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# Rethinking the Tyranny of the Majority: The Extra-Legal Consequences of Anti-gay Ballot Measures

Amy L. Stone\*

## INTRODUCTION

On June 26, 2015, the United States Supreme Court held in *Obergefell v. Hodges* that state bans on same-sex marriage are unconstitutional, legalizing same-sex marriage across the country.<sup>1</sup> This case directly overturned the Ohio Definition of Marriage Amendment, a 2004 initiated constitutional amendment that 61% of voters passed.<sup>2</sup> This initiative was one of thirty ballot measures since 1998 that explicitly restricted marriage to a “union of one male and female.” In addition, ballot measures in states like Hawaii, Maine, Washington, and Maryland permitted voters to veto existing same-sex marriage laws or permit the legislature to make new laws against same-sex marriage.<sup>3</sup> These same-sex marriage bans fit into a history of ballot measures on lesbian, gay, bisexual, and transgender (LGBT) rights that began in the mid-1970s.<sup>4</sup> Although *Obergefell* overturned same-sex marriage bans across the country, other anti-gay and anti-transgender ballot measures persist in the United States.

Since 1974, there have been over 175 ballot measures on LGBT rights at the town, municipal, county, and state levels.<sup>5</sup> These ballot measures are typically referendums on municipal or

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1 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

2 *Ohio Definition of Marriage, Amendment 1 (2004)*, BALLOTPEDIA, [http://ballotpedia.org/Ohio\\_Definition\\_of\\_Marriage,\\_Amendment\\_1\\_%282004%29](http://ballotpedia.org/Ohio_Definition_of_Marriage,_Amendment_1_%282004%29) [<http://perma.cc/HU52-XZ9N>].

3 2012 Ballot Measures, BALLOTPEDIA, [https://ballotpedia.org/2012\\_ballot\\_measures](https://ballotpedia.org/2012_ballot_measures) [<https://perma.cc/85LG-M8FL>]. See generally Kathleen E. Hull, *The Political Limits of the Rights Frame: The Case for Same-Sex Marriage in Hawaii*, 44 SOC. PERSP. 207 (2001).

4 See generally AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX (2012).

5 See *id.* Over 100 additional referendums and initiatives have been attempted but have been unsuccessful in making it to the ballot box due to pre-ballot *judicial* challenges or ineffectual petition collection. *Id.*

statewide nondiscrimination laws (40%) and ballot measures about domestic partnerships or same-sex marriage (31%).<sup>6</sup> Almost a quarter of the additional ballot measures are legal-restrictive initiatives intending to restrict future nondiscrimination laws and eliminate government support for homosexuality more broadly.<sup>7</sup>

There are two central questions in the study of anti-gay ballot measures. First, there is the question of whether these referendums and initiatives are majoritarian tyranny due to the low passage rate of ballot measures on civil rights. Disproportionately, organized conservative movement actors sponsor these ballot measures to oppose LGBT rights, although many same-sex marriage bans were legislatively referred initiatives. Rarely do LGBT organizers propose a vote on their rights.<sup>8</sup> Between 1974 and 2012, almost 70% of these ballot measures resulted in either the repeal of a LGBT rights law or the creation of a new anti-gay law.<sup>9</sup> Although many of these measures are challenged in post-ballot judicial review, the high passage rate of said measures is used as evidence for the tyranny of direct democracy for LGBT rights.

Second, this Article pushes beyond the question of legal tyranny to the extra-legal consequences of anti-gay ballot measures. Ballot measures impact the LGBT community in the affected municipality or state, the broader LGBT movement, and the psychological health of lesbian, gay, and bisexual individuals. In this Article, I extend the existing arguments that call for stricter judicial scrutiny of referendums and initiatives to argue for a more holistic understanding of anti-gay ballot measures that accounts for the extra-legal impact of direct democracy on the LGBT community, movement, and individual. I argue that even when these referendums and initiatives do not result in anti-gay outcomes at the ballot box, they tyrannize the LGBT community.

Part I of this Article will provide a brief history of anti-gay ballot measures from 1974 to 2012. Part II will consider the legal literature on whether or not these ballot measures are tyrannical. Part III will analyze the community, movement, and psychological consequences of these ballot measures.

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<sup>6</sup> Amy L. Stone, Subject of Ballot Measure (unpublished chart) (on file with author).

<sup>7</sup> *Id.*

<sup>8</sup> See *id.* (documenting the number of ballot measures initiated by the LGBT community).

<sup>9</sup> *Id.* See generally STONE, *supra* note 4.

## I. A BRIEF HISTORY OF BALLOT MEASURES

Ballot measures on LGBT rights emerged at the municipal level as part of a reaction to the advances of the emerging gay and lesbian movement. In the 1970s, the gay and lesbian movement passed municipal nondiscrimination ordinances that provided protections in housing, employment, and/or public accommodations based on sexual orientation.<sup>10</sup> By 1974, the movement had successfully passed fourteen of these ordinances in municipalities across the country with only routine opposition.<sup>11</sup> In 1974, Boulder, Colorado community members collected petitions to put their ordinance up for referendum, but the opposition was relatively unorganized and received little national attention.<sup>12</sup> It was not until 1977 that a conservative anti-gay countermovement organized to oppose the growing successes of the gay and lesbian movement.<sup>13</sup>

The Religious Right is a “broad coalition of profamily [sic] organizations and individuals who have come together to struggle for a conservative Christian vision in the political realm.”<sup>14</sup> The anti-gay Religious Right emerged within the New Right from the rising involvement of evangelical Christians in politics in the 1970s, specifically the beginning of the pro-life movement in response to *Roe v. Wade*,<sup>15</sup> the development of the antifeminist movement to defeat the Equal Rights Amendment (ERA), and the mobilization to respond to the growth of the lesbian and gay movement.<sup>16</sup> Although not all campaign leaders or actors involved in municipal or state ballot measures may identify as members of the Religious Right, scholars consistently analyze these campaigns as part of a broader movement agenda; most campaigns are well-networked with national Religious Right organizations and share master frames about LGBT rights to sway public opinion.<sup>17</sup> In general, the Religious Right is far

<sup>10</sup> See generally JAMES W. BUTTON ET AL., *PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES* (1997).

<sup>11</sup> *Id.* at 69 (detailing the history of the ordinances). See generally Mary Bernstein, *Celebration and Suppression: The Strategic Use of Identity by the Lesbian and Gay Movement*, 103 AM. J. SOC. 531 (1997) (analyzing the routine opposition against these movements).

<sup>12</sup> See STONE, *supra* note 4, at 13.

<sup>13</sup> See BUTTON ET AL., *supra* note 10, at 68.

<sup>14</sup> DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 9 (1997).

<sup>15</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>16</sup> See SARA DIAMOND, *ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES 161–64* (1995). See generally JEAN HARDISTY, *MOBILIZING RESENTMENT: CONSERVATIVE RESURGENCE FROM THE JOHN BIRCH SOCIETY TO THE PROMISE KEEPERS* (1999).

