POPULAR CONSTITUTIONALISM: TOWARD A THEORY OF STATE CONSTITUTIONAL MEANINGS

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I. INTRODUCTION: FINDING THE INTERPRETER IN STATE CONSTITUTIONALISM

A. The New Judicial Federalism and Constitutional Interpretation

The sobriquet the "new judicial federalism" is both a blessing and a curse for those who study state constitutionalism.[**] Its blessing comes from the term's ability to bundle and name a phenomenon of judicial activity. More precisely, the term invokes a legal regime of energetic state judges who interpret the unique, and not so unique, constitutional provisions of their respective state constitutions in vigorous ways to advance state-based individual rights that are independent of federal constitutional provisions. Its

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** After the completion of this article, but prior to its publication, the Hawaii Supreme Court issued a summary disposition order in *Baehr v. Miike* and the Vermont Supreme Court handed down its ruling in *Baker v. State*. On December 9, 1999, the Hawaii Supreme Court ruled that the marriage amendment approved by Hawaii's voters in November 1998 rendered the plaintiffs' complaint moot. In short, the Hawaii Supreme Court chose not to rule against the democratic rejection of its interpretation of the state constitution. On December 20, 1999, the Vermont Supreme Court ruled that the Common Benefits Clause of the Vermont Constitution prevents the state from denying to the plaintiffs the statutory benefits and protections granted to married couples. It then ordered the state legislature to either enact "domestic partnership" legislation to confer those benefits or to allow same-sex partners to marry under the existing Vermont marriage statutes. In handing down this decision, it is clear that the Vermont Supreme Court learned from Hawaii's example, noting that a decision which mandated same-sex marriage outright might face intense opposition. Wrote the court: "[I]t cannot be doubted that judicial authority is not ultimate authority." That, in a nutshell, is the lesson of popular constitutionalism.

While not yet published, the opinions are available on-line at the Hawaii and Vermont Supreme Court web sites: <http://www.state.hi.us/jud/index.html> and <http://dol.state.vt.us/gopher_root3/supct/current/98-032.op>.

curse lies in its replication of traditional understandings of constitutionalism within a new form of judicial and legal politics.

The evolution of state constitutional law has been seen largely as a judge-driven development. Scholars typically see the political salience and robustness of state constitutional law as the result of state judges who, over the past twenty-five years, have become increasingly willing to assert independent state constitutional grounds for their rulings. This perspective, however, prevents us from seeing another view of state constitutional law and state constitutionalism. In short, the scholarship on the "new judicial federalism"—because of its judge-centered focus—has not sufficiently developed the extent to which state constitutions are profoundly different from the U.S. Constitution. These differences require scholars to seek out new approaches to attain a more general understanding of the vitality, complexity, and dynamism of state constitutional law and state constitutional politics.

In its early phase, the judges and scholars who lauded the "new judicial federalism" described state constitutions as rich sources of constitutional language and practices—as if state polities had recently uncovered their own long-lost Magna Cartas, replete with unique histories and protections of individual rights.[1] Critics, however, were quick to disparage state constitutions and state judicial interpretations of them as fig leaves for mere political or policy preferences of state judges who could no longer count on

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1. Although other works preceded his and the literature has grown vastly, Justice William Brennan's 1977 article generally is regarded as launching the effort to revive the protections afforded by state constitutions. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). For other writings by judges in favor of state constitutional protection, see Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992); J. Skelly Wright, *Commentary: In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165 (1984). Pitler provides an exhaustive listing of articles relating to "new judicial federalism" in Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 6 nn.1-12 (1996).

Reagan and Bush appointees to uphold the Warren Court agenda.[2] Other critics found the historical record of state constitutionalism to be thin at best and wholly indeterminative at worst.[3] Still others decried state judiciaries' lack of independence from popular pressures and the excessive interpenetration of law and politics within the state constitutional setting.[4]

Despite this academic debate over the desirability and the limits to this growth of state court activism, that growth has continued virtually unabated. State constitutions and state supreme courts now stand as key elements in activists' strategies for legal, political and social change. Moreover, recent legal and political developments at the state levels, including recent efforts by Congress to "devolve" social programs, give new relevance to this legal and judicial activity. State supreme court efforts to restructure educational finance,[5] to confront racial and economic segregation in education and

2. *See, e.g.*, Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095 (1985); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor: Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985). This point was conceded tacitly by Washington Supreme Court Justice Robert Utter in his article. *See* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985) (advising state supreme court interpreters how to avoid U.S. Supreme Court review).

3. *See* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

4. *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

5. State supreme courts ruling in favor of greater equity and/or adequacy include: *Ex parte James*, 713 So. 2d 869 (Ala. 1997); *Roosevelt Elementary School District No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Dupree v. Alma School District No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (based on state constitutional provisions); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (held invalid on federal grounds); *Horton v. Meskill*, 486 A.2d 1099 (Conn. 1985) (imposing a more demanding burden of proof of plaintiffs' claim concerning the adequacy of reform); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Idaho Schools for Equal Education Opportunity v. Idaho State Board of Education*, 912 P.2d 644 (Idaho 1996); *Knowles v. State Board of Education*, 547 P.2d 699 (Kan. 1976) (ruling that dismissal based on mootness was improper, case was remanded for further proceedings); *Rose v. Council for Better Education*, 790 S.W. 2d 186 (Ky. 1989); *McDuffy v. Secretary of the Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993); *Helena Elementary School District No. One v. State*, 769 P.2d 684 (1989) (holding that the existing scheme was unconstitutional); *State ex rel. Woodahl v. Straub*, 520 P.2d 776 (Mont. 1974); *Claremont School District v. Governor*, 635 A.2d 1375 (N.H. 1993); *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Tennessee Small School System v. McWherter*, 851 S.W.2d 139 (Tenn. 1993);

housing,[6] and—most prominently—to allow marriage between same-sex couples[7] all point to a continuation or expansion of the dynamics of the "new judicial federalism." Moreover, state-based constitutional amendments and ballot initiatives demonstrate that leading political issues are finding expression or resolution within the texts of state constitutions, thus exhibiting a vitality and responsiveness that the Federal Constitution generally lacks.

Despite this multi-faceted political and legal activity, scholars who study state constitutionalism generally agree that state judges are the final interpreters of state constitutions. All of these perspectives, in short, assume that the process of interpreting state constitutional provisions bears a close resemblance to the process of interpreting federal constitutional provisions. The "new judicial federalism" is, at day's end, simply the invigoration of state judges playing the interpretative role previously left to federal judges, no matter what their preferred mode of constitutional interpretation. Indeed, all of the aforementioned arguments for or against "the new judicial federalism" make a common assumption: the meanings of constitutions—whether state or federal—are discerned by judges who interpret texts in a traditional and legalized fashion. Even those who with insight and clarity spell out the difficulties of state constitutional interpretation, nonetheless assume that judicial interpretation is the sole or primary mode of understanding the meanings of state constitutions.[8]

This article takes issue with that assumption. Drawing from two sets of academic literature that explore the forms of extra-judicial constitutional interpretation, I examine the processes by which state constitutions take on

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Edgewood Independent School District v. Kirby, 777 S.W.2d 391 (Tex. 1989); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (overruling much of *Northshore*); *Northshore School District No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1974); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Washakie County School District No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980).

6. *See* Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996); Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

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

8. For some guidelines on state constitutional interpretation, see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 173-209 (1998); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1194-95 (1992). Tarr's points are well taken and reveal profound inadequacies in existing constitutional theories as they are applied to state constitutions. However, the guidelines are intended to assist judges or academic lawyers concerned with devising theories of constitutional interpretation. I offer no advice to judges or lawyers, but the approach here may help foster a better understanding of the political realities and utilities of state constitutions.

meaning, particularly in those states where the initiative mechanism exists. These processes of generating state constitutional meanings, I argue, are subject to much more intense political disputation by interests and coalitions of interests than is the Federal Constitution. Part of the distinctiveness of state constitutionalism, I contend, lies in its indeterminate process of interpretation, a process often open to non-judicial actors who vie strategically against one another in a political competition to advance their understandings of state constitutional meanings. In this regard, state constitutional law is often sustained and developed more by the political engagements of interest groups and social movements than by the interpretative acts of judges.

The argument, reduced to its essence, is as follows: the meanings of state constitutions are generated through an exchange between popular mobilization and judicial interpretation. Particularly in states where the initiative mechanism exists, the meanings of state constitutions—in both legal and political senses—are defined through both extra-judicial and judicial mechanisms. The resulting form of constitutionalism—what I call popular constitutionalism—advocates a far less text-centered and judge-centered approach than previous accounts of the "new judicial federalism." Moreover, popular constitutionalism is quite different than federal constitutionalism. The differing institutional contexts of state constitutions and their far greater popular dimensions mean that the higher law tradition of the U.S. Constitution is less central to the state constitutional experience. Indeed, popular constitutionalism means that fundamental state commitments are far more readily transformed through the political activity of citizens than is possible under the U.S. Constitution. The result is that state constitutional law is less circumscribed by legal norms and more defined by political coalition-building and mobilization. The interpreter of state constitutions, under popular constitutionalism, is less likely to be a judge and more likely to be a mobilized and politically active citizenry.

This article will trace how two forms of political activity—legal mobilization through public interest litigation and voter mobilization through ballot initiatives—have diminished the capacity of judges to determine unilaterally the meanings of state constitutional provisions that concern gay rights and same-sex marriage. This political activity, sometimes sparked by judicial decisions, has profoundly structured the law on gay rights and same-sex marriage in Oregon and Hawaii. The two instances of litigation and initiative-making in these states provide an excellent case study into the politics of popular constitutionalism. They show, rather clearly, that in settings of popular constitutionalism, judicial determinations

of controversial state constitutional rights and meanings are rarely final; instead, popular determinations of the content of those rights will more likely prevail—even if the process is politically messy and confrontational. This conclusion, of course, holds important lessons not only for scholars of state constitutional law, but also for activists who are increasingly using state constitutional texts as a basis for litigation to expand the rights of politically unpopular groups.[9] The existence and prevalence of popular constitutionalism means that this effort to recreate a Warren Court activist agenda on state benches could find severe and successful resistance—not among the judges, but more likely among the populace at large.

The remainder of this article is organized into three sections. The next section, Part II, is concerned with the theoretical basis for popular constitutionalism. Part II itself consists of three sections. The first section of Part II roots popular constitutionalism within an intellectual and academic context by examining two bodies of academic writing within legal studies. These recent works highlight the extent to which constitutional and legal interpretation takes place *outside* courtrooms and is effected by actors other than judges. The second section of Part II situates the extra-judicial approach within the institutional contexts of state constitutions and state constitutional politics. The final section of Part II puts forward a theory of how initiative politics and state constitutional litigation seek—in different venues—similar goals of political mobilization and constitutional revision. The processes of mobilization and revision, rest, in part, on transforming the legal and political understandings of movement activists.

In the second half of the article, Part III, I will apply the theory of popular constitutionalism to two episodes of state constitutional politics: the battles over gay rights and same-sex marriage in Oregon and Hawaii. These two case studies help us understand how both litigation and popular mobilization act as processes of constitutional revision and how they constitute two strands of popular constitutionalism. In Oregon, a conservative effort to use the ballot initiative to limit gay rights mobilized significant portions of the state electorate, despite the overwhelming evidence that both state and federal judiciary would not allow the ballot

9. See, for example, the ACLU's and Lambda Legal Defense Fund's recent joint campaign to overturn sodomy laws in several states. This campaign targeted Arkansas, Kansas, Missouri, Oklahoma, Texas, and Maryland because each state banned same-sex sodomy, but not opposite-sex sodomy. The ACLU's litigation has thus far produced at least one victory in Maryland. *See* Williams v. Glendening, No. 98036031-CC1059 (Baltimore City Cir. Ct. Feb. 5, 1998), *available in* Leo L. Wong, *Lesbian/Gay Law Notes: 1998 Case Table* (visited Nov. 23, 1999) <http://qrd.rdrop.com/qrd/usa/legal/lgln/case.table-1998>.

initiatives to stand, even if they passed. In Hawaii, gay rights activists won its biggest court battle yet in *Baird* only to suffer a severe setback in a state constitutional referendum on same-sex marriage in the fall of 1998. By examining these episodes of litigation and referendum politics, we can see the extent to which judicial decisions were often marginal to the process of defining the scope of gay rights within those states. Part IV concludes the article with some thoughts on the limitations that popular constitutionalism poses for activists seeking to use state constitutions as a basis for social and political transformation.

II. THE THEORY OF POPULAR CONSTITUTIONALISM

A. "Down and Out" Judicial Scholarship

At about the same time that the "new judicial federalism" became a thriving and energetic judicial enterprise, scholars within law schools and political science departments began to shift their analyses away from traditional explorations of U.S. Supreme Court doctrine. That is, the institutional and political developments of the "new judicial federalism" have been accompanied by scholars' and theorists' new-found appreciation for constitutional interpretation outside the U.S. Supreme Court. This shift away from the U.S. Constitution and the Supreme Court's interpretations of it has led to explorations of legal activity in a variety of fora and to examinations of how other actors, both institutional and individual, can foster and legitimate authoritative constitutional interpretations and practices. This growth of "down and out" judicial and legal scholarship highlights both the fluidity of legal constructs and their capacity for democratic expression.

Diverse scholars such as Stephen Griffin, Keith Whittington, Mark Tushnet, Wayne Moore, Sanford Levinson, Daniel Levin, Michael McCann, John Brigham, Austin Sarat, Patty Ewick, Susan Silbey and many others are trying, in many different ways, to provide a theory of extra-judicial legal interpretation and mobilization and to explore these events in empirical terms. Although this is a broadly divergent group of scholars working in different fields in law schools and political science departments, they share a common orientation towards the extra-judicial process of legal and constitutional interpretation. This scholarship can be very useful as we try to make sense of the political and legal practices that can provide meaningful constitutional ordering within American state politics. Although they might agree on the importance of extra-judicial legal and constitutional

interpretation, there are important differences among these scholars, which I will trace below. My account of this group of scholars begins with those who see constitutional interpretation as institutionally rooted but removed from the strict purview of courts and proceeds to those who see constitutional (and more broadly, legal) interpretation to be a dimension or element of political consciousness. While the former group often relies on historical or institutional accounts of constitutional interpretation, the latter group is more likely to rely on cultural understandings of the meanings of law. My aim here, in part, is to arrive at a synthesis of these two approaches to extra-judicial legal and constitutional interpretation.

In light of both schools of thought, I contend that our understandings of state constitutional practices and state constitutional interpretation should change. My argument is that these perspectives on the production of legal and constitutional interpretations can help us explain the vital, dynamic, and often unsettled nature of state constitutional law and politics. These theories shed light on a form of constitutionalism—state constitutionalism—that has not been at the center of scholarly discourse on American constitutional orders, but which suffuses contemporary American politics and law. By relocating the processes and centers of constitutional interpretation from courtrooms to other branches and levels of government and even to individual legal identities, these theories provide a remarkable insight into the production of state constitutional meanings.

1. Non-Judicial Constitutional Interpretation and Practice

A number of recent works by political scientists and legal academics have sought to understand the nature and processes of constitutional interpretation outside courtrooms. Although running counter to the strong academic and political traditions that contend the Constitution is what the courts say it is, these scholars have identified forms of constitutional law that have emerged in the face of judicial opposition, judicial indifference, or judicial incapacity. Although I cannot engage in sustained analyses of these books here, a brief recapping of their main points will help us understand the ways that these new perspectives on non-judicial interpretation of the U.S. Constitution can help us better understand state constitutionalism.[10]

10. Three other excellent works merit inclusion in this analysis, but they will not be discussed here due to space considerations: *See* DANIEL LESSARD LEVIN, REPRESENTING POPULAR SOVEREIGNTY: THE CONSTITUTION IN AMERICAN POLITICAL CULTURE (1999); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); KEITH E. WHITTINGTON, CONSTITUTIONAL CONTRADICTION: DIVIDED POWERS AND CONSTITUTIONAL MEANINGS (1999).

In his book, *American Constitutionalism: From Theory to Practice*, Stephen Griffin argues that "the meaning of most of the Constitution is determined through ordinary politics" and that the "course of constitutional change during the New Deal and other important periods of change in the twentieth century flowed through the President and Congress, not the Supreme Court and the legalized Constitution."[11] This understanding of American constitutionalism (and indirectly, constitutional theory) expands the range of both possible interpreters and interpretations beyond Supreme Court Justices and academic lawyers.[12] But more than interpretation is at stake here: Griffin contends that whole new areas of legal, constitutional *practice* have arisen over the past 200 years—practices about which both the U.S. Constitution and the U.S. Supreme Court have been resoundingly silent. According to Griffin, the birth and growth of American political parties, the rise of the administrative state, and the emergence of the national security apparatus all have an authoritative constitutional theory undergirding them and those theories have been shaped by the political practices of non-judicial actors. Thus, the legally-binding meanings of the U.S. Constitution, argues Griffin, are not solely judicially-authorized.

