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# The Politics of Court Driven Morality Policy: A Comparative Analysis of Abortion and Same-Sex Marriage 1971-2015

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The Politics of Court Driven Morality Policy: A Comparative Analysis of Abortion and Same-Sex  
Marriage 1971-2015

by:  
Korey Hughes

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the  
requirements for the degree of Doctor of Philosophy, The City University of New York  
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This manuscript has been read and accepted for the  
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dissertation requirement for the degree of Doctor of Philosophy.

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Abstract:

The Politics of Court Driven Morality Policy: A Comparative Analysis of Abortion and Same-Sex Marriage 1971-2015

Advisor: Professor Thomas Halper

My dissertation had two principal components. First was the development of an argument outlining the five critical differences between abortion and same-sex marriage policy, which highlight the current insufficiency of the existing morality politics framework. These differences were: the duration of the issue, whether it demonstrated an incrementalist or a punctuated equilibrium theory of policy change, the scope of conflict, the degree of institutional entrenchment within the two parties, and the social construction of stakeholders. I then advanced five hypotheses to explain why these differences between the two policy areas in both process and outcome existed, for the purpose of providing greater analytical clarity of my two cases and for developing a larger theory of morality policy outcomes. Abortion and same-sex marriage policy trajectories diverged due to variation in when the issues were nationalized, the prevalence of the targeted group/behavior, complexity of policy implementation, partisan strategy and whether the legal opportunity structure encourages repeat players. I argue that rather than propounding a general theory of morality policy that lumps all morality policies together, a more useful classification scheme would be to create a two-part typology of morality policy that distinguished between moral conflicts, of which abortion would be an example, and moral panics, of which same-sex marriage would be an example.

## Acknowledgments

I would like to start by offering thanks to my amazing advisor Prof. Halper. He offered me endless kindness and encouragement throughout this process. His lightning fast responses to my many drafts and emails were incredibly impressive. I have to thank him for being so pivotal to my development as a scholar, and for the well timed Law and Order jokes. Every student should be so lucky to have such an advisor. My committee members Prof. DiGaetano and Prof. Tien were a great help to me. I thank them for their time and assistance.

My husband Jack has stood by my side for almost my entire adult life, from the time graduate school was a hazily imagined part of my future to the conclusion of this dissertation. No words are adequate to capture the depth of love and respect I have for a life partner who has given me so much. Jack always intuitively knew when I needed to talk about my dissertation at great length, and when I needed to talk about anything but. I could never have done this without him. In my wildest dreams I could not have imagined such a great husband.

I also could have never done this without my parents Michael and Kathy. My father gave me a love of reading and a love of politics, which were both essential to completing this project. No person has had greater influence over my intellectual development. There is little of me that I can't trace back to his influence. I am lucky enough to have a very close relationship with my mother as well. We share common interests both highbrow (politics) and lowbrow (TLC reality television, Lifetime movies). I have the luxury of knowing I can discuss anything with my mother at any time and I would feel completely lost and adrift without her (many) phone calls.

I was so fortunate to gain my “other mother” Florence when I met my husband. I have known my mother-in-law for so long and so intimately sometimes I forget she hasn't actually raised me from birth. Having lived with her for five years, I can attest that her generosity is boundless. A political

science acknowledgments page would not be complete without a dedication to a woman who used to order physical copies of legislation from C-SPAN in the pre-internet era.

I am thankful for the friendship of Ashley, Matt, Matt, Andrew, and Heather. The years of meals, movies, games and most importantly conversations we've shared have been and remain invaluable to me.

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## Chapter One: Introduction

Informed by Lowi's assertion in "Four Politics of Policy, Politics and Choice" (1972) that policies determine politics, over the past twenty-five years scholars have analyzed the distinctive attributes and political patterns of what is referred to as morality policy (Meier 1994, 1999, Oldmixon 2005, Hunter 1991, Roh and Berry 2008). Morality policy has been conceptualized as a discrete policy area with unique policy dynamics. In these accounts, morality policy is defined as involving a clash between fundamentally irreconcilable worldviews. Additionally, morality policy is considered non-technical in nature, carries strong symbolic resonance, and is characterized by low barriers to citizen interest/participation. Mooney, who has written extensively on morality policy, offers four related predictions based on this definition: that morality policy will be defined by low levels of compromise, widespread citizen participation, high public salience, and technical simplicity (Mooney 1995, 2001, 2008).

