

*The Recognition of Same-Sex Relationships:  
Comparative Institutional Analysis, Contested Social Goals,  
and Strategic Institutional Choice*

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TABLE OF CONTENTS

I. INTRODUCTION .....	2
II. CONTESTED SOCIAL GOALS AND THE NATURE OF CHOICE .....	7
A. Inside the Black Box of Social Goals .....	9
B. Single Institutionalism in Social Movement Theory .....	15
C. The Strategic Nature of Choice .....	23
III. THE RECOGNITION OF SAME-SEX RELATIONSHIPS .....	31
A. The Demand for Recognition.....	31
B. The Counter-Demand and the Traditional Values Movement .....	43
IV. THE ELEMENTS OF STRATEGIC INSTITUTIONAL CHOICE .....	49
A. Competency.....	51
B. Responsiveness.....	57
C. Resilience .....	66
V. THE FEDERAL MARRIAGE AMENDMENT: THE ULTIMATE MAJORITARIAN PREROGATIVE.....	72

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## I. INTRODUCTION

Comparative institutional analysis (CIA) begins with the simple observation that our primary decision-making processes -- institutions, such as the market, the courts, and the political process -- are each subject to certain structural constraints that necessarily effect an institution's ability to provide the desired relief or to further an agreed upon social goal.<sup>1</sup> Each institution is limited by its design.<sup>2</sup> Beyond the pages of law review articles, there are no frictionless institutional choices, only "imperfect alternatives"<sup>3</sup> that all groan and deteriorate

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<sup>1</sup> As discussed in this Essay, CIA refers to the method of public policy analysis outlined principally by Neil Komesar. NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 9 (2001) (asserting "law and rights are the product of tough institutional choices impacted by systemic variables such as the costs of participation and numbers and complexity"). Komesar's use of the term "institution" differs from that of institutional economists, such as Douglas North, who use the term to signify "laws, rules, and customs." *Id.* at 31. *See also* Daniel H. Cole, *Taking Coase Seriously: Neil Komesar on Law's Limits*, 29 *LAW & SOC. INQUIRY* 261, 263-64 (2004) (describing divergence between Komesar's terminology and that used by institutional economists). Komesar defines institutions as "large-scale social decision-making processes – markets, communities, political processes, and the courts." KOMESAR, *LAW'S LIMITS*, *supra*, at 31. For a discussion of CIA's debt to Ronald Coase see Cole, *supra*, at 262 (noting Coase had "championed" comparative institutional analysis).

<sup>2</sup> Institutional behavior is a function of design and participation. *See Id.* at 29-31 (discussing Komesar's "participation-based" approach). Participation is, in turn, a function of the average per capita stakes, information costs, and the costs associated with collective action. *Id.* Important design features include the extent to which an institution is insulated from bottom-up atomistic forces or is designed primary for top-down or bottom-up decision making. *See* Neil K. Komesar, *Basic Instincts: Participation, Economics and Institutional Choice*, Comparative Institutional Analysis Conference, September 10-11, 2004, at 5, *available at* <http://www.law.wisc.edu/ils/CIA-Conference-Papers.htm> (last visited August 22, 2005) (stating "degree to which an institution is characterized by bottom-up versus top-down decision-making can be an important design feature[']").

<sup>3</sup> Komesar uses the term "imperfect alternatives" to describe the inevitable result of comparative institutional analysis. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 271 (1994). No single institutional choice will produce an optimal result. *Id.*

under the weight of increasing numbers and increasing complexity.<sup>4</sup>

This dose of structural realism exposes a basic flaw that pervades contemporary legal analysis across the ideological spectrum: the conceit of single institutionalism.<sup>5</sup> Because all institutions are irretrievably flawed and limited, every inquiry regarding the competency of a particular target institution will find the target experiencing some form of failure.<sup>6</sup> The identification of failure invites the analyst to propose the substitution of an idealized rescue institution.<sup>7</sup> Without a rigorous comparative analysis of the institutions' relative strengths and weaknesses, the rejection of the target is a foregone conclusion and the identity of the rescue institution is most likely determined by ideology or intuition, reflecting our strong tendency to conflate certain social goals with particular institutions.<sup>8</sup>

By examining the movement for the equal recognition of same-sex relationships, this Essay builds on these basic observations and introduces a new dimension to CIA, namely the

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<sup>4</sup> Central to Komesar's articulation of CIA is the observation that "institutions tend to move together." KOMESAR, *supra* note 1, at 23. In particular, Komesar identifies a clear "link between institutional performance and variation in numbers and complexity." *Id.*

<sup>5</sup> *Id.* at 20-1. Given that all institutions feel the weight of increasing numbers and complexity, it is not sufficient to identify the shortcomings of a particular institution because all institutions have shortcomings. *Id.* at 23 (stating "[a]ll institutions are imperfect and choices between alternatives can be sensibly made only by considering their relative merits") Single institutionalism refers to an instance where an analyst details the deficiencies of an institution, but fails to interrogate the alternative institutional settings with the same vigor. *See e.g., Id.* at 21 (discussing recommendation for "a greater role for the judiciary" without "consideration of variation in the ability of the judiciary").

<sup>6</sup> As Komesar notes, "market failure is a trivial necessary condition with little analytic value. It is always fulfilled and, in the complex world in which we live, always significantly fulfilled." Komesar, *supra* note 2, at 2.

<sup>7</sup> Komesar observes that "the implicit assumption" of single institutionalism "is that a perfect or idealized institution is waiting in the wings." KOMESAR, *supra* note 1, at 24.

<sup>8</sup> Komesar explains the frequency with which certain goals are associated with certain institutions by reference to a tendency on the part of commentators to "hardwire" institutions to

dynamic process through which social goals are articulated and social change is realized. Despite its expressed concern with the “real world,”<sup>9</sup> CIA’s failure to interrogate the nature of social goals creates a frictionless blind spot in its analytic frame where social goals are expressed as vague exogenous conceptions of the good, such as equality, strong property rights, or resource allocation efficiency.<sup>10</sup> The relatively specific and highly polarizing goal of equal recognition of same-sex relationships is more emblematic of the type of contested social goals that command center stage in today’s “culture wars.”<sup>11</sup> The acknowledgment that the production of social goals involves institutional behavior, as well as multiple sites of contestation, will enhance the analytic power of CIA and offer a comparative institutional approach to social movement theory.<sup>12</sup> Other similarly divisive struggles over the proper iteration of the good, such as abortion rights or gun control, could produce an equally productive discussion of CIA and its application to social

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goals. *Id.* at 174.

<sup>9</sup> See *id.* at 22 (discussing “real-world institutions”).

<sup>10</sup> See William W. Buzbee, *Sprawl’s Dynamics: a Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 514 (2000) (noting that “comparative institutionalism cannot neglect the importance of scrutiny of goal choice”). See also, Howard S. Erlanger & Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 L. & SOC. INQUIRY 959, 988 (1997) (discussing influence of goal choice on CIA).

<sup>11</sup> The traditional values movement began using the term “culture war” as a “catchphrase” for the debate over homosexuality in 1992. DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 55 (1997) (defining “culture wars” as “struggles over ideas and values, rights and responsibilities”). See *infra* note 16 (defining “traditional values movement”). The term is now issued to describe a number of polarizing public policy disputes regarding family and individual rights. See generally, WIKIPEDIA, THE FREE ENCYCLOPEDIA, *Culture Wars*, at [http://en.wikipedia.org/wiki/Culture\\_war](http://en.wikipedia.org/wiki/Culture_war) (last visited Aug. 24, 2005).

<sup>12</sup> For a description of the evolution of social movement theory and scholarship see Edward L. Rubin, *Symposium: Social Movements and Law Reform: Passing Through The Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. (2001) (describing development of social movement theory and social movement scholarship).

movements.<sup>13</sup>

The debate over same-sex relationships offers a rich context for an examination of the atomistic forces that shape participation in alternative decision-making processes and thereby determine institutional behavior. Indeed, when viewed through the lens of CIA, the debate appears to be a long exercise in strategic institutional analysis where advocates on either side evaluate institutions in terms of competency to supply the desired rights or status, responsiveness to demands for such rights or status, and resilience against attempts by opponents to subvert the process or to reverse gains. This “strategic” analysis does not identify the optimal institution, but rather informs the allocation of resources among institutions as advocates simultaneously pursue their goal in a variety of complementary institutional settings.<sup>14</sup> Not surprisingly, grass roots advocates do not suffer from the academic shortcoming of single institutionalism nor do they “hardwire” goals to certain institutions.<sup>15</sup> Arguably, some of the greatest gains in the recognition of same-sex relationships have come from the market, which many might assume to be an unlikely place for progressive social change.

In a world with contested social goals, institutions can not only secure desired rights or status, they can also blunt or reverse gains secured by the opposing side in other institutional settings. This has led to a creative and combative program of institutional one-upmanship where gains secured by pro-gay advocates through the market or courts are frequently reversed by the

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<sup>13</sup> See e.g., Timothy D. Lytton, *Symposium: Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1248 (2000) (arguing “tort system is an imperfect policymaking institution, but it can enhance the policymaking process”).

<sup>14</sup> As such, this analysis does not identify the singular “least imperfect alternative.” KOMESAR, *supra* note 3, at 271.

<sup>15</sup> KOMESAR, *supra* note 1, at 174-75 (noting “you cannot hardwire goals and institutions

proponents of “traditional values” through the political process.<sup>16</sup> Moreover, it is important to remember that battles over contested social goals take place within a democratic frame where a motivated majority can choose to rewrite the rules that define institutions and their decision-making authority. This observation has not been lost on the advocates of traditional values who have increasingly looked to the constitutional amendment process, on both the state and federal levels, as a means to exercise the ultimate majoritarian prerogative.<sup>17</sup> The ability of the majority to rewrite the rules has obvious implications for social movements designed to secure minority rights, but it also underscores the ultimately contingent nature of CIA.

In short, this Essay challenges CIA to contextualize its application to contested social goals and suggests that CIA could enrich social movement theory. It also confirms the suspicion of Neil Komesar, the chief architect of CIA, that atomistic forces, in this case individuals with strongly held values working for social change, understand comparative analysis and practice it instinctively.<sup>18</sup> Part II of the Essay examines CIA’s failure to consider the production of social

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and, therefore, no program of law and public policy follows from goal choice[ ]”).

<sup>16</sup> For purposes of this Essay, I refer to the social movement opposing the recognition of same-sex couples as the traditional values movement. Eskridge refers to this as the “traditional family values” (TFV) “countermovement.” William N. Eskridge, Jr, *Symposium Centennial Celebration: Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2079 (2002). The traditional values movement is often characterized as a backlash against the recent successes of the Lesbian Gay Bisexual and Transgender (LGBT) movement. Didi Herman, who has conducted a comprehensive study of the anti-gay policies and activities of pro-family organizations, rejects that these activities represent a “backlash.” DIDI HERMAN, *supra* note 11, at 195 . Instead, Herman describes the traditional values movement as a “paradigmatic movement for social change.” *Id*

<sup>17</sup> See Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, at 48 (noting that federal marriage amendment has potential to “provoke a mini-culture war in each of the 50 state legislatures”).

<sup>18</sup> Komesar writes: “[e]ven if scholars and public officials will not do comparative institutional analysis, atomistic actors will.” Komesar, *supra* 2, at 21.

goals, the single institutionalism practiced by social movement theory, and the nature of strategic institutional choice. Part III describes the forces aligned on either side of the struggle over the recognition of same-sex relationships and outlines the costs and benefits associated with participation. Part IV evaluates the pro-recognition gains made in various institutional settings in terms of the three core components of strategic institutional choice: competency, responsiveness, and resilience. Part V offers some final thoughts on the constitutional amendment process and the potential transitory nature of minority gains.

## II. CONTESTED SOCIAL GOALS AND THE NATURE OF CHOICE

CIA urges existing approaches to law and public policy to engage in a comparative analysis and to reject the ingrained notion that certain social goals are “hardwired” to certain institutions (e.g., resource allocation efficiency and the market).<sup>19</sup> Indeed, a growing number of legal analysts have eschewed the tidiness of single institutionalism in favor of the imprecise and messy enterprise of comparative analysis.<sup>20</sup> This has produced a rich and nuanced literature that explores institutional behavior as a function of design and participation.<sup>21</sup> However, this

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<sup>19</sup> Komesar decries this tendency to “hardwire” certain goals to certain institutions as it forms the starting point for single institutionalism. *See* KOMESAR, *supra* note 1, at 174 (pointing to “Richard Epstein’s aversion to the rent-seeking, welfare state and Margaret’s Radin’s aversion to the callous, atomistic market”).

<sup>20</sup> CIA has been applied in a wide variety of disciplines, including: criminal law, cyberlaw, environmental law, federalism, international law, land use planning, regulation of the legal profession, product liability law, and tort litigation. *See id.* at 177 (discussing areas where CIA applied).

<sup>21</sup> *See e.g.*, Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation – Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003) (lawyer regulation); Buzbee, *supra* note 10 (land use planning); Daniel H. Cole, *The Importance of Being Comparative*, 33 IND. L. REV. 921 (2000)(environmental law); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1(1999)(international law); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the*

literature is necessarily unidirectional, focusing on the best implementation of a received social goal, because the analysis takes place under the artificial constraint of consensus.<sup>22</sup> As a result, CIA is employed halfway through a social conversation regarding any social goal. By ignoring the dynamic role of institutions in the negotiation and production of social goals, CIA remains a one-dimensional model that accepts a prescriptive pronouncement of the good and identifies the best institutional setting for the implementation of that good.

The recognition that social goals are contested also has obvious applicability to social movement theory. As articulated by legal scholars, social movement theory is preoccupied with the courts.<sup>23</sup> Some commentators take political scientists to task for neglecting the role of the courts in social change,<sup>24</sup> whereas others debate whether courts can function as a situs of

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*Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (corporate law); Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: the Case of Intermediary Liability for Defamation*, 14 HARV. J. LAW & TEC 569 (2001)(cyberlaw); Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 TEMPLE POL. & CIV. RTS. L. REV. 337 (1998)(family law); Lytton, *supra* note 13 (land use planning).

<sup>22</sup> Benjamin H. Barton notes that “[a] further controversy in institutional analysis is the choice of values that underlie the analysis and the criteria for comparison.” Barton, *supra* note 21, at 1177. In particular, William W. Buzbee has specifically challenged CIA with regard to the importance of goal choice. Buzbee, *supra* note 10, at 514. Buzbee argues: “The basic point that goal choice cannot be examined to the exclusion of considerations of institutional choice is undoubtedly sound, but an intertwined analysis of policy goals is both necessary and is itself a contested part of the public policy game recognizes the need to consider goal choice.” *Id.*

<sup>23</sup> Of course, many would say that legal scholars, as a class, were preoccupied with the courts. Attempting to explain the relationship between legal scholars and judges, Komesar writes: “Here are people to converse with— people like us . . . reflective judges are the ultimate pen pals.” Komesar, *supra* note 2, at 23.

<sup>24</sup> William Eskridge advocates the integration of social movement theory into legal education in light of the influence of social movements on the evolution of the law. William N. Eskridge, Jr., *Symposium: Social Movements And Law Reform: Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001). He also notes that legal scholars have a valuable perspective to bring to social movement theory, stating: “The social

meaningful social change.<sup>25</sup> In any event, courts remain central to the core inquiry of social movement theory, thereby giving rise to its own particular brand of single institutionalism. An application of CIA to social movement theory would shift the focus to *alternative* institutional settings. Moreover, the rejection of the myth of a common policy goal allows for the development within CIA of a strategic multi-force approach that is more closely reflected by the lived experience of individuals who work for social change.<sup>26</sup> Advocates for social change practice a form of strategic institutional choice where institutions are evaluated in terms of their competency, responsiveness, and resilience. The activity of “institutional choice” informs the rational allocation of resources between multiple complementary institutional alternatives. It does not seek to identify the “best” or “least imperfect” alternative to the exclusion of all others.<sup>27</sup>

#### **A. Inside the Black Box of Social Goals**

In a time of persistent culture wars, it is difficult to identify a social goal that is not

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movements literature does not adequately reflect the importance of the law.” *Id.* at 420. Tomiko Brown-Nagin, however, tempers this view with the observation that legal “scholars overstate law’s capacity to trigger social movements and undervalue nonlegal, noninstitutional forms of political activism.” Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: the Case of Affirmative Action*, 5 COLUM. L. REV. 1436, 1489 (2005).

<sup>25</sup> Gerald Rosenberg set off a continuing debate over the role of the courts in social change with the 1991 publication of his book: *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?*. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). Rosenberg concludes, “U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government.” *Id.* at 338. For a collection of essays concerning the role of the courts in social change see *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* (David A. Schultz, ed. 1999).

<sup>26</sup> See *infra* text accompanying notes 91-102 (discussing multi-force approach).

<sup>27</sup> KOMESAR, *supra* note 3, at 271 (discussing nature of “imperfect alternatives”).

potentially polarizing.<sup>28</sup> The 2004 Presidential election left images of a country ideologically divided between Red states and Blue states.<sup>29</sup> Indeed, many university faculties are divided along ideological lines which are just as sharp, but lack the seeming clarity of partisan color coding.<sup>30</sup> Only the most abstract iterations of the good are capable of commanding anything that approaches consensus, and consensus dissipates rapidly as the parameters of the goals are expressed in greater relief.<sup>31</sup> This breakdown is independent from and precedes any disagreement regarding implementation or institutional placement.

For example, Americans place great importance on the values of liberty and equality.<sup>32</sup> However, the exact contours of these interests will vary significantly from person to person. To

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<sup>28</sup> In 2005 the national debate over the Terri Schiavo case added a new topic to the culture wars: the right to forego life-sustaining treatment. See Howard Kurtz, *Culture War*, WASH. POST, March 25, 2005, at <http://www.washingtonpost.com/wp-dyn/articles/A183-2005Mar25.html> (describing Schiavo case as “a full-fledged chapter in the culture wars”).

<sup>29</sup> The terms “Red state” and “Blue state” emerged as adjectives to describe a presumed set of political and personal values after the 2000 Presidential election. *Red State vs. Blue State Divide*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, at [http://en.wikipedia.org/wiki/Red\\_states](http://en.wikipedia.org/wiki/Red_states) (last visited Aug. 27, 2005). The designation of the color red or blue reflects the media charting of the outcome of the election where states that went for the Republican candidate for President were coded red and state which voted for the Democratic candidate were indicated in blue. *Id.* The terms have been expanded to represent a host of demographic and ideological differences. *Id.* See Joyce Purnick, *New York is So Lonely and So Blue*, N.Y. TIMES, November 1, 2004, at B1 (referring to New York as “a bright blue state”).

<sup>30</sup> See Francis J. Mootz, Jr., *Book Review: Between Truth and Provocation: Reclaiming Reason in American Scholarship*, 10 YALE J. L. & HUMAN. 605 (1998) (discussing split on law faculties regarding critical legal studies scholarship).

<sup>31</sup> Komesar recognizes this when he notes: “Most people share an amorphous definition of the good that is part resource allocation efficiency (the size of the pie) and part equity (the division of the pie).” Komesar, *supra* note 2, at 25.

<sup>32</sup> Liberty and equality are core democratic principles, enshrined in the Declaration of Independence and protected by the U.S. Constitution. See Deborah L. Rhode, *Symposium: Law, Knowledge, and the Academy: Legal Scholarship*, 115 HARV. L. REV. 1327 (2002) (noting law review editor required citation for proposition that “one of the values of American life is equality”).

one person, the notion of liberty may include the liberty to engage in adult consensual sex with individuals of the same sex.<sup>33</sup> Thus, a weak version of the social goal of liberty would include, at a minimum, the eradication of criminal sanctions against consensual sodomy.<sup>34</sup> A stronger version of this social goal would include uniform age of consent laws,<sup>35</sup> consistent pro-gay sex education,<sup>36</sup> and positive media portrayals.<sup>37</sup> To the contrary, some individuals may conclude

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<sup>33</sup> The influential Wolfenden Report issued in Great Britain in 1957 is an example of the application of liberty principles to the criminalization of same-sex sexuality. THE WOLFENDEN REPORT: THE REPORT OF THE DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (1963). The report recommended the de-criminalization of consensual same-sex activity based on the premise that the activity was not sufficiently other-regarding to merit interference by the law. *Id.*

<sup>34</sup> The 1986 U.S. Supreme Court decision *Bowers v. Hardwick* held that the criminalization of same-sex sexuality did not violate the U.S. Constitution. *Bowers v. Hardwick* 478 U.S.186 (1986). *Lawrence v. Texas* overruled *Bowers* in 2003. *Lawrence v. Texas*, 539 U.S. 538 (2003).

<sup>35</sup> Some states impose higher ages of consent for same-sex sexuality. *See e.g.*, K.S.A. § 21-3522(a) (2005) (restricting to opposite-sex couples a so-called “Romeo & Juliet” exception for children over 14 years of age and partners less than 19 years of age). The application of this disparate age of consent was widely publicized when 18 year old Matthew Limon was sentenced to 17 years in jail for engaging in oral sex with a 14 year-old boy. *State v. Limon*, 41 P.3d 303 (Kan. App. 2002). If Limon and the boy had been of opposite sexes, Limon would have qualified for the “Romeo & Juliet” exception under which the maximum penalty would have been 13 to 15 months, instead of the 206 months (17 years and two months) Limon received. *State v. Limon* 83 P.3d 299, 243 (Pierron, J., dissenting). Immediately following *Lawrence*, the U.S. Supreme Court voted unanimously to vacate the judgment and remand the case for re-consideration in light of the new precedent. *Limon v. Kansas*, 539 U.S. 955 (2003). On remand, the conviction was affirmed by the Court of Appeals of Kansas. *State v. Limon*, 83 P.3d 299 (Kan. 2004). The case is currently pending before the Supreme Court of Kansas, *State v. Limon*, 204 Kan. LEXIS 284 (2004).