Mark Tushnet expands on Griffin's point by arguing that the meaning of American constitutional commitments can legitimately be interpreted by non-judicial actors, even when their interpretations oppose the established doctrines of the Supreme Court.[13] His assault on judicial supremacy, more controversial than Griffin's, contends that political leaders can, and ought to, "take the Constitution away from the courts" in order to advance the foundational political commitments found in the Declaration of Independence and the Preamble to the Constitution. Those commitments of equality, justice, and democratic expression define the aspirational goals of the Constitution and can best be advanced by what Tushnet calls "populist constitutional law."[14] Moreover, those goals and commitments comprise

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11. STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 45 (1996).

12. In this sense, Griffin's account dovetails with Sanford Levinson's notion of multiple "Protestant" interpreters within the American constitutional order. *See* LEVINSON, *supra* note 10, at 27-53.

13. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

14. At the end of his book, Tushnet provides this definition: populist constitutional law is "a law oriented to realizing the principles of the Declaration of Independence and the Constitution's Preamble. More specifically, it is a law committed to the principle of universal human rights justifiable by reason in the service of self-government." *Id.* at 181. While Tushnet's phrase "populist constitutional law" is quite similar to my own term "popular constitutionalism," there are significant and important differences that will become apparent

what Tushnet calls the "thin" Constitution, the foundational American project of universal human rights and democratic aims.

Importantly, Tushnet contends that members of Congress are just as well-suited to the task of defining the meaning of the "thin" Constitution as Supreme Court Justices are. He cites, as one example among many, Robert Bork's confirmation hearings before the Senate Judiciary committee, as an episode in Congressional constitutional interpretation. There, the Senators' questions and Bork's responses formed a dialogue about the Constitution that informed citizens and defined a public understanding of the document's scope and importance. According to Tushet, the Senators and Bork "were discussing the Constitution in front of the American people. We might see them as attempting to educate the people about what the Supreme Court said the Constitution means. In a sense, they were *constructing* the First Amendment for public edification, not construing it."[15] Because members of Congress and other political actors have the capacity to at least partly define the meaning of the Constitution independent of judges, they can either resist Supreme Court doctrines or advance competing lines of argument, in support of the "thin" Constitution.

Similarly, Wayne Moore argues that constitutional politics means more than the politics of court decisions. Indeed, Moore argues that constitutional politics are central to the political identities of citizens and to our understanding of shared normative commitments. Moore's book seeks "to account for ways that the people at large may play roles in creating and sustaining constitutional norms—including 'legal' norms that do not fit readily within professional narratives."[16]

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later, but which will be briefly noted here. First, my language applies explicitly to the form of constitutionalism that state constitutions represent, which is significantly different from federal constitutionalism. Second, the popular nature of state constitutions are directly related to the institutional design, aims, and features of state constitutions. That is, their responsiveness to democratic majorities lies in marked contrast to the U.S. Constitution's super-majority requirements.

Tushnet advances a theory of U.S. Constitutional interpretation that is populist. This article, on the other hand, seeks to understand the institutional and political features of a different kind of constitutionalism—a constitutionalism that many scholars have not previously regarded as sufficiently "constitutional" primarily because it is more closely tied to populist sentiments. While there is important overlap between the two theories, Tushnet's interpretative framework is still concerned with resolving legal and constitutional questions at the national level. My theory focuses on the form of politics that is pursued under state constitutionalism. Finally, it should be noted that the two terms were derived independently; I became aware of Tushnet's book only after this article was submitted to this Journal.

15. *Id.* at 64.

16. WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 11 (1996).

These works and others seek to disrupt our conventional understanding of the way constitutional meanings are produced. By identifying how other branches and political actors establish constitutional interpretations—whether in the absence of judicial action, in opposition or in tension with judicial action or simultaneously with judicial action—these authors have gone a long way toward showing how political actors and institutions can and do collectively struggle over the production of constitutional meaning. Rather than simply allowing the Supreme Court Justices and other members of the judiciary to determine exclusively the meaning of the U.S. Constitution, these authors view other institutional actors as viable and authoritative interpreters of binding Constitutional commitments. The next topic will focus on a group of scholars who seek to expand the range and processes of interpretation even further—beyond institutions and to the level of legal consciousness.

2. Interpretivism, Legal Consciousness, and Constitutional Mobilization

Just as Griffin, Whittington, Moore, and Tushnet take constitutional practice and interpretation *out* of courtrooms, other recent scholarship in the study of law and social change has taken the study of law and social change *down* to its very foundations—down to the level of individual identity. These studies also challenge the prevailing political science and law school emphasis on a "court-centered, top-down" view of law and social change, but in a different way.[17] Scholars such as Michael McCann, Austin Sarat, John Brigham, Patty Ewick, and Susan Silbey strive to understand how the law and changes in the law shape the identities and strategies of legal and non-legal actors. They take the law outside of its institutional contexts and explore its effects on individual legal consciousness and political activity in general. By "de-centering" courts from their analyses of law and social change, these scholars present powerful alternative models and methods to institutional approaches to legal studies.

17. For an overview of the differences between interpretivist and positivistic approaches to law, see the two review exchanges between McCann and Gerald Rosenberg. *See* Michael W. McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715 (1992) [hereinafter McCann, *Reform Litigation*]; Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 17 L. & SOC. INQUIRY 761 (1992); Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 L. & SOC. INQUIRY 435 (1996); *see also* Michael W. McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being So Positive . . .)*, 21 L. & SOC. INQUIRY 457 (1996) [hereinafter McCann, *Causal Versus Constitutive Explanations*].

Unlike "top-down" scholarship, which typically regards judicial impact as a question of individual or official compliance with court orders,[18] interpretivists contend that the significance of law and judicial action rests in their capacity to constitute both political identities and ideologies—particularly among individuals in political movements seeking to change existing distributions of power or resources. From this perspective, law and legal institutions are not merely commands or injunctions from authoritative sources of power. Instead, law and legal institutions provide ideologies and languages that frame our self-understanding and our relationships towards power.[19]

As a consequence, interpretivists, particularly those who study legal mobilization, generally do not focus on the direct impact of litigation on social conditions. Instead, they are curious about the social change that "bubbles up" in the wake of judicial action—often in places and in ways unexpected by judges and legal or political analysts. Scholars such as McCann analyze the legal frameworks and institutions that shape normative commitments and strategic opportunities for political actors. Often the actors who use these legal contexts—both rhetorically and politically—are outside the judicial focus of particular decisions. Echoing Austin Sarat's contention that "the law is all over,"[20] McCann sees interpretivist legal studies as moving outside formal legal settings. The interpretivist lens views courts "as relatively peripheral to most forms of legal action."[21] Courts still matter, but in profoundly different ways than judicial impact scholars have traditionally thought. Indeed, a de-centered legal model examines how

18. I must confess that my work thus far falls into the "top-down" school of judicial politics. *See, e.g.*, Douglas S. Reed, *The People v. The Court: School Finance Reform and the New Jersey Supreme Court*, 4 CORNELL J.L. & PUB. POL'Y 137 (1994); Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC'Y. REV. 175 (1998).

19. Interpretivism in legal studies borrows from intellectual developments in a variety of fields, ranging from post-modern political theory and cultural studies to sociology and critical legal studies. A key component of interpretivism (and legal mobilization) that sets it apart from other more strictly theoretical developments is its reliance on some form of empirical reference. Although the fact-value distinction is implicitly rejected by interpretivism, its leading practitioners use empirical accounts to make their claims. For a foundational article highlighting the tensions between legal academy scholars who rely solely on critical doctrinal studies and scholars outside the legal academy who see virtues in empirical techniques and investigation, see David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

20. Austin Sarat, "The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343 (1990).

21. *See* McCann, *Reform Litigation*, *supra* note 17, at 731.

"citizens routinely reconstruct legal norms into resources for purposes unintended by judicial officials."[22] In short, courts and law are not about decisions and compliance, but about resources, identities, and opportunities—resources for activists to mobilize, identities of individual participants, and opportunities for strategic action to achieve movement aims.

From the interpretivist perspective, the meanings of court decisions are constructed by their intersection and interaction with existing norms, interests, and ideologies. For example, the meaning of *Roe v. Wade* is not necessarily found in the number of hospitals providing abortions before and after Justice Blackmun wrote his decision. Rather, it is found in the transformations of individuals' political identity[23] and the subsequent reorientation of political divisions within the electorate.

For example, when John Brigham sought to understand how the law and the legal order shaped the closing of gay bath houses in San Francisco during the early days of the AIDS crisis, he looked not to public health department regulations or court orders, but to the gay community's invocation of the right of sexual expression and property rights. Brigham contends that laws, constitutions, and legal norms exert a force that is not evident in official, textual pronouncements or in formal, legal institutions.

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22. *Id.* at 733.

23. A vivid example of the law's capacity to constitute identities is sharply drawn in KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984). A pro-life activist whom Luker interviewed described the origins of her involvement in the movement:

> [It was my oldest son's] third birthday and I was making his cake . . . . My husband came in with a newspaper. It said there would be peace in Vietnam, and of course that overshadowed the Supreme Court decision. So he was going through the paper and he saw this [article] about legalizing abortion . . . . And so, all of a sudden he walked into the kitchen and he showed me, he said, "Hey, did you see this, Maria?" I says . . . you know I was too busy doing the cake but he says, "Lookit here," he says, "read this." And I read that and it very much upset me. I've got that paper to this day. It wasn't saved because of the peace in Vietnam. It was saved because inside in the pages is that article . . . . It had a photograph of the [J]ustices, and it mentions how [abortion] was to be legal and all of that. And it was Jamie's birthday. And I sat down, I was very upset . . . . I wanted to cry in a way . . . . All of these things in my personal life—things that were no concern of mine, so to speak, you say "that's somebody else's business—all came together in one. And being Jamie's birthday, my very first son . . . that kind of made it a personal thing . . . almost like seeing Providence. God was saying, "Lookit, Sister, you better see what's going on there.

Id. at 137. This "bolt from the blue," as Luker describes it, forever changed this woman's sense of identity and political efficacy. Within this catalytic moment, she perceived the law, the Supreme Court, and the meaning of the Constitution in a profoundly new light.

Instead, legal rhetoric and conceptions of law suffuse the actions and attitudes of non-legal actors. He contends that this extra-legal life of the law is just as significant as the law on the books and the laws enforced by county sheriffs. According to Brigham, political movements:

> are constituted in legal terms where participants see the world through concepts derived from state institutions and organize themselves according to these concepts . . . . Legal forms are evident in the language, purposes, and strategies of movement activity as 'practices.' When activists speak to one another in meetings, on picket lines, or over the phone, their language contains consistent ways of understanding or acting, that is, practices of, about or in opposition to the legal system.[24]

For McCann, Brigham, and other students of legal mobilization, the power of the legal order to constitute identities and political claims reveal the effects of statutes and court decisions.

Similarly, Patricia Ewick and Susan Silbey also see the power of law as constituting identity, but they contend that this ordering of legal consciousness occurs even among persons who are not political activists seeking political change or transformation. For Ewick and Silbey, the daily and mundane encounters with law and legal institutions profoundly shape the viability and content of legal and constitutional understandings. Of course, the law and society movement has long contended that law exists and is sustained through encounters with not only officials and official texts, but also through the development of legal consciousness among citizens engaged in everyday transactions. Thus, the power of law resides not in the deeds and texts of legitimate authorities, but in the internalization and production of legal meanings among non-official and even non-political actors. In their book, *The Common Place of Law,* Ewick and Silbey strive to illuminate the varieties of legal consciousness among Americans to understand how and why people resort to the law. In the course of doing so, however, they must arrive at an understanding of law that is profoundly decentered:

> To discover the law outside of formal legal settings, we must tolerate a kind of conceptual murkiness. Instead of relying on the doctrinal definitions of, for instance, private property (purchased, titled, and receiving protection of the state), we must acknowledge and fathom the significance of "property"

24. JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS 24 (1996).

> as it is claimed, used, protected and fought over in the social spaces outside of official agencies.[25]

Ewick and Silbey ultimately resort to a distinction between "law" and "legality" to highlight the differences between official, sanctioned forms of legal meaning and those legal forms or meanings that exist "independently of . . . institutional manifestations."[26]

Whether we are discussing political actors seeking changes in policy or lay citizens simply engaging in their daily routines, an interpretivist framework demonstrates that the power of law does not lie only in its capacity to induce compliance through formal decrees and subsequent enforcement. Its profound strength lies in the internalization and rearticulation of a legal, rights-based idiom. Recognizing law's ability to shape and refine both political and personal understandings of power is an important step to understanding the capacity of state constitutions to mobilize and redefine political conflicts.

This article strives to fuse these two schools of judicial and legal scholarship by locating the production of state constitutional meaning within a dialectical exchange between institutional understandings of constitutional commitments and individual forms of constitutional consciousness. That is, constitutional meanings and understandings emerge outside of, but often in response to, officially sanctioned texts, and these extra-institutional, highly individuated notions of constitutional commitments can be just as compelling and viable as judicially-authored opinions. The meanings of state constitutions are frequently forged outside judicial confines because state constitutions give great credence and power to democratic majorities, which invites political contestation and dispute. This political responsiveness of state constitutions, in conjunction with the expansion of the state judicial agenda under the "new judicial federalism," has made state constitutional politics an increasingly dynamic and energetic form of political contestation in recent times. However, two questions remain: First, what kind of constitutionalism *is* state constitutionalism? And second, how does it differ from federal constitutionalism? My answer is that state constitutionalism is better understood as "popular constitutionalism" and that its primary difference lies in its implicit rejection of higher law constitutionalism.

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25. PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW 20-21 (1998).
26. *Id.* at 22.

B. State Constitutional Law On Its Own Terms

1. Introduction: "A Proposition Too Plain to Be Contested" is Contested

A perceptive critic might at this point take issue with my contention that state constitutions—some of the oldest constitutions in the world—are defined not by judges but by our political imaginations. This important objection taps into the broader issue of state constitutional theory and its relationship to the higher law tradition in American constitutionalism. Constitutionalism in the traditional sense has always hewn to the notion that constitutions delimit a higher law, a law above the course of normal politics. Higher law constitutionalism endows some legal forms (particularly written constitutions and judicial interpretations of them) with a greater solemnity and worth than others (legislative enactments and administrative regulations). The higher law controls the lower, structures its use, and polices its boundaries. As Chief Justice John Marshall wrote:

> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.[27]

One aim of this article is to show that this dichotomous understanding of constitutionalism, while it may be applicable to the U.S. Constitution, breaks down in the context of state constitutional ordering. This article contests what Chief Justice Marshall claimed in *Marbury v. Madison* was "too plain to be contested." "Popular constitutionalism" is still a form of constitutional ordering even though it does not conform terribly well with higher law notions of constitutionalism. It lies within that middle ground that Chief Justice Marshall claimed did not exist within constitutional law or constitutional politics. Thus, my imaginary but perceptive critic is wrong. The meanings of state constitutions often do not rest on judicial interpretations, but on particular forms of political imagining: political mobilization and organization.

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27. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

One of the reasons academic lawyers have been reluctant to view state constitutions as "real" constitutions is their mutability: their rates of amendment and modification.[28] The responsiveness of state constitutions to majority influences and pressures has created incentives for interest groups and activists to seek constitutional, as opposed to statutory, change. Moreover, electoral methods of judicial selection and retention mean that controversial decisions and judges can become rallying cries for an activist and mobilized citizenry, who seek to resist the constitutional interpretations advanced by judges.[29] This very dynamism, however, renders state constitutionalism suspect as a form of higher law. The higher law tradition within American constitutionalism requires that "real" constitutions be relatively immune from the sentiment of simple majorities, but state constitutions—because of their organization and institutional design—are far more responsive to democratic inputs. That key difference shapes both our understanding of state constitutions *qua* constitutions and the incentives of politicians, interest groups, and activists alike.

2. The Unique Institutional Contexts of State Constitutionalism

The central and immediately obvious difference between federal constitutionalism and state constitutionalism is the latter's penetrability by democratic majorities.[30] This difference occurs in at least two ways: (1) the

28. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

29. See, for example, Barry Latzer, *California's Constitutional Counterrevolution*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES & HISTORICAL PATTERNS, (G. A. Tarr. ed., 1996) for an account of California's explosive debate over the retention of Chief Justice Rose Bird on the California Supreme Court.