This literature has produced a volume of case studies of individual morality policies, models of how morality policies operate, studies of what motivates individuals and politicians to take the stances on morality policies that they do, and analyses of how moral conflict shapes elections and partisan attachments. As fruitful as this line of scholarly inquiry has been, significant gaps remain within the morality policy literature. This dissertation seeks to help fill one of those gaps by developing a model that explores why there are two very different sorts of morality policies in American politics: moral conflicts and moral panics, using observations drawn from process tracing two policy case studies, abortion and same-sex marriage.

If one accepts the proposition that morality policy may be seen as its own policy area, abortion and same-sex marriage are both undoubtedly morality policies. Yet the political dynamics in these two fields have proceeded quite differently. My argument is two fold. First, I argue that rather than viewing morality policy as a monolithic whole, it is useful to subdivide "morality policy" into two

types; moral conflicts and moral panics. Then I advance a series of arguments that explain why an issue becomes one of these and not the other. I argue that the two types of morality policy that may be distinguished from each other in the following ways:

1) Duration: Moral conflicts endure for long periods of time in American history, defying definitive resolution, with a consistent level of policy activity. Policy activity is measured in terms of legislation introduced and passed and cases heard. Moral panics, by contrast, are short term.

2) Incrementalism vs. Punctuated Equilibrium Theory: Moral conflicts exhibit incremental policy dynamics while moral panics demonstrate the characteristics of punctuated equilibrium theory.

3) Scope of conflict: This refers both to the levels of government where policy is being created (state, federal, or both) and how broadly or narrowly the boundaries of the policy area are conceived. The scope of conflict in moral conflicts is broader than in moral panics.

4) Institutional entrenchment: This is a function of the three previously listed characteristics. A long running issue with a broad scope of conflict and an incremental rate of policy change becomes embedded in the machinery of American politics. I will be focused on whether and how morality policies embed themselves into the institutional machinery of the two parties. Moral conflicts have a greater degree of institutional importance within the bureaucracy of the two political parties than do moral panics.

5) Social construction of relevant stakeholders: There is a pronounced difference between a policy where there is consensus over what is morally right or wrong and where there is not. Mooney (2001) touches on this distinction somewhat when he discusses “consensual” versus “contentious” moral issues. The former are issues where “...there appears to be a consensus on the value that should be affirmed by the state. Morality policy regarding prostitution and recreational drug use might fall into this category.” Conversely, contentious morality policies are issues where “...redistributive morality policy debate is characterized by at least two legitimate, substantial, and recognized positions

on the issue...Values are 'redistributed' because one group has its value affirmed by a policy change, while another has its values repudiated. Morality policies that fall into this group might include abortion and gambling regulations” (Mooney 2001). It is also important to consider the social construction of the parties on either side of a moral debate. Ingram and Schneider (2007) created a useful model to measure the power and the positive or negative construction of policy target populations. Moral conflicts occur between groups who are relatively equal in their power/social construction, where moral panics occur when powerful and/or well thought of groups are able to tar their opponents as deviants.

Abortion is an example of a moral conflict in American politics. Same-sex marriage on the other hand is a moral panic. I will establish this through detailed case study analysis in chapters two through five while also advancing and testing a series of hypotheses that explain why these two morality policy issues had such different policy trajectories. These hypotheses do not merely describe these two policy areas, but can also be used to determine the political, legal, and institutional forces that turn some moral issues into moral conflicts and others into moral panics in the American political system.

### **Theoretical Framework and Substantive Focus:**

#### 1) Morality Policy Theory

In addition to the characteristics of morality policy listed above, morality policies are often conflated with Carmines and Stimson's (1980) “easy issues,” i.e., issues that are “symbolic rather than technical,” where public opinion is based on “gut reactions.” Activists in the realm of morality policy are driven by their values and desire to forward a particular moral vision, rather than by pure self-interest or financial considerations. Even though drug/alcohol, pornography/obscenity, gun control, and death penalty policies have been at times classified as morality policy by scholars, the greatest degree of consensus in the morality policy literature is that abortion and gay rights policy are the policy

areas that most closely adhere to the morality policy framework. (Oldmixon 2005, Mooney 1995, 2001, 2008, Hunter 1991, Meier 1994, Haider-Markel and Meier 1996, Layman 2001).

