2014

Civil Rights 3.0

Nan D. Hunter
Georgetown University Law Center, ndh5@law.georgetown.edu

This paper can be downloaded free of charge from:
http://scholarship.law.georgetown.edu/facpub/1324
http://ssrn.com/abstract=2404422


This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: http://scholarship.law.georgetown.edu/facpub

Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, Family Law Commons, Gender and Sexuality Commons, and the Sexuality and the Law Commons
Civil Rights 3.0

© 2014 Nan D. Hunter

President Obama’s endorsement of gay marriage ... was by any measure a watershed. A sitting United States president took sides in what many people consider the last civil rights movement....

*New York Times*, May 9, 2012

The LGBT rights movement owes an immeasurable debt to the advocates for racial justice who created the modern American idea of civil rights as well as its doctrinal foundation. Perhaps an even greater debt is owed to those mid-century civil rights leaders for creating one of the nation’s most compelling cultural narratives: a Scripture-like account of suffering, exodus, and redemption that has inspired every campaign for social justice since that time. The quasi-mythologized history of civil rights in the 1960’s has created the sense of the eventual inevitability of victory over the most extreme forms of irrational bias and the achievement of formal equality.

This narrative now attaches to LGBT rights, as evidenced by how frequently LGBT equality is being described as the last, or the next, or today’s, pre-eminent civil rights issue. Indeed, it was this background narrative that gave such rhetorical power to the President’s phrasing of his support for LGBT equality in his Second Inaugural

---


Address, a passage that cements the place of LGBT rights squarely in the civil rights heritage, in implicit equivalence to its forebears. But the march-of-progress narrative, while not entirely untrue, is deeply misleading.

In this chapter, I will explore what it means, for better and for worse, to be (arguably) this generation’s emblematic civil rights campaign. What does the label tell us about the civil rights paradigm itself? If the achievement of marriage equality is the great civil rights achievement of this generation, what does that suggest about a future for equality more generally? How have new forms of, and technologies for, movement building affected the idea and practice of civil rights? Does the civil rights paradigm have a future? Or are we on the cusp of reaching the civil rights version of the end of history?

This chapter addresses three aspects of the social meaning of civil rights: legal doctrine and legal institutions, especially as they relate to statutory mandates for equal treatment; social movement strategies, with a focus on the professionalization and corporatization of a civil rights campaign; and the tension between the discourse of social hierarchy and that of civil rights.

The gay story began with what many saw as an upstart, even faux, civil rights movement as compared to the traditional civil rights movements that were thought to be the real thing. Until recently, LGBT rights advocates struggled to join the informal alliance of constituency-based rights groups, to get a place at the civil rights table and entrée to the diversity industry that flourishes among large employers, and to build its own niche as part of the base of the Democratic Party. Those goals have been achieved, along with a broad public recognition that the LGBT movement counts as a civil rights struggle.

3 “We the people declare today that the most evident of truths that all of us are created equal -- is the star that guides us still; just as it guided our forebears through Seneca Falls and Selma and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth.” Barack H. Obama, Second Inaugural Address, January 21, 2013 (available at http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama).

4 The reference is to FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992), which argued that the fall of the Soviet Union left classic western liberal thought as the only viable paradigm in global politics.
As other movements in the American civil rights tradition have each brought new insights, approaches and problems to the fore, so too has the LGBT movement. Over time, the movement itself has changed, acquiring greater resources and responding to changes in the broader political climate. LGBT organizations have utilized increasingly sophisticated technologies to achieve fundamental social movement objectives of framing issues, mobilizing a constituency, forging alliances and interacting with political parties and state actors.

LGBT legal rights work began in earnest after the ascent of Reagan-Bush era conservatives whose elections were fueled by the coalition of social issues and pro-business policies. For many of the current leaders – in all civil rights movements – that Reagan-Bush political culture forms the baseline for goals and expectations. This context of backlash and retrenchment contributed to the growth of multidimensional advocacy: LGBT rights advocates have moved, or been forced, into a variety of lawmaking venues – courts and legislatures, state and federal, elections and advertising. The result is a melding of new and old models of persuasion in which themes developed in non-juridical contexts may migrate to courts and legislatures. The hyper-investment in litigation during the height of the Warren Court era has ceased. Advocates now routinely develop campaigns to eliminate discriminatory laws consciously using litigation as only one component of an array of techniques.

Underlying the chapter is an understanding that the social meaning of civil rights in the United States is extraordinarily rich, with issues being framed and reframed in a continuous iterative process. Every marginalized group seeks pathways and portals into greater power, whether through institutions of the state, the market or civil society. The discourse of civil rights has been productive in both jurisgenerative and culture-generative terms.