30. Little work in political science or legal scholarship has examined empirically the institutional contexts of state supreme courts and state constitutional interpretation. The scholars who have studied the institutional contexts include: STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (Mary Cornelia Porter & G. Allan Tarr eds., 1982; G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION (1988); Henry R. Glick, *Policy Making and State Supreme Courts*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT (John B. Gates & Charles A. Johnson eds., 1991). Two ambitious studies by lawyers, emerging from a common data set, trace the historical development of the kind of cases heard by state supreme courts: Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977); Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978). More work has addressed the determinants of judicial decision-making at the state level. *See, e.g.*, Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54 (1990); Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme*

selection of justices and (2) the adoption and/or modification of the state constitution. Both the democratic regulation of judicial office-holding at the state level and the democratic influence on state constitutional texts comprise two institutional forms that allow popular constitutionalism to thrive. Popular constitutionalism structures the sites of political mobilization in both political and legal terms for activists who are seeking social and political change at the state level.

The selection of state supreme court justices is, in many ways, influenced by majority sentiments. The recruitment and selection mechanisms of state supreme court justices are far more democratic than the selection of U.S. Supreme Court Justices. Twenty-five states elect state supreme court justices through direct election, either partisan or non-partisan.[31] Another fourteen states use the "Missouri Plan" where a judicial selection commission presents a list of candidates to the governor, who then nominates the justices. The justices' terms in office are then limited by non-competitive elections. Thus, in thirty-nine out of fifty states, state supreme court justices are either elected or removed from office by a direct vote of the electorate.

A second feature of state constitutionalism is the democratic penetration of constitution-making, particularly through constitutional referenda and initiatives. A recent study of state constitution-making shows that American states have had a total of 145 constitutions, which have been amended nearly 6000 times.[32] The amendment rate[33] for state constitutions is nearly ten

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Courts, 79 AMER. POL. SCI. REV. 178 (1985); Melinda Gann Hall *Docket Control as an Influence on Judicial Voting*, 10 JUST. SYS. J. 243 (1985); Melinda Gann Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POL. Q. 147 (1992); John T. Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239 (1974).

Some important work within this latter field has shown that differences in institutional settings influence judicial outcomes, independent of judicial ideology or the social backgrounds of judges. Although this literature has construed institutional constraints narrowly by examining such factors as judicial selection procedures, the courts' control of their dockets, opinion assignment practices, rules favoring judicial seniority in conference discussions, etc., more recent work has begun to consider external institutional constraints. *See, e.g.*, Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. OF POL. 427 (1992).

31. Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25 (1979).

32. Donald S. Lutz, *Patterns in the Amending of American State Constitutions*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES & HISTORICAL PATTERNS, 32-34 (G. A. Tarr. ed., 1996).

times that of the amendment rate for the U.S. Constitution (1.23 for states versus 0.13 for the U.S. Constitution).[34] Moreover, the success rate for proposed state constitution amendments between 1776 and 1979, via all forms of amendment processes (legislative, convention, and initiative), is sixty-two percent.[35] This means that nearly two-thirds of all proposed state constitutional amendments are adopted. Thus, the mutability and responsiveness of state constitutions to democratic mobilizations should be considered when attempting to understand what constitutionalism means at the state level and what institutional constraints and opportunities these constitutions present to activists. Clearly, the classic depiction of constitutions as bulwarks against majority infringements of minority rights is not necessarily accurate for state constitutions—given the relative ease with which majorities alter them. Instead, state constitutions fall within the space that Chief Justice Marshall claimed did not exist: a middle constitutional ground in which law and politics blur and blend. Within this middle ground, popular mobilizations use constitutional language to prevent minority groups or powers from attaining special or unique privileges.

The early adherents of the "new judicial federalism," however, failed to appreciate the dynamic characteristics of state constitutionalism. Instead, judges, and then later litigators and other legal activists, began citing state constitutional texts in their legal and constitutional arguments with the assumption that these provisions had the same "constitutional" status as the Federal Constitution. Early successes reinforced this effort; consequently, a wholesale movement of state constitutional litigators arose. These state constitutional litigators sought to employ state constitutional texts in the same way that earlier public interest litigators used federal constitutional provisions to obtain racial and sexual equality, prisoners' rights, and educational opportunity. Indeed, much of the expansion of the "new judicial federalism" was the result of efforts to continue the Warren Court agenda into the 1970s and 1980s, in the face of an increasingly conservative federal judiciary. Despite these early successes, popular reversals of judicial interpretations of state constitutional provisions have become increasingly common because of the dynamic nature of state constitutions. Nonetheless, it is important to note that the use of state constitutional texts by interest group litigators pursuing social and political change has been the most

33. The amendment rate is defined as the number of amendments adopted per year of a constitution's existence.

34. Lutz, *supra* note 32, at 34.

35. *Id.* at 40.

visible dimension of state constitutionalism in American politics and has perhaps permanently changed state constitutionalism.

My theory of popular constitutionalism starts with both the dynamic nature of state constitutional texts and the use of state constitutions—through pubic interest litigation—to achieve social and political change. Together they form a dynamic and rich process of constitutional interpretation that is structured by both institutional norms of judicial interpretation and the democratic norms of majority rule. These two wings of state constitutional politics comprise a vibrant and complex form of constitutional ordering within American politics—a form of constitutionalism that has been denied far too long by Chief Justice Marshall's edict that higher law controls popular rule.

1. A Horizontal, Dual-track Theory of State Constitutionalism

Popular constitutionalism is most apparent in states where litigators actively use state constitutional provisions and in states where the initiative process has conformed the process of amending state constitutions to the pressures and constraints of election campaigns. Legal mobilization through litigation and democratic mobilization through ballot initiatives form two wings of popular constitutionalism. Together, they transform the project of interpreting state constitutional provisions into simultaneous judicial and extra-judicial tasks. Over the past twenty-five years, state citizenries have used the initiative process to engage in popular contestations that are often intense and bitter. Issues such as the meaning of gay rights, immigrant rights, the right to die, bilingual education, property taxes, gambling, and affirmative action have all been debated through the initiative process. Simultaneously, however, litigators seeking social change, newly-enamored with the "new judicial federalism," also have been relying on state constitutional texts to define the content of many of these same issues. In many instances, the result has been a dialectical exchange between judicial rulings based on state constitutional provisions and popular initiative politics that seek to redefine or reinterpret those same or other provisions. What ensues is a distinctively legalized, democratic politics that I call popular constitutionalism.

For the remainder of this section, I will explicate how legal mobilization through litigation and how democratic mobilization through initiatives work as discrete enterprises. These two forms of political activity are treated as

strategic mechanisms for building broad social movements.[36] Each form of political activity seeks results beyond the immediate legal objective at hand.

(a) Litigation and the Legal Mobilization of State Constitutions

As legal and political activists began litigating constitutional issues, they realized that litigation was an excellent tool to boost movement organizing.[37] Activists realized that the political and social repercussions of the litigation extended beyond the context of the immediate law suit. In this regard, suing to effect change may achieve goals for the organization that are wholly distinct from the aims of the lawsuit. The possible benefits an organization may gain by pursuing a litigation strategy to build a political or social movements are numerous, including: heightened media exposure, a greater capacity to fund-raise, the exertion of political pressure on

36. It is useful to view these forms of political conduct as simply two tactics available within a repertoire of actions open to both social movements and interest groups. As Charles Tilly wrote:

> Let us think of the set of means which is effectively available to a given set of people as their repertoire of collective action. The analogy with the repertoire of theater and music is helpful because it emphasizes the learned character of the performance and the limits to that learning, yet allows for variation and even continuous change from one performance to the next. The repertoire of collective action typically leaves plenty of room for improvisation, innovation and unexpected endings.

Charles Tilly, *Social Movements and National Politics*, *in* STATEMAKING AND SOCIAL MOVEMENTS 307 (Charles Bright & Susan Harding eds., 1984).

This understanding of collective action explicitly draws on Tilly's definition of a social movement. Although space does not permit a detailed exploration of Tilly's theory of social movements, his definition is as follows:

> A social movement is a sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support.

Id. at 306.

In the case of the Oregon Citizens Alliance ("OCA"), which I address below, it is debatable whether anti-gay activists truly lacked "formal representation" or whether the entire gay community lacked such representation. To refine Tilly's theory somewhat, it is useful to view Measure 9 and the battle over gay rights in Oregon as a struggle to determine which constituency—gay/gay tolerant or anti-gay—would be represented by the public language. OCA activists clearly believed that they were not being heard and consequently felt underrepresented by Oregon's power elite.

37. See, for example, the relationship between Justice Thurgood Marshall's early litigation campaigns and the growth of the NAACP in MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 20-41 (1994).

administrators or legislators, recruiting additional members, improving one's bargaining position with current or potential adversaries outside of the courtroom, and possibly the creation over the long-term of a more hospitable legal and political environment for the organization's policy aims. All of these benefits—whether ancillary or central to the litigation strategy—figure into the calculus of those who pursue litigation as a means to social and political, rather than strictly legal, ends. A number of analysts and commentators have argued that the expanded agenda of public interest litigators damages the judicial process and produces poor policy.[38] However, the fact remains that litigation can be an effective tool with which to achieve organizational goals that may be independent of the activists' substantive policy goals.

The necessary rejoinder or comment at this point is an obvious one: how does the understanding of the *strategic* use of litigation amount to a partial or an entire theory of constitutionalism? How can a political practice or, more basely, a form of strategic behavior represent or constitute a theory of governance? The answer to this challenge lies partly in a reconceptualization of constitutionalism away from the strict Marshallian framework discussed above. The answer also lies in removing the conceptual blinders that higher law constitutionalism has placed on our understanding of state constitutions.

By its operation, legal mobilization puts into practice an understanding of the relationship between rights and interests that highlights the social or extra-legal characteristics of rights theory. The importance, then, of legal mobilization lies not in its ability to persuade judges or juries of the content of particular rights or of their applicability in a particular context. Rather, legal mobilization's strength stems, in part, from its capacity to translate grievances or "mere" interests into claims of fundamental rights. This translation process not only occurs among actual plaintiffs, but also among folks who share the plaintiffs' grievances or interests. This transformation of interests into rights that must be respected and given due regard by either the state or other powerful individuals is a process of political transformation. Thus, a primary and essential goal of activists who pursue legal mobilization is to persuade plaintiffs to perceive their claims as rights. Once that is done, however, it becomes very difficult to dissuade those who are mobilized that their claims are not rights. They may understand that their rights are not being recognized, but they do not think they possess mere interests any longer.

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38. *See, e.g.*, DONALD L HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Nathan Glazer, *Towards an Imperial Judiciary?*, 10 PUB. INTEREST 104 (1975).

While this kind of recognition and politicization of individuals occurs in most forms of social movement activity, legal mobilization confers a different level of consciousness-raising. Legal mobilization encourages individuals to act as if their understanding of the legal order is authoritative. In this sense, legal mobilization, in some ways, undermines existing legal authorities, but it also forces authoritative interpreters to continually defend their positions. In his book *Rights at Work*, Michael McCann explores the reaction of legal and union activists to hostile rulings.[39] Rather than accept judicial determination of claims as authoritative, these activists resisted and substituted their judgment for the official assessment. McCann writes, "[t]his understanding was especially apparent in many interviewees' proclivity to distinguish what the law 'really is' from judicial rulings. '[Judge] Kennedy is just plain wrong. We don't care what he says. The wage discrimination cited in that case is wrong and illegal.' "[40]

Union and legal activists' rejection of judicial pronouncements, like Protestant interpretations of Holy Scripture, enables multiple, competing, legal assessments to circulate, despite the fact that the enforcement capacity of the state lies behind only one of those interpretations. In the context of state constitutionalism, however, these competing legal interpretations can be substituted rather quickly through a democratically mobilized law. Thus, legal activists' willingness to substitute their "lay" legal understanding for the judicial version creates a far more fluid legal setting within the context of state constitutionalism.[41] Within this setting, the relationship between rights and interests is far more contested and open to political influence. Activists who use legal mobilization tactics in the state constitutional context rely on that contested nature in their efforts to redistribute power and resources.

Here is where we arrive at an understanding of how legal mobilization can be seen as a kind of constitutional theory. Legal mobilization is a political and strategic practice that seeks to redefine legal rights and to transform the interests that are claimed or perceived as legal rights. The transformation occurs both at the level of individual consciousness and institutional recognition. Thus, legal mobilization is a regularized political practice that strives to reallocate power within a regime or political order. It does so by asking rank and file members to reconceive their grievances as

39. MICHAEL W. MCCANN, RIGHTS AT WORK, 234 (1994).

40. *Id.*

41. As explained further in this article, it also creates the possibility of counter-mobilization, in which a newly-defined understanding of the law can be supplanted by a competing vision through democratic counter-mobilization.

rights and then by seeking legal legitimation of that reconceptualization. From the perspective of down and out legal scholarship, the practice and struggle over the allocation of rights is effectively a process of constitutional definition. The value of down and out scholarship is that it enables us to see these episodes not merely as recurring legal contests, but as fundamental fights over the meaning and content of state constitutional provisions. That is what makes legal mobilization a constitutional practice from which we can discern a theory of governance.

(b) Initiatives and Popular Mobilization of State Constitutions

The other wing of popular constitutionalism is state initiative politics, which may be more readily identifiable as a form of constitutionalism. After all, voter initiatives often seek to alter the texts of state constitutions. Nevertheless, voter initiatives do more than simply effect a textual change. The constitutionalism of initiative politics lies not in its textual alteration of a state constitution, but rather in its effects on the identity and membership within states. The most acute constitutional struggles of initiative politics force fundamental reassessments of the norms of a state-level polity. State-level constitutional initiative politics, taken as a whole, has developed into a particularly effective way of pursuing and allocating what I refer to as "identity goods." "Identity goods" are public declarations about membership within a political community and the relative status of that community's members. The battles over "identity goods" reflect a broader form of constitutional conflict than the textual alteration would indicate.

(i) Social Movement Origins and "Identity Goods"

As identity politics has come to dominate American politics, initiatives and state constitutional reform efforts have also emerged as successful tactics within social movement repertoires because of the distinctive features of state constitutionalism. In particular, initiative politics responds well to simple political majorities, allows for the expression of popular sentiments, and draws on a long American tradition of fusing political and legal demands into a constitutional language.

It is well established that collective action to produce public goods[42] is irrational from the individual perspective.[43] Over thirty years ago, Mancur

42. A public good generally is defined as any good that is neither divisible nor excludable. Once this good is made available, it cannot be denied to anyone nor parceled out. The classic example is clean air. Once air is cleaned—often at a high cost—everyone gets the

Olson illustrated that public goods will be provided at lower than optimal levels because individuals have an incentive to free-ride on the efforts and contributions of large actors.[44] Absent coercion or a selective incentive, groups will provide lower levels of a public good than all its members desire because there is little incentive for individual members to contribute to its provision.[45]

The problem with Olson's line of analysis is that groups do frequently form in an effort to create public goods. The Civil Rights Movement, in particular, illustrates the way that rational individual-level analysis cannot account for all of the motivations and inspirations of collective actors. Social movement theorists working in the wake of Olson, most notably the resource mobilization school, have argued that ideological and normative commitments can transcend individual self-interest and help groups mobilize actors to engage in activity that will produce little direct benefit, often at high personal costs.[46] The resource mobilization school of social movement theory helps us to overcome the weaknesses in Olson's account by demonstrating that "conscience constituencies"—both individual and organizational—can be mobilized to help groups to overcome collective action problems.[47]

Two social movement theorists who have promoted this line of analysis, John McCarthy and Mayer Zald, have been criticized for begging a key

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opportunity to breathe it.

43. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

44. *Id.*

45. As Olson writes,

> If the members of a large group rationally seek to maximize their personal welfare, they will *not* act to advance their common or group objectives unless there is coercion to force them to do so, or unless some separate incentive, distinct from the achievement of common or group interest, is offered to the members of the group individually on the condition that they help bear the costs or burdens involved in the achievement of the group objectives.

Id. at 2. For an application of Olson's logic to the development and internal dynamics of political interest groups, see TERRY M. MOE, THE ORGANIZATION OF INTERESTS (1980).

