FIGHTING CHANCE: CONFLICTS OVER RISK IN SOCIAL CHANGE LITIGATION

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Drawing on a case study of marriage equality litigation, this Article examines how practice setting affects the construction of risk and the emergence of conflict in social change litigation. Although private law firms often work collaboratively with social movement organizations to pursue common goals, conflicts also emerge when movement groups oppose "risky" private litigation which could imperil the movement's ongoing impact litigation strategies. How do attorneys in private firms and social movement organizations vary in their framing of risk in social change litigation? Under what conditions does that variation lead to conflict? The findings show that movement-based LGBT rights attorneys framed risk broadly, by emphasizing threats to their organizations' collective and long-term impact litigation strategies. Movement attorneys looked to cautionary tales from the movement's collective history of LGBT rights litigation against resistant courts and quick-to-override legislators to emphasize caution and threat-avoidance, to express a preference for incrementalism, and to justify efforts to thwart private litigation that moved ahead too quickly. Private attorneys, on the other hand, framed risk narrowly, as individual and short-term. Private attorneys focused on advancing the

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client's immediate interests in winning by presenting all viable claims, despite objections by LGBT-movement attorneys. However, I demonstrate that these contrasting constructions of risk did not inevitably lead to conflict. Private firms with longstanding ties to LGBT legal groups extended a client-like deference to movement groups informally, enabling collaboration between firms and movement groups. In examining these mechanisms of conflict and collaboration, the Article offers new insights into dynamics that shape the effectiveness of litigation as a strategy for social change.

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INTRODUCTION

While the Supreme Court's decision in *Obergefell v. Hodges* (2015)[1] was an apparent victory for the decades-long legal struggle for same-sex marriage, that success has overshadowed fault lines among the various organizations pursuing marriage equality litigation. This Article draws from a case study of marriage equality litigation to illuminate the origins of conflict and collaboration among organizational actors who litigate to advance social change.

[1] Obergefell v. Hodges, 576 U.S. 644 (2015).

Private law firms have expanded and institutionalized their pro bono practice in recent years,[2] embracing a greater share of cases that were traditionally the province of nonprofit, movement-based public interest legal organizations.[3] Much of this growth of private pro bono litigation has benefitted public interest groups, which often cultivate close relationships with private law firms to help shoulder the costs of large-scale litigation.[4] Yet public interest groups can also come into conflict with private attorneys who pursue "risky" cases that movement groups fear would thwart ongoing impact litigation strategies.[5] Such conflicts suggest that private and public interest attorneys may vary in their interpretations of what constitutes a "risky" case, and in their opinions concerning the degree of caution which should be exercised in avoiding such cases. Drawing on interviews with attorneys involved in marriage equality litigation (1990–2015), this Article examines the organizational factors that promote strategic alignment or incite strategic conflict, among attorneys working toward common social change goals. How do attorneys in private firms and social movement organizations vary in their framing of risk in social change litigation? Under what conditions does that variation lead to conflict?

Marriage equality litigation has generated numerous instances of both cooperation and conflict between private and public interest

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2 Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 6 (2004); Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 135, 145 (Robert Granfield & Lynn Mather eds., 2009).

3 Public interest law firms (or public interest legal organizations) are defined as nonprofit organizations whose resources are devoted exclusively to pursuing a social change agenda, primarily through the use of litigation. *See generally* ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE (2013). Social movement organizations that litigate are one type of public interest law firm, but not all public interest law firms are affiliated with a social movement. Legal aid groups serving the poor are conceptually distinct from public interest law firms, as the former groups "abjure[] reform-oriented advocacy and instead concentrate[] on resolving minor individual pursuits." *Id.* at 58.

4 *Id.* at 171.

5 *See infra* Section I.A.3. The most comprehensive examinations of these types of conflict to date has been in independent scholarship by law professors Douglas NeJaime and William Rubenstein, who compile numerous examples of these types of conflicts between movement attorneys and private lawyers in their work. *See* Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 671–75 (2012) (discussing examples from the Civil Rights Movement, abortion rights litigation, etc.); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1632–44 (1997) (discussing examples from same-sex marriage litigation); *see also* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009); Michael Ashley Stein, Michael E. Waterstone, & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1663–64 (2010) (reviewing SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009)).

attorneys,[6] providing an ideal case study for this research. LGBT[7] legal groups took up marriage equality litigation in the 1990s. Like other social justice movements, these nonprofit legal organizations had insufficient resources to meet the expansive legal needs of their constituents, compelling movement groups to enlist support from the private bar.[8] LGBT legal groups developed strategic pro bono relationships with private firms, referring out cases beyond their capacity or priority areas, and also frequently developing close working relationships with private attorneys as co-counsel in resource-intensive impact litigation.[9] Private firms were routinely listed as co-counsel in the LGBT groups' marriage equality cases. At the same time, LGBT rights groups also clashed with private firms throughout the contemporary history of the marriage equality struggle—including quite prominently in cases bookending this period.[10] Private counsel brought the first contemporary marriage equality lawsuit in Hawaii state court after LGBT rights groups declined to represent the same-sex plaintiffs in the case, with the explanation that it would "set the movement back."[11] LGBT movement lawyers at the time, fearful that

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6 *See generally* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010).

7 This Article uses "LGBT" (lesbian, gay, bisexual, transgender) in discussing LGBT legal organizations and their agendas, and "LGBTQ+" (queer+) in discussing the inclusion of non-binary gender and sexual identities in the broader movement. While some LGBT legal organizations have adopted the "Q," to signal inclusion, I use "LGBT" for clarity and to avoid contributing to the erasure that can arise from symbolic inclusion. *See* Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 2 (2021). This is an imperfect solution to balancing inclusion against erasure, since the term "LGBT" itself includes bisexual and transgender people, whose interests are also marginalized in mainstream LGBT rights litigation. *See, e.g.*, Gabriel Arkles, Pooja Gehi, & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 587–88 (2010) (regarding trans erasure); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (regarding bisexual erasure).

8 *See* Cummings, *supra* note 2, at 46 (explaining how public interest legal organizations "have developed ways to strategically use an array of pro bono relationships—from active co-counseling to more passive pro bono placement—to lessen the burden of large-scale litigation").

9 *Id.* at 44–45.

10 This Article focuses on the contemporary historical period of marriage equality from 1990–2015. Although three earlier marriage equality cases were brought in the early 1970s (*Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), *appeal denied*, 84 Wash. 2d 1008 (1974)), those cases were filed before the founding of any of the major LGBT civil rights organizations. *See* Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 2–3 (2015). The cases are excluded from the study, as they have little bearing on the Article's comparative inquiry of movement organizations versus the private bar.

11 Molly Ball, *How Gay Marriage Became a Constitutional Right: The Untold Story of the Improbable Campaign that Finally Tipped the U.S. Supreme Court*, ATLANTIC (July 1, 2015),

the courts and public were not ready for same-sex marriage, instead cautiously invested their efforts in seeking nonmarital forms of relationship recognition.[12] Fast-forwarding two decades, movement attorneys faced a similar situation when private attorneys announced that they would be filing a federal constitutional challenge to California's prohibition on same-sex marriage, in a case that would become the first marriage equality case to be heard before the U.S. Supreme Court.[13] In the intervening years since the Hawaii case, LGBT rights groups had engaged in marriage equality litigation. However, still wary of the controversy surrounding the marriage issue, those groups remained highly cautious in their approach,[14] implementing a carefully coordinated impact litigation strategy premised on narrow incremental gains: the first step was challenging state bans against same-sex marriage in a select set of hospitable state courts; the second, challenging the federal government's discriminatory treatment of lawfully married same-sex couples through the Defense of Marriage Act; then, finally, bringing a federal court challenge to state bans on same-sex marriage under the U.S. Constitution.[15] When the *Perry* attorneys announced their decision to cut straight to the federal constitutional challenge, movement attorneys voiced vehement opposition.[16] After failing to convince the *Perry* attorneys to reconsider filing the case—as movement attorneys had done (with varying degrees of success) in similar situations in the past—LGBT rights groups issued a joint statement denouncing the decision to litigate.[17] Despite this initial opposition, after the private attorneys set the federal

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https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052 [https://perma.cc/WBE4-DPK8] (explaining how before the Hawaii plaintiffs in *Baehr* filed suit, "gay-rights advocates had advised against it, saying it would set the movement back"); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *see also* ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 178 (2005).

12 Ball, *supra* note 11; *see also* Gwendolyn M. Leachman, *Media, Marriage, and the Construction of the LGBT Legal Agenda*, 69 RUTGERS U. L. REV. 691, 695 (2017) (discussing findings from a study of LGBT rights groups' legal dockets showing a cautious and limited investment in marriage equality arguments during these early years); Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 275–79 (2015). *See generally* Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).

13 Hollingsworth v. Perry, 570 U.S. 693, 697–705 (2013).

14 *See generally* Leachman, *supra* note 12.

15 *See* Aviram & Leachman, *supra* note 12, at 293–95.

16 See NeJaime, *supra* note 5 for a discussion of Make Change, Not Lawsuits.

17 Leslie J. Gabel-Brett & Kevin M. Cathcart, *Introduction*, *in* LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA 13 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).

constitutional claim on a nearly inevitable course toward the U.S. Supreme Court, LGBT rights lawyers became active supporters, both assisting the *Perry* attorneys in the coordination of amici and expert witnesses, and moving full speed ahead with their own federal court challenges.[18]

The history of marriage equality litigation illustrates the importance of examining differences between private and public interest attorneys in their goals and approach to social change litigation. This history suggests that the traditional impact model of social change litigation—a model that has been emulated in numerous contemporary inequality movements[19]—may be premised on a highly risk-averse approach which is at odds with the approaches of at least some private firms.[20]

This Article expands understanding of these conflicts in social change litigation by examining the construction of risk in movement legal organizations and private firms. I proceed with the assumption, well supported by sociological evidence, that "risk" is a social construction. Risk is not something that people rationally calculate from objective facts.[21] Rather, ideas about what is "risky" emerge through social interaction. In organizational fields, where social interaction is regularized and routine, ideas and values about risk can become widespread and entrenched in organizational fields. In social change litigation, risk is constructed through a similarly interpretive process. Attorneys devise strategies in response to opportunities or threats in their environment, yet, opportunities and threats are not objective facts, but rather, they are defined in relation to assumptions about one's purpose and priorities. Attorneys frame something as an opportunity to pursue or risk to avoid in ways that resonate with organizational goals and narratives that dominate their organizational setting.[22] Thus, the construction of risk may vary across different types of organizations, sowing the seeds of inter-organizational conflict.

Through an original case study of marriage equality litigation, this Article examines how organizational setting affects attorneys' framing of threats or opportunities for strategic action, and how this affects

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18 Cummings & NeJaime, *supra* note 6, at 1302 (explaining how LGBT rights lawyers provided expert witnesses and filed amicus briefs in *Perry*); *id.* at 1303–04 (noting how LGBT rights lawyers filed federal challenges "complementing . . . arguments in *Perry*").

19 *See, e.g.*, David S. Meyer & Steven A. Boutcher, *Signals and Spillover:* Brown v. Board of Education *and Other Social Movements*, 5 PERSPS. ON POL. 81, 82 (2007).

20 Carol A. Heimer, *Social Structure, Psychology, and the Estimation of Risk*, 14 ANN. REV. SOCIO. 491, 491 (1988).

21 Lee Clarke & James F. Short, Jr., *Social Organization and Risk: Some Current Controversies*, 19 ANN. REV. SOCIO. 375, 379 (1993).

22 *See infra* Section I.B.

conflict and collaboration in social change litigation. I find that movement-based attorneys constructed risk broadly, highlighting threats to collective and long-term interests in LGBTQ+ equality. Movement lawyers looked to cautionary tales from the movement's history of litigating against resistant courts and quick-to-override legislators. Movement lawyers avoided these risks by presenting claims incrementally and attempting to thwart private litigation that reached too far, too quickly. By comparison, private attorneys constructed risk more narrowly, by highlighting opportunities for their firms to pursue the more individuated and immediate interests of winning a case for a client. Private attorneys relied on client-service narratives that emphasized the firm's expertise in private practice and past successes in winning high-stakes cases. This specific vision of "client service" compelled some firms to include as many viable claims as possible, to present multiple possible routes to victory—even over the objections of LGBT rights groups. The implication of these findings is that distinct organizational narratives may enable costly conflicts in social change litigation, with movement-based lawyers constructing risk as collective and long-term, and private attorneys constructing risk as individual and short-term. The organizational construction of risk in movements may thus discourage movement actors from making novel legal claims, opening the door for private attorneys—who may not be as informed about or invested in movement goals—to lead and direct the course of social change litigation. Yet, these contrasting constructions of risk did not always lead to conflict. Private firms with longstanding ties to LGBT legal groups informally extended client-like deference to movement groups, which enabled firm deference and enhanced collaboration between firms and movement groups.

In examining these mechanisms of conflict and collaboration, the Article offers new insights into dynamics that shape the effectiveness of litigation as a strategy for social change. Private attorneys' willingness to venture into areas avoided by traditional impact litigation groups may enable those private attorneys to seize the reins of a movement, changing the strategy. Private firms which take on cases that counteract carefully planned impact litigation strategies have repeatedly forced LGBT rights groups to recalibrate their strategies, in efforts to diminish the threat of negative precedent. Such recalibration requires the investment of additional movement resources, which are notoriously scarce.[23] While legal scholars have offered numerous critiques of impact

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[23] *See, e.g.*, Cummings, *supra* note 2, at 46 (stating that public interest legal organizations "even at their largest, tend to have small staffs and modest budgets"). "Resource mobilization" scholarship in sociology accounts for the role of resource limitations in shaping the actions and

litigation,[24] few have considered the possibility that impact strategies—which are designed to achieve long-term success for a movement—may ultimately set traditional movement-based civil rights groups on a course toward derailment by private firms.[25]

Existing literature on social change litigation tends to focus on one specific organizational sector (e.g., private firms or public interest organizations), without comparing the respective approaches used by attorneys in each of those fields. The few studies that do engage with the practices of both fields, although extremely informative, have primarily reported on collaborations between private firms and movement attorneys.[26] This Article, on the other hand, examines the involvement of both private firms and movement groups in litigation on a common issue. In addition to illuminating understandings about conflict and collaboration among private and public interest attorneys, the comparative focus of this Article also illuminates how the organizational setting may shape the meaning and practice of lawyering for social change.

The Article proceeds as follows. Part I surveys the legal and sociolegal literature for illumination concerning sources of conflict between private and public interest attorneys. I draw from the sociology of organizations to identify factors like organizational identity, organizational ties, and notions of "legitimacy" developed through organizational interaction—all of which are known to affect strategy (and contribute to divergence between organizations). Section II.A provides background on the decades-long efforts by private and public interest attorneys to achieve the right of same-sex couples to marry. It describes how strategizing around marriage equality litigation was both a collective and a contested process, and the interaction between LGBT rights attorneys and attorneys from private firms shaped the form and direction of marriage equality litigation. Section II.B discusses the original empirical study employed to investigate the strategies of attorneys litigating for marriage equality. The results of this study, reported in Part III, indicate that while both private and movement attorneys shared the broad goal of achieving full marital rights of same-

agendas of social movement organizations. *See* Jack A. Goldstone, *More Social Movements or Fewer? Beyond Political Opportunity Structures to Relational Fields*, 33 THEORY & SOC'Y 333, 346 (2004); J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOCIO. 527, 528 (1983).

24 *See, e.g.*, Derrick. A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 472 (1976).

25 *But see* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 944–46 (2011); *see also infra* Section I.A.3.

26 *See, e.g.*, Cummings & NeJaime, *supra* note 6; Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008).

sex couples, their interpretations of the risks involved in these cases were fundamentally shaped by their organizational setting. Part III shows how "risk" is constructed differently in movement organizations versus private firms. These differing narratives on risk, in turn, justify and support the positions of the attorneys on either side of a "risk conflict." The discussion in Part IV lays out the mechanisms explaining these findings and their implications. Conflicts over risk may affect agenda-setting in social movements, pushing movement lawyers to support cases they disagree with to improve their chances for success. This can further double-marginalization in identity movements when responding to private litigation displaces movement actors' efforts to increase intersectional advocacy. The Article concludes by underscoring the importance of future investigation into strategic variation among the actors litigating for common social change goals.

I. LITERATURE ON ORGANIZATIONS AND SOCIAL CHANGE LITIGATION

What does the existing literature say regarding the emergence of conflicts in social change litigation? Section I.A reviews scholarship on legal mobilization and strategic conflict in impact litigation. Section I.B then draws on sociological studies of social movements to construct a research model for understanding conflict in struggles for social change. The sociological literature shows that organizational narratives (e.g., about an organization's goal orientation, or history) can affect the framing of threat and opportunity, in ways that may lead to strategic variation among activists in the same movement. I argue that similar mechanisms may produce conflict within social change litigation as well. Section I.C assembles these insights from the literature, to develop a conceptual model for studying the construction of risk in social change litigation.

A. *Conflict in Social Change Litigation*

1. "Legal Mobilization" Attracts Extralegal Resources

This study is situated in the scholarship on "legal mobilization," which analyzes use of law and litigation by social movements to accomplish larger goals, including symbolic goals such as visibility and

transforming discourse.[27] Use of litigation by social movements in their attempts to achieve change is one form of legal mobilization.