Examining the meaning of civil rights through the prism of the LGBT rights movement provides a window into strengths, weaknesses and dynamism of the struggle for social justice in the United States. What we learn is that LGBT advocates have contributed to

---

5 To make this concrete: if you were 10 years old when Ronald Reagan was elected President in 1980, you are 44 years old today.
the overall project of formal equality under law primarily by developing an extraordinary strategic and tactical dexterity, uniquely so at the state level and in its alliance with the business sector. Particularly as to the latter, however, there are major trade-offs that have yet to become manifest. The possibility of advances in substantive equality law – either statutory or Constitutional - has shrunken to the point that, even as LGBT rights groups make breakthroughs in achieving goals such as marriage equality, they will do well to avoid having to take backward steps with regard to such overarching concepts as the disparate impact principle or heightened scrutiny. For the future, the big question for this movement – and all other social justice movements in the United States – is whether it will deploy its talents and resources to meet the more difficult challenge of dislodging embedded, structural forms of discrimination and social hierarchy.

I. The Law: Equality and Containment

...I got nothing but homage an holy thinkin for the ol songs and stories
But now there’s me an you

Bob Dylan, 1963

The project that civil rights movements and arguments framed under the rubric of equality do best, and for which the law is perfectly suited, is ending exclusions and categorical inequalities. What civil rights movements and equality arguments more broadly do not do so well is dismantling hierarchies. The fundamental critique of formal equality is that its very achievement perpetuates more deeply embodied patterns of stratification, in part because the existence of civil rights laws tends to legitimate the hierarchy that remains. Whether constitutional or statutory, formal equality rights are differentially deployed by differently situated subjects in a complex stratified society.

---


To date, LGBT equality has been overwhelmingly framed as about ending exclusions – currently and most dramatically the exclusion from marriage, but prior to that, a series of other categorical exclusions: from the legality of one’s sexual intimacy, from protection of one’s parental rights, and often from employment. So in that structural sense at least, LGBT rights should be an easy fit for a civil rights paradigm. And indeed there is truth in this parallel construction: the LGBT movement does offer its own narrative of progress in ending exclusions. Gay sex is no longer criminal, even in the most conservative jurisdictions. Several million Americans have achieved at least a bounded liberty to live lives that are more economically and physically secure than was imagined possible 50 years ago. Prospectively, a demographically driven tectonic shift in public opinion suggests that more progress is on the way.

Yet it is also true that the LGBT equality movement has not yet attained what I would describe as the two markers of formal equality in law. One is adoption by the Supreme Court of an Equal Protection analysis under which laws differentiating on the basis of a specific characteristic are presumptively unconstitutional under a heightened scrutiny analysis. The other is national legislation that regulates the private as well as the public sectors and that prohibits discrimination based on the given characteristic in a variety of contexts. Neither has occurred in the field of LGBT rights.

From a political point of view, we must ask whether this institutional reluctance by both the Supreme Court and Congress stems from something more than hostility to a particular and relatively “new” minority. Doubtless some part of it derives from controversies specific to homosexuality and gender identity, but it also reflects a shrinking of the vision of equality. Mapping civil rights legal doctrine from the perspective of a constituency that seems to stand on the cusp of crossing the finish line into formal equality can tell us much about how the dialog between law and politics has constructed the evolving social meaning of “civil rights.” LGBT groups are poised to follow in the footsteps of older movements based on race and gender, but the parameters of what is possible have narrowed.

In both constitutional and statutory law, the Supreme Court has cut back on the promise that law would serve as a tool to achieve racial, and to a lesser extent gender, justice. These examples of retrenchment are easy to overlook in the LGBT rights context
because, for this group, they stunt forward progress, which is less dramatic than forcing a
group backward, as has occurred with people of color and women. Since Congress
enacted the Civil Rights Act in 1964, an increasingly conservative Supreme Court has in
effect discounted the value of achieving equivalent protection by interpretations that have
undermined the efficacy of the underlying statute.8 Together, these changes have
redefined equality under law in more limited ways, even if the number of constituencies
protected under civil rights law has expanded.

The shrinkage of the civil rights paradigm is evident in comparing the Civil
Rights Act of 1964 to its closest analog in the field of sexual orientation or gender
identity, which is legislation pending before Congress. The Employment Non-
Discrimination Act (ENDA) passed the Senate in November 2013,9 but appears unlikely
to win approval in the House of Representatives so long as that body is under Republican
control.10 In this section, I will describe how two dimensions of ENDA, as well as current
law on the standard of review for sexual orientation discrimination under the Equal
Protection Clause, illustrate ways in which constrictions of existing civil rights law are
channeling future law. I will close by suggesting that the strongest protection against
discrimination for LGBT persons may lie not in a 21st century civil rights bill, but instead
in the interstices of Title VII.

A. Employment Only Non-Discrimination, If Intentional

As its name indicates, the ENDA legislation covers only one of the realms –
employment – that fall within the scope of the 1964 Civil Rights Act. Congresswoman
Bella Abzug introduced omnibus legislation in 1974 that would have added sexual
orientation protection to range of issues covered in the Civil Rights Act, but Washington-
based advocates decided in 1993 to increase the possibility of legislative success by

8 See infra, text at notes [//].
9 Jeremy W. Peter, “Senate Approves Ban of Anti-gay Bias in the Workplace,” N.Y.
10 Chris Johnson, “Boehner Tells LGBT Caucus ‘No Way’ ENDA Will Pass,”
Washington Blade, Jan. 29, 2014 (available at http://www.washingtonblade.com/2014/01/29/boehner-tells-lgbt-caucus-way-enda-will-pass/). A different version of ENDA passed the House in 2007, but was not considered
by the Senate.
redrafting the bill to cover only employment, because the workplace was the context that drew the greatest level of popular support for an anti-discrimination law.\footnote{Chai R. Feldblum, The Federal Gay Rights Bill: From Bella to ENDA in Creating Change: Sexuality, Public Policy and Civil Rights (D’Emilio et al., ed.) 178-79 (2000).}