46. The classic article within the resource mobilization literature is John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212 (1977). *See also* J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527 (1983) (giving an overview of the field). For a useful refinement of the resource mobilization argument that introduces the notion of political opportunity to the determinants of collective action, see DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930-1970 (1982). McAdam also provides a concise overview of theories of collective action. *See id.*

47. McCarthy & Zald, *supra* note 46, at 1216-17.

question: why are some consciences initially mobilized? That is, McCarthy and Zald fail to develop a theory of conscience formation or conscience mobilization. Why is it that some actors or organizations feel the tug of their consciences more sharply than others? Rather than fall back on psychological accounts of virtue or civic-mindedness, many social movement theorists have adopted an identity-based paradigm for social movement mobilization. The rise of the "new social movements" in Europe and the United States[48] have led some scholars to focus on the political and social movements that have emerged out of questions of individual and collective identity. For example, the emergence of a gay rights movement is simultaneously the process of self-recognition as an individual gay person and the gay community's collective demand for recognition as full members of the larger political and civic community. As Jean Cohen has written, the new social movements are composed of "collective actors [who] consciously struggle over the power to socially construct new identities, to create democratic spaces for autonomous social action, and to reinterpret norms and reshape institutions."[49] That description accurately captures in theoretical terms the gay rights movement's practical struggle to create social, political, cultural, and economic spaces for an uncloseted gay or lesbian existence; to enact laws protecting gays and lesbians from legal, social, and economic discrimination; to create new forms of intimate relationships; and even to redefine the institution of marriage. All of these transformations emerge from a politically mobilized sense of identity at both the individual and group level.

But all of these transformations may prove unsettling to those whose identities are profoundly rooted in the stability of the very institutions and norms that the gay rights movement seeks to redefine.[50] It is here that

48. Scholars have noted that these movements are based less on older categories of political division (race and class, in particular) than on newly emergent political cleavages: feminist politics, gay rights, environmental activism, and peace activism. For an overview of these movements see Claus Offe, *New Social Movements: Challenging the Boundaries of Institutional Politics*, 52 SOC. RES. 817 (1985).

49. Jean L. Cohen, *Strategy or Identity: New Theoretical Paradigms and Contemporary Social Movements*, 52 SOC. RES. 663, 690 (1985).

50. I should note, parenthetically, that it is not only the gay rights movement that seeks the redefinition of social roles and institutions; all social movements do. The women's movement seeks a redefinition of power in work and family relationships; the labor movement seeks a redefinition of power between owners of capital and workers, and perhaps most prominantly the American Civil Rights Movement sought a redefinition of the institutions of governance, legislative representation, public education, transportation, etc., between the races in the United States. However, not all of these efforts to redefine

clashes emerge among groups who view the battles over identity politics as zero-sum. For example, some fundamentalist Christians within the United States see openly gay and lesbian relationships as damaging to their own identities and, as a result, seek to prevent the toleration of those relationships. Clashes of identity politics are thus less about the emergence of a Castro Street and are more about the perceived threat of Castro Street to Main Street.

(ii) Identity Goods and State Constitutional Mobilization

The process by which identity goods are produced is neither difficult nor singular. To be explicit, identity goods are publicly authorized symbolic or material expressions of a community's membership and the recognition of those who have prominence within that community. Identity goods are produced when a community expresses in a public forum the community's membership and/or the relative rankings of the community's members. Most commonly, these markers are established implicitly through the public recognition of individuals or the inclusion and exclusion of particular members from community functions, events, or celebrations. At times, however, they are expressed explicitly, through formal exclusion and/or denigration of groups or individuals. Within the American political experience, identity goods have, in general, explicitly promoted egalitarian values of inclusion. Many of our foundational texts and political idioms value equality before the law, and the American creed of "justice for all" stresses the professed neutrality and openness of our legal structures. But within the American experience also runs a darker streak—an exclusionary, ascriptive ideology that defines legal and civic membership in terms of race and gender. As Rogers Smith has written, "Many adherents of ascriptive Americanist outlooks insisted that the nation's political and economic structures should formally reflect natural and cultural inequalities, even at the cost of violating doctrines of universal rights. Although these views never entirely prevailed, their impact has been wide and deep."[51]

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institutions and norms undermine individual identities. For example, although a successful workers' insurrection would limit the autonomy of owners of capital to a far greater extent than a successful gay rights revolution would limit the autonomy of fundamentalist Christians, the labor movement does not prompt the same fears of identity assault among owners of capital as the gay rights movement does among portions of the fundamentalist Christian community. My point is that some transformations are far more extensive than others, even though they do not fundamentally assault individual notions of identity.

51. Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 550 (1993).

The public production of identity goods serves not only the immediate political needs of defining membership, but also the normative need to have one's values and identity reproduced and validated. This validation occurs to the extent that the identity good produced reflects a consensus within a community. Acute conflict may arise over the production of identity goods when that consensus breaks down or when outsiders seek to claim an ability to control or shape the public production of identity goods. Since identity goods, in many ways, announce who we are, controlling the production of identity goods necessarily requires the ability to define the social and political terms of a community. In the broadest sense, identity goods seek to establish, in symbolic and material ways, the composition of the political community that asserts, "We, the people."

Social movement activists, who are seeking a strategic advantage, can use this division over the production of identity goods to mobilize their supporters. In either a reactionary or transformative way, individuals can be mobilized to advance the identity goods that represent their clusters of values, traditions, and definitions of communities.[52] At this juncture, identity goods and state constitutional mobilization merge, most prominently in states where the initiative process allows for a direct popular election of the identity goods a community will produce. Thus, efforts in California to eliminate bilingual education, activists' efforts in Washington and Oregon to allow physician-assisted suicide, and symbolic efforts to eliminate fur-trapping or reduce hunting in Colorado and Michigan all tap into the symbolic or material expressions about a community's substantive values. Of course many, if not most, ballot initiatives are far more mundane and do not greatly roil the political waters of a state. Clearly, every effort to amend a state constitution does not result in what Bruce Ackerman describes as a popular constitutional "moment."[53] Nonetheless, the capacity of

52. In fact, one could argue that the resort to constitutional mechanisms to force the public production of identity goods increases as other sources of public production—particularly schools, churches, and civic associations—are increasingly unable or unwilling to forge a consensus on the identity goods to be produced. In this sense, the rise of initiative politics may be the result of a breakdown in the ability of other public institutions to decide which identity goods should be produced and how. As these breakdowns occur, groups and individuals resort to the most readily available mechanism to enforce the production of identity goods—state mechanisms.

53. Bruce Ackerman argues in his projected trilogy of constitutional theory and history that transformative moments in history reshape political and judicial understandings of the fundamental political commitments that are reflected in the constitution. For a condensed version of his argument see Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). For the first two volumes of this profound effort to

initiative mechanisms to tap into the fluid, yet strongly felt, issues of the day allows social movement activists to shorten the cycle of movement development by raising the profile of an issue or organization.

Thus, constitutional initiatives can have profound consequences not only for the interpretation of constitutional meanings and commitments, but also for the organizational array of political forces operating within a state. In this way, constitutional arguments made outside of courtrooms are deployed by groups vying for influence and standing within a political community. These constitutional arguments may not take the same form as judicial constitutional arguments, but they shape and structure—in the most keenly contested battles—the popular understanding of a state constitution and its fundamental normative commitments. As demonstrated in Oregon's battle over gay rights, these arguments tap into other deeply held values—values based on religion, morality, and ideology. Consequently, scholars may be inclined to diminish the constitutional and legal dimensions of these rhetorical and political contests. The venue in which these battles are fought, however, profoundly shapes their course. The constitutionalization of a conflict through initiative politics affects the type of mobilization and its intersection with other political actors and institutions. Clearly, constitutionalized conflicts operate within different parameters than strictly religious or ideological battles; advocates of both (or for that matter all) sides must contend with a complex array of obstacles, including the U.S. Constitution and the federal judiciary.[54]

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rethink American constitutional theory, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

54. A note here must address the influence of the U.S. Constitution on state constitutional battles. The expression of fundamental commitments in a state, obviously, is not open to all possible normative horizons. The establishment of an Islamic state or a fundamentalist Christian one is beyond the scope of state constitutional mobilization. The Supremacy Clause of the U.S. Constitution as well as other constitutional provisions place significant limitations on the possibilities of popular state constitutional mobilization. The decision in *Romer v. Evans*, 517 U.S. 620 (1996), which struck down Colorado's Measure 2 (enacted on the same election day that Oregon's Measure 9 was defeated) highlights these limitations.

But the necessarily legal form of these reversals by the federal judiciary nonetheless creates space for a popular state constitutional rhetoric that persists even when the legal form of the amendment or revision is rejected by the federal (or state) judiciary. This form of constitutional meaning is expressed within the more traditional form of a states' right rhetoric that discounts the legitimacy of federal courts and highlights their "intrusion" into local affairs. This argument, therefore, places greater primacy on the legitimacy of state governments and their closer connection to the people of the state. It should be noted as well that, as the federal judiciary, particularly the U.S. Supreme Court, becomes more tolerant of

Thus, state constitutions' responsiveness to popular demands and their capacity to draw on the American idiom of constitutionalism allow social movement activists and interest groups to mobilize popular understandings of state constitutions that exist separately from judicial interpretations of them. These popular forms of state constitutionalism are often used in highly strategic ways to advance particular causes or goals, especially those concerned with the production of identity goods. Although identity goods can be expressed in various ways, state constitutions provide a particularly resonant form of expression because of their capacity to define political communities and to rank members of those communities within the limits allowed by federal constitutional provisions. Thus, the rise of initiative politics is not simply the result of a decaying party system or the influence of media on state elections, but rather a response to increasing competition between political actors regarding the production of identity goods. This competition occurs through a process of constitutional definition and interpretation that initially takes place outside of judicial arenas.

C. Conclusion: The Aspirations of Theory

Whether through litigation or through initiative politics, popular constitutionalism represents a dynamic and energetic form of constitutional ordering within the federal structure. Clearly, higher law constitutionalism will regulate and constrain many facets of popular constitutionalism,[55] but the range of political and constitutional options within that broad federal ambit is enormous. Both wings of popular constitutionalism are fundamentally concerned with merging questions of community identity and political expression. On a range of issues, from affirmative action to the right to die, activists and citizens are litigating and mobilizing voters in an effort to assert foundational visions of what their community will look like. That alone makes these truly constitutional issues.

The aim of this theoretical discussion has been to connect academic approaches to constitutionalism with political practices and organizing. The remainder of this article will apply those theoretical issues to gay rights and same sex marriages. Because they invoke contested visions of community

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autonomous state policies and initiatives, the national moorings on state constitutions loosen, heightening the stakes and incentives for state constitutional initiatives. *See* Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 61 ALB. L. REV. 1399 (1998).

55. An example of higher law constitutionalism regulating popular constitutionalism is *Romer v. Evans*, 517 U.S. 620 (1996). *See supra* note 54.

membership and community identity, gay rights and same sex marriage are deeply foundational, and raise questions that prompt heated, intense, and sometimes violent encounters. The aspirations of this theoretical discussion has been to lay out a framework that can help us understand popular constitutional ordering. An examination of gay rights and gay marriage will illustrate its operation.

III. POPULAR CONSTITUTIONALISM IN CONTEXT: TWO TALES OF GAY RIGHTS MOBILIZATION AND COUNTER-MOBILIZATION

A. Initiatives and the Production of State Constitutional Meanings: The Case of the Oregon Citizen's Alliance

Oregon's national reputation is that of a politically progressive state populated by environmentalists, aging hippies, rugged individualists, and, increasingly, software engineers. Yet during the late-1980s through the mid-1990s, Oregon witnessed a pitched battle over the legal protections the state and localities could provide to its gay and lesbian residents. That struggle, led by the Oregon Citizens Alliance ("OCA"), drew on state constitutional initiative mechanisms to raise the profile of the anti-gay rights campaign and to build a powerful, religiously-inspired coalition of activists who could both sustain a local grass roots movement and extend their issues to other states and the national political arena. Although state constitutional amendment procedures were simply the vehicle that activists chose to build their movement, the public debate and contestation provoked by the initiative process forced Oregon's residents to judge the relative standing of gays and lesbians within their state.

The OCA's efforts to amend the Oregon constitution with language condemning homosexuality illustrates the tremendous power of state constitutions to produce identity goods. The proposed constitutional pronouncements[56] of the relative status of certain persons within the state

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56. The ballot language of Measure 9 read as follows:

Measure Nine—Amends Constitution. Government Cannot Facilitate, Must Discourage Homosexuality, Other "Behaviors." Oregon, 1992 Amends Oregon Constitution. All governments in Oregon may not use their monies or properties to promote, encourage, or facilitate homosexuality, pedophilia, sadism, or masochism. All levels of government, including public educational systems, must assist in setting a standard for Oregon's youth which recognizes that these "behaviors" are "abnormal, wrong, unnatural, and perverse," and that they are to be discouraged and avoided. State may not recognize this conduct under sexual orientation or sexual

distilled and refined a broader struggle between gay activists and social conservatives. Fearing significant change to their religious, moral, and ideological landscape, social conservatives sought to reimpose a norm that they had previously regarded as an unquestioned truth: homosexuality should not be condoned in society or public policy. The social conservatives' position had eroded in large part because of gay activists' efforts to achieve civil rights protection in employment, housing, and domestic law. This activism for gay rights sparked a conservative backlash that mobilized and incorporated a host of other sentiments, including anti-affirmative action, anti-minority, and anti-government attitudes. This messy, complex, and somewhat contradictory set of political values is not what constitutional scholars typically think of when they seek to understand state constitutional provisions. But exploring how the OCA mobilized these rhetorics and consolidated them into a legal and constitutional idiom reveals how constitutional meanings are generated in popular contexts.

This section illustrates this principle by examining three aspects of the OCA's campaign. First, it focuses on the OCA's rise to prominence and its decline. Second, it discusses the nature of the OCA's rallying cries, its campaign literature, and the writings and speeches of its activists. The focus here will be on the blending of religious rhetoric with "rights talk" and other forms of non-legal constitutional languages. Finally, the dramatic popular constitutional mobilization will be contrasted with the rather lackluster judicial component of the OCA's campaign. The differences between these two forms of constitutional interpretation reveals that the legal struggle was largely irrelevant to the OCA's goals and was designed primarily enhance OCA's ability to organize extra-judicial constitutional campaigns.

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preference levels, or through quotas, minority status, affirmative action, or similar concepts.

Appendix B: Text of Anti-Gay Initiatives, *in* ANTI-GAY RIGHTS 165 (Stephanie L. Witt & Suzanne McCorkle eds., 1997). The ballot language for Measure 13 read as follows:

> Measure Thirteen. Amends Constitution: Governments Cannot Approve, Create Classifications Based on, Homosexuality. Oregon, 1994 Amends Oregon Constitution: Governments cannot: Create classifications based on homosexuality; Advise or teach children, students, employees that homosexuality equates legally or socially with race, other protected classifications; Spend public funds in manner promoting or expressing approval of homosexuality; Grant spousal benefits, marital status based on homosexuality; Deny constitutional rights, services due under existing statutes. Measure nonetheless allows adult library books addressing homosexuality with adult-only access. Public employees' private lawful sexual behaviors may be cause for personnel action, if those behaviors disrupt workplace.

It is important to note that, while the experience of anti-gay rights mobilization is not unique to Oregon,[57] the OCA's initiative campaign produced some particularly intense and ugly forms of identity politics. The OCA's campaign brought forward, often in violent form, ideological elements that are best described by Rogers Smith as "ascriptive Americanism."[58] During the height of the anti-gay mobilization at the end of the campaign for Measure 9 in 1992, the houses of gay rights activists were firebombed, a Catholic Church in Portland was vandalized with anti-gay and neo-Nazi graffiti, and assaults on gays and lesbians throughout the state escalated.[59] Communities and families were intensely divided and anonymous death threats were used as forms of political intimidation.[60] Moreover, party politics within Oregon were substantially altered: the Republican party was fractured into a moderate wing and a religious or social-conservative wing.[61] The initiative campaigns also created local power centers of religious activists, particularly in rural areas, and, ironically, have forged greater solidarity, vigilance, and visibility within Oregon's gay community. The issue certainly touched a nerve within the state—a nerve that both animated the political discourse and jolted it with

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Id. at 165-66.

57. A recent study of anti-civil rights initiatives found that 38 states and localities voted on anti-gay rights initiatives or referenda between 1977 and 1993. Of those, voters enacted 79% of the proposed limitations on gay rights. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 258 (1997).

58. Smith, *supra* note 51, at 550.

59. Heather MacDonald's documentary film *Ballot Measure 9* recounts several instances of violence during the campaign season, including instances of firebombing and church vandalism. BALLOT MEASURE 9 (Zeitgeist Films 1995). State figures showed that the number of bias crimes against gays and lesbians during the first six months of 1992 increased by 40% over the first six months of 1991, from 35 to 49. Bettina Boxall, *Battle Lines Drawn over Oregon's Anti-Gay Measure*, L.A. TIMES, Oct. 22, 1992, at A1.