<sup>36</sup> Six states have statutes that expressly require homosexuality to be taught in the public schools in a negative light. ALA. CODE § 16-40A-2(c)(8)(2005); ARIZ. REV. STAT. § 15-716(c)(1-3)(2004); LOUIS. REV. STAT. § 17:281(3)(2004); MISS. CODE ANN. § 37-13-171(1)(e)(2004); S.C. CODE ANN. § 59-32-30(A)(5)(2004); TEX. HEALTH & SAFETY CODE § 163.002(8)(2004). Alabama and Texas require an emphasis that “homosexuality is not a lifestyle acceptable to the general public,” and Arizona bans any promotion of “a homosexual life-style.” ALA. CODE § 16-40A-2(2005); TEX. HEALTH & SAFETY CODE § 163.002(2004); ARIZ. REV. STAT. § 15-716(c)(1-3)(2004). In addition, North Carolina provides that the basic education

that homosexual sex is more analogous to alcoholism or drug abuse and, therefore, is not encompassed in views of liberty.<sup>38</sup>

A similar problem arises with the social goal of equality. To some individuals who are committed to equality, gay men and lesbians should be granted workplace protections from discrimination.<sup>39</sup> A stronger version of that view would include equal marriage rights and full recognition of same-sex partners.<sup>40</sup> However, others individuals who share an abstract

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program must promote heterosexual marriage. N.C. GEN. STAT. § 115C-81(2004). The South Carolina statute provides: “The program for instruction . . . may not include a discussion of alternate sexual lifestyles from heterosexual relationships, including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.” S.C. CODE ANN. § 59-32-30(A)(5)(2004).

<sup>37</sup> The Gay & Lesbian Alliance Against Defamation was founded in 1985. GLAAD, *Our History*, at <http://www.glaad.org/about/history.php> (last visited Aug. 27, 2005). It was originally organized to protest the media coverage of the first wave of the HIV/AIDS epidemic in New York City. *Id.* GLAAD is now a national organization dedicated to “promoting and ensuring fair, accurate and inclusive representation of people and events in the media as a means of eliminating homophobia and discrimination based on gender identity and sexual orientation.” GLAAD, *Our Mission*, at <http://www.glaad.org/about/history.php> (last visited Aug. 27, 2005).

<sup>38</sup> For a discussion of the traditional values movement’s construction of same-sex desire as a chosen, immoral, and unhealthy lifestyle analogous of other forms of addiction see Nancy J. Knauer, *Science, and Identity, and the Constructive of the Gay Political Narrative*, 12 LAW & SEX. 1, 46-50 (2003) (noting traditional values movement rejects comparisons of sexual orientation to race and contends “it more appropriate to compare homosexuality to alcoholism”). The traditional values movement advocates therapeutic intervention to liberate individuals who are mired in, what they consider to be, the destructive lifestyle of homosexuality. *Id.* at 24-25 (discussing reparative therapy).

<sup>39</sup> Based on Gallup polls results beginning in 1977, the public has steadily increased its support for equal workplace access for gay men and lesbians. Ontario Consultants on Religious Tolerance, *U.S. Public Opinion Polls on Homosexuality*, at [http://www.religioustolerance.org/hom\\_poll2.htm](http://www.religioustolerance.org/hom_poll2.htm) (last visited Aug. 27, 2005). *supra* note 39. In 1977 only 56% of those surveyed thought that homosexuals should have “equal rights in terms of job opportunities,” and 33% thought they should not. *Id.* As of 2003, the number in favor of equal workplace rights had risen to 88%, with only 9% advocating unequal employment rights. *Id.*

<sup>40</sup> Although the percentage of respondents in favor of same-sex marriage or some other form of relationship recognition has also increased over time, the numbers lag far behind those in

commitment to equality could label such protection or recognition “special rights” and, therefore, the antithesis of equality.<sup>41</sup>

As a theoretical construct, the assumption of consensus is useful to establish the applicability of CIA to public policy proposals beyond those firmly anchored in the goal of resource allocation efficiency.<sup>42</sup> Indeed, much of Neil Komesar’s recent work on CIA has been designed to illustrate the applicability of CIA regardless of ideology.<sup>43</sup> In *LAW’S LIMITS*, Komesar demonstrates a variety of instances where CIA is an important (and some might agree essential) evaluative tool regardless of whether the social goal in question is resource allocation efficiency, equality, altruism, or liberty.<sup>44</sup> He argues that the focus on participation – the atomistic forces that shape participation in alternative decision-making processes and thereby

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favor of equal workplace rights. Ontario Consultants on Religious Tolerance, *U.S. Public Opinion Polls on Homosexuality*, at [http://www.religioustolerance.org/hom\\_poll5.htm](http://www.religioustolerance.org/hom_poll5.htm) (last visited Aug. 27, 2005). In 1996 only 26% were in favor of recognizing same-sex marriage or civil unions, with 67% opposed. *Id.* This number increased to 49% in favor and 49% opposed in May, 2003. *Id.* However, after *Lawrence* was decided in June 2003, there was a considerable backlash and the number in favor decreased to 37%. *Id.* A 2005 CNN/USA/Gallup poll shows a slim majority of 47% in favor of some form of relationship recognition with 45% favoring no relationship recognition. Pollingreport.com, *Law and Civil Rights*, at <http://www.pollingreport.com/civil.htm><http://www.pollingreport.com/civil.htm> (last visited Aug. 27, 2005).

<sup>41</sup> For a discussion of the campaign by the traditional values movement to characterize anti-discrimination protections as “special rights” see Knauer, *supra* note 38, at 78-83 (describing evolution and deployment of “special rights” rhetoric in legal battles). *See also*, HERMAN, *supra* note 11, at 133-36 (explaining development of “special rights strategy”).

<sup>42</sup> In *LAW’S LIMITS*, after discussing single institutionalism in the economic analysis of law, Komesar notes: “Anyone interested in promoting altruism and equality – like anyone interested in promoting resource allocation efficiency – must seriously address institutional choice or risk undercutting the goals that they seek.” KOMESAR, *supra* note 1, at 26.

<sup>43</sup> *See e.g.*, Neil K. Komesar, *Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions: Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465 (1997) (explaining his goal to convince “more legal analysts to focus on institutional choice”).

determine institutional behavior – provides the necessary link that can cross ideological divides as wide as those existing between law and economics and civic republicanism.<sup>45</sup> Participation, in turn, is a function of costs and benefits associated with the participation.<sup>46</sup>

The assumption of consensus also works well with the highly prescriptive nature of legal scholarship.<sup>47</sup> Much legal scholarship is intent on providing detailed accounts of how certain issues of public policy *should* be resolved.<sup>48</sup> The legal scholar’s persuasive techniques are typically restricted to the pages of law reviews and rely on argumentation and documentation. CIA allows the legal scholar to consider a full range of institutional options to implement the particular policy proposal, but does not require the legal scholar to assess the likelihood of such implementation or even the conditions under which implementation would be most feasible.<sup>49</sup>

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<sup>44</sup> KOMESAR, *supra* note 1, at 26.

<sup>45</sup> With regard to the unifying nature of participation, Komesar writes: Many seemingly diverse view or philosophies stress the importance of participation and the determinants of inadequate, incomplete or unequal participation. Civic republicans stress greater and more equal participation as the core of the goals they seek. The amount, pattern, and quality of participation define communitarian notions. Resource allocation efficiency, a seemingly quite different societal goal, is also defined in terms of the completeness of participation . . . The central issues of “externality” and transaction costs are about the extent and quality of participation in the market . . . Market failures are failures of participation.

*Id.* at 65.

<sup>46</sup> *Id.* at 30 (noting “[t]he character of institutional participation is determined by the interaction between the benefits of participation and the costs of participation”).

<sup>47</sup> See Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847 (1988) (noting “most distinctive feature of standard legal scholarship is its prescriptive voice”).

<sup>48</sup> Edward Rubin notes: “This prescriptive voice distinguishes legal scholarship from most other academic fields. The natural sciences and the social sciences characteristically adopt a descriptive stance, while literary critics adopt an interpretive one. Only moral philosophers seem to share the legal scholar’s penchant for explicit prescription.” *Id.* at 1848.

<sup>49</sup> Komesar focuses on the market, the courts, and the legislature. *Id.* at 29 (noting “I

As discussed below, one of CIA's most important contributions has been its insistence that institutional alternatives for the implementation of public policy measures include the market and are not limited to the familiar three branches of government.<sup>50</sup> This expansive view of institutional options has much to offer social movement theory.

### **B. Single Institutionalism in Social Movement Theory**

CIA considers social goals *a priori*. Generally, the goals are articulated, identified, and championed by legal analysts independent of any discussion regarding the production of the goals or the social movements responsible for the advancement of the goals.<sup>51</sup> Social movement theory can thus provide much of the back story that is missing from CIA because it focuses on the formation and development of social movements.<sup>52</sup> In particular, the subset of social movement theory that studies questions of resource mobilization has considerable overlap with CIA's emphasis on participation and share a common vocabulary.<sup>53</sup>

In turn, CIA can also offer social movement theory a valuable antidote for its particular

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tend to speak of three institutional alternatives – the market, the political process, and the courts or adjudicative process”). However, he also mentions communities. *Id.* at 31. Finally, Komesar notes that the range of institutional options will vary depending upon the subject matter of the social goal. *Id.* at 29 (stating range of alternatives will depend on “the subject studied and the inclinations of the investigator”).

<sup>50</sup> To the extent that goals are hardwired to institutions, designs for progressive social change do not generally attach to market-based solutions.

<sup>51</sup> As noted earlier, this lack of engagement with goal choice has provoked some comment. *See e.g.*, Barton, *supra* note 21, at 1177 (noting criticism); Buzbee, *supra* note 10, at 514 (arguing for analysis of goal choice).

<sup>52</sup> William Eskridge argues that this back story should also be included in legal education. Eskridge, *supra* note 24, at 419. Eskridge reasons that law professors should “understand and teach [their] students more about social movement theories” in light of the movements’ influence on the evolution of both statutory and constitutional law. *Id.*

<sup>53</sup> *See* Rubin, *supra* note 12, at 28-34 (describing resource mobilization theory).

brand of single institutionalism.<sup>54</sup> Legal commentators have understandably approached the issue of social movements and social change from the perspective of legal reform.<sup>55</sup> Indeed, the 20<sup>th</sup> century saw remarkable changes in terms of both statutory law and Constitutional law that can be traced to the efforts of social movements.<sup>56</sup> William Eskridge argues that social movement theory, as practiced by political scientists and sociologists, trivializes the importance of law, particularly that produced by the courts.<sup>57</sup> In a related debate, legal scholars have actively disputed the competency of the courts to effect meaningful social change.<sup>58</sup>

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<sup>54</sup> In the case of social movement theory advanced by legal scholars, the label of single institutionalism could be used to refer to the singular focus on the courts, rather than the failure to interrogate alternative institutional options.

<sup>55</sup> *Id.* at 2 (explaining emphasis by reference to legal scholars’ “unity of discourse with the judiciary, which creates a mentality that tends to assimilate the style of legal analysis to arguments before a court”).

<sup>56</sup> See Eskridge, *supra* note 24, at 419 (asserting strong influence of social movements over statutory and Constitutional law).

<sup>57</sup> Eskridge states “[t]he social movements literature does not adequately reflect the importance of law.” *Id.* at 420. Although Eskridge discusses the influence of social movements on the evolution of statutory law, his ultimate focus is the “constitutionalization” of social movements. *Id.* at 479.

<sup>58</sup> Gerald Rosenberg’s 1991 book HOLLOW HOPE challenged the wisdom of the instrumental use of litigation to effect social change. ROSENBERG, *supra* note 25. Rosenberg’s argument challenged view that had been popularized by Joel Handler’s influential 1978 book titled, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE. JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978) (outlining instrumental use of litigation to secure social change). Handler had concluded “use of litigation as an instrument of social reform [has] become so widespread that it can be called a movement.” *Id.* Rosenberg’s book was critiqued heavily for its methodology. See e.g., Neal Devines, *Review Essay: Judicial Matters*, 80 CALIF. L. REV. 1027 (1992) (criticizing Rosenberg’s claim of “judicial impotence” and his methodology); Peter H. Shuck, *Book Review: Public Law and Litigation*, 102 YALE L. J. 1763 (1993)(criticizing Rosenberg’s methodology). Rosenberg’s work has recently been cited by advocates of “popular constitutionalism,” which has sparked its own debate. See Erwin Chemerinsky, *David C. Baum Memorial Lecture: In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, at 676 (2004) (rejecting popular constitutionalism). See *contra* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE

CIA starts with the assumption that the social goals advanced by a particular social movement could find expression in a variety of institutional settings.<sup>59</sup> Thus, it short circuits the juricentrism endemic among legal scholars. In addition, CIA provides an emphasis on implementation that is arguably lacking in the resource mobilization literature.<sup>60</sup> This focus on alternatives for implementation would address the tendency to trivialize law identified by Eskridge without necessarily asserting the primacy of law and the courts.<sup>61</sup> As such, CIA could help advance social movement theory by addressing how social movements effect social change, not simply how social movements form or how social movements effect the law.<sup>62</sup>

The juricentric approach of legal scholars can unintentionally collapse an entire social movement into a platform for legal reform.<sup>63</sup> The current social movement for the recognition of

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COURTS 154, 169 (1999) (advocating end of most judicial review); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 957 (2004) (presenting overview of new scholarship on popular constitutionalism).

<sup>59</sup> After discussing various theories of property, Komesar writes:

Virtually nothing follows from the choice of goal or of a general philosophy of property. You cannot hardwire goals and institutions and, therefore, no program of law and public policy follows from goal choice. The simple correlations between goals and institutions that characterize so many ideological positions simply do not hold. Institutional choice, at least institutional choice at high numbers and complexity, is filled with paradoxes and counterintuitive combinations of goals and institutions.

KOMESAR, *supra* note 1, at 153.

<sup>60</sup> See Rubin, *supra* note 12, at 2-3 (noting that political scientists and legal scholars study “different parts of [the] phenomena” of social movements).

<sup>61</sup> As noted earlier, Eskridge argues that “social movements literature does not adequately reflect the importance of law.” *Id.* at 420.

<sup>62</sup> As Edward Rubin explains, political scientists are concerned with the former, whereas legal scholars focus on the latter. Rubin, *supra* note 12, at 2-3.

<sup>63</sup> Tomiko Brown-Nagin argues persuasively for the need to distinguish campaigns for legal reform from social movements. Brown-Nagin, *supra* note 25, at 1502-03. Brown-Nagin notes that “[t]hose who champion the centrality of law to social movements or advance the concept of legal mobilization wrongly conflate politicized legal campaigns with ‘social

same-sex relationships is a prime example of this. It would be foolish to argue that laws restricting marriage to one man and one woman are not an important and particularly potent source of inequality and oppression.<sup>64</sup> However, the law is not the source of the oppression; it is merely an expression of it.<sup>65</sup> The regulation of same-sex desire has been enforced through a variety of overlapping and mutually reinforcing prohibitions that originate in religion, medicine, and the law.<sup>66</sup> These prohibitions reflect certain social values and goals. Express laws regulating same-sex conduct are relatively new and date from the mid 20<sup>th</sup> century.<sup>67</sup> Accordingly, legal reform will not be sufficient to achieve equality for and recognition of same-sex relationships nor will legal reform occur unless it is preceded by social change.<sup>68</sup> When legal scholars foreground the legal definition and regulation of minority groups, they are only telling part of the story.<sup>69</sup>

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movements.” *Id.* at 1502. She attributes the tendency to view campaigns for legal reform as interchangeable with social movements to the wide acceptance of Joel Handler’s views on cause lawyering and the efficacy of litigation to achieve social change as outlined in his influential 1978 book, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM*. HANDLER, *supra* note 58. In an effort to stress the importance of cause-directed litigation, Handler declared that use of such litigation to secure change constituted a “movement.” *Id.*

<sup>64</sup> For example, 44 states now expressly restrict marriage to opposite sex couples. *See infra* note 231 (describing state laws restricting marriage).

<sup>65</sup> *See* Nancy J. Knauer, *Symposium: Lawrence v. Texas: When “Profound and Deep Convictions” Collide with Liberty Interests*, 10 *CARDOZO WOM. L. J.* 325, 336 (2004) (arguing “criminal status of homosexual conduct was never the only justification for the social and legal disabilities imposed on gay men and lesbians”).

<sup>66</sup> *See* Knauer, *supra* note 38, at 11-12 (discussing “discourse of sin and transgression which stubbornly continues to define same-sex desire”).

<sup>67</sup> For example, sodomy laws restricted to same-sex sodomy did not appear until 1969. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 210 (1999) (referring to such laws as “a novelty, not showing up in state sodomy law until 1969”). The majority in *Lawrence* recognized the relatively recent appearance of same-sex restrictions. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (stating “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter”).

<sup>68</sup> *See supra* note 65.

<sup>69</sup> Tomiko Brown-Nagin notes that when legal scholarship fails to engage “the

Indeed, the early gay liberation movement targeted medicine as the primary institutional source of oppression, not the law.<sup>70</sup> The continued diagnosis of homosexuality as a mental illness was used as a justification for a wide range of legal and social disabilities imposed on homosexuals, not to mention the potential loss of liberty or invasive medical “treatment.”<sup>71</sup> Clearly, the declassification of homosexuality as a mental disability by the American Psychiatric Association in 1973 was a necessary step toward equality.<sup>72</sup> Contrary to what some activists believed at the time, however, it was not a sufficient step to secure equality.<sup>73</sup> After

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formation, organization, evolution, strategies and tactics of social movements[.]” it “simplifies and flattens these movements into static repositories or mirrors of legal epistemologies, norms, and processes.” Brown-Nagin, *supra* note 58, at 1492. This failure to engage “overlooks the interactive and temporal dimensions of a social movement’s engagement with law.” This result is that “law envelops and defines the movements[.]” *Id.*

<sup>70</sup> The primacy of medicine in the definition of gay men and lesbians during the early gay liberation movement challenges the centrality of law to minority identity-based social movements as advocated by Eskridge. See Eskridge, *supra* note 24, at 422. Eskridge argues that “[l]egal rules and their enforcers strongly reinforced stigmas and disadvantages that not only provided important incentives and goals for minorities, but helped give concrete meaning to the “minority group” itself.” *Id.* For the purposes of CIA, the primacy of medicine also provides an example of an instance where the appropriate range of institutional options for the implementation of a social goal would diverge from the standard trio of the courts, the legislature, and the market. See *supra* note 49 (discussing variation of institutional options depending on subject matter).

<sup>71</sup> First published in 1952, the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM I) included homosexuality as one of the most severe sociopathic personality disorders. Knauer, *supra* note 38, at 20. The classification of homosexuality as a mental illness emerged in the 1930s, a result of the growing popularity of Freudian psychoanalytic theory. *Id.* at 18-22. At that point, “the pathologizing of psychiatry and the promise of a cure influenced both the criminal law and public policy regarding homosexuality[.]” *Id.* at 20. (discussing sexual psychopath laws and indeterminate commitments).

<sup>72</sup> See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 71-88 (1981) (describing early efforts to change diagnosis).

<sup>73</sup> See Knauer, *supra* note 38, at 25-27 (discussing slow pace of change after declassification). Of course, this statement in no way is intended to detract from the importance of the declassification. As one newspaper reported: “20 Million Homosexuals Gain Instant Cure. SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* 224

declassification, the legal disabilities did not only fail to melt away; they multiplied.<sup>74</sup>

The 2003 U.S. Supreme Court decision *Lawrence v. Texas* provides a similar lesson.<sup>75</sup> Despite the prognostications of Justice Scalia, the recognition of a protected liberty interest in a choice of an intimate partner of the same-sex has not led to the wholesale recognition of same-sex marriage rights.<sup>76</sup> The criminalization of same-sex sodomy was an important feature of the regulation of same-sex desire, but was not the only source of justification for the continued regulation.<sup>77</sup> Since the decision, the supreme court of one state has cited *Lawrence* as supporting same-sex marriage,<sup>78</sup> whereas the supreme court of a second state found that *Lawrence* did not require equal marriage rights.<sup>79</sup>

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(1996) (quoting headline from Philadelphia newspaper reporting declassification of homosexuality as a mental disease). The continuing stigma of diagnosis was a significant impediment to advancing an agenda for LGBT rights.

<sup>74</sup> In many instances, the restraining force of heteronormativity made specific laws targeting gay men and lesbians unnecessary. Knauer, *supra* note 38, at 50 (noting “more specifically anti-gay legislation than ever before”).

<sup>75</sup> *Lawrence v. Texas*, 339 U.S. 558 (2003).

<sup>76</sup> *Id.* at 601 (Scalia, J., dissenting) (stating majority’s “reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite couples”).

<sup>77</sup> The fact that it was constitutionally permissible to criminalize homosexual conduct under *Bowers v. Hardwick* served as justification for denying equal rights to gay men and lesbians. Justice Scalia explained this reasoning in his dissent in *Romer v. Evans*. *Romer v. Evans*, 517 U.S. at 636 (Scalia, J., dissenting). Justice Scalia wrote: “If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual “orientation” is an acceptable stand-in for homosexual conduct.” *Id.* at 644. Justice Scalia argued that the Coloradans who had passed Amendment 2 were “entitled to be hostile toward homosexual conduct” in light of *Bowers v. Hardwick*, even though Colorado had repealed its sodomy statute. *Id.*

<sup>78</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution and citing *Lawrence* approvingly).