Despite the increased numbers in public opinion polls voicing agreement that LGBT should not be fired based on that characteristic,\footnote{Jeff Krehely, Ctr. for Am. Progress, Polls Show Huge Public Support for Gay and Transgender Workplace Protections (2011), http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/protection_poll.pdf.} the needle has not moved for 20 years in the willingness of Congressional supporters to advance legislation that addresses issues such as housing, education, and public accommodations. As noted above, this may stem in part from the continuing power in Congress of social conservatives who view homosexuality with distaste. In light of the overall legal retrenchment in this field, however, I would argue that at least some of resistance grows out of a broader hostility to civil rights and government regulation more generally.

Compare the United Kingdom, which enacted a new civil rights law in 2010. The Equality Act unified dozens of laws and policies into one comprehensive statute, eliminating fragmented coverage for race, gender, disability and sexual orientation.\footnote{U.K. Dep’t for Culture, Media & Sport, Equality Act 2010: Guidance, https://www.gov.uk/equality-act-2010-guidance (last updated Feb. 27, 2013).} The new British law is designed to modernize and clarify, rather than expand, the reach of the civil rights paradigm, in an effort to render the overall concept more accessible to the public and to eliminate areas of confusion for employers and other institutions that must comply.

iteration of civil rights principles, the resulting legal edifice becomes ever more complex and complicated.

The second telling characteristic of ENDA is that it explicitly forbids any claims based on disparate impact theory. The disparate impact doctrine allows proof of discrimination without the need to prove an intent to discriminate. In the context of sexual orientation, disparate impact claims likely would arise primarily in relation to compensation packages that cover only spouses of employees, in jurisdictions where same-sex marriage is not valid. Denying coverage to unmarried couples would have a disparate effect on employees who could not marry. Because same-sex couples who marry anywhere are now recognized as married under a federal law that regulates many benefits plans, this particular disparate impact problem may not occur frequently. (A Supreme Court ruling mandating marriage equality under all state laws would also eliminate the problem.) While disparate impact based on sexual orientation may thereby appear to be a small or diminishing concern, the insistence by business interests on the inclusion of its prohibition in ENDA reflects a much larger campaign against the underlying concept.

In *Griggs v. Duke Power Co.*, the Supreme Court held that proof of the disparate impact on racial minorities of facially neutral employment rules constituted a violation of Title VII. Its effect was a powerful boost to the continued efficacy of that statute after employers discarded once explicitly discriminatory policies. More that one scholar has characterized *Griggs* as the Court’s most important civil rights decision aside from *Brown*. The disparate impact principle comes the closest of any aspect of

---

15 S. 815, § 4(g) (available at https://www.govtrack.us/congress/bills/113/s815/text).
16 Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2012); Irizarry v. Bd. Educ. City of Chicago, 251 F.3d 604 (7th Cir. 2001).
antidiscrimination law to reaching structural patterns of stratification.\(^{21}\) In other words, at least in theory, disparate impact claims have the potential to achieve more than formal equality, something more like concrete steps toward disestablishing hierarchy.

Since *Griggs*, the battle over disparate impact has become a central point of back-and-forth dispute between those who seek to expand the concept of civil rights and those who seek to shrink it. The Supreme Court has ruled that disparate impact does apply to claims filed under the Age Discrimination in Employment Act,\(^{22}\) but it has precluded disparate impact claims under Title VI of the Civil Rights Act,\(^{23}\) Section 1981,\(^{24}\) and the Fourteenth\(^{25}\) and Fifteenth\(^{26}\) Amendments. In *Wards Cove Packing Co. v. Atonio*,\(^{27}\) the Court severely limited disparate impact by its ruling on allocation of burden of proof and the scope of the business necessity defense. Congress responded to *Wards Cove* with the Civil Rights Act of 1991,\(^{28}\) which effectively reversed most of the Court’s decision, returning the burden of proof to the defendant and requiring the defendant to show that practice with disparate effects was job related and consistent with business necessity.\(^{29}\) In one of the most recently enacted antidiscrimination laws, the Genetic Information Nondiscrimination Act, the issue arose again. Congress barred disparate impact claims pending review by an Advisory Commission.\(^{30}\)

In light of this ongoing battle, it is a mistake to consider the disparate impact exclusion in ENDA as turning on gay-specific issues or as of trivial significance. The enactment of a blanket prohibition on disparate impact in ENDA would contribute to precedent of dropping it in contemporary laws that can be invoked in future legislative

\(^{22}\) Smith v. City of Jackson, 544 U.S. 228 (2005).
\(^{27}\) 490 U.S. 642 (1989).
debates. ENDA as currently written constitutes another data point in the 21st century civil rights narrative of a shrinking civil rights fabric.