<sup>17</sup> See generally KIMBERLY B. DUGAN, *THE STRUGGLE OVER GAY, LESBIAN, AND BISEXUAL RIGHTS: FACING OFF IN CINCINNATI* (2005); TINA FETNER, *HOW THE RELIGIOUS*

more successful in the arena of ballot measures than they are on the legislative or judicial level.<sup>18</sup> The movement also deploys more radical claims about gay rights for a public audience than they do for a judicial or legislative audience.<sup>19</sup>

In 1977, celebrity Anita Bryant, a former Miss America contestant and spokesperson for Florida Orange Juice, led a campaign against the Dade County, Florida nondiscrimination ordinance.<sup>20</sup> Bryant and the group Save Our Children, Incorporated gained national attention with their rhetoric about the dangers of gay rights, specifically their arguments about religious rights and the influence on children, implying that gay men were pedophiles looking to recruit children.<sup>21</sup> Many scholars point to the Dade County conflict and the national attention to gay rights issues in 1977 for motivating an upsurge in lesbian and gay activism across the country during this time.<sup>22</sup> The form of the Dade County ballot measure—reactive opposition to the passage of pro-gay legislation—was the most common type of anti-gay ballot measure during this time period.<sup>23</sup>

Shortly after Dade County's ballot measure, California State Senator John Briggs, who worked with Bryant on her campaign, sponsored the California Defend Our Children Initiative, a response to a 1975 California law that protected gay and lesbian teachers from being fired.<sup>24</sup> Popularly called the Briggs Initiative, this new law would have required the firing of teachers who were lesbian or gay, or who advocated homosexuality.<sup>25</sup> Rather than a referendum to overturn an existing law, this initiative was an attempt to write a new, anti-gay law through the ballot measure process.<sup>26</sup> The Briggs Initiative was "[o]verwhelmingly opposed by teachers' unions and then-Governor Ronald Reagan" and lost by a million votes.<sup>27</sup>

RIGHT SHAPED LESBIAN AND GAY ACTIVISM (2008); JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S (1996); HARDISTY, *supra* note 16; HERMAN, *supra* note 14.

<sup>18</sup> See ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 143–45 (2005); see also Regina Werum & Bill Winders, *Who's "In" and Who's "Out": State Fragmentation and the Struggle over Gay Rights, 1974-1999*, 48 SOC. PROBS. 386, 400–02 (2001).

<sup>19</sup> See Joseph Mello, *Rights Discourse and the Mobilization of Bias: Exploring the Institutional Dynamics of the Same-Sex Marriage Debates in America*, 66 STUD. L. POL. & SOC'Y 1, 2–3, 22 (2015).

<sup>20</sup> See BUTTON ET AL., *supra* note 10, at 68.

<sup>21</sup> See FRED FEJES, GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY 96 (2008).

<sup>22</sup> See generally *id.*; FETNER, *supra* note 17.

<sup>23</sup> See generally STONE, *supra* note 4.

<sup>24</sup> HARDISTY, *supra* note 16, at 100.

<sup>25</sup> *Id.*; FEJES, *supra* note 21, at 181–212.

<sup>26</sup> HARDISTY, *supra* note 16, at 100; FEJES, *supra* note 21, at 181–212.

<sup>27</sup> STONE, *supra* note 4, at 14.

In the mid-1980s the Religious Right harnessed panic and fear about AIDS to increase fundraising and anti-gay animosity.<sup>28</sup> In 1986, Lyndon LaRouche sponsored a statewide HIV/AIDS initiative which required mandated state reporting of individuals with AIDS, the inclusion of AIDS in quarantine and isolation statutes, and a limitation on the occupations open to afflicted individuals.<sup>29</sup> Although unsuccessful, the LaRouche initiative led to a series of similar initiatives addressing AIDS in California.<sup>30</sup>

In the late 1980s, the Religious Right also innovated with a new form of anti-gay ballot measure, the legal-restrictive initiative. Legal-restrictive initiatives attempted to constrain future legislation by limiting government support for homosexuality or the possibility of passing LGBT rights legislation in the future, along with typically eliminating any existing protections. The Religious Right developed these initiatives out of the failed Family Protection Act of 1981, attempted federal legislation that included provisions for school prayer, parental control over textbooks, traditional roles for women, and prohibited the promotion or support of homosexuality by the government.<sup>31</sup> In the late 1980s, the movement spearheaded campaigns to eliminate “special rights” based on sexual orientation in the State of Washington, to prohibit the promotion of homosexuality in the California cities of Irvine, Concord, and Riverside, and to require voter approval for LGBT rights laws in Maine, California, and Minnesota (St. Paul).<sup>32</sup> Few of these ballot measures made it on the ballot, but their attempt demonstrates an increasing emphasis within the Religious Right on proactive opposition to LGBT rights.

The two most infamous legal-restrictive initiatives are Oregon Ballot Measure 9<sup>33</sup> and Colorado Amendment 2.<sup>34</sup> The

28 GALLAGHER & BULL, *supra* note 17, at 25–30.

29 See Jay M. Kohorn, *Petition for Extraordinary Relief: If the LaRouche AIDS Initiative had Passed in California*, 15 N.Y.U. REV. L. & SOC. CHANGE 477, 490 (1986); see also Christopher P. Toumey, *Conjuring Medical Science: The 1986 Referendum on AIDS/HIV Policy in California*, 11 MED. ANTHROPOLOGY Q. 477, 488 (1997).

30 Mark Vandervelden, *Californians Say “No on 64,”* ADVOCATE, Dec. 9, 1986, at 10, 11; see also STONE, *supra* note 4, at 20.

31 See Thomas J. Burrows, *Family Values: From the White House Conference on Families to the Family Protection Act*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 336 (John D’Emilio et al. eds., 2000) [hereinafter CREATING CHANGE]. See generally Karen Flax, *Women’s Rights and the Proposed Family Protection Act*, 36 U. MIAMI L. REV. 141 (1981).

32 STONE, *supra* note 4, at 21.

33 *Oregon Government Must Discourage Homosexuality, Measure 9 (1992)*, BALLOTPEDIA, [http://ballotpedia.org/Oregon\\_Government\\_Must\\_Discourage\\_Homosexuality,\\_Measure\\_9\\_\(1992\)](http://ballotpedia.org/Oregon_Government_Must_Discourage_Homosexuality,_Measure_9_(1992)) [<http://perma.cc/2SEJ-8S2R>].

34 *Colorado No Protected Status for Sexual Orientation Amendment, Initiative 2 (1992)*,

Oregon Citizen's Alliance (OCA), led by vocal anti-gay activist Lon Mabon, sponsored legal-restrictive initiatives in the Oregon cities of Corvallis and Springfield in early 1992, which were test cases for the statewide initiative in November 1992.<sup>35</sup> Ballot Measure 9 was one of the most extreme anti-gay initiatives in that it would have eliminated all existing and future nondiscrimination laws, along with requiring the firing of lesbian and gay teachers in public schools (along with anyone openly supportive of lesbian, gay, bisexual, transgender, or queer rights), and the removal of all books approving of homosexuality from public schools and libraries.<sup>36</sup> Ultimately, Oregon voters rejected Ballot Measure 9.<sup>37</sup> In the same election year, the organization Colorado for Family Values (CFV) sponsored Amendment 2, a legalistic initiative that eliminated future and existing gay rights laws in the state.<sup>38</sup> CFV had originally mobilized to defeat an ordinance in conservative Colorado Springs. Colorado Amendment 2 distinguished between "true" minorities and gays by using legal language about "protected classes" and "minority status."<sup>39</sup> CFV innovated with a secular, legalistic argument about LGBT rights that became widely used by Religious Right campaigns across the country. This language included a legalistic argument about how lesbian and gay rights were "special rights" that usurped the rights of "true minorities" like African Americans.<sup>40</sup> Through this argument, the Religious Right appealed to both voters who were ambivalent about civil rights and African American community members.<sup>41</sup> Colorado voters passed Amendment 2,<sup>42</sup> although it was quickly challenged in the courts.<sup>43</sup>

In the next few years, the Religious Right disseminated the legal-restrictive initiative across the United States. Mabon and

BALLOTPEDIA, [http://ballotpedia.org/Colorado\\_No\\_Protected\\_Status\\_for\\_Sexual\\_Orientation\\_Amendment,\\_Initiative\\_2\\_\(1992\)](http://ballotpedia.org/Colorado_No_Protected_Status_for_Sexual_Orientation_Amendment,_Initiative_2_(1992)) [http://perma.cc/HW5G-Z5MF].