<sup>79</sup> In *Standhardt v. MCSC*, the Arizona Supreme Court let stand an appellate court decision that distinguished *Lawrence v. Texas* and found that it did not require equal marriage

Although the legal regimes defining and regulating minority interests can be breathtaking in their totality, law is part of a larger multi-institutional web of regulation that reflects social values and goals.<sup>80</sup> When legal scholars engage in noncontextual or single institutional analysis, they risk a type of formalism that reinforces the power of the regime they are attempting to dismantle.<sup>81</sup> Exclusive focus on legal doctrine can obscure the instrumental nature of discriminatory laws and rules. Without an acknowledgement that law reflects values and social goals, continued inequality can be seen as simply the result of a glitch in accepted legal reasoning that will be resolved with greater clarity as legal doctrines inevitably mature. This conveys a false optimism regarding the natural evolution of the law. It also absolves the atomistic forces whose participation created the demand for the discriminatory laws in the first place. The source of inequality is incorrectly understood to be the faceless autonomous force of law, instead of the family next door and the church down the street.

Finally, when a social movement is collapsed into a program of legal reform, the concept of the law ceases to be what Tomiko Brown-Nagin refers to as “inspirational” and becomes

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rights. *Standhardt v. MCSC*, 2004 Ariz. LEXIS 62 (Ariz., May 25, 2004). The intermediate appellate court reasoned that *Lawrence* did not recognize a fundamental right to engage in same-sex sexual activity. *Stanhardt v. Superior Court of Ariz.*, 77 P.3d 451, 457 (Ariz. App. Ct. 2003).

<sup>80</sup> For example, the regulation of same-sex desire can be seen as primarily a morality discourse which distinguishes the stigma attached to homosexuality from other minority groups. Michael Warner explains that “[t]here have always been moral prescriptions about how to be a woman or a worker or an Anglo-Saxon; but not whether to be one.” Michael Warner, *Introduction* to *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* at xxi (Michael Warner ed., 1993). The centrality of morality highlights the possibility that religion and communities would be important alternative institutional settings for goal choice implementation. *See supra* note 49 (discussing alternative institutional settings).

<sup>81</sup> One is reminded of Audre Lorde’s admonition that “the master tools will never dismantle the master’s house.” AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110-13 (1984) (essay entitled “The Master’s Tools Will Never Dismantle the Master’s House”).

“definitional.”<sup>82</sup> Brown argues that this can strip a social movement of its “insurgent value.”<sup>83</sup> It effectively cedes the power of self-definition to the very regime that enforced the subjugation.<sup>84</sup> This definitional outcome was apparent when, in the wake of *Bowers v. Hardwick*,<sup>85</sup> LGBT rights litigation increasingly attempted to present a meaningful distinction between the status of being homosexual and the act of engaging in homosexual conduct.<sup>86</sup> Although the bifurcation of status from conduct seemed to be a necessary concession in light of the criminalization of same-sex sexuality,<sup>87</sup> it created an ultimately disempowering image of homosexuals who were completely divorced from expressions of their sexuality and denied protection for them.<sup>88</sup> This

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<sup>82</sup> Brown-Nagin, *supra* note 24, at 1510-1518 (explaining distinction).

<sup>83</sup> Brown-Nagin argues “social movements that make litigation definitional to their agendas threaten their insurgent role in the political process.” *Id.* at 1511. She continues: “[w]ithout an insurgent element, social movements lose their agenda-setting ability.” *Id.*

<sup>84</sup> Brown-Nagin observes that “[t]he one-dimensional identity that the law of equal protection and interest group politics imposes on “suspect” racial classes is deeply problematic for claims of distributive justice . . . It limits the goals of political struggle and legal agenda to those objectives preferred by and most useful to elites.” *Id.* at 1492. Brown-Nagin defines the term “elites” as “those with superior status based on social standing, wealth, intellect, or identification with high status institutions, including governmental or political, educational, or commercial institutions.” *Id.* n.12.

<sup>85</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Bowers v. Hardwick* upheld the constitutionality of criminal sodomy statutes, holding that homosexual sodomy was not protected under the constitutional right of privacy in light of our nation’s history and tradition. *Id.*

<sup>86</sup> For a discussion of the bifurcation of status from conduct as a litigation strategy see Knauer, *supra* note 38, at 54.

<sup>87</sup> See Janet Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1737 (1993).

<sup>88</sup> Edward Stein has pointed out that gay men and lesbians suffer legal and social disabilities on account of their actions and not their sexual orientation or identity. He writes: . . . lesbians and gay men deserve protection against discrimination and positive rights with respect to their actions and decisions rather than for their mere orientations. It is when they engage in same-gender sexual acts, identify as gay men and lesbians, and create lesbian and gay families that they especially need protections for and rights based on choices that build on their underlying (and perhaps immutable) desires.

de-sexualized notion of a status homosexual was vigorously advanced in litigation designed to secure suspect classification under the Equal Protection clause, as court papers increasingly asserted that sexual orientation was an innate and unchangeable identity.<sup>89</sup> During this period, a rising percentage of the general public came to understand sexual orientation as inborn rather than chosen, begging the question of which came first, the identity or the litigation strategy?<sup>90</sup>

### **C. The Nature of Choice**

Once CIA is expanded to acknowledge the contested nature of many social goals, its potential application to the study of social movements becomes obvious. As discussed in the preceding section, the comparative frame of CIA addresses the single institutionalism that results from an over emphasis of the courts and their importance in effecting social change. Moreover, the behavior of social movements can inform the notion of institutional choice which is at the core of CIA. As opposed to the omniscient prescriptive stance adopted by legal commentators applying CIA to their policy proposals, social movements practice CIA as a strategic means to achieve their social goals. The evaluation incorporates three general considerations: competency,

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STEIN, *supra* note 5, at 295.

<sup>89</sup> This was particularly true in the case of “Don’t Ask, Don’t Tell” litigation challenging the U.S. military’s regulations against servicemembers revealing their sexual orientation. Litigants argued unsuccessfully that a statement of “I’m gay” did not indicate any propensity on the part of the speaker to engage in same-sex sodomy. Knauer, *supra* note 38, at 57-61. As Janet Halley noted, unless the servicemember “is truly and contentedly celibate,” this litigation strategy “is an insult to the personal sexual dignity of most servicemember clients.” JANET HALLEY, *DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY* 125 (1999).

<sup>90</sup> See EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 230 (1999) (discussing increase in number of people who ascribe a biologic or genetic cause to homosexuality). *Id.* According to a 1977 Gallup poll, only 13 percent of Americans believed that homosexuality was inborn. Mark Schoofs, *Straight to Hell*, *VILLAGE VOICE*, Aug. 11, 1998, at 56. That number had increased to 31 percent by 1996. *Id.* By 2001, the number of respondents who believed that homosexuality is something “a person is born

responsiveness, and resilience. The result is not so much asingular “choice” as it is a ranking of institutional options.<sup>91</sup>

Movements working for social change cannot afford the luxury of single institutionalism that is practiced by and debated by legal commentators.<sup>92</sup> Even the relevant institutions will change, depending on the social movement and its particular vectors of oppression.<sup>93</sup> As noted above, the early gay liberation movement had to target medicine, specifically psychiatry, in order to advance its social goals.<sup>94</sup> Religion, education, and the media could also be counted as institutions with particular relevance to LGBT rights and recognition.<sup>95</sup> In addition, the LGBT movement has placed great importance on the power of individuals to change attitudes by being open and honest about their sexual orientation.<sup>96</sup>

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with” had risen to 40 percent. *See*, Ontario Consultants on Religious Tolerance, *supra* note 39.

<sup>91</sup> For example, the conclusion that the federal courts are not as responsive as certain private employers to demands for relationship recognition would not suggest an abandonment of the courts. Because the oppression of gay men and lesbians originates in multiple sites, there is no rescue institution capable to mandate systemic and immediate social change.

<sup>92</sup> This is particularly true when dealing with a group of high stakes individuals, such as the men and women working for relationship recognition who are in same-sex relationships. For a discussion of the distribution of stakes see *infra* text accompanying notes 141-144.

<sup>93</sup> Komesar recognizes that the relevant institutions “will change depending upon the subject studied and the inclinations of the investigator.” KOMESAR, *supra* note 1, at 29.

<sup>94</sup> The efforts to win the declassification of homosexuality as a mental illness preceded the marriage litigation. The decision to target psychiatry was made by the fledgling homophile organizations even in advance of the Stonewall Riots. BAYER, *supra* note 72, at 91. Pickets began to appear at psychiatric and medical meetings as early as 1968. *Id.* at 92. Gay activists escalated the lobbying efforts throughout the early 1970s. *Id.* at 105-06.

<sup>95</sup> The LGBT movement devotes considerable resources to each of these institutions, with varying levels of success. The evaluation of these alternative institutions through the lens of CIA is beyond the scope of the Essay and necessarily a project for another day.

<sup>96</sup> The notion of “coming out” and declaring one’s sexuality is very important for an otherwise invisible minority. A public avowal of homosexuality is considered to help identity formation and to operate as a public good with potentially transformative power. George Chauncey writes: “coming out to heterosexuals became a new moral imperative, an existentialist

As any activist knows, a program of legal reform that involves sharply contested, or simply unpopular, social goals can not succeed without some degree of strategic planning involving elements of both education and persuasion.<sup>97</sup> This necessitates a multi-institutional approach. For example, the early marriage cases brought by same-sex couples in the 1970's were long considered anomalies, more a reflection of guerilla conscience-raising tactics than a reasoned litigation strategy.<sup>98</sup> For twenty years, same-sex marriage disappeared as the movement grappled with other concerns, not the least of which was an internal debate regarding the very desirability of marriage as a social goal.<sup>99</sup> When marriage demands reappeared in the 1990's,

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act of witness to a truth of onself[.]” GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 33 (2004).

<sup>97</sup> For example, the mission statement of the Human Rights Campaign (HRC), the largest LGBT lobbying organization in the United States, describes its activities as follows: “The Human Rights Campaign effectively lobbies Congress; mobilizes grassroots action in diverse communities; invests strategically to elect a fair-minded Congress; and increases public understanding through innovative education and communication strategies.” Human Rights Campaign, *supra* note 97.

<sup>98</sup> There were several same-sex marriage cases that date from the early 1970s around the same time when states began adopting Equal Rights Amendments and ratification of the federal Equal Rights Amendment was pending before the states. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974). *See* CHAUNCEY, *supra* note 96, at 146-47 (describing Equal Rights Amendment). The claims for equal marriage rights were rejected largely on definitional grounds: marriage can only exist between a man and a woman. *See e.g., infra* note 193 (discussing *Jones v. Hallahan*).

<sup>99</sup> Marriage is still not a universal goal among men and women in same-sex relationships. Pam Belluck, with Katie Zezima, *Gays Respond: 'I Do,' 'I Might' And 'I Won't,'* N.Y. TIMES, Nov. 26, 2003, at 1A (gauging reaction to impending legalization of same-sex marriage in Massachusetts). The debate within the LGBT community over marriage can be traced to an exchange that took place between Paula Ettlebrick and Tom Stoddard in responsive articles in *OUT Magazine*. Paula Ettlebrick, *Since When was Marriage a Path to Liberation?* in *LESBIANS, GAY MEN, AND THE LAW* 401-05 (William B. Rubenstein ed., 1993); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, in *LESBIANS, GAY MEN, AND THE LAW* 401-05 (William B. Rubenstein ed., 1993). Some criticism of marriage goals has suggested that marriage would lead to a “domestication” of same-sex relationships. *See e.g.,* RUTHANN ROBSON, *LESBIAN*

they were part of an orchestrated litigation strategy that targeted certain jurisdictions and actively discouraged litigious couples from filing court cases in jurisdictions with less favorable outlooks.<sup>100</sup>

It would have been folly for the early gay rights movement to pursue marriage litigation in the 1970s. At the time, the prohibitions against same-sex relationships were pervasive, being grounded in religion, medicine, and law.<sup>101</sup> Education and the media helped enforce these prohibitions through either silence or highly negative and stereotypical portrayals.<sup>102</sup> Although litigants pointed out that the challenged marriage laws did not specify that the couple had to consist of a man and a woman, the force of heteronormativity was such that courts ruled against the same-sex couples on definitional grounds.<sup>103</sup> No other reading of marriage was possible. By

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(OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 18 (1992) (describing “unthinkable assimilation of domestication”).

<sup>100</sup> David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES SUN. MAG., May 9, at 52 (describing evolution of coordinated same-sex marriage litigation).

<sup>101</sup> Homosexuality was classified as a serious mental illness until December 1973. BAYER, *supra* note 72, at 123. Throughout the 1970s, states began to repeal their sodomy laws, but the process was slow. Ten years after declassification only the following states had repealed their sodomy laws: Illinois (1962), Connecticut (1971), Colorado (1972), Oregon (1972), Delaware (1973), North Dakota (1973), Ohio (1974), New Hampshire (1975), New Mexico (1975), California (1976), Maine (1976), West Virginia (1976), Washington (1976), Indiana (1977), South Dakota (1977), Vermont (1977), Wyoming (1977), Iowa (1978), Nebraska (1978), New Jersey (1979), Alaska (1980), Wisconsin (1983). Jeremy Quittner, *Are You Breaking the Law? Where Does Your State Stand on Sodomy Laws?* THE ADVOCATE, Aug. 20, 2002, at 52.

<sup>102</sup> Chauncey notes that “it was only in the 1990s that lesbian and gay images, often positive and increasingly diverse and complex, permeated the mass media[.]” CHAUNCEY, *supra* note 96, at 53. On college campuses, LGBT groups proliferated, but often met with considerable resistance from the administration. *See infra* note 154 (discussing student group litigation).

<sup>103</sup> For Example, in *Jones v. Hallhan*, the Court of Appeals of Kentucky had only to consult two dictionaries to determine that the failure to issue a marriage license to Marjorie Jones and Tracey Knight did not implicate any constitutional rights. *Jones v. Hallahan*, 501 S.W.2d 588 (1973). True, the state statute did not specify that the applicants for a marriage license had to be of opposite sexes. *Id.* at 589. That notwithstanding, the court concluded that by definition

definition, marriage could only exist between a man and a woman.<sup>104</sup>

Obviously, quite a bit had changed by 1993 when the Supreme Court of Hawaii found that the denial of a marriage license to a same-sex couple violated the equal protection clause of the state constitution and the state of Hawaii had failed to show a compelling state interest to justify that violation.<sup>105</sup> During those two intervening decades, the LGBT movement had started a dialogue with organized religion,<sup>106</sup> lobbied successfully for the declassification of homosexuality as a mental illness,<sup>107</sup> and secured legal gains such as the repeal of sodomy laws,<sup>108</sup> anti-discrimination measures,<sup>109</sup> and hate crimes legislation.<sup>110</sup> It campaigned for positive portrayals of gay men and lesbians in the media and educational materials.<sup>111</sup> In short, it pursued a very broad inter-related program of social change. At the same time, the LGBT movement saw the rise of the traditional values movement that countered every gain and made

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Jones and Knight could not marry. *Id.* The judge reasoned: “It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.” *Id.*

<sup>104</sup> Despite the obviousness of this reasoning, state legislatures began to enact sex-specific marriage laws in the wake of these early marriage cases. CHAUNCEY, *supra* note 96, at 91. Chauncey reports that 15 states passed such legislation. *Id.*

<sup>105</sup> Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

<sup>106</sup> See CHAUNCEY, *supra* note 96 (noting religious views regarding homosexuality began to change in 1970s in favor of anti-discrimination laws).

<sup>107</sup> See generally, BAYER, *supra* note 72 (describing lobbying for declassification)

<sup>108</sup> See *supra* note 101 (discussing state repeal of sodomy laws).

<sup>109</sup> See CHAUNCEY, *supra* note 96, at 38-39 (discussing anti-discrimination protections)

<sup>110</sup> See generally, Human Rights Campaign, *Hate Crimes*, at [http://www.hrc.org/Template.cfm?Section=Hate\\_Crimes1](http://www.hrc.org/Template.cfm?Section=Hate_Crimes1) (last visited Aug. 27, 2005) (discussing need for and progress toward securing hate crime protections).

<sup>111</sup> The Gay & Lesbian Alliance Against Defamation was founded in 1985. GLAAD, *supra* note 38. The Gay, Lesbian, and Straight Education Network was founded in 1990 to address the needs of LGBT students. GLSEN, *History*, at <http://www.glsen.org/cgi-bin/iowa/all/about/history/index.html> (last visited Aug. 27, 2005).

particularly effective use of the citizens' referendum.<sup>112</sup> Over time, this counter movement evolved from a narrowly drawn anti gay focus to espouse a much more comprehensive vision for social change and transformation.<sup>113</sup>

Throughout the 1990s, however, the largest gains with respect to the recognition of same-sex relationships came from the market in the form of domestic partnership benefits as employers began to extend the equivalent of spousal health insurance and other benefits to the same-sex partners of their employees.<sup>114</sup> Indeed, the practice coined the term "domestic partnership," and now the term "domestic partner" or more simply "partner" are widely used outside the Human Relations departments of corporations to signal an exclusive committed intimate relationship.<sup>115</sup>

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<sup>112</sup> For a description of the rise of the traditional values movement see CHAUNCEY, *supra* note 96, at 147-52 (describing the history of movement).

<sup>113</sup> HERMAN, *supra* note 11, at 195 (describing traditional values movement as a "paradigmatic movement for social change").

<sup>114</sup> According to the Human Rights Campaign Foundation, 11 state governments and 129 municipal or county governments extend domestic partnership benefits. Human Rights Campaign Foundation, *Employers that Offer Domestic Partnership Health Benefits*, at [http://www.hrc.org/Template.cfm?Section=Search\\_the\\_Database&Template=/CustomSource/WorkNet/srch.cfm&searchtypeid=3&searchSubTypeID=1](http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/srch.cfm&searchtypeid=3&searchSubTypeID=1) (last visited Aug. 27, 2005). In addition, 244 of the Fortune 500 companies offer domestic partnership benefits. *Id.* In order to qualify for these employee benefits, a same-sex couple must establish either that they are registered as domestic partners with the relevant jurisdiction or they must satisfy a prescribed number of factors establishing a relationship. See Knauer, *supra* note 21, at 46-48 (1998) (describing general requirements to qualify for domestic partnership benefits).

On the municipal or county level, domestic partner ordinances can extend relatively few benefits to non-employees. *Id.* at 340-42. Domestic partner registries are largely symbolic, although registration does provide strong evidence of a committed relationship. *Id.* at 340-41. According to the Human Rights Campaign Foundation, 69 municipalities and counties offer registries. Human Rights Campaign Foundation, *Work Life: Search for an Organization or Agency*, at [http://www.hrc.org/Template.cfm?Section=Get\\_Informed2&Template=/CustomSource/Agency/AgencySearch.cfm](http://www.hrc.org/Template.cfm?Section=Get_Informed2&Template=/CustomSource/Agency/AgencySearch.cfm) (last visited Aug. 28, 2005). However, the increasing availability of registries may lead to a negative inference in the case of a couple who fails to register.

<sup>115</sup> For example, one definition of "domestic partner" provides: "domestic partner or

The willingness of the gay rights movement to pursue marketplace solutions illustrates that activists do not “hardwire” institutions to their goals, a common criticism the CIA wages against legal commentators.<sup>116</sup> Speaking in the broadest of ideological terms, and assuming that designations such as “left” or “right” retain some modicum of descriptive power, movements to secure rights and recognition for traditionally marginalized minority groups are generally considered to fall to the “left” of center, whereas the private orderings and remedies of the marketplace are more closely associated with the “right.”<sup>117</sup> In fact, the efforts to secure domestic partnership benefits were considered suspect by some and exposed the LGBT movement to internal criticism, showing yet again how politics can make strange bedfellows.<sup>118</sup>

As explained more fully in Part IV, the amount of resources the LGBT movement expended on domestic partnership protections was also criticized given that market-based recognition provides a very partial remedy.<sup>119</sup> In other words, as an institution, the market is not competent to implement the social goal of equal recognition for same-sex relationships.<sup>120</sup>

Despite this partiality, the market has been very responsive to demands for equal treatment of

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domestic partnership identifies the personal relationship between individuals who are living together and sharing a common domestic life together but are not joined in any type of legal partnership, marriage or civil unions.” WIKIPEDIA: THE FREE ENCYCLOPEDIA, *Domestic Partnership*, at [http://en.wikipedia.org/wiki/Domestic\\_partner](http://en.wikipedia.org/wiki/Domestic_partner) (last visited Aug. 27, 2005).

<sup>116</sup> KOMESAR, *supra* note 1, at 174-75 (noting “you cannot hardwire goals and institutions and, therefore, no program of law and public policy follows from goal choice”).

<sup>117</sup> *Id.* at 92 (pointing to the label “conservative” as a “ideological generalization” that “misses much”).

<sup>118</sup> See Knauer, *supra* note 21, at 349 n.56 (describing fear of “domestication”).

<sup>119</sup> The remedy is partial because it is limited to the employees of certain employers and does not confer rights that are enforceable against third parties. The class of individuals benefited does not include the unemployed or the underemployed. The type of benefits available is limited to those generally associated with compensation packages.