B. Equal Protection

Many people use the term “civil rights” to encompass Equal Protection law as well as the statutory antidiscrimination prohibitions. In this aspect of equality law, the Supreme Court has struck down forms of sexual orientation discrimination in three important decisions.31 Remarkably, however, it has done so without articulating a clear standard of review for such classifications, leaving lower courts to conclude that some form of a rational basis test was used, even though there is little possibility that the outcomes would have been the same had the traditional and highly deferential version of rational basis been the operative standard.32

The Court’s treatment of this next, last or most contemporaneous civil rights issue signals that, like the scope of antidiscrimination statutes, the future likely holds only the possibility of additional one-off invocations of constitutional equality. The Court has become allergic to any extension of a more stringent standard for scrutiny beyond the groups to which it has traditionally been applied.33 I read the Court’s message in the gay cases as indicating that the Justices accept that they will have to address whether sexual orientation exclusions violate the Constitution, but are determined to do so without articulating standards for Equal Protection scrutiny that will have broader application. After we get through the marriage issue – I hear the majority of Justices saying - we’re done.

C. Sex Discrimination Claims: A Return to the Future?


32 In Windsor, for example, the Court intertwined equality and federalism grounds to conclude that “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” 133 S. Ct. at 2696. See Michael J. Klarman, Comment: Windsor and Brown: Marriage Equality and Racial Equality, 127 Harv. L. Rev. 127, 140-42 (2013) (explaining why Windsor opinion is “unconvincing as a doctrinal matter”).

33 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445-446 (1985) (reasoning that if the class in question was deemed suspect, it would broaden the landscape of suspect classification in a way that the Court was unwilling to do).
With the failure to enact national legislation prohibiting employment discrimination, advocates and courts have turned to the prohibition on sex discrimination in Title VII to reach adverse workplace actions against LGBT persons. To date, the progress is uneven but promising. The majority of circuits have ruled that adverse actions that result from sex stereotyping based on gender nonconformity can constitute sex discrimination against LGBT people.\(^34\) Courts increasingly accept that antipathy toward homosexuality or transgender status is vulnerable because it hinges on stereotypes of masculinity or femininity.\(^35\) These rulings re-open the possibility of using sex discrimination theories, regardless of whether ENDA is enacted.

The EEOC has also moved forward on this front, issuing a decision finding that gender identity discrimination is covered under Title VII as *per se* sex discrimination.\(^36\) EEOC accepts claims of discrimination based on sexual orientation as well as gender identity, for investigation and conciliation,\(^37\) though most judicial acceptance of sexual orientation cases is currently contingent on evidence that the complainant did not conform to sex stereotypes.\(^38\) Thus, administrative agency enforcement of Title VII as it applies to discrimination based on either sexual orientation or gender identity is already occurring nationwide.

---


In many respects – the availability of disparate impact claims and a more targeted religious exemption – Title VII is a stronger law than is ENDA.\textsuperscript{39} Thus, ironically, the best hope for expanding civil rights protection for LGBT Americans, at least in the workplace, may well lie in the 50-year-old Civil Rights Act.

II. The Law Reform Movement: Mobilization in an Era of Retreat

While there are lots of lessons that we have learned from chapters one and two of the civil rights movement, we’re in a new day. We need a little boost. There is so much to be learned from [the LGBT forces].

Judith Browne Dianis, quoted in \textit{San Francisco Magazine}, 2012\textsuperscript{40}

One cannot understand the ways in which legal claims for LGBT equality signal both continuity and change in the civil rights paradigm without understanding the historical context and legal culture in which those claims were formulated, debated and adjudicated. Lawyers who brought LGBT rights claims beginning roughly in the 1980’s had the advantage of well-established constitutional law doctrines and equal rights statutes that were in their infancy for an earlier generation of civil rights lawyers working in the 1950’s and 1960’s. Ironically, however, the LGBT rights lawyers who sought to build on the legal foundations set in place by earlier social justice lawyers discovered that the foundations themselves were eroding. The adaptations made by the legal wing of the LGBT civil rights movement offers a window into changes in strategy and innovations in tactics that other civil rights movements can learn and utilize.

LGBT rights strategies emerged on a large scale only after – indeed, long after – the end of the Warren and early Burger Court. LGBT rights litigation got off the ground not in the afterglow of \textit{Brown v. Board of Education},\textsuperscript{41} but in the midst of a rights counter-revolution that produced a strange disconnect. Many of us grew up with civil

\textsuperscript{41} 347 U.S. 483 (1954).
rights movement lawyers as heroes and with an aspirational understanding of the potential for using law to achieve justice that grew out of experiencing the 1960’s during childhood. When baby boomers (including the first generation of women in significant numbers) began attending law school, public interest law was already a recognized field. Some of us studied with civil rights lawyers who had become law professors. We took courses designed to train us as advocates for disadvantaged groups, an opportunity that did not exist when the older generation had been in law school. Upon graduation, many of us secured jobs with public interest and civil rights groups or worked with civil rights units of government agencies – organizations that were available for young lawyers to join, rather than have to invent.