<sup>35</sup> GALLAGHER & BULL, *supra* note 17, at 48–51.

<sup>36</sup> See generally Elizabeth A. Tedesco, "Humanity on the Ballot": The Citizen Initiative and Oregon's War over Gay Civil Rights, 22 B.C. THIRD WORLD L.J. 163 (2002).

<sup>37</sup> Oregon Government Must Discourage Homosexuality, Measure 9 (1992), *supra* note 33.

<sup>38</sup> HARDISTY, *supra* note 16, at 105. See generally LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL (1998).

<sup>39</sup> Colorado No Protected Status for Sexual Orientation Amendment, Initiative 2 (1992), *supra* note 34; see also KEEN & GOLDBERG, *supra* note 38, at 3.

<sup>40</sup> KEEN & GOLDBERG, *supra* note 38, at 133–58; Didi Herman, (Il)legitimate Minorities: The American Christian Right's Anti-gay Discourse, 23 J.L. & SOC'Y 346 *passim* (1996).

<sup>41</sup> See Jean Hardisty & Amy Gluckman, The Hoax of "Special Rights": The Right Wing's Attack on Gay Men and Lesbians, in HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE 209, 218 (Amy Gluckman & Betsy Reed eds., 1997).

<sup>42</sup> Colorado No Protected Status for Sexual Orientation Amendment, Initiative 2 (1992), *supra* note 34.

<sup>43</sup> See *Romer v. Evans*, 517 U.S. 620 (1996); see also KEEN & GOLDBERG, *supra* note 38.

the OCA persisted in sponsoring additional legal-restrictive initiatives (often called “the son of 9”)<sup>44</sup> at the state and town levels for the next two years, passing these initiatives in over thirty towns across the state.<sup>45</sup> Religious Right affiliates across the country collected petitions for imitation Amendment 2 initiatives, and an affiliate of the OCA sponsored a similar initiative in Idaho, which the voters did not pass.<sup>46</sup> The most notable successful legal-restrictive initiative was the passage of Issue 3 in Cincinnati in 1993.<sup>47</sup>

In 1996, the Supreme Court repealed Colorado Amendment 2 in *Romer v. Evans*.<sup>48</sup> This ruling invalidated state legal-restrictive initiatives but also affirmed the legitimacy of sexual orientation as a minority-group category.<sup>49</sup> This case set an important precedent for future Supreme Court rulings, including the abolition of sodomy laws in *Lawrence v. Texas*<sup>50</sup> and the establishment of same-sex marriage rights in *United States v. Windsor*<sup>51</sup> and *Obergefell v. Hodges*.<sup>52</sup>

Although *Romer* foreclosed the use of state legal-restrictive initiatives, the success of these initiatives created tactical repertoires of proactive opposition to LGBT rights that were mobilized to oppose same-sex marriage. In the mid-1990s, many legal-restrictive initiatives included a clause about prohibiting same-sex marriage. Scholars Michael Dorf and Sidney Tarrow argue that anti-gay activists engaged in anticipatory counter mobilization, opposing same-sex marriage before it would be realistically recognized by the courts or legislatures.<sup>53</sup> After the 1993 Hawaii Supreme Court case, *Baehr v. Lewin*,<sup>54</sup> the Religious Right mobilized in anticipatory counter mobilization to pass the Federal Defense of Marriage Act (DOMA)<sup>55</sup> in 1996 and fifteen

<sup>44</sup> See STONE, *supra* note 4, at 87.

<sup>45</sup> See ARLENE STEIN, *THE STRANGER NEXT DOOR: THE STORY OF A SMALL COMMUNITY'S BATTLE OVER SEX, FAITH, AND CIVIL RIGHTS* 27 (2001).

<sup>46</sup> See Daniel Levin, *The Constitution as Historical Symbol in Western Anti-gay Rights Initiatives: The Case of Idaho*, in *ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES* 33, 36 (Stephanie L. Witt & Suzanne McCorkle eds., 1997).

<sup>47</sup> See DUGAN, *supra* note 17, at 9–10.

<sup>48</sup> *Romer*, 517 U.S. 620; see also JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* 22 (2002).

<sup>49</sup> *Romer*, 517 U.S. at 632–36. However, municipal legal-restrictive ordinances continued in the Midwest. See generally STONE, *supra* note 4.

<sup>50</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>51</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>52</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>53</sup> See Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 463 (2014).

<sup>54</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>55</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), declared unconstitutional by *United States v. Windsor*, 133 S. Ct. 2675 (2013).

statutory DOMAs in states like Arizona, Georgia, Utah, Idaho, and Michigan in 1995 and 1996.<sup>56</sup> Similarly, after the legalization of civil unions in Vermont in 1999 and same-sex marriage in Massachusetts in 2004, the Religious Right sponsored a series of state constitutional amendment initiatives across the country to forbid same-sex marriages. The first statewide ballot measures on same-sex marriage were in 1998 in Alaska and Hawaii, two states where court cases had authorized the possibility of legal same-sex marriage.<sup>57</sup> Long before same-sex marriage was legal in Massachusetts, the Religious Right sponsored citizen initiatives or campaigned to support legislatively-referred constitutional amendments on the ballot. Some of these ballot measures were “super-DOMAs” that forbade both same-sex marriage and broader relationships, such as domestic partnerships and recognition rights.<sup>58</sup> For over a decade, the same-sex marriage ban was the Religious Right’s most successful ballot measure tactic.<sup>59</sup> Until 2012, voters passed all bans except one, most by a large margin of support. The LGBT movement struggled to defeat same-sex marriage bans due to the lack of voter support for same-sex marriage, limited movement resources, and inexperienced campaigns run in states that rarely had ballot measures on LGBT rights, such as Montana and Missouri.<sup>60</sup>

In early 2008, the California Supreme Court legalized same-sex marriage, and Religious Right organizations quickly collected petitions to put a constitutional amendment on the ballot to ban same-sex marriage in the state. When Proposition 8 was voted on in November of 2008, more than 18,000 same-sex marriages had already been conducted in the State of California.<sup>61</sup> There were two things that were historical about California Proposition 8. First, the initiative was the first time there were legal same-sex marriages conducted in a state that would be rescinded by a ballot measure. Second, the size and

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<sup>56</sup> See Dorf & Tarrow, *supra* note 53, at 450.

<sup>57</sup> See Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People’s Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 215 (1999); see also Goldberg-Hiller, *supra* note 48, at 1.

<sup>58</sup> See Bayliss J. Camp, *Mobilizing the Base and Embarrassing the Opposition: Defense of Marriage Referenda and Cross-Cutting Electoral Cleavages*, 51 SOC. PERSP. 713, 717 (2008).