Legal mobilization studies often include litigation as one of a set of broader strategies, and investigate how movement and cause lawyers use litigation for cultural goals as well as formal legal change.[28] The focus is on the extralegal impacts that flow from engagement with law and legal institutions, which have consequences for mobilization outside the courtroom. Empirical work in this area identifies how legal mobilization is used to a variety of extralegal ends. Litigation can offer up a powerful language for expressing complex forms of injustice, and "rights" claims in particular have the power to mobilize. "Cause lawyers" often formulate litigation strategies with these extralegal factors in mind as goals: to attract attention, educate the public, and shape popular opinion.[29] "Cause lawyers" affiliated with a broader social movement may also use litigation to support movement mobilization and fundraising,[30] or to provide leverage for legislative advocacy or negotiations with private organizations.[31] These types of extralegal benefits are often "cause lawyers'" most salient motivations in litigation—at times, potentially even more important than winning in court.[32]

Litigation as a tactic also resonates broadly with arbiters of public discourse like the mainstream media. Litigation creates more publicity for LGBTQ+ movement issues than any other form of activism.[33] Litigation thus has significant impact on which issues become defined as the "legitimate" or "mainstream" movement agenda. The legitimacy

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27 *See generally* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

28 NeJaime, *supra* note 5, at 664 ("legal mobilization" is a strategy "that deploy[s] litigation in conjunction with a range of other tactics and exploit[s] the . . . political potential of rights claims.").

29 *See, e.g.*, Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOCIO. 1201 (1991); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); MCCANN, *supra* note 27; Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 L. & SOC'Y REV. 367 (2000).

30 *See generally* Idit Kostiner, *Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change*, 37 LAW & SOC'Y REV. 323 (2003); NeJaime, *supra* note 25.

31 *See generally* MCCANN, *supra* note 27; NeJaime, *supra* note 25.

32 Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261, 267 (Austin Sarat & Stuart Scheingold eds., 1998).

33 *E.g.*, Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667 (2014).

created by the legal claims can also bring more resources, in terms of institutional funding for the organizations in the struggle. These more symbolic consequences of litigation can transform movements: their strength, their identities, their trajectories, their core agendas.[34]

2. Conflicts over Clients vs. Cause

Given the cultural salience of legal mobilization, it is critical to examine the mechanisms of conflict that shape agenda-setting and strategy. Which actors are at the helm of social change litigation, and what types of conflicts arise?

First, the use of impact litigation may set the stage for conflict between collective actors (movement organizations) and individuals (clients). "Impact litigation" describes the attempt to change legal rules through incremental legal claims, with the goal of creating precedents that build toward more comprehensive legal and social change. Impact litigation uses test cases to establish new rights or legal principles in incremental succession. Impact litigation is the traditional model for social change litigation, exemplified by the NAACP's Legal Defense Fund's (LDF) campaign to end racial segregation and invalidate Jim Crow laws. The LDF approach became the standard-bearer for social change litigation in the post-*Brown v. Board* civil rights era. The NAACP's impact litigation approach at the LDF was used as the model for LGBT rights litigation.[35]

Professor Derrick Bell argues that the LDF's impact litigation campaign created conflict between LDF attorneys and their clients over agenda-setting in their Southern school desegregation cases.[36] LDF attorneys strove for a specific vision of the cause, seeking broad legal impact, which influenced the lawyers to pursue agendas with the broadest collective reach. The goal for impact was to provide a foothold for subsequent claims, and LDF attorneys viewed desegregation as the means to this end. The LDF's clients, the Black plaintiffs whose children were on the lines in these cases, had different goals related to substantive improvements for Black schools. Furthermore, LDF attorneys' detachment from local political struggles of their clients enabled LDF

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34 *Id.* at 1713–14.

35 *See, e.g.*, ANDERSEN, *supra* note 11; Meyer & Boutcher, *supra* note 19, at 82; JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978).

36 Bell, Jr., *supra* note 24.

attorneys to pursue a specific vision of impact litigation which was somewhat cavalier about extralegal risks.[37]

Professor Bell argues that the LDF's commitment to the "cause" clashed with clients' substantive goals, leading to conflict between the individual client on one hand, and on the other, a collective cause. Similar types of tensions between "cause" and "client" arise in other agenda-setting conflicts. "Cause" litigation prioritizes the best result *collectively* for a cause, in contrast to the best outcome *individually* for the plaintiffs whose interests are formally at issue.[38] This suggests that attorneys working for the same cause might share commitments, encouraging organizational actors in cause litigation to act collectively to strategize and pool resources.

Private law firms' increased participation in social change litigation in recent years may exacerbate these tensions over "client versus cause." Clients who find conflict with the collective cause of civil rights groups may be able to find plentiful avenues for individual representation in private practice. The ethical standards and procedural rules that structure private representation in private practice are guided by an "individualist" litigation model.[39] Ethical standards reinforce values like neutrality in choosing one's clients, and zealous client service in pursuit of clients' interests. Private practice thus provides an entryway for conflict when firms represent clients who oppose the collective goals of movement groups. There may be contradictory values infused in these practice models.

In summary, this literature suggests that conflicts may arise from variation in attorneys' normative commitments, with private firms oriented toward their clients, and movements toward their cause. However, if conflict-producing factors are embedded in firms and movement legal groups, we would expect to see conflicts as a persistent problem, discouraging firm-movement relationships. The reality is different. Firms do cooperate and collaborate quite extensively with social movement groups.[40] A more comprehensive theory is needed to account for the dynamic nature of conflict and the ways in which legal mobilization influences the construction of movement grievances.

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37 *Id.* at 513 ("The risks involved in such [civil-rights litigation] efforts increase dramatically when [private] civil rights attorneys, for idealistic or other reasons, fail to consider continually the limits imposed by the social and political circumstances under which clients must function even if the case is won.").

38 *See* McCann & Silverstein, *supra* note 32, at 266–69.

39 Rubenstein, *supra* note 5, at 1644–45 (arguing that the "individualist model" of "procedural and ethical rules" is responsible for conflicts).

40 *See, e.g.*, Cummings & NeJaime, *supra* note 6; Rhode, *supra* note 26.

3. Conflicts over Legal Mobilization

Professor Douglas NeJaime theorizes a set of dynamic processes through which conflict may emerge in the course of impact litigation.[41] Professor NeJaime argues that the extralegal "benefits" that flow from legal mobilization, while sustaining the movement broadly, may ultimately help to derail impact litigation.[42] On one hand, legal mobilization creates extralegal resources like publicity and attention to movement goals like same-sex marriage. Impact litigation likely increases pressures on private firms to get involved, using the tools created by the movement in service of their clients' own claims. On the other hand, movement groups may become reluctant to move forward with claims that present impact too broadly in some contexts. This was the case for LGBT legal groups, which declined to take marriage cases where those cases' high impact presented the possibility of extralegal backlash or political rollback for the movement. With movement groups refusing to take marriage cases, the LGBTQ+ constituents mobilized by marriage looked elsewhere for representation—specifically to private firms.[43]

This process, known as the "legal mobilization dilemma,"[44] affects impact litigation groups, whose successes generate pressure for firms to get involved in cases that run afoul of incrementalism. Impact litigation, led by social movement groups, may be particularly susceptible to "individual attempts to control or redirect movement strategy."[45] Private firms may be compelled to use the formal legal opportunities that impact litigation provides, in service of their individual clients. Impact litigation may inspire outside nonmovement actors, like firms, to take up big-stakes claims that the impact groups want to save for last.

NeJaime's and Bell's work in combination suggests that "impact litigation" may manifest in distinct types, depending on which "extralegal" factors attorneys consider in their strategies.[46] For the

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41 NeJaime, *supra* note 5, at 664–65. Professor NeJaime's study is highly relevant to the current context, as it focuses on conflict between impact-based social movement organizations and private firms in marriage equality litigation. *Id.* at 680–82. LGBT legal organizations appeared to be highly attuned to extralegal threats, such as backlash, their cases could evoke, and engaged in not just litigation, but also legislative and public-education strategies to counter those threats. *Id.* at 687.

42 *Id.* at 687.

43 *See id.* at 694–97.

44 *Id.* at 664–65.

45 *Id.* at 687.

46 *Cf.* Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662 (2017) (arguing that LGBT rights organizations used

LGBT rights groups in NeJaime's work, extralegal factors were central to strategy formation. "[L]awyers for the movement recognize[d] the risks and constraints of litigation and therefore approach courts with caution. They target[ed] states with favorable background conditions—pro-LGBT[Q+] laws relating to antidiscrimination and parenting, potentially receptive judges and political leaders, and a difficult and lengthy process for amending the state constitution."[47] Why did LGBT rights lawyers, who used the same "impact" approach as the LDF, begin taking regular notice of these specific extralegal and legal considerations? How do extralegal threats become incorporated into impact litigation strategies, making movement actors more cautious and risk-averse?

This Article builds on these accounts of conflict in social change litigation by showing how attorneys' strategic behavior may be subtly shaped by the informal norms and logics that structure their organizational environment.[48] While organizational actors may aim to rationally direct their behavior toward a particular organizational goal, culture and power enable certain perspectives and strategies, while constraining others.[49] This Article takes the approach that ideas about risk are culturally constructed, and it considers how cultural factors—such as shared stories about a movement's identity and history—may be involved in the construction of risk in different organizational settings (e.g., in movement—and private—firm settings). I look to organizational sociology to create a model for research on conflicts in legal mobilization, which takes these factors into account as potential mechanisms for strategic conflict.

B. *Narrative, Organizational Strategy, and Conflict in Social Movements*

I use a sociological framework to examine the construction of risk in social change litigation. Sociological studies of social movements

a hybrid model of impact litigation in their marriage equality cases focuses more than traditional models on extralegal tactics).

47 NeJaime, *supra* note 5, at 681.

48 *See generally* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147 (1983).

49 *See* Patricia H. Thornton & William Ocasio, *Institutional Logics*, *in* THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 99, 103 (Royston Greenwood, Christine Oliver, Kerstin Sahlin, & Roy Suddaby eds., 2008) ("Decisions and outcomes are a result of the interplay between individual agency and institutional structure. While individual and organizational actors may seek power, status, and economic advantage, the means and ends of their interests and agency are both enabled and constrained by prevailing institutional logics." (internal citations omitted)).

once favored a "political opportunity structure" approach, which focused on movements' responsiveness to opportunities and threats from their environment. Current literature emphasizes that movements are not simply "responsive" to objective inputs from their political environment. Rather, "movements are active in structuring and creating political opportunity."[50] Movement actors interpret and collectively construct their environments before determining which strategies are available and legitimate.[51]

"Framing" is one tool movement actors use to define the opportunities to pursue, and threats to avoid, in strategies for social change.[52] "Frames" are interpretative devices that "locate, perceive, identify, and label" conditions in the world as meaningful.[53] "[T]he extent to which [political opportunities] constrain or facilitate collective action is partly contingent on how they are framed by movement actors."[54] Whether movement actors decide to embrace or reject a strategy is partially contingent on activists' framing.[55]

"Narrative" or storytelling is another discursive tool that shapes movement strategizing. Narrative is "an account of a sequence of events in the order in which they occurred to make a point."[56] Like framing, narrative selectively repackages information to "mobilize, channel, and legitimate collective action."[57] Unlike framing, however, narrative delivers meaning through the coherent rhetorical structure and sequencing of a story.[58] Stories signify meaning by putting characters into a plot, with antecedents and consequences, which present

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50 William A. Gamson & David S. Meyer, *Framing Political Opportunity*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 275, 276 (Doug McAdam, John D. McCarthy, & Mayer N. Zald eds., 1996) ("[O]pportunities sometimes present themselves with no movement provenance, but movements are active in structuring and creating political opportunity.").

51 *Id.* ("[O]pportunities [and threats] are subject to framing processes and are often the source of internal movement disagreements about appropriate action strategies.").

52 *See* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 614 (2000).

53 *Id.* (quoting ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE 21 (1974)).

54 *See id.* at 631 (arguing that "framing processes and political opportunity are linked interactively").

55 *Id.*

56 Francesca Polletta, Pang Ching Bobby Chen, Beth Gharrity Gardner, & Alice Motes, *The Sociology of Storytelling*, 37 ANN. REV. SOCIO. 109, 111 (2011).

57 David S. Meyer, *Claiming Credit: Stories of Movement Influence as Outcomes*, 11 MOBILIZATION INT'L J. 281, 286 (2006) ("Stories identify the factors relevant to an issue, defines which policy areas are amenable to human intervention, which claims and claimants are worthy, and which actors are politically significant.").

58 Polletta, *supra* note 56, at 112 ("Narratives are forms of discourse, vehicles of ideology, and elements of collective action frames, but unlike all three, they can be identified in a chunk of text or speech by their formal features.").

information about cause-and-effect relations to convey a meaningful whole message.[59]

Movement actors use storytelling to identify conditions as threats (to be avoided) or opportunities (to be pursued).[60] Some stories are more available than others within specific movement organizations, depending on constituents' shared values and experiences.[61] Variation in movement organizations' dominant narratives about organizational goals and history may lead to strategic variation.

Goal-orientation narratives provide activists a framework for strategy formation.[62] These narratives do not just ask whether something is a goal or not; rather, they help activists situate their tactical choices within the movement organizations' larger "theoretical narrative about how social change is achieved."[63] This varies depending on the organization. "For some movement organizations, this means tackling dominant institutions, for others it means empowering communities to control their own fate, and for other organizations it involves the personal transformation of individuals."[64] These narratives are not ambivalent about strategy, but rather, they may favor strategies which resonate with dominant causal stories about what methods for achieving change are effective and legitimate.

Movement actors may also use retrospective narratives about past events to inform strategizing.[65] These narratives are a movement's re-constituted, collective stories about the past.[66] The stories become a collective artifact, which is relatively autonomous of the original event

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59 *Id.* at 111 ("Only relevant events are included in the story, and later events are assumed to explain earlier ones. The causal links between events, however, are based not on formal logic or probability but on plot. Plot is the structure of the story. It is the means by which what would otherwise be mere occurrences are made into moments in the unfolding of the story.").

60 *See, e.g.*, Joost de Moor & Mattias Wahlström, *Narrating Political Opportunities: Explaining Strategic Adaptation in the Climate Movement*, 48 THEORY AND SOC'Y 419, 438 (2019) (finding that a movement narrative activists used to evaluate strategic choices in light of past failures "was rather successful in teaching about threats and opportunities").

61 Meyer, *supra* note 57, at 286–87.

62 *See generally* Laura K. Nelson & Brayden G. King, *The Meaning of Action: Linking Goal Orientations, Tactics, And Strategies in the Environmental Movement*, 25 MOBILIZATION INT'L J. 315 (2020).

63 *Id.* at 333.

64 *Id.*

65 Priska Daphi & Lorenzo Zamponi, *Exploring the Movement-Memory Nexus: Insights and Ways Forward*, 24 MOBILIZATION INT'L Q. 399, 402, 406–07 (2019) (analyzing studies showing "how memories of various pasts affect how movements mobilize, shaping for example recruiting processes, identity building or strategic decisions").

66 de Moor, *supra* note 60, at 423 ("'[E]xperiencing' becomes 'an experience' as actors retrospectively construct a narrative about what happened.").

and not reducible to individual recollection.[67] These retrospective narratives shape strategic decision-making, by signaling which factors to consider and prioritize in strategy formation.[68] The stories highlight a normative point about which strategies are currently legitimate and worthy of pursuing in light of the analogy to the past—and conversely, which strategies may be ill-advised in light of the subsequent (narrated) experience.[69]

C. *The Construction of Risk in Marriage Equality Litigation*

This Article conceptualizes organizations' "construction of risk" as the interpretative processes that actors in social movement organizations and private firms use (e.g., such as storytelling about movement history and the framing of opportunity and threat) in strategic decision-making about whether to pursue marriage equality litigation. Thus, lawyers aren't just handed a set of opportunities and constraints, nor do these factors fit into a universally accepted equation for creating social change. Rather, they actively construct conditions as threats or opportunities for strategic action. I observe how attorneys in private firms and social movement organizations use narrative constructions of their organizational goals, strategy, and history, in order to frame conditions as threats (to be avoided) or opportunities (to be pursued). I analyze how narratives shape actors' orientation and ability to perceive new situations as threats or opportunities.

It is important to note that sociological work on "social movements" and on "organizations" has been increasingly porous over the years. Organizational sociology, particularly in its "new institutionalist" approach, emphasizes how people structure organizational behavior to respond to stimuli from their environments—including from the "field" of peer organizations that perform similar services and compete for similar resources.[70] Organizations also do not simply rationally respond to stimuli, but rather organizational actors must first understand conditions as

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67 *See* Britta Baumgarten, *The Children of the Carnation Revolution? Connections Between Portugal's Anti-Austerity Movement and the Revolutionary Period 1974/1975*, 16 SOC. MOVEMENT STUD. 51, 52 (2017) (distinguishing the "[g]roup-specific collective memory" from individual memories and from collective-memories at the societal level).

68 Daphi, *supra* note 65, at 406 (arguing that retrospective movement narratives about "memory" affect movement actors framing and tactics).

69 *Id.* Thus, "memory ends up being an object movements can appropriate in order to foster their legitimacy, or to gain visibility recalling the relevance of an historical precedent." *Id.*

70 *See* Catherine R. Albiston & Gwendolyn M. Leachman, *Law as an Instrument of Social Change*, 13 INT'L ENCYC. SOC. & BEHAV. SCIS. 542, 545–46 (2015).

opportunities and threats to their collective purpose. They use interpretive mechanisms like framing to perceive risk and to motivate action.

Following this approach, I focus on how the organizational environment subtly shapes social change litigation. Organizations pursue behaviors that reflect the rules, norms, and cognitive logics embedded in their organizational fields.[71] While acknowledging that organizational behavior may sometimes be described as a "rational," instrumental response to material and regulatory stimuli, this approach emphasize the influence of taken-for-granted assumptions and ideas about how organizational practices can and should be structured.[72]

I examine how these processes develop inductively, when organizations from two distinct professional fields operate collectively, providing unique insights for sociology, which increasingly analyzes society—including systems of oppression and social change—through interactions among multiple institutional fields.