60. The Portland Chief of Police stated, "I have never seen in my tenure as chief anything other than the civil rights issues and the Vietnam War that has created such division within our state and pitted family members against family members." BALLOT MEASURE 9, *supra* note 59.

61. This conflict emerged early in the OCA's mobilization effort when, in 1990, the group backed Al Mobley as an independent gubernatorial candidate to run against Republican candidate Dave Frohnmayer and Democratic candidate Barbara Roberts. With the OCA's backing, Mobley garnered 13% of the vote, which split the Republican vote and put Roberts into office, even though she won only 46% of the vote. Frohnmayer received 40%. Since the election, relations between the state Republican leadership and Lon Mabon, the head of the OCA, have been quite strained. In 1994, many Republican candidates refused to endorse the OCA's Measure 13 ballot initiative. *See infra* Part III.A.1 (discussing the OCA's relationship with the Oregon Republican Party).

pain. This painful, confrontational, and personally threatening form of politics clearly was not the result of the state constitutional amendment process; however, the fact that OCA activists chose the state constitutional amendment process as their vehicle reshaped the course of constitutional politics in Oregon.

1. OCA's Rise and Demise: A Brief Chronology

From the beginning, OCA's fortunes have been tied to the energies, talents, and flaws of Lon Mabon, a confrontational and fiery religious activist who found God after his tour in Vietnam and found politics after Ronald Reagan stormed into the White House in 1980. Mabon has always maintained a rocky relationship with Republican party regulars and views his organizing efforts as a militaristic crusade to place religion at the center of public life.[62] His organizing efforts have produced three state-wide anti-gay rights initiative campaigns between 1988 and 1994 (one successful, two that failed),[63] the sponsorship of two unsuccessful independent candidates for the U.S. Senate and Governor of Oregon, and a score of local anti-gay ballot initiatives which pitted counties and municipalities against the state legislature and the state judiciary, which were committed to preventing localities from enacting anti-gay ordinances.

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62. Mabon, for example, has told the media that he believes that Jesus Christ will shortly return to Earth and that God demands that he wage his political crusade. Sura Rubenstein, *OCA's Rise Meteoric Since Start-Up in 1986*, THE OREGONIAN, June 21, 1993, at B1. He also takes pride in his blunt, no-compromise positions that have alienated significant portions of the Oregon electorate. Mabon has stated, "Our mission is to crash the barricades first. We are like the Marines, the 82nd Airborne and the Cavalry." *Id.* In a mass mailing sent to prospective members of the OCA, Mabon wrote: "OCA is bold, aggressive and uncompromising about pro-family values. OCA challenges every anti-family group and institution in the state." Letter from Lon T. Mabon, Chairman, OCA, to "Friend" (n.d.) (on file with author).

63. In 1988, Measure 8 overturned then Governor Neil Goldschmidt's executive order banning state agencies from discriminating against gays and lesbians by a vote of 53% to 47%. Measure 9, on the ballot in 1992 and perhaps the most well-known of the OCA's initiatives, sought to declare that homosexuality was "abnormal, wrong, unnatural and perverse under the Oregon Constitution." It also would have prevented any Oregon locality from protecting gays and lesbians from discrimination and would have required all levels of government to actively discourage homosexuality. The initiative lost, 56% to 44%. In 1994, Mabon and the OCA returned with Measure 13. This constitutional initiative toned down Measure 9's rhetoric, but it would have achieved nearly the same result. Oregon voters defeated it as well, but barely. Measure 13 lost 48.5% to 51.5%, or by a total of 37,000 votes. *See supra* note 6 for the full text of each proposed measures.

Since 1996, however, the OCA campaign has suffered some severe setbacks. With the U.S. Supreme Court's decision in *Romer v. Evans*, the OCA has been unable to use anti-gay rights initiatives as a mobilizing tool. The OCA has yet to find a suitable replacement issue, despite efforts to expand its campaign into anti-tax measures and initiatives against state restrictions on land use. In short, the organization has not placed an initiative on the ballot since 1994 and OAC membership has declined by twenty-five percent.[64] By July 1998, the OCA leadership had even voted on whether to disband the organization.[65] However, the OCA lives on, but its lifeblood—anti-gay politics—is draining away in Oregon. Nonetheless, the OCA's rise to power and its mobilization techniques serve as a useful case study of how state constitutions are mobilized and how their meanings are constructed through social movement activity.

The OCA was founded by Mabon and others in 1986 after a group of conservative activists supported candidate Joe Lutz, a Baptist minister and pro-life activist, in the Republican Senate primary to run against incumbent Senator Robert Packwood, who had consistently supported abortion rights.[66] Lutz garnered forty-two percent of the vote against Packwood and placed the OCA at odds with the Oregon Republican establishment, particularly the Republican moderates and the business elite in Portland.[67] Mabon and others sought to build on that impressive early showing and during the 1987 state legislative session they found their issue. Conservative religious leaders sought Mabon and the OCA's support to defeat gay rights legislation that would have banned job and housing discrimination against homosexuals. Having defeated the bill, the OCA then focused on Governor Neil Goldschmidt's Executive Order 87-20, which banned discrimination on the basis of sexual orientation. The OCA launched its first initiative campaign in 1988, which raised a half million dollars and overturned Goldschmidt's order by a margin of fifty-three percent to forty-seven

64. Mark O'Keefe, *OCA Founder Confident Amid Myriad Problems*, THE OREGONIAN, March 3, 1996, at A1.

65. The OCA voted unanimously to continue operations, but the organization is a mere shadow of its former presence. *OCA to Remain in Operation*, THE BULL., July 19, 1998, at A1. Other conservative organizations in Oregon have shunned Mabon and the Republican establishment has rejected both the substance of his positions and his rhetoric.

66. Paul Neville, *OCA: Financing the Holy War; Part I: Money, Power and the OCA*, REG. GUARD, Oct. 24, 1993, at A1.

67. Thomas B. Edsall & Maralee Schwartz, *Big Break for Sen. Packwood*, WASH. POST, Aug. 16, 1992, at A24; Maralee Schwartz, *Independent Says He Won't Oppose Packwood, For Now*, WASH. POST, Jan. 26, 1992, at A16.

percent.[68] In 1990, the OCA rallied behind the abortion issue by placing a strict pro-life constitutional amendment on the ballot, only to see it fail at the polls sixty-eight percent to thirty-two percent. Next came perhaps its most prominent initiative, Measure 9.

On the ballot in the same election year as Colorado's Amendment 2, Measure 9 was far more confrontational and condemnatory of gays and lesbians.[69] Despite its harsh tone, however, the measure secured substantial support, losing forty-four percent in favor to fifty-six percent against. Also, the OCA was able to raise substantial funds during the campaign; for example, in the primary and general elections, the OCA raised $1.3 million in a state where the average cost of a successful U.S. House of Representative campaign is only $860,000.[70] Moreover, OCA's Measure 9 campaign revealed geographic political splits within the state. Throughout Oregon's rural areas, particularly in southern Oregon, Measure 9 passed overwhelmingly; in fact, the measure actually won in a majority of Oregon counties, passing in twenty-one of Oregon's thirty-six counties.[71]

Seeing this rural-urban split within Oregon, the OCA decided to take their anti-gay measures closer to their supporters. In the spring of 1993, the OCA embarked on a campaign to enact local measures in towns and counties throughout the state. These local initiatives did not enjoy constitutional status, but in some instances the initiatives were written directly into city charters. Twenty towns and counties eventually passed ballot measures that became known as "Son of Nine." Most importantly, these victories gave the OCA a much-needed boost because it demonstrated to activists that anti-gay initiatives could win in much of the state. These measures were also adopted despite opposition from the governor and the state legislature. In July 1993, the legislature passed and the governor signed HB 3500, which rendered all local initiatives that prohibited the protection of gay rights unenforceable. The OCA immediately filed suit protesting HB 3500; however, the OCA eventually lost the case in the Oregon Court of Appeals in 1995.[72] Despite their unenforceability, these local initiatives

68. Neville, supra note 66, at A1; *OCA Scorecard*, THE OREGONIAN, June 21, 1993, at B4.

69. See *supra* note 56 for the full text of the Oregon ballot measures.

70. *See* Neville, *supra* note 66, at A1. The average cost of an Oregon congressional seat was calculated by averaging the cash spent by winners in the 1995-96 election cycle. For campaign expenditure data, see Project Vote Smart, *Project Vote Smart* (last visited Nov. 23, 1999) <http://www.vote-smart.org>.

71. *Supporters of Gay Rights Criticize Oregon Town's Vote*, ST. LOUIS POST-DISPATCH, May 20, 1993, at C4.

72. *See* deParrie v. Oregon, 893 P.2d 541 (Or. Ct. App. 1995).

proved of significant symbolic value for Oregon's anti-gay rights movement in 1993-94. The OCA kept the issue in the fore of the conservative agenda and thus demonstrated the continuing grassroots appeal of OCA and its message. This sense of advancing strength helped organizers greatly during the 1994 campaign for Measure 13, another state-wide initiative.

In November 1994, buoyed by a national conservative resurgence in the House of Representatives' mid-term elections, Measure 13 nearly passed, failing by only 37,000 votes, or 48.5% to 51.5%. Mabon vowed that the OCA would return with another measure in 1996 and promised that this time the initiative would pass. But conservatives leaders within Oregon—witnessing the divisiveness of OCA campaigns—began to question the political efficacy of the OCA's movement. State Senate leader Gordon Smith, a Republican businessman from eastern Oregon who sought the OCA's support during his losing campaign for Robert Packwood's resigned U.S. Senate seat, turned against the OCA a few months later during his primary campaign for retiring U.S. Senator Mark Hatfield's seat. Mabon responded by attacking those who urged him to compromise.[73] As Republican leaders abandoned Mabon and the OCA, it became clear that Measure 13 had been the high water mark of the OCA's statewide support. Within two years, divisions in the Republican party and increasing hostility among conservative religious activists in Oregon against Mabon's imperious and uncompromising attitudes[74] signaled the OCA's demise. Since 1994,

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73. In fact, Mabon decided to run against Gordon Smith in the 1996 Republican Senate primary when Smith directly stated that he did not want the OCA's endorsement. The OCA had favored Jim Witt, but Witt withdrew from the race shortly before the filing deadline. Rather than work on Smith's behalf, Mabon entered the race himself. He garnered only nine percent of the primary vote, while Smith won 78%.

74. Mabon and the OCA probably hit their lowest point with Oregonians when, in 1994, they insisted that the German Nazi Party was the product of a gay rights movement. Further, the OCA insisted that the gay rights movement in the United States used Nazi tactics to organize. OCA Membership Director Scott Lively made this claim repeatedly in public forums and in writings. The OCA also paid for a statement in the Oregon voter's pamphlet that made similar claims. The pamphlet was mailed to all registered voters prior to the fall 1994 election. Sura Rubenstein, *OCA Claims That Gays Were Behind Holocaust*, THE OREGONIAN, Oct. 19, 1994, at B1. Such outright lies and demagoguery eventually turned even formerly ardent supporters against the OCA. Former OCA spokesman Mike Wiley in March 1996 stated,

> It's time to face the truth about the OCA, not only for me but for other people . . . . A consistent display of meanness of spirit reflects meanness of heart. I think how evangelicals treat other people is as important a value as the right to life, less government or any other political value we hold dear.

OCA's Meanness Erodes Power, Membership, THE BULL., Mar. 10, 1996, at B5.

the OCA has not placed a single initiative on the ballot, despite making numerous attempts with issues such as abortion, tax policy, and land use.

The OCA was finished, however, by the U.S. Supreme Court. In May 1996, the same week that Mabon suffered a humiliating defeat to Gordon Smith in the Senate Republican primary, the Court ruled that Colorado's Amendment 2 violated the 14th Amendment of the U.S. Constitution. Thus, the OCA's most successful organizing tool, the anti-gay initiative, had been stripped by a Supreme Court dominated by Republican appointees. In early June, Mabon announced that the OCA would discontinue efforts to place another anti-gay measure on the fall 1996 ballot. The formal admission was anti-climatic as the OCA had secured only a third of the 97,000 signatures required to place an initiative on the ballot.[75]

This brief account of the OCA's successes and failures conveys only one side of the OCA's mobilization effort. The endorsements, campaigns, petition drives, and factional in-fighting among both supporters and foes highlight the usual narratives of politics. Yet there is another side to the OCA story that has been neglected: the way that Mabon and the other OCA leaders used a particular rhetoric to galvanize their supporters so quickly. That rhetoric, a combination of religious fervor and rights-based discourse, was fused into a set of constitutional meanings that were simultaneously American and illiberal.

2. The Battle Cries of OCA: The Rhetorics of Rights and Religion

The use of religious language against homosexuality is a standard line of attack on the gay rights movement. The backlash against gay rights draws on Biblical authority to argue that homosexuality should be discouraged and is intolerable.[76] Religions exhibit different viewpoints on homosexuality and gay rights; however, the predominant form of religious opposition to the gay rights movement has been cast within the language of Christian fundamentalism. As early as Anita Bryant's campaign in Florida in the 1970s to Pat Robertson's ministry in the 1990s, conservative fundamentalists have insisted that the Bible's moral and religious teachings should be the basis for societal attitudes towards homosexuality and public policy.

This approach, however, is limited when one considers its applicability to public policy. Considerations such as the separation of church and state,

75. *Foes of Gays Alter Plans*, SAN DIEGO UNION-TRIB., June 7, 1996, at A3.

76. For an overview of the religious opposition to gay rights ordinances at the local level, see JAMES W. BUTTON, ET AL. PRIVATE LIVES, PUBLIC CONFLICTS, 173-99 (1997).

the normative commitment to liberty and self-determination, and the individualist ethos of American life provide rhetorical resistance to overtly religious appeals. The pursuit of happiness can transform Bible lessons into a harsh and intolerant moral absolutism. Although most Americans over the past twenty years have felt that homosexuality is morally wrong,[77] a substantial portion (roughly two-thirds of those surveyed) feels that "homosexual relations in private between consenting adults" should be "left to the individual."[78] Despite the efforts of religious conservatives, the tension between the moral unpopularity of homosexuality among a majority of Americans and their reluctance to restrain the American values of individualism and autonomy often leaves religious appeals against gay rights uncatalyzed.

The success of moralistic appeals is heightened, however, when fused with individual self-interest. Support for gay rights is dramatically reduced when straight voters see gay rights as no longer simply a toleration of alternative lifestyles, but rather as a restraint on their opportunities and on their capacity to express their values. The campaign against gay rights in Oregon, Colorado, Idaho, and Maine tried to do precisely that. The OCA downplayed down the religious language in their public statements by translating their opposition into a rights-based idiom and by claiming that public policies that prohibited discrimination against gays and lesbians were assaults on the rights of the majority. While preserving the notion that homosexuality is worthy of condemnation, Mabon and the OCA also developed a rhetorical strategy that portrayed gay rights activists as seeking privileges and rights unavailable to the general population. The OCA's "No Special Rights" campaigns fused anti-affirmative action sentiment with a religious opposition to galvanize supporters.[79] The result was an amalgam

77. Polls consistently show high rates of disapproval (70%) of sex between two adults of the same sex, but this has declined over the course of the 1990s. Alan S. Yang, *The Polls—Trends: Attitudes Towards Homosexuality*, 61 PUB. OP. Q. 477, 478 (1997). Simultaneously, however, the public's view of the relative standing of gays and lesbians when compared to other social groups remains quite low. Even in the 1990s, "they were still among the lowest averages for any other social groups measured." *Id.* at 479. Also, in the 1992 National Election Survey, over 20% of respondents ranked gays and lesbians zero out of a possible 100 on a "feeling thermometer." In comparison, illegal immigrants and people on welfare scored zero by 15.4% and 3.5%, respectively. Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: Opinions on Anti-Gay and Lesbian Ballot Initiatives*, *in* ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 107, 111 (Stephanie L. Witt & Suzanne McCorkle eds., 1997).

78. Yang, *supra* note 77, at 478.

79. It should be noted that the OCA initially sought a more intolerant condemnation of

of moral and legal justifications that claimed equal treatment for gays and non-gays while simultaneously seeking to deny gays and lesbians legal recourse against discrimination.