Expanding further on the hypotheses of Mooney and Carmines and Stimson, Tatalovich and Davies lay out a series of fourteen testable propositions based on the hypothesized characteristics of morality policy. Their propositions are as follows:

**1a.** Single-issue groups are the lobbies that most increase public awareness and political significance of social regulatory policy. **1b.** Single-issue groups promote absolutist positions on social regulatory policy that polarize the debate as one of nonnegotiable, moral imperatives. **2a.** Courts promote legal change in social regulatory policy by asserting individual rights and liberties against traditional values. **2b.** Federal courts have expanded the opportunities for using litigation to change social regulatory policy outside the normal political process. **3a.** Presidents generally do not exert leadership to change social regulatory policy, although they may make symbolic gestures. **3b.** Republicans exploit social regulatory policy to mobilize conservative voters, whereas Democrats are constrained not to abandon liberalism. **4a.** Congress usually opposed the federal judiciary and aligns itself with the state legislatures on social regulatory policy. **4b.** Electoral pressures encourage Congress to represent traditional values in social regulatory policy. **5a.** Public opinion is often conservative, sometimes moderate, and rarely liberal, but always less intense with respect to social regulations as compared to the ideology of those who favor social change. **5b.** Legal changes in social regulation that make major revisions in community norms will be resisted by the public, especially any “target” populations. **6a.** Agencies of the federal government usually have limited jurisdiction over social regulatory policy. **6b.** The ability of federal agencies to implement social regulations depends on liberal vs. conservative pressures extended by the Congress, presidency, judiciary, supportive groups, and regulated interests. **7a.** Federalism is important to social regulatory policy because historically the states have had jurisdiction over most of these issues. **7b.** Enforcement of social regulatory policy often depends on the compliance of state and local officials as well as on decision makers in the private sector (Tatalovich and Daynes 2011).

## A) Culture Wars

The argument of culture wars theorists is that cultural conflict has displaced economic/material conflict as the primary source of ideological disagreement between the two political parties and (to a lesser extent) the mass public. To summarize: the divide between orthodox religious traditionalists and culturally progressive secularists has superseded the old interdenominational conflicts that characterized earlier eras of American politics. The mobilization of voters around cultural issues, such as abortion and same-sex marriage, introduced a new partisan divide into American partisan politics.

These issues realigned voters based on a new partisan schism, and mobilized activists who, according to culture war theorists, are different from older racial, ethnic, or class based movements (Hunter 1991, Layman 2001, Wuthnow 1989, Hartman 2015).

This process unfolded in the following way. It began with a religious realignment that occurred as interdenominational conflict ebbed and was supplanted by intradenominational conflict amongst religious liberals and religious conservatives. Animosity between Catholics and Protestants was driven by stark socio-economic differences and geographic divergence between the two groups. These differences abated in the sixties and seventies. Once Protestants and Catholics became indistinguishable from each other in terms of average income and educational attainment and less geographically polarized, the “social sources of denominationalism” eroded. The Catholic Church's adoption of the Second Vatican Council also reduced interdenominational enmity. Denomination switching also became increasingly common during this time. In 1955 only four percent of people changed their denominational affiliation. Thirty years later, this number had grown to thirty-three percent. Ten percent of individuals who switched denominations did so at least three times (Wuthnow 1989, Wolfe 2003).

As these large scale socio-economic changes defused interdenominational strife, institutional changes within mainline and evangelical Protestants provoked increased intradenominational clashes. On the conservative side, “[d]uring the 1950's and 1960's an infrastructure was built that gave religious conservatives a strong set of interdenominational ties, a growing body of skilled leaders trained in evangelical colleges and seminaries, and increasing access to the media.” (Wuthnow 1989). The mainline Protestant hierarchy became increasingly political and liberal during this time, further motivating religious polarization along liberal/conservative lines.

These changes were accompanied by partisan realignment based on cultural liberalism/conservatism. Layman (2001) outlines four conditions that need to be present to produce a

transformation of party politics “...the conflict over the issues has to be both broad and deep, the issues must be on the political agenda for a relatively long time, the issues have the capacity to provoke resistance, and the new conflict must cut across the existing lines of partisan cleavage.” As will be discussed later in this chapter, abortion meets all four of these criteria, while same-sex marriage does not, which is one of the reasons why the opposition to same-sex marriage has abated in a way opposition to abortion has not. Once this new transformative issue emerges, there are three types of politicians who benefit from taking stances on it. Members of the minority party may use a new issue to try to gain support at the expense of the majority party, members of “losing factions” within one or both parties may use a new issue to try to gain power within their party, and candidates competing in elections (particularly primary elections) may use a new issue to try to lure new voters in.