The legal culture into which we graduated, however, had changed dramatically in the opposite direction. The single most prominent issue in legal politics grew out of a backlash movement rather than a civil rights movement: the continuing effort to reverse Roe v. Wade, a goal adopted as official policy by the Department of Justice after President Ronald Reagan took office. As the Reagan Administration brilliantly used the power of judicial appointment to deepen the conservatization of the federal bench that had begun under President Nixon, a new consensus emerged among progressives: that federal courts had become unreliable, at best, as allies in struggles for equality. In response to Reagan’s policies and appointments, traditional civil rights groups were drawn to Congress, where Democrats controlled both chambers from 1986 to 1994. Congress, rather than courts, became the site for expansions of rights to new groups and

42 410 U.S. 113 (1973).
45 See STEPHEN G. CHRISTIANSON, FACTS ABOUT CONGRESS 514, 521, 530, 539 (1996). (showing Democratic majorities in the 100th through 103rd Congresses).
for legislation effectively reversing Supreme Court decisions that had narrowly interpreted civil rights statutes.46

Advocates seeking to establish equality protections for LGBT persons adopted the adjustments made by the older groups and developed new ones. The federal courts almost literally closed to Equal Protection claims based on sexual orientation after the Supreme Court upheld the legitimacy of a state law that criminalized same-sex intimacy. In Bowers v. Hardwick,47 the Court torpedoed what was then the movement’s legal priority – eliminating sodomy laws, upon which so much anti-gay discrimination was based. Although grounded in liberty rather than equality analysis, that decision prevented any significant victory for a class understood as being defined by criminal conduct until the Court’s decision in Romer v. Evans ten years later.

LGBT advocates turned to state courts as an alternative. When Hardwick was decided, a deliberate shift to litigation strategies based on state constitutional claims had already occurred among progressive lawyers engaged with issues such as school financing.48 Building on this base, LGBT rights lawyers began identifying and litigating challenges to state sodomy laws in state courts. The successes in the campaign to invalidate sodomy laws eventually became the most successful use of state constitutions to expand rights. Half of the sodomy laws that had been in existence at the time of Hardwick were eliminated, which paved the way for the Supreme Court’s repudiation of Hardwick in the 2003 Lawrence v. Texas decision.49


47 478 U.S. 186 (1986).


On the national level, LGBT rights lawyers joined other civil rights groups in seeking relief in Congress, but to a lesser extent. Their major success was the inclusion of HIV/AIDS as a presumptively covered disability in the Americans with Disabilities Act adopted in 1990. Most of the Washington-based LGBT lobbying addressed issues that arose from the first decade of the HIV/AIDS crisis. The movement’s greatest Congressional setback was the enactment of Don’t Ask Don’t Tell legislation following President Clinton’s failed attempt to allow openly gay persons to serve in the military.

What the LGBT legal groups did much more extensively than traditional civil rights groups was to focus on state legislatures. During the 1980’s, this strategy was defensive - driven primarily by the need to respond to proposals for coercive restrictions on persons with HIV/AIDS that arose as amendments to state public health laws. LGBT organizations often formed alliances with public health officials, who understood that prevention and treatment efforts would be more successful if patients and those at risk trusted them. To a large extent, the strategy worked; the kinds of quarantines and forced testing that many had feared did not materialize.

A second, positive rather than defensive, factor drew LGBT rights advocates to state legislatures: campaigns to add protection based on sexual orientation – and later gender identity – to state anti-discrimination laws. The initial adoption of laws prohibiting discrimination based on race and religion had also begun with state legislatures. The pace of enactment of sexual orientation protection between 1990 and

today resembles that for the race discrimination laws between 1945, when New York adopted the nation’s first such law, and 1963, just before the federal statute was enacted. With their attention appropriately directed to national civil rights laws, the traditional racial justice constituency groups had little ongoing engagement with state legislatures. As a result, the discourse of civil rights in state legislatures since the 1980’s has focused almost exclusively on LGBT issues, together with contests over abortion laws.

The turn to the state level of lawmaking – in both courts and legislatures – has been a distinguishing characteristic of LGBT rights lawyering, and it has served the movement well. The mutual familiarity between state lawmakers and LGBT rights advocates that has developed since the 1980’s has probably contributed significantly to legal progress in moderate to liberal regions of the United States. On the biggest issue of family law – marriage equality – the extent of legislative success is dramatic. Of the 18 jurisdictions where same-sex marriage is legally authorized today, the change in law occurred by legislative action in 12. Only in six states was marriage equality forced by a judicial decision.

Some scholars, most prominently Gerald Rosenberg, continue to assert an old critique of civil rights lawyers, now adding to it the lawyers in marriage equality cases: that they have been blind to the lack of social progress achieved by litigation and the risk of backlash it generates. In fact, civil rights groups long ago began to develop multidimensional forms of advocacy that are not dependent on litigation. The LGBT rights movement provides the strongest refutation of Rosenberg’s arguments. Although

57 California, Connecticut, Iowa, Massachusetts, New Jersey and New Mexico.
some marriage equality litigation undoubtedly has triggered backlash in the short term, advocates have adeptly managed a complex overall strategy, relying on organizing and education, and coordinating lawsuits with lobbying in state legislatures and even with anticipated referenda. Litigation is no longer seen as the rifle-shot path to equality, but rather as merely one device in an increasingly high tech set of tools. Litigation, in other words, has become radically decentered in civil rights strategy.

