase noticeably in 2009. Not only did four states become the first to legislate in favor of marriage equality,²⁵⁶ but also several polls registered new levels of support. For example, for the first time since it began polling on the issue, an ABC News/*Washington Post* poll showed higher levels of support for legalizing same-sex marriage than for banning it.²⁵⁷ This poll recorded 49% support, up from 32% in 2004.²⁵⁸ Similarly, a CNN/Opinion Research Corporation poll found 44% support for legalizing marriage, with support at 58% among eighteen- to thirty-four-year-olds.²⁵⁹ Polls are far from uniform, and they can shift quickly and without obvious explanation.²⁶⁰ Nevertheless, the confluence of rising poll numbers and regional developments in New England suggests that levels of support for marriage equality can sometimes change quickly.

The increasing public support for same-sex couples is especially

Baehr, 65% of respondents in a Pew poll said they opposed allowing same-sex marriage, with 27% of respondents registering support. By May 2008, five years after *Goodridge*, the number favoring legalizing same-sex marriage in a comparably worded Pew poll had increased to 38%, with opposition down to 49%. *Id.* at 22.

255. Egan, Persily, and Wallsten note that the Supreme Court's decision in *Lawrence* produced something of a short-term public opinion backlash that disrupted an upward trend in public support for gay rights generally. See Egan et al., *supra* note 250, at 241–45. They theorize that this effect was most likely due to the fact that *Lawrence* was perceived as not principally about criminalizing sodomy, but about same-sex marriage, see *id.* at 241—a point Justice Scalia actively sought to promote in his dissent, see *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (arguing that the Court's decision called state bans of same-sex marriage into question).

256. See *supra* note 225 and accompanying text.

257. See ABC News Polling Unit, Changing Views on Gay Marriage, Gun Control, Immigration and Legalizing Marijuana (Apr. 30, 2009), <http://abcnews.go.com/PollingUnit/Obama100days/story?id=7459488&page=1> (reporting 49% support for gay marriage versus 46% opposed).

258. See *id.*

259. Posting of Paul Steinhauer to CNN Political Ticker, <http://politicalticker.blogs.cnn.com/2009/05/04/cnn-poll-generational-gap-on-gay-marriage/> (May 4, 2009, 16:22 EST).

260. See Posting of Stephanie Condon to CBS News Political HotSheet, <http://www.cbsnews.com/sections/politics/politicalhotsheet/main503544.shtml?tag=contentMain;contentBody> (June 17, 2009, 18:30 EST) (noting a decrease in support for legalizing marriage from 42% in April 2009 to 33% in June 2009).

pronounced if support for civil unions is factored in to the equation. In a careful analysis of public opinion, for example, Patrick Egan, Nathaniel Persily, and Kevin Wallsten trace a substantial rise in support of civil unions, noting that polls asking about *both* marriage *and* civil unions now regularly reflect majority support for one or the other.²⁶¹ This conclusion is borne out by a national poll taken in the wake of the Massachusetts, California, and Connecticut decisions upholding marriage rights, as well as Proposition 8's passage. This December 2008 poll asked: "Thinking again about legal rights for gay and lesbian couples, which of the following comes CLOSEST to your position on this issue?" A combined 63% favored some form of legal recognition—marriage rights (31%) or civil unions (32%)—with only 30% favoring no legal recognition.²⁶² In that poll, 55% thought there should not be legally sanctioned marriage, with 39% in support. An identical 55%, however, favored legally sanctioned unions or partnerships, with 36% in opposition.²⁶³ Thus, at the very time that a tremendous policy backlash against marriage was unfolding, support for legally protecting same-sex couples had grown quickly.

Recall the contrast among different polling questions on interracial marriage—some asked respondents whether they approved of the practice, while others asked about support for legalizing such marriages.²⁶⁴ In the context of the same-sex marriage debate, most polling has asked some variant of the legalization question. This is not surprising given that most of the polling followed *Baehr* and thus pursued the question of legalization made salient in the wake of *Baehr* and *Goodridge*. The core polling question has asked whether respondents would support legalizing same-sex marriage, but variants include whether other states should recognize a same-sex marriage performed in Massachusetts and whether the federal Constitution should be amended to ban same-sex marriage.²⁶⁵

Despite the prevalence of polling questions about legalizing same-sex marriage, there are some analogues to the kind of "do you approve" questions featured in the 1958 Gallup poll on interracial marriage. A series

261. See Egan et al., *supra* note 250, at 253–55. Indeed, support for civil unions as a *freestanding* option has moved upward, reaching majority level support in multiple recent polls. PollingReport.com, Same-Sex Marriage, Gay Rights (2009), <http://www.pollingreport.com/civil.htm> (reporting the Quinnipiac University Poll: April 21–27, 2009, showing 57% support, and the CNN/Opinion Research Corporation Poll: April 23–26, 2009, showing 60% support).

262. Princeton Survey Research Assocs. Int'l, *Newsweek* Poll: Gay Marriage/President-Elect Obama 9 (Dec. 15, 2008), <http://www.newsweek.com/id/172404>.

263. *Id.* at 5.

264. See *supra* text accompanying tbl.1.

265. For varying questions, see Bowman & Foster, *supra* note 250, at 26, 29, 33, 35.

of Harris polls conducted between 1996 and 2004 asked respondents if they approved, disapproved, or did not feel strongly about same-sex marriage, using separate questions to test opinion about marriage between two men and between two women.²⁶⁶ As was true with polls testing opinion on legalizing marriage, the results reported in table 2 reflect evidence of some warming in attitudes over these years.

TABLE 2. Attitudes Toward Same-Sex Marriage

Year	Marriage Between Two Men			Marriage Between Two Women		
	Approve	Disapprove	No Strong Feeling	Approve	Disapprove	No Strong Feeling
1996	10%	64%	24%	11%	63%	25%
2000	15%	57%	24%	16%	55%	26%
2004	26%	51%	18%	27%	50%	19%

Interestingly, the polling evidence on same-sex marriage does not support a large gap between those who disapprove of same-sex marriage and those willing to ban it. A one-time *Boston Globe* poll in 2005 asked respondents both about approval/disapproval of same-sex marriage generally and about support for/opposition to legislation in their states to prohibit same-sex marriage. As for levels of approval, the poll showed 50% disapproving, 37% approving, and 11% “neutral.”²⁶⁷ As for support for a legal ban, the poll showed 46% opposed such legislation, 46% favored it, and 7% were neutral.²⁶⁸ Thus, the poll recorded only a 4% gap between disapproval and support for a ban, and a somewhat larger 9% gap between those approving same-sex marriage and those opposed to a ban. A similar pattern emerges if we compare the results of the 2000 *Los Angeles Times* poll (34% support legalizing same-sex marriage, and 58% do not support) with the separate 2000 Harris polls on approval (15–16% approve and 55–57% disapprove of same-sex marriage, with slight variation when asking about women versus men).²⁶⁹ Once again, we see very little gap (0–3%) between those who disapprove and those who oppose legalization, with a more sizable gap (here, 18–19%) between approval and support for legalization. This GSS-Harris comparison introduces the problem we

266. *Id.* at 23.

267. *Id.* at 26.

268. *Id.* at 35.

269. *See id.* at 23–24.

observed earlier in the context of the polling on interracial marriage—namely, the problem of comparing polls taken by different pollsters at different times. Various methodological differences make it unwise to look to polls like these for precise answers to the question whether opinion about approval/disapproval matches up with opinion about support for/opposition to legalization. Taken together with the comparable result in the 2005 *Globe* poll, however, these polls supply some indications that, at least regarding disapproval versus opposing legalization, the gap may be smaller in the context of same-sex marriage than it was for interracial marriage. Recall that in the case of different polls taken in the same years on interracial marriage the gap between disapproval and support for a legal ban in some years ranged as high as 20%.²⁷⁰ Perhaps the lack of a similar gap in the contemporary context is not all that surprising given the salience of the legal dispute over same-sex marriage and the reasonable likelihood that questions about disapproval would be understood to be questions about opposing legalization.

IV. ACCOUNTING FOR THE DIFFERENCES

The two stories of breakthrough state court litigation on marriage rights reflect dramatically different policy and popular responses. In this part, I focus on what might explain why *Baehr* and *Goodridge* spurred such an intense—and *nationalized*—campaign against same-sex marriage, while *Perez* was met with barely a whimper. I also consider what the historical comparison might teach us about the contemporary dynamics of judicial backlash.

Recall the Klarman criteria for explaining backlash: raising the salience of the issue, increasing susceptibility to a charge of outsider interference or judicial activism, and altering the order in which social change would otherwise occur.²⁷¹ As I briefly suggested at the outset, these criteria would seem to predict a backlash after *Perez*, and we are now in a better position to see why.

Within Klarman's schema, *Perez* raised the salience of interracial marriage by generating extensive press coverage, much of it emphasizing the unprecedented nature of the California court's ruling. The initial wave of post-*Perez* press coverage did not have the staying power of the post-*Baehr* and post-*Goodridge* coverage, and the interracial marriage issue plainly did not become as salient as same-sex marriage has become in the

270. See *supra* tbl.1.

271. See Klarman, *supra* note 19, at 473.

contemporary context. Yet if the duration of press coverage constitutes a salience differential, then the salience issue can become question begging. The interesting question, especially in light of the wave of prominent national press coverage that initially accompanied the *Perez* decision, is precisely *why* that decision did not ignite the same ongoing, high-profile public debate (and, ultimately, the countermeasures) that the contemporary marriage cases have.