<sup>59</sup> See STONE, *supra* note 4, at 129–54.

<sup>60</sup> Amy L. Stone, *Winning for LGBT Rights, Losing for Same-Sex Marriage*, in THE MARRYING KIND? DEBATING SAME-SEX MARRIAGE WITHIN THE LESBIAN AND GAY MOVEMENT 135, 161–62 (Mary Bernstein & Verta Taylor eds., 2013).

<sup>61</sup> John Schwartz, *California High Court Upholds Gay Marriage Ban*, N.Y. TIMES (May 26, 2009), [http://www.nytimes.com/2009/05/27/us/27marriage.html?\\_r=0](http://www.nytimes.com/2009/05/27/us/27marriage.html?_r=0) [http://perma.cc/45TU-5JVF].

scale of the campaigns were remarkable. The Religious Right campaign to pass Proposition 8 successfully defeated the largest LGBT campaign in U.S. history, a campaign that dwarfed any other ballot measure campaign that came before it. The passage of Proposition 8 spurred protests across the country and the play 8 by Dustin Lance Black.<sup>62</sup> Like Colorado Amendment 2, this initiative was overruled as unconstitutional in the federal courts, and California same-sex marriages resumed in June of 2013.<sup>63</sup>

The success of the Religious Right in passing same-sex marriage bans was challenged in the 2012 elections. In 2012, there were nine ballot measures: four municipal referendums on nondiscrimination ordinances in Anchorage (Alaska), Royal Oak (Michigan), and the Kansas towns of Salina and Hutchinson; same-sex marriage bans in Minnesota and North Carolina; referendums on same-sex marriage laws in Maryland and Washington; and, a historical first, an initiative sponsored by the LGBT community in Maine to legalize same-sex marriage.<sup>64</sup>

North Carolina voters passed a same-sex marriage ban in May of 2012.<sup>65</sup> After over a decade of successful same-sex marriage bans, the LGBT movement won all four states in the November 2012 election. In Minnesota, voters overturned a same-sex marriage ban, which allowed the later legalization of same-sex marriage in the state.<sup>66</sup> In Maryland and Washington, where the state legislatures had legalized same-sex marriage, voters elected to retain the legislation through a referendum.<sup>67</sup> And Maine voters legalized same-sex marriage through an initiative.<sup>68</sup> However, only the referendum in Royal Oak resulted

<sup>62</sup> Jesse McKinley, *Across U.S., Big Rallies for Same-Sex Marriage*, N.Y. TIMES (Nov. 15, 2008), <http://www.nytimes.com/2008/11/16/us/16protest.html> [<http://perma.cc/2BT2-3CT7>]; AM. FOUND. FOR EQUAL RIGHTS, *Why "8," 8*, <http://www.8theplay.com/about-8/> (last visited Dec. 19, 2015).

<sup>63</sup> *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

<sup>64</sup> See *Chart of 2012 Ballot Measure Issues*, BALLOTPEdia, [http://ballotpedia.org/Chart\\_of\\_2012\\_ballot\\_measure\\_issues](http://ballotpedia.org/Chart_of_2012_ballot_measure_issues) [<http://perma.cc/Y9NF-JNGH>].

<sup>65</sup> *North Carolina Same-Sex Marriage, Amendment 1 (May 2012)*, BALLOTPEdia, [http://ballotpedia.org/North\\_Carolina\\_Same-Sex\\_Marriage,\\_Amendment\\_1\\_\(May\\_2012\)](http://ballotpedia.org/North_Carolina_Same-Sex_Marriage,_Amendment_1_(May_2012)) [<http://perma.cc/KQ9Y-BP9C>].

<sup>66</sup> *Minnesota Same-Sex Marriage Amendment, Amendment 1 (2012)*, BALLOTPEdia, [http://ballotpedia.org/Minnesota\\_Same-Sex\\_Marriage\\_Amendment,\\_Amendment\\_1\\_%282012%29](http://ballotpedia.org/Minnesota_Same-Sex_Marriage_Amendment,_Amendment_1_%282012%29) [<http://perma.cc/Y43R-89YC>].

<sup>67</sup> *Maryland Same-Sex Civil Marriage Referendum, Question 6 (2012)*, BALLOTPEdia, [http://ballotpedia.org/Maryland\\_Same-Sex\\_Civil\\_Marriage\\_Referendum,\\_Question\\_6\\_%282012%29](http://ballotpedia.org/Maryland_Same-Sex_Civil_Marriage_Referendum,_Question_6_%282012%29) [<http://perma.cc/D669-GTPR>]; *Washington Same-Sex Marriage Veto Referendum, Referendum 74 (2012)*, BALLOTPEdia, [http://ballotpedia.org/Washington\\_Same-Sex\\_Marriage\\_Veto\\_Referendum,\\_Referendum\\_74\\_%282012%29](http://ballotpedia.org/Washington_Same-Sex_Marriage_Veto_Referendum,_Referendum_74_%282012%29) [<http://perma.cc/Z3MG-LM75>].

<sup>68</sup> *Maine Same-Sex Marriage Question, Question 1 (2012)*, BALLOTPEdia, [http://ballotpedia.org/Maine\\_Same-Sex\\_Marriage\\_Question,\\_Question\\_1\\_\(2012\)](http://ballotpedia.org/Maine_Same-Sex_Marriage_Question,_Question_1_(2012)) [<http://perma.cc/9HJZ-39Q4>].

in the retention of a nondiscrimination ordinance; in the other three cities, Religious Right scare tactics about transgender women may have influenced voters' decision.<sup>69</sup>

*Obergefell* forecloses any future marriage ban ballot measures, but the Religious Right still mobilizes against state and municipal nondiscrimination laws with ballot measures.<sup>70</sup> Increasingly, these referendums focus on protections for gender identity, making transgender rights central to Religious Right campaigns.<sup>71</sup>

## II. THE TYRANNY OF THE MAJORITY

There are legal, social, and political questions about the consequences of anti-gay ballot measures. Scholars have long debated the merits of direct democracy itself, whether it is a tyranny of the majority or an ideal form of citizen governance. K.K. DuVivier likens the citizen-initiated ballot measure to a "genie" being let out of bottle by the Progressive and Populist movements that advocated for direct democracy.<sup>72</sup> Activists idealized these initiatives as a purer form of democracy that was devoid of the special interests of representative democracy. However, "unintended consequences arise from the genie master's ignorance rather than greed" in the case of citizen voters.<sup>73</sup> There are ongoing questions about whether ballot measures reflect the will of the majority due to problems with voter fatigue,<sup>74</sup> voter turnout,<sup>75</sup> voter education,<sup>76</sup> and voter confusion.<sup>77</sup>

<sup>69</sup> Khalil AlHajal, *Gay Rights Ordinance Passes in Royal Oak*, MLIVE (Nov. 5, 2013, 9:30 PM), [http://www.mlive.com/news/detroit/index.ssf/2013/11/gay\\_rights\\_ordinance\\_pases\\_in.html](http://www.mlive.com/news/detroit/index.ssf/2013/11/gay_rights_ordinance_pases_in.html) [<http://perma.cc/AD9P-CTNK>]; William Yardley, *Anchorage Voters Reject Extension of Rights Protections to Gay Residents*, N.Y. TIMES (Apr. 4, 2012), <http://www.nytimes.com/2012/04/05/us/proposition-5-gay-rights-anchorage-alaska.html>.