In this environment, LGBT lawyering groups have developed an extraordinary level of sophistication with regard to non-juridical modes and technologies of advocacy. If the emblematic movement tactic during the late 1980’s and early 1990’s was an ACT-UP sit-in or demonstration, the core tactic now is polling. Today, LGBT groups commission their own polling, the results of which often shape their messaging strategies, which in turn suggest the parameters of “story banks” that solicit and authorize the collection of accounts of certain kinds of experiences, stories that one often finds summarized in the opening portions of the complaints that initiate litigation, in legislative testimony, and in media feature stories. Until recently, a non-profit group’s media strategy consisted of efforts to attract media attention and coverage of one’s issues; today it is likely to be an intentional and data-driven set of techniques to change public opinion, the success or failure of which can be measured.

Use of new technologies of social change is not unique to the LGBT civil rights movement, but LGBT groups have been early adopters of mechanisms generated by broader technological change. One reason is necessity: the frequency of anti-gay ballot initiatives has forced LGBT groups into the electoral arena more often than other civil rights groups. That experience has required LGBT advocates to develop more

60 CHEN and CUMMINGS, supra note [] at 501-07; Mary L. Bonauto, Goodridge in Context, 40 HARV. C.R.-C.L. L. REV. 1, 2- 21 (2005); Douglas Nejaime, Winning Through Losing, 96 IOWA L. Rev. 941 (2011).
61 CHEN and CUMMINGS, supra note [] at 267-68, 520-21, 530.
63 Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41 AM. J. POL. SCI. 245 (1997).
sophisticated methods for persuading voters – not simply judges or legislators – to reject anti-gay arguments.

Direct electoral political battles over LGBT rights issues culminated in the unsuccessful effort to defeat Proposition 8 in California in 2008. Approximately 53 per cent of a total of 13.4 million voters supported a state constitutional amendment to prohibit same-sex marriage.\textsuperscript{64} Each side raised and spent more than $40 million, making it second only to the Presidential contest that year in the amount of money spent on an election campaign.\textsuperscript{65} The scale of fundraising and the nature of the political expertise required to compete in that kind of electoral environment creates an immediate need for the capacity to play to win in the big leagues, and its urgency simultaneously discourages any instinct to challenge the structures of wealth that distort the electoral system. Just as civil rights groups learn from each other, so of course do conservatives, and this history of repeated ballot initiatives may be predictive of continuing anti-equality campaigns on other issues, such as immigration.

Combined, these interventions outside the courtroom have shaped new constitutional meanings of LGBT equality. In an ironic full circle return to Rosenberg’s criticism, high stakes court challenges on the issue of marriage may have turned a corner into becoming virtually a no-lose proposition. Messaging campaigns did not persuade the U.S. Supreme Court to strike down all marriage exclusions, as the plaintiffs sought in the constitutional challenge to Proposition 8,\textsuperscript{66} or even to adopt heightened scrutiny in analyzing the constitutionality of the Defense of Marriage Act.\textsuperscript{67} But public opinion shifts surely did pave the way for the remarkable number of lower court opinions that have struck down exclusionary marriage laws in the wake of \textit{Windsor},\textsuperscript{68} despite the lack


\textsuperscript{66} Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

\textsuperscript{67} Windsor; see supra note [//]

of guidance in that opinion. Even before the Supreme Court ruled in the 2013 cases, Time Magazine declared on its cover that “gay marriage [has] already won.” For this movement, at this time, it would be only a slight exaggeration to say that the Supreme Court has become a very, very important opinion poll.

These non-litigation skills are not unique to LGBT groups, but multi-dimensional advocacy has been formative in its impact on relatively newer rights organizations like the LGBT groups and on a younger generation of leaders in all groups. The by-products of new technologies of advocacy and the blurred lines between legal advocacy and election campaigns will shape the future dimensions of civil rights practice in American political culture.

III. Social Change: Civil Rights + Corporate Social Responsibility = Corporatist Civil Rights

Struggles for human rights always begin with brave men and women who stand up, isolated, against the forces of oppression. But, in the United States, victory really arrives on the glorious day when the people with money decide discrimination is bad for business.


Law is not an autonomous realm, least of all when one seeks social justice reforms. Other dimensions of movement advocacy interact with the kinds of legal work described in the prior section. The meaning of constitutional principles and the aspiration to equality are shaped by many actors – not only courts and legislatures, or even only those in the legal profession more broadly.

---

69 Windsor; see supra note [//]
One distinguishing mark of the LGBT civil rights movement is the extent to which the corporate business sector has become an important non-juridical voice. More so than in other civil rights movements, gay advocates have negotiated directly with employers to obtain internal policies against discrimination and have enlisted corporate support to stress economic reasons for greater equality. Out of these efforts, a major coalition has emerged: an alliance between LGBT rights and corporate interests that has become one of the most effective movement resources for combatting the arguments of moral conservatives.