Moving to Klarman's second criterion—the outsider interference/judicial activism objection—*Perez* seems tailor made to that idea. As the first decision of its kind, and one made in the absence of any organized political campaign to dislodge bans on miscegenation, *Perez* would seem to be a paradigmatic candidate for backlash on this basis. Indeed, the absence of precedent was stressed by the dissenters in *Perez* and by reporters in their press stories.²⁷² As I discuss in detail below, one part of the answer may relate to the fact that the particular idea of judicial activism as the evocative and densely meaningful political phrase it has become in contemporary politics had not yet taken root in 1948.²⁷³ Still, it is worth remembering, as alluded to at the outset, that this fact did not prevent a post-*Brown* backlash that featured plenty of hostility to courts only a few years after *Perez*.

For many of the same reasons, *Perez* also seems well matched to Klarman's third point—that backlash is facilitated by decisions that change the order in which social change would otherwise occur. Indeed, one of the more striking aspects of the *Perez* litigation is the extent to which it was isolated from any organized movement. The case filed by the Catholic Interracial Council and lawyer Daniel Marshall in California, with its idiosyncratic emphasis on religious freedom, was an outlier.

The three Klarman criteria alone, then, help to frame the problem, but they do not solve the puzzle. Unraveling the mystery, I suggest below, requires studying the contextual factors in a more granular and detailed way. In the balance of this part, I consider a range of differences relating to the legal, political, and cultural landscapes surrounding these disputes—and surrounding courts more generally—and assess which ones have some explanatory power. Identifying these factors, in turn, points toward some more general conceptual guidance about how to think about backlash.

272. See *supra* notes 66, 151–52 and accompanying text.

273. See *infra* Part IV.C.2.

A. PUBLIC OPINION?

One simple hypothesis to distinguish the disparate aftermaths of *Perez* and *Baehr* and *Goodridge* relates to public opinion. If public opinion was substantially more favorable to interracial marriage in 1948 than it was to same-sex marriage in 1993 or 2003, that would offer a straightforward way to explain the different aftermaths. As described above, however, the evidence about public opinion in 1948 is sparse and uncertain. Still, what does exist offers little to support the conclusion that the public was warming to interracial marriage in a way that would convincingly support this hypothesis.

At the outset, it is difficult to do what might be most useful—that is, to make a precise comparison of public opinion at the relevant times about the decisions and the form of marriage each one legalized. Given the very limited polling evidence on public attitudes toward interracial marriage in 1948, especially compared to the wealth of available polling data on same-sex marriage over the last several years,²⁷⁴ that comparison is difficult. Recall that the poll closest in time to *Perez*—the one showing 94 percent disapproval of interracial marriage—was taken ten years *after* the decision.²⁷⁵ Recall as well that there are methodological limitations on what the 1958 poll can tell us and on how good a comparison to the present it can facilitate.²⁷⁶ And the comparison between the aftermaths of *Perez* and *Baehr/Goodridge* is further complicated by the contemporary advent of civil unions, which can triangulate the debate and shape public opinion in ways that were not possible in 1948.

In light of the difficulties in making a precise comparison, what can we say about public opinion and whether it provides a basis to distinguish the two cases? It seems to me that there are a few important points here. First, there is no survey evidence suggestive of growing public support for interracial marriage in 1948. The 1958 poll, though imperfect, registered almost universal disapproval. The pre-*Perez* polls on the separate—but related—question of whether respondents would themselves marry someone of another race are consistent with very high rates of disapproval.²⁷⁷ And both the contemporaneous and the contemporary scholarly consensus reflect the view that there was strong public hostility to interracial marriage in the 1940s.²⁷⁸ In addition, there were no legislative

274. See *supra* Part III.A.2, B.2.

275. See *supra* text accompanying note 176.

276. See *supra* text accompanying notes 177–82.

277. See *supra* note 174.

278. See *supra* notes 182–84 and accompanying text.

repeals close to the time of *Perez* that might have signaled growing public tolerance. To the contrary, the last state to repeal a ban on miscegenation before *Perez* had done so in 1887, more than sixty years before *Perez* was decided.²⁷⁹

On the other hand, there are some facts that might point in the opposite direction. Recall that the 1958 poll tested approval and not attitudes toward legalization per se. In addition, there was surely some *general* movement in public attitudes toward racial inequality in 1948, in part driven by post–World War II and Cold War influences.²⁸⁰ Moreover, it is reasonable to believe that the strongest opposition to interracial marriage was in the South given southern attitudes about race, the selective appeal of the Dixiecrats there, the region’s blanket coverage with statutory bans on miscegenation, and the fact that none of the five states that repealed miscegenation bans in the nine years after *Perez* was in the South.²⁸¹ Although the 94 percent disapproval level in the 1958 poll is not consistent with disapproval that is strictly regional, this modest spurt of decriminalization in the nine years following *Perez* might suggest that there was some latent fluidity in public opinion in 1948, at least in these five western states. Finally, the fact that eighteen states already allowed interracial marriage in 1948 offers some evidence that public opinion in at least those eighteen states was more favorable to interracial marriage than elsewhere in the country, although it would surely be a mistake to equate the absence of a statutory ban with affirmative public approval or even indifference. There might be many reasons that a state does not outlaw conduct, and those reasons may or may not track contemporary public sentiment—just as there may be statutes on the books that no longer reflect public opinion. One near-contemporaneous student of the law of interracial marriage, sociologist Edward Byron Reuter of the University of Iowa, refuted the idea that the absence of a statutory ban was a proxy for public approval. In 1931, Reuter argued that “[t]he infrequency of such unions is perhaps the chief reason why prohibitive laws are not found in other states,”²⁸² and he quoted a state official in Massachusetts (which had no ban) saying that “[i]nter marriages are very few chiefly because of the

279. That state was Ohio. See NEWBECK, *supra* note 24, app. C, at 230.

280. See *supra* notes 39–43 and accompanying text.

281. Oregon, Montana, and North Dakota repealed their bans between 1951 and 1955, and Colorado and South Dakota followed in 1957. See NEWBECK, *supra* note 24, app. C.

282. EDWARD BYRON REUTER, RACE MIXTURE: STUDIES IN INTERMARRIAGE AND MISCEGENATION 39–40 (1931). Reuter also noted that government officials in different states had been known to deny marriage licenses to mixed-race couples, even in the absence of a statutory ban. See *id.* at 101–02.

violent opposition of the public toward such marriages.”²⁸³

Taken as a whole, then, the evidence about the state of public opinion in 1948 seems ambiguous at best, and insufficient to support the conclusion that public opinion toward interracial marriage was significantly more positive than public opinion about same-sex marriage in the comparable postdecision period. Moreover, it is worth noting that the evidence about public opinion concerning same-sex marriage is itself more nuanced and less simplistic than might be thought. Doubtless, the wide swath of anti-same-sex measures across the country and the enactment of DOMA by Congress reflect substantial opposition to same-sex marriage. Yet recall that polling evidence *also* suggests a steady increase in support for same-sex marriage since *Baehr* and a sharp increase in support for civil unions over the same period.²⁸⁴ Moreover, while it is true that five states repealed their bans on interracial marriage within nine years of *Perez*,²⁸⁵ it is also true that there has been substantial legal progress on protecting same-sex relationships in a comparable time frame. In the wake of additional legislative developments in 2009, it is now the case that three states have, without a court order, legalized same-sex marriage within six years of *Goodridge*, and two of them—New Hampshire and Maine—eliminated antimarriage measures in so doing. And eight states enacted statewide civil union or domestic partnership legislation of some kind within five years of *Goodridge*,²⁸⁶ most of them acting without any judicial involvement. These are not marriage laws of course, but their enactment does suggest growing public support for legally protecting same-sex couples.

At a minimum, then, the available evidence about public opinion in the two contexts does not support the idea that public opinion alone is the variable that can persuasively distinguish the two historical episodes and explain the absence of a post-*Perez* policy backlash. A more fruitful set of possible distinctions, explored below, is legal, political, and cultural in nature.

B. LEGAL DIFFERENCES

1. State v. Federal Law

One plain difference between *Perez* and the same-sex marriage decisions is that *Perez* invoked the *federal* Constitution and *Baehr* and

283. *Id.* at 101.

284. *See* Egan et al., *supra* note 250, at 254.

285. *See* Martyn, *supra* note 166, at 1210.

286. *See* NAT’L GAY & LESBIAN TASK FORCE, *supra* note 225.

Goodridge, the *state* constitutions. That difference means that the enactment of state law measures in the wake of *Perez* would not have been functionally responsive to the *Perez* decision. State law measures would not have blunted *Perez* in the way that anti-same-sex marriage initiatives have been designed to head off at the pass a *Goodridge*-type decision in other states (or, as in California, to reverse a decision). Instead, a federal constitutional amendment or a contrary ruling by the U.S. Supreme Court would have been needed, and securing either one would have posed formidable challenges.