The tone of the OCA's strategy is evident in Mabon's public comments and in the OCA's press releases and fund raising letters. In a 1992 interview on *Larry King Live*, Mabon stated, "We simply are saying that behaviors such as homosexuality, lesbianism, sodomy, sado-masochism, pedophilia should not be recognized as a legitimate civil rights category and that the government should not be involved in the business of promoting it."[80] Additionally, Mabon stated that turning gay rights into a "legitimate civil rights" category creates affirmative action programs in which private and public employers will be *required* to hire gays and lesbians: "If [gays] were given civil rights protections . . . there are certain benefits that come with that in hiring."[81] This theme is repeated throughout the OCA's rhetoric and literature. In an article published in *USA Today* shortly before the vote on Measure 13, Mabon wrote, "there is no way to determine whether individuals are homosexual—unless they say they are. Extending minority status, with all its attending benefits (i.e., affirmative action, preferential government contracts, domestic partnerships) based solely on the word of the recipient makes a mockery of legitimate civil-rights minorities."[82] This fusion of affirmative action with anti-gay moralism found expression in numerous public statements of OCA officials; it was their central rallying cry.[83]

This stance has tremendous political utility for opponents of gay rights. It enables them to recast the gay rights away from toleration and into the realm of self-interest. If benefits accrue to gays and lesbians, then those benefits are not available to the heterosexual community, thus, placing heterosexuals at a competitive disadvantage. The OCA's rhetorical strategy

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homosexuality in Measure 9, which would have constitutionalized the notion that homosexuality is "abnormal, wrong, unnatural and perverse." *See supra* note 56. However, Mabon and the rest of the OCA leadership learned from Colorado's Amendment 2 and, thus, two years later toned down the language of intolerance in Measure 13. As a result, Measure 13 nearly won at the polls. *See supra* note 63.

80. *Larry King Live: Gay Discrimination in Springfield, Oregon* (Cable News Network television broadcast, June 15, 1992).

81. *Id.*

82. Lon Mabon, *No Special Status for Gays*, USA TODAY, Oct. 18, 1994, at A10.

83. For example, Scott Lively, the OCA Membership Director, wrote in an op-ed piece: "What will stop anyone from identifying himself as homosexual on a confidential civil service form to get that extra five or ten points for being a 'minority'?" David Tuller, *Anti-Gay Measure Divides Oregon*, S.F. CHRON., Oct. 2, 1992, at A1.

is not merely to construct gays as threats to the religious beliefs of Christian heterosexual America, but also to its material self-interest. Thus, an issue of toleration is readily transformed into an issue with a focused economic dimension. In communities where economic prospects appear dim—such as in many rural areas of Oregon where timber, fishing, and other extractive industries are waning—this economic dimension to the "gay threat" fuses with a background of moral intolerance towards homosexuality. This creates an environment that allows for the repression of gay rights as a clear assertion of an identity good: the identity of white, heterosexual "mainstream" Christian America that feels threatened by a reconfigured moral, social, and economic landscape.

The success of this strategy can be seen in the responses of citizens as to why they favored Measure 9. In her documentary film *Ballot Measure 9*, Director Heather MacDonald spoke with supporters, many of them rather young, of Measure 9. Their rationales for endorsing the constitutional amendment reveals the political appeal of the OCA's rhetorical strategy. One woman stated: "I don't feel they should have more rights than I do as a citizen." Another opponent claimed, "I just didn't want them to have special rights that my family or I can't have." Yet another stated, "Basically, I didn't want someone to have special rights over me when it's already hard enough to get a job in today's society." When one woman was asked whether banning discrimination against gays would give them an unfair advantage, she replies,

> Does that mean when they go get a job that because they have that minority [status] they're going to get a job over a heterosexual? I mean that's exactly what the statement is because a lot of other minorities are getting jobs over the white people because they [employers] need so much [of a] minority in a company.[84]

Having set up the terms of debate between legitimate majoritarian morality and illegitimate minority affirmative action, Mabon and the OCA reaped its greatest strength from white males. For example, Rick Wald, a white Springfield man, claimed "the only minority, the only endangered species around here, is not the spotted owl but the good ol' Springfield white male." Wald also told a *San Francisco Chronicle* reporter: "I know some gay guys, and they're good people . . . But why should someone get special status for what they do in the bedroom? I see blacks, women, Mexicans, and

84. BALLOT MEASURE 9, *supra* note 59.

everyone else getting jobs before people who have lived here all their lives, and it's not right."[85] By recasting himself as a minority, Wald inverted the power relationship that he felt was illegitimately controlling his job prospects and his community. Wald implicitly argued that majority interests should prevail over minority rights and he saw in Measure 9 the possibility of producing an identity good that reflected his own vision of community norms and values.

The relationship between minority rights and majority powers in establishing the norms of a community figure prominently in this extra-judicial constitutional struggle. Although discrimination against gays and lesbians was perfectly legal throughout most of the state, the notion of preventing anti-gay discrimination rankled those who viewed that shift in public discourse and public policy as producing an identity good that made homosexuals equal to heterosexuals. The need for the majority to accommodate a sexual minority galvanized a portion of the majority and led them to reassert what they considered a fundamental and moral majoritarian viewpoint: that homosexuals are not the equals of heterosexuals.

The OCA's rhetoric, however, did more than fuse anti-affirmative action sentiment with a moral and religious condemnation of gay rights; it sought to transform the campaign into a patriotic exercise in which the defense of one's identity, community, and country were linked. A letter distributed to the OCA's mailing roster during the 1993 campaign to enact local anti-gay ordinances sounded the clarion call by invoking Patrick Henry as a model for anti-gay mobilization:

> [Henry's dilemma] is as much a conflict today as it was in our Founding Fathers' day, except we are using time, money and votes instead of muskets, cannons and powder. Patrick Henry was defining the American spirit by his very actions. Involvement, commitment and a personal sacrifice created the values, freedoms and liberties we enjoy today. While others were fighting for what was right, he could not stand by and be idle in the conflict. It was that attitude that birthed our America.[86]

Mabon adds a few lines later:

> Much is owed to our Founding Fathers, for it was out of their labor and toil that this nation emerged, but it is up to us to keep it. Can we do it? I believe

85. Tuller, *supra* note 83, at A1.

86. Fundraising Letter from Lon T. Mabon, Leader, *Oregon Citizens Alliance*, to the OCA's Mailing Roster (June 28, 1993) (on file with author).

> we can, but all traditional American pro-family citizens in Oregon must become more active in the conflict.
>
> The same spirit that motivated and drove Thomas Jefferson, Patrick Henry, Washington, Franklin and Madison can inspire and compel us to restore the rule of American values and principles in our culture and land.[87]

Wrapping oneself in the mantle of patriotism is not a new organizing tactic. However, the portrayal of gay rights as part of a broader assault on "true" American values and culture reveals that anti-gay mobilization taps into a rich vein of communal identity and the capacity of a polity to regulate that communal identity. In Mabon's rhetoric, the very meaning of Americanism is challenged by the provision of legal protections for gays and lesbians against job and housing discrimination.[88]

It is here that the full flowering of the *constitutional* politics of anti-gay mobilization occurs. The struggle against gay rights is part of a larger struggle to define legitimate and illegitimate members of the community and to rank and value some members over others. The OCA's campaign to enact a constitutional expression of homosexuality's "immorality" was partly an effort to enact a broad constitutional vision of a moralized republic, where majority interests and identities would be ratified in the face of deeply threatening challenges by a largely unpopular minority. In many ways, this effort to define the meaning of political membership took on an air of a constitutional ratification, where the citizens of Oregon would define the fundamental values of their constitutional order. Fred A. Stickel, President and Publisher of *The Oregonian,* issued an unprecedented front-page appeal against Measure 9 on the Sunday before election day and urged voters to reject the constitutional initiative.[89] His interest in the initiative was reflected throughout the state. In 1992, the year Measure 9 was on the ballot, voter turnout in Oregon was

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87. *Id.*

88. As Scott Lively, OCA Membership Director stated: "[T]here is a cultural civil war taking place in this country . . . . It's a war of traditional American family values against the pop culture where anything goes . . . . And this fight against sexually deviant behavior is a crucial battleground in the war." Mark Matassa, *Shock Tactics in "Civil War,"* SEATTLE TIMES, May 18, 1992, at C1.

89. Fred Stickel wrote:

> Today, I am making a personal appeal to the people of Oregon: Ballot Measure 9 in Tuesday's election must be defeated . . . . My appeal to you is unprecedented. I speak out now because Measure 9 is also unprecedented—an assault on human rights and human dignity that should have no place in the Oregon Constitution.

Newspaper Makes Front-Page Appeal Against Ballot Measure 9, ASSOCIATED PRESS, Oct. 31, 1992.

eighty-four percent of registered voters, which was the highest turnout in twenty-four years.[90]

At its core, however, the competition between anti-gay rights activists and their opponents was a fight over the possibility of a constitutional ideal that would permit discrimination against a sexual minority. Both groups held profoundly different views of the meaning of the tolerance of gay rights upon the viability of the polity. The OCA and its members viewed tolerance of gay rights as antithetical to a healthy, communal identity that valued, at least implicitly, Christian and biblical understandings of morality and sexuality. In contrast, their opponents viewed tolerance as a hallmark of American liberalism, to which self-determination, liberty, and autonomy were central. This level of public debate, consideration, and ultimately the rejection of anti-gay politics in Oregon, shows a thorough and transformative consideration of the meaning of civil rights in Oregon. Although Oregon voters were repeatedly offered and were tempted to choose a political and constitutional vision where minority autonomy would be diminished, they declined, albeit narrowly, the politics of anti-gay rights.

A legal dimension of this conflict simultaneously wound its way through Oregon's court system, but it provoked little of the conflict and controversy that the ballot initiatives did. The jurisprudential component of this struggle against gay rights pales in contrast to the OCA's extra-judicial mobilization.

3. OCA Challenges: Their Constitutional Law v. Their Constitutional Meanings

If one were to explore the impact of Oregon's anti-gay movement on the state's constitutional development in a traditional fashion, one would look to the rulings of the Oregon judiciary to see how the OCA has prompted shifts indoctrinal development or new interpretations of the state constitution. Taking that approach, one might reasonably conclude that the OCA was a constitutional nullity because it won only one statutory initiative,[91] which was quickly struck down by the courts,[92] and it lost a constitutional challenge to a state law that prevented local governments from enacting anti-gay ordinances.[93] Moreover, all of the OCA's initiatives clearly violated one or

90. Jeff Mapes, *OCA Creates Activists*, THE OREGONIAN, June 22, 1993, at B1.

91. Measure 8, passed in 1988, overturned Governor Neil Goldschmidt's executive order banning discrimination against gays and lesbians by state agencies. *See* OR. REV. STAT. § 236.380 (Supp. 1999).

92. Merrick v. Board of Higher Educ., 841 P.2d 646 (Or. Ct. App. 1992).

93. The relevant portion of state law in question, H.B. 3500 (codified at Oregon

more existing provisions of the state constitution, ranging from the freedom of expression of state employees to the state's equality provisions. In addition, the judicial trouncing that Colorado's Amendment 2 received at both the Colorado state court level and the U.S. Supreme Court shows that there is little viable basis for arguing the constitutionality of an anti-gay rights initiative under the U.S. Constitution. In short, even if the OCA could enact an anti-gay rights amendment, the OCA had few judicial resources on its side and faced overwhelming odds. However, this perspective assumes that the judicial arena is the only arena in which constitutional meanings are generated and ratified. Few though they are, the OCA's courtroom battles are geared less for legal argument than political ones. While it is true that the judicial side of the OCA's constitutional mobilization has seen only slight activity and little success, the existing record highlights the OCA's goal to secure extra-judicial victories rather than judicial ones. Indeed, the bulk of the judicial record of the OCA's constitutional challenge reveals that the organization's primary aim was to foster *extra*-legal efforts to reinterpret the Oregon Constitution.

At one point in the documentary *Ballot Measure 9*, Lon Mabon asserts an awareness that judicial interpretation will be central to any constitutional mobilization: "No matter how you word an initiative, the battle is going to be fought in the courts. And we need to be prepared with an organization that can actually recall some judges."[94] This sentiment captures the OCA's attitude towards judicial interpretation of constitutional rights. Relying on a bald-faced version of legal realism, Mabon and his supporters see judges as driven solely by their political predispositions; thus, in Mabon's view, it is perfectly legitimate to replace judges whose political views run counter to the OCA's and the political and social majority of Oregon. This theme permeates the legal manifestations of the OCA's battle. The OCA seeks to use the legal process as a means for keeping open channels of extra-judicial mobilization rather than a way to achieve judicial victories. It is less concerned with achieving substantive victories within the courts than in using the courts to preserve its capacity to organize extra-judicially and to challenge existing constitutional

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Revised Statutes section 659.165), reads as follows:

> A political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any citizen or group of citizens on account of sexual orientation, or enact or enforce any charter provision, ordinance, resolution or policy that singles out citizens or groups of citizens on account of sexual orientation.

OR. REV. STAT. § 659.165(1) (1998). The statute also provided that any person who believes that a political subdivision is enacting or enforcing such a law has standing to seek injunctive relief in circuit court. *Id.* § 659.16(2).

94. BALLOT MEASURE 9, *supra* note 59.

and legal understandings of gay rights. Moreover, it does not see the judicial system as sympathetic to its cause. Indeed, in the OCA's view part of America's moral breakdown and the creation of unnecessary civil rights protections can be traced to the judiciary. As the OCA's "Statement of Principles"[95] pronounces in Article 3: "We believe that the form of government established by the [U.S.] Constitution needs no revision. We also believe that the Constitution should be read, interpreted and taught according to the original construction and intent of the Founders."[96]

The OCA has been involved in, or fostered, a number of lawsuits in its efforts at conservative mobilization. Most, however, have challenged the initiative titles that appear on voters' ballots.[97] Two other court decisions, one concerned with the wearing of political buttons within a polling place[98] and another addressing petition-gathering at a shopping center without the owner's permission,[99] focused primarily on the permissible limits that state or private actors may impose on political activity. The goals of these ballot title appeals and campaign activity cases are not substantive efforts to achieve the OCA's goals. Instead, they are legal strategies designed to facilitate and enhance the OCA's capacity to engage in constitutional mobilization *outside* of the courtroom.

The two most significant cases involving the OCA center on the constitutionality of the OCA's 1988 initiative and the OCA's legal battle to overturn a state law prohibiting the enactment and enforcement of local anti-gay statutes. In the former case, a lesbian who worked for the Oregon State Board of Higher Education challenged Measure 8 on the grounds that it

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95. The "Statement of Principles" is a fascinating document—complete in constitutional form with a preamble and 20 articles, covering such topics as "Human Rights" (Article 1); "Freedom" (Article 2); "The Right to Life" (Article 5); "Free Enterprise" (Article 10); "The American Worker" (Article 11); "Law and Justice" (Article 14); and "Statism" (Article 18). The statement ends with "Patriotism" (Article 20). Taken as a whole, the "Statement of Principles" is an odd blend of anti-state, libertarian sentiments, right-wing religious conservativism (encompassing the right to life, religious freedom and family values rhetoric), and economic conservatism. But it also includes some remnants of a producer's ideology, complete with statements about the value of "honest work, faithfully done." OREGON CITIZENS ALLIANCE, STATEMENT OF PRINCIPLES (n.d.) (on file with author).

96. *Id.*

97. *See, e.g.*, Mabon v. Kulongoski, 925 P.2d 1234 (Or. 1996); Mabon v. Kulongoski, 896 P.2d 574 (Or. 1995); Mabon v. Keisling, 856 P.2d 1023 (Or. 1993); Baker v. Keisling, 822 P.2d 1162 (Or. 1991); Oregon Citizen's Alliance v. Roberts, 783 P.2d 1001 (Or. 1989).

98. Picray v. Secretary of State, 916 P.2d 324 (Or. Ct. App. 1996).

99. Wabban, Inc. v. Brookhart, 921 P.2d 409 (Or. Ct. App. 1996).

restricted her freedom of speech, which was a protected right under the Oregon Constitution.[100] The Oregon Court of Appeals unanimously agreed:

> Not only does the statute discourage state employees from telling others their sexual orientation, it also discourages them from becoming involved in groups advocating gay and lesbian rights, a constitutionally protected activity, because such involvement might expose them to adverse personnel action. The statute's practical effect is to chill speech and other expression and to severely limit open communication by state employees. Accordingly, the statute violates Article I, section 8.[101]

This line of reasoning, which would have applied to Measure 9 and Measure 13 had they passed, defeats any state effort to regulate its employees' messages concerning homosexuality—a prominent objective of both Measure 9 and Measure 13. OCA leaders knew that the *Merrick* ruling posed an enormous jurisprudential roadblock to their policy goal, but they pursued their mobilization nonetheless. Clearly, the OCA's political work and mobilization disregarded the binding constitutional interpretation of its initiatives. Simultaneously, however, OCA leaders thought that their parallel constitutional definition could eventually trump the judicial one.