Again, historical context is all. The LGBT civil rights movement grew up under and into a Reagan-Bush-Clinton-Bush-Obama corporatist political culture. Throughout that period, the political and economic dynamics of globalization weakened the power of government to regulate multinational enterprises and to mitigate the localized externalities of downward pressure on wages and benefits. The balance of power between business on the one hand, and labor and environmental interests on the other, shifted dramatically from what it was in 1964. It should not be surprising that the significance and presumed legitimacy of business interests would be baked into any overall strategy for achieving civil rights that essentially began during this era.

The alliance with corporate interests in the LGBT rights movement grew out of the effort to eliminate workplace discrimination. Outside of municipalities, usually in either large urban or university-dominated areas, most of the early successes in securing protection came through negotiations with large corporate employers, rather than from legislation. As more employers agreed to adopt antidiscrimination rules, the Human Rights Campaign began a Corporate Equality Index that itself has become a major factor in further driving adoption of these policies, fostering a competition among human

---


relations and diversity professionals as they sought the 100 per cent score awarded to entities that satisfied each of the HRC’s indicia of “corporate equality.”

The larger political context for this effort was the rise of a Corporate Social Responsibility (CSR) concept within the business sector roughly coexistent with the rise of the LGBT rights movement. CSR consists of voluntary, non-enforceable practices by which companies use methods of self-regulation to integrate social and environmental concerns in their business operations and in their relations with stakeholders. The power of internal corporate law has grown as firms have been able to bargain with public authorities and to relocate in search of less restrictive legal regimes. Implicit in CSR concept is recognition that corporations comprise a privatist layer of sovereignty, with internal law that crosses traditional political boundaries of state and nation.

Antidiscrimination agreements for LGBT employees are a classic CSR strategy. Especially in sectors such as technology and tourism, corporations have long viewed the LGBT population as an important source of skilled labor or an important market segment for their products or both. Today, with popular support for LGBT equality increasing, 88 percent of Fortune 500 companies have adopted policies that prohibit discrimination and provide benefits. LGBT employee groups exist at nearly 300 large employers.

---

78 See generally, Fransen note [74] supra at 189-91; Shestack, note [75] supra at 120-22.
80 See http://outandequal.org/employee-resource-groups-corps.
The corporate-friendly approach has brought cascading benefits to the LGBT civil rights movement, at least among elites. Most significantly, it has produced a mutually legitimating discourse that can be deployed in multiple settings. Advocacy groups repeatedly invoke a “business leads the way” theme in efforts to persuade Congress or other legislatures to enact antidiscrimination protections. When the leading corporate actors in a state, region or nationwide have endorsed equal treatment, it is much easier to depict companies that continue to discriminate as laggards or outliers. Corporate support has extended to marriage as well. An amicus brief filed by a number of large corporate employers in United States v. Windsor argued that businesses were harmed by the unnecessary complexities in personnel-related laws caused by their inability to treat married same-sex couples in the same way as married different-sex couples under federal laws. A Wikipedia entry lists almost 125 corporations that have issued statements in support of same-sex marriage.

The power of corporate support for LGBT rights burst into public view when Arizona Governor Jan Brewer vetoed legislation that would have allowed persons with religious objections to same-sex marriage to decline service to gay customers. Behind

---


81 Brief of 278 Employers and Organizations Representing Employers as Amici Curiae in Support of Respondent, United States v. Windsor, 2013 WL 823227 (2013). Here, LGBT rights advocates were following the lead of racial justice advocates who secured amicus briefs from a number of large corporations and from retired military leaders making the argument that affirmative action is necessary for the competitiveness of U.S. firms in the context of global capitalism and for national security. Grutter v. Bollinger, 539 U.S. 306, 330-331 (2003). Tomiko Brown-Nagin sharply criticized this litigation tactic as enhancing the role of elites in determining the attention given by the Supreme Court and the media to justifications for affirmative action. Tomiko Brown-Nagin, Elites, Social Movements and the Law, 105 COLUM. L. REV. 1436, 1516-17 (2005)

82 http://en.wikipedia.org/wiki/List_of_organizations_that_support_same-sex_marriage_in_the_United_States

her decision was a business-led lobbying effort that stressed the potential of anti-gay laws to harm prospects for economic development. The episode illustrated the value to LGBT rights advocates of using corporate interests to peel off economic from social conservatives. Indeed, LGBT rights, including marriage, seems to have become a reverse wedge issue that once fueled support for conservative candidates, but is now weakening the free market-traditional values coalition on which the Republican Party has depended.

There are three major costs to this alliance, however. First, it is contingent on a discourse of cultural and political sameness, i.e., that the achievement of LGBT equality would change very little in the broader society, family dynamics and certainly in the economic structure. As Patricia Cain has noted, every civil rights movement has relied on sameness arguments to allay fears about the effects of eliminating legal stigma, but such arguments, by their very nature, tend to de-radicalize a social movement and distance it from broader efforts to rectify injustice.