It is reasonable to believe that the greater ease of securing state law responses like those that have proliferated on same-sex marriage has indeed facilitated backlash, but this difference only goes so far in making sense of these stories. First, even if state law responses in 1948 would not have directly nullified or prevented the replication of *Perez* in states strongly opposed to the ruling, there may nevertheless have been political reasons for opponents of interracial marriage to have pursued such measures. Only six of the thirty states that banned interracial marriage at the time of *Perez*, for example, had a constitutional (as opposed to a statutory) ban,²⁸⁷ so there was room to strengthen the existing policy—as, indeed, many states have done in relation to same-sex marriage in the wake of *Goodridge*.²⁸⁸ Indeed, in a structurally similar situation, several southern states did amend their state constitutions on the issue of education after *Brown*, in an effort to resist that federal ruling.²⁸⁹ Post-*Perez* state initiatives might also have been used to demonstrate political support for the miscegenation bans and to signal state judges not to follow California's lead. It may well be that in southern states—the states likely to have the most intense opposition to *Perez*—there simply was no real fear of state judges following the lead of *Perez*. The action of the California court may have seemed too remote—geographically or culturally—to pose a credible threat. But that can likewise be said of many of the earliest states to pass anti-same-sex measures. In 1995, Utah became the first state to pass an anti-same-sex marriage measure in the wake of *Baehr*, and fourteen states followed in 1996.²⁹⁰ Most of these first-wave adopters were “red” states like Utah

287. Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee were the states with constitutional bans. Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 51 & n.15 (1964).

288. See *supra* notes 219–24 and accompanying text.

289. See Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1508–10 (2006).

290. The 1996 states were Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, Missouri, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee.

itself—states whose courts would be highly unlikely to follow the (then-apparent) lead of the Hawaii Supreme Court.

Finally, it bears noting that the state-versus-federal difference might plausibly have cut the other way, and the *Perez* decision might be seen as the one more likely to have gone national. While it was not decided by a federal court, its reasoning and grounding in the federal Constitution could have been seen by defenders of interracial marriage bans as a blueprint for a ruling on federal constitutional grounds that could invalidate all laws in one fell swoop—as, indeed, *Loving* one day would.

2. Fifty-State v. Thirty-State Policy

A second set of legal differences is likely to have played a greater role in shaping the response to *Perez*. While not a single state allowed same-sex marriage before *Goodridge*, eighteen of the then forty-eight states allowed interracial marriage when *Perez* was decided.²⁹¹ Indeed, perhaps more than anything else, the universality of the policy on same-sex marriage before *Baehr* and *Goodridge* made the issue easier to nationalize, simply because it upset a fully national status quo and ignited a debate about “redefining marriage.” Moreover, that universality supplied the basis for a different strategy used by opponents to nationalize the debate—namely, through claims made about the purported effect of the Full Faith and Credit Clause in Article IV of the federal Constitution. Almost immediately after *Baehr* was decided, anti-gay rights activists argued that this clause would obligate other states to recognize marriages performed in Hawaii or in any other state that might allow same-sex marriage.²⁹² Claims about a chain reaction of this sort were crucial to nationalizing the same-sex marriage issue. Absent the specter of mandatory interstate recognition, it is hardly inevitable that there would be national consequences of a lone state court decision interpreting state law on a matter that, like marriage, has been traditionally left to state law.

The centrality of the full faith and credit claims to nationalizing the debate is, indeed, ironic because the reading of the clause offered by opponents of same-sex marriage had no real basis in the relevant legal

NAT'L GAY & LESBIAN TASK FORCE, *supra* note 9.

291. See *supra* text accompanying note 24.

292. See, e.g., Anna Dubrovsky, *Same-Sex Marriage: A Struggle for Equal Rights*, PITTSBURGH POST-GAZETTE, Sept. 10, 1996, at A-1; Sherry Jacobson, *Hawaii Debates Gay Marriage: State May Recognize Such Unions After Court Ruling; Pair's Bias Suit*, DALLAS MORNING NEWS, Sept. 17, 1993, at 1A; David Osborne, *Hawaii on Collision Course Over Gay Marriages*, INDEP. (London), Sept. 10, 1996, at 9.

doctrine. That clause has not been read to apply to marriages, as distinguished from judgments of courts, which have been its principal focus.²⁹³ Instead, the issue of interstate recognition of marriages has been left to more flexible and discretionary common law rules. Under longstanding rules in effect at the time of *Perez* and in effect today, states have generally recognized marriages validly performed in other states, but have done so at a subconstitutional level that gives them latitude to decline recognition when affording it would violate the state's public policy.²⁹⁴ The law of interstate recognition, as it stands today, and as it has stood during the time periods relevant to the decisions we are examining, does not support the constitutional chain reaction that opponents grounded in the Full Faith and Credit Clause and began emphasizing almost immediately after *Baehr* was decided.

Political rhetoric, of course, often flunks the test of fidelity to legal doctrine. So captivating was the fallacious full faith and credit claim that Congress enacted DOMA²⁹⁵ only three years after *Baehr*, and stated in its legislative history that the explicit freedom it gave states to deny recognition to same-sex marriages performed elsewhere reflected an exercise of congressional enforcement power under the Full Faith and Credit Clause.²⁹⁶

For our purposes, the relevant point is that the judicial legalization of same-sex marriage threatened by *Baehr*, and accomplished by *Goodridge*, fueled the domino theory of marriage in a way that did not apply to *Perez*. In the *Perez* scenario, eighteen states *already* allowed interracial marriage.

293. See *Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 22–23 (2004) [hereinafter *Judicial Activism vs. Democracy: Hearing*] (statement of Yale Law School professor R. Lea Brilmayer); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2146–47 (2005).

294. Koppelman, *supra* note 293, at 2148; Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1968–71 (1997). The mini-DOMAs in many states have been justified as expressing the state's public policy. Some argue that the public policy exception ought to be seen as unconstitutional—in the context of same-sex marriage recognition and otherwise—but courts have yet to make that leap. See Kramer, *supra*, at 1980–92.

295. Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419, 2419 (1996) (codified at 28 U.S.C. § 1738C (2006)).

296. See H.R. REP. NO. 104-664, at 25 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2929 (“The Committee therefore believes that this situation presents an appropriate occasion for invoking our congressional authority under the second sentence of the Full Faith and Credit Clause to enact legislation prescribing what (if any) effect shall be given by the States to the public acts, records, or proceedings of other States relating to homosexual ‘marriage.’”).

The California Supreme Court's decision therefore did not newly create the possibility of an interstate recognition showdown. If, before *Perez*, a mixed-race couple moved from a state that allowed interracial marriage to one that banned it, the question of recognition could have arisen. There were, in fact, a very small handful of cases on the subject, although these cases did not yield any clear legal consensus on the recognition question under common law rules.²⁹⁷

C. POLITICAL AND CULTURAL DIFFERENCES

Other differences between the context surrounding *Perez* and the context surrounding the same-sex marriage decisions are political, cultural, or both. These relate to the dynamics of partisan politics, the issue frames likely to resonate with the public, and the political cultures of the relevant times.

1. Partisan Differences

One striking point of difference is the partisan political alignment of the issues in the two contexts. Over the last several years, the national Republican party has perceived the same-sex marriage issue as a political winner and has aggressively sought to press it.²⁹⁸ This dynamic intensified over time. In 1996, when DOMA passed in Congress by a large bipartisan majority and was signed by President Bill Clinton, the partisan alignment of the issue was less clear. Given that opposition to gay rights had long been a staple of Republican politics in the culture wars,²⁹⁹ however, it is not surprising that Republicans decided to lay strong claim to the marriage issue. President George W. Bush's election-year support for a federal marriage amendment, and his high-profile use of the issue in 2004, reflects the more partisan cast that the issue assumed over time.

This dynamic also shaped the heavy use of initiatives on same-sex marriage around the country. As a general matter, ballot measures have increasingly become part of the partisan toolkit for influencing elections.³⁰⁰

297. See Koppelman, *supra* note 293, at 2152.

298. See, e.g., Clyde Wilcox, Linda M. Merolla & David Beer, *Saving Marriage by Banning Marriage: The Christian Right Finds a New Issue in 2004*, in *THE VALUES CAMPAIGN? THE CHRISTIAN RIGHT AND THE 2004 ELECTIONS* 56, 66–67 (John C. Green, Mark J. Rozell & Clyde Wilcox eds., 2006); Carl Hulse, *Republicans Still Hope to Score Points on Gay Marriage*, N.Y. TIMES, July 16, 2004, at A17.

299. See, e.g., Lewis & Edelson, *supra* note 188, at 200–01 (discussing the Republican party's use of same-sex marriage as a political issue and highlighting Pat Buchanan's 1992 Republican convention speech attacking gay activists).