<sup>70</sup> Editorial, *In Houston, Hate Trumps Fairness*, N.Y. TIMES (Nov. 4, 2015), <http://www.nytimes.com/2015/11/05/opinion/in-houston-hate-trumped-fairness.html>; Alan Hickman, *Gay and Lesbian Movement*, ENCYCLOPEDIA ARK. HIST. & CULTURE, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=1177> [<http://perma.cc/H9XE-NLXK>].

<sup>71</sup> See STONE, *supra* note 4, at 170.

<sup>72</sup> K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045 (2007).

<sup>73</sup> *Id.* at 1050.

<sup>74</sup> See Shaun Bowler et al., *Ballot Propositions and Information Costs: Direct Democracy and the Fatigued Voter*, 45 W. POL. Q. 559 (1992).

<sup>75</sup> See Caroline J. Tolbert et al., *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 42 AM. POL. RES. 625 (2001).

<sup>76</sup> See Michele S. Moses & Lauren P. Saenz, *Hijacking Education Policy Decisions: Ballot Initiatives and the Case of Affirmative Action*, 78 HARV. EDUC. REV. 289 (2008).

<sup>77</sup> See generally Elise Hofer, *The Case for Judicial Review of Direct Democracy*, 4 J.L. 49 (2014).

Many scholars contend that the referendum and initiative processes can be tyrannical assertions of majority power over minorities.<sup>78</sup> In her early work, Barbara Gamble argues, “Typically, civil rights laws seek to shift political power from the majority to the minority, creating a conflict steeped in self-interest. Thus, where the civil rights of a political minority are at stake, the absence of the representative filter opens the door to the tyranny.”<sup>79</sup> Other scholars have argued that direct democracy “uniquely facilitate[s] majoritarian oppression of disfavored minority interests.”<sup>80</sup> The main evidence for the tyrannical nature of these measures is the frequency with which voters reject civil rights at the ballot box. The low passage rate of referendums on civil rights measures suggests that civil rights measures fare poorly when subject to majority approval. The passage rates are even more dramatic for anti-civil rights initiatives, such as affirmative action bans, AIDS policies, housing and public accommodations for racial minorities, English language laws, and same-sex marriage bans.<sup>81</sup> Three-quarters of initiatives on these topics are enacted to restrict or eliminate minority rights in some way.<sup>82</sup> The exceptions to this pattern are initiatives that focus on women’s issues such as women’s suffrage, the Equal Rights Amendment (ERA), and reproductive rights issues, in which the passage rate is similar to other forms of citizen initiatives.<sup>83</sup> The greater success of ballot measures on women’s issues is partly a consequence of the demographic prominence of women; comparatively, the first large-scale government survey of sexual orientation, the National Health Interview Survey, reported in July 2014, that less than three percent of Americans identify as gay, lesbian, or bisexual.<sup>84</sup>

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<sup>78</sup> See generally DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* (2004); Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: An Extension*, 42 AM. J. POL. SCI. 1020 (1998); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997); Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304 (2007); Daniel C. Lewis, *Direct Democracy and Minority Rights: Same-Sex Marriage Bans in the U.S. States*, 92 SOC. SCI. Q. 364 (2011).

<sup>79</sup> Gamble, *supra* note 78, at 248.

<sup>80</sup> Hofer, *supra* note 77, at 57.

<sup>81</sup> LYDIA CHAVEZ, *THE COLOR BIND: CALIFORNIA’S BATTLE TO END AFFIRMATIVE ACTION* (1998); Jodi Miller, “*Democracy in Free Fall: The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*,” 1999 N.Y.U. ANN. SURV. AM. L. 1.

<sup>82</sup> Gamble, *supra* note 78, at 245.

<sup>83</sup> THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 97–98 (1989).

<sup>84</sup> Sandhya Somashekhar, *Health Survey Gives Government Its First Large-Scale Data on Gay, Bisexual Population*, WASH. POST (July 15, 2014), [http://www.washingtonpost.com/national/health-science/health-survey-gives-government-its-first-large-scale-data-on-gay-bisexual-population/2014/07/14/2db9f4b0-092f-11e4-bbf1-cc51275e7f8f\\_story.html](http://www.washingtonpost.com/national/health-science/health-survey-gives-government-its-first-large-scale-data-on-gay-bisexual-population/2014/07/14/2db9f4b0-092f-11e4-bbf1-cc51275e7f8f_story.html)

Ballot measures on LGBT rights require the strong support of heterosexual allies in order to pass.

The tyrannical aspects of direct democracy have led to the call for stricter pre-ballot and post-ballot judicial review of ballot measures,<sup>85</sup> along with harsher requirements for initiative petition collecting. Historically, the LGBT movement has effectively used both pre- and post-ballot judicial review to subvert direct democracy. In her book *Out of the Closets and into the Courts*, Ellen Ann Andersen traces the history of judicial challenges to anti-gay ballot measures from 1974 to 2003.<sup>86</sup> National organizations, like Lambda Legal, and local campaigns alike, have systematically filed pre-ballot legal challenges, which led to the deterrence of multiple legal-restrictive initiatives in the 1990s.<sup>87</sup> Some of the most tyrannical ballot measures have been deflected before petition collection and voting. Additionally, two extreme forms of anti-gay initiatives—legal-restrictive initiatives and same-sex marriage bans—have been overturned by post-ballot judicial review.<sup>88</sup> Other ballot measures—such as referendums on municipal nondiscrimination laws—typically do not foreclose political actors from passing said legislation again in the future.<sup>89</sup> Thus, the high passage rate of anti-gay ballot measures is mitigated by pre- and post-ballot legal challenges. However, post-ballot legal challenges may be successful years or decades after an anti-gay initiative, leaving residents of that city or state with anti-gay laws and policies in the meantime.

This literature on the tyrannical nature of anti-gay ballot measures focused disproportionately on the constitutionality of initiatives during pre-ballot judicial review, the high passage rate of ballot measures as evidence for tyranny, and broader

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[<http://perma.cc/M6U9-ECT3>].

<sup>85</sup> Hofer, *supra* note 77, at 52. See generally Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259 (2008); Anya J. Stein, *The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343 (2009).

<sup>86</sup> ANDERSEN, *supra* note 18.

<sup>87</sup> *Id.* at 143–74; STONE, *supra* note 4, at 63–90.

<sup>88</sup> See ANDERSEN, *supra* note 1887.

<sup>89</sup> Indeed it is common for the same city to have multiple referendums over a period of decades about these nondiscrimination ordinances. For example, Houston, Texas, had two referendums in January of 1985 on nondiscrimination protections, a vote on domestic partnerships in 2001, and a vote on a nondiscrimination ordinance in 2015. Ferndale, Michigan, had three separate referendums and initiatives on nondiscrimination ordinances in November 1991, February 2000, and November 2006. In the final referendum, a nondiscrimination ordinance was passed. Cincinnati, Ohio, had a legal restrictive initiative in 1993 and a vote to rescind the legal restrictive initiative in 2006. Miami-Dade, Florida, had referendums on nondiscrimination ordinances in 1977, 1978, and 2002.

philosophical questions about whether or not referendums and initiatives allow for a tyranny of the majority. This Article presses this question of tyranny further, to examine the extra-legal consequences of said ballot measures. Even if direct democracy does not result in a negative legal outcome, I argue that there are extra-legal consequences due to the campaigning by the Religious Right and LGBT movement.