II. MARRIAGE EQUALITY LITIGATION: A CASE STUDY

This Part discusses the historical context of marriage equality litigation and explains the Article's original empirical study of attorneys' constructions of risk and conflict in these cases.

A. *Marriage Equality Litigation in Historical Context*

The timeframe for this study of marriage-equality litigation is 1990–2015. The start year (1990) is the first year in the contemporary LGBTQ+ movement's history in which a same-sex couple brought litigation against state officials for denying them the right to marry.[73] The end year (2015) is the U.S. Supreme Court landmark *Obergefell v. Hodges* decision,[74] which found statewide bans on same-sex marriage to be unconstitutional. This Section looks to secondary sources to identify

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71 Mark C. Suchman & Lauren B. Edelman, *Review: Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 919 (1996).

72 *See* DiMaggio, *supra* note 48, at 153.

73 NeJaime, *supra* note 12, at 104; PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 259 (2000). For a discussion of earlier cases claiming the right for same-sex couples to marry before the organized litigation efforts began in the 1990s, see Boucai, *supra* note 10. These cases are excluded from the study because they were brought before the formation of the contemporary LGBT legal groups.

74 Obergefell v. Hodges, 576 U.S. 644 (2015).

key aspects of the legal, political, cultural, and movement environments shaping marriage equality litigation during this period.

This Section focuses on *litigation* for marriage equality since it is in litigation where movement groups and private firms primarily overlap. However, the LGBT legal groups used non-litigation tactics as well.[75] LGBT rights groups' marriage cases used public-opinion polling and public-education campaigns from the start to support marriage-equality litigation.[76] Movement actors also increasingly used extralegal tactics to decenter litigation when they predicted a legal loss.[77] Although extralegal tactics are outside this Article's scope, I highlight how extralegal factors and extralegal considerations may have shaped litigation.

1. LGBT Legal Groups' Impact Litigation for Marriage Equality

The LGBT rights organizations which became the architects of the movement's impact litigation campaign for marriage equality were formed more than a decade before any of them would formally articulate a legal claim for the right to marry. These LGBT rights groups include Lambda Legal, National Center for Lesbian Rights (NCLR), GLBTQ Legal Advocates and Defenders (GLAD), and the American Civil Liberties Union's (ACLU's) Gay Rights Project.[78] These LGBT rights groups used an impact litigation model to achieve social change goals, one which was specifically modeled on the NAACP Legal Defense

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75 *See* Cummings & NeJaime, *supra* note 6, at 1235 ("Lawyering for Marriage Equality" included non-litigation tactics like legislative advocacy and drafting model laws.).

76 Hunter, *supra* note 46, at 1682 ("GLAD's emphasis on non-litigation activities in the early marriage cases largely flew under the radar . . . ."). The use of extralegal strategies for marriage equality eventually became so engrained that Professor Hunter argues that LGBT rights groups enacted a hybrid "electoral politics-style" model which differs from traditional impact litigation. *Id.*

77 *See* NeJaime, *supra* note 5, at 680–82; Matt Coles et al., *Winning Marriage: What We Need to Do* (June 21, 2005), http://s3-us-west-2.amazonaws.com/ftm-assets/ftm/archive/files/images/Final_Marriage_Concept_Paper-revised_(1).pdf [https://perma.cc/8QPV-VKGV] ("In some states . . . where legislation and litigation don't make sense, the effort should focus on general public education to change the climate in the state toward LGBT people."). *Cf. infra* Section III.A.2 ("[M]ovement lawyers made the 'conscious' decision in parenting cases 'to not make them about marriage,' the idea was to fly the case under the radar—to get a cautious win for constituents while preserving the marriage argument for more receptive venues.").

78 *See* Leachman, *supra* note 12, at 705. Lambda Legal was founded in 1973. *Id.* NCLR was founded in 1977. *Id.* GLAD was founded in 1978. *Id.* The ACLU's Gay Rights Project (now called the Lesbian Gay Bisexual Transgender and HIV Project) was founded in 1986. *See About the ACLU Lesbian Gay Bisexual Transgender & HIV Project*, ACLU (2020), https://www.aclu.org/other/about-aclu-lesbian-gay-bisexual-transgender-hiv-project [https://perma.cc/N7PY-UYJS].

and Educational Fund.[79] Litigators followed conventional impact litigation practices, which acknowledge that judges' ability to generate legal reform is constrained by existing legal precedent.[80] LGBT rights groups developed complex, step-by-step litigation strategies to incrementally build up favorable legal precedent in priority issue areas.

While organizations varied somewhat in their priorities,[81] their agendas increasingly converged in the late 1980s. This was due in no small part to the devastating blow dealt to the movement by its first major impact litigation campaign to overturn state sodomy laws, ending in the *Bowers v. Hardwick* decision at the Supreme Court.[82] LGBT rights groups asked the Court to overturn a Georgia ban on consensual sodomy. Instead, the Court upheld laws criminalizing same-sex intimacy, creating a high-court precedent that threatened movement efforts to combat "legal discrimination" against LGBTQ+ people on various other fronts as well.[83] LGBT rights groups banded together in the aftermath of *Bowers* to collectively recalibrate priorities and to shore up the planning and coordination of litigation.[84] A twice-yearly Litigators' Roundtable, implemented in 1986, became a regular and routinized venue for interaction and joint strategizing among LGBT rights groups, as did the annual Lavender Law conference hosted by the National LGBT Bar Association beginning in 1988.[85]

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79 ANDERSEN, *supra* note 11, at 1.

80 *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 11–12 (2d ed. 1991).

81 NCLR, for example, was formed in the 1970s—a time when HIV/AIDS issues affecting gay men consumed significant movement resources—to increase representation of issues affecting women and lesbians in the movement. *See Mission & History*, NCLR (2020), http://www.nclrights.org/about-us/mission-history [https://perma.cc/QQ7S-UTJP].

82 Bowers v. Hardwick, 478 U.S. 186 (1986).

83 For example, there are prohibitions on military service for LGBT people. *See, e.g.*, Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988), *cert. denied*, 498 U.S. 957 (1990).

84 *See* Eric van der Vort, *Revisiting Demise Through Success: The Lesbian and Gay Movement after* Obergefell, 51 SOCIO. IMAGINATION 1, 10 (2017) (noting how the Litigators' Roundtable came in the wake of the *Bowers* case and "came to serve a central role in planning [and] coordinating . . . legal strategies").

85 *See, e.g.*, ANDERSEN, *supra* note 11, at 42; *The 2020 Lavender Law Conference & Career Fair*, LGBT BAR, https://lgbtbar.org/annual [https://perma.cc/DSS9-2RAN]. *Bowers* itself was not an example of private-pro bono intervention. LGBT rights groups pursued it, along with collaborators including Professor Lawrence Tribe. It was an impact litigation strategy, but perhaps one that looked more like that of the NAACP-LDF variety than the variety we find in contemporary LGBT rights litigation. *Cf. infra* Section IV.A.2 ("[M]ovements with longer histories of impact litigation will simply have more raw experience with past defeats to draw from, making 'threat' narratives more available in longstanding movements than in newer ones.").

In these post-*Bowers* strategy meetings, "relationship recognition" emerged as a major collective focus for LGBT rights groups.[86] Movement lawyers reassessed their earlier impact litigation of anti-sodomy laws. The shadow of *Bowers* loomed over the federal courts, making LGBT rights groups wary of this traditional impact litigation venue.[87] Federal courts were increasingly seen as a threat as Republican-appointed conservatives filled the bench. As a result, LGBT rights groups shifted their priorities to state courts. They also shifted litigation away from federal constitutional rights that could reach all states in one fell swoop, to state constitutional and statutory matters that would be litigated state-by-state in state court.[88] Such cases would not create removal or certiorari jurisdiction and would thus be insulated from the hostile federal courts. Movement lawyers also considered it important to refocus on LGBTQ+ families and relationships to combat homophobic cultural narratives sexualizing queer people.[89] Family rights and nonmarital "relationship recognition" fit this goal.[90] By the early 1990s, all the major LGBT rights groups focused a portion of their dockets on securing legal recognition *outside marriage* for same-sex couples and for the rights of LGBTQ+ parents.[91] Without implementing any formal strategy focused on marriage equality at this time, LGBT rights organizations began collectively laying the groundwork for later marriage cases, through piecemeal cases asking for legal recognition of LGBTQ+ families and same-sex relationships.[92]

This early litigation for nonmarital rights reflects a consensus that was largely shared within the LGBT groups of the early 1990s—to avoid direct claims that same-sex couples were entitled to marriage.[93] Accounts of this period vary regarding the specific reasons for avoiding marriage, with some emphasizing the more radical ideological

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86 Cummings & NeJaime, *supra* note 6, at 1249–50.

87 *Id.*

88 *Id.*

89 *See* ANDERSEN, *supra* note 11, at 120 (discussing how LGBT rights litigators after *Bowers* turned to privacy claims around the family as a response to *Bowers*: "The majority in *Bowers* had been able to dismiss Michael Hardwick's privacy claim in part because they framed his sexual activity as existing outside the bounds of familial decision making.").

90 For a discussion of LGBT rights litigation for nonmarital relationship recognition, *see generally* NeJaime, *supra* note 12, at 87.

91 *See generally* Leachman, *supra* note 12, at 691.

92 *See* NeJaime, *supra* note 12, at 103–04.

93 *But see* Thomas Stoddard, *Yes: Marriage Is a Fundamental Right*, 76 A.B.A. J. 42, 42 (1990). Evan Wolfson was another early voice within the movement pushing for marriage. Wolfson was a lawyer for Lambda Legal who volunteered to litigate the first *Baehr* case privately along with local counsel in Hawaii, despite the case being "in direct contravention of movement strategy." Cummings & NeJaime, *supra* note 6, at 1245. Wolfson would go on to found Freedom to Marry in 2001.

opposition, citing marriage as an institution, and others emphasizing the practical obstacles.[94] The substance of this original debate over marriage is addressed at length elsewhere,[95] and is beyond the focus of this Article. What is clear from this period is that no major LGBT rights group was pursuing marriage equality claims in the early 1990s—and that they in fact had rejected multiple requests for representation by same-sex couples hoping to initiate marriage cases around this time.[96]

One of these requests was by a same-sex couple in Hawaii, who nevertheless proceeded to litigate their marriage case with the help of private counsel, claiming that prohibitions on same-sex marriage violated rights enshrined in the state's constitution.[97]

The *Baehr* case in Hawaii was the first time a state court issued a positive ruling for same-sex marriage, challenging LGBT rights groups' consensus against litigation of marriage.[98] Contrary to LGBT rights groups' expectations for the case, the Hawaii Supreme Court in *Baehr* held in 1993, that the state's prohibition on same-sex marriage was subject to strict scrutiny.[99] The case was remanded to allow state arguments that such bans were narrowly tailored to a compelling state objective.[100] Lambda Legal assisted with arguments on remand. A Hawaii circuit court awarded a victory to same-sex couples in 1996, finding for the first time, that prohibitions on same-sex marriage violated the state constitution.[101]

This victory, while significant for LGBT rights groups' first foray into marriage litigation, was also, however, short-lived. *Baehr* kicked up enormous conservative backlash to thwart the movement's advance

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94 Resistance to marriage based on ideological reservations about the institution has been at issue since the movement's initial debates about marriage. *See, e.g.*, Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV 529, 530–31 (2009). Others saw nonmarital rights as a precursor toward marriage. NeJaime, *supra* note 12, at 104–05.

95 *See, e.g.*, Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994); *see also* NeJaime, *supra* note 12, at 105–10.

96 LGBT rights groups declined to represent same-sex couples who later filed suit in Washington D.C., Hawaii, and Alaska. The Hawaii case is Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). The D.C. case is Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); *see also* Craig R. Dean, *Demanding Gay Marriage: One Gay Man's Account of the Struggle to Have His Union Recognized*, 19 GAY CMTY. NEWS, Aug. 25–31, 1991, at 7. The Alaska case is Brause v. Bureau of Vital Stats., No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); *see also* Aviram & Leachman, *supra* note 12, at 287 (noting that National Gay Rights Advocates, a now-disbanded LGBT rights group, was approached in the 1990s by plaintiffs in Alaska).

97 Cummings & NeJaime, *supra* note 6, at 1250.

98 *Id.*

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

100 *Id.*

101 Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

toward marriage before it even secured a toehold.[102] Perhaps true to the fears of movement lawyers who had shied away from a marriage-based goal, same-sex marriage became a conservative flashpoint in the 1996 presidential election, and voters and legislators across the country set up a massive resistance campaign. The federal government passed the federal Defense of Marriage Act (DOMA) in 1996 to "protect" states from recognizing same-sex marriage, and several states also followed suit with the passage of "mini-DOMAs" mandating opposite-sex marriage. Hawaii voters participated in this backlash, mooting the *Baehr* victory via a ballot initiative amending the state constitution. LGBT rights groups were increasingly drawn into the fray as they tried to stave off backsliding.[103]

Proceeding with caution in this volatile terrain, LGBT rights groups took up two cases in Vermont and Massachusetts, which were particularly formative in shaping the movement's marriage litigation strategy for the next decade. The Vermont case, *Baker v. State*,[104] was litigated by the New England LGBT group GLAD and local Vermont attorneys.[105] While the Vermont Supreme Court sided with the plaintiffs,[106] victory was ultimately only partial; the Vermont legislature reacted to the decision by establishing the separate-but-equal category of "domestic partnerships" for same-sex couples.[107] GLAD then initiated a case in the organization's home state of Massachusetts in 2001. This resulted in the movement's first secure legal victory on marriage in the *Goodridge* decision in 2003.[108] This victory in Massachusetts coincided with another major victory for LGBT legal groups, the U.S. Supreme Court decision overturning *Bowers* in the landmark *Lawrence v. Texas*, finding that prohibitions on same-sex

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102 *See* Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 454–55 (2014).

103 *Id.*; *see also* Leachman, *supra* note 12, at 717–18 (showing a post-2004 increase in LGBT rights groups' cases challenging ballot initiatives prohibiting same-sex marriage).

104 Baker v. State, 744 A.2d 864 (Vt. 1999).

105 Attorneys for plaintiffs/appellants were Beth Robinson and Susan M. Murray of Langrock Sperry & Wool and Mary Bonauto of Gay & Lesbian Advocates & Defenders (GLAD). *Id.* at 866.

106 The Vermont Supreme Court decided that the same-sex couples were similarly situated to opposite-sex, married couples, and therefore that the state had no rational motive to deny them the rights and benefits of marriage. *Id.* at 867–68.

107 The later reversal through the legislature would be to design the separate-but-equal category of "domestic partnerships," which denied Vermont same-sex couples the title of marriage while allowing them to possess the same rights and benefits as married couples. *See, e.g.*, *Vermont Civil Union Bill Becomes Law*, DEMOCRACY NOW (Apr. 27, 2000), https://www.democracynow.org/2000/4/27/vermont_civil_union_bill_becomes_law [https://perma.cc/EFP5-SQT7].

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

intimacy infringe on constitutional privacy rights.[109] These victories boosted confidence in the movement's impact litigation, and LGBT rights groups intensified efforts toward marriage—cautiously.

2. LGBT Legal Groups' Strategy for Marriage Equality

Still highly wary of the federal courts following the defense-of-marriage backlash, LGBT rights groups coordinated an incremental strategy for marriage equality. First, they would challenge restrictions on same-sex marriage at the state level (the state-by-state strategy). Second, they would attack provisions of the federal Defense of Marriage Act in federal courts (the DOMA strategy). Finally, they would ask the U.S. Supreme Court to strike down all state bans on same-sex marriage nationwide (the Supreme Court strategy).[110] LGBT rights groups thus set out with the vision of a piecemeal progression toward upending same-sex marriage bans nationwide—but not until enough state bans had fallen that marriage equality would be an active reality in much of the United States before the issue reached the Supreme Court. The next Sections discuss each phase of this strategy.

a. The State-by-State Strategy

The LGBT rights groups' state-by-state strategy was designed to incrementally diffuse victories like *Goodridge* to selected states throughout the nation. LGBT rights groups would challenge state bans against same-sex marriage in a select set of hospitable state courts. The concept was to build up the most favorable precedent possible by targeting the states most welcoming to LGBT rights first.

The state-by-state strategy, implemented collectively with participation by all major LGBT rights groups after *Goodridge*, again followed the path of traditional impact litigation. LGBT rights groups undertook a careful deliberation process in deciding what types of cases to bring, when, and in what forum. LGBT rights groups tracked legal developments closely, comparing states' records on issues like judicial conservatism and antidiscrimination protections for LGBT people.[111]

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

110 This discussion of three stages is not to say that LGBT rights groups followed a preordained strategy without deviation. Rather, strategizing involved flexibility to maneuver. *See, e.g.*, Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1688–89 (2017) ("[T]he specific dates and which states would go into which buckets were approximate . . . .").