300. For a good overview, see STEPHEN P. NICHOLSON, *VOTING THE AGENDA: CANDIDATES,*

Propositions can affect candidate races by helping to set the issue agenda, shaping the composition of the electorate through increased turnout, dividing party constituencies with “wedge” issues, and offering a new source of political spending that is not subject to the same campaign finance restrictions that apply to candidates.³⁰¹ In the context of same-sex marriage, Republicans have seen restrictive ballot measures as a way to draw more conservative voters to the polls and to heighten the election-year salience of a divisive, culture-wars question.³⁰² Whether, and to what extent, this political strategy actually worked is debated. For example, the empirical basis for the claim, made by some, that ballot measures on same-sex marriage in eleven states delivered reelection to Bush in 2004 is hotly contested and at best uncertain.³⁰³ But there seems little question that partisan politics have contributed to the high number of ballot measures on same-sex marriage.

In terms of partisan incentives, the picture in 1948 was quite different. In the era of *Perez*, neither major party had a comparable political interest in raising the salience of the miscegenation issue. It would have been the Democrats in 1948 who had the constituents—white southerners—most likely to have intense preferences on the issue of interracial marriage. Yet that party would have been hesitant to raise the issue for fear of straining its New Deal coalition.³⁰⁴ Indeed, oddly enough, the issue was not even emphasized by the Dixiecrats, the splinter party that did break the

ELECTIONS, AND BALLOT PROPOSITIONS 42–60 (2005), Daniel A. Smith, *Direct Democracy and Candidate Elections*, in *THE ELECTORAL CHALLENGE: THEORY MEETS PRACTICE* 143 (Stephen C. Craig ed., 2006), and Daniel A. Smith & Caroline J. Tolbert, *The Initiative to Party: Partisanship and Ballot Initiatives in California*, 7 *PARTY POL.* 739 (2001).

301. Smith, *supra* note 300, at 148–58.

302. See, e.g., Janet Hook, *Initiatives to Ban Gay Marriage Could Help Bush in Key States*, L.A. TIMES, July 12, 2004, at A1 (“Republican strategists hope—and Democratic strategists fear—that the presence of anti-gay-marriage initiatives on the ballots of swing states such as Michigan and Oregon will boost turnout among conservative voters and improve President Bush’s chances of winning crucial electoral college votes.”).

303. For a review of the literature on this question, as well as some new analysis reflecting the complexity of the issue, see Daniel A. Smith, Matthew DeSantis & Jason Kassel, *Same-Sex Marriage Ballot Measures and the 2004 Presidential Election*, 38 *ST. & LOC. GOV’T REV.* 78, 78–79, 84–88 (2006). For skeptical accounts, see Kenneth Sherrill, *Same-Sex Marriage, Civil Unions, and the 2004 Presidential Vote*, in *THE FUTURE OF GAY RIGHTS IN AMERICA* 37 (H. N. Hirsch ed., 2005); Barry C. Burden, *An Alternative Account of the 2004 Presidential Election*, FORUM, Dec. 2004, art. 2, at 9–10; and Simon Jackman, *Same-Sex Marriage Ballot Initiatives and Conservative Mobilization in the 2004 Election* (Nov. 9, 2004), available at <http://www.docstoc.com/docs/6073234/Same-Sex-Marriage-Ballot-Initiatives-and-Conservative-Mobilization-in> (PowerPoint presentation).

304. ANTHONY J. BADGER, *THE NEW DEAL: THE DEPRESSION YEARS, 1933–1940*, at 248 (First Ivan R. Dee paperback ed. 2002) (1989) (“[T]he ultimate political impact of the New Deal was to create a more precisely delineated, sharply focused, class-based Democratic Party.”). The New Deal Coalition consisted of southerners, organized labor, lower-income voters, and blacks. *Id.* at 248–52.

Democratic coalition in 1948 by deserting Truman precisely on the issue of race. The Dixiecrats' platform had a plank supporting the ban on interracial marriage.³⁰⁵ Nevertheless, I have found no sign that Strom Thurmond, the Dixiecrat nominee, made *Perez* an election issue. Indeed, the same October 11, 1948, issue of *Time* magazine that carried a story reporting the *Perez* decision also carried a long cover story on Thurmond.³⁰⁶ Neither story cross-referenced the other, and the Thurmond piece did not mention the miscegenation issue at all. The Dixiecrat party likely could not have successfully nationalized opposition to *Perez* on its own given how regionally based—and controversial—it was.³⁰⁷ But the party's role in 1948 presents an interesting window on how things have changed. Viewed through a contemporary lens, it seems inconceivable that a third party with retrograde views on race, and that was running a high-profile presidential candidate, would not seize on the first state supreme court decision to topple a ban on interracial marriage—especially when that decision was made only a month before the November election.

There is another relevant point of contrast between 1948 and the contemporary political context. The use of initiative and referendum was at a low ebb for the twentieth century during the 1940s,³⁰⁸ while at the high watermark in the 1990s (with the first decade of the twenty-first century on pace to exceed the 1990s).³⁰⁹ Thus, it was less likely as a matter of prevailing political practice that *Perez* would be met with a series of initiatives in states committed to banning interracial marriage. And the aggressive use of ballot measures by political parties to try to influence candidate elections was not a feature of the political landscape of the 1940s.

305. The relevant plank provided:

We stand for the segregation of the races and the racial integrity of each race; the constitutional right to choose one's associates; to accept private employment without governmental interference, and to earn one's living in any lawful way. We oppose the elimination of segregation, *the repeal of miscegenation statutes*, the control of private employment by Federal bureaucrats called for by the misnamed civil rights program. We favor home-rule, local self-government and a minimum interference with individual rights.

The American Presidency Project, Platform of the States Rights Democratic Party (Aug. 14, 1948), <http://www.presidency.ucsb.edu/ws/index.php?pid=25851> (emphasis added).

306. *Third Parties: Southern Revolt*, TIME, Oct. 11, 1948, available at <http://www.time.com/time/magazine/article/0,9171,887886,00.html>.

307. Thurmond won the electoral votes of only four states and took the overwhelming majority of his votes from the South. KLARMAN, *supra* note 33, at 386.

308. See Initiative and Referendum Inst., Univ. of S. Cal., Initiative Use 1 (Nov. 2006), available at [http://iandrinstitute.org/IRI%20Initiative%20Use%20\(2006-11\).pdf](http://iandrinstitute.org/IRI%20Initiative%20Use%20(2006-11).pdf).

309. See *id.*

2. Resonance and Partisan Dimensions of the Judicial Activism Claim

The fact that *Perez* was not pressed even by the Dixiecrats in 1948 probably relates as well to the changing role of the courts as an object of political debate. That change reflects another key difference in the political environments surrounding these decisions. The same-sex marriage decisions were fed into a political culture in which the organized opposition quickly and repeatedly made the idea of judicial activism a core part of its response.³¹⁰ For example, when the trial judge in Hawaii ruled that the state had no basis to deny same-sex couples the right to marry, the conservative Family Research Council said that “[o]nce again, an activist judge has flouted public opinion and a perfectly reasonable law and imposed his own agenda.”³¹¹ When state legislators have defended mini-DOMAs, they have frequently cited the need to rein in “activist judges who don’t rule from the bench based on the law, but based on their personal views or opinions.”³¹² When *Goodridge* was decided and President Bush backed a federal constitutional amendment to limit marriage, his remarks in the White House stressed “that he was acting because ‘activist judges’ had made aggressive efforts to redefine marriage.”³¹³ Hearings held on the proposed Federal Marriage Amendment a few weeks after Bush spoke were entitled “Judicial Activism vs. Democracy.”³¹⁴

310. See *supra* note 199. This dynamic is explored in Wilcox et al., *supra* note 298, at 60 (referring to the “judicial activism frame”).

311. *Judge: Gays May Wed First in U.S.: Hawaiian Court’s Landmark Ruling Still*, SAN JOSE MERCURY NEWS, Dec. 4, 1996, at 1A.

312. James Dao, *State Action Is Pursued on Same-Sex Marriage*, N.Y. TIMES, Feb. 27, 2004, at A24 (quoting a Georgia legislator). See also Jim Ragsdale, *State of Their Unions: What’s at Stake: Social Conservatives Want the People to Vote on Forever Banning Same-Sex Marriage in Minnesota*, ST. PAUL PIONEER PRESS, Jan. 29, 2004, at A8 (discussing Republican state efforts to push for a constitutional amendment despite preexisting DOMA legislation and quoting then-state senator Michele Bachmann’s statement that “[t]he courts for 30 years have increasingly turned nearly every issue into what they term a constitutional issue, thus becoming an imperial judiciary not unlike the seers on Mount Olympus”); Lornet Turnbull, *Lawmakers Want Role in Gay-Marriage Suits*, SEATTLE TIMES, June 17, 2004, at B1 (“It is imperative that we defend the constitutional and historical rights of the Legislature against improper intrusion by the judicial and executive branches of state government.” (quoting a letter from Republican legislators seeking strong defense of a state DOMA law)).

313. Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

314. *Judicial Activism vs. Democracy: Hearing*, *supra* note 293; *President Bush Endorses Constitutional Amendment Defining Marriage* (NPR radio broadcast Feb. 25, 2004) (noting Republican subcommittee chairman Senator John Cornyn’s stated intention to call the first hearing “Judicial Activism vs. Democracy”). See also Editorial, *The Road to Gay Marriage*, N.Y. TIMES, Mar. 7, 2004, at 12 (arguing that opponents were trying “to place all of the blame for recent events on ‘activist judges’”); Robert P. George, *Judicial Activism and the Constitution: Solving a Growing Crisis*, DECLARATION FOUND., Apr. 29, 2005, <http://www.declaration.net/news.asp?docID=4867&y=2005> (advocating a uniform definition of marriage to prevent judicial activism from eroding the institution of

These attacks were fueled by the fact that no state legislature had opened marriage to same-sex partners before *Goodridge* did so. The idea that the court was the first mover became a centerpiece of the opposing strategy. This is another way in which the fact that eighteen states legally permitted interracial marriage at the time of *Perez* is relevant. Although the California court provided the first judicial legitimation of interracial marriage, and no state in the sixty-one years before *Perez* had repealed a ban on interracial marriage, it is nevertheless the case that interracial marriage *was* legal in some states when *Perez* was decided. Relatedly, the contemporary attack on judicial activism as part of the same-sex marriage debate may have acquired some staying power by virtue of the fact that the campaign for same-sex marriage has mostly been focused on the courts. From 1993 to 2008, only California's legislature passed same-sex marriage legislation, ultimately to be thwarted by a gubernatorial veto.³¹⁵ During this period, gay rights groups had significant legislative success on civil unions or domestic partnerships in several states, but not on marriage itself.³¹⁶ Legislative victories on marriage in the New England states did not come until 2009. By contrast, the campaign that followed *Perez* was largely focused on legislatures. Fifteen states repealed their bans in the nineteen years between *Perez* and *Loving*. Some litigation was filed, but it was not the principal focus.³¹⁷ Indeed, in the time between *Perez* and *Loving*, no other state supreme court joined the California court in rejecting bans on interracial marriage, and two state supreme courts ruled the opposite way.³¹⁸

As important, perhaps, was the fact that debates about judicial activism were well established by the time the contemporary same-sex marriage debate began. The anti-judicial activism framing by opponents of same-sex marriage drew on a familiar and existing part of contemporary political discourse—one that in its contemporary iteration dates to the Warren Court³¹⁹ and can be seen as having “primed” segments of the

marriage).

315. Nancy Vogel & Jordan Rau, *Gov. Vetoes Same-Sex Marriage Bill*, L.A. TIMES, Sept. 30, 2005, at B3.

316. See *supra* notes 225–26 and accompanying text.

317. Both Arizona's and Nevada's antimiscegenation laws were struck down by lower courts in 1959. See NEWBECK, *supra* note 24, at 79–87.

318. *State v. Brown*, 108 So. 2d 233 (La. 1959); *Naim v. Naim*, 87 S.E.2d 749 (Va.), *vacated*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (Va.), *appeal dismissed*, 350 U.S. 985 (1956) (mem.).

319. See, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 112 (1998); KLARMAN, *supra* note 33, at 335–43; LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 127–34 (2000); Mark Tushnet, *The Warren Court as History: An Interpretation*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 1, 21 (Mark Tushnet ed., 1993);

public to respond.³²⁰ In the wake of controversial decisions on race, school prayer, crime, and sexual privacy, the attacks on courts from the right had come to focus consistently on the idea not only that courts were being illegitimately aggressive with their powers, but that they also were doing so in derogation of traditional cultural values. The oppositional dynamic may have roots in the southern reaction to *Brown*, but it intensified in the later Warren Court years.³²¹ It also intensified with the rise of an increasingly established public interest law movement, which regularly turned to the courts in search of social justice.³²²

Moreover, through this period and continuing to the present, the term “judicial activism” came to be virtually encoded with the particular idea of promoting liberal cultural policies.³²³ From the time Nixon successfully ran against the courts and first made the jurisprudence of crime an issue in the 1968 presidential campaign,³²⁴ the attack on judicial activism has been something of a rhetorical fixture in electoral politics, and one with a distinct political valence. The issue has been “owned” by the Republicans and conservative interest groups and has been made a consistent part of election campaigns and party platforms.³²⁵

Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 156 (2002).

320. For a succinct overview of “framing” and “priming” public opinion, see Jeffrey W. Koch, *Political Rhetoric and Political Persuasion: The Changing Structure of Citizens’ Preferences on Health Insurance During Policy Debate*, 62 PUB. OPINION Q. 209, 210–12 (1998).

321. See KLARMAN, *supra* note 33, at 321–43; Friedman, *supra* note 319, at 202–15.

322. See Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1592 (2006) (discussing the rise of public interest law).

323. See, e.g., David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 9 (1999) (“The Warren Court’s opponents won the rhetorical battle . . . ‘[J]udicial activism’ has become, in the hands of the politicians, little more than a euphemism for judicial protection and promotion of reverse discrimination, crime on the streets, atheism, and sexual permissiveness . . .”); Tushnet, *supra* note 319, at 21.

324. See RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 266 (2008); POWE, *supra* note 319, at 410; Friedman, *supra* note 319, at 214–15. Goldwater had made some efforts to introduce the crime issue in the 1964 election but had not gone as far as Nixon. See SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 201–02 (2d ed. 1998) (discussing Goldwater’s use of the issue).

325. See Michael Kinsley, Editorial, *The Right’s Kind of Activism*, WASH. POST, Nov. 14, 2004, at B7 (arguing that since the Warren Court decided *Brown*, “denouncing activist judges” has been part of “Republican boilerplate”). The Democrats have occasionally tried to wield the activism charge against the Rehnquist Court. See, e.g., Joan Biskupic, *Ban on Guns Near Schools Is Rejected: Congress Exceeded Commerce Power, High Court Holds*, WASH. POST, Apr. 27, 1995, at A1 (quoting Senator Herb Kohl (D-WI) accusing the Rehnquist Court of “judicial activism that ignores children’s safety for the sake of legal nitpicking”); Charles Lane, *Scope of Federal Authority at Issue in Supreme Court*, WASH. POST, Oct. 1, 2000, at A3 (noting that “[i]n an ironic twist, liberals now find themselves denouncing ‘judicial activism’ with almost the same fervor conservatives once reserved for the Warren court” and quoting then-Senator Joe Biden (D-DE) as saying the issue was “whether power will be

Ritualized appeals against judicial activism after *Baehr* and *Goodridge*, in short, helped to create favorable terrain for opponents of same-sex marriage. Moreover, the partisan cast of the judicial activism issue interacts with a point raised in the previous section—that whereas the national Republican party has apparently viewed the same-sex marriage issue as enhancing its political fortunes, neither national party in 1948 made a comparable calculation about interracial marriage.

Ideas and debates about judicial usurpation of democratic prerogatives were, of course, not themselves new at the time of the Warren Court. They have been a well-worn feature of American politics for a long time.³²⁶ At the time of *Perez*, the nation was not that far away from the battle that had raged from *Lochner* to the New Deal, as conservative courts frustrated progressive regulatory initiatives. But that set of battles was the more familiar frame of reference in 1948 for attacks on judges. The charge that courts were running amok had not yet been yoked so closely to liberal cultural policy. Indeed, the very term “judicial activism” was itself coined by Arthur Schlesinger in *Fortune* magazine only the year before *Perez* was decided.³²⁷

There was something of a quiescence on judicial issues in the 1940s, with the decade sandwiched between the end of the protracted *Lochner*-to-New Deal battles and the coming southern onslaught against *Brown*. The canonical footnote four, which provided a blueprint of sorts for what would later come to be criticized as judicial activism in defense of minorities and civil rights, was new on the scene, having been written by Justice Harlan Fiske Stone in 1938.³²⁸ True, there were decisions that were candidates for criticism along these lines, including, for example, cases invalidating the mandatory flag salute,³²⁹ striking down the white primary,³³⁰ or blocking

exercised by an insulated judiciary or by the elected representatives of the people”); David G. Savage, *Two Visions of the Supreme Court: McCain Wants to End “Judicial Activism”; Obama Favors Justices with “Empathy” for Ordinary People*, L.A. TIMES, May 19, 2008, at A8 (quoting then-Senator Barack Obama (D-IL) accusing the Roberts Court of judicial activism, stating, “The nation has just witnessed how quickly settled law can change when activist[] judges are confirmed In decisions covering employment discrimination to school integration, the Roberts-Alito Supreme Court has turned back the clock on decades of hard-fought civil rights progress”). But Democrats have never seized the mantle with the same fervor, consistency, or discipline that the Republicans have displayed.

326. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 207–23 (2004); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 161–229 (2007).

327. Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 202, 208.

328. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

329. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

330. *Smith v. Allwright*, 321 U.S. 649 (1944).

the judicial enforceability of racially restrictive covenants.³³¹ The decision on the white primary, in particular, produced considerable hostility in the South.³³² But it was not part of any broader, more systematic attack on the courts. That was soon to come in the wake of *Brown*. There was, in sum, not all that much high-profile public controversy about the courts in the 1940s,³³³ and that shaped the political environment into which *Perez* was released. Given public discomfort with interracial marriage and the longstanding criminalization of it in twenty-nine other states, California's landmark judicial elimination of a ban might have stirred up more controversy if there was an established public narrative that political elites might have used to activate public opposition by, among other things, assailing courts as illegitimate sources of liberal cultural change.