### III. EXTRA-LEGAL CONSEQUENCES

Beyond sociolegal questions about the democratic nature of anti-gay ballot measures, there are extra-legal ramifications for the LGBT community and individuals who live in municipalities or states experiencing a ballot measure. From the drain on community monetary resources to the exacerbation of secondary marginalization within the LGBT movement, these referendums and initiatives have consequences at the local, state, and national levels. Many scholars document the psychological toll for lesbian, gay, and bisexual individuals experiencing a local anti-gay ballot measure.<sup>90</sup> Some of these community, movement, and individual consequences can be productive; anti-gay campaigns result in new community organizations, escalated mobilization within the movement, and stronger voting habits. However, most anti-gay ballot measures produce negative outcomes for the LGBT community, movement, and individuals.

First, I focus on how the LGBT community in a particular city or state is impacted by a local ballot measure. Large-scale, organized campaigns must be mobilized to fight anti-gay ballot measures. Consistently, lesbian and gay ballot measure campaigns struggle with marshalling enough resources and funding to run successful campaigns.<sup>91</sup> Ballot measure campaigns are frequently unanticipated, have to be mobilized quickly, and require much funding. The campaign to fight Proposition 8, the same-sex marriage initiative in California in

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<sup>90</sup> Unfortunately, little of this work has included transgender individuals. Given the increase in anti-transgender ballot measures and the increasing use of anti-transgender framing by Religious Right campaigns, future work should include transgender individuals in studies of the impact of anti-LGBT animus. See Ellen D.B. Riggle et al., *Marriage Amendments and Lesbian, Gay, and Bisexual Individuals in the 2006 Election*, 6 SEXUALITY RES. & SOC. POL'Y 80 (2009); Sharon Scales Rostosky et al., *Lesbian, Gay, and Bisexual Individuals' Psychological Reactions to Amendments Denying Access to Civil Marriage*, 80 AM. J. ORTHOPSYCHIATRY 302 (2010) [hereinafter Rostosky, *Psychological Reactions*]; Sharon Scales Rostosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. COUNSELING PSYCHOL. 56 (2009); Glenda M. Russell & Jeffrey A. Richards, *Stressor and Resilience Factors for Lesbians, Gay Men, and Bisexuals Confronting Antigay Politics*, 31 AM. J. COMMUNITY PSYCHOL. 313 (2003).

<sup>91</sup> See STONE, *supra* note 4, at 133–35.

2008, spent \$43.3 million, shattering campaign-spending records and outspending most gubernatorial campaigns.<sup>92</sup> The Proposition 8 campaign spent more money than the combined funds of twenty-four other campaigns to fight same-sex marriage bans in other states.<sup>93</sup> Although some of these funds were raised from out-of-state contributors, anti-gay ballot measures are a direct financial strain on the communities in which they take place.<sup>94</sup> This demand for resources in ballot measure campaigns can draw resources away from LGBT community non-profit organizations, health organizations, community centers, and businesses, along with other ongoing activist projects and Democratic candidates.<sup>95</sup> The funds raised during ballot measure campaigns do not result in long term products for the local community; these funds often disappear into thin air as political ads or consulting fees rather than fueling durable community organizations. Oftentimes, even the political ads crafted to fight the ballot measure do not change public opinion about LGBT issues. In the 2000s, polling consultants advised many marriage ban campaigns to run political ads that did not focus on same-sex marriage. Instead, campaigns ran ads focusing on the damaging impact of revising the state constitution.<sup>96</sup> One campaign organizer remarked, "We spent a quarter of a million dollars on a big ad buy [about the constitution] and still lost with thirty percent of the vote. In the months following the campaign I really thought about the benefits of a gay-positive ad, that the community would have been better off."<sup>97</sup>

In addition to financial resources, successful campaigns have to engage in mass mobilization of leaders and volunteers. In each state with such marriage bans, including states like Arkansas and Louisiana, the LGBT community had to mobilize a response to the Religious Right.<sup>98</sup> Organizers of inexperienced campaigns complained that it diverted local movement resources away from ongoing projects like anti-bullying or anti-violence laws and instead focused activist energy on same-sex marriage.<sup>99</sup> Even a municipal ballot measure may require over 10,000 volunteers to make phone calls, do door-to-door canvassing to talk to voters,

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<sup>92</sup> Justin Ewers, *California Same-Sex Marriage Initiative Campaigns Shatter Spending Records*, U.S. NEWS & WORLD REP. (Oct. 29, 2008, 1:06 PM), <http://www.usnews.com/news/national/articles/2008/10/29/california-same-sex-marriage-initiative-campaigns-shatter-spending-records> [<http://perma.cc/JHB8-HU7R>].

<sup>93</sup> STONE, *supra* note 4, at xiii.

<sup>94</sup> *Id.* at 71–72, 134–35.

<sup>95</sup> *Id.* at xxvii.

<sup>96</sup> *Id.* at 145.

<sup>97</sup> *Id.*

<sup>98</sup> Stone, *supra* note 60.

<sup>99</sup> STONE, *supra* note 4, at 133.

put up yard signs, and organize rallies. This requires the mobilization of heterosexual volunteers as well as broad community coalitions. In cities where the ballot measure is a referendum response to a passed nondiscrimination ordinance, there is typically an existing organization or coalition of individuals who worked to pass the nondiscrimination ordinance.<sup>100</sup> This organization frequently mobilizes to run a campaign when the ordinance is challenged in a referendum. When the Religious Right engages in proactive opposition by proposing anti-gay initiatives or constitutional amendments, the LGBT movement has to mobilize in new and unexpected ways. In her study of an anti-gay initiative in Timbertown, a small town in Oregon targeted by the OCA in the 1990s, sociologist Arlene Stein documents the mobilization that had to happen in a town with no pre-existing LGBT organizations.<sup>101</sup> Progressive locals met in private homes, worked with no paid staff, and engaged in a personal campaign with their neighbors.<sup>102</sup> When Louisiana had a legislative-initiated constitutional amendment to ban same-sex marriage, LGBT organizers in the state had never coordinated a statewide campaign of any kind.<sup>103</sup> The marriage ban required the formation of a statewide coalition and new social networks between organizers.<sup>104</sup> These requirements for mobilization can serve the LGBT community in the long term. In Louisiana and other states with marriage bans, this mobilization frequently extends past the campaign into the formation of statewide LGBT rights organizations that work throughout the year on state legislative issues or protests. In 2010, one-fifth of all existing statewide LGBT rights organizations were founded as a result of marriage ban campaigns or other ballot measures.<sup>105</sup> Other kinds of organizing can also result from these campaigns. After Colorado Amendment 2 passed in 1992, new chapters of Parents and Friends of Lesbians and Gays (PFLAG) began across the state, public libraries increased their holdings of LGBT books, and a task force to address the climate for LGBT individuals on campus was created at the University of Colorado at Boulder.<sup>106</sup>

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<sup>100</sup> See generally *id.*

<sup>101</sup> STEIN, *supra* note 45, at 16–18.

<sup>102</sup> *Id.* at 17–18.

<sup>103</sup> Telephone Interview with Randy Evans, Political Director, Forum for Equality (May 7, 2010).

<sup>104</sup> *Id.*

<sup>105</sup> STONE, *supra* note 4, at xxiv–xxv, 135. See generally Donald P. Haider-Markel, *Lesbian and Gay Politics in the States*, in *THE POLITICS OF GAY RIGHTS* 290 (Craig Rimmerman et al. eds., 2000) (describing how threatening the gay community can incentivize formation of new gay organizations).