George McGovern took this latter strategy in 1972. “Prior to the late 1960's, there was something of a cultural consensus in the party system...neither party contained a large number of secularists nor showed many signs of cultural or moral progressivism...” (Layman 2001). McGovern's candidacy, which was supported by strongly secular, culturally liberal Democrats, began the process of upending that consensus. The legalization of abortion, which met all the criteria outlined above for a realigning issue, did, as well. Activists within the Democratic and Republican parties began polarizing along this new cultural fault line (Adams 1997, Carmines and Woods 2002). At this point, the nascent partisan polarization around moral issues remained an elite phenomenon. It was evident initially amongst party convention delegates and activists, then “...the close similarity between the two parties voting patterns on cultural issues began to disappear in the late 1970's and early 1980's and the level of polarization between the congressional parties' cultural stands increased steadily after that” (Layman 2001). Finally, this elite level polarization filtered down to the mass public who began altering their perceptions of the two parties based on their cultural stances. The partisan split became apparent in Congress by 1979 and amongst the general public by 1988 (Bolce and DeMaio 1999, Layman 2001,

Hartman 2015).

## B) Moral Panic

The concept of moral panic dates back to a methodological dispute amongst British criminologists and sociologists in the late 1960's. In 1968 a group of sociologists formed the National Deviancy Conference to deliberate over whether deviance was “an objectively discernible class of behaviors” or “an ascribed social category.” This group intended to offer a leftist critique of how the concept of deviancy was defined by the Third National Conference of Teaching and Research on Criminology. One of the scholars in attendance, Jock Young, introduced the concept of a “deviancy amplification spiral,” a proto-moral panic theory meant to measure how the media creates and amplifies deviance through sensationalistic stories (Krinsky 2013, Young 1971).

Cohen's *Folk Devils and Moral Panics*, first published in 1972, further expanded on the concept and is often cited as the foundational text for the moral panic literature. Cohen uses a case study analysis of the “mods” and the “rockers,” English juvenile delinquents, to develop a broader theory of moral panics. Cohen describes a five step process of moral panic: first, a “folk devil” is created and their identity and/or behavior is defined as threatening. This threat perception is then broadcast in “recognizable dramatic form” by the media. Following this wave of media attention there is a “rapid build up of public concern.” As the public responds with fear, anger, and disgust at the folk devil, “authorities, politicians, and moral entrepreneurs” call for the solution the problem identified by the media and the public. Finally, the moral panic recedes. (Cohen 2002, Krinsky 2013, Klocke and Muschert 2010). Hall et al., in their analysis of a moral panic about mugging in *Policing the Crisis* use a three pronged definition of moral panic. A moral panic exists when the perception of threat is “out of proportion” to observable empirical reality at both the time of the panic and in hindsight. Additionally, during a moral panic “experts perceive the threat in all but identical terms and talk with one voice about about rates, diagnoses, problems and solutions.” The media “stresses novelty and sudden, dramatic

increases.”

The concept of moral panic became dormant within the scholarly literature during the 1980's. There was almost a complete absence of new work. However, the concept of moral panic enjoyed a resurgence in the 1990's and into the twenty-first century. Goode and Ben-Yehuda (1994) wrote *Moral Panics: The Social Construction of Deviance* which also used a five part model of moral panics with many similarities to Cohen's formulation. They start by identifying the “concern phase,” which is created by an anxiety triggering event; phase two is the “hostility phase,” where the “folk devils” that cause the precipitating event are identified and stigmatized. Phase three, “consensus,” describes the uniformly negative response to the folk devils identified in phase two. Phases four and five identify additional characteristics of the processes that undergird phases one through three: the disproportionality of the response to the problem and the volatility of the moral panic. Moral panics recede as quickly as they emerge.

In terms of where moral panics originate, Goode and Ben-Yehuda distinguish among three sources: the grass-roots model, the elite model, and the interest group model. In the grass-roots model, there is a sudden, widespread mass public reaction against a perceived deviant group. Politicians and the media are reactive in this scenario; rather than proactively creating the moral panic, they respond to it and behave in accordance with public opinion. The moral deviants are latched onto by the public as scapegoats for complex social or political problems that are difficult for individuals to comprehend. For example, the moral panic about satanic child abuse in American daycare centers in the 1980's was really a response to the changing role of women in the workforce and second wave feminism (Nathan and Snedeker 1995). Conversely, in the elite model, “...the major institutions of a society promote a campaign to generate and sustain public moral outrage about a threat from a target category of deviants. The actual intention of the campaign is to divert attention away from real problems in a society, the solution of which would threaten the economic and political interests of the elite” (Victor 1998).



Finally, in the interest group model an interest group(s) creates a moral panic through its ideological advocacy and/or to strengthen its organization. If this is successful the interest group(s) will trigger competitive activity from other groups, accelerating the moral panic. (Goode and Ben-Yehuda 1994, Victor 1998).