Second, the mutual legitimation effect of an LGBT-corporate alliance strengthens a discourse promoting privatization of social costs and risks. In family law, for example, the tendency to shift the cost associated with vulnerable populations (unemployed homemakers, children, the elderly) to individual caretakers has long been criticized by feminist theorists, but unexamined in LGBT advocates’ proposals for new family status forms of domestic partnerships and same-sex marriage. More generally, the effort to allocate to individuals the expenditures that flow from increasingly unregulated corporate discretion in hiring, firing and compensation of employees has become a major theme in

conservative politics in the United States.\textsuperscript{88} This development conflicts with all but the narrowest conception of equality.

Lastly, the man-bites-dog narrative that results when well-known conservatives, such as Theodore Olson, endorse LGBT rights issues tends to garner an outsized amount of media attention and public interest. This can provide a powerful mechanism for breaking through media noise and clutter to convey a message that equality is a demand with broad support, but it can also be used to reinforce old stereotypes that the LGBT community is almost exclusively composed of affluent white males.

IV. The Future: Toward Anti-Hierarchy

For years groups seeking equality for gays drew inspiration from the civil-rights era...[After the adoption of Prop 8] Gay campaigners concluded that their approach had been wrong. With their talk of discrimination, they had been appealing to voters’ heads... [The new strategy] involves persuading voters that their existing values allow them to accept gay marriage...because same-sex couples are asking to join the institution, rather than to change it.

\textit{The Economist}, February 2014\textsuperscript{89}

The future of the civil rights paradigm turns on what “civil rights” means in a political and legal environment in which formal equality has been incorporated into institutions of governance and cultural authority, although structural forms of subordination continue and even worsen. The gains of race and gender civil rights movements have reshuffled those hierarchies, benefitting most the women and people of color who are socially advantaged in terms of class. Those least likely to benefit have been persons with intersecting vectors of social disadvantage, for whom the indicia of social inequality have hardened or condensed at the bottom of the social pyramid. The

prospect that formal equality will fail to achieve social equality, which is so evident with regard to race and gender,\textsuperscript{90} looms for the LGBT civil rights movement as well.

Liberal equality discourse may provide an essential tool in a long-term effort to more fundamentally alter patterns of social stratification. But there is an inevitable temptation to declare victory, paired with a tendency to run out of steam (not to mention donors), when a civil rights movement has achieved the markers of formal equality. The big question for LGBT advocates is whether, when that point is reached on these issues, “today’s civil rights movement” will take on the project of challenging the economic and social hierarchy associated with sexuality.

The paradoxical effect of securing formal equality is to strengthen the subordination of those at the bottom of the pyramid. Progress in ending sex discrimination, for example, can reinforce (and not merely pass by) the oppression of low-income women and women of color by creating a mutually reinforcing dynamic of invisibility.\textsuperscript{91} If harms disproportionately affecting LGBT people of color or who have low incomes are not challenged as such, those groups will become more vulnerable if privileged sectors of the LGBT community turn their attention away from a seemingly completed set of goals. The entrenched nature of discrimination against some women and some LGBT people not only will remain, but will worsen.

There are ideological consequences as well as material harms associated with the condensation of social hierarchy. The resilience of stratification along lines of race and poverty, in the face of civil rights progress, creates a naturalization effect – a sense that there are intractable, irremediable causes associated with the very nature of the people who suffer the worst that explains why they have not succeeded.

Let me close by briefly sketching two possible futures for the social meaning of “civil rights.”

The first model is civil rights as a cultural commodity. LGBT equality is a global brand, grounded in the most desirable market demographic: young adults (gay and straight) who are in the process of developing public policy loyalties, as they do product


\textsuperscript{91} MARTHA CHAMALLAS, \textit{INTRODUCTION TO FEMINIST LEGAL THEORY} 81-83 (2d ed. 2003).
loyalties, that they will continue to favor for the remainder of their lives. LGBT equality is a stakeholder governed, public-private partnership. It is both consumer friendly and a consumer durable. It combines value and growth. It is market-friendly equality, embedded in the concepts associated with CSR.

The second model of civil rights is grounded in egalitarianism and the project of dismantling hierarchy. Its foundation lies in demographic data that make visible the LGBT individuals at greatest risk of harm, such as low-income parents who – even if entitled to lawfully marry – routinely engage with a variety of hostile public and private institutions. Such persons are at high risk of HIV infection, of police harassment and of incarceration, of inadequate educations – all for reasons that are not limited to, but are related to, their sexuality or gender identity. They are not concentrated in the well-known gay strongholds of DC, Fort Lauderdale and San Francisco, but in San Antonio, Memphis, and Virginia Beach.

One does not have to strain to identify intersectionality in such situations. Relatively advantaged LGBT people experience modified, usually mitigated, systems of stratification, often sheltered by race or gender privilege. Those without such shelters are trapped in complex hierarchies, mutually constituted by multiple vectors of subordination. Exclusions can be attacked one by one. But it is not possible to engage any hierarchy – whether sexual, racial or other – without addressing this complexity. Heteronormativity is a layered set of interlocking hierarchies, not just a collection of exclusions. It is not merely straight – it has a race, a class, even a geography.

One of these models of civil rights – perhaps even a mixture of both – will comprise Civil Rights 3.0.

---


93 Kastanis and Wilson, supra note [//]; Williams Institute, INFOGRAPHIC: % of Same-sex Couples Raising Children in Top Metro Areas (2013).