111 *Cf.* CHEN & CUMMINGS, *supra* note 3, at 504 (noting that the factors LGBT rights groups weighed in deciding which state courts to target included "case theory, precedent, possible

Based on their experiences in Hawaii and Vermont, movement lawyers also carefully analyzed state culture and public opinion concerning same-sex marriage, as well as a state's process for constitutional amendments (avoiding jurisdictions that allowed amendment via ballot initiative).[112] Litigators strategized the specific legal arguments they would present, and the sequence—mapping out the forums to target and arguments to build upon, and planning in advance for a fallback position if things did not go according to plan.[113] LGBT rights groups shared information throughout this process and worked collaboratively in developing mutually-supportive strategies to achieve marriage.[114]

Cases initiated by LGBT rights groups under the state-by-state plan typically raised claims of equal protection and due process under state constitutions, where high courts had already expanded rights in these areas beyond the federal floor.[115] LGBT rights groups attempted to maximize the legal precedent in these states by arguing for heightened scrutiny under state constitutional guarantees of equal protection (based on gender and/or sexual orientation classifications in state marriage laws) and due process (based on the state's restriction on a fundamental right to marry afforded to opposite-sex couples).[116] Their efforts met mixed success. Some initial victories for LGBT rights groups in states' lower courts language languished as appeals to high-courts in New Jersey, Maryland, and Washington were unsuccessful.[117] In other

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forums, judicial profiles, the likelihood of success on the legal merits, and the potential for reversal by statewide initiative").

112 *See* Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 28 (2005); *see also id.* at 23 n.125 ("The Hawaii litigation and political developments were also very influential in our thinking.").

113 Coles et al., *supra* note 77.

114 Part of this was out of routine, as national litigation on LGBT rights issues in the past had set the groups on a path toward collaboration.

115 These state constitutions were modeled on federal constitutional provisions guaranteeing due process and equal protection. A key difference with the state constitutional arguments was that many high state courts had moved state-constitutional interpretation beyond the floor-level rights provided in the federal model.

116 Cases discussed *infra* note 117 in New Jersey, Maryland, and Washington state illustrate some of the many examples of the types of due process and equal protection arguments seen throughout LGBT rights groups' state-by-state strategy.

117 Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (holding that same-sex marriage is not a fundamental right). The *Lewis* court also said same-sex couples are entitled to the same rights as opposite-sex couples, and that the legislature must change their statutes, leading to law that was unsettled until 2013. The New Jersey Supreme Court settled the issue in Garden State Equal. v. Dow, 79 A.3d 1036 (N.J. 2013) (holding that the state's Civil Union Act violated the Fourteenth Amendment's Equal Protection Clause). Conaway v. Deane, 932 A.2d 571 (Md. 2007) (applying a rational basis review and finding the state's interests in fostering procreation and encouraging a traditional family structure to be legitimate reasons and related reasonably to the means

states, such as Connecticut and Iowa, the strategy played out as LGBT rights groups had hoped, resulting in other high-court victories.[118]

LGBT rights groups also became involved in state litigation they did not originally anticipate.[119] This occurred when same-sex couples circumvented LGBT rights groups to litigate marriage claims via private attorneys. Large numbers of private claims were filed, for example, in California, New York, Arizona, and Indiana, after local-government officials in those states issued marriage licenses to same-sex couples in apparent contravention of state law.[120] These states had not been seen as "hospitable" enough to warrant litigation in the early state-by-state plan. LGBT rights groups headquartered in California and New York nevertheless took up cases in those states.[121] LGBT rights groups also engaged in informal advocacy work to try to convince litigators in Arizona and Indiana not to litigate in state court—efforts that ultimately fell short.[122]

b. The Defense of Marriage Act (DOMA) Strategy

LGBT rights litigators began to tentatively bring federal-court challenges against the Defense of Marriage Act of 1996, the federal legislative backlash against same-sex marriage.[123] These DOMA-based challenges focused on Section 3 of the federal Defense of Marriage Act, which defined *marriage* to include only opposite-sex unions.[124] Challenges argued that the federal government discriminated against

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employed by § 2-210). After a superior court in Washington found that restrictions on same-sex marriage violated substantive due process rights under the state constitution, Andersen v. King Cnty., No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), the case was consolidated on appeal to the Washington Supreme Court, Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (finding restrictions on same-sex marriage do not violate the state constitution's due process clause or equal rights protections).

118 Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (finding state restrictions on same-sex marriage were not substantially related to a legitimate government interest).

119 LGBT rights groups also took increasing cases to overturn state ballot initiatives against same-sex marriage which did not quite follow the state-by-state approach. *See, e.g.*, Citizens for Equal Prot., Inc. v. Bruning, 290 F. Supp. 2d 1004 (D. Neb. 2003) (discussing how LGBT rights groups challenged Nebraska's mini-DOMA in federal court); *see also* Leachman, *supra* note 12, at 717.

120 This litigation was itself responsive to local government action allowing same-sex couples to marry, at least for a brief period of time. When they were later denied marriage rights, those couples sued. LGBT rights groups formally intervened in New York and California cases, and tried to oppose litigation in Indiana and Arizona. *See infra* notes 121–22.

121 *See* Hernandez v. Robles, 26 A.D.3d 98 (N.Y. App. Div. 2005); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

122 *See* Standhardt v. Super. Ct. *ex rel.* Cnty. of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005).

123 The Federal Defense of Marriage Act was passed in 1996. 1 U.S.C. § 7; 28 U.S.C. § 1738C.

124 1 U.S.C. § 7; 28 U.S.C. § 1738C.

lawfully married same-sex couples in denying them federal rights and benefits afforded to opposite-sex couples.[125] What made this strategy so important to the incremental approach was its focus on nonmarital couple benefits. Rather than claiming a right to marriage, the plaintiffs claimed equal rights to nonmarital benefits that the federal government linked to marriage. These benefits lacked the religious and emotional baggage attached directly to the institution of marriage and shifted the focus away from a religious lens of marriage as a holistic, sanctified institution. Viewing marriage as a bundle of benefits would make it harder in the future to deny the non-pecuniary benefits of that institution.

LGBT rights lawyers in GLAD—the group that initiated *Goodridge* and other precedent-setting New England cases—initiated *Gill v. Office of Personnel Management* as a principal case under Section 3.[126] LGBT rights groups argued that the exclusive definition of "marriage" as between one man and one woman under Section 3, denied same-sex couples the federal constitutional protections of due process and equal protection. These arguments mirrored the types of arguments articulated under analogous state-law constitutions, claiming that DOMA infringed on constitutional guarantees of equal protection and the fundamental right to marriage. While the federal courts were far from settled concerning the level of scrutiny applicable to these cases, LGBT rights groups relied on language in *Lawrence* and earlier precedent[127] suggestive of heightened scrutiny if denying LGBT people rights appeared to be overt animus.[128] The *Gill* line of cases was eclipsed when national attention focused on other DOMA challenges—particularly the *Perry* and *Windsor* cases when the U.S. Supreme Court granted certiorari.[129]

Perry represented a departure from LGBT rights groups' DOMA strategy.[130] In that case, private attorneys prominent in social change

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125 This is distinguishable from challenges under Section 2, which were litigated by private firms at the time. *See* Smelt v. Cnty. of Orange, 447 F.3d 673, 683 (9th Cir. 2006) (finding that plaintiffs "lacked standing to attack Section 2 of DOMA").

126 Gill v. Off. of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

127 *See* Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

128 *See Gill*, 699 F. Supp. at 394–97 (discussing how the court could not understand how sexual orientation could be relevant to the federal benefits at issue and held it could only be irrational prejudice that motivated the classification in DOMA). This was affirmed in Massachusetts v. U.S. Dep't of Health and Hum. Servs., 682 F.3d 1 (1st Cir. 2012). The court in this case is clearly waiting for a U.S. Supreme Court ruling on the matter, which would come in *Windsor*; LGBT rights groups pursued similar strategies in other cases. *E.g.*, Pedersen v. Off. of Pers. Mgmt., 881 F. Supp. 2d 294 (D. Conn. 2012).

129 Hollingsworth v. Perry, 570 U.S. 693 (2013); United States v. Windsor, 570 U.S. 744 (2013).

130 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

litigation in contexts outside LGBT rights, joined together to represent same-sex couples in a federal court challenge to California's same-sex marriage prohibition.[131] Unlike *Gill*, *Perry* involved a federal argument suitable for decision at the U.S. Supreme Court that all states were required to allow people to marry.[132] LGBT rights groups attempted interventions ranging from informal negotiation with the private attorneys to outright intervention.[133] LGBT rights groups initially tried to dissuade the *Perry* attorneys informally from bringing the case.[134] They next doubled down with a formal motion to intervene.[135] LGBT rights groups later played a supportive role in the *Perry* case.[136] Yet the U.S. Supreme Court ultimately did not decide on the nationwide legality of same-sex marriage in that case, basing the holding instead on other grounds.[137]

In *Windsor*, on the other hand, the U.S. Supreme Court would resolve questions similar to those raised in *Gill* regarding the constitutionality of DOMA's Section 3 (i.e., the federal government's discrimination against same-sex marriage in the states). The lead plaintiff in the case, Edie Windsor, was a surviving widow of a spouse she married in a legal same-sex marriage, who was taxed at exorbitant rates because of the federal DOMA's Section 3 prohibiting the federal government from recognizing their valid marriage.[138] Litigation in this case, proceeding with the help of LGBT rights groups,[139] would ultimately result in a landmark ruling at the U.S. Supreme Court. The 2012 *Windsor* decision was the first clear signal that the U.S. Supreme

131 CAL. CONST. art. I, § 7.5.

132 *See* Douglas NeJaime, *First, Decide DOMA*, L.A. TIMES (June 8, 2012, 12:00 AM), https://www.latimes.com/opinion/la-xpm-2012-jun-08-la-oe-nejaime-doma-prop8-high-court-20120608-story.html [https://perma.cc/DA5D-FP9D].

133 Notice of Motion and Motion to Intervene as Party Plaintiffs; Memorandum of Points and Authorities at 1, Perry v. Schwarzenegger (N.D. Cal. July 8, 2009) (No. 09-CV-2292). Similar motions to intervene were filed by LGBT rights groups in other federal DOMA cases initiated by private attorneys. *See, e.g.*, Docket Report, Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006) (No. 05-56040).

134 LGBT rights groups tried issuing a public statement denouncing the decision to litigate. *See* Gabel-Brett & Cathcart, *supra* note 17, at 12–13.

135 Notice of Motion and Motion to Intervene as Party Plaintiffs; Memorandum of Points and Authorities, *supra* note 133, at 1.

136 *See* Cummings & NeJaime, *supra* note 6, at 1302 (discussing the facilitation of expert witnesses at trial in *Perry*).

137 Hollingsworth v. Perry, 570 U.S. 693, 700–01 (2013).

138 Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

139 The Supreme Court cases in both *Windsor* and *Perry* were supported by LGBT rights groups. ACLU acted as co-counsel in *Windsor*. LGBT rights groups also did significant informal support in *Perry*, including coordinating amicus briefs among other things. *See* Cummings & NeJaime, *supra* note 6, at 1302 n.496.

Court was ready and willing to accept constitutional arguments for same-sex marriage.[140]

c. The Post-*Windsor* Strategy

After *Windsor*, all these strands of litigation finally united. In this third and final stage, LGBT rights groups (along with a number of private litigators)[141] filed broad challenges to state bans on same-sex marriage, attempting to invalidate those bans nationwide. LGBT rights groups at this point were taking cases that included both arguments to overturn the federal DOMA and arguments to overturn state-level prohibitions on same-sex marriage.[142]

These expansive claims culminated in 2015 with *Obergefell v. Hodges*,[143] the U.S. Supreme Court case which ultimately legalized same-sex marriage nationwide. The cases consolidated into this Supreme Court appeal involved both private counsel and several LGBT rights groups.[144] It was *Obergefell* which ultimately ruled on the unconstitutionality of Section 2 of the federal Defense of Marriage Act.[145]

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140 This was the interpretation of Windsor, arising from the most conservative reaches of the Supreme Court to the most progressive LGBT rights groups' interpretations. *Compare Windsor*, 570 U.S. at 795–802 (2013) (Scalia, J., dissenting) (saying that this spells celebration for same-sex marriage), *with* Obergefell v. Hodges, 576 U.S. 644 (2015).

141 LGBT rights groups, while pursuing their own cases, also worked actively in tandem with private litigators behind the scenes on many cases to provide informal support. Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1528 (2016); *see also* Chris Geidner, *How One Lawyer Turned the Idea of Marriage Equality into Reality*, BUZZFEED NEWS (Nov. 17, 2013, 9:01 AM), https:/www.buzzfeednews.com/article/chrisgeidner/how-the-idea-of-marriage-equality-became-reality [https://perma.cc/7V7K-RRU8] (discussing GLAD's litigation concurrent with *Windsor*).

142 The progression of Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012) after *Windsor* illustrates how *Windsor* terminated LGBT rights groups' incrementalism in the federal courts. LGBT rights lawyers had to file to amend their original complaint to raise new and broader arguments after *Windsor*. LGBT rights groups originally filed *Sandoval* on a very narrow theory, which would not require the Court to overrule the marriage laws of a vast majority of states at the time to rule in their favor. Instead, the argument in *Sandoval* at filing was that denying same-sex couples "marriage" in name, while still allowing providing comprehensive domestic partnership laws, was unconstitutional. A judge dismissed the claim, and it went up on appeal after *Windsor*. By then, LGBT rights groups wanted to include broader arguments, following *Windsor*, not raised in the original complaint.

143 *Obergefell*, 576 U.S. 644.

144 The four cases that were combined in *Obergefell* were from four states and included cases by both private counsel and LGBT rights groups including Lambda Legal, ACLU, NCLR, and GLAD. *See id.*; *Obergefell v. Hodges*, CONST. ACCOUNTABILITY CTR. (2020), https://www.theusconstitution.org/litigation/obergefell-v-hodges-et-al-u-s-sup-ct [https://perma.cc/B69V-G9HR].

145 *Obergefell*, 576 U.S. 644.

Each phase in the LGBT rights strategy outlined above demonstrates a new consensus among LGBT rights groups about the litigation strategies that best managed perceived risks and opportunities in pursuing marriage equality. Conflicts arose with private firms during the first two stages of the LGBT rights groups' strategy, as LGBT rights groups sought to stave off private-firm arguments that were broader and more expansive than the LGBT litigation strategy. Consensus then emerged after *Windsor*, as movement groups and private firms interpreted risks similarly (narrowly) in light of *Windsor*'s signal of receptivity to same-sex marriage.

B. *Study of Marriage Equality*

This Section discusses the original empirical study of attorneys' framing of risk and opportunity in marriage equality litigation. The primary data source for the study is interviews with attorneys who litigated marriage equality cases between 1990 and 2015.[146] Section II.B.1 describes the methods used to construct an initial database of marriage-equality cases which includes "counsel" information for all attorneys litigating for same-sex marriage. Section II.B.2 describes the criteria used to select interview respondents from this database. Section II.B.3 provides the methodology used for the interviews. Section II.B.4 discusses the supplemental archival data used to triangulate the interviews. Section II.B.5 concludes with a description of the procedures used in the analysis of these data.

1. Constructing the Database of Marriage-Equality Cases Used for Selecting Interview Respondents

To identify interview respondents, I first used Westlaw keyword searches to construct a comprehensive database of all federal and state cases involving claims related to the marital rights of same-sex couples during the study timeframe (1990–2015). The cases included direct challenges to state statutes prohibiting same-sex couples from marrying,[147] as well as other challenges to other state and federal laws that excluded same-sex couples from the benefits of marriage.[148]

"Counsel" information was included for every case in this database of marriage-equality cases. A research assistant populated the database

146 For an explanation of the study's timeframe, see *supra* Section II.A.

147 *E.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

148 *E.g.*, *In re* Shields v. Madigan, 783 N.Y.S.2d 270 (Sup. Ct. 2004).

with information about the attorneys and firms representing the same-sex couples, including attorney contact information as listed on state bar websites, firm websites, and attorney directories like Martindale.com. These online searches provided a birds-eye view of the attorneys and organizational actors involved in these cases. I used this information for reference in selecting attorneys for interviews and situating their perspectives in the context of the overall data. These methods produced a total of 178 potential attorneys to solicit for interviews.

2. Selecting Interview Respondents

The database of marriage equality counsel served as a "sampling frame" for selecting interview respondents. From this sampling frame, I conducted interviews with thirty-one attorneys: eighteen from private firms and thirteen from nonprofit LGBT legal organizations.

Interviewees were drawn broadly from two pools—one consisting of attorneys working in private firms (during their marriage equality litigation involvement) the other consisting of attorneys working in nonprofit movement organizations.[149] I solicited a greater number of private-firms attorneys than LGBT rights lawyers for these interviews to obtain perspectives of attorneys in private firms of varying sizes. The final response rates reflect this initial oversampling, with attorneys in the sample skewed slightly in favor of private attorneys. During the course of data collection, however, it became clear that the private-attorneys' framing of this litigation were not as variable as anticipated.[150] The number of interviewees was also limited in part due to a low response rate.

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149 Regarding overlap between these categories: Respondents were characterized as "private" versus "movement" attorneys depending on where they worked when they were actively pursuing these marriage-equality cases. Most attorneys worked within firms or nonprofits only in pursuing their case. Only one respondent could provide information on marriage-equality litigation from both perspectives (i.e., very few attorneys have litigated cases both as private-firm lawyers and as staff attorneys in LGBT rights groups).

150 For variation of approach in private practice, see, for example, Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 183, 195 (Robert Granfield & Lynn Mather eds., 2009); Cummings, *supra* note 2, at 148.

3. Interview Methods

I conducted semi-structured interviews with thirty-one attorneys involved in marriage equality litigation.[151] The interviews took place between July 2016 and May 2017 and averaged sixty-three minutes each. All interviews were conducted individually except for two, which the respondents requested to be conducted in a two-person group format.