For these reasons, the special resonance of the judicial activism-based attack on same-sex marriage is an important part of distinguishing the cases. It cannot, however, bear all the explanatory weight. It is best seen as one among several interacting political factors. As discussed in the next section, opponents also pressed ideas about "defending" marriage, and thereby tapped into an existing cultural narrative about marriage as an institution under siege. Thus, the fact that it was a *court* that first embraced same-sex marriage helped to shape the form and texture of the political response, but that does not mean that there would have been no political response at all on the issue had there been no judicial involvement.³³⁴

3. Mobilization, Countermobilization, and Culture Wars

A final set of political—and related cultural—distinctions concerns the character of the movements that surrounded and shaped the cases. The movements both for and against change during the pertinent time periods were different in significant respects. Before *Goodridge* was decided, there was an organized, well-funded national movement to legalize same-sex marriage. That movement dates at least to 1993 and the *Baehr* decision. While there was not much of a national same-sex marriage movement

331. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

332. See KLARMAN, *supra* note 33, at 236–38, 387, 393.

333. See Friedman, *supra* note 319, at 178 ("The telling feature of the 1940s, however, is that although the issues on the docket held the potential for conflict, the Supreme Court was not doing much to arouse attention, let alone popular ire."); *id.* at 179 (characterizing the 1940s as a decade of "quiet surrounding the Supreme Court"). The absence of much reaction to the Court's *Korematsu* decision further suggests quiescence, see Roger Daniels, *The Japanese American Cases, 1942–2004: A Social History*, LAW & CONTEMP. PROBS., Spring 2005, at 159, 162–64 (2005), though that case alone might be chalked up to wartime exceptionalism.

334. I discuss below the reasonable prospect that approval of same-sex marriage by a lone state's legislature would have produced backlash as well.

before *Baehr*, the idea was not unknown. Recall that test cases seeking to establish the right of same-sex couples to marry had been instituted—without success—almost as soon as the modern gay rights movement began.³³⁵ The issue had sufficient punch that between 1975 and 1988 attorneys general in six states issued opinions that same-sex marriage was not permitted under the relevant state law.³³⁶ In the years leading up to *Baehr*, there was also a lively debate inside the gay community about whether marriage rights ought to be a priority.³³⁷ Moreover, marriage advocacy aside, when *Baehr* was decided in 1993, the larger gay civil rights movement was nearly twenty-five years old, and there was already a vigorous, well-established, and mature campaign to institutionalize the recognition of same-sex relationships and to secure some protections for same-sex couples, principally through domestic partnership programs. For example, by 1992, as a result of political organizing and advocacy by gay groups, about a dozen municipalities around the country recognized domestic partnerships for same-sex partners.³³⁸

Equally important, the mobilization of gay rights groups at the time of *Baehr* and *Goodridge* had long since been met with countermobilization. That meant that when the contemporary same-sex marriage cases were decided, there was a well-organized, well-funded national opposition in place to activate negative public opinion by pouncing on the decisions, delivering preplanned messages, executing oppositional strategies, driving press coverage, and agitating for political responses. This opposition included elected members of Congress, as well as high-profile spokespersons for traditional values.³³⁹

335. See *supra* note 75 and accompanying text (discussing the *Baker*, *Jones*, and *Singer* cases in the early 1970s).

336. WILLIAM B. RUBENSTEIN, *LESBIANS, GAY MEN, AND THE LAW* 418 n.4 (1993).

337. See *Gay Marriage: A Must or a Bust*, *OUT/LOOK*, 1989, reprinted in RUBENSTEIN ET AL., *supra* note 8, at 678–88 (containing a debate between Thomas Stoddard (“Why Gay People Should Seek the Right to Marry”) and Paula Ettlbrick (“Since When Is Marriage a Path to Liberation?”)).

338. NAN D. HUNTER, SHERRYL E. MICHAELSON & THOMAS B. STODDARD, *THE RIGHTS OF LESBIANS AND GAY MEN* 80 (3d ed. 1992); Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 *COLUM. L. REV.* 1164, 1188–96 (1992). See also RUBENSTEIN ET AL., *supra* note 8, at 706–15 (describing individual litigation seeking partner recognition for purposes of rent control, health insurance benefits, and the like).

339. See Chambers, *supra* note 78, at 294–96; *Massachusetts Court’s Same-Sex “Marriage” Ruling an Outrage: Dobson Denounces “Arrogant” Decision*, *PR NEWSWIRE*, Nov. 18, 2003 (quoting James Dobson arguing that “[f]or millennia” marriage has been “celebrated by every culture on Earth as the cornerstone of society” and that “now, we have this activist court that is arrogant enough to say that those thousands of years of culture are simply wrong”); Schmitt, *supra* note 199 (quoting Senator Trent Lott’s defense of DOMA as a response to judicial activism); *The Early Show: Reverend Jerry Falwell and Representative Barney Frank Discuss Their Opinions on the Massachusetts Court Ruling That Says*

Moreover, the longstanding countermobilization on gay rights issues was itself enabled by a major political force that was not on the scene in 1948 and that also marks a point of cultural and political contrast between the two controversies: the rise of the Religious Right.³⁴⁰ In the early 1970s, the Religious Right in its current form rose in response to a set of highly charged cultural controversies about gender, sexuality, and family. The Equal Rights Amendment,³⁴¹ *Roe v. Wade*,³⁴² and decisions about prayer in schools,³⁴³ among others, galvanized groups of religious conservatives and spurred efforts to organize politically. Various high-profile religious leaders emerged over time to form groups and assume leadership positions.³⁴⁴

Same-sex marriage has proven to be something of a perfect storm for the Religious Right. The controversy combines in a single issue several of that movement's foundational commitments—commitments to normative heterosexuality,³⁴⁵ to traditional gender roles,³⁴⁶ to combating perceived judicial activism on cultural issues,³⁴⁷ and to the idea that marriage is an

It's Unconstitutional to Ban Same-Sex Unions (CBS television broadcast Nov. 19, 2003) (quoting Jerry Falwell as saying that opponents of same-sex marriage did not want to “reward misbehavior” and that “the only real cure . . . [is a] federal marriage amendment”).

340. See CLYDE WILCOX, *ONWARD CHRISTIAN SOLDIERS?: THE RELIGIOUS RIGHT IN AMERICAN POLITICS* 5 (1996).

341. See RUTH MURRAY BROWN, *FOR A “CHRISTIAN AMERICA”: A HISTORY OF THE RELIGIOUS RIGHT* 29–138 (2002) (associating the rise of the Religious Right with opposition to the Equal Rights Amendment).

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

343. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

344. Some identify 1979, the year in which Jerry Falwell founded the Moral Majority, as a particularly significant moment in the ascent of this political movement. WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 200–05*, 218–19 (1996). After that, many other groups, including Pat Robertson's Christian Coalition and James Dobson's Focus on the Family, formed to advocate politically for a culturally conservative agenda. See Wilcox et al., *supra* note 298, at 62–64. Phyllis Schlafly was also instrumental in promoting an antifeminist agenda, founding Eagle Forum, which worked to further the agenda of the Religious Right. MARTIN, *supra*, at 162.

345. See, e.g., Green, *supra* note 194, at 121–22 (noting the Religious Right's emphasis on traditional social arrangements in opposing gay rights); MARTIN, *supra* note 344, at 162 (noting Phyllis Schlafly's role in opposing the Equal Rights Amendment and her opposition to gay rights).

346. See, e.g., MARTIN, *supra* note 344, at 161–62 (discussing the role of Phyllis Schlafly in opposing the Equal Rights Amendment and noting that many in the Religious Right viewed the role of a woman as “to be quiet, have babies, and do what her husband tells her”).

347. See, e.g., PETER SPRIGG, *OUTRAGE: HOW GAY ACTIVISTS AND LIBERAL JUDGES ARE TRASHING DEMOCRACY TO REDEFINE MARRIAGE* 7–16 (2004) (written by a senior official of Family Research Council). The Religious Right has consistently opposed what it characterizes as judicial activism. See DAVID P. GUSHEE, *THE FUTURE OF FAITH IN AMERICAN POLITICS: THE PUBLIC WITNESS OF THE EVANGELICAL CENTER* 28–35 (2008) (discussing platforms of various groups on the Religious Right and their opposition to what they characterize as judicial activism, among other issues). See Part

institution under widespread social siege and in need of defense.³⁴⁸ The latter issue may explain the signature phrase opponents of same-sex marriage have used, inspiring the federal DOMA and numerous mini-DOMAs around the country.³⁴⁹ The Religious Right has long argued that rising divorce rates and single-parent households reflect a weakened institution of marriage and that this weakness poses a grave social threat.³⁵⁰ Contemporary critics of same-sex marriage have argued that allowing same-sex couples to marry could be the development that causes the already teetering institution to collapse.³⁵¹ Just as opponents of same-sex marriage effectively drew on the existing political narrative about judicial activism, they likewise fit the controversy into an existing cultural and political narrative about marriage as a vulnerable institution.