<sup>120</sup> For a discussion of competence see *infra* text accompanying notes 200-27.

same-sex partners and relatively resilient to attempts by the traditional values movement to protest through the use of consumer boycotts and the like.<sup>121</sup> This placed the LGBT movement in the paradoxical situation where the institution that was the most responsive to its demands and able to withstand pressure from the traditional values counter-movement was the least competent to provide the desired relief.<sup>122</sup>

The key to CIA is the element of participation, and from its inception the LGBT movement has recognized the importance of the atomistic forces that determine institutional behavior.<sup>123</sup> It is individuals who demand discriminatory legislation, support citizen referenda to repeal gay rights legislation, fire employees based on sexual orientation, determine the “best interest” of a child, and commit violent hate crimes.<sup>124</sup> These things are not the product of the neutral, albeit misguided, Law. They are choices made by individuals. As such, the LGBT movement stresses the importance of individuals to “come out” and be open and honest

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<sup>121</sup> For example, the 16 million member strong Southern Baptist Convention organized a boycott of the Walt Disney Company shortly after the company began to offer domestic partner benefits. Gustav Niebuhr, *Baptists Censure Disney for Gay-Spouse Benefits*, N.Y. TIMES, June 13, 1996, at A14. The boycott was largely regarded as a failure and ended eight years later. See *Baptists End Disney Boycott*, N.Y. TIMES, JUNE 23, 2005, at A17 (quoting Southern Baptist Convention “The boycott has communicated effectively our displeasure concerning products and policies that violate moral righteousness and traditional family values”).

<sup>122</sup> Komesar notes: “The world of institutional choice under high numbers and complexity – the real world – yields incomplete and paradoxical results. Simplistic associations of good and evil with particular institutions and ideologies as well as demands for perfection no longer fit.” KOMESAR, *supra* note 1, at 121 (discussing paradoxical results).

<sup>123</sup> See *supra* note 96, at 33 (discussing presumed transformative power of “coming out”).

<sup>124</sup> The “best interests” of the child is a family concept used to determine issues of custody and adoption. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFFALO L. REV. 341, 364-68 (2002) (explaining “best interests” interests). Its multifactor analysis frequently denied custody to parents in same-sex relationships even where courts did not consider such parents to be unfit

regarding their sexual orientation because public opinion polls regularly show that individuals who know that they know someone who is gay are more likely to support gay rights initiatives.<sup>125</sup>

Thus, the LGBT movement not only pursues its contested goal through strategic institutional choice, it also seeks to build consensus, or at least a majority, regarding the contested goal.

Through the use of personal narrative, the coming out process seeks to achieve this by reaching one atomistic actor at a time.

### III. THE RECOGNITION OF SAME-SEX RELATIONSHIPS

2004 was a tumultuous year for the recognition of same-sex relationships. Despite many procedural challenges and a pending state constitutional referendum, Massachusetts became the first state to legalize same-sex marriage, as mandated by a 2003 Massachusetts Supreme Court decision.<sup>126</sup> Several weeks before the Massachusetts order became effective, the Mayor of San Francisco, Gavin Newsom, authorized the issuance of marriage licenses to same-sex couples.<sup>127</sup> Night after night, television news programs showed long lines outside City Hall where couples

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*per se. Id.*

<sup>125</sup> See Human Rights Campaign, *Coming Out as a Straight Ally*, at [http://www.hrc.org/Content/NavigationMenu/Coming\\_Out/Get\\_Informed4/Straight\\_Allies/Coming\\_Out\\_as\\_a\\_Straight\\_Ally2.htm](http://www.hrc.org/Content/NavigationMenu/Coming_Out/Get_Informed4/Straight_Allies/Coming_Out_as_a_Straight_Ally2.htm) (last visited Aug. 27, 2005) (stating “Opinion polls show that people who know someone who is gay or lesbian are more likely to support equal rights for all gay and lesbian people”).

<sup>126</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution).

<sup>127</sup> In advance of the implementation of the *Goodridge* decision of the Massachusetts Supreme Court, the Mayor of San Francisco authorized the issuance of marriage licenses to same-sex couple starting in February 2004. Dean E. Murphy, *Bid to Stop San Francisco From Letting Gays Marry*, N.Y. TIMES, Feb. 14, 2004, at A10. By the time the California courts enjoined the practice one month later, 4,037 same-sex couple from 46 states had married. Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs from 46 States*, N.Y. TIMES, March 18, 2004, at A2. The Supreme Court of California later declared the marriages invalid. *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Calif. 2004).

patiently waited for hours as volunteer officiants scrambled to meet the pent up demand.<sup>128</sup> For a brief time, it appeared as if the United States had reached a tipping point. Bursts of localism led municipal officials to follow suit in Oregon,<sup>129</sup> New Jersey,<sup>130</sup> New Mexico,<sup>131</sup> and New York.<sup>132</sup> Over 8,000 same-sex couples were “married” before the courts intervened and invalidated the marriages as *ultra vires*.<sup>133</sup>

The media images of the happy newlyweds energized the traditional values movement, and same-sex marriage became a defining issue for the 2004 Presidential election.<sup>134</sup> Faced with

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<sup>128</sup> Carolyn Marshall, *Rushing to Say ‘I Do’ Before City is Told ‘You Can’t,’* N.Y. TIMES, Feb. 17, 2004, at A10 (noting staff and volunteers workers through three-day weekend without pay).

<sup>129</sup> On March 3, 2004, “Oregon’s largest county, Multnomah [County] began issuing marriage licenses to same-sex couples.” Matthew Peusch, *Oregonians Look to One Suit to Settle Gay Marriage Issue*, N.Y. TIMES, March 25, 2004, at A16. More than three thousands marriage licenses were issued to same-sex couples in Oregon before the state courts stopped the practice. Matthew Peusch, *Oregon: Judge Halts Same-Sex Marriage Licenses*, N. Y. TIMES, April 21, 2004, at A21. The Oregon Supreme Court later invalidated the marriages. *Li v. State*, 110 P.3d 91 (2005).

<sup>130</sup> On March 10, 2004, Asbury Park, New Jersey issued a marriage license to a same-sex couple. Thomas Crampton, *A City on the Jersey Shore, Wading Into Gay Issues*, N.Y. TIMES, March 13, 2004, at B4.

<sup>131</sup> Sandoval County, New Mexico issued 66 marriage licenses to same-sex couples on February 20, 2004. Steve Barnes, *New Mexico: Gay Marriage Injunction Stands*, N.Y. TIMES, Aug. 27, 2004, at A15. The state courts quickly enjoined the issuance. *Id.*

<sup>132</sup> A number of marriage licenses were issued to same-sex couples in New Paltz, New York, and the mayor personally performed 25 same-sex marriages. Thomas J. Lueck, *Police Charge New Paltz Mayor for Marrying Same-Sex Couples*, N.Y. TIMES, March 3, 2004, at B4. The mayor was charged with 24 misdemeanors when he presided over 25 same-sex marriage ceremonies. *Id.* The charges were eventually dropped after 18 months of legal maneuvering. Jennifer Medina, *Charges Dropped Against Mayor Who Performed Gay Weddings*, N.Y. TIMES, July 13, 2005, at B5

<sup>133</sup> *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (CA 2004) (invalidating over 4,000 marriage licenses issued to same-sex couples by San Francisco); *Li v. State*, 110 P.3d 91 (2005) (invalidating over 3,000 marriage licenses issued to same-sex couples in Oregon).

<sup>134</sup> See WIKIPEDIA: THE FREE ENCYCLOPEDIA, *Same-Sex Marriage in the United States*, at [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States) (last visited Aug. 29,

the specter of same-sex marriage spreading throughout the United States via the “activist judges” and the Full Faith and Credit Clause of the U.S. Constitution, anti-gay activists redoubled their efforts to use the constitutional amendment process, on both the federal and state levels, to stop court-mandated equal marriage rights.<sup>135</sup> In 2004, voters in 13 states, representing a large percentage of the U.S. electorate, approved state constitutional amendments prohibiting same-sex marriage.<sup>136</sup> A Federal Marriage Amendment (FMA) was introduced in Congress, with the support of the President.<sup>137</sup> The response against same-sex marriage was so overwhelming that leading Democrats publicly blamed Newsom for the re-election of President Bush, claiming that Newsom’s improvident decision had given the Republican party compelling images around which to rally its base.<sup>138</sup>

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2005) (noting “legal recognition became a major issue”).

<sup>135</sup> See Rosen, *supra* note 17, at 48 (noting that the marriage amendment has potential to “provoke a mini-culture war in each of the 50 state legislatures”).

<sup>136</sup> In 2004, 15 state constitutional amendments were ratified. WIKIPEDIA, *supra* note 134. Some of the amendments not only prohibited marriage, but also any parallel status that would grant “the incidents of marriage.” Human Rights Campaign Foundation, *Marriage-Related State Constitutional Amendments*, available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=21264&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Oct. 12, 2004). As of September 2005, the Human Rights Campaign reports that one additional state had amended its constitution and amendments were pending in 13 more states. Human Rights Campaign Foundation, *Proposed State Constitutional Amendments*, available at <http://www.hrc.org/Template.cfm?Section=Center&Template=/ContentManagement/ContentDisplay.cfm&ContentID=26900> (last visited September 2, 2005). A total of 18 states have passed state constitutional amendments banning same-sex marriage. AP, *Psychiatrists May Make Stand for Same-Sex Marriage*, N.Y. TIMES, MAY 23, 2005, at A15.

<sup>137</sup> In 2004 the Federal Marriage Amendment was considered in both the U.S. House and Senate where it failed to garner the required two-thirds majority to continue. Sheryl Gay Stolberg, *Same Sex Marriage Amendment Fails in the House*, N.Y. TIMES, Oct. 1, 2004, at A14 (noting vote was 227 to 186 in favor of the amendment, but short of the two-thirds majority needed).

<sup>138</sup> Dean E. Murphy, *Some Democrats Blame One of Their Own*, N.Y. TIMES, NOV. 5,

The events of 2004 followed a now familiar pattern in the longstanding struggle over the recognition of same-sex relationships. A pro-marriage court ruling is challenged by the traditional values movement through the political process, which then sets in motion a flurry of prophylactic political measures in other jurisdictions. Regional or local pro-recognition sentiments are overwhelmed by majoritarian bias when the issue is re-framed on a larger scale. The general pattern has taken a variety of forms. For example, a municipal domestic partnership registry reflecting local pro-recognition views could be invalidated by a state constitutional amendment prohibiting not only same-sex marriage, but also any extension of “the incidents of marriage” to same-sex couples.<sup>139</sup> Massachusetts same-sex marriages, imposed by court order, could be invalidated by a pending Massachusetts state constitutional amendment or the FMA.<sup>140</sup>

To understand the dynamics of this strategic of institutional maneuvering, it is important to examine the process of goal articulation and the costs and benefits of participation. As explained below, the demand for relationship recognition is driven by individuals in same-sex relationships who have very high stakes in the outcome. These stakes can run from such mundane concerns as whether the local swim club will let a same-sex couple sign up for a

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2004, at A18 (quoting Sen. Diane Feinstein).

<sup>139</sup> For a discussion of a new generation of marriage laws which, in addition to banning same-sex marriage, prohibit the grant of the “incidents of marriage” see *infra* text accompanying notes 309-13.

<sup>140</sup> Voters and legislators tried to circumvent the implementation of the *Goodridge* court order through appeal to the constitutional amendment process. Pam Belluck, *Massachusetts Plans to Revisit Amendment on Gay Marriage*, N.Y. TIMES, May 10, 2005, at A13. However, this attempt was thwarted in Massachusetts due to a design feature of the state amendment process. *Id.* The Massachusetts Assembly passed a constitutional amendment barring same-sex marriage, but voters will not be able to consider the amendment until 2006. *Id.*

“family” membership<sup>141</sup> to issues involving fundamental questions of human dignity and bodily integrity, such as whether a surviving same-sex partner can control the disposition of her partner’s remains<sup>142</sup> or sue on account of her partner’s wrongful death.<sup>143</sup> In the case of the counter-demand from the traditional values movement, the benefits of participation are more diffuse and less immediate.<sup>144</sup>

#### A. The Demand for Recognition

The demand for the recognition of same-sex relationships began as a natural extension of the broader goals of equality and individual freedom espoused by the LGBT movement.<sup>145</sup>

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<sup>141</sup> See Marcia Chambers, *At Country Clubs, Gay Members Ask for Privileges for their Partners*, N.Y. TIMES, Sept. 21, 2004, at D1 (describing efforts to win relationship recognition).

<sup>142</sup> Same-sex couples can draft documents which try to anticipate such circumstances, but the extent to which the documents can legally bind third parties such as funeral directors or cemeteries is uncertain, except where such documents are expressly authorized by law. For example, Virginia expressly authorizes the designation of an individual who “shall make arrangements for [the declarant’s] burial or the disposition of [the declarant’s] remains, including cremation, upon [the declarant’s] death.” VA. CODE ANN. § 54.1-2825 (2001). For the particular problems facing surviving same-sex partners see Jennifer E. Horan, Note, “*When Sleep at Last has Come*”: *Controlling the Disposition of Dead Bodies for Same-Sex Couples*, 2 J. GENDER RACE & JUST. 423 (1999) (discussing difficulty encountered by surviving same-sex partners).

<sup>143</sup> Standing to sue for wrongful death is established by statute. See John G. Culhane, *A “Clanging Silence”*: *Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 953-54 (describing origin of wrongful death actions). The order of priority starts with the surviving spouse and continues through the next of kin. *Id.* Only a handful of states include surviving same-sex partners as spousal equivalents for wrongful death purposes.

<sup>144</sup> For a discussion of the distribution of stakes in the traditional values movement see *infra* text accompanying notes 174-95 (discussing diffuse stakes).

<sup>145</sup> The gay rights movement originally espoused a liberationist philosophy based on principles of individual autonomy and freedom. See generally, CHAUNCEY, *supra* note 96, at 29-31 (discussing gay liberation movement). Gay liberationists pursued a path of revolutionary social and political change, but it was short-lived, spanning from the 1969 Stonewall riots until the mid 1970s. See JAGOSE, *supra* note 18, at 30-43 (describing liberationist strategy. The emphasis the gay liberationists placed on personal autonomy gave way to equality demands that have dominated since the 1980s. *Id.*

Tracing its inception to the Stonewall Riots of 1969,<sup>146</sup> the contemporary LGBT movement is represented by a sophisticated array of advocacy organizations, including legal advocacy groups, media watchdogs, federal, state, and local lobbying efforts, and networks of educators, religious organizations, and special interest groups.<sup>147</sup> With its ultimate goal being the normalization of homosexuality, the LGBT movement has lobbied for anti-discrimination measures,<sup>148</sup> positive portrayals of homosexuals by the media,<sup>149</sup> and the repeal of sodomy laws.<sup>150</sup> In recent years, there has emerged a movement within a movement dedicated to the singular goal of equal relationship rights for same-sex couples.<sup>151</sup> Increasingly, this goal has been defined as equal

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<sup>146</sup> *Id.* On June 27, 1969, after a memorial service following the death of Judy Garland at the Stonewall Inn, police in New York City raided the gay and drag bar, and the resistance that followed has been established as marking the initiation of a social movement dedicated to seeking recognition and acceptance of same-sex relationships. *Id.*

<sup>147</sup> See Chauncey, *supra* note 96, at 5 (noting “profound change” in “the place of lesbians and gay men in American society”).

<sup>148</sup> Only 16 states and the District of Columbia have legislation that prohibits discrimination on account of sexual orientation. Human Rights Campaign, *Statewide Anti-Discrimination Laws & Policies*, at <http://www.hrc.org> (last visited Aug. 27, 2005). The 16 states are: California, Connecticut, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, Hawaii, New Mexico, New Jersey, New York, Nevada, Rhode Island, Vermont, and Wisconsin. *Id.*

<sup>149</sup> For example, the Gay & Lesbian Alliance Against Defamation was founded in 1985. GLAAD, *Our History*, *supra* note 38. It was modeled the B’nai B’rith Anti-Defamation League. CHAUNCEY, *supra* note 96, at 32. GLAAD is now a national organization dedicated to “promoting and ensuring fair, accurate and inclusive representation of people and events in the media as a means of eliminating homophobia and discrimination based on gender identity and sexual orientation.” GLAAD, *supra* note 38. Chauncey notes that the efforts of GLAAD “prompted soul-searching and debate in many of the nation’s newsrooms”). CHAUNCEY, *supra* note 96 at 44.

<sup>150</sup> By the time *Lawrence* was decided in 2003, only 13 states had sodomy laws. *Lawrence v. Texas*, 539 U.S. 538, 573 (2003). This was down from 24 states and the District of Columbia when *Bowers v. Hardwick* was decided in 1986. *Id.* at 572. All states had sodomy laws until Illinois adopted the Uniform Penal Code in 1961 and as a result repealed its sodomy law. *Id.*

<sup>151</sup> See generally CHAUNCEY, *supra* note 96 (discussing historical roots of demand for

marriage rights.<sup>152</sup>

The focus on marriage is understandable given the recent high profile case in Massachusetts and the fact that opposite-sex secular marriage is commonly used as a touchstone against which to measure the disabilities imposed on same-sex couples.<sup>153</sup> Once marriage is established as the benchmark for the desired quantum of rights and responsibilities, anything short of marriage smacks of inequality. This notwithstanding, same-sex couples have pursued recognition of their relationships in a variety of ways and in a variety of institutional settings. The greatest gains toward relationship recognition have been made in these margins, as same-sex partners establish standing and visibility often one employer or one case at a time.

From a pragmatic standpoint, the possibility of same-sex *marriage* seemed very remote when demands for domestic partnership benefits were first made in the 1980s.<sup>154</sup> The question of

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equal marriage rights). *See also*, MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 87 (1999) (noting “[m]arriage became the dominant issue in lesbian and gay politics in the late 1990s, but not before”).

<sup>152</sup> The momentum for equal marriage rights increased greatly after the *Goodridge* decision. However, the resounding defeat in terms of both the Presidential election and the state constitutional amendments has led many within the LGBT movement to question the wisdom of focusing on *marriage* rights instead of a more moderate demand for relationship recognition. John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1 (reporting HRC leadership has concluded that “aggressively pursuing marriage played into the hands of Republicans and religious conservatives”).

<sup>153</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution).

<sup>154</sup> From the perspective of the 1980s, the most successful LGBT litigation to date had concerned the associational freedoms and the right to organize LGBT student groups on college campuses. *See Wood v. Davison*, 351 F. Supp. 543 (N.C.Ga. 1972); *Gay Students Organization of University of New Hampshire v. Bonner*, 509 F.2d 652 (1<sup>st</sup> Cir. 1974); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4<sup>th</sup> Cir. 1976); *Gay Lib v. University of Missouri*, 558 F.2d 848 (1977) *cert. den’d*, 434 U.S. 1080, (1978); *The Student Coalition for Gay Rights v. Austin Peay University*, 477 F.Supp 1267 (1979); *Gay Students Serv. v. Texas A&M Univ.*, 737 F.2d 1317 (5<sup>th</sup> Cir. 1984) *cert. den’d* 471 U.S. 1120 (1985). In each case, the courts affirmed the

whether marriage was an appropriate goal for a movement dedicated to progressive social change was the subject of considerable internal dispute.<sup>155</sup> Rather than make an impulsive dash for marriage as had the early gay liberationists, advocates pursued a broad-based multi-institutional program, including employee benefits for domestic partners and other private contractual arrangements in the market,<sup>156</sup> dialogue with progressive religious denominations,<sup>157</sup> and municipal domestic partner registries.<sup>158</sup> In addition, advocates constructed a long-term plan to secure constitutionally mandated equal marriage rights through the state courts.<sup>159</sup>

Often, however, the demand for relationship recognition has not been the result of a carefully orchestrated design for social change. Instead, it arose from an individual tragedy visited upon a particular couple. For example, when the emergency room staff at the University of Maryland Medical System refused to allow Bill Flanigan to see his dying partner, he

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students' associational freedoms guaranteed under the First Amendment. These politically themed cases were a far cry from marriage. Moreover, the resistance the early LGBT student groups faced was emblematic of the then-prevalent negative views of homosexuality. According to a 1982 Gallup poll, only 34% of the respondents thought that same-sex behavior was "acceptable." Ontario Consultants on Religious Tolerance, *supra* note 39.

<sup>155</sup> Progressive voices within the LGBT movement have questioned whether the emphasis placed on traditional "marriage" compromises the potentially transformative power of the movement. *See e.g.*, Paula Eittlebrick, *supra* note 99 (questioning marriage as a goal). The perspective offered by Queer Theory has also offered a sustained and nuanced critique of the goal of same-sex marriage. *See e.g.*, WARNER, *supra* note 151, at 87-95 (arguing same-sex marriage is inconsistent with tradition of queer thought).

<sup>156</sup> Writing in 1996, Urvashi Vaid, the former executive director of the National Lesbian and Gay Task Force, concluded that "[s]ome of the biggest successes in the gay rights movement came in the 1990s through changes in corporate policies that covered thousands of employees." URVASHI VAID, *VIRTUAL EQUALITY* 10 (1996).

<sup>157</sup> *See* CHAUNCEY, *supra* note 96, at 37 (discussing "debate in the churches over the place of lesbians and gay men in religious life")

<sup>158</sup> For example, West Hollywood California became the first municipality to establish a domestic partnership registry. Equality California, *AB205 Fact Sheet, available at* <http://eqca.org> (last visited Aug.29, 2005).

demanded to be recognized as “family.”<sup>160</sup> Sherry Barone demanded recognition as the executor of her partner’s will when the cemetery where her partner was buried refused to permit the term “beloved life partner” to be inscribed on the grave marker.<sup>161</sup> Frank Vasquez demanded to be recognized as something more than a “roommate” when the family of his deceased partner tried to evict Vasquez from the home he and his partner had shared for 27 years.<sup>162</sup> As these cases

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<sup>159</sup> Garrow, *supra* note 100 (describing evolution of marriage litigation strategy).