Interviews are used to provide insight into the strategic choices made behind closed doors. Retrospective interviews are imperfect data for information about actors' past motivations, including their strategic motivations. Self-reported retrospective accounts can be concocted and self-serving (as can non-retrospective accounts). However, concerns about retrospective bias may be less troublesome in this study's context. It is in strategy talks that movement actors construct a dominant, collective account of lessons from past events. In the marriage-equality context, prolonged strategic negotiations occurred at every step. Thus, the interview data likely reveals the narratives that were collectively constructed and institutionalized through this process. It is here that movement actors "arrive at joint experiences of groups and organizations," i.e., the collective "story" of past events, which is then consolidated and simplified as they are then used "to inform strategizing."[152]

The interviews themselves used a semi-structured format. All questions were loosely structured around a set of core topics. While every interview touched on questions from within each topic area, the questions did not always progress in the same order; this allowed for respondents to direct the discussion based on the topics they found to

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151 For a discussion of LGBTQ+ research using similar methods, see D'LANE R. COMPTON, *How Many (Queer) Cases Do I Need? Thinking Through Research Design*, *in* OTHER, PLEASE SPECIFY: QUEER METHODS IN SOCIOLOGY 185, 198 (D'Lane Compton et al. eds., 2018) (describing a study of LGBTQ scholarship published on JStor.org between 1960–2013 finding that "[t]he largest proportion of the LGBTQ scholarship published in JStor.org (37.6%) is based on interview data alone" and that "[t]he median number of interviews utilized by LGBTQ articles in JStor.org continues to hold at 30 across data collection and qualitative methodologies . . . . [and] across time").

152 de Moor & Wahlström, *supra* note 60, at 423. Recent work helpfully theorizes how past experience-based movement narratives may develop in three stages, wherein individual experiences are synthesized into collective stories, which in turn, become constructs original event, and shape future strategizing. *Id.* at 5 ("In the first step in our model, 'experiencing' activists learn about the POS [political opportunity structure] through interacting with it. In a second step, 'experiencing' becomes 'an experience' as actors retrospectively construct a narrative about what happened. At this stage, there are exchanges of individual experiences and possibly negotiations to arrive at joint experiences of groups and organizations. . . . In a third step, these narratives are appropriated to inform strategizing.").

be most important, while still allowing me to ask follow-up questions as needed and to account for any unanticipated issues that emerged organically over the course of the conversation.[153]

The focus of the questions was on determining the factors associated with the decision to take specific cases and articulate specific legal arguments.[154] The interviews covered a range of factors that might potentially influence attorneys' litigation strategies, including the attorneys' professional and political background (typical area of practice; previous work at other organizations; political orientation; general impressions of marriage equality advocacy or the larger LGBTQ+ movement at the time of the case); the structure of the public interest or private firm to which they belong (major financial contributors; staff; oversight committees; relationships to other organizations); processes used to decide whether to pursue a particular case; and the attorney's relationships with other organizations.

4. Archival Data

Archival data and all available legal documentation related to each case in the study provided a secondary source of information on marriage equality litigation. I collected archival data showing the firm's or LGBT rights groups' publicly available messaging around marriage equality that groups publicized at the time of litigation. I also collected case-related documents and secondary materials available through Lexis-Nexis's additional court documents (e.g., documents that attorneys or others in their organization filed in court at the time of litigation). Prior to each interview, research assistants used these archival documents to construct reference sheets to prompt specific questions, tailored to each respondent, about the legal arguments used and the justifications underlying them.

Reviewing the contemporaneous organizational documents provided a check against retrospective bias in the interview data. Some attorneys also shared documentary evidence on file personally during the time of the interviews, which served similar purposes. I used all

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153 *See* Kathleen M. Blee & Verta Taylor, *Semi-Structured Interviewing in Social Movement Research*, *in* METHODS OF SOCIAL MOVEMENT RESEARCH 92 (Bert Klandermans & Suzanne Staggenborg eds., 2002).

154 *Cf.* Carla A. Pfeffer, *"I Don't Like Passing as a Straight Woman": Queer Negotiations of Identity and Social Group Membership*, 120 AM. J. SOCIO. 1, 14 (2014) ("One research goal was to develop a deeper understanding for how participants construct their social worlds through everyday actions and interactions, an approach that may be particularly useful in the context of studying trans lives and families." (citation omitted)).

available archival material and secondary sources in the analysis of the data as well to triangulate findings (as discussed in the next Section).

5. Analysis

All interviews were transcribed and uploaded to NVivo software for coding and analysis. With research assistants, I developed a coding scheme to systematically identify patterns in the data. Coding categories were generated inductively from the data and later refined.

The analysis examined attorneys' descriptions of strategy formation, focusing in particular on how attorneys presented their strategic options and their rationales for decision-making. The coding scheme aimed to identify the frames and narratives that were important in shaping actors' strategic decision-making. Coding identified variation in the content of this discourse, with different codes assigned for different forms of movement discourse.

Discourse was operationalized as "narrative" when it contained specific narrative features: characters and events involving action, ordered in sequence to promote a specific message with a normative point.[155] The coding scheme interpreted narratives as motivating strategy where respondents provided narratives as rationale for the decision to perform an action. Specific narrative codes were developed inductively where interviews revealed specific historical narratives emphasizing loss or opportunity for marriage equality litigation. I analyze both the content of the narratives, and how attorneys used these narratives to frame opportunities and threats related to conflict with allies.

I also took precautions to minimize the possibility of interpreting backward-looking justifications (made after the fact) as strategy-informing narratives. I considered, for example, the extent to which statements were shared or not, and I consulted archival sources to check for additional validation for idiosyncratic viewpoints.

I focus on discourse that had an apparent effect on attorneys' or organizations' tactics. A separate set of codes was used for discussions of tactical variation—including conflict and cooperation—to contextualize meaning-making and how it may vary by context. The "tactic" codes identified when the narratives and frames were being used with these outcomes.

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155 These elements of narrative are discussed *supra* in Section I.B.

III. FINDINGS: RISK AND CONFLICT IN MARRIAGE EQUALITY LITIGATION

This Part discusses findings from the interviews with marriage equality attorneys. Organizational history informed attorneys' assessments of risk, leading the movement attorneys and their allies to view risks as collective and long-term, while private attorneys viewed risks as individual and short-term. These differences in risk-framing were a causal factor in conflict when movement attorneys (and their allies) pushed for a more cautious and risk-averse approach than that pursued by private firms unaffiliated with the movement.

A. *Movement Attorneys: Broad Construction of Risk (Collective and Long-Term)*

The objectives of LGBT rights organizations in pursuing marriage equality litigation were broader than just "winning marriage." As impact litigation organizations, LGBT rights groups sought long-term victories, which would provide the foundation for later courts to rule in their favor in subsequent cases. LGBT rights lawyers actively considered the effect that cases would have on concurrent and future rights litigation, including in other areas outside marriage, and the degree to which extralegal factors could detract from a permanent victory for marriage. The risks they emphasized most strongly were risks affecting these wide-ranging organizational goals.

Specifically, LGBT rights lawyers emphasized: collective risks to LGBT rights issues outside marriage; and long-term risks to marriage equality coming from factors outside litigation. These risks were emphasized in addition to the legal risks and opportunities posed by formal case law and legislation.

The following Sections analyze LGBT rights lawyers' framing of these risks. I find that movement attorneys appealed to their organizations' and the movement's history in identifying and framing the risks of marriage equality litigation. These attorneys looked to cautionary tales from the past in highlighting an expansive set of collective, long-term risks that marriage litigation could entail, affecting movement strategies beyond litigation, and movement issues beyond marriage. Movement attorneys thus framed the risks of marriage equality litigation broadly, and they designed incremental strategies as a way of managing those risks. Movement attorneys also justified their attempts to thwart private-firm litigation as a risk-management

strategy. These conflicts were seen as fallout from the urgent need to educate and redirect private attorneys toward less risky claims.

1. LGBT Rights Groups' Goals: Collective and Long-Term

Marriage equality cases were just one front in a multi-case strategy, whose ultimate goal was to improve LGBT rights across a variety of substantive issues affecting LGBTQ+ people collectively. Movement attorneys did not see themselves as servants of the marriage-equality "cause," but rather as practical strategists who understood how the panoply of familial rights assumed within marriage claims broadly affected nearly all these groups' priority areas. Marriage cases thus were viewed as effective or successful to the extent that they contributed to LGBT organizations' more fundamental goal of expanding LGBT rights collectively across the board.

Despite being an analytically distinct legal argument, marriage was ultimately intricately interconnected with other issues, which LGBT rights groups considered to be preliminary priorities to be addressed before presenting marriage claims. Movement attorneys considered the collective needs of the LGBTQ+ community and the collective risks to that community, as the following quotation indicates:

> [T]here was a plethora of problems for the LGBT community, it wasn't just about marriage. It was job discrimination, housing discrimination, parenting discrimination—not only in terms of being a foster or adoptive parent, or in second parent adoption, but also in custody disputes. I had a number of cases, several cases on behalf of either transgender or gay parents in the Deep South, where . . . family court judges were giving custody of the kids to the other parent, regardless of the effect on the child, purely based on [parents'] sexual orientation or being transgender. And so there was a lot. And there was a great desire to—just bring a marriage case. Folks, there is so much that we need to do. We cannot even have custody of our own kids. It doesn't make sense to [proceed with a marriage claim]. We may win. We may get a good judge. But those types of victories are going to be short-lived. Unless you do all the incremental change, the cultural change that has to happen before you advocate for something like marriage.[156]

156 Interview 838183 (on file with author).

This observation also demonstrates that LGBT rights lawyers defined "success" in marriage litigation as winning a victory that was stable and long-lasting.[157]

The permanency of an outcome was a constant worry for movement lawyers and was the most critical goal by which they defined success in marriage litigation. Thus, it was not just losing marriage cases that LGBT rights attorneys feared. They realized that victories on marriage might be "short-lived" if similar prior cases created backlash. Victories had to be long-term, not only to serve the substantive goals of improving LGBTQ+ people's lives, but also to serve the procedural purpose making these victories positive precedent in future cases.

In summary, movement attorneys pursued marriage cases that could deliver long-term victories for the collective interests of their constituents. As the next Sections will show, movement actors drew from specific historical accounts of failure on these fronts—cases that were lost or overturned politically, producing far-reaching consequences outside marriage—to highlight threats and emphasize the need for caution.

2. Long-Term Risks to Marriage: Avoiding Loss, Backlash, and Political Reversal

Movement attorneys underscored threats to long-term goals by referring to cautionary narratives from the movement's history.

LGBT rights groups historically experienced backlash and political reversal, which had made prior courtroom victories short-lived. Movement lawyers avoided cases that could present similar types of extralegal obstacles to long-term success. In the following example, a movement attorney lists a variety of legal, political, and cultural considerations that affected attorneys' decisions concerning which courts to target in the early state-by-state litigation:

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157 Movement attorneys explained that the incremental strategies they used were designed in hopes of best preserving success for the long term. For example:

> [I]t was a core part of the philosophy of change at . . . the LGBT groups—that it's not just about getting a decision by a court. Right? There's so many things that need to be done—prior to being able to actually have those victories last—that it made a lot of sense to take an incremental approach.

Id.; see supra Section I.A.1. The respondent advocates incrementalism as the best-suited litigation approach for achieving long-term success. "Incrementalism" meant laying the groundwork for marriage cases by litigating smaller-stakes issues in those jurisdictions first before taking the more visible marriage cases.

> What's their process for amending their state constitution like? We learned from Hawaii and Alaska. You know—choose a state that's not so easy to amend the state constitution. What is the composition of their state supreme court, how are the justices picked, do they stand for re-election, what those looked like in the past, what is their jurisprudence on equal protection, on due process—you know what kind of the various things we might argue and to think about then also, well if there was an attempt to do—undo this politically, is there a strong political group in the state. How would this be fought? What sort of educational work can be done to start to change the public debate and understanding of these issues that can also affect the way the judges think about the issues, but also how they think their decision might be received?[158]

The Hawaii and Alaska cases from the early 1990s discussed here sent a clear message to movement attorneys: a favorable judicial decision would not result in lasting change if it was subject to post hoc political backlash. Attorneys saw a similar message in the barrage of ballot initiatives and the legislative rollback experienced in the wake of later marriage victories.[159]

What movement lawyers took away from these histories was the need to insulate their marriage cases from not only from bad precedent, but also from extralegal threats. LGBT rights groups did significant extralegal activism, including public education and legislative advocacy, to disarm foreseeable backlash.[160] If movement lawyers could not avoid extralegal threats, they avoided litigating marriage claims in those states altogether.

Movement lawyers frequently drew on historical narratives involving nonmarital family rights cases to gauge which courts were too risky for marriage claims, particularly parental custody cases, second-parent adoption, and domestic partnerships. The attorneys described a logical connection among these cases, such that marriage arguments were seen as a natural extension of arguments attorneys and their organizations made earlier.[161] Indeed, many of these cases involved similar versions of the same legal arguments.[162] Courts often ruled

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158 Interview 578252 (on file with author).

159 Interview 158251 (on file with author).

160 *See supra* Section II.A.

161 *See, e.g.*, Interview 468211 (on file with the author) ("I consider the pre-marriage cases to be marriage cases. From my perspective, all the early domestic partner cases were also marriage cases . . . I think it's a trajectory, about recognition.").

162 *See* Interview 838183, *supra* note 156 ("My understanding is that we—and I was also involved in a [state] case involving second-parent adoption where marriage was potentially one of the issues—so in those cases, we, at that time, we did not make them about marriage. What we

against same-sex couples in marriage cases, for example, by finding a legitimate state interest in discouraging same-sex parenting as something that was supposedly bad for the children.[163] Movement attorneys fought against nearly identical arguments to those faced regarding a state interest in discouraging same-sex parenthood in their cases involving domestic partnership and parenting rights (custody, adoption, foster parenting)[164]—"long before marriage ever became something that was part of litigation."[165] Attorneys saw arguments long presented in nonmarital relationship recognition cases as laying important groundwork on family issues more broadly.[166]

In deciding whether to pursue a marriage claim, movement attorneys essentially looked to this prior groundwork in family-law issues, and they ruled these claims out if their organizations had not done enough successful prior groundwork in these areas. Movement lawyers viewed prior work which provided incremental legal footholds as essential before bringing a marriage case.[167] In collective decision-making concerning whether to pursue marriage arguments in a particular state, movement attorneys reviewed their prior work in these family-rights areas. If litigation on nonmarital family rights cases was either untried or unsuccessful in LGBT rights groups' earlier work, movement attorneys preferred pushing new cases away from marriage in those jurisdictions.

Many attorneys described how LGBT rights groups decided collectively on whether a case should be framed as marriage versus nonmarital rights:

> So decisions we all made, both organizationally and individually, and also across organizations from roundtables . . . We all made decisions about where it made sense to make full domestic-

said was this is a violation of equal protection. It violates the rights of children, specifically the rights of the children to be able to have the legal protections that come from having two parents. So, I'm a child of a gay couple. One is my bio parent. The other one is my parent who wants to adopt me. I'm not able to have my second parent be my legal parent—and get all the social-security benefits and other types of benefits that flow from the parent/child relationship—only because my parents are in a same-sex relationship. That's a roundabout way of saying well, and because they can't get married.")

163 Interview 838183, *supra* note 156.

164 *See, e.g.*, Ark. Dep't of Hum. Servs. v. Cole, 380 S.W.3d 429 (Ark. 2011) (LGBT rights group case challenging a state regulation that prohibited same-sex couples from being foster parents).

165 Interview 838183, *supra* note 156.

166 *Id.*

167 *See, e.g.*, Interview 158251, *supra* note 159 (discussing groundwork laid by prior domestic partnership cases) ("[T]he state shouldn't be able to make any of these arguments. I mean the state can't claim an interest in having only different sex parents for kids, because we have second-parent–step parent adoption in statute for domestic partners. I mean we had intentionally taken those arguments away in the domestic partner work.").

> partnership arguments, where it made sense to make the marriage argument, when it became time to talk about making marriage briefs. So all of that whole trajectory, in my view—including custody cases—to my mind, it's an artificial thing to say marriage cases are a separate thing. It's more of a culmination.[168]

In describing this "culmination" toward marriage litigation, the respondent is referring to how attorneys first examined whether LGBT rights groups had completed sufficient background work in a particular state, laying the foundation first through nonmarital rights claims, before taking the risk of placing marriage on the table.

Movement attorneys framed marriage arguments as particularly risky in jurisdictions that showed historical resistance to nonmarital family-law claims. The risk here went beyond having to contend with bad precedent, since attorneys found some jurisdictions to be risky even if attorneys' hard-fought efforts ultimately succeeded in winning favorable precedent. The experience indicated that the cultural context was one to avoid.[169] The following illustrates how attorneys drew from prior parenting cases to frame marriage arguments as unlikely to win, potentially harmful, and ultimately much too risky to entertain:

> Q: Now, were you specifically trying not to introduce [marriage arguments]?
>
> A: Yes.
>
> Q: Why?
>
> A:Because . . . the states that didn't have second-parent adoption were also the states that were unlikely to be able—where we were unlikely to achieve marriage equality in their state courts . . . .
>
> So, in some ways, there was no point, and it was potentially going to be harmful to bring marriage cases—specifically in those states. And certainly, we—the cases that I'm thinking of were before the federal marriage case, long before Windsor . . . . Realistically, it was unlikely that those state supreme courts were going to find a constitutional right to marry for same sex couples at that time . . .And there was—certainly there was a conscious decision in those parenting cases at the time that I was doing them to not make them about marriage.[170]

Movement actors again highlighted the overlap between marriage and parenting issues to show that either argument would be on shaky ground in these states. Nevertheless, it was the marriage claims in

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168 Interview 468211 (on file with author).

169 *See, e.g.*, Interview 838183, supra note 162 (noting how victories on marriage will be "short lived" in places where "we cannot even have custody of our own kids."