There are significant points of contrast here with the political and cultural landscape in 1948. First, as previously noted, when *Perez* was decided, there was no real movement aimed at securing the right of interracial marriage, nor was there organized advocacy by the NAACP or others to legitimate interracial romance or improve the lot of unmarried interracial couples. There was simply no analogue to the political organizing that was undertaken to pursue the rights of same-sex couples—though not the right to marriage per se—before *Baehr*, or to pursue the right to marriage itself after *Baehr*. Second, in the absence of greater mobilization by civil rights advocates on the interracial marriage issue, the kind of countermobilization associated with backlash was far less likely.

IV.C.2 *supra* for further discussion of judicial activism.

348. For example, the Family Research Council, once the lobbying arm of James Dobson's Focus on the Family, but now a separate entity, proclaims in its mission statement that its goal is to "champion[] marriage and family as the foundation of civilization, the seedbed of virtue, and the wellspring of society. [Family Research Council] shapes public debate and formulates public policy that . . . upholds the institution[] of marriage . . ." Family Research Council, Mission Statement, <http://www.frc.org/mission-statement> (last visited Aug. 1, 2009).

349. See *supra* Part IV.B.2 (discussing backlash measures).

350. The White House Conference on the Family, held in 1980, is often credited with placing the issues of the health of the family and marriage as an institution on the national agenda. See BROWN, *supra* note 341, at 142–53.

351. James Dobson, for example, argued that Massachusetts's distribution of marriage licenses to same-sex couples amounted to "death certificates for the institution of marriage." See M. V. Lee Badgett, *Prenuptial Jitters: Did Gay Marriage Destroy Heterosexual Marriage in Scandinavia?*, SLATE, May 20, 2004, <http://www.slate.com/id/2100884/>. Similarly, a coalition of groups on the Religious Right sponsored a "Mayday for Marriage" rally in the run-up to the 2004 presidential election. See David C. Campbell & Carin Robinson, *Religious Coalitions For and Against Gay Marriage: The Culture War Rages On*, in THE POLITICS OF SAME-SEX MARRIAGE 131, 131–32 (Craig A. Rimmerman & Clyde Wilcox eds., 2007). Cf. DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 144–46 (2007) (making the argument that same-sex marriage could bring down the institution, but avowedly not from the perspective of the Religious Right).

True, there were some signs of a more general civil rights backlash in 1948, as the very existence of the Dixiecrat revolt indicates. But that movement was regionally limited in ways illustrated by the party's very limited success in the 1948 election.³⁵² And the Dixiecrats, in any event, did not choose to engage on the interracial marriage issue beyond a fairly nominal mention in their platform. By contrast, the backlash against same-sex marriage was facilitated by well-drawn national battle lines over gay rights in general, and the contested rights of same-sex couples in particular. By the time of the same-sex marriage decisions, in other words, a political infrastructure was in place that allowed opponents of the decisions to seize the issue and activate public opinion.

V. IMPLICATIONS FOR CONCEPTUALIZING BACKLASH

The purpose of this Article has been twofold: first, to identify, document, and explore the intriguingly disparate aftermaths of these two instances of landmark litigation on marriage equality; and second, to try to explain the disparity in backlash between the two. As to the latter objective, I have suggested a range of legal, political, and cultural differences in the environments surrounding these cases that help to explain why a post-*Baehr*- and *Goodridge*-style backlash did not unfold after *Perez*.

Having closely compared these two episodes, we are now in a position to consider what the starkly contrasting aftermaths might indicate, in a more general sense, about the dynamics of backlash against judicial decisions. Let me suggest two points that flow from the comparison.

A. BACKLASH AGAINST COURTS AS A SPECIES OF POLITICAL BACKLASH

First, the contrasting case studies suggest that there are risks in thinking about backlash against court decisions as a discrete and distinctive category of analysis—that is, as being *sui generis* and detached from the more general category of backlash against any public or political decision, as opposed to what Nathaniel Persily calls an “event[] like any other” that can “elevate issues onto the national agenda through media coverage, elite discussion, and other behavior that follows in the[] wake.”³⁵³ Legal scholars have become increasingly focused on the dynamics of backlash

352. See KLARMAN, *supra* note 33, at 386.

353. Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 18, at 9 (“[C]ourt decisions are events like any other. They can elevate issues onto the national agenda through media coverage, elite discussion, and other behavior that follows in their wake. The nature of court decisions’ effects on public opinion is usually a product of the way elites react to the decision and the messages they send to the mass public concerning the issue adjudicated.”).

against court decisions in particular.³⁵⁴ Paradoxically, however, that mode of analysis may be both too generalized and too particularized.

The risk of excessive generalization inheres in the assumption that court decisions as a group will produce backlash under a relatively general set of circumstances. One example of this kind of generalization is the common view among social scientists and many legal scholars that courts do not and/or cannot get too far ahead of public opinion.³⁵⁵ That may be true in the aggregate, but *Perez* suggests that in fact, on at least some occasions and as to important matters, courts can and do issue rulings at odds with dominant public opinion, without observable political or institutional consequence. Whatever the precise state, structure, and stability of public opinion regarding interracial marriage in 1948, it is safe to say that it was not a practice popular with much of the public when *Perez* was decided. Yet undifferentiated, adverse public opinion, standing alone, did not mean that a backlash was inevitable. Backlash is unlikely if the environment of public opinion surrounding a decision does not facilitate the activation of that opinion. Perhaps, in other words, existing public sentiment in 1948 *could* have been activated as in the contemporary setting if some circumstances surrounding *Perez* had been different—if, for example, the national legal landscape on interracial marriage had been more homogenous, if prevailing partisan incentives had led one major political party to seize on the issue, if direct democracy had been more frequently used, if narratives about judicial activism or the need to defend marriage as an institution under siege had been well established, if political forces related to interracial marriage had been both mobilized and countermobilized well before *Perez*, or if other circumstances had led political leaders to prioritize resistance to the decision and to organize against it.

Moreover, even the more developed and contextually attuned criteria offered by Klarman may be too generalized. Recall that Klarman suggested that judicial decisions are likely to cause backlash when they raise the salience of an issue, incite anger over outside interference or judicial

354. See, e.g., Eskridge, *supra* note 17, at 1294–1301; Klarman, *supra* note 19, at 452–82; Post & Siegel, *supra* note 17, at 373–406; Sunstein, *supra* note 17, at 33.

355. See generally Gerald N. Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that courts need political support to produce genuine social change); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (arguing that the Supreme Court generally tracks majoritarian political preferences). In the context of backlash in particular, see Klarman, *supra* note 19, at 482 (linking backlash to courts' "outpacing public opinion on issues of social reform").

activism, and alter the order in which social change would otherwise occur. As we saw, there is a strong case to be made that *Perez* meets this test, yet it did not trigger backlash. As we also saw, in order to generate reasonable hypotheses to explain that fact, the analysis had to be taken to a more granular level. This more fine-grained analysis moved away from institutional generalizations about courts and placed more weight on the particulars of the political context, culture, and dynamics that surround individual decisions.

Yet the problem is not only that generalizing about courts qua courts in relation to backlash is problematic, for there are *also* ways in which the framing of the issue is too particularized. Seeing adverse reaction to judicial decisions as sufficiently distinctive to require analysis separate from the larger category of political backlash can obscure important connections between and among different kinds of backlash. This is particularly clear in the context of gay rights issues. Consider this counterfactual: suppose that the Hawaii or Massachusetts legislature—and not a court—had taken the first step on same-sex marriage. It seems highly likely that cultural conservatives would have seized on the issue with equal gusto and made similar claims about a single state presuming to redefine marriage for the nation.³⁵⁶ It is not hard to imagine a national backlash organized against the “arrogance” of the “elites” of those states, who presumed to “redefine” marriage and impose their will on the country through interstate recognition.

Indeed, it is instructive to consider the history of political backlash against gay rights measures initiated by political officials, not judges. One prominent example is the ill-fated attempt by President Bill Clinton to redeem his campaign pledge to lift the ban on gays in the military. That attempt was made by a newly elected president—not a court—and was quickly stamped out by a political backlash in Congress.³⁵⁷ Another example relates to gay civil rights statutes. The adoption of antidiscrimination laws that include sexual orientation on the list of protected categories was, for many years, countered with ballot measures designed to repeal or to preempt the future adoption of such measures.³⁵⁸ It was exactly such a ballot measure—directed at, among other things,

356. See Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 *DRAKE L. REV.* 861, 870–71 (2006).

357. See Adam Clymer, *Lawmakers Revolt on Lifting Gay Ban in Military Service*, *N.Y. TIMES*, Jan. 17, 1993, at A1.

358. See generally Schacter, *supra* note 195 (addressing the backlash that regularly followed the extension of antidiscrimination laws to cover sexual orientation); Schacter, *supra* note 356, at 878–81.

eliminating local antidiscrimination ordinances—that culminated in the Supreme Court’s leading equal protection decision on gay rights, *Romer v. Evans*.³⁵⁹

These examples suggest that adverse political reaction to legislative, executive, or agency decisionmaking is not always, or necessarily, different in kind from such reaction to court decisions. Plainly, there are institutional aspects of the judicial process that shape the form and dynamics of backlash, as illustrated by the use of judicial activism as a framing device in the same-sex marriage controversy. Yet one of the lessons taught by juxtaposing these case studies is how much the discourse about judicial activism has itself come to be embedded in partisan politics and in political opposition to liberalizing cultural policies. Thus, the increasing politicization of courts underscores, rather than negates, the links between backlash against courts and other kinds of political backlash.