<sup>160</sup> The hospital did not allow Flanigan to see his dying partner until the partner’s mother arrived and authorized the visit. Flanigan v. University of Maryland Medical Center, *Lambda Legal’s Complaint*, available at <http://www.lambdalegal.org/cgi-bin/iowa/cases/brief.html?record=1012><http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=174> (last visited Aug. 29, 2005). The hospital denied Flanigan the right to see his partner even though his partner had executed a health care power of attorney in Flanigan’s favor and the couple had registered as domestic partners in San Francisco. *Id.* By the time Flanigan was permitted to see his partner, he was unconscious and life-sustaining treatment had been administered contrary to his express wishes. *Id.* Flanigan later sued the hospital for negligence and intentional infliction of emotional distress. *Id.* The jury found for the hospital. Lambda Legal, *Flanigan v. University of Maryland Medical System*, at <http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=174> (last visited Aug. 29, 2005).

<sup>161</sup> When Sherry Barone’s partner of thirteen years, Cynthia Friedman, died at age 35, she left a will which appointed Barone as executor. Debbie Woodell, *Gay Partner Battles for Rights Even at the Grave*, AUSTIN AMERICAN-STATESMAN, May 31, 1997, at C8. The will expressly authorized Barone to “arrange for the disposition” of Friedman’s remains. Murray Dubin, *Late Woman’s Parents, ‘Life Partner’ Wage Legal Battle Over Headstone Inscription*, PHILADELPHIA INQUIRER, June 30, 1997. The cemetery where Friedman was buried refused to inscribe her headstone with the epitaph directed by Barone — “beloved life partner, daughter, granddaughter, sister and aunt” — because Friedman’s parents objected to the use of the term “beloved life partner.” Claudia N. Ginanni, *Cemetery To Inscribe Headstone, Pay \$ 15,000*, THE LEGAL INTELLIGENCER, Sept. 8, 1997, at 5. The parents demanded a slightly different ordering of Friedman’s filial ties: “our beloved daughter, sister, granddaughter, and loving friend.” Dubin, *supra*. Shortly before the third anniversary of Friedman’s death, the cemetery acceded to Barone’s wishes as part of a settlement agreement reached in the federal lawsuit Barone brought against the cemetery. Ginanni, *supra*.

<sup>162</sup> Frank Vasquez’s partner of 27 years, Robert Schwerzler, died without a will. Marsha King, *Should Companion Get Deceased’s Estate?* SEATTLE TIMES, Jan. 23, 2001, at A1. Vasquez and Schwerzler ran a burlap bag recycling business in Puyallup, Washington where they shared a modest three-bedroom house. *Id.* When Schwerzler died intestate at the age of 78, Vasquez quickly learned that the entire \$230,000 estate was titled solely in Schwerzler’s name.

illustrate, the movement for relationship recognition is not driven by abstract considerations of equality, but by a very real vulnerability that confronts every person in a same-sex relationship: your same-sex partner is a legal stranger.<sup>163</sup> She is not considered family regardless of the length or quality of your relationship.<sup>164</sup>

In the United States, the status of same-sex relationships varies wildly from jurisdiction to

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*Id.* Schwerzler's siblings asserted their rights to Schwerzler's property as next of kin and, according to Vasquez's lawyer, "literally wanted to put Mr. Vasquez out on the street with nothing." Sam Skolnik, *Same-Sex Estate Rights Backed; State High Court Says Gays May Be Entitled to Partners' Property in Absence of a Will*, SEATTLE POST-INTELLIGENCER, Nov. 2, 2001, at B1. Although not required to legally, the siblings justified their claim to Schwerzler's estate, including the home he had shared with Vasquez, on the basis that the two men were not homosexual. *Id.* See also, King, *supra*. (quoting Schwerzler's brother "[c]ertainly, there was nothing being done in public"). In the eyes of Schwerzler's family Vasquez was really more like a housekeeper or a boarder who just happened to stay for 27 years. *Id.* (stating that Vasquez "was a boarder or friend, nothing more than that[]").

Ultimately, the Washington Supreme Court recognized an equitable claim brought by Vasquez against his partner's estate. *Vasquez v. Hawthorne*, 33 P.3d 735 (2001). The court extended to same-sex couples an established equitable doctrine that allows an unmarried opposite-sex partner who relied on the decedent to execute the necessary documents to secure the survivor's property interests to maintain an action against the estate that is somewhat akin to the doctrine of equitable adoption. *Id.*

<sup>163</sup> This raises a very important point of reference. Surviving same-sex partners are not simply unequal to surviving spouses. In the absence of some form of state-wide relationship recognition, same-sex partners are no relation to the decedent, standing behind siblings, cousins, and the state in terms of priority. Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 41 (2002).

<sup>164</sup> The disabilities that flow from this lack of status are too numerous to catalogue here. The HIV/AIDS epidemic of the 1980s exposed some of the most wrenching of these disabilities as a generation of young men faced a premature death and their partners were denied access to hospital rooms and rendered invisible in the face of often estranged and disapproving parents. See CHAUNCEY, *supra* note 56, at 95-104 (discussing role of HIV/AIDS epidemic in creating demand for same-sex marriage). In the 1990s, the highly publicized case of Sharon Kowalski who suffered a brain injury in a car accident and whose parents refused to allow her to see her partner, inspired a public education campaign to induce same-sex couples to write wills and sign health care powers of attorney. See *id.* at 111-15 (discussing emphasis on documents and role in forming demand for same-sex marriage). As is evident from the Flanigan and Barone cases, private documents are not sufficient to make a same-sex partner the equivalent of family. See

jurisdiction and whether a same-sex partner will be considered a legal stranger, a spouse, or something in between, depends on where the couple lives and works.<sup>165</sup> When a couple who enjoys some form of recognition where they live decides to travel, they do so at their own risk, since very few forms of relationship recognition are portable.<sup>166</sup> Both the American Psychiatric Association and the American Psychological Association have come out in support of equal marriage rights, citing the psychological toll caused by this uncertainty.<sup>167</sup> The problems caused by the lack of uniform relationship recognition are compounded when a same-sex couple is raising children and second-parent adoption is not available.<sup>168</sup>

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*supra* notes 161 and 162.

<sup>165</sup> This is a function of the competence of the recognizing jurisdiction. *See infra* text accompanying notes 200-27 (discussing element of competence).

<sup>166</sup> The fragility of local grants of recognition was obvious when the University of Maryland Medical System rejected Flanigan's claim that his status as a registered domestic partner pursuant to a San Francisco ordinance made him "family" for purposes of the hospital's visitation policy. *See supra* note 160 (describing Flanigan's ordeal and suit against hospital).

<sup>167</sup> In 2004, the American Psychological Association (APA) adopted a Resolution in favor of same-sex marriage. American Psychological Association, *Resolution on Sexual Orientation and Marriage*, July, 2004, available at <http://www.apa.org/pi/lgbc/policy/marriage.pdf> (last visited Jan. 11, 2005). The APA Resolution supports equal marriage rights, noting "the minority stress" suffered by same-sex couples due to lack of legal recognition and the fact that a parallel or partial status such as a registered domestic partner is "rarely portable." *Id.* at 3. In 2005, the American Psychiatric Association followed suit with a similar resolution. AP, *Top Psychiatric Group Urges Making Gay Marriage Legal*, WASH. POST, May 23, 2005, at 0A2; American Psychiatric Association, *Same Sex Marriage Resource Document*, available at [http://www.psych.org/public\\_info/libr\\_publ/resource.cfm](http://www.psych.org/public_info/libr_publ/resource.cfm) (last visited Aug. 29, 2005).

<sup>168</sup> According to the 2000 Census, 34 percent of female same-sex couples and 22 percent of male same-sex couples have at least one child under 18 living in the home. National Gay and Lesbian Task Force, *Parenting*, at <http://www.thetaskforce.org/theissues/issue.cfm?issueID=30> (last visited Aug. 29, 2005). One of the major questions for same-sex parents is whether a second-parent adoption will be recognized in a state that does not allow such adoptions. For example, Oklahoma recently enacted a statute that prohibits the recognition of an adoption by more than one individual of the same sex. 10 OK. ST. ANN. s. 7502-1.4 (2004). This raises the disturbing possibility that a non-biological child who is jointly adopted by a same-sex couple would be considered an orphan if taken into the jurisdiction of Oklahoma. For an overview of

At base, the movement for the recognition of same-sex relationships is driven by high stakes individuals who have a strong desire to protect their chosen family. Beyond these high stakes individuals, the movement for relationship recognition has attempted to build alliances with other marginalized groups and combat what was once a pervasive negative view of same-sex relationships.<sup>169</sup> For example, as recently as 1987, 78% of the U.S. population reported that same-sex relationships were always wrong.<sup>170</sup> With that level of disapproval, local or regional gains could easily be overturned through majoritarian action, regardless of whether the gain was secured in the market, the courts or the political process. Faced with extraordinarily high information costs, the LGBT movement had to work to change the perception of homosexuality or risk losing any gains to periodic expressions of majoritarian bias.<sup>171</sup> Although views regarding homosexuality, including workplace protection from discrimination, have changed drastically over the last two decades,<sup>172</sup> the 2004 referenda results strongly suggest that the traditional values

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the laws governing second-parent adoptions see National Gay and Lesbian Task Force, *Second Parent Adoptions in the U.S. as of January 2005*, available at <http://www.thetaskforce.org/downloads/secongparentadoptionmap.pdf> (last visited Aug. 29, 2005).

<sup>169</sup> For example, the mission statement of Marriage Equality USA, a national organization dedicated to securing equal marriage rights, lists three core activities: education, media outreach, and forming partnerships and alliances with “gay and non-gay” organizations. Marriage Equality, *About Marriage Equality*, at [http://www.marriageequality.org/about\\_us.htm](http://www.marriageequality.org/about_us.htm) (last visited Aug. 29, 2005).

<sup>170</sup> CHAUNCEY, *supra* note 96, at 43 (reporting polling data).

<sup>171</sup> The available stock of negative stereotypes regarding homosexuality greatly increased the information costs for the LGBT movement. Chauncey notes that “[t]hose demonic [anti-gay] stereotypes became less effective as people became more familiar with gay people, as their friends and relatives came out to them and as they saw gay people treated in more humane and respectful ways in the media.” *Id.* at 151.

<sup>172</sup> See *supra* note 39 (discussing current poll statistics showing 88% favor equal workplace treatment). On the availability of stock symbols, Komesar notes:

The degree to which someone understands any issue also depends on that person’s

movement has successfully drawn the line at same-sex marriage – at least for now.<sup>173</sup>

### **B. The Counter-Demand and the Traditional Values Movement.**

The counterdemand for the non-recognition of same-sex relationships is part of the larger traditional values movement that can be traced to the founding of politically active conservative evangelical organizations in the late 1970s, such as the Reverend Jerry Falwell’s influential Moral Majority.<sup>174</sup> The traditional values movement considers homosexuality, along with abortion, no-fault divorce, and the separation of church and state, as symptomatic of a general decline in morals that threatens the health of the nation.<sup>175</sup> In many ways, the traditional values movement mirrors the structure of the LGBT movement, complete with sophisticated advocacy groups, media watchdogs, and the like.<sup>176</sup> In terms of homosexuality, the traditional values movement has recharacterized anti-discrimination laws as government-granted “special rights”

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stock or endowment of general information. This stock is determined by cultural, formal education, and the coverage of the press and media. Each culture has certain subjects such as religion or ethnicity that are part of the common experience of the members of that culture. This stock of “simple symbols” provides certain issues with easy recognition. Because the press and media provide cheap and accessible information, press and media response is a central element in determining the degree of majoritarian influence.

KOMESAR, *supra* note 1, at 63.

<sup>173</sup> This would be consistent with the national polling figures on the subject of relationship recognition, which lags behind equal workplace treatment. *See supra* note 40 (discussing polling data on attitudes toward same-sex marriage).

<sup>174</sup> *See* CHAUNCEY, *supra* note 96, at 147-48 (discussing Moral Majority).

<sup>175</sup> *See* HERMAN, *supra* note 11, at 195 (discussing traditional values movements in terms of its desired platform for social change).

<sup>176</sup> For example, the Family Research Council (FRC) is a full-service traditional values lobbying organization. Family Research Council, *Defending Faith, Family, and Freedom*, at <http://www.frc.org> (last visited Aug. 2005). Its numerous designated “policy areas” include such issues as: homosexuality, stem cell research, religious freedom, the “homosexual agenda in public education,” judicial activism, abortion, covenant marriage, and tax reform. Family Research Council, *Policy Areas*, at <http://www.frc.org/get.cfm?c=RESEARCH> (last visited Aug.

and led numerous successful state-wide referenda reversing pro-gay gains.<sup>177</sup>

After the 1993 decision of the Hawaii state supreme court in *Baehr v. Lewin*,<sup>178</sup> the traditional values movement increasingly focused on one particular “special right,” namely same-sex marriage.<sup>179</sup> It characterizes the push for same-sex relationship recognition as an assault on traditional marriage that represents the next step on the ominous “gay agenda.”<sup>180</sup> The traditional values movement correctly assumes that the limited gains same-sex couples make in terms of relationship recognition have a cumulative effect. Accordingly, it decries all actions that contain so much as a glimmer of recognition for same-sex relationships. For example, traditional values advocates have objected to providing domestic violence protections to victims of same-sex intimate battering on the grounds that it sets the stage for same-sex marriage.<sup>181</sup> Similar objections were raised in connection with the September 11 relief efforts when the Reverend Lou Sheldon, chairman of the Traditional Values Coalition, denounced the American Red Cross for providing emergency assistance to surviving same-sex partners.<sup>182</sup>

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29, 2005).

<sup>177</sup> For a discussion of the rise of the referendum campaigns see CHAUNCEY, *supra* note 96, at 45-46. For a discussion of the “special rights” campaign see *id.* at 46-47.

<sup>178</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). See Rosen, *supra* note 17 (describing citizen’s initiative to amend Hawaii’s constitution).

<sup>179</sup> Chauncey notes that “‘defending marriage’ as the union of one man and one woman had special symbolic significance for the opponents of gay rights.” CHAUNCEY, *supra* note 96, at 145. The traditional values movement considers same-sex marriage “both the ultimate sign of gay equality and the final blow to their traditional ideal of marriage[.]” *Id.*

<sup>180</sup> The Gay Agenda is the title of an anti-gay documentary produced during the Amendment 2 battle in Colorado that culminated in *Romer v. Evans*. *Id.*

<sup>181</sup> Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 338-39 (1999).

<sup>182</sup> See Am. Red Cross, *Guidelines on the Definition of Family for Red Cross Assistance and the Family Gift Program*, available at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/50.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/50.pdf) (last visited Jan. 26, 2005). Reverend Lou Sheldon, chairman

The traditional values movement typically does not have standing to challenge the individual unscripted victories that occur from time to time when same-sex partners demand recognition in the courts, such as when the California Supreme Court allowed Sharon Smith to bring a wrongful death action against the owners of the two dogs that had mauled her partner to death in the hallway outside their apartment.<sup>183</sup> In these individual cases, the traditional values movement is consigned to comment from the sidelines occasionally making an appearance as amici.<sup>184</sup> The same is true when employees demand domestic partner benefits. Except in the

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of the Traditional Values Coalition, denounced attempts to secure recognition for surviving same-sex partners as an attempt on the part of pro-gay advocacy organizations to use a “national tragedy to promote their agenda.” Thomas B. Edsall, *Minister Says Gays Should Not Get Aid*, WASH. POST, Oct. 5, 2001, at A22. Sheldon argued that relief should be awarded “on the basis and priority of one man and one woman in a marital relationship.” *Id.*

<sup>183</sup> Peter Hartlaub, *Same-Sex Partner Can Sue for Damages; Wrongful-Death Claim in Dog-Mauling Case*, S.F. CHRON., July 28, 2001, at A1. Diane Whipple, a 33 year old lacrosse coach, was mauled to death by her neighbors' two large dogs in the hallway outside the door to the apartment that she shared with her partner of seven years, Sharon Smith, on January 26, 2001. Christopher Heredia, *Dog Mauling Victim's Partner to Test Wrongful Death Law*, S.F. CHRON., Feb. 19, 2001, at A13. The details of Whipple's attack were widely reported in the press and generated considerable sympathy for her surviving partner and hostility toward the owners of the dogs. Bill Hewitt, Frances Dinkelspiel & Rebecca Paley, *Unleashed Fury; A Dog Attack in San Francisco Kills a Beloved Lacrosse Coach and Stirs Outrage Coast to Coast*, PEOPLE, Feb. 19, 2001, at 117. In the face of clear statutory language to the contrary, Smith pursued her wrongful death action against the owners arguing that the exclusion of same-sex partners was invalid under the California state constitution and met with unexpected success at the trial court level. Peter Hartlaub, *Same-Sex Partner Can Sue for Damages*, S.F. CHRON., July 28, 2001, at A1. *See also*, Heredia, *supra* (noting that “no case like Smith's has ever been successful”). Whipple's mother also filed a wrongful death suit in case Smith's was dismissed, with the intent that the two suits be merged. Jaxon Van Derbeken, *Dog-Mauling Case Settled: Victim's Mom, Partner Sued Landlords*, S. F. CHRON., Dec. 20, 2002, at A31.

<sup>184</sup> In their capacity as *amici*, traditional values organizations will often raise issues that are too controversial to find their way into the actual pleadings. For example, in *Lawrence v. Texas*, a variety of traditional values *amici* argued that public health and safety – not simply morals – justified the criminalization of same-sex sodomy. For example, an amicus brief filed by Texas legislators argued that the Texas Homosexual Conduct Law was rationally related to protecting public health. Brief of Amici Curiae Texas Legislators at 15, *Lawrence*, (No. 02-102).

case of public employers, aggrieved members of the traditional values movement have no standing to challenge the grant of benefits.

The lack of standing to challenge individual cases underscores a puzzling feature of the traditional values movement. Unlike same-sex couples who have an obvious personal stake in the debate, it is not clear what motivates the core participants in the traditional value movement. It is one thing for an individual to work toward formal and social recognition of her family, but it is quite a different thing to work toward the erasure of a stranger's family.<sup>185</sup> Therefore, as a practical matter, it makes sense that the movement concentrates its efforts on legislative action or constitutional amendments that can undo or forestall the individual court victory or grant of

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The legislators argued, *inter alia.*, that “[s]ame-sex sodomy presents serious health problems that must be prevented in order to ensure that all of the people of the state of Texas, especially those that seek to engage in same-sex sodomy, are fully protected from the ravages of infection and disease.” *Id.* at 17. The Texas Physicians’ Resource Council argued specifically that “same-sex sodomy is more harmful to the public health than . . . opposite sex-sodomy” and noted that “[t]he extent of STDs associated with same-sex sodomy is likely related to the high frequency of sex, anonymous or multiple sex partners, and other high-risk behaviors.” Brief of Amici Curiae Texas Physicians’ Resource Council et al. at 20-21, *Lawrence*, (No. 02-102).

In *Dale v. Boy Scouts of America*, the Boy Scouts successfully argued that the New Jersey anti-discrimination law infringed upon the group’s associational freedom by requiring it to reinstate an openly gay assistant scoutmaster. *Dale v. Boy Scouts of Am.*, 706 A.2d 270 (N.J. Super Ct. 1998). An amicus brief filed by the Family Research Council, a traditional values organization with a particular focus on homosexuality, argued that male homosexuals should not be scoutmasters because of their tendency toward pedophilia. Brief of Amicus Curiae Family Research Council at 22, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)(No. 99-699). In a thirty page brief, the organization managed to use the term pedophile or some derivation thereof thirty-one times. Knauer, *supra* note 38, at 63.

<sup>185</sup> In response to claims by then-Representative Henry Hyde that same-sex marriage “demean” or “trivialize” marriage, Michael Warner asserts: “He doesn’t just want his marriage to be holy; he wants us to be holy at the expense of someone else’s. To see gay marriage as “demeaning” is, in his view, a way of seeing “traditional marriage” as more significant.” WARNER, *supra* note 80, at 82. Warner explains that “same-sex marriage provokes such powerful outbursts of homophobic feeling in many straight people . . . [because] [t]hey want marriage to remain a privilege, a mark that they are special.” *Id.*

benefits. Locating its demand in the political process or direct democracy may be necessary because the benefits of participation are arguably so diffuse, and success depends on reaching the broadest possible base.

The vocabulary of the traditional values movement expresses the motivation in terms of a threat that is no less real or immediate than that encountered by Bill Franklin or Sharon Barone or Frank Vasquez. According to the traditional values movement, “Defense of Marriage” acts are necessary to secure traditional marriage and safeguard it from homosexual encroachment and degradation.<sup>186</sup> Senator Rick Santorum, in his impassioned statement on the floor of the Senate in support of the FMA, argued that stopping same-sex marriage was a matter of “the ultimate homeland security.”<sup>187</sup> Beyond the immediate desire to protect marriage, there is the larger goal to eradicate or control homosexuality, which is seen as an unhealthy, immoral, and chosen lifestyle.<sup>188</sup> Working with this larger goal as its platform, the traditional values movement

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<sup>186</sup> For a discussion of what exactly the Defense of Marriage Act is trying to defend see CHAUNCEY, *supra* note 96, at 144-55.

<sup>187</sup> 150 CONG. REC. S 8061, S8075 (daily ed. July 14, 2004) (statement of Sen. Santorum). Senator Santorum was responding, in part, to Democratic claims that Congress had more important things to consider. The full statement also included an appeal to consider the best interests of the children:

I would argue, the future of our country hangs in the balance because the future of the American family hangs in the balance. What we are about today is to try to protect something that civilizations for 5,000 years have understood to be the public good. It is a good not just for the men and women involved in the relationship and the forming of that union, which is certainly a positive thing for both men and women, . . . but even more important to provide moms and dads for the next generation of our children. Isn't that important? Isn't that the ultimate homeland security, standing up and defending marriage, defending the right for children to have moms and dads, to be raised in a nurturing and loving environment? That is what this debate is all about.