170 Interview 838183, *supra* note 156.

particular that movement groups fought hard to avoid. Movement attorneys would sometimes proceed with parenting rights cases that threatened loss in hostile venues, in their efforts to piece together protections that LGBTQ+ people direly needed. When movement lawyers made the "conscious" decision in parenting cases "to not make them about marriage," the idea was to fly the case under the radar[171]—to get a cautious win for constituents while preserving the marriage argument for more receptive venues.[172]

With marriage, on the other hand, because the institution of marriage subsumes many affiliated additional rights, movement lawyers argued for a strategy of incrementalism. LGBT rights groups lacked the resources to fight every marriage restriction. Thus, the decision to argue a case as a "parenting" issue rather than a "marriage" issue was about "being strategic about where you would bring the cases and picking the states where there would be a test case. It's like any civil rights movement. You know, there are cases that are going to be test cases. And there are a variety of factors that go into picking the states."[173]

3. Avoiding Collective Risks Outside Marriage

Movement lawyers also framed risks collectively in marriage equality cases by emphasizing how failed marriage claims could affect LGBTQ+ people's interests collectively, by impacting the organizations' work on other types of cases. The threat in bringing marriage arguments was not just that they could lose, and block possibilities for same-sex marriage in a particular state. It was also that a negative precedent on marriage could later be used against LGBT rights groups litigating other issues for the community collectively. Many noted how prior litigation losses on marriage had in the past (and could in the future) spill over into domestic partnership and parenting/family issues. The risk here was that "that precedent is then used against people in other ways . . . if that decision is taken as a—you know—'gay people don't deserve the same treatment,' even though, well, it was 'just about marriage.'"[174] LGBT rights lawyers repeatedly noted the threat that marriage cases

171 Interview 211031 (on file with author) (noting that LGBT rights groups "don't publicize" some parenting cases when "children are involved in these domestic disputes and it's just not appropriate sometimes to publicize it"). *See generally* ALISON L. GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS (2015).

172 Interview 838183, *supra* note 156.

173 *Id.*; *see also* Interview 158251 *supra* note 159 ("And we don't step in to try to help because we have limited resources and we make strategic judgments.").

174 Interview 158251, *supra* note 159.

could seep into their concurrent work on more limited parenting rights claims. They feared that judges would rely on the bad precedent of a failed marriage argument to undo hard-fought gains on parenting and domestic partnership.[175] The following quote indicates how the spillover of marriage to other collective impact litigation affected movement attorneys' framing of threat:

> [I]t was . . . having been do[ing] the work for a long time, and see[ing] how the losses get used against us in other cases, and seeing that the arguments that courts were accepting about gay people—how it is harmful to children to be raised by same sex couples—well that wasn't just going to affect marriage, that was going to affect adoption and custody . . . [W]e have some responsibility to our communities to not be doing things that are going to cause people to lose their children.[176]

This attorney's response reveals how LGBT rights lawyers assessed the collective impact of marriage cases on their wider LGBT rights work by looking to what their movement's experience had been in the past. The risk was in how broadly marriage cases could affect all areas of LGBT rights litigation moving forward. The urgency therefore was in the need to protect against this pattern of "how the losses get used against us."[177] The specific threat to collective strategies was that losses could be used so broadly against LGBT rights groups—as past experience demonstrated—that it increased the "responsibility" in these cases, and the urgent need for cautious, incremental strategies.

Historical narratives regarding the spillover of marriage into other areas of family rights raised the stakes in marriage cases. LGBT rights lawyers broadened the framing of risk in marriage cases to incorporate a collective view of harm, accounting for the risks involved when marriage precedent spread to affect multiple other areas of LGBT rights law. This collective narrative, in turn, was used to frame threats to collective interests broadly, and to justify the substantial amount of forbearance that these groups showed in the selective marriage caseload advanced before *Windsor*.

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175 *Id.*

176 Interview 578252, *supra* note 158.

177 *Id.*

4. LGBT Rights Groups' Construction of Risk in Conflicts with Private Firms

LGBT rights attorneys attempted to reduce the risks marriage cases posed to concurrent impact litigation efforts outside marriage. One risk-management measure that LGBT rights lawyers used was to intentionally avoid marriage arguments altogether in jurisdictions where that could have a lasting, detrimental impact on LGBT rights.

The decision of LGBT rights attorneys to avoid marriage claims led to conflicts with private firms that rejected similar precautions. If private firms presented marriage claims in states where movement lawyers had determined that these claims were too risky, movement attorneys made significant efforts to discourage these cases:[178]

> There were one-off cases where it was like just some random person who wanted to sue and got random pro bono counsel that was not connected to the rights organizations, was not part of the bigger conversation, and they would either initiate suit or start getting ready. And I think the organizations made a big effort to reach out to those people and discourage them from bringing suit earlier in the wrong jurisdictions or with bad facts.[179]

LGBT rights attorneys tried to discourage private cases that circumvented incrementalism. Movement attorneys typically presented the narrowest arguments possible to advance claims incrementally—rather than jumping ahead with the more "sweeping" arguments that would result in a premature final court decision on marriage. Movement lawyers reported significant hesitation, for example, in bringing broad federal court claims challenging the validity of marriage statutes.

In avoiding "sweeping" arguments, LGBT rights attorneys specifically distinguished their approach from that of private attorneys with whom they came into conflict. In *Perry*, for example, movement lawyers raised several problems with the breadth of the case. LGBT rights groups had deliberately taken the incremental approach of first tackling the federal Defense of Marriage Act, to avoid the facial

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178 *E.g.*, Interview 578252, *supra* note 158 ("We had been fairly effective at convincing people not to file suits that we thought were not a good move. Not totally.").

179 Interview 958212 (on file with the author).

challenge.[180] They noted how *Perry* overlooked opportunities for overturning California's existing ban on marriage under state law.[181]

LGBT rights lawyers attempted to discourage the *Perry* case. They articulated their preferred, narrower argument through amicus briefing:

> [T]he amicus brief that we did write in the beginning before that [intervention] hearing was overall supporting yes, yes, same-sex couples should—we believe—have a constitutional right to marry. And you can decide this case on some narrower grounds which make it in our view—pretty easy to do. It has seemed a little puzzling to us that the Supreme Court ultimately found that presentation so unhelpful—that the—some of the questions that were in the oral argument kind of like gave it very back of the hand—we're like—would it make so much sense? Why would you really focus on the broadest question when you have—aren't you supposed to decide on narrower grounds? I learned that at some point.[182]

Movement attorneys ascribed conflicts like these to differences in their own organizational history and experience, vis-à-vis the private firms. They had reasoned arguments, from their perspective, regarding the need to intervene. In their view, private attorneys could not see things the same way as movement attorneys because they simply did not have the perspective necessary to interpret the signals from their environment. This gave way to a sense of duty to educate private attorneys—despite awareness that this was certainly something that would not be welcomed by any independent-minded private attorney. There was an urgency for outreach on one hand, with a simultaneous knowledge on the other that these outreach attempts were a setup for conflict with private attorneys.[183]

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180 *See* Interview 158251, *supra* note 159 ("[A] core part of the objection to the *Perry* case was that there was a deliberate strategy to tackle federal DOMA first . . . .").

181 As one movement attorney put it, "[the *Perry* attorneys] framed it so inter-galactically that things that we had specifically (in California law), which could bear on the constitutionality of the California marriage law, would not necessarily carry the day." Interview 158251, *supra* note 159.

182 *Id.*

183 *Id.* ("And then you have other people who haven't been part of the movement who have good intentions but sometimes also have significant ego. Maybe they have significant ego because they've had good success in their field, and they have a lot of confidence. They don't necessarily know who the different organizations are, and our track record, so they may not appreciate the value of the advice we may be offering, or the guidance, because they really don't know. Sometimes, we can form a good relationship and provide information without saying, like, 'you should just go away.' Right? Again, people don't usually want to hear that. And especially if they've become invested in the idea of helping somebody in particular—you know, maybe a client who came to them for another problem—and then this issue, an LGBT issue, marriage or whatever, arises and they feel a connection to their client and they want to help the client.").

5. Reversals of Movement Strategy: LGBT Rights Groups' Post-Conflict Cooperation with Firms

When conflicts emerged between LGBT rights movements and private firms, the movement attorneys reported recalibrating efforts.[184] As previous Sections note, movement actors often framed conflicting firm strategies as threats to collective and long-term movement goals. This Section discusses how movement actors' framing of threat in cases of conflict may also play a role in post-conflict collaborations with firms whose strategies they initially opposed.

First, LGBT groups used post-conflict collaboration with firms as a risk-reduction measure, designed to reduce the threats posed by private litigation. Firm cases that threatened collective movement goals were no less threatening after movements articulated that conflict, and once firms proceeded to file suit. Indeed, when firms proceeded to litigate cases and formalize expansive claims to marry, these threats became even more salient. Just like movement actors use "threats" of collective harm to support conflict-ridden attempts to thwart private litigation, they later used "threats" to support post hoc collaboration with firm attorneys. In both contexts, LGBT rights groups thus responded to firm strategies by engaging in organizational actions designed to stave off feared consequences.

The *Perry* case illustrates these points. *Perry* exemplifies a conflict where LGBT rights groups had staked out their position publicly against the private firms litigating the case. Given this public statement, one might think that LGBT rights groups would have had face-saving reasons to avoid supporting private litigation. Yet, movement attorneys came around and eventually played a supportive role. The following statement reflects how LGBT rights attorneys drew on "threat" framing to justify cooperation:

> Well, we tried the intervention and that didn't happen. Basically, once the lawsuit got filed, we all sat down and said, well, okay, this is happening. We've got to get on board. It's kind of like Smelt: We had to get on board and make it as good as can be. We met with the Gibson Dunne team a couple of times early on and once that whole intervention thing was past, I think we all were kind of very much on the same page of wanting to make the Perry case as successful as it could be. So we filed briefs in support of them at the trial court level, at the Ninth Circuit. We certainly gave them whatever support they needed and wanted in terms of connecting with people in the community or experts or whatever they might need from us. I don't

184 *See also* Cummings & NeJaime, *supra* note 6, at 1302.

> recall that they needed a whole lot from us, actually, but we certainly were there for them.[185]

Damage control was the main consideration that enabled cooperation at this stage.[186] Once private firms proceeded with risky claims, movement actors felt compelled to intervene ("we had to get on board"). Attorneys also intensified urgency of these threats by referencing historical narratives ("like *Smelt*"), which provided guidelines supporting cooperative action.[187] Participating in these cases reduced the urgency of these threats by making them more likely to succeed ("as successful as it could be").

Second, LGBT groups also initiated their own cases in response to the threat of broadly-framed firm cases, sometimes bringing their own, more expansive arguments reflecting those of private firms. In these cases, movement attorneys were responding to the fear was that wide-reaching firm cases did not provide courts sufficient options to rule for same-sex couples on narrower (and safer) grounds. Movement lawyers filed their own cases, which included similarly broad claims, along with more risk-averse options. The idea was to provide high courts with an alternate movement-led case that could reach the high court before firms could. The *Perry* litigation also provides an example of this dynamic:

> [W]hen Perry happened, it allowed a lot of the DOMA cases that were in the works to go forward. Because now Perry's going so we might as well—it's going to be a race to the courthouse now . . . Because the worst would be for Perry to go up first and there to be no DOMA case up there, and then the Court to be deciding the whole shebang without deciding on the limited issue that the DOMA cases presented.[188]

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185 Interview 868192 (on file with author).

186 *See also id.* ("[U]ltimately the constitutional issue was going to be raised—one way or another. So we knew that it was time.").

187 *Id. Smelt* was a federal constitutional challenge to DOMA initiated by private attorneys after Mayor Gavin Newsom enabled same-sex couples to marry for a brief period in 2003. LGBT rights groups filed a motion to intervene in *Smelt*, arguing that the case should be dismissed for lack of standing. *See e.g.*, Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006). LGBT rights groups then filed their own separate challenge to the marriage statutes because "ultimately the constitutional issue was going to be raised—one way or another. So we knew that it was time." Interview 868192, *supra* note 185. *See also* NeJaime, *supra* note 5, at 697 n.208 (citing LGBT rights groups efforts to dissuade DOMA cases in Wyoming, Florida, and Georgia).

188 *See* Interview 958212, *supra* note 179.

Perry hurried LGBT rights groups' initiation of their first DOMA challenges in federal court.[189] Although movement attorneys already had plans "in the works" for a DOMA challenge, those cases did not "go forward" until *Perry* presented a path to the Supreme Court "deciding the whole shebang" on marriage equality, rather than presenting a more narrow issue of DOMA's legality first. As another attorney put it: "[W]e all tried to work with the various private counsel and support them because, again, we didn't know which case was going to get there first."[190]

In summary, movement attorneys' broad framing of risk may produce cooperation as well as conflict, by compelling movement support of firm cases that introduce unavoidable threats. Movement attorneys responded to the threat of private litigation by providing collaboration to influence those cases' outcomes, or by initiating their own cases taking the same approach of private firms. In each of these ways, private litigation acted as a powerful influence on movement strategies, compelling movement actors to pursue or support "risky" strategies, despite movement actors' own vision and experience concerning what was strategically best for the movement. Firms thus play a critical role in influencing movement agenda-setting by compelling these types of risk-responsive measures.

B. *Private Attorneys: Narrow Construction of Risk (Individual and Short-Term)*

Private attorneys emphasized a narrower set of risks in marriage-equality cases, which were more individualized and shorter-term than those of the movement attorneys. Private attorneys focused on their professional role as hired representatives of a well-defined client interest, and seized opportunities to pursue all viable legal claims to serve those specific clients' demands.[191] As this Section will show, conflict emerged when the clients at the heart of this strategy were individual private parties.[192] Attorneys in firms without ongoing ties to LGBT rights groups relied on this particular version of the traditional

189 *See id.* ("[T]he worst would be for Perry to go up first and there to be no DOMA case up there, and then the court to be deciding the whole shebang without deciding on the limited issue that the DOMA cases presented.").

190 *See* Interview 578252, *supra* note 158.

191 Private attorneys of all types—not just those that conflicted with LGBT rights groups—emphasized "client service" as their primary motivation in marriage equality cases.

192 *See infra* Section III.B.1.

"client advocacy" narrative, to justify strategies that escalated conflict with the LGBT rights groups.[193]

1. Private Attorneys' Goals: Client Service

Private attorneys emphasized client service in explaining their goals and motivations for participating in marriage equality litigation. For a private firm attorney whose only identifiable clients were same-sex couples (rather than one or more LGBT rights groups), this presumptive interest in winning the individual case was what motivated the litigation. The following demonstrates how firms' commitment to client service—the bread-and-butter of everyday private practice—extended into private attorneys' work with marriage-equality cases:

> If we have a lasting relationship with a client, and represent them on these three issues, and then they call us up next week and ask to represent them on another issue, we're going to do that issue. But what drives it is the client service, first and foremost. So I think there is definitely a bit of something about that—that you're not just viewing it solely as the cause; you're viewing it as, "I want to help these people."[194]

This client-service narrative makes individual clients—"helping these people"—the primary focus of legal advocacy.

This specific vision of client service—which prioritizes individual client interests over collective goals for change—was a common narrative in private practice. Private attorneys shared these client-service goals, regardless of whether they practiced in smaller firm settings or large firms with established pro bono practices. The concern for client interests also was uniform even among private attorneys who were queer—and who acknowledged the personal impact their cases would have on their own same-sex relationships. As one queer private attorney put it: "I'm not fighting this fight for me; I'm fighting for this right for our plaintiffs. I have [clients] who want to get married . . . I'm fighting for them."[195] The goals were expressly individuated to the client's marriage, even when the attorney and client would collectively reap the benefits of a positive outcome.

The focus on individual clients' interests stood in stark contrast to the focus of LGBT rights attorneys. As one respondent put it, "[F]or the rights organizations, the clients are a vehicle for the cause, while, for

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193 *Id.*

194 Interview 838242 (on file with author).

195 Interview 178241 (on file with author).

private practice lawyers, the clients are the end goal. It's a different relationship."[196]

If pursuing client interests is the "end goal," private attorneys' goal orientations were distinctively short-term. The case was not a "vehicle" for larger collective interests, at least not if the client who hired the firm did not already come with those collective interests in mind. Another private attorney noted how this responsiveness to client interests affected his firm's litigation strategies:

> I'm not putting any judgment on this—but for [the movement groups], the plaintiff is beside the point. It's the case they want to do and then they'll find the people who want to come do it. Because we are not that, because we are client focused, [the clients] were a major part of this case . . . . They were actively involved in how this case was done.[197]

As this suggests, private attorneys assumed that client-service goals were at the heart of private representation. Private attorneys said that client concerns shaped private attorneys' strategies regardless of whether cases were pro bono or privately funded.

These assumptions were reflected in all private attorneys' statements regarding client service. While private attorneys all expressed support for marriage equality as a substantive goal, they framed their specific involvement in these cases in terms of their commitment to zealous client advocacy.

2. Avoiding Short-Term Risks to Individual Clients' Case

Private attorneys translated "client service" goals into the more specific need to "win," as a formal matter, on the marriage-equality claims they put forward on their clients' behalf. As one attorney explained it:

> [I]t was my view [that], when you're a lawyer, you have a client. You have a client; you don't have a cause. And so if I have a client and I say, 'You could win. I want to tell you how you could win, and it's up to you whether you want to.' Then it's a client call.[198]

As this quote suggests, however, a client's interests are not always clear-cut. Attorneys may shape their client's demands, by advising clients concerning the grievances addressable through legal means.

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196 Interview 958212, *supra* note 179.