<sup>106</sup> Glenda M. Russell et al., *Trauma, Recovery, and Community: Perspectives on the*

These campaigns are often mobilized to fail. In areas where LGBT rights are unpopular, even the most diligent LGBT campaign cannot succeed. For example, even the most effective campaign to fight same-sex marriage bans failed until there was a dramatic shift in public opinion about same-sex marriage.<sup>107</sup> This situation, in which LGBT organizers and volunteers work tirelessly for a campaign that loses, can be demoralizing and challenging. At the end of a campaign, particularly a losing campaign, there may be little to show for all the effort put in by activists.

This intensified mobilization can dramatize inter-community conflicts, particularly secondary marginalization, city-rural differences, movement ideological division, and racial coalition building.<sup>108</sup> Campaigns require a level of consensus about tactics that can be challenging for any social movement, but particularly challenging for one as diverse as the LGBT movement. These campaigns tend to increase movement dissent and marginalize direct action and queer activism.<sup>109</sup> Queer activism challenges campaign work by advocating for the importance of proud, diverse representations of the LGBT community. In many campaigns, if LGBT lives are represented at all, they are typically white, gender-normative, middle-class gay men or lesbians in monogamous relationships. In so representing the LGBT community, diversity within the movement is stifled and community members who are less palatable to mainstream voters—such as drag queens, transgender women, or leathermen—are hidden from view.<sup>110</sup> In addition, there are frequently tensions over racial coalition building during ballot measure campaigns that exacerbate existing racial marginalization within the LGBT movement.<sup>111</sup> In her study of multiple statewide referendums and initiatives in Maine, Kimberly Simmons elaborates on the divisions between strategies deployed in rural and urban organizing against ballot measures.<sup>112</sup> Specifically, activists in rural areas chafed under the directives of the statewide campaign, which was often housed in an urban area and used tactics that worked better in cities.

Beyond the immediate community, anti-gay ballot measures impact the trajectory of the LGBT movement. Scholars have studied

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*Long-Term Impact of Anti-LGBT Politics*, TRAUMATOLOGY, June 2011, at 14, 20.

<sup>107</sup> STONE, *supra* note 4, at 132.

<sup>108</sup> *Id.* at 155–78; DUGAN, *supra* note 17.

<sup>109</sup> STONE, *supra* note 4, at 85.

<sup>110</sup> *Id.* at 155–78.

<sup>111</sup> *Id.* at 166.

<sup>112</sup> KIMBERLY CLARKE SIMMONS, GRASSROOTS GOES TO THE POLLS: CITIZEN INITIATIVES AND SOCIAL MOVEMENTS 342 (2002).

the relationship between the LGBT movement and the Religious Right as a classic example of a movement-counter movement dynamic. Movements and counter movements operate in a sustained, oppositional relationship in which one movement impacts the other by making contested claims about similar subjects of concern.<sup>113</sup> Counter movements may alter the framing of social issues, create new social institutions, or generally shape movement tactics and strategies.<sup>114</sup> In her book, *How the Religious Right Shaped Lesbian and Gay Activism*,<sup>115</sup> sociologist Tina Fetner documents the continual impact of the Religious Right on the LGBT movement. Fetner argues that the Religious Right has “affected lesbian and gay activists’ choices of which issues to rally around and which issues to put on the back burner. It has blocked or reversed the implementation of policies that would benefit lesbians and gay men.”<sup>116</sup>

Although the campaigns operate on the municipal or state level, anti-gay ballot measures divert movement resources on the national level. Most notably, national LGBT organizations such as the Human Rights Campaign (HRC) and National Gay and Lesbian Task Force (Task Force) provide campaign startup funds, train campaign leaders, strategize about campaign tactics, and invest the time and energy of paid staff members to help run campaigns.<sup>117</sup> This energy can divert movement resources from other activist causes. Escalated mobilization of the Religious Right in sponsoring ballot measures like legal-restrictive initiatives and marriage bans had a strong impact on national

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<sup>113</sup> David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1631 (1996); Mayer N. Zald & Bert Useem, *Movement and Countermovement Interaction: Mobilization, Tactics and State Involvement*, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY 247, 247–48 (Mayer N. Zald & John D. McCarthy eds., 1987).

<sup>114</sup> See generally Nancy Whittier, *The Consequences of Social Movements for Each Other*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 531 (David A. Snow et al. eds., 2004) (discussing women’s movements and the successive counter movements that followed from their influence); Kenneth T. Andrews, *Movement-Counter movement Dynamics and the Emergence of New Institutions: The Case of “White Flight” Schools in Mississippi*, 80 SOC. FORCES 911 (2002) (analyzing the creation of “private segregationist academies” that developed in the U.S. South after court-ordered desegregation); Dawn McCaffrey & Jennifer Keys, *Competitive Framing Processes in the Abortion Debate: Polarization-Vilification, Frame Saving, and Frame Debunking*, 41 SOC. Q. 41 (2000) (investigating how social movements regarding abortion frame their arguments in a competitive response to counter movements); Deana A. Rohlinger, *Framing the Abortion Debate: Organizational Resources, Media Strategies, and Movement-Counter movement Dynamics*, 43 SOC. Q. 479 (2002) (studying social movements’ framing literature regarding abortion and how they create media frames and packages in response to their opposition).

<sup>115</sup> FETNER, *supra* note 17.

<sup>116</sup> *Id.* at xv.

<sup>117</sup> STONE, *supra* note 4, at 142.

organizations and the direction of the movement.<sup>118</sup> In the 1990s, the Task Force developed a program called Fight the Right, which was criticized by organization board member and gay historian John D'Emilio as “thoroughly reactive, completely dependent on what one’s political opponents did rather than on what queer communities wanted or needed.”<sup>119</sup> Some election cycles completely diverted the energy of national organizations. In the November 2004 election, eleven states faced same-sex marriage bans; most of these bans were legislatively referred initiatives and occurred in states like Oklahoma,<sup>120</sup> Georgia,<sup>121</sup> and Kentucky,<sup>122</sup> where the LGBT community had never fought a ballot measure. National organization staff members spent time and funding training campaigns leaders in all eleven states, and they triaged Oregon as the state most likely to be victorious.<sup>123</sup>

Beyond the effect on the community and movement, anti-gay ballot measures have dramatic psychological impacts not only on individuals involved in campaigns, but also lesbian, gay, and bisexual individuals in the broader community. Religious Right campaigns often rely on existing homophobia or transphobia in public opinion in order to win a campaign.<sup>124</sup> Early Religious Right campaigns relied on messaging about gay men as sexual predators, which was transformed in the 1990s into legalistic arguments about “special rights.”<sup>125</sup> Same-sex marriage ban campaigns often emphasize the benefits of children having one mother and one father, along with the sanctity of marriage and concerns about the teaching of same-sex marriage in elementary schools.<sup>126</sup> Since the late 1990s, increasingly Religious Right campaigns to rescind municipal nondiscrimination laws include arguments about transgender individuals, specifically transgender women. These arguments frame transgender women as “men in dresses” trying to invade the bathrooms of women and

<sup>118</sup> *Id.* at 63–90, 129–54.

<sup>119</sup> John D'Emilio, *Organizational Tales: Interpreting the NGLTF Story*, in *CREATING CHANGE*, *supra* note 31, at 469, 485.