*Id.*

<sup>188</sup> See, Knauer, *supra* note 38, at 46-50 (describing traditional values movement’s

believes that any recognition of same-sex relationships to encourages homosexuality and abandons the individuals who are trapped in the unhealthy and immoral lifestyle.<sup>189</sup> Thus, the traditional values movement is decidedly other-regarding, expressing, in a very literal way, its evangelical roots.

When the traditional values movement denounces same-sex marriage, it demonizes homosexuality while at the same time exalting opposite-sex “one-flesh” unions.<sup>190</sup> At its inception, the movement could easily draw on the existing stock of stereotypical opinions regarding homosexuality and pervasive disapproval, thereby greatly reducing information costs<sup>191</sup> As the public understanding of homosexuality gradually changed, however, the traditional values movement has had to incur increasing costs by continuing to champion an outdated view originally popularized by the American Freudians where homosexuality is a diseased condition, susceptible to therapeutic intervention.<sup>192</sup>

Increasingly, the traditional values movement has attempted to distance itself from its views regarding homosexuality and characterize the battle over same-sex marriage as a question

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construction of homosexuality).

<sup>189</sup> See *Id.* at 46-47 (discussing ex-gays).

<sup>190</sup> Robert P. George, *What's Sex Got to do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 73-77 (2004) (explaining natural law concept of “marriage as one-flesh unity”).

<sup>191</sup> See *supra* notes 171 and 172 (discussing easily available stock of negative stereotypes regarding homosexuality).

<sup>192</sup> A 1982 Gallup poll revealed that only 34 percent of the respondents considered homosexuality to be an acceptable “lifestyle.” See, Ontario Consultants on Religious Tolerance, *supra* note 39 (reproducing Gallup results from 1982 through 2003). By 2003, the number of respondents who believed that homosexuality was acceptable had risen to 54 percent. *Id.*

of institutional legitimacy.<sup>193</sup> References to morality and the best interests of the children have taken second place to concerns about the balance of powers and democracy.<sup>194</sup> According to the argument, important questions of moral and cultural significance are uniquely the province of the people to be determined by the precept of majority rule. The “activist judge” has replaced the “homosexual activist” as the object for derision.<sup>195</sup>

#### IV. THE ELEMENTS OF STRATEGIC INSTITUTIONAL CHOICE

The on-going struggle over the recognition of same-sex relationships illustrates a hands-on bottom-up approach to CIA that is an integral feature of any movement for the recognition of minority rights or social change. Advocates seeking to secure recognition of same-sex relationships must evaluate the various institutional alternatives, such as the market, the courts, and the legislature, not simply with regard to their competency to grant the desired quantum of rights, but also in terms of the institutions’ perceived responsiveness to demands for such rights

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<sup>193</sup> For example, Senator Santorum argued that the FMA was necessary because courts “create rights and change the Constitution without having to go through this rather cumbersome process known as article V [the amendment process].” 150 CONG. REC. S 8061, S8074 (daily ed. July 14, 2004) (statement of Sen. Santorum). Senator Santorum warned that if Congress failed to act, “the courts will go about the process, which they have been now for the past couple of decades, and simply change the Constitution without the public being heard.” *Id.* at S8075. He concluded, “That is what this amendment is all about.” *Id.*

<sup>194</sup> Santorum’s full statement represents a hybrid approach where claims of legitimacy are mixed with panic over children being raised by same-sex couples or otherwise influenced by homosexuals. 150 CONG. REC. S 8061 (daily ed. July 14, 2004) (statement of Sen. Santorum).

<sup>195</sup> In 2005 the traditional values movement held two televised conferences called “Justice Sunday” to publicize its criticism of judicial activism and a judiciary that it views as hostile to religion. David D. Kirkpatrick, *Delay to Be on Christian Telecast on Courts*, N.Y. TIMES, Aug. 3, 2005, at A14 (noting Representative Tom Delay, House majority leader agreed to participate). The FRC website includes both “judicial activism” and “judicial reform” as “policy areas.” Family Research Council, *Policy Areas*, at <http://www.frc.org/get.cfm?c=RESEARCH> (last visited Aug. 29, 2005).

and resilience to anti-gay pressure.<sup>196</sup> This strategic analysis does not produce a singular choice, but informs the movement's allocation of resources among the various institutions.

A multi-institutional approach is required because, despite the hopes of some legal scholars, there is no one single rescue institution “waiting in the wings” that can deliver the desired relief with one groundbreaking decision or comprehensive legislation package.<sup>197</sup> A change in the law is not sufficient to effect social change.<sup>198</sup> Moreover, a favorable change in any single institutional setting is potentially transitory in nature. If adequately mobilized, the atomistic forces that shape institutional behavior hold the ultimate majoritarian prerogative. Through the constitutional amendment process, they have the power to redraw the lines that define institutions. Ultimately, they have the power to decide who decides.<sup>199</sup>

An understanding of the strategic nature of CIA can help explain what might appear at first glance to be puzzling choices or results, such as the decision of the LGBT movement to devote much time and resources to securing partial market-based rights. This section discusses the three core components of strategic institutional choice and the use of extra-institutional responses to reverse of blunt gains made in other institutional settings. After addressing the

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<sup>196</sup> As noted earlier, this Essay focuses on the three core institutions: the market, the courts, and the legislature. However, there are arguably a number of other relevant institutions, such as religion, the media, and communities. Within the three core institutions presented for analysis, there is often an important demarcation between federal and state actors. *See supra* notes 49 and 70 (discussing alternative institutional options).

<sup>197</sup> KOMESAR, *supra* note 1, at 24 (faulting the belief “that a perfect or idealized institution is waiting in the wings”). *See also* ROSENBERG, *supra* note 25 (disputing ability of judiciary to effect meaningful social change).

<sup>198</sup> *See* Martha Minow, *Access to Justice: The Social Responsibility of Lawyers: Surprising Legacies of Brown v. Board*, 16 WASH. U. J.L. & POL'Y 11, 14-17 (2004) (discussing resistance to desegregation order by *Brown v. Board of Education*).

<sup>199</sup> KOMESAR, *supra* note 1, at 162 (discussing importance of “who decides”).

relative competence of each institution to grant the desired relief, it compares the responsiveness and resilience of the market with that of the courts and the political system. It also outlines the facility with which the traditional values movement has utilized extra-institutional responses to block relationship recognition on both the state and federal levels, particularly with its resort to direct democracy and the constitutional amendment process.

### **A. Competency**

The market, the courts and the political process are each competent to provide some level of recognition to same-sex relationships. Indeed, all institutions in society are probably competent to do so because the recognition of marriage as a privileged status is so pervasive.<sup>200</sup> At the outset, it is important to make a distinction between relationship recognition and equal marriage rights. Although the goal of the relationship recognition movement has been increasingly expressed as same-sex *marriage*, many important combinations of rights and responsibilities short of marriage are potentially available.<sup>201</sup> The extension of these rights and imposition of these responsibilities sometimes occurs in a piecemeal and uncoordinated fashion; case by case, employer by employer. Whereas these seemingly isolated flashes of recognition do not amount to *marriage*, they often make a significant difference in the lives of the individuals

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<sup>200</sup> On the federal level alone, there are an estimated 1,138 benefits attached to marriage. The Letter from Danya K. Shah, Associate General Counsel, United States General Accounting Office, to Honorable Bill Frist, Majority Leader, United States Senate (Jan. 23, 2004) *available at* <http://www.gao.gov/new.items/d04353r.pdf> (last visited Jan. 22, 2005).

<sup>201</sup> The states that have adopted some form of relationship recognition each created a distinct parallel status typically designed to provide some, but not all, of the rights and responsibilities of marriage. *See infra* text accompanying notes 245-58 (describing different parallel structures). The Vermont structure of Civil Unions is an exception in that it provides identical benefits and responsibilities. *See infra* note 212 (describing civil unions).

involved. They also have potential transformative value. Each instance of recognition furthers the larger social goal of the normalization of homosexuality and provides precedent on which to base future decisions.<sup>202</sup>

Traditionally, marriage is thought to be a state law issue, along with questions of divorce, inheritance, adoption, and tort claims.<sup>203</sup> However, the Defense of Marriage Act established a federal definition of marriage as the union of one man and one woman.<sup>204</sup> DOMA also purports to grant states the right to refuse to recognize same-sex marriages from sister states.<sup>205</sup> Same-sex marriages that are legally performed in Massachusetts are not respected at the federal level,

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<sup>202</sup> In decisions that provide some degree of relationship recognition, courts routinely point to the existence of domestic partnership policies. *See e.g.*, *Langan v. St. Vincent's Hospital*, 196 Misc. 2d 440, 452 (N.Y. Misc. 2003) (supporting decision to recognize Vermont Civil Union for wrongful death purposes with notice of widespread domestic partner policies).

<sup>203</sup> The traditional view is that family law is a state matter. *See e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (identifying family law as “an area that has long been regarded as a virtually exclusive province of the States”). *See contra* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L. Q. 611, 619-23 (2004) (explaining traditional view that marriage is a state issue while outlining history of significant federal regulation).

<sup>204</sup> The Federal Defense of Marriage Act (DOMA) was enacted in 1996 in response to the Hawaii Supreme Court decision in *Baehr v. Lewin*. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). DOMA adds a definition of “marriage” and “spouse” to Title 1 of the United States Code, also known as the Dictionary Act. 1 U.S.C.A. § 7 (2004). It provides:

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 wife.

1 U.S.C.A. § 7 (2004).

<sup>205</sup> DOMA purports to grant states the authority not to recognize same-sex marriages performed in sister states. 28 U.S.C.A. § 1738C (2004). For a discussion of the Full and Faith and Credit concerns raised by this provision see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1996-1997).

and it remains to be seen whether sister states will recognize the unions.<sup>206</sup> As of January 2004, the United States General Accountability Office identified 1,138 federal statutory provisions under “which marital status is a factor in determining or receiving benefits, rights, and privileges.”<sup>207</sup> These include favorable joint tax rates,<sup>208</sup> social security spousal benefits,<sup>209</sup> and pension rights.<sup>210</sup> Accordingly, the attainment of equal marriage rights would require action by the U.S. Supreme Court or Congress.

Although federal recognition has significant consequences, the issuance of marriage licenses is a state matter. A state supreme court or legislature can authorize the issuance of marriage licenses to same-sex couples.<sup>211</sup> In the alternative, a state legislature can choose to create a parallel status that grants all the rights of marriage, such as civil unions in Vermont.<sup>212</sup>

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<sup>206</sup> A New York court recognized a Vermont civil union as the equivalent of marriage for purposes of the state wrongful death statute. In *Langan v. St. Vincent’s Hospital*, the court reasoned that Full Faith and Credit and equal protection considerations required it to treat a civil union in the same manner it would an out-of-state common law marriage. *Langan v. St. Vincent’s Hospital*, 196 Misc. 2d 440, 452 (N.Y. Misc. 2003). Although the case represented the first time that a civil union had been recognized outside of Vermont, it was restricted to the discrete question of whether the decedent’s partner had standing to sue for wrongful death. There is also the issue of whether the same-sex marriages performed in Canada will be recognized. See Michael Cooper, *Hevesi Extends Pension Rights to Gay Spouses*, N.Y. TIMES, Oct. 14, 2004, at B1 (reporting New York State pension fund would recognize same-sex marriages performed in Canada and thereby grant same-sex partners those rights otherwise reserved for spouses).

<sup>207</sup> Letter from Danya K. Shah, *supra* note 200.

<sup>208</sup> 26 U.S.C.A. § 1(a)(2) (2003).

<sup>209</sup> A surviving spouse qualifies for social security death benefits. 42 U.S.C.A. § 402 (2004). The surviving spouse of a deceased retired worker receives one hundred percent of the deceased spouse’s benefits. 42 U.S.C.A. § 402 (2003).

<sup>210</sup> The federal pension statute, ERISA, provides protection for a spouse’s interest in certain retirement funds. See CHAUNCEY, *supra* note 75 (describing federal pension protections).

<sup>211</sup> To date, three state supreme courts have done so: Hawaii, Massachusetts, and Vermont. See *infra* text accompanying notes 259-61.

<sup>212</sup> Vermont established civil unions under which parties to the union are granted “all the

Or, it can choose to create a partial status that carries some, but not all, of the rights and responsibilities of marriage, such as reciprocal beneficiaries in Hawaii.<sup>213</sup> In any event, the benefits extended will be limited in scope to those that the granting jurisdiction has to offer. This question of portability remains an important aspect of competency because gains made on a state or local level are rarely transferable to another jurisdiction.<sup>214</sup> For example, a state can permit a same-sex couple to file joint income tax returns for state purposes, but, in light of DOMA, a valid marriage license will not prompt the federal government to extend the same privilege.<sup>215</sup> Finally, state courts and legislatures can provide specific relief to same-sex partners on a case-by-

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same benefits, protections and responsibilities . . . whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in marriage.” VT. STAT. ANN. tit. 15, §1204(a) (2002). This broad grant of rights includes equal status under the rules of intestate succession. VT. STAT. ANN. tit. 15, § 1204(e)(3) (2004).

<sup>213</sup> Hawaii established the category of “reciprocal beneficiary relationship” in order “to extend certain rights and benefits which [were] presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.” HAW. REV. STAT. ANN. § 572C-1 (Michie 1999). Individuals must sign a “declaration of reciprocal beneficiary relationship” in order to be eligible for certain benefits. HAW. REV. STAT. ANN. § 572C-5 (Michie 1999). A reciprocal beneficiary is afforded the same status as a spouse under the rules of intestate succession. HAW. REV. STAT. ANN. § 560:2-102 (Michie 1999).

<sup>214</sup> Unlike the partial market-based benefits, the courts have the ability to order the issuance of marriage licenses to same-sex couples. With marriage would come the full panoply of rights and responsibilities available to married couples. On the federal level, it remains to be seen whether *Lawrence v. Texas* will lead to the recognition of a fundamental right to marry a same-sex partner and the invalidation of DOMA, as well as the state constitutional amendments and state defense of marriage acts which restrict marriage to one man and one woman. Justice Scalia seems to believe that this day has arrived, but marriage litigation at the federal level is not currently being pursued by any of the leading advocacy groups. However, for many dedicated to the goal of equal marriage rights, the struggle for the recognition of same-sex relationships will not be over until the U.S. Supreme Court extends the holding of *Loving v. Virginia* to same-sex partners. *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>215</sup> See E.J. Graff, *Marrying Outside the Box*, N.Y. TIMES MAG., April 10, 2005, at 22 (noting for first time individuals married under state law will be denied right to file as married for federal income tax purposes).

case basis that is not part of an over-arching scheme of relationship recognition.<sup>216</sup>

On the local level, the scope of available benefits is even more limited. By ordinance, a municipality or county can establish the status of domestic partner and provide a registry system to formalize the relationship.<sup>217</sup> The registry provides a governmental acknowledgement of the relationship, but the rights obtainable under these ordinances are necessarily limited to those rights that a municipality or county can grant.<sup>218</sup> These could include the right to visit a same-sex partner incarcerated at a county prison, municipal tax benefits enjoyed by married couples, and the ability to transfer certain municipal licenses, such as a liquor license, to a same-sex partner.<sup>219</sup>

Within the market, the recognition of same-sex couples has come in the form of domestic partnership employee benefits and other instances where third-party service providers choose to treat same-sex couples the same as married couples. The latter would include insurance companies that extend “married” rates to same-sex couples<sup>220</sup> and country clubs that offer family

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<sup>216</sup> See e.g., *supra* note 162 (discussing Vasquez’s equitable claim against his partner’s estate).

<sup>217</sup> The act of registration also provides evidence of the relationship if it were to be challenged in litigation. This poses a potential trap for the unwary. Because domestic registry provide little in the way of tangible benefits, it is reasonable that same-sex couples might not take the time to register. However, the lack of registration – for admittedly meager benefits – could be used at a later date to undermine the existence of the relationship or its seriousness.

<sup>218</sup> Such ordinances grant relative few benefits to non-municipal employees. Knauer, *supra* note 21, at 346-48. However, the San Francisco domestic partnership ordinance goes one step further and requires all city contractors to offer domestic partnership benefits equal to those provided for spouses. *Myers v. City and County of San Francisco*, 253 F.3d 461, 467-76 (9th Cir. 2001) (upholding ordinance). In this way, the ordinance benefits a wider class of employees.

<sup>219</sup> The San Francisco Human Rights Commission website maintains a comprehensive list of all domestic partnership ordinances on the city and county level, including the requirements for registration and the rights conferred. San Francisco Human Rights Commission, *State Domestic Partnership Registries*, available at [http://www.sfgov.org/site/sfhumanrights\\_page.asp?id=6283](http://www.sfgov.org/site/sfhumanrights_page.asp?id=6283) (last visited Aug. 29, 2005).

<sup>220</sup> Lambda Legal, *Top Three Car Insurance Companies in New York Will Recognize Gay*

memberships to same-sex couples.<sup>221</sup> Private contract also can help order the rights and responsibilities of individuals in same-sex relationships with documents involving property distribution or substituted decision making.<sup>222</sup>

Market-based solutions are by their nature inadequate to provide wide-spread and comprehensive protection for same-sex relationships, in that employer-provided domestic partnership benefits extend only to a limited class of workers.<sup>223</sup> However, workplace domestic partner benefits can be very valuable due to the structure of health care in the United States where health insurance is linked to employment.<sup>224</sup> A married worker whose employment package includes health insurance can generally elect to cover her spouse and children, resulting

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*Couples*, at <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1515> (last visited Aug. 29, 2005).

<sup>221</sup> In *Koebke v. Bernandino Heights Country Club*, the Supreme Court of California ruled that registered domestic partners were equivalent to married couples for purposes of discrimination laws applying to private businesses. *Koebke v. Bernandino Heights Country Club*, 36 Cal. 4<sup>th</sup> 824 (2005).

<sup>222</sup> As noted earlier, however, private contract is not sufficient to provide surviving same-sex partners with rights against third parties. *See supra* note 142. In particular, wills remain vulnerable to challenge by the next of kin, although the frequency with which next of kin actually contest wills which primarily benefit surviving same-sex partners is not clear nor is it easily susceptible to study. *See* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1075 (1999).

<sup>223</sup> The benefits are limited to the employees of the slightly over 8,000 employers who offer some level of domestic partner benefits and do not confer rights enforceable against third parties. *See infra* note 268 (citing number and types of employers which offer domestic partner benefits). It is likely further limited to the full-time employees of such employers, as part-time employees typically work without benefits.

<sup>224</sup> An estimated 45 million Americans do not have health insurance. Robert Pear, *Health Leaders Seek Consensus Over Uninsured*, N.Y. TIMES, May 29, 2005, at A1 (noting Census data estimating 45 million Americans are uninsured). With 45 million uninsured individuals, employment that includes health benefits is very desirable. *Id.* High health care costs significantly increase the disparity between the compensation packages of married employees and employees in same-sex relationships without domestic partner benefits.

in greater costs for the employer and an additional co-pay for the employee.<sup>225</sup> In addition to health insurance benefits, employment packages often include a variety of spousal benefits, including bereavement or sick leave, tuition reimbursement, and retirement or pension benefits.<sup>226</sup> Domestic partnership benefits extend these spousal benefits, or some subset of them, to same-sex partners.<sup>227</sup>

## **B. Responsiveness.**

Beyond assessing the competency of an institution, strategic institutional choice must be predictive in nature. Inquiring how responsive a given institution will be to a demand ensures that resources are not imprudently allocated to an ideal, but remote, institutional choice.<sup>228</sup> This assessment involves issues of design, including structural roadblocks and susceptibility to majoritarian influence or bias.<sup>229</sup> The institutional jockeying of the traditional values movement has produced a number of structural roadblocks that are specifically designed to inhibit an institution's responsiveness to a demand for recognition of same-sex relationships. For example, the extent to which the courts in a given jurisdiction are receptive to demands for relationship recognition may depend on whether the jurisdiction has a state DOMA and/or a state

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<sup>225</sup> Employee benefits comprise an estimated 40 percent of a total compensation package. Human Rights Campaign, *Why Employers Offer Domestic Partner Benefits*, at [http://www.hrc.org/Content/NavigationMenu/Work\\_Life/Get\\_Informed2/The\\_Issues/Why\\_Employers\\_Offer/Why\\_Employers\\_Offer.htm](http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/The_Issues/Why_Employers_Offer/Why_Employers_Offer.htm) (last visited Aug. 29, 2005).

<sup>226</sup> For a comprehensive discussion of the different types of benefits offered and different types of domestic partner benefit programs see ACLU, *Domestic Partnership*, at <http://www.aclu.org/GetEqual/rela/domestic.html> (last visited July 31, 2005).

<sup>227</sup> *Id.*

<sup>228</sup> An example of this would have been a decision to pursue marriage litigation in the 1970s. See *supra* note 98. The result would have likely been an accumulation of bad precedent.

<sup>229</sup> KOMESAR, *supra* note 1, at 62-63 (describing two-force model of majoritarian and

constitutional amendment restricting marriage to one man and one woman.<sup>230</sup> Forty-four states have either a state-wide DOMA or a state constitutional amendment restricting marriage.<sup>231</sup> Many states have now have both.<sup>232</sup> The number of states with these roadblocks illustrates that the goal of relationship recognition has not been able to command broad support, thereby making it particularly vulnerable to majoritarian influence or bias.<sup>233</sup>

In terms of responsiveness, the greatest gains have been made in the marketplace, on the regional and local level in the political process, and in individual court challenges asking for some form of partial and discrete recognition.<sup>234</sup> Thus, there appears to be an inverse relationship between an institution's responsiveness to demands for recognition and its competency to provide comprehensive relief; the least competent institutional settings are the

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minoritarian bias).