B. DISAGGREGATING THE CONCEPT OF BACKLASH

A second significant implication that flows from the comparison between *Perez* and the contemporary cases is that backlash itself is a category in need of disaggregation. In laying out the aftermaths of these decisions, I separated out the policy and public opinion sequences of the cases. The disparity in the two episodes of marriage-reform litigation is quite stark if we define backlash in terms of policy countermeasures, and that has been the focal point of this Article. By contrast, defining backlash in terms of the evolution of public opinion in the wake of these cases would generate a different set of conclusions. This difference highlights the importance of distinguishing between and among different forms of backlash, and carefully defining what form is meant in a particular context.

Notwithstanding the various methodological difficulties of comparing public opinion in the two contexts with any precision,³⁶⁰ we can say at least this much: the striking divergence between the two stories with respect to the policy countermeasures that followed the cases is not replicated if we focus instead on public opinion. To the contrary, in the wake of these court decisions, public opinion as to both interracial and same-sex marriage warmed to the contested form of marriage over time. The lack of contemporaneous polling at and after the time *Perez* was decided limits what we can say with precision about the pace and trajectory of public opinion change on interracial marriage in relation to same-sex marriage.

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

360. *See supra* Parts III, IV.

Recall, however, that Gallup polls registered only 4 percent approval of interracial marriage in 1958, and only 20 percent in 1968, fully twenty years after *Perez*.³⁶¹ By contrast, Harris polls registered 10–11 percent approval of same-sex marriage in 1996, 15–16 percent in 2000, and 26–27 percent in 2004, one year after *Goodridge* and nine years after *Baehr*.³⁶² Comparing these polls testing approval suggests that the public's approval of same-sex marriage, if anything, grew somewhat more quickly after the litigation than did the public's approval of interracial marriage after *Perez*. Recall, as well, that support for legalizing same-sex marriage in one set of successive surveys tripled between 1988 and 2006. The pre-*Baehr* baseline of 12 percent support in 1988 had grown to 36 percent by 2006, two years after *Goodridge*. The relative speed with which public support has grown for same-sex marriage is further reflected in what appear to be additional gains in polling support, as well as in the recent legislative victories on marriage.³⁶³ At the very least, these post-*Baehr* and post-*Goodridge* developments are inconsistent with the idea that the same-sex marriage cases have caused any public opinion backlash. That fact, in turn, underscores how the metric for backlash matters.

There is, to be sure, a legitimate question about whether trends in public opinion polls following court decisions are in any significant way related to those decisions. One might say, for example, that even in the absence of *Baehr* and *Goodridge*, same-sex marriage would have begun to poll better over time simply because younger people are far more likely to support same-sex marriage.³⁶⁴ Some measure of speculation is necessary here because we cannot know how events would have unfolded over this time period in the absence of litigation. Still, it is implausible to suppose that the advent of same-sex marriage litigation has had no role in increasing public support for same-sex marriage. Put simply, there is little reason to believe people would have been talking about, thinking about, or warming up to same-sex marriage this much or this quickly had the court decisions not so dramatically put the issue on the public radar screen and begun a public dialogue. Before *Baehr*, there had been no legislative activity or even serious public education efforts on same-sex marriage by gay rights groups. Gay rights lawyers had decided it was premature to raise the issue and were not attempting to secure marriage rights.³⁶⁵ Instead, the

361. See *supra* text accompanying note 185.

362. See *supra* tbl.2.

363. See *supra* text accompanying notes 249, 256–60.

364. See Klarman, *supra* note 19, at 445.

365. See Chambers, *supra* note 78, at 285–87.

movement pursued limited domestic partnership benefits on a local level. It was only the surprise win in *Baehr* that suddenly put the issue on the agenda, caused a sharp reversal in strategy by LGBT leaders and legal groups, and at the very least, helped to start the chain of events that coincided with the steady rise in polling support between 1988 and the present and the breakthrough enactment of marriage bills in 2009 in the New England states.

In sum, if we view the evolution of public opinion on same-sex marriage as the product of interacting legal, political, and cultural forces, it seems reasonable to reject *both* the drawing of singular and simplistic causal arrows connecting court decisions to the thaw in public opinion *and* the denial that judicial decisions have played a meaningful role in catalyzing the movement in public attitudes. What seems beyond question is that the same-sex marriage litigation launched the issue for public debate in a way that was unforeseen—and perhaps unforeseeable—in 1993.

Recognizing that there are different metrics for backlash underscores a related issue. Just as the comparative analysis of backlash in these two episodes would look different if we used public opinion polls as the relevant point of comparison, there is also a source of *temporal* variability here. The events of 2009 underscore the import of the time frame. The overall state of the same-sex marriage movement looked very different in 2008 than it did one year later. With 2009 came the unanimous decision in Iowa, the legislative enactment of marriage in three states, and the rising levels of support in some opinion polls. These developments at least raise the possibility that momentum has shifted on the issue in some significant respect and that the backlash may be running out of steam.

Moreover, taking a longer-term view, it may one day prove to be the case that the comparative exercise undertaken in this Article is mooted by events. Suppose the proposed federal constitutional amendment on same-sex marriage continues to languish. Suppose further that the Supreme Court one day announces that the federal Constitution protects the right of same-sex couples to marry. At the doctrinal level, it is not hard to connect the dots from the *Lawrence* ruling to that result—as, indeed, Justice Scalia’s dissent in *Lawrence* anxiously emphasized.³⁶⁶ A federal constitutional

366. See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (“State laws against . . . same-sex marriage . . . [are] called into question by today’s decision . . .”); *id.* at 604 (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”); *id.* at 601 (noting that Justice O’Connor’s concurring opinion would leave laws banning same-sex marriage on “pretty shaky grounds”); Ball, *supra* note 289, at 1511; Klarman, *supra* note 19,

ruling of that kind would, presumably, wipe out the forty-one state anti-same-sex marriage laws and DOMA. If we expanded the temporal frame, in other words, and this longer-term scenario were to ensue and become the relevant “aftermath,” the inquiry undertaken in this Article would look very different. The road from *Goodridge* to this hypothetical Supreme Court case might then look quite like the road from *Perez* to *Loving*. In other words, we might well one day pinpoint *Baehr* or *Goodridge* as the beginning of the end of restricting marriage to heterosexuals. And if a *Loving v. Virginia* of same-sex marriage were decided in 2012 or even 2022, we might say that the nineteen-year path to such a decision from either *Baehr* in 1993, or *Goodridge* in 2003, would provide an even closer parallel to the nineteen-year-long road from *Perez* to *Loving*.

The temporal issue is a real one, but it is worth noting that the possible long-term happy ending for proponents of same-sex marriage does not negate the importance of comparing the two episodes in terms of policy backlash. The optimistic scenario for proponents of same-sex marriage is, of course, speculative, given that it is unknown what the Supreme Court will do over the next few decades. Moreover, even if a future Supreme Court were one day to decide the *Loving* of same-sex marriage, it would not mean that the forty-one state laws and DOMA had not been passed. Those initiatives and the campaigns that led up to them have had their own costs and consequences for sexual minorities, who have endured the sometimes-harsh public debates and denunciations. These measures, moreover, have changed the legal landscape in ways that may delay or deter the Supreme Court from taking on the marriage issue or may alter the way it is handled once the Court does address the question. And these measures have generated collateral legal and political controversies of various sorts.³⁶⁷ By virtue of these countermeasures, the road from *Goodridge* to any *Loving*-like decision that may one day come will, in other words, necessarily be a different—and more arduous—road.

In sum, these contrasting case studies suggest the need to better conceptualize and define backlash against court decisions. Just as it may be seductive to make categorical assertions about the limitations of courts’

at 451–52.

367. For an example of legal controversies, see *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008) (holding that the state’s broadly worded antimarriage measure invalidated the domestic partnership benefits program of the University of Michigan and other public entities), and *State v. Carswell*, No. CA2005-04-047, 2005 WL 3358882 (Ohio Ct. App. Dec. 12, 2005), *aff’d*, 871 N.E.2d 547 (Ohio 2007) (reversing a lower court decision that had held domestic violence laws inapplicable to unmarried cohabiting couples because the recent same-sex marriage amendment restricted the definition of the word “spouse”).

ability to produce genuine social change,³⁶⁸ so it may likewise be tempting to make similarly categorical assertions about the likelihood of backlash against judicial decisions. The comparative case studies presented here push in a different direction, suggesting that, as Justice O'Connor said in another setting, context matters.³⁶⁹

368. In responding to Gerald Rosenberg's well-known skepticism on this score, I have made a similar plea for contextual thinking. *See* Schacter, *supra* note 356, at 863.

369. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (arguing that "[c]ontext matters" in applying the Equal Protection Clause to an affirmative action policy).