<sup>120</sup> *Oklahoma Definition of Marriage, State Question 711 (2004)*, *BALLOTPEDIA*, [http://ballotpedia.org/Oklahoma\\_Definition\\_of\\_Marriage,\\_State\\_Question\\_711\\_\(2004\)](http://ballotpedia.org/Oklahoma_Definition_of_Marriage,_State_Question_711_(2004)) [<http://perma.cc/M937-ND3V>].

<sup>121</sup> *Georgia Marriage Amendment, Question 1 (2004)*, *BALLOTPEDIA*, [http://ballotpedia.org/Georgia\\_Marriage\\_Amendment,\\_Question\\_1\\_\(2004\)](http://ballotpedia.org/Georgia_Marriage_Amendment,_Question_1_(2004)) [<http://perma.cc/9HZ4-7XR4>].

<sup>122</sup> *Kentucky Marriage Amendment (2004)*, *BALLOTPEDIA*, [http://ballotpedia.org/Kentucky\\_Marriage\\_Amendment\\_\(2004\)](http://ballotpedia.org/Kentucky_Marriage_Amendment_(2004)) [<http://perma.cc/SV94-H86N>].

<sup>123</sup> STONE, *supra* note 4, at 134.

<sup>124</sup> Patrick McCreery, *Save Our Children/Let Us Marry: Gay Activists Appropriate the Rhetoric of Child Protectionism*, *RADICAL HIST. REV.*, Winter 2008, at 186; *see also* HERMAN, *supra* note 14.

<sup>125</sup> HARDISTY, *supra* note 16, at 112; HERMAN, *supra* note 14, at 47–48.

<sup>126</sup> STONE, *supra* note 4, at 36–37.

children.<sup>127</sup> The proliferation of these homophobic and transphobic arguments can be psychologically painful for LGBT residents and create a hostile and at times dangerous community to live in.

The evidence for negative psychological impacts is overwhelming and extends beyond the legal outcome of the vote to the campaign experience itself. Although there is some evidence that these campaigns mobilize lesbian, gay, and bisexual individuals to vote more often,<sup>128</sup> to fight for justice and equal rights,<sup>129</sup> and to publicly disclose their sexuality,<sup>130</sup> most research uncovers negative psychological and behavioral impacts. Multiple studies demonstrate that the experience of a local anti-gay campaign is stressful for gay, lesbian, and bisexual residents of a city or state.<sup>131</sup> Studies show that contentious same-sex marriage ballot measures contribute to increased minority stress among lesbian, gay, and bisexual state residents and heightened awareness of anti-gay activity.<sup>132</sup> Surveys taken right before the vote on California Proposition 8 showed high levels of anger and deleterious impacts on personal and familial relationships.<sup>133</sup> The anti-gay rhetoric of campaigns can lead to high rates of fear, creation of stress due to community divisions, heightened awareness of anti-gay activity, and an increase in internalized homophobia.<sup>134</sup> These psychological effects extend beyond LGBT individuals to their family members, who may experience heightened stress and concern for lesbian and gay people in their lives.<sup>135</sup>

The impact of the passage of an anti-gay law also leads to negative psychological effects. Some of the most detailed work has been conducted by scholar Glenda Russell and her colleagues about the effects of Colorado Amendment 2. A longitudinal study of lesbian, gay, and bisexual residents of Colorado during the

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<sup>127</sup> *Id.* at 28; see also Laurel Westbrook & Kristen Schilt, *Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 GENDER & SOC'Y 32, 37 (2014) (discussing the construction of gender panics about transgender women).

<sup>128</sup> See Riggle et al., *supra* note 90.

<sup>129</sup> Rostosky, *Psychological Reactions*, *supra* note 90, at 307.

<sup>130</sup> KEEN & GOLDBERG, *supra* note 39, at 233.

<sup>131</sup> Riggle et al., *supra* note 90, at 86; Rostosky, *Psychological Reactions*, *supra* note 90, at 305.

<sup>132</sup> Rostosky et al., *supra* note 90, at 62; Russell & Richards, *supra* note 90, at 316.

<sup>133</sup> Natalya C. Maisel & Adam W. Fingerhut, *California's Ban on Same-Sex Marriage: The Campaign and its Effects on Gay, Lesbian, and Bisexual Individuals*, 67 J. SOC. ISSUES 242, 253 (2011).

<sup>134</sup> Russell & Richards, *supra* note 90, at 316–22.

<sup>135</sup> Sharon G. Horne et al., *Impact of Marriage Restriction Amendments on Family Members of Lesbian, Gay, and Bisexual Individuals: A Mixed-Method Approach*, 67 J. SOC. ISSUES 358, 370–71 (2011).

legal-restrictive initiative Amendment 2 suggests that the harmful effects of said ballot measures may persist decades after the initiative.<sup>136</sup> More recently, psychologists have found that living in states with instituted bans on same-sex marriage increases the probability of lesbian, gay, and bisexual individuals having psychiatric issues, including anxiety, mood disorders, and alcohol use.<sup>137</sup>

### CONCLUSION

The history of anti-gay ballot measures extends beyond same-sex marriage bans to the first referendums on municipal nondiscrimination ordinances in the 1970s. Legal-restrictive initiatives and same-sex marriage bans have been the most systematic, proactive uses of the initiative process by the Religious Right and have resulted in anti-gay laws and policies that were overturned in the courts. Although both forms of ballot measures have been outlawed by the courts, the Religious Right still persists in sponsoring referendums against municipal ordinances or laws that support LGBT rights. These Religious Right campaigns have become increasingly anti-transgender as the support of lesbian, gay, and bisexual individuals has shifted with the legalization of same-sex marriage.

Although legal scholars have disproportionately focused on the question of whether ballot measures about civil rights are tyrannical, there has been less attention paid to the extra-legal consequences of these referendums and initiatives. Most of the research on extra-legal consequences has been conducted in the fields of sociology and psychology, not political science or law. This research demonstrates that the extra-legal consequences for anti-gay measures are mostly negative and impact the community and individuals directly affected by the referendum or initiative in question, along with the broader trajectory of the LGBT movement. Regardless of the outcome of said measures, the experiences of living in a community with an anti-gay campaign and working on a ballot measure campaign may themselves be challenging for LGBT individuals. When considering the tyrannical aspects of ballot measures, this Article pushes scholars to move beyond analyzing just the rate of passage of said measures and instead suggests that the extra-legal impact of these referendums and initiatives may be just as important.

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<sup>136</sup> Russell et al., *supra* note 106, at 17–18.

<sup>137</sup> Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 AM. J. PUB. HEALTH 452, 454 (2010).

This research calls for a holistic understanding of the impact of ballot measures about civil rights on gender, racial, and sexual minority group members. Other researchers have documented the consequences of these ballot measures for other minority group members, including disenfranchisement.<sup>138</sup> Like other scholars, I echo the need for more stringent judicial review of ballot measures affecting civil rights before these referendums and initiatives go before voters. The extreme extra-legal consequences of these ballot measures for LGBT individuals, communities, and movements should be included during judicial review as part of the potential harm of said initiatives. Although judges are often deferential to the “will of the people,” the complex, layered majoritarian tyranny that is part of anti-gay ballot measures should be considered as a reasonable justification to restrict these referendum and initiatives.

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<sup>138</sup> See generally Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982) (discussing the origins of the political process and the difficulty that minorities have in participating); Johnson, *supra* note 85 (focusing on the effect of ballot measures on the latino/a community and discussing their difficulty in engaging in the political process).