197 Interview 178241, *supra* note 195.

198 Interview 778191 (on file with author).

However, attorneys in private firms largely assumed that a "win" was the outcome their clients wanted.[199]

The goal of winning— for a particular client, on a particular legal claim—presented a narrow set of individual, short-term threats for private attorneys to navigate when pursuing marriage equality cases. The following example demonstrates how "winning" became the ultimate focus of the risk calculus for private attorneys who pursued these cases without LGBT rights groups:

> Everyone on the team thought we were going to win. I don't think there was a single person . . . who was part of that case who thought for a second that we were going to lose. And not because they were reckless, not because they were like, 'Oh, obviously we're going to win.' They thought in their heart of hearts that we were going to win. So I don't know if people really had deep thoughts about what a loss meant.[200]

As this statement shows, private attorneys' involvement in these cases was not reckless. Rather, they justified their firm's involvement in marriage equality cases by focusing on the opportunity to win, rather than "what a loss meant" outside their individual cases.

Some private attorneys framed the risks in marriage-equality litigation as equivalent to those seen in private practice.[201] This As several private attorneys put it, the inclination in private practice is to throw in "the kitchen sink" into argument briefing. The stakes are low, from the perspective of a singular case, if the riskier arguments are denied. It's worth a shot, to give the judge a variety of footholds for taking their client's side:

> I guess I would say, normally as a litigator, I might try to make every argument that I think has a good chance of winning. And sometimes, even if I don't think it has a good chance of winning, if it will pass the "red face" test where I'm not going to be embarrassed by making it, I might make it, depending on how dire the circumstances are.[202]

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199 This was particularly true when the only client interests that private attorneys represented in marriage equality litigation was that of individuals unaffiliated with LGBT rights organizations. *See supra* Section I.C. for a discussion of how movement attorneys reframed risks when working with LGBT rights groups as "client-like" co-counsel.

200 Interview 178241, *supra* note 195.

201 *See, e.g.*, Interview 838242 *supra* note 194 ("We have clients who came to us and said, 'We think our rights are being denied,' and we looked at it and we said, 'we do, too.' So what do you do in that case? You bring the case for them; you represent them. Why would you do anything else? It's pretty much what we do.").

202 Interview 110125 (on file with author).

The attorney went on to say that for private litigation, "it's kind of a no-holds-barred, bare-knuckle approach to try and litigate."[203] This contrasts with movement lawyers, who are typically guarded about presenting arguments, fearful that judges will not ignore them, but rather, will impose negative rulings that movement groups have to contend with for sometimes decades.[204] Private attorneys would have no reason to consider "what kinds of arguments are going to be most palatable to them down the road," unless their firms had robust pro bono practices affecting LGBT rights or unless they had partnered with LGBT rights groups.[205]

The prior respondent, a private attorney who worked with LGBT rights groups cooperatively, was able to articulate the private "no holds barred" approach in such stark terms because his work with LGBT rights groups gave self-perspective.[206] For private attorneys who came into conflict with movement groups, the tendency to withhold strong legal arguments was expressed in even more combative terms: "These [movement] briefs were . . . 'trying to narrow, narrow, narrow . . . ' '[W]e're just asking for a little thing.' Our [firm's] brief was like, the dignity of humanity, that we are equal, etc. Big, flowing briefs."[207]

3. Private Attorneys' Conflicts with LGBT Legal Groups

Private attorneys in firms without historical pro bono connections with LGBT rights groups indicated that the "client-first" goal orientation was a primary source of conflict with movement attorneys. In the following example, a private attorney describes the origins of conflict with movement groups that had tried to discourage the attorney's firm from getting involved in marriage equality litigation:

> [T]he angle I come from, I was fighting for our clients. My view was that our clients had a constitutional right to something and it was being denied them, and they should get it. And so some of these arguments, some people would say, "Well, if you do this now, there's going to be a backlash and people will be abusive and it will actually

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203 *Id.*

204 *See supra* Section III.A.2–3.

205 *See* Interview 110125, *supra* note 202 ("[Movement] attorneys, being that they spend their lives serving the public interest, were much more attuned to having to approach formulating and structuring our arguments along those lines, as opposed to folks like me, who mostly deal with private litigation . . . .").

206 *Id.* (distinguishing the "no-holds-barred, bare-knuckle approach" of private practice to the more "proactive and holistic approach" of the LGBT rights organizations that worked with the respondent's firm).

207 Interview 178241, *supra* note 195.

> hurt the cause overall." But part of me was like, that's not my job. These guys are being denied something that they get, and I'm not going to not give them what they get because someone else is going to be a bad actor in a year. That doesn't make any sense. We don't do that.[208]

This quote demonstrates the expectation that what private attorneys "do" is client service—but specifically it is for the short-term client interests in this case, and not where the case might be headed "in a year." This expectation is so strong that the respondent cannot "make sense" of a litigation approach that would prioritize the longer-term concerns for the stability of marriage rights, if that goal was not raised by the client.[209] This quote was representative of attorneys at firms that experienced conflicts with LGBT groups.

Attorneys in firms without ties to LGBT rights groups expressed significant resistance to the idea that they should defer to LGBT rights groups. As one attorney working for a firm that experienced strategic conflict with LGBT rights groups said:

> What pissed me off was when they finally realized that we were actually going to do this—and frankly [firm] was not going to bring this case if [a prominent firm partner] didn't think he was going to win it. But, when we finally did it, they were like, "Ok, well we want to join, and we want to be involved."[210]

This quote was from a private attorney who also showed some degree of ambivalence and sense of understanding the LGBT rights groups' perspectives in other parts of the interview. The respondent still resists the idea that movement groups should necessarily be entitled to be involved.

Ultimately for the private attorneys who were ambivalent about litigating without the support of LGBT rights groups, what brought them on board was their trust in the expertise of the firm's leadership. The attorneys trusted firm leaders' assessments that they could win on the merits. For example, one private attorney who initially expressed reservations about proceeding contrary to movement-groups' strategies, said:

> So doctrinally, [taking the case] made sense, but politically, it was like, is this the right time? It seems like everyone is saying no, no, no. But it took like five minutes of having a team conversation with [top

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208 Interview 838242, *supra* note 194.

209 *See infra* Section III.B.4 (LGBT rights groups often entered relationships with firms as clients or entered into pro bono relationships were firms treated LGBT rights groups like clients and deferred to their long-term and collective framing of risk.).

210 Interview 568184 (on file with author).

> partners at the firm] for me to drink the Kool-Aid deeply and feel like, you know what? This [litigation] makes total sense.[211]

Most private attorneys showed no ambivalence, however, expressing the unhesitating conviction that they would win the case for their clients.

At the same time, some private attorneys indicated that the conviction that they would win may have been informed by a more tolerant approach to risk in private practice:

> But I think there was a little bit of a fence on the part of some of the groups and some of the LGBT lawyers to that position, because they said, lives are at stake here. You guys aren't used to doing that. But I think our view was, well, we're used to super-high stakes, and when you got people who built a business or are running a business and their business is in jeopardy or something, or they're facing jail time for anti-trust issues or anything like that, that's all very much high stakes. And you want to win the high stakes thing.[212]

This attorney said that in private practice, "[w]e come in on different types of subject matter . . . when they're at their highest, most important stakes, and we learn them and craft them, that's what we do." These statements suggest that private attorneys' everyday involvement in private litigation may affect how those attorneys navigate the risk involved in social change litigation—making at least some attorneys in the private sector more willing to take on "high stakes" cases.

This Section has detailed how private attorneys framed risk in ways that were tied to the individual clients whom they were representing in marriage equality cases. This created conflict when those clients were individuals seeking private representation. But "client service" alone cannot explain the emergence of conflict versus cooperation. This is because—as the next Section will explain—"client service" narratives also dominated risk framing among the private attorneys who worked in highly cooperative relationships with rights groups.[213] Instead, private attorneys may give client-type treatment to their pro bono partners, treating them "like clients' in deferring to movement attorneys' views on risk.

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211 Interview 178241, *supra* note 195.

212 Interview 838242, *supra* note 194.

213 *See infra* Section III.B.4.

4. Private Attorneys' Cooperative Relationships with Movement Groups: "Like Clients"

The focus on client representation also figured strongly in the risk-framing of private attorneys who worked closely (and without conflict) with LGBT legal groups. That is to say, private attorneys in *both* conflictive and cooperative relationships with LGBT rights groups relied on organizational narratives emphasizing client service. Cooperating private attorneys also said that these fundamental differences in the focus on "client vs. cause" led to differences in strategic approach and the perspectives that private attorneys brought to their coordinated work with LGBT legal groups.[214] Yet, across the board, what cooperating attorneys reported was that these differences never amounted to much, and they were resolved before rising to the level of conflict.[215] A key difference, which may have averted conflict with cooperating attorneys, was in a subtle manipulation of "client" narrative in instances where firms and movement organizations had longstanding pro bono partnerships. These organizational ties expanded private attorneys' definition of the "client" to include the collective interests of their partnering LGBT rights groups, to whom they deferred.

It is important to note at the outset that the private attorneys reporting "no conflict" with LGBT rights groups were not actually representing the LGBT rights groups in the marriage equality cases. Attorneys in cooperating private firms were listed as "co-counsel in these cases. Nonetheless, the attorneys in these arrangements clearly had a stark division of labor in mind, one in which LGBT rights groups were typically recognized as taking the lead"[216] in terms of the overall strategizing and agenda-setting process.[217]

Nearly every private attorney who worked as co-counsel reported deferring to the LGBT rights groups on strategic matters. One attorney described his firm's role as co-counsel: "We were just work

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214 Interview 958212, *supra* note 179 ("We had some conflicts I think with [LGBT rights group], because they're a rights organization. They have clients, but their real client is the cause. And I came from a private practice background where your client is your client. So I think that sometimes we didn't necessarily see things eye to eye. But most of those were resolved . . . ").

215 *Id.* (reporting that conflicts "were resolved").

216 Interview 976818 (on file with the author) (noting that a coalition of LGBT rights groups were "taking the lead" in setting the coordinated marriage litigation strategy with this respondent's private firm).

217 *Id.* Those who were involved in originally linking up with movement attorneys referred to a formal agreement which delegated tasks between attorneys in these agreements. But even the cooperating attorneys who were not aware of such an agreement informally acknowledged how they were the more limited actors compared to LGBT rights groups.

horses . . . supporting the institutional knowledge of [the movement groups]."[218] Another expressed how the LGBT rights organization he worked with "very much took the strategic lead."[219]

These differences among the private attorneys (some taking a cooperative stance, others a combative one) are not well explained by typical ideas of "client" versus "cause." Like the private attorneys who took a more combative stance, cooperating firm attorneys generally also cited "client service" as their most significant consideration in strategic decisions in their cases.

What appears to explain the difference is how firm attorneys construed the "client" being served. All private attorneys who took the more deferential approach were in firms with established ties to LGBT rights groups. Some of those firms had previously represented the LGBT rights groups as clients. Yet, even private attorneys whose firms who had not previously formally represented LGBT rights groups nonetheless framed their deference to those groups as furthering the firm's organizational commitment to serving clients:

> Q: I'm interested in how you all cultivated this kind of collectivity and partnership and just deference [to LGBT rights groups].
>
> A: Yeah. It was almost kind of like, I really kind of look at it—it was almost as if [LGBT rights group] was our client.
>
> Q: Right. Yes, that's what it sounded like.
>
> A: And we were kind of doing their wishes. That's really kind of what it was.[220]

This exchange indicates an apparent expectation among the firms that worked closely with LGBT rights groups that the private attorneys would defer to the groups' judgment. Another respondent similarly reflected on his deferential posture in working with LGBT rights groups: "[T]hey said, 'we're going to do this.' And I said, 'okay, nobody elected me king.'"[221]

Firms, in other words, treated their relationships with the LGBT rights groups with a deference similar to that cultivated in client service. This was natural and expected from the private attorneys' perspectives. Some attorneys even thought that their firms had signed agreements requiring this deference. However, if any such agreement existed, it was

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218 Interview 558194 (on file with the author).

219 Interview 958212, *supra* note 179 ("I felt like they very much took the strategic lead. But we had strategy discussions and we had situations where we didn't necessarily see it the same way.").

220 Interview 558194, *supra* note 218.

221 Interview 976818, *supra* note 216.

not a contract that attorneys had out on the table with them during strategy negotiations. Rather, firms appeared to simply apply a mode of deference with which they were familiar, deference to clients' interests, to a different context, their relationships with movement groups. Pro bono relationships may have helped institutionalize private narratives around client service into firms' pro bono partnerships.

When firm attorneys had established a longstanding deferential posture vis-à-vis LGBT rights groups, potential conflicts were defused. Again, the proclivity toward winner-take-all arguments in the private sphere did not totally evaporate when the private attorney coordinated with movement groups. However, the long working relationships in themselves reinforced a sense of trust and mutual commitment, which helped private attorneys understand and respect the perspectives of their movement counterparts. Those who had fostered cooperative relationships reported acquiring an understanding of LGBT rights groups' strategies, and an intense respect for the expertise of movement lawyers in understanding what was at stake.[222] One cooperating private attorney (with longstanding pro bono ties to LGBT rights groups) reported wanting to file a marriage case, which would have gone ahead of the movement's incremental strategy.[223] His rationale for restraint in this context shows not only deference to LGBT rights groups, but also what he saw as a deep respect for movement lawyers' construction of risk:

> Q: But tell me more, because I actually didn't know that there was even any talk at all among the organizations about maybe we should go ahead and file this case.
>
> A: Well, the extent of it I can't tell you. It was clear I wasn't going to have any ability to persuade anyone, including [LGBT rights group], that this was good to do.
>
> Q: Were you surprised by that?
>
> A: No. I thought that the contrary views were carefully thought. They obviously had the broader picture in mind—that is, that we will lose this and it will set the movement back a long way. And they certainly had more of a basis for those kinds of judgments than I did. I just thought it was a winning case and that it could have been successfully brought, and I would have brought the case had it been my decision. But it never occurred to me to go out and try to find someone and

222 Interview 958212, *supra* note 179 ("[A]s I worked more on the litigation, I got closer to the [movement organization's] team and then we went on a lot of the calls and stuff, just understanding the strategy a little more, which is cool.").

223 Interview 976818, *supra* note 216 (reporting the desire to file suit in federal courts in a case that "organizations were way too nervous about").

> do it, among other reasons because I was going to defer to them about this. To do that would have been ego on my part, and I would never have done that. If someone [at the firm] had come to me and said, "I want to bring this case," I would have said, "I don't think so." They [at the LGBT legal group] felt strongly enough. But I was kind of, yeah, it's a bit of a high-risk strategy, but I think you'll win.[224]

Again, the proclivity toward making broad legal arguments was still present for private attorneys, which created some differences in approach from the LGBT rights groups during their close coordination with private firms. Cooperating attorneys across the board acknowledged a narrower view of risk than that of their movement-based counterparts. As with the private attorneys who experienced conflict with movement lawyers, cooperating private attorneys also highlighted the opportunities associated with winning as a source of the differences that arose in terms of risk assessment. What apparently deescalated conflict in these situations was the feeling of appreciation that cooperating private attorneys gained through longstanding interactions with movement groups. This allowed private attorneys to naturalize the perspectives of movement actors—and even to advocate for the movement's perspectives above their own in deescalating conflict.

IV. DISCUSSION: CONSEQUENCES OF "RISK CONFLICTS" FOR SOCIAL CHANGE LITIGATION

The findings from this study suggest that organizational history becomes infused into how attorneys frame risk of social change litigation.

For LGBT rights groups, the use of impact litigation introduced broader risk analysis when presenting marriage equality arguments, which extended beyond the scope of each individual case. Movement attorneys framed marriage equality litigation as a valuable contribution to the larger goal of expanding LGBT rights across the board. Risks then were framed in terms of larger impact beyond marriage cases. As a result, LGBT rights attorneys developed narrower claims than private attorneys, predicated on their fear that losses in the marriage context could be used against these groups' other efforts for the movement.

For private firms, this study suggests that two distinct and independent sets of organizational pressures shaped attorneys' approaches to this litigation. First, as previous literature suggests, the

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224 *Id.*

client-service model in private practice does appear to shape private attorneys' approaches to social change litigation. Several respondents highlighted basic differences in client- vs. cause-focus in explaining why conflicts emerged. Yet, other private attorneys also experienced pressures derived from the organizational relationships that developed through the institutionalization of pro bono practice. Formalized relationships between movement organizations and private firms created routine interactions and chances for strategic coordination between these actors. As pro bono representation was institutionalized, maintaining those organizational ties between firms and movement groups became an end in itself. Preserving firm-movement partnerships also appears to be a goal that is both independent of firms' goals of individual client service, and more impactful than the client-service goal, at least in terms of the actual impact on differences in litigation strategy. These partnerships also dampened down strategic differences which, in other contexts, appeared to sow the seeds of conflict between firms and movement groups.

A. *Mechanisms and Alternative Explanations*

Under what conditions are we like to see these types of conflicts arise in other contexts? This Section takes a closer look at the mechanisms that may be in play and how broadly the processes described here may apply to other contexts.

Before proceeding, it is important to provide the caveat that conflict, while potentially extremely costly, is also relatively rare. Over the history of marriage equality litigation, LGBT legal organizations were often successful in attempts to dissuade private lawyers from litigating what they viewed as ill-advised marriage cases.[225] That being said, movement actors do invest significant resources into avoiding these conflicts and negotiating with private firms. Thus, it is important to discuss which of the findings presented here best helps to explain how conflicts arise, to draw conclusions that may be of relevance LGBTQ+ movement actors and social change agents in other movements, as well as to scholars of legal mobilization more broadly.