The second case, *deParrie v. Oregon*, emerged out of the OCA's local efforts to enact city initiatives to prohibit gay rights protections. In the wake of these electoral victories for the OCA, the state legislature passed H.B. 3500, which banned the enactment and enforcement of city initiatives. Relying on the Home Rule Amendments of the Oregon Constitution, the OCA contended that the Home Rule allows localities to enact policies in the absence of a state statute or policy on gay rights. The OCA argued that without state preemption, localities are free to legislate as they see fit. The Oregon Court of Appeals disagreed, finding that H.B. 3500 is effectively a state policy *against* local bans on gay rights legislation. Therefore, the Home Rule Amendments did not apply.[102]

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100. Article I, section 8 of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." OR. CONST. art. 1, § 8.

101. Merrick v. Board of Higher Educ., 841 P.2d 646, 651 (Or. Ct. App. 1992).

102. deParrie v. Oregon, 893 P.2d 541, 543-44 (Or. Ct. App. 1995).

The OCA has enjoyed little success in the court system, but it continues to seek to amend the Oregon Constitution.[103] Despite its increasing unpopularity within the state and its repeated failures to secure a political majority for its vision of a moralized constitution, the OCA continues to rely on extra-judicial constitutional mobilization. The OCA's reliance may be a failure of its leaders to extend or improvise its mobilization repertoire, but extra-judicial constitutional mobilization but also may provide the quickest and surest form of galvanizing existing and latent supporters.

B. Litigation, Social Change, and Counter-Mobilization: Hawaii and Same-Sex Marriage

1. Introduction

In contrast to the little known story of the OCA's rise and demise, much of the nation followed the Hawaiian battle over same-sex marriage. Indeed, the potential national significance of the establishment of same-sex marriage prompted a sharp outcry from Washington and resulted in a hasty federal legislative response in the Defense of Marriage Act. This well-publicized battle, however, has not been viewed from a popular constitutionalist perspective. Most of the public reaction has centered on the initial court victories; less attention has been given to the important state constitutional counter-mobilization against gay marriage. The two stories reveal important aspects of popular constitutionalism.

Over the course of the 1990s, Hawaiian citizens witnessed a classic legal mobilization campaign to secure the rights of same-sex marriage. Initially, the effort was fought in the courtroom, but as judicial successes mounted, the mobilization was transformed into something much larger than a single courtroom challenge. The case of *Baehr v. Miike*[104] is, simultaneously, a straightforward legal claim to an individual right, a contentious constitutional issue within Hawaiian politics, a nuanced question within American federalism, and an episode in what Justice Scalia has referred to as a "culture war."[105] These multiple meanings and levels of contestation illustrate a legal mobilization campaign's capacity to function as a process

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103. The OCA's latest initiative efforts have centered on restricting abortions and banning same-sex marriages. The proposed abortion initiative would ban all abortions after the first trimester, except to save the life of the mother. So far, the petition-gathering has flopped. *OCA to Remain in Operation*, THE BULL., July 19, 1998, at A1.

104. 910 P.2d 112 (Haw. Ct. App. 1996).

105. Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

of constitutional revision within a framework of federalism. These struggles are deeply symbolic and have significant practical consequences. The constitutional and political resolution of the *Baehr* case could establish gay marriage in the United States and sharply change the legal status of the personal relations of homosexuals. The transformation could be quite significant on a number of levels—personal, legal, institutional, political, and social. The multiplicity of these changes makes this particular example of legal mobilization highly compelling.

The next section of this article contends that the legal mobilization campaign led by Ninia Baehr to secure equal marriage rights is part of an identifiable process of constitutional revision that goes beyond the revision of constitutional texts. Her efforts to secure this right under the Hawaii Constitution transcends any judicial or textual interpretation of the Hawaii Constitution by directly seeking to alter fundamental constitutional practices and meanings. In this context, courtrooms and judges have little to do with the content of Constitutional practices and meanings; instead, a more popular constitutionalism determines their shape and substance. A key test of popular constitutionalism's capacity to resolve the claims of gays and lesbians lies in the political majority's ability to reconstruct the language of a constitutional *right* to equal marriage as a negotiable *interest* that can be traded within a framework of majoritarian policy-making. The political trajectory of the struggle indicates that this has already happened.

This section is organized into three more parts. The first section addresses the legal strategies of equal marriage activists in Hawaii and their use of a legal mobilization model. The second section examines the nature of the legal victory and the hopes of activists for an expansion of equal marriage rights throughout the United States. The strategy for expansion hinged on the U.S. Constitution's Full Faith and Credit Clause and the stability of the meanings and interpretations of the Hawaiian Constitution. Both of these assumptions have proved untenable. Clearly, the litigants' strategists failed to appreciate the institutional contexts of state constitutional change and its capacity for popular constitutional *counter*-mobilization. The third section addresses this counter-mobilization by focusing on the 1998 Hawaiian constitutional amendment that allows the state legislature to regulate marriage as a legal union of one man and one woman.

2. Equal Marriage Rights: The Case of *Baehr v. Lewin*

The lead plaintiffs in the lawsuit that would launch national campaigns for and against equal marriage rights were, in some respects, unwitting participants in the struggle. Ninia Baehr and Genora Dancel had grown frustrated over their rebuffed efforts to have Baehr placed on Dancel's health insurance because only immediate family members could be added to Dancel's policy.[106] Dancel and Baehr contacted the Gay and Lesbian Community Center in Honolulu.[107] There, the two met William E. Woods, a gay rights activist, who was planning to have gay couples apply for marriage licenses from the Hawaii Department of Health and then sue the Department's Director when their requests were denied.[108] They agreed to join the effort, and, on December 17, 1990, Baehr and Dancel, along with two other same-sex couples, sought marriage licenses. When the Department of Health denied the licenses on the grounds that the applicants were of the same sex, the six applicants then filed suit on May 1, 1991.[109]

Their lawsuit was not the first to challenge a state ban on same-sex marriage: legal challenges in Minnesota,[110] Kentucky,[111] Washington,[112] and Pennsylvania[113] had sought to force recognition of same-sex marriage. Unlike these claims, however, the suit filed by Baehr and the others was the first to secure a legal victory.[114] Shortly after the filing, the State of Hawaii

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106. The details of the suit's origins are from Fern Shen, *A Same-Sex Couple Married to the Cause*, WASH. POST, Sept. 10, 1996, at A1.

107. *Id.*

108. *Id.* Newspaper accounts suggest that Baehr and Dancel were not astute political activists, but had simply run into Woods as he was planning the lawsuit. Woods eventually was dropped from the litigation after a Hawaiian AIDS organization accused him of embezzling funds. Woods himself indicated his goals when he told a *Washington Post* reporter that "we had Genora on the radio within hours" after their first effort to obtain a marriage license. *Id.*

109. The three couples, Ninia Baehr and Genora Dancel, Tammy Rodrigues and Antoinette Pregil, and Pat Lagon and Joseph Melilio, are now represented by Dan Foley of the Hawaiian firm Partington & Foley. Also, Evan Wolfson of the Lambda Legal Defense and Education Fund in New York has served as co-counsel for the case since 1993. The Hawaii Equal Rights Marriage Project ("HERMP"), assisted by the Gay and Lesbian Community Center in Honolulu, coordinated the local political effort for equal marriage rights. The lawsuit has also received assistance from the ACLU. *Id.*

110. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

111. Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973).

112. Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

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

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

moved for judgment on the pleadings, arguing that the plaintiffs had failed to state a claim upon which relief could be granted.[115] The state argued that a marriage could exist only between a man and a woman and the state was incapable of changing that fact.[116] The First Circuit Court granted the state's motion, and Baehr appealed to the Hawaii Supreme Court.[117] In a surprising victory, the Hawaii Supreme Court ruled that the denial of marriage license to same-sex couples constituted sex discrimination under the Hawaii Constitution.[118] The court ruled that the denial of a marriage license must undergo "strict scrutiny" and that the state bore the burden of demonstrating a compelling state interest in maintaining marriage as an exclusively heterosexual institution, if it wished to deny marriage licenses to the plaintiffs.[119]

3. Nationalizing Marriage Rights: The Constitutional Meanings of Marriage

At this juncture, the Lambda Legal Defense and Education Fund ("Lambda") and other gay activist organizations saw an opportunity to translate this surprising legal victory into a national campaign for equal marriage rights. With the initial victory secured, Lambda overcame its previous opposition to the Baehr lawsuit[120] and placed itself at the center of a legal and political mobilization campaign. Confident that Hawaii would not be able to meet the "compelling interest" standard, Evan Wolfson, the director of Lambda's Marriage Project, devised a plan in which same-sex couples would travel to Hawaii, marry, and then seek legal recognition of the marriage in their home states. This plan would then spawn numerous localized legal and political battles throughout the United States. Using the Full Faith and Credit Clause of the U.S. Constitution, Lambda and other organizations hoped to leverage the legal victory in Hawaii into a national movement for equal marriage rights. Wolfson wrote in a memo to supporters that "Lambda looks forward to working with you, others in our movement, and our allies, and is available as a resource to assist you and others, in

115. *Id.* at 50 & n.6.
116. *Id.* at 51.
117. *Id.* at 52.
118. *Id.* at 59.
119. *Id.* at 67.
120. In 1991, Baehr and Dancel approached Lambda for assistance with the lawsuit, but the organization thought the suit was not worth the effort. Wolfson stated, "The time did not seem ripe; the others thought we had too little chance of winning." Joseph Hanania, *Reshaping Society from the Outside In*, L.A. TIMES, Aug. 26, 1996, at E1.

organizing and preparing at this historic moment in our equal rights struggle."[121]

Wolfson devised a two-part strategy: (1) to exploit the institutional advantage that the Full Faith and Credit Clause offered and (2) to rely on broadly held notions of marriage as a deeply personal choice based on love and respect that should be encouraged and promoted. According to Wolfson, the same arguments made by conservative groups to defend traditional notions of marriage could also be used to extend this right to lesbians and gays. After rhetorically asking whether Hawaiian same-sex marriages would be recognized in other states, Wolfson wrote:

> We at Lambda believe that the correct answer to these questions is "Yes." To support that answer, common sense and people's general intuitions both back us up and are there for us to tap into: marriage is marriage; it's a fundamental right; if you're married, you're married; this is one country, and you don't get a marriage visa when you cross a state border.[122]

Lambda's political strategy to counter conservative opposition to same-sex marriage rested on tapping into the emotional resonance of marriage, particularly its deeply personal and intimate dimensions. By appealing to the "general intuition" of what marriage is, same-sex marriage activists tried to turn the conservative argument on its head by contending that gay marriage would not be significantly different, at the interpersonal level, from heterosexual marriage. In other words, Lambda contended that same-sex marriage was about individuals seeking the capacity to choose a binding love based on mutual concern, affection, and respect.

In the course of seeking political and legal support for this vision of equal marriage rights, Wolfson and Lambda have urged their supporters to gather endorsements for the "Marriage Resolution."[123] The resolution reads in its entirety as follows: "Because marriage is a fundamental right under our Constitution, and because the Constitution guarantees equal protection of the law, RESOLVED, the State should permit gay and lesbian couples to marry and share fully and equally in the rights and responsibilities of marriage."[124]

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121. *See* Evan Wolfson, *Fighting to Win and Keep the Freedom to Marry: The Legal, Political, and Cultural Challenges Ahead*, 1 NAT'L J. SEXUAL ORIENTATION L. 259, 261 (1995) [hereinafter Wolfson, *Fighting*].

122. Wolfson, *Fighting*, *supra* note 121, at 262.

123. *Id.* at 260.

124. *Id.*

The Marriage Resolution attempts to translate the intuitive notion of marriage at the individual level into constitutional language. The political campaign is designed to mobilize "common sense" understandings of marriage into personal interpretations of constitutional meanings and practices. It is an effort to fuse, in a novel way, constitutional understandings with cultural norms of interpersonal relationships.

A popular *constitutional* understanding of marriage is being forged throughout the political campaign to achieve equal marriage rights for same-sex couples. This organizing effort highlights the political salience and persuasiveness of rights-based discourse; however, it also reveals that an individual-level, decentered mode of constitutional reasoning and interpretation can carry political weight outside of a formal, legal setting. The force of the constitutional claim set forth in the Marriage Resolution lies not in its ability to persuade judges, but in its ability to persuade fellow citizens and legislators to support a novel constitutional view. One front in the cultural war over equal marriage rights is an effort to redefine the constitutional culture in which marriage exists. For these purposes, higher law constitutionalism does not explain very well the dynamics of the constitutional change being effected. Instead, these shifts in constitutional meanings and practices are better understood through notions of popular constitutionalism.

As part of its mobilization effort, Lambda and other gay rights organizations must energize the gay community itself. Thus, Wolfson writes that one of the political tasks confronting the gay community is to "create a non-defeatist sense of entitlement and expectation."[125] This language suggests that part of Lambda's success depends on its capacity to persuade its own members that same-sex marriage is—and ought to be—a right that is legally binding. By fostering a sense of entitlement and expectation, Lambda is directly involved in the process of rights creation. Lamdba's leadership recognizes that one of its important tasks is to transform its members' desire to marry (an interest) into their assertion of the moral and legal capacity to marry (a right). By encouraging its members and supporters to perceive their needs and interests in a new way, Lambda will convert them from interest-bearing citizens into rights-claiming citizens.

It is, however, exceedingly important to note that the success of these organizing strategies—the fostering and the reliance on a new constitutional view of marriage and the creation of rights-consciousness among members—significantly depends on the institutional contexts in which they are deployed. The effectiveness of the diffused constitutional understanding of marriage

125. *Id.* at 263.

depends on the institutional mechanisms by which marriages are recognized. Similarly, the success of rights-claims among members depends on the institutional capacity of the state and federal governments to deflect and reform those rights claims back into mere interests. In order to explore that side of the story, an examination of the Defense of Marriage Act and the constitutional amendment movement in Hawaii is required. In other words, an examination of the counter-mobilization of rights is necessary.

4. Counter-Mobilization: The Defense of Marriage Act ("DOMA") and Amending the Hawaii Constitution

Two key assumptions underlie Lambda's efforts to nationalize the battle over equal marriage rights: the applicability of the Full Faith and Credit Clause to Hawaiian marriage licenses and the relative constitutional stability of the Hawaii Constitution. The battle over the validity of Hawaiian same-sex marriages quickly shifted to Congress as it became apparent that Hawaii was unlikely to meet the strict scrutiny standard. The political fight over DOMA did not take Lambda and other gay organizations by surprise. As Evan Wolfson wrote:

> [W]ill we be able to keep that fundamental right [to marry], or will we see it taken away in a political and legal backlash? The answer may well depend on the work we all have done between now and then. The cultural, political, and legal battles will be fought out both on the national level and state-by-state.[126]

Clearly, Lambda and others anticipated a counter-attack in the wake of the *Lewin* decision. What they might not have expected, however, was the ferocious reaction and the dearth of Democratic political support. The DOMA struggle played out in Congress during the summer of 1997. Congress quickly disposed of one of Lambda's assumptions in its legal battle for the recognition of same sex marriage, the Full Faith and Credit Clause. Having lost the DOMA fight, Lambda developed a legal strategy challenging the DOMA in federal court. In a memo dated May 13, 1996, Wolfson and attorney Michael Melcher planned their line of attack. Their argument was based on a number of points. First, they contended that Congress had exceeded its powers under the Full Faith and Credit Clause when it *restricted* rather than expanded the validity of state public acts. Second, they contended that federalizing domestic relations law was an unprecedented expansion of national powers that intruded

126. *Id.* at 259.

on state sovereignty. Third, the legal confusion ensuing from the redefinition of marriage rendered the DOMA unconstitutional.[127] Lambda's primary line of attack against the DOMA assumed that a state would issue, at some point, a marriage license to a same-sex couple who would then seek recognition of that marriage elsewhere. The linchpin was Hawaii's (or some other state's) approval of same-sex marriage.