<sup>230</sup> See Garrow, *supra* note 100 (describing strategy for marriage litigation).

<sup>231</sup> Forty-four states have defense of marriage acts that define marriage as the union between one man and one woman or state constitutional amendments prohibiting same-sex marriage. Human Rights Campaign Foundation, *State Wide Marriage Laws*, available at [http://www.hrc.org/Template.cfm?Section=Your\\_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449](http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449) (last visited Aug. 19, 2005). All but three of these provisions were enacted in response to the marriage litigation of the 1990s. *Id.* In addition, California passed a law restricting marriage in 1977 and then passed a law in 2000 that refuses to recognize same-sex marriages performed in other jurisdictions. *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> These federal and state anti-marriage provisions were largely of academic interest because no state recognized same-sex marriage until the implementation of the *Goodridge* decision in June of 2004. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). However, the implementation of *Goodridge* and the U.S. Supreme Court's decision in *Lawrence v. Texas* led to a renewed interest in anti-marriage legislation on both the federal and state level. *Lawrence v. Texas*, 539 U.S. 558 (2003). In 2004, 25 state constitutional anti-marriage amendments were introduced, many of which purported to prohibit not only same-sex marriage, but also any parallel status that would grant "the incidents of marriage." Human Rights Campaign Foundation, *supra* note 136.

<sup>234</sup> This would be domestic partner employee benefits, municipal domestic partner registries, and cases such as the ones brought by Frank Vasquez and Sharon Smith. See *supra*

most responsive. Employer-provided domestic partnership benefits are now commonplace, but they remain a partial benefit reserved for a privileged few.<sup>235</sup> Sixty-nine municipalities and counties have enacted some form of recognition for same-sex couples, but the recognition is largely symbolic.<sup>236</sup> Courts have also recognized same-sex partners as family in very specific instances, such as protection from eviction under municipal rent control guidelines,<sup>237</sup> standing to sue for wrongful death,<sup>238</sup> and the right to take from a partner's estate.<sup>239</sup> However, these decisions are based on the notion of a "functional" family or equitable principles, not a declaration of equality for same-sex couples.<sup>240</sup>

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notes 162 and 185 (discussing the Vasquez and Smith cases, respectively).

<sup>235</sup> See *infra* text accompanying notes 257-69 (discussing prevalence of domestic partner benefits).

<sup>236</sup> See *supra* note 218 (discussing quantum of benefits available under municipal ordinances).

<sup>237</sup> New York City rent control guidelines allowed a member of the decedent's immediate family who shared the household to stay in a rent controlled apartment even where the family member was not a named party to the lease. The ground-breaking 1989 case of *Braschi v. Stahl Associates Co.*, extended this protection to a surviving same-sex partner through the adoption of a functional definition of family, with an emphasis on mutual interdependence. *Braschi v. Stahl*, 543 N.E.2d 49 (N.Y. 1989).

<sup>238</sup> Standing to sue for wrongful death is established by statute. See *Culhane*, *supra* note 143 (describing origin of wrongful death actions). The order of priority starts with the surviving spouse and continues through the next of kin. *Id.* Only a handful of states include surviving same-sex partners as spousal equivalents

<sup>239</sup> See *supra* note 162 (discussing equitable claim brought by Frank Vasquez against his partner's estate).

<sup>240</sup> In response to specific demands for recognition, courts in many states have expanded the notion of family to allow second-parent adoption and mandate visitation or shared custody for non-biological parents, expressing an element of pragmatism that acknowledges the changing face of the American family. See *supra* note 168 (discussing Census data regarding number of same-sex couples raising children). Other courts have used equitable principles. By and large, these decisions have not recognized same-sex partners *qua* spouses. Some courts have interpreted anti-discrimination laws to compel employers to provide domestic partner benefits and private business to offer spousal rates to same-sex couples. For example, the California Supreme Court recently ruled that registered domestic partners were equivalent the

With respect to the local and regional gains secured through the political process, one explanation for this success is that majoritarian forces are not sufficiently motivated to challenge these partial and piecemeal episodes of recognition. The pro-recognition gains at issue are relatively modest or symbolic in nature and not portable.<sup>241</sup> Arguably, these types of gains do not pose a direct “threat” to traditional marriage and, as a result, mobilization carries with it relatively low stakes and very diffuse benefits. In such cases, the concentrated interests of a high stakes minority can easily overwhelm the slumbering majority.

As an alternative to this capture scenario, it is possible that relationship recognition *can* garner majority support among certain demographics.<sup>242</sup> Thus, the explanation for the local and regional gains lies in the geographic outlines of the nation’s growing polarization on social issues, such as homosexuality.<sup>243</sup> For example, public opinion polls show that 75% of the residents of the San Francisco Bay area favor same-sex marriage whereas that figure drops to 49% when measured nationwide.<sup>244</sup> The municipal ordinances might reflect a geographically discrete pro-recognition majority that is lost once the frame is amplified to the state or national level. Predictably, the traditional values movement excels at expanding the frame to secure the

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married couples for purposes of discrimination laws applying to private businesses. *Koebke v. Bernardino Heights Country Club*, 36 Cal. 4<sup>th</sup> 824 (2005).

<sup>241</sup> See *supra* note 218 (discussing quantum of benefits conferred by municipal ordinances).

<sup>242</sup> This would represent a more nuanced polarization than suggested by the popular Red v. Blue states explanation. See *supra* note 29 (explaining the Red and Blue state designations). As some commentators have suggested, there are often Blue urban areas surrounded by a big Red state. See e.g., John Wildermuth, *Red State, Blue State: California’s Political Map Reflects the Nation*, S.F. CHRON., Nov. 7, 2004, at A1.

<sup>243</sup> For a breakdown of views regarding relationship recognition on the basis of party affiliation, age, and region see WIKIPEDIA, *supra* note 134.

<sup>244</sup> *Same-Sex Marriage: Summary of Key Findings*, ABC7news.com, at

broadest possible voter or constituent base.

On the state level, no legislature has authorized same-sex marriage.<sup>245</sup> The legislatures of six states and the District of Columbia have granted some level of recognition to same-sex couples. The jurisdictions represented are all decidedly in the “Blue-state” camp:<sup>246</sup> California,<sup>247</sup> Connecticut,<sup>248</sup> District of Columbia,<sup>249</sup> Hawaii,<sup>250</sup> Maine,<sup>251</sup> New Jersey,<sup>252</sup> and

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<http://abclocal.go.com/kgo/story?section=local&id=3306039> (last visited Aug. 27, 2005).

<sup>245</sup> A bill legalizing same-sex marriage was voted out of committee in the California legislature in 2005 and heard on the floor of the Senate. Linda Gledhill, *Same-Sex Marriage Bill Clears Committee*, S.F. CHRON., Aug. 26, 2005, at B2. **[add result when it occurs]**

<sup>246</sup> For a list of the “Blue” states see [http://en.wikipedia.org/wiki/Red\\_states](http://en.wikipedia.org/wiki/Red_states).

<sup>247</sup> CAL. FAM. CODE §§ 297, 297.50, 290, 298.5 (West 2004) (establishing procedure for “Registered domestic partners”). Effective January 1, 2005, “registered domestic partners” enjoy substantially all the rights and responsibilities enjoyed by spouses under California law. Assemb. B. 205, 1st Sess. (Cal. 2003-04). Prior law had extended to “registered domestic partners” a number of rights traditionally reserved for spouses, including inheritance rights, certain health care decision-making authority, and standing to sue for wrongful death. CAL. CIV. PRO. CODE § 377.60 (2004).

<sup>248</sup> In 2005 Connecticut enacted civil union legislation. 2005 CT. ALS 3; 2005 CT. P.A. 3; 2005 CT. HB 7502 (2005). The Connecticut law is modeled on Vermont’s civil union legislation and grants all the rights and responsibilities applicable to married couples. *Id.* Unlike Vermont, Connecticut was not pressured to do so through litigation. William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. TIMES, April 21, at B5

<sup>249</sup> The District of Columbia provides a domestic partner registry. D.C. CODE § 32-701, *et seq.* The legislation provides domestic partner benefits for the employees of the District of Columbia. D.C. CODE § 32-705. It also provides limited benefits, such as the right of visitation in District hospitals. D.C. § 32-704. Congress blocked the implementation of the domestic partner provisions for nine years. Adam Clymer, *House Approves D.C.’s Law on Rights of Domestic Partners*, N.Y. TIMES, Sept. 21, 2001, at A12.

<sup>250</sup> HAW. REV. STAT. § 572C-1 (2004). Hawaii enacted legislation granting certain inheritance and other rights to “reciprocal beneficiaries.” *Id.*

<sup>251</sup> In 2004, Maine enacted legislation establishing a state-wide domestic partner registry and extending to same-sex couples certain health-care decision-making authority and inheritance rights equivalent to spouses. 22 M.R.S. § 2710(2005).

<sup>252</sup> New Jersey’s newly enacted status of “domestic partners” extends certain medical decision-making authority to same-sex partners, as well as certain insurance and state tax benefits. N.J. STAT. ANN. §§ 26:8A-1 to 8A-11 (2004).

Vermont.<sup>253</sup> In some of these instances, the legislation was the product of pending litigation or, in the case of Vermont, an express court order.<sup>254</sup> The state-wide legislation varies with respect to the scope of the rights granted. Civil Union status in Vermont carries with it all of the benefits and responsibilities of marriage.<sup>255</sup> The California domestic partnership law extends a substantial number of rights that are commonly associated with marriage to registered domestic partners,<sup>256</sup> as does Connecticut's newly enacted domestic partnership law.<sup>257</sup> On the other end of the spectrum, the New Jersey domestic partnership law grants registered domestic partners certain decision making authority and state tax benefits, but little in the way of substantive property rights.<sup>258</sup>

If the failure to secure gains through the political process is due to majoritarian bias, then the presumed top-down nature of courts should predict that the courts would be more responsive to demands for minority recognition than the political process. However, both the courts and the legislature have been reluctant to grant broad-based recognition. The Supreme Courts of only three states, Hawaii,<sup>259</sup> Vermont,<sup>260</sup> and Massachusetts,<sup>261</sup> have held that the denial of marriage

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<sup>253</sup> VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004). Vermont established same-sex civil unions. *Id.* The parallel status extends to same-sex couples who enter into civil unions the benefits and responsibilities equivalent to spouses. *Id.*

<sup>254</sup> Baker v. State, 744 A.2d 864 (Vt. 1999).

<sup>255</sup> VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004).

<sup>256</sup> CAL. FAM. CODE §§ 297, 297.50, 290, 298.5 (West 2004) (establishing procedure for "Registered domestic partners"). *See also* CAL. CIV. PRO. CODE § 377.60 (2004) (inheritance and wrongful death).

<sup>257</sup> 2005 CT. ALS 3; 2005 CT. P.A. 3; 2005 CT. HB 7502 (2005).

<sup>258</sup> N.J. STAT. ANN. §§ 26:8A-1 to 8A-11 (2004).

<sup>259</sup> Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

<sup>260</sup> Baker v. State, 744 A.2d 864 (Vt. 1999).

<sup>261</sup> Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003)

licenses to same-sex couples violates their state constitutions.<sup>262</sup> As explained more fully in the following section, only the Massachusetts decision was implemented.

One possible explanation for this lackluster response is that in this particular struggle the courts involved are for the most part state courts where the majority of judges are elected and, therefore, are perhaps more susceptible to the types of majoritarian or minoritarian bias that plague the political process than the federal judiciary.<sup>263</sup> Unlike federal judges who serve with Article III lifetime tenure, 87% of all state judges are elected, including the supreme court justices of 38 states.<sup>264</sup> Although state court judges typically serve longer terms than legislators,<sup>265</sup> the fact that many state judges remain responsible to local voters might explain certain jurisdictional differences.<sup>266</sup>

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<sup>262</sup> The cases have all been decided on state constitutional grounds, thereby making them not appealable to the U.S. Supreme Court.

<sup>263</sup> In part, the emphasis on state courts and state constitutions represents the lingering effect of *Bowers v. Hardwick*. *Bowers v. Hardwick* 478 U.S.186 (1986). It also represents the continuing effect of DOMA. Writing for the majority in *Bowers*, Justice White stated unequivocally, that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.” *Bowers*, at 191. This precedent forced advocates to look to state courts for relief and relationship recognition, given the absence of protection under the U.S. Constitution

<sup>264</sup> Brennan Center, *Press Release*, June 27, 2002, available at [http://www.brennancenter.org/presscenter/releases\\_2002/pressrelease\\_2002\\_0525.html](http://www.brennancenter.org/presscenter/releases_2002/pressrelease_2002_0525.html).

<sup>265</sup> Some judges are initially chosen in a contested elections and thereafter only stand for a yes or no retention vote. *Id.* Others are appointed to an initial term and then stand for retention. *Id.* Longer terms and the retention votes, give judges greater security than members of Congress or state legislators. Notwithstanding this added security, the cost of judicial campaigns has increased significantly in recent years. *Id.* For example, candidates for state Supreme Court raised an estimated \$45.6 million during 2000 campaign, which represented a 61 percent increase over the amount raised in 1998 and a 200 percent increase over that raised 1994. *Id.*

<sup>266</sup> Judges who must stand for election in progressive jurisdictions may be more likely to reflect the values of their constituents. This need not be a question of ideology and judicial activism. For example, judges who live in communities with a large visible population of gay men and lesbians may be more likely to apply the functional family definition that reflects the

The responsiveness of the market to demands for relationship recognition stands in sharp contrast to the reluctance exhibited by the courts and legislatures. For example, 8286 employers offer domestic partner benefits, including 244 of the Fortune 500 companies, 11 state governments, 130 cities and municipalities, and 295 colleges and universities.<sup>267</sup> An even greater number of employers have included sexual orientation in their anti-discrimination policies.<sup>268</sup> Indeed, domestic partnership policies are now so widespread in both the private and public sectors that LGBT lobbyists argue in favor of the Federal Domestic Partnership Bill on competition grounds, asserting that “[c]orporate America is leaving the federal government in its dust[.]”<sup>269</sup>

The market was the first mover with respect to formalized relationship recognition, and its innovation of domestic partnership benefits provides an excellent example of the dynamic process that can take place when institutions participate in the formation and articulation of contested social goals.<sup>270</sup> Any institutional response to a demand, whether positive or negative,

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changing face of the American family. *See supra* note 168 (discussing 2000 Census data).

<sup>267</sup> Human Rights Campaign, *supra* note 114.

<sup>268</sup> The first private employer to offer domestic partner benefits was the alternative weekly, THE VILLAGE VOICE. ACLU, *supra* note 226. Two years later, Berkeley became the first municipal employer to offer the benefits. Despite its counterculture origins, domestic partner benefits have now been accepted as part of the corporate mainstream.

<sup>269</sup> HRC, *HRC Urges Passage of the Federal Domestic Partnership Bill*, July 14, 2005, available at [http://www.hrc.org/Template.cfm?Section=The\\_Issues&CONTENTID=27901&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.hrc.org/Template.cfm?Section=The_Issues&CONTENTID=27901&TEMPLATE=/ContentManagement/ContentDisplay.cfm) (last visited July 31, 2005) (quoting HRC President Joe Solmonese). According to the HRC, managers report that domestic partner benefits are a relatively inexpensive and very effective recruitment and retention tool. Human Rights Campaign, *supra* note 225.

<sup>270</sup> It is important to keep the market-based domestic partnership status distinct from a relationship status granted through the political process that is designed to provide parallel benefits to marriage. For example, in 2005 California extended to same-sex couples who register

also helps to shape the next demand and refine the stated goal. The market not only coined the term domestic partner, it participated in the construction of the concept that is now widely deployed both socially and politically to convey something much more than an eligible recipient of certain employee benefits.<sup>271</sup>

The concept of domestic partnership had very pragmatic roots. When employers started to extend benefits to their employees' same-sex partners in the 1980s, it was necessary to determine who qualified for these newly created benefits. The definition, crafted in conjunction with LGBT advocacy groups, has influenced state and municipal relationship-recognition schemes, as well as court decisions attempting to define functional families. Unlike a married employee, and employee with a same-sex partner could not rely on the bright-line status of state-sanctioned marriage to telegraph the legitimacy of her relationship.<sup>272</sup> Accordingly, employers developed a multi-part inquiry that attempted to disaggregate the hallmarks of a committed spousal-type relationship. It required a statement of commitment,<sup>273</sup> adherence to otherwise applicable marriage requirements, such as minimum age, prohibited degrees of consanguinity,

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as “domestic partners” many of the rights and responsibilities enjoyed by opposite married couples. *See supra* note 256. The potential for confusion arises because the market was the first mover in the area of recognition of same-sex partners and “domestic partnership” was a marketplace innovation. In addition, municipalities were among some of the early employers to offer benefits for domestic partners.

<sup>271</sup> A simple dictionary definition of the term “domestic partner” provides: “A person, other than a spouse, with whom one cohabits.” Houghton Mifflin Dictionary, *Domestic Partner*, available at <http://www.answers.com/topic/domestic-partnership> (last visited July 31, 2005).

<sup>272</sup> Today, employers typically require employees to sign an affidavit, and, in many instances, submit supporting documents as proof of the relationship in order to prove their eligibility for domestic partner benefits. HRC, *Domestic Partner Definition*, at [http://www.hrc.org/Content/NavigationMenu/Work\\_Life/Get\\_Informed2/The\\_Issues/Domestic\\_Partners\\_Definition/Domestic\\_Partners\\_Definition.htm](http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/The_Issues/Domestic_Partners_Definition/Domestic_Partners_Definition.htm) (last visited July 31, 2005).

<sup>273</sup> The statement of commitment is sometimes referred to as the “hearts and flowers”

exclusivity, and finally proof of financial interdependence.<sup>274</sup>

### C. Resilience.

The question of resilience attempts to measure the potential longevity of any gain by predicting an institution's ability to withstand counter-demands. Often the counter-demands are made through intra-institutional channels and represent the common give and take associated with politics. For example, the traditional values movement has waged consumer boycotts of firms granting domestic partnership benefits,<sup>275</sup> threatened to impeach judges who are perceived to be pro-gay,<sup>276</sup> and worked to frustrate the re-election attempts of legislators who supported relationship recognition.<sup>277</sup> However, the real success of the traditional values movement has been its ability to harness the natural advantage enjoyed by the majority in the political process, particularly when paired with an unpopular minority. The result has been a steady stream of prophylactic legislation in the form of state DOMAs designed to forestall relationship recognition and a series of counter demands designed to reverse gains already realized.<sup>278</sup> The latter course often involves appealing to a wider demographic, such as subjecting a regional or

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clause ACLU, *supra* note 226.

<sup>274</sup> Financial interdependence often can be shown by a variety of means, such as joint ownership of property and reciprocal beneficiary designations. *Id.*

<sup>275</sup> See *supra* note 121 (discussing Southern Baptist Convention boycott of the Walt Disney Company).

<sup>276</sup> See e.g., Dana Milbank, *And the Verdict on Justice Kennedy is: Guilty* WASH. POST, April 9, 2005, at A09 (reporting on meeting of conservatives where consensus was that Justice Kennedy, author of majority opinion in *Lawrence*, "should be impeached, or worse").

<sup>277</sup> For example, the Christian Coalition publishes a Congressional scorecard that rates the annual performance of members of Congress on a scale of 0 to 100. Representative Barney Frank, an openly gay Congressman from Massachusetts, scored a 7 for 2004. Christian Coalition, *House Issues*, available at <http://www.cc.org/scored.pdf> (last visited on Sept. 2, 2005).

<sup>278</sup> Many of the states enacted these so-called "mini-DOMAS" following *Baehr v. Lewin*. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). See *supra* note 231 (discussing number of states with

local gain to a state-wide referendum. It also involves using extra-institutional avenues, such as attempting to moot a court decision by legislation or a state-constitutional amendment.

In the case of relationship recognition, the pattern of escalating counter-demands that expand the jurisdictional frame or appeal to another institution began after the 1993 decision of *Baehr v. Lewin*.<sup>279</sup> Once the Hawaii Supreme Court ruled that the failure to grant marriage licenses to same-sex couples violated the Equal Rights amendment to the state constitution, it took another several years and numerous decisions for the court to conclude that the state had not established a compelling state interest that would justify the denial.<sup>280</sup> Before the case concluded, however, the voters mobilized, amended the state constitution through a referendum process, and mooted the decision.<sup>281</sup> This trajectory was followed again in 1998 when an intermediate court in Alaska ruled in favor of same-sex marriage.<sup>282</sup>

Clearly, when assessing the potential responsiveness of a state court to a demand for

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anti-marriage legislation).

<sup>279</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The traditional values movement, however, had successfully employed similar methods in connection with its attempt to stop the spread of anti-discrimination protection.

<sup>280</sup> *Baehr v. Miike*, 1996 WL 694235 (Cir. Ct. Haw. No. 91-1394, Dec. 3, 1996). At the trial level, Judge Change made extensive findings of fact and concluded that the state, which had relied on a modified ‘best interests’ of the children argument, had failed to meet its burden. *Id.* For an overview of this very complicated and protracted litigations see Human Rights Campaign, *Same-Sex Marriage from Frontline to Footnote*, available at <http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=18157&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Aug. 31, 2005).

<sup>281</sup> *Baehr v. Miike*, 1999 Haw LEXIS 391 (1999) (ruling constitutional amendment rendered lower court decision moot). Article I, Section 23 of the Constitution of the state of Hawaii now provides: “The legislature shall have the power to reserve marriage to opposite-sex couples.” HRS CONST. ART. I §23 (2005). The Hawaii Supreme Court held that the amendment validated the sex-specific marriage law. *Id.* See CHAUNCEY, *supra* note 96, at 126 (describing concerted effort by national organization to derail same-sex marriage in Hawaii).