1. Firm Conditions

Two important scope conditions for the findings were the establishment of the plaintiff's bar and the rise of organized pro bono

225 *But see* NeJaime, *supra* note 5, at 671–75.

practice in private firms. These conditions, which existed throughout the study period, enabled the significant firm-movement interaction that preceded both conflict and coordination.[226] Firm-movement interactions may also be more likely when "high-stakes and expensive litigation is a salient feature of a social movement campaign," since pro bono work is often designed to promote the firm's work through the visibility these cases provide.[227]

My findings suggest conflicts may be mitigated when private firms cultivated alternative narratives to traditional client service. I highlight the role of preexisting organizational ties and prior pro bono collaborations with movement legal organizations to explain firms' deference. Firms that showed deference and no conflict all had preexisting pro bono ties to movement groups, suggesting that those ties help establish the conditions for deference.

More research is needed to determine what types of firms are more likely to collaborate with social movement groups, since perhaps there is some unobserved factor explaining both the original collaborations and the later deference. Older and larger firms, which have had the time to establish these relationships, may show greater deference to movement litigation, compared to private firms that perform pro bono on an unstructured or ad-hoc basis. It would require more large-scare organizational data outside the current study to bear out whether size plays a role, since the firms in my study that experienced conflict came in all sizes (from solo practice to large corporate firm). There was too much variation to infer which structural factors in these firms might have produced deference or conflict, independent of the firm-movement organizational ties.

If the existence of prior working relationships does mediate conflict between movement organizations and firms, the suggestion then for movement organizations may be to cultivate the "strength of weak ties."[228] This sociological concept was developed in a different context, but the core idea of relevance to movement legal groups is to spread out connections and relationships (here, relationships with firms) by engaging in "serial co-counsel" relationships with a variety of firms. Movement organizations might opt to rotate regularly in teaming with firms, establishing connections with firms which may be weak, but do not require many resources, and would allow movement groups to

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226 Scott L. Cummings, *Movement Lawyering*, 2017 ILL. L. REV. 1645, 1701 (2021) ("Professional trends toward greater specialization, the rise of organized pro bono, a well-developed plaintiff's bar, and restrictions on funding for nongovernmental legal organizations have boosted public-private partnerships within progressive legal practice . . . .").

227 *Id.*; Cummings, *supra* note 2, at 39–41.

228 Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOCIO. 1360 (1973).

cast a wide net. The more private firms that get into these short-term "quasi-client" relationships with movement groups, the more private attorneys there will be to help establish widespread professional norms of deference to movement actors in impact litigation.

2. Movement Conditions

Impact litigation may facilitate conflicts, to some extent, as prior scholarship has argued.[229] Impact litigation, however, is unlikely a *sufficient* condition for creating movement groups' deeply cautious approach. Studies of prior impact litigation have not always shown risk-aversion like that seen in the threat-focused LGBT rights approach. Professor Bell's work on the NAACP-LDF finds attorneys too cavalier about the enormous risks it asked its clients to undertake in school desegregation cases in the South.[230] If the LDF and the LGBT rights groups used an impact litigation model, then impact litigation is not the only mechanism.

This Article's findings suggest that it is not impact litigation per se, but rather, it is the use of historical narratives that amplify threat, which enable conflict between movement groups and private firms. Historical narratives about extralegal threat here enabled movement-based LGBT legal groups to construct risk more expansively than private firms, leading to conflict. A question that remains for future research is whether these sort of threat-based narratives are more prominent, or impose greater constraints, on movements with longstanding impact litigation campaigns. It is certainly possible that movements with longer histories of impact litigation will simply have more raw experience with past defeats to draw from, making "threat" narratives more available in longstanding movements than in newer ones. On the other hand, these narratives themselves were not from rational tallies of objective historical fact. They were collectively constructed normative messages, in which historical details mattered less than the messages they conveyed about the constraints on future action. This suggests that historical narratives may be relatively autonomous from actual movement history.

Most likely, there are multiple pathways for these "threat" narratives to arise in movements. For older and most established impact litigation groups, such as those seen in the LGBT rights movement,

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229 NeJaime, *supra* note 5.

230 *Cf.* Bell, *supra* note 24, at 513 ("[E]ven when directed by the most resourceful attorneys, civil rights litigation remains an unpredictable vehicle for gaining benefits, such as quality schooling . . . .").

historical events will likely provide additional inputs for "threat" framing, since movement actors' broad goals may inevitably fall short and give actors lessons to learn from. Younger movements, or movements which lack the experience to have learned from past litigation failures, conversely, may take bigger and bolder cases.[231] However, younger movements may also be able to cultivate historical "threat" narratives indirectly, for example, in the spillover of movement tactics from one context to another. As newer movements borrow from older organizations' strategies, they do not do so mechanically. Younger movements are likely to adapt these models to incorporate "threats" that have emerged in critiques of established tactics. Perhaps contemporary social movement groups are more likely to build caution and attention to extralegal threats into their impact litigation strategies, in reaction to critiques of their borrowed organizational model.[232]

B. *Consequences for Social Movements*

How do conflicts over risk affect movement agendas? What are the consequences of these conflicts for social movement organizations?

1. Agenda-Setting: The Movement's Post-Conflict Support for "Risky" Cases

Although the focus of this Article is on differences in approach, more important is how unity emerges through those differences—how these groups respond to each other, and together influence the larger movement. When firms and movement organizations diverge, they are not operating in isolation from one another. Rather, they are changing the legal landscape within which both actors operate. Their actions affect one another, and they are forced to take account of one another.[233]

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231 This question would be difficult to study, because there are likely numerous other processes that may make younger movement groups likely to use radical strategies than older and more established movement groups. *Cf.* J. Craig Jenkins & Craig M. Eckert, *Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Movement*, 51 AM. SOCIO. REV. 812, 819 (1986) (arguing that private foundation funding in the Civil Rights Movement "was largely directed at the moderate classical [social movement organizations], especially the NAACP," enabling moderate organizations to survive longer over time).

232 Meyer, *supra* note 57, at 282, 292.

233 *See, e.g.*, Interview 578252, *supra* note 158 (movement attorney reporting that coordination with private firms was necessary because "ultimately, if your end game is the Supreme Court, you have to figure out how to get them ready . . . we all tried to work with the

This does not mean, however, that that private firms and movement groups have equal power and influence over one another's strategies.[234] Indeed, this Article's findings reveal that movement groups revised strategies to support "risky" firm cases. Movement actors and firms clearly disagreed over whether to present legal claims to marriage broadly, with firms demanding more comprehensive rights at once, and movement actors demanding less comprehensive change to help boost long-term chances for success. Movement actors even deployed public messaging campaigns actively to frame the firm's case as a threat to their organizational goals, risking these groups' own legitimacy when they would later come on board with the firms. This strongly suggests a dynamic of derailment in the movement groups' post hoc decisions to support firm litigation.

What factors compel movement groups to revise strategies to support "risky" firm cases? Movement legal groups may face a legitimacy crisis when private firms take over their strategies—particularly if firms stand to win the hard-fought prize of "impact" without all the unsung efforts that preceded it. When firms roll the dice on cases the movement avoids, a win for the firms makes the movement strategy of avoidance appear less effective and legitimate. Loss of legitimacy is significant for movement organizations and explains why they disband. Organizations with the longest lasting strategies—and thus whose identity is closely associated with preserving the strategy—may experience the most pressure to contain and control "interference" by private firms.

Yet, movement attorneys have the choice of how to respond to private litigation. The LGBT legal groups' experience provides lessons regarding successful practices movement lawyers may use in this regard. When firms have captured LGBT impact strategies, the movement organizations appear to have reworked the power of narrative to potentially recapture some of the benefit of the limelight. For example, LGBT legal groups have claimed authorship over marriage equality's victory in many ways,[235] deploying narrative strategically to highlight how their long history of impact litigation had paved the

various private counsel and support them because, again, we didn't know which case was going to get there first").

234 Indeed, movement actors with more resources may be able to get their rhetorical positions across better about movement strategy and what approach would be most effective. *Cf.* de Moor & Wahlström, *supra* note 60, at 442–43 (2019) ("We found that the availability of particular resources determines actors' reliance on narratives about the POS to convince others about their strategic preferences.").

235 Interview 568184, *supra* note 210 ("When we won, I can't tell you how many emails I got from all these [LGBT legal] organizations saying 'Donate to us now because we just won gay marriage.' . . . I'm like, 'What do you mean us?' You guys told us not to bring the case.").

way.[236] LGBT legal groups' reframing of success in private firms' victories may be a lesson for future movements.[237] While this may seem like proprietary behavior, it is critically important for donation-based movement organizations to reframe success in their own terms.[238] LGBT rights groups showed how social movement organizations can shift the narrative about private firm victories, in ways that channel resources from the win back into the movement organizations which otherwise bear significant losses from these conflicts.

2. Intersectionality and Double-Marginalization

The dynamics mentioned in the previous Section have implications for intersectionality and racialization within the LGBTQ+ movement and other identity movements. As noted, LGBT legal groups mobilized in response to threats of blowback from private litigation, moving quickly to reach the highest court first on the claim that would produce legal impact.[239] There are dynamics in the urgency to protect impact litigation from the "threat" of private incursion, which may contribute to the marginalization of LGBTQ+ people of color within LGBT rights litigation.[240]

First, as a result of this urgency to move quickly, LGBT organizations scaled back on ongoing efforts that they had been doing to increase racial representation among their plaintiffs in the marriage cases. Movement organizations in the latter part of this study used race-conscious plaintiff selection to display the movement's race and class diversity through a "rainbow coalition" of LGBTQ+ plaintiffs in marriage cases. This may have been a self-reflective strategy that movement organizations implemented in response to internal critiques

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236 Interview 838183, *supra* note 156 ("I think that if you take a sort of big look at the marriage equality movement . . . [Perry] succeeded in getting a decision from the Supreme Court that the [plaintiffs] didn't have the standing. So it didn't actually lead to marriage equality. It was really after Windsor and all the other work that had been done on getting rid of anti-gay parenting laws, like in Florida and Arkansas, that we were able to succeed.").

237 *See id.* at 944–46; Steven A. Boutcher, *Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization*, 13 AMICI 8 (2005).

238 Meyer, *supra* note 57, at 286–87.

239 *See supra* Section III.A.2.

240 *See generally* Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000); Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655 (2016); Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010 (2014).

of the whiteness of their plaintiffs.[241] Private attorneys in this study did not report any goals associated with inclusion like this.[242] When firms require greater attention from movement legal groups, identity movements may sacrifice strategies that strive for fuller representation of constituents across sexuality, gender, race, and class.[243]

Second, the fears about the extralegal nature of the potential backlash seemed to make LGBT rights attorneys think their organizations were the best equipped to handle these threats. Stories about extralegal backlash being a key part of the movement's history helped support the view that it was upon movement group to act; movement actors after all had some experience when it comes to handling backlash.[244] Movement attorneys referenced this, along with the "threat' of extralegal backlash itself, to support the idea of a post-conflict alliance. When LGBT legal groups experienced increased pressures to support "risky" private litigation, this generally meant supporting cases where plaintiffs were relatively rich and white. This tapped into stereotypes about wealth and privilege, which LGBT legal groups sought to combat. If helping firms means investing in narratives of whiteness, legal organizations should weigh this extralegal factor also as a threat, ensuring that constituents with multiple stigmatized

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241 Interview 838183, *supra* note 156 ("I think that if you look at a number of the marriage plaintiffs, that they tended to be white—overwhelmingly white—and middle class or even more privileged than middle-class. I don't think that that at all was the intent or desire. So, I think it was—there was certainly a desire among the LGBT groups because a big component of what we were trying to do was to change hearts and minds about gay people and there's already a perception of the gay community being privileged even though it's obviously erroneous because gay couples disproportionately live in poverty, etc.").

242 Interview 568184, *supra* note 210 (a private attorney when asked about diversity in plaintiff selection said "[y]ou wanted people in stable, loving relationships. We never thought of it as like we need to check off some diversity boxes or anything like that."). Recent sociological scholarship (looking at impact litigation with the feminist movement) also suggests that firm-led litigation may show less investment in movements' values and political norms. Holly J. McCammon, Minyoung Moon, Brittany N. Hearne, & Megan Robinson, *The Supreme Court as an Arena for Activism: Feminist Cause Lawyering's Influence on Judicial Decision Making*, 25 MOBILIZATION: AN INT'L Q. 221, 225–26 (2020).

243 Interview 868192, *supra* note 185 ("[I]n an ideal world you would want to take a lot of time and get as diverse and large a group of plaintiffs as you could. But after Windsor, things started moving really, really fast, and people were filing cases on their own. We were feeling a need to get cases on file. And so we decided to go forward with cases that might only have two or three couples as plaintiffs because there was a sense of urgency, and we needed to kind of move forward with the people we had rather than spend six months trying to find exactly the right people.").

244 Interview 578252, *supra* note 158 ("[Y]ou try to have a big picture perspective . . . and try to think about what repercussions are going to be—but, it's hard to know for sure. But, the advantage that the movement lawyers have is they've got a lot of experience to draw on. They've got a lot of sense of like if you do this, this might happen. And then that might happen as a result and people who haven't done this work don't have that understanding.").

identities move to the core, rather than the peripheries, of legal mobilization.[245]

3. Consequences of Risk-Taking in Social Change Litigation

Finally, there is a normative question looming barely below the surface of this empirical project: Did attorneys' willingness to take risks help them achieve marriage equality? Or were the traditional, risk-avoidant impact strategies the more effective approach?

Private firms and movement groups contributed to the struggle in different, but perhaps mutually reinforcing, ways. The LGBT rights groups' cautious and narrow approach likely kept up momentum on marriage equality during a period when anti-LGBT activism was surging, and the threat of backlash and negative precedent was palpable. As right-wing conservatives used the threat of marriage equality to fuel an onslaught of anti-LGBT legislation, LGBT rights leaders' success in persuading many private attorneys to refrain from litigating marriage equality cases in hostile jurisdictions likely staved off an even more significant backlash.

On the other hand, even in the worst cases where private attorneys brought ill-advised marriage cases and lost, their efforts arguably fueled the grassroots efforts of LGBTQ+ activists and their allies. Losing litigation can indeed fuel mobilization, including that of mobilizing donor support for organizational funding.[246] A public campaign for legal reform can be enormously visible and mobilizing, and firms' "going rogue" likely invigorated LGBTQ+ activism.

In short, there may be both advantages and drawbacks to both caution and risk-taking in achieving goals for social change litigation. This Article accounts for the organizational origins of each type of strategy and raises observations about their potential consequences—but is not intended to endorse one strategy over the other.

To the extent that conflicts also produce pressures on movement actors to support private cases post-conflict, there is a different cautionary narrative. For LGBT rights litigation, post hoc derailment toward firm litigation may have caused movement groups to relinquish efforts to increase representation of marginalized movement constituencies. That is a consequence to avoid.

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245 Holly J. McCammon, Minyoung Moon, Brittany N. Hearne, & Megan Robinson, *The Supreme Court as an Arena for Activism: Feminist Cause Lawyering's Influence on Judicial Decision Making*, 25 MOBILIZATION: AN INT'L Q. 221, 225–26 (2020).

246 Boutcher, *supra* note 237, at 11.

CONCLUSION

This Article demonstrates that organizational context may influence attorneys' framing of risk in social change litigation. Movement attorneys structured their strategies to maximize their cases' precedential value and to avoid the types of losses that plagued previous impact litigation efforts. Private attorneys, on the other hand, emphasized client-service narratives focused on winning cases for their individual clients. While some private attorneys reported this client-focused narrative to be a primary source of conflict with movement attorneys, those in private firms with established ties to LGBT rights groups deferred to those groups' impact-focused goals to preserve the ongoing organizational relationship. Thus, while both private and movement attorneys sought to achieve marriage equality, organizational goals specific to these attorneys' practice areas critically informed attorneys' strategic decision-making in these cases.

This study contributes directly to the sociolegal literature on law and organizations, which examines how organizations respond to their legal environments, and how cultural norms cultivated within organizational fields may thwart the implementation of law or redefine it to match organizational prerogatives.[247] Less is known about how an organization's field or institutional context shapes how organizational actors "read" their legal environment or interpret what the state of the law is. This Article contributes to an understanding of how organizational actors make sense of their legal environments, which in turn has implications for those organizations' behaviors and social impact.

This Article also contributes to sociolegal understandings of factors that may shape and constrain public interest litigation. Sociolegal scholars have rekindled longstanding debates about whether and how litigation may shape and constrain ongoing struggles for social change. The focus of this work has been on interactions between and among social movement organizations.[248] Without comparison to the other organizational actors that carry out social change litigation, we cannot know what effect an attorney's embeddedness within a movement has on her judgment and strategy. This Article suggests a possibility that has been unexplored in prior work: that social movement organizations may naturalize the incremental pace of change

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247 *See, e.g.*, Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOCIO. 1531 (1992).

248 *E.g.*, Leachman, *supra* note 33, at 1715 (studying how interactions among LGBT protest and legal groups shape movement agenda-setting).

that their legal environments provide for them.[249] Thus, the Article advances knowledge regarding the impact of law on meanings associated with social change and the practices implemented to pursue it—both of which significantly influence the potential type and scope of social change achievable by movements.

Finally, this project has broader importance in helping practitioners craft more effective social change litigation strategies. Movement attorneys across a variety of causes invest significant resources into carefully planning and executing impact litigation campaigns.[250] Yet, those impact litigation strategies have the potential to be quickly upended by private efforts—particularly for movements representing a diverse constituency which might not share the priorities of movement leaders. In exposing the dynamics that promote strategic conflict among private and public interest attorneys, this article provides the tools for enhanced collaboration—which is what is ultimately required to craft the most effective social change litigation strategies.

249 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

250 *See* Meyer & Boutcher, *supra* note 19, at 89–90.