What Lambda did not fully anticipate was a popular constitutional counter-mobilization that has rendered the Hawaiian strategy less likely to succeed. Hawaiian citizens in 1998 approved a state constitutional amendment that allows the state legislature to define marriage as a legal relationship exclusively between a woman and a man. For a short time, Alaska looked like a viable alternative because of a February 1998 preliminary ruling by a trial court that the state must show a compelling reason why it should not issue same-sex marriage licenses.[128] That possibility, however, evaporated when Alaskan voters—on the same day as Hawaiian voters—amended their state constitution to define marriage as a legal contract between one man and one woman.[129] As a result, attention is now directed toward the Vermont Supreme Court, where a lower court upheld the prohibition on same-sex marriage.[130]

But in all of these struggles, Lambda and its allies have made the strategic assumption that litigating the provisions of a state constitution held the same dangers and promises as litigation over a federal constitutional provision. This strategic assumption has proven to be the weak link in the legal mobilization effort concerning gay rights and same-sex marriage. Lambda and its allies have failed, thus far, to appreciate the institutional and political contexts of

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127. *See* Constitutional and Legal Defects in H.R. 3396 and S. 1740, the Proposed Federal Legislation on Marriage and the Constitution, (May 13, 1996) (on file in Lambda's New York offices). For other academic arguments against the constitutionality of the DOMA see Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Larry Kramer, *Same-Sex Marriage, Conflict of Laws and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

128. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998).

129. The proposed amendment, Ballot Measure 2, read as follows: "Constitutional Amendment Limiting Marriage: This measure would amend the Declaration of Rights section of the Alaska Constitution to limit marriage. The amendment would say that to be valid, a marriage may exist only between one man and one woman. Should this Amendment Be Adopted?" *See* ALASKA CONST. art. I, § 25.

130. *See Baker v. Vermont*, No. S1009-97 Cnc (Chittendon Super. Ct. Dec. 19, 1997), *available in* Leo L. Wong, *Lesbian/Gay Law Notes: 1998 Case Table* (visited Nov. 23, 1999) <http://qrd.rdrop.com/qrd/usa/legal/lgln/case.table-1998>. Vermont Supreme Court oral arguments in the case were held in November 1998 and a ruling was expected by the summer of 1999.

popular constitutionalism and have held relatively steadfast to an implicit understanding of constitutionalism as a higher law construct. Clearly, after their victory in *Baehr v. Lewin*, Lambda's key legal strategist did not anticipate a popular counter-mobilization. In one strategy memo, Wolfson suggested that there was little likelihood of a popular reversal of the *Baehr* decision: "Because the case involves state, not federal, constitutional questions, the Hawaii Supreme Court has the final word. There can be no appeal in Baehr to the U.S. Supreme Court, nor can the legislature alter the outcome . . . short of a highly unlikely constitutional amendment."[131]

Wolfson's confidence was not entirely misplaced. Hawaii has a reputation as a liberal, tolerant state and to discriminate actively against gays and lesbians would run counter to the state's political culture. In addition, Governor Ben Cayetano is a Democrat, as is most of the state legislature.[132] But after Circuit Court Judge Kevin Chang ruled on December 3, 1996 that the state had not shown a compelling reason for its refusal to issue marriage licenses to same-sex couples, political pressure began to build among conservatives in Hawaii and elsewhere for a political resolution that would evade the Hawaii Supreme Court's likely affirmance of Judge Chang's decision.[133] At that time, only the

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131. Wolfson, *Fighting*, *supra* note 121, at 265.

132. Prior to the 1998 election, the Democrats outnumbered the Republicans 39 to 12 in the State House and 23 to 2 in the State Senate. The respective political parties hold the same number of seats in the 1999 legislature. *See* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 68 (1998); THE COUNCIL OF STATE GOVERNMENTS, CSG STATE DIRECTORY, DIRECTORY 1-ELECTIVE OFFICIALS 1999, at 58 (1999).

133. Shortly after Judge Chang's decision, the academic consensus was that it was only a matter of time before same-sex marriage licenses would be issued in Hawaii. *See, e.g.*, Kramer, *supra* note 127, at 1965. "We can confidently predict that Hawaii will recognize same-sex marriages, for while the trial court stayed its mandate pending appeal, it is very unlikely that the decision will be overturned." *Id.*

In light of the pending referendum vote, the Hawaii Supreme Court delayed its consideration of the state's appeal until after the November 1998 election. As of this writing, all pleadings have been filed and the court could rule at any time. The State contends that the state constitutional amendment renders operative a 1994 law defining marriage as a legal union between one man and one woman. *See* HAW. STAT. ANN. § 572-1 (Michie 1997). Dan Foley, plaintiffs' attorney, contends that the trial court's 1996 ruling declared section 572-1 unconstitutional, and that the State has not appealed that portion of the ruling; therefore, the law remains unconstitutional despite the state constitutional amendment enacted in November 1998.

Legislation has been introduced in the 1999 Hawaiian legislative session to reenact section 572-1. *See* H.B. 775, 20th Leg. (Haw. 1999). Under the authority of the newly-enacted state constitutional amendment, this bill, if enacted, would essentially defeat Foley's objection. Another bill, H.B. 884, seeks to establish an alternative legal relationship for same-

trial court's stay of its ruling pending review on appeal to the Hawaii Supreme Court stood in the way of the issuance of marriage licenses to same-sex couples.

The state legislature reacted strongly to the *Baehr v. Lewin* decision. Shortly after the ruling, the legislature defined marriage as a relationship exclusively between a man and a woman.[134] In a lengthy section on legislative findings and purposes, the legislature scolded the Hawaii Supreme Court by stating that the court had overstepped its bounds and that it was not respecting either the state legislature or the will of the people.[135] After the trial court struck down section 572-1 of the Hawaiian Revised Statutes in December 1996, there was immediate support for a voter referendum to resolve the matter.

Undoubtedly, state lawmakers were aware of the national reaction to the Hawaiian same-sex marriage controversy and of the more immediate concerns of their constituents. Since the first state supreme court ruling on the matter, support for same-sex marriage has eroded in Hawaii. According to polls, support for same-sex marriage was at its strongest shortly after the *Baehr* case was filed in 1991, when it stood at thirty-four percent. Since then, polls have shown a steady and significant decline in support for same-sex marriage. In February 1997, support for same-sex marriage was only at twenty percent,

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sex partners by granting the same set of legal rights and obligations to same-sex partners without using the term marriage.

134. *See* Requisites of a Valid Marriage Contract, Act 217, sec. 3, 1994 Haw. Sess. Laws 526, 531 (codified as HAW. REV. STAT. ANN. § 572-1 (Michie 1998)).

135.

> Although the Hawaii supreme court has the right to pass on the constitutionality of section 572-1, Hawaii Revised Statutes, the question before the court in Baehr was and is essentially one of policy, thereby rendering it inappropriate for judicial response. Policy determinations of this nature are clearly for nonjudicial discretion, and are more properly left to the legislature or the people of the State through a constitutional convention. Contrary to the plurality's assertion that it was not engaging in judicial legislation, the court's intervention in this matter encroached on the functions of the legislature in its law-making function, thereby impinging on the separation of powers of the respective branches of government.
>
> Separation of powers is necessary for the functional division of governmental power that is the foundation of our constitutional democracy. The Hawaii state legislature, as the elected representatives of the people of the State of Hawaii, is, along with the executive branch, the appropriate source of major policy initiatives. The Hawaii supreme court in Baehr has in effect substituted its own judgment for the will of the people of this State.

§ 1, § 572-1, 1994 Haw. Sess. Laws at 526-27 (quoting legislative findings and purpose).

having dropped from thirty percent in 1993.[136] This intense popular opposition—combined with organizing efforts by religious conservatives—clearly drove many state legislators to place a state constitutional amendment on the ballot.

The power of a political majority to trump a state constitutional decision is a hallmark of popular constitutionalism. The notion of a constitution operating in a higher law capacity, regulating and inhibiting democratic reversals of unpopular decisions often is not a central concern of popular constitutionalism. Instead, popular constitutionalism seeks to redefine and reconstruct what had been asserted as a fundamental right into a negotiable interest or a set of interests, subject to partisan and pluralistic wrangling and horsetrading. This is precisely how the Hawaii legislature reacted to Judge Chang's ruling.

In the spring of 1997, the combined impact of intense public opinion opposed to same-sex marriage and a concerted drive by conservative groups and religious organizations yielded a proposed constitutional amendment. By the necessary two-thirds vote, the legislature approved a referendum that was placed on the November 1998 ballot. The proposed amendment read, "The Constitution of Hawaii shall be amended to read, 'The legislature shall have the power to reserve marriage to opposite-sex couples.' "[137] For signing on to the amendment, the Democratic legislators won approval of a "reciprocal beneficiaries" law that gave registered partners over fifty state benefits, including survivorship and inheritance rights; workers compensation and retirement benefits; health insurance coverage and medical benefits, including hospital visitation; the ability to hold property jointly; and standing to sue for wrongful death.[138] Despite the benefits, gay activists were outraged by the legislative compromise. Dan Foley, attorney for the plaintiffs in the *Baehr* case, told a reporter, "It's a slap in the face . . . . It's a statement by this legislature that law-abiding, tax-paying gay and lesbian citizens of this state should not have equal protection under the law."[139]

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136. *Voters Strongly Oppose Gay Unions*, HONOLULU STAR BULLETIN, Feb. 24, 1997, *available in* Star-Bulletin Staff, *Voters Strongly Oppose Gay Unions* (last visited Nov. 23, 1999) <http://starbulletin.com/97/02/24/news/story2.html>. In 1991, the approval rating for same-sex marriage was at its peak—34%. Since then, polls indicate that support for the notion has eroded. For a summary of polling results, see 1995 COMM'N ON SEXUAL ORIENTATION & THE L. REP. 203.

137. *See Gay Marriage Ban in Voters' Hands*, HONOLULU STAR BULLETIN, Apr. 17, 1997, *available in* Star-Bulletin Staff, *Gay Marriage Ban in Voters' Hands* (last visited Nov. 23, 1999) <http://starbulletin.com/97/04/17/news/story1.html>.

138. HAW. REV. STAT. ANN. §§ 572C-1 to 7 (Michie Supp. 1998).

139. *See* Star-Bulletin Staff, *supra* note 137.

The benefits that same-sex partners received under the reciprocal beneficiaries law represents the limits of popular constitutionalism for gay activists. Indeed, within a relatively short period of time, these benefits were substantially eroded. In August 1997, only one month after the bill took effect, Hawaii Attorney General Margery S. Bronster issued a Formal Opinion Letter that exempted HMO's from the health insurance obligations of the reciprocal benefits act.[140] In December 1997, Attorney General Bronster issued another Formal Opinion Letter that stated that the reciprocal benefits statutes did not require employers to pay for the health benefits that insurance companies were required to offer to registered reciprocal partners.[141] Although bills are currently pending within the Hawaii legislature that would restore these benefits,[142] their diminution indicates the strength of popular constitutionalism's ability to redefine fundamental rights as mere interests. The establishment of a reciprocal benefits law, enacted simultaneously with the legislative approval of the state constitutional amendment, represents popular constitutionalism's successful effort to transform the judicially declared fundamental right of marriage into a "domestic partnership" interest that must continually fight within the pluralistic arena against encroachment and erosion.

Although Lambda and its supporters had hoped to use the legal mobilization wing of popular constitutionalism to generate a rights-based aspiration among its followers, the institutional and political contexts of state constitutionalism transformed their temporary success into a mere interest that could be successfully contained legislatively and politically. This episode illustrates the claim that state constitutionalism is dominated by a dynamic of rights contestation *outside* the framework of higher law constitutionalism. Popular constitutionalism is not about the identification and preservation of rights against dominant or exploitative majorities, but about the contestation and aspirations of rights and interests in a fluid institutional context. And strategists who are seeking legal and social change need to be aware that their legal and constitutional claims made under state constitutions do not work in the same way as they might under the Federal Constitution. Without that awareness, much political and legal energy may be unwisely spent or misdirected.

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140. Section 4 of Act 383, Relating to Unmarried Couples, Haw. Att'y Gen. No. 05 (1997).

141. Health Insurance Coverage for Reciprocal Beneficiaries, Haw. Att'y Gen. No. 10 (1997).

142. S.B. 1315, 20th Leg. (Haw. 1999); H.B. 1107, 20th Leg. (Haw. 1999).

Although the gay rights groups in Hawaii and across the nation put up a mighty fight, the outcome in the same-sex marriage referendum was a foregone conclusion. Polls in mid-August 1998 showed that sixty-three percent of the Hawaii electorate opposed same-sex unions while twenty-four percent supported them, and thirteen percent were undecided.[143] Outspent by a number of outside religious organizations, the gay rights movement in Hawaii had too many voters to persuade and too little money.[144] Those percentages did not shift very much by November 3, 1998, as those who favored the amendment won sixty-nine percent of the vote and those who opposed the amendment secured nearly twenty-seven percent of the vote.[145] The referendum echoed the results from Alaska as voters in that state approved a constitutional amendment restricting marriage to men and women by a vote of sixty-eight percent to thirty-two percent.[146]

5. Conclusion: Assumptions of the Hawaiian Supreme Court

One last chapter remains to be written in the Hawaiian story of same-sex marriage. The Hawaii Supreme Court has not yet ruled on the appeal from Judge Chang's 1996 trial court decision. Since that decision, the expression of popular constitutionalism has been felt keenly in Hawaii, but it is unclear how the Hawaii Supreme Court will respond to that expression. If its commitment to higher-law constitutionalism remains robust, the Hawaii Supreme Court may face even more intense opposition from religious and conservative groups in the state. The stakes and consequences of directly overturning a super-majority of Hawaiian citizens are high.

Thus far, the "counter-mobilization of rights" in Hawaii clearly demonstrates two elements of legal mobilization. First, the more fluid and responsive institutional contexts of state constitutionalism affect activists' ability to achieve their ends. Winning legal victories and mobilizing supporters is not sufficient in the state context. Legal activists who seek to deploy a legal mobilization strategy within a framework of state constitutional "rights" must

143. Mike Yuen, *Same-Sex Marriage Losing Big*, THE STAR-BULL., *available in* Mike Yuen, *Same-Sex Marriage Losing Big* (last visited Nov. 24, 1999) <http://starbulletin.com/98/08/14/news/index.html>.

144. *Total of $ 3.1 Million Spent in Same-Sex Marriage Campaign*, ASSOCIATED PRESS, Apr. 24, 1999, *available in* LEXIS, AP File.

145. Mike Yuen, *Same-Sex Marriage Strongly Rejected*, HONOLULU STAR BULLETIN, Nov. 4, 1998, *available in* Mike Yuen, *Same-Sex Marriage Strongly Rejected* (last visited Nov. 23, 1999) <http://starbulletin.com/98/11/04/news/story3.html>. 2.2% of the votes were either blank or double votes. *Id.*

146. *Id.*

be aware of the capacity for a quick reversal if a counter-mobilization occurs. Second, the constitutional dialogue and debate that has occurred in Hawaii shows that the constitutional theory that accompanies counter-majoritarian assumptions does not sufficiently explain the range and scope of legal and constitutional discourse in the state context. Constitutional meanings are not entirely judicially determined; instead, there is a strong popular dimension to constitutional interpretation at the state level. The Hawaii Supreme Court's tremendous defeat at the hands of a majority of Hawaiian citizens did not stem from its institutional position as a counter-majoritarian body. Rather, its loss stemmed from its assumption that it alone could interpret the Hawaii Constitution and determine the range of constitutional discourse. The Hawaii Supreme Court assumed that it enjoyed the same primacy of place when it interprets the Hawaii Constitution as the U.S. Supreme Court enjoys when it interprets the Federal Constitution. In making that assumption, it committed itself to a notion of higher law constitutionalism. However, subsequent events illustrate the limitations of that understanding of state constitutionalism and instead, highlight the range and applicability of popular constitutionalism within the framework of American federalism.

IV. CONCLUSION

What does it mean to live in a constitutional order that is not exclusively delimited by higher law constitutionalism? In part, it means that politics matters more than law, which is a notion that may disturb many lawyers, both practicing and academic. It also means, however, that the constitutional imagination is viable in the United States. The pursuit of controversial and important issues through state constitutional litigation and initiatives signals more than the vibrancy of the "new judicial federalism" and single-issue voting.

Looking at popular constitutionalism the right way reveals that constitutional interpretation is not reserved exclusively for the few judges who have the occasion and the will to interpret foundational texts. Because of the porousness of the federal system and its commitment to multiple forms of constitutional ordering, constitutional meanings emerge through political contestation as well as legal interpretation. Through political engagement, including litigation and initiatives, citizens can mobilize constitutional meanings that have profound resonance for their lives and their identities.

Clearly, the issues of gay rights and same-sex marriage highlight some particularly contentious issues, but their resolution through popular constitutionalism may give greater legitimacy to the eventual victories that gay

activists will achieve. Gay rights in Oregon are more firmly established because voters in that state rejected the mobilization that the OCA sought. Whether popular constitutionalism will allow a similar resolution in Hawaii remains to be seen, but there is no doubt that the battle will continue. Indeed, the democratic possibilities that popular constitutionalism offers us—the capacity to claim aspirational rights and to define our constitutional order and constitutional community—almost requires fighting those fights.