<sup>282</sup> *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 at 1

same-sex marriage, it is important to address any structural roadblocks which would include the prophylactic measures such as a state-wide DOMA.<sup>283</sup> However, the lessons of Hawaii and Alaska illustrate that in order to measure resilience, it is essential to consider the state constitutional amendment process.<sup>284</sup> By design, the next two state supreme court decisions favorable to same-sex marriage occurred in jurisdictions with much more cumbersome amendment processes and the outcomes in both case were very different.<sup>285</sup>

In 1999, the Vermont Supreme Court ruled that same-sex couples were entitled to the same rights and privileges afforded to married couples.<sup>286</sup> The decision specifically suspended the issuance of marriage licenses to same-sex couples until the state legislature could attempt to remedy the situation.<sup>287</sup> A year later, the legislature enacted the parallel status of Civil Unions which granted same-sex couples all of the rights of marriage in order to avoid the implementation of the 1999 court decision.<sup>288</sup> Vermont does not have a state-wide referendum process and, therefore, the decision could not be overturned by resort to direct democracy.<sup>289</sup> Only the state legislature can introduce a constitutional amendment and the process takes a period of several years.<sup>290</sup>

In 2003 the Massachusetts Supreme Court held in *Goodridge* that the state constitution

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(Alaska Super. Ct. Feb. 27, 1998).

<sup>283</sup> See Garrow, *supra* note 100 (describing evolution of marriage litigation strategy).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>287</sup> *Id.*

<sup>288</sup> VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004).

<sup>289</sup> Vermont does not have a statewide initiative process. V.S.A. CONST. Ch. II, § 72 (2004).

<sup>290</sup> *Id.*

requires equal treatment of same-sex couples with respect to marriage.<sup>291</sup> In an advisory opinion, the majority of the justices of the Massachusetts Supreme Court concluded that proposed Vermont-style civil union legislation would not cure the constitutional infirmity, noting that the difference between civil unions and civil marriage “is more than semantic.”<sup>292</sup> Although aggrieved voters mobilized around a state constitutional amendment, procedural constraints dictated that it could not be considered by the voters until 2006.<sup>293</sup> Massachusetts began issuing marriage licenses to same-sex couples in 2004.<sup>294</sup> There are currently marriage cases pending in five states: California, Maryland, New Jersey, New York, and Washington.<sup>295</sup>

The prophylactic measures spawned by *Baehr v. Lewin* began as definitional statutes designed to clarify for the courts that marriage was by definition a union only between one man and one woman.<sup>296</sup> This type of statute is reflected in the federal DOMA and the many state DOMAs that were passed immediately following *Baehr*.<sup>297</sup> The scope of these measures has expanded over time. Some constitutional amendments restricted the jurisdiction of the courts by

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<sup>291</sup> Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution).

<sup>292</sup> Opinion of the Justices to the Senate, 802 N.E. 2d 565, 570 (2004).

<sup>293</sup> See *supra* note 140 (describing constitutional amendment process).

<sup>294</sup> Massachusetts began issuing marriage licenses to same-sex couples on May 17, 2004. Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16.

<sup>295</sup> LambdaLegal, *Marriage Project*, at <http://www.lambdalegal.org/cgi-bin/iowa/issues/record2?record=9> (last visited July 31, 2005).

<sup>296</sup> DOMA falls into this category. See *supra* note 204 (describing DOMA). It amended the U.S. Dictionary Act to provide that for all federal purposes “marriage” could only be between one man and one woman. 1 U.S.C.A. § 7 (2004).

<sup>297</sup> In its 1993, the Hawaii Supreme Court remanded the case to be considered under the appropriate constitutional standard requiring the government to show a compelling state interest in denying marriage licenses to same-sex couples. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The trial was postponed for three years, and finally started in 1996 on the same day the U.S.

consigning the definition of marriage to the legislation.<sup>298</sup> Measures aimed at restricting the powers of the courts reflect the traditional values movement’s growing hostility toward “activist” judges and the “Imperial Judiciary.”<sup>299</sup> In 2004 the U.S. House of Representatives passed a court-stripping bill that purports to limit the power of the federal judiciary to decide the constitutionality of DOMA.<sup>300</sup>

As explained more fully in the following section, the traditional values movement has cast a wider net in attempts to address all forms of relationship recognition, not simply demands for equal marriage rights. Recent state constitutional amendments prohibit same-sex marriage, as well as any grant of “the incidents of marriage.”<sup>301</sup> States have also chosen to address individual

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Senate approved DOMA. CHAUNCEY, *supra* note 96, at 125.

<sup>298</sup> For example, the amendment to the Hawaii constitution reserves for the legislature the power to define marriage. HRS CONST. ART. I §23 (2005). Article I, Section 23 of the Constitution of the state of Hawaii provides: “The legislature shall have the power to reserve marriage to opposite-sex couples.” *Id.*

<sup>299</sup> The traditional values movement has increasingly attacked judges who author pro-gay opinions. For example, Justice Kennedy, who authored the majority opinion in *Lawrence v. Texas*, has been singled out for some particularly pointed criticism. Milbank, *supra* note 276 (reporting on meeting of conservatives where consensus was that Justice Kennedy “should be impeached, or worse”). This treatment is part of a larger ideological objection to “activist” judges who are perceived to have overstepped their authority and usurped the legislative role. *See supra* note 195 (discussing “Justice Sunday”). This hostility bubbled over during the Terri Schiavo controversy when U.S. House majority leader, Tom Delay warned, “The time will come for the men responsible for this to answer for their behavior.” Carl Hulse and David D. Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Apr. 1, 2005, at A1 (reporting Rep. Delay “threatened retribution”).

<sup>300</sup> Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004). *See* Alexander K. Hopper, *Recent Development: Jurisdiction-Stripping: The Pledge Protection Act of 2004*, 42 HARV. J. ON LEGIS. 511 (2005) (discussing court-stripping and focusing on Pledge Protection Act).

<sup>301</sup> For example, the amendment to the Ohio Constitution adopted in 2004 specifically addresses attempts “to approximate the design, qualities, significance or effect of marriage.” OH. CONST. ART. XV, § 11 (2005). This differs from the standard type of DOMA that was adopted by Mississippi in 2004. MISS. CONST. ANN. ART. 14, § 263A (2005). Section 263A of the

instances of relationship recognition. For example, Oklahoma recently enacted a law that refuses to recognize a second-parent adoption from a sister state.<sup>302</sup> Virginia, on the other hand, chose to enact a blanket statute that purports to void all private contracts “between persons of the same sex purporting to bestow the privileges of marriage.”<sup>303</sup>

This new generation of counter-measures has placed the continued resilience of marketplace gains in question. The site of some of the most widespread gains in terms of relationship recognition, the market has proven to be largely impervious to intra-institutional counter-demands in the form of consumer and stakeholder pressure.<sup>304</sup> Only a handful of

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Mississippi Constitution provides: “Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.” *Id.*

<sup>302</sup> 10 OKL. ST. § 7502-1.4 (2004). The law provides that “this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.

<sup>303</sup> VA. CODE ANN. § 20-45.3 (2005). Titled “The Affirmation of Marriage Act,” its language could void not only domestic partnership benefits offered by private employer, but also private contractual arrangements between same-sex partners. The full text of the statute provides:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

*Id.*

<sup>304</sup> Despite their widespread use, the adoption of a domestic partnership policy can still provoke the protests of anti-gay consumers and other constituents, such as alumni and shareholders. *See supra* note 121 (discussing Southern Baptist Convention boycott of Walt Disney Co.) (quoting Southern Baptist Convention “The boycott has communicated effectively our displeasure concerning products and policies that violate moral righteousness and traditional family values”).

employers have rescinded domestic partnership policies in the face of stakeholder complaints,<sup>305</sup> and a much publicized boycott of the Walt Disney Company by the 16 million member Southern Baptist Convention ended in failure.<sup>306</sup> State constitutional amendments that prohibit “incidents of marriage” could arguably void the grant of domestic partner benefits by public employers.<sup>307</sup> Laws such as one adopted in Virginia could threaten even private employers.<sup>308</sup>

## V. THE FEDERAL MARRIAGE AMENDMENT: THE ULTIMATE MAJORITARIAN PREROGATIVE

As explained in the preceding section, the political process has been very responsive to counter-demands from the traditional values movement. Initially, these efforts were designed to block or reverse “activist” courts committed to legalizing same-sex marriage. The success of this program of institutional pre-emption illustrates the potentially transitory nature of any court-ordered minority gain, as favorable court decisions were ultimately reversed through the political process. Courts may be designed to insure their institutional independence, but the exact

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<sup>305</sup> A notable exception to this general rule is the town of Eastchester, New York, where the decision to provide domestic partner benefits to city employees provoked a strong response from the traditional values movements. Jennifer Medina, *A Town in Westchester Ends Health Benefits for Domestic Partners*, N.Y. TIMES, Jan. 6, 2005, at B1. The traditional values organization, Family First, filed a lawsuit against the city and then endorsed a candidate for the local city council who was opposed to the grant of benefits. *Id.* Eastchester rescinded its grant of benefits. *Id.*

<sup>306</sup> *Baptists End Disney Boycott*, *supra* note 121.

<sup>307</sup> The Federal Marriage Amendment refers to the “legal incidents” of marriage. The Federal Marriage Amendment, H. J. Res. 56 (2003). The Oklahoma state constitution also refers to “legal incidents.” OKL. CONST. ART. II, § 35 (2004). The constitutions of Kentucky and Louisiana speak of “a legal status identical or substantially similar to that of marriage.” KY. CONST. § 233A (2004); LA. CONST. ART. XII, § 15 (2005). North Dakota and Utah both state in their constitution that “no other domestic union” may be given “the same or substantially equivalent effect” as marriage. N.D. CONST. ART. XI, § 28 (2005); UTAH CONST. ART. I, § 29 (2005). Ohio forbids any “legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” OH. CONST. ART. XV, § 11 (2005).

contours of their jurisdiction remain subject to constitutional revision through the political process. The success also underscores the contingent nature of CIA because the analytic frame itself is subject to majoritarian revision.

In its latest efforts, the traditional values movement has attempted to break out of the “paper, scissors, rock” stalemate that is sometimes produced by strategic institutional choice. First, it extended its demand for prohibition to reach specific forms of relationship recognition short of marriage by drafting more aggressive DOMAs.<sup>309</sup> Second, it continued with its tactic of appealing to ever larger and more diffuse electorates by moving the issue to the national stage with its demand for an amendment to the U.S. Constitution.<sup>310</sup> In this way, the traditional values movement’s most recent demands are comprehensive in terms of both subject matter and jurisdiction.

The new type of DOMA expands its reach well beyond same-sex marriage. No longer content to prohibit only actual marriage, the new DOMAs have sprouted teeth, in that they purport to prohibit any grant of the “incidents of marriage” to same-sex couples.<sup>311</sup> These newly aggressive state constitutional amendments target grants of parallel status by the legislature, such as civil unions and municipal registries, as well as the provision of domestic partner employee benefits by public employers.<sup>312</sup> In addition, they could be interpreted to inhibit the ability of

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<sup>308</sup> VA. CODE ANN. § 20-45.3 (2005).

<sup>309</sup> See *supra* note 307 (discussing different attempts to reach “incidents of marriage”).

<sup>310</sup> See *supra* note 139 (describing current legislative status of FMA).

<sup>311</sup> See *supra* note 307 (describing different ways states express concept of “incidents of marriage”).

<sup>312</sup> For example, the newly enacted marriage amendment to the Michigan state constitution provides: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only

courts to apply concepts of “functional” family or equity to secure certain rights and standing for same-sex partners.<sup>313</sup>

The traditional values movement gave this new generation of DOMA teeth because it correctly realized that instances of relationship recognition have potentially transformative value, even when the recognition falls well short of equal marriage rights. For example, a court will often bolster its decision to recognize same-sex relationships by citing other examples of recognition, including the prevalence of domestic partnership registries and employee benefits.<sup>314</sup> These limited flashes of recognition have a cumulative effect on public perception and, as such, they further the long-term goal of the normalization of homosexuality.

The Virginia law represents yet another innovation. Whereas the new DOMAs apply to state recognition of same-sex relationships, the Virginia “Affirmation of Marriage Act” purports to void private contracts that attempt to secure the “privileges or obligation of marriage” for same-sex couples.<sup>315</sup> This could include the grant of domestic partner employee benefits by a private employer and cohabitation agreements entered into by same-sex partners.<sup>316</sup> Although

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agreement recognized as a marriage or similar union for any purpose.” MCLS CONST. ART. I, § 25 (2005). After its adoption, the Michigan Attorney General issued an opinion stating that all governmental entities had to stop offering domestic partner benefits. Rick Lyman, *Gay Couples Files Suit After Michigan Denies Benefits*, N.Y. TIMES, April 4, 2005, at A16. The litigation is currently pending.

<sup>313</sup> For example, a court in Ohio determined that the state’s marriage amendment mandated that an unmarried partner could not be charged with a domestic violence felony charge because it would approximate marriage. Brian Albrecht, *Issue 1 Conflicts with Domestic Abuse Law, Judge Says; Marriage Amendment Makes a Portion of Law Unconstitutional, He Rules*, PLAIN DEALER (CLEV.), March 25, 2005, at A1.

<sup>314</sup> See e.g., *Langan v. St. Vincent’s Hospital*, 196 Misc. 2d 440, 452 (N.Y. Misc. 2003) (noting that “Ford, General Motors, Chrysler and Coca-Cola” provide domestic partner benefits).

<sup>315</sup> VA. CODE ANN. § 20-45.3 (2005).

<sup>316</sup> Editorial, *Uncivil Disunion*, WASH. POST, May 9, 2004, at B06 (noting potentially

the attempt to reach private ordering may be Constitutionally infirm,<sup>317</sup> it demonstrates the extent to which the traditional values movement aims to erase any vestige of relationship recognition.<sup>318</sup>

No longer content to ignore non-state actors, it wants to reverse the gains made in the market that, up until now, have been remarkably resilient in the face stakeholder pressure.<sup>319</sup>

The FMA represents an endgame strategy to guarantee the durability of the scheme of state-wide DOMAs and impose the prohibitions on all states. Days after the U.S. Supreme Court decided *Lawrence v. Texas* and repealed *Bowers v. Hardwick*, influential Republican leaders and the President expressed their support for the FMA.<sup>320</sup> In his dissent in *Lawrence*, Justice Scalia predicted a precipitous fall down a slippery slope that would end inexorably with same-sex marriage,<sup>321</sup> and the traditional values movement took notice.<sup>322</sup> To many in the traditional values movement, *Lawrence* signaled that the state DOMAs and the federal DOMA were now

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broad scope that could reach health care powers of attorney).

<sup>317</sup> Article I, Section 10 of the U.S. Constitution prohibits states from interfering with obligations under existing contracts.

<sup>318</sup> The Family Foundation, a traditional values organization in Virginia, includes the law under the heading “Victories for Our Families.” Family Foundation, *Victories for Our Families*, at <http://www.familyfoundation.org/victories.html> (last visited on Sept. 2, 2005). It notes that the law was necessary to insure that “counterfeit forms of marriage” did get receive any measure of legal recognition. *Id.*

<sup>319</sup> See *supra* note 275 (discussing failed boycott of Walt Disney Co.).

<sup>320</sup> Senate majority leader, Bill Frist, expressed his unqualified support for the FMA three days after the Court decided *Lawrence*. *Frist Opposes Gay Marriage*, N.Y. TIMES, June 30, 2003, at B8. The next day, President Bush addressed the issue of same-sex marriage during a Rose Garden news conference. Neil A. Lewis, *Bush Backs Bid to Block Gays From Marrying*, N.Y. TIMES, July 31, 2003, A1.

<sup>321</sup> *Lawrence v. Texas*, 539 U.S. 558, 604-05 (Scalia, J., dissenting) Justice Scalia warned that “judicial imposition of homosexual marriage . . . has recently occurred in Canada.” *Id.* at 604.

<sup>322</sup> See Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 5, 2003, at 8 (noting that both sides “agree[] that the question of whether the United States will allow gays to marry would become the next major focus of both the gay rights

vulnerable to challenge under the U.S. Constitution.<sup>323</sup> A federal amendment would forestall this potential challenge and have the added benefit of reversing all forms of state and local relationship recognition by putting a stop to regional experimentation.<sup>324</sup> As currently drafted, the FMA prohibits same-sex marriage and the extension of the “incidents” of marriage to same-sex couples.<sup>325</sup>

As discussed in Part III, the movement for relationship recognition is driven by individuals with very high stakes, whereas the interests of the traditional values movement are more diffuse. The contested social goal of the recognition of same-sex relationships raises important issues of equality, autonomy, fundamental rights, morality, custom, and sincerely held

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movement and of social conservatives”).

<sup>323</sup> After *Lawrence*, some public opinion polls showed what was described as backlash, particularly with respect to views regarding same-sex marriage. Joanna Grossman, *Two States Offer Different Path to Same-Sex Marriage*, CNN, Nov., 20, 2003, available at <http://www.cnn.com/2003/LAW/11/20/fl.grossman.samesex> (last visited Sept. 2, 2005) (reporting that after *Lawrence* percentage in support of gay marriage dropping from 60 to 48).

<sup>324</sup> One of the most quoted statements on federalism and the ability of the states to implement a novel scheme is from Justice Brandeis’ dissent in the 1932 U.S. Supreme Court case *New Ice Co. v. Leibman*: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New Ice Co. v. Leibman*, 285 U.S. 262, 311 (1932) (challenging state regulation of private industry).

<sup>325</sup> The Federal Marriage Amendment (FMA) provides in full:  
Marriage in the United States shall consist only of a 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.  
The Federal Marriage Amendment, H. J. Res. 56 (2003). See Senator John Cornyn, *Opening Statement*, Hearing of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights, Sept. 4, 2003, available at <http://judiciary.senate.gov> (last visited Sept. 29, 2003) (stating “[r]ecent . . . cases . . . have raised serious questions regarding the future of the traditional definition of marriage, as embodied in DOMA”).

religious beliefs.<sup>326</sup> In an attempt to mobilize broad support for the FMA, the traditional values movement has adopted the rhetoric of institutional choice and legitimacy.<sup>327</sup> It characterizes the debate over the amendment as a question of who should have the power to define marriage: the unelected judiciary or the people? In this way, the FMA is linked to the traditional values movement's larger critique of the judiciary and its base discomfort with the principal of judicial review.<sup>328</sup>

This abstraction taps a fundamental question of CIA, namely "who decides."<sup>329</sup> However, it also glosses over the unabashedly anti-gay sentiments that typically animate the counter-demands of the traditional values movement.<sup>330</sup> With the help of this abstraction, one can support the FMA without thinking that homosexuality is an immoral, unhealthy, and chosen lifestyle.<sup>331</sup> One can also support the FMA without considering the effect it will have on

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<sup>326</sup> Justice Kennedy recognized that for some the question of the decriminalization of homosexual behavior raised "profound and deep conviction accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives." *Lawrence v. Texas*, 539 U.S. 538, 571 (2003) (noting "for centuries there have been powerful voices to condemn homosexual conduct as immoral").

<sup>327</sup> See e.g., Robert P. George, *Judicial Activism and the Constitution: Solving a Growing Crisis*, available at <http://www.frc.org/get.cfm?i=IS05D01&f=BC05F01> (last visited Sept. 2, 2005) (discussing same-sex marriage case in context of legitimacy of judicial review). See also *supra* note 195 (discussing Justice Sunday).

<sup>328</sup> See generally *supra* note 195 (discussing Justice Sunday). On the topic of judicial review, an article on the FRC website begrudgingly acknowledges that the principle is Constitutionally defensible, but notes the negative reaction to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). George, *supra* note 327.

<sup>329</sup> Komesar notes that "Constitutional law raises the central issue of who decides who decides." KOMESAR, *supra* note 1, at 162.

<sup>330</sup> See, Knauer, *supra* note 38, at 46-50 (describing traditional values construction of homosexuality).

<sup>331</sup> *Id.*

individuals in same-sex relationships and the families they have formed.<sup>332</sup> The comfort provided by the abstraction is the reason that a social movement is necessarily larger than a platform of proposed legal reform.

As with any movement for minority rights, the movement for relationship recognition practices its strategic institutional choice against a potentially bleak majoritarian backdrop. State constitutional amendments have blocked and reversed many court-ordered gains. The FMA has the potential to block many more. The ultimate majoritarian prerogative to delimit institutional boundaries exists outside considerations of majoritarian influence or bias.<sup>333</sup> It is the stark reality of majority rule. Accordingly, at the end of the day, the path to minority recognition does not lie in deciphering the best institutional alternative or mounting a flawless litigation strategy. It lies with the atomistic forces that drive the institutions, with the neighbor across the street and the colleague down the hall.

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<sup>332</sup> According to the 2000 Census, same-sex couples live in 99.3 percent of all counties in the United States. Human Rights Campaign, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households*, available at <http://www.hrc.org/Content/ContentGroups/Publications1/census.pdf> (last visited Sept. 2, 2005). In addition, according to the 2000 Census, 34 percent of female same-sex couples and 22 percent of male same-sex couples have at least one child under 18 living in the home. National Gay and Lesbian Task Force, *Parenting*, available at <http://www.thetaskforce.org/theissues/issue.cfm?issueID=30> (last visited Aug. 29, 2005).

<sup>333</sup> For an explanation of majoritarian influence and majoritarian bias see KOMESAR, *supra* note 1, at 67-70.