This second generation of moral panic literature did not merely re-state the propositions of the first wave in the 1970's, but also debated to what extent the concept should be altered in light of political and technological changes in the decades since the early work of Young, Cohen and their contemporaries. McRobbie and Thornton (1995) introduced the concept of “multi-mediated worlds” to the moral panic literature. They argued that the fragmentation of the media environment since the seventies limited the persuasive power of the “moral crusaders” to control the definition of “folk devils.” Folk devils now have increased power to contest their stigmatization, and it is harder for the media to create a definition of any group or behavior that is widely accepted. Moral panic theory assumes a hierarchical relationship between the “agents of social control” and the “folk devils,” where the folk devils have little agency over how they are perceived and little power to challenge the charges of deviance leveled against them. McRobbie and Thornton predict that the conditions necessary to generate moral panics are rarer now than in earlier eras of American history. Ungar (2014) makes a similar point in his elaboration of the “risk society” concept. Ungar seeks to explain what the “new sources of social anxiety” are and how this contemporary anxiety may be differentiated from moral panic. He also argues that moral conflict between interest groups of relatively equal power has become more common than the hegemonic majority stigmatizing a folk devil population.

Beyond these alterations of the concept, the renewed popularity of the moral panic concept also has led to increased criticism of the concept on both theoretical and methodological grounds. One such criticism is that the moral panic concept carries a level of normative judgment towards its subject inappropriate in scholarly literature. To classify an event as a “moral panic” is to cast a pejorative

judgment on those who create, disseminate, and/or accept the premises of the moral panic. Moral panic becomes “...less an analytic concept than an invidious label applied to claims that sociologists wish to discredit” (Best 2013). Related to this concern over the moral panic concept is the methodological difficulty involved in measuring the disproportionality that is central to multiple models of moral panic. How does one determine that a public, political, or media reaction to a problem is disproportionate? Disproportionate relative to what (Best 2013)?

Klocke and Muschert (2010) argue for a hybrid theory of moral panics, which would synthesize Cohen and Goode and Ben-Yehuda's models into one working framework. They start by defining the concept as “...a particular kind of moral regulation that involves a high threat to moral order, is a problem constructed as highly amenable to social control, yet is not deemed as easily controlled through individuals' self management.” Their model begins with the cultivation stage, which consists of “the emergence of conditions, actors and discourses that make the growth of a moral panic more likely, such as: conflict among competing moral universes or rapid social change, economic or political crisis, [or] media attention to related social problems.” This stage is followed by the operation stage, where the “processes that function during a moral panic” unfold. These processes include distortion of a deviant group/conduct, prediction of future deviance, and then “symbolization” of the subject of the panic. After this comes magnification which is further subdivided into moralization, the “identification of the folk devils and why they are a threat...and typification of their behavior as representative of their inherent evil nature,” officiation by “police, experts, other officials, moral entrepreneurs, and community leaders,” and amplification and regulation. Finally, as the moral panic recedes it enters the dissolution phase. Dissolution may occur through normalization, wherein “a new hegemony is established,” transformation where “the panic results in social, ideological or institutional change,” or dissipation which occurs when the moral panic is debunked or replaced by a new panic.

## 2) Theories of the Policy Process: Punctuated Equilibrium Theory and Incrementalism

One of the most important distinctions between a moral conflict and a moral panic is the difference in the timing and content of policymaking. In order to understand this variation, it is useful to consider two different theories of the policy process and how they represent the policy dynamics of moral panics and moral conflicts.

Punctuated equilibrium theory (PET), first developed by Baumgartner and Jones in the early 1990's, holds that the policy process is defined by long periods of stasis highlighted by short "punctuations" of dramatic policy change. When a policy is in "equilibrium," there is little or no policy change. Since Congress can deal only with a finite number of issues at any given time, Baumgartner and Jones distinguish between "policy subsystem" politics, where a policy is likely to be in equilibrium, and the "macropolitical agenda," where policy punctuation is likely to occur. Baumgartner and Jones use the term "policy subsystem," but the politics of equilibrium is somewhat analogous to the concept of the iron triangle. Policy monopolies are composed of a stable network of government officials/bureaucrats, policy experts, and interest groups. When a policy is in equilibrium, it is usually operating below the radar: low public salience, and little attention beyond the intensely committed members of the policy subsystem. A stable policy subsystem is presided over by a fixed policy monopoly, and has a stable policy image. Policy images are "...a mixture of empirical information and emotive appeals" that both the public and policymakers create and use when making policy in a given area. Baumgartner and Jones continue, "[w]hen a single image is widely accepted and generally supportive of the policy, it is usually associated with a successful policy monopoly. When there is disagreement over the proper way to describe or understand a policy, proponents may focus on one set of policies, while their opponents focus on a different set of issues" (Baumgartner and Jones 2014).

Yet policy change is often rapid and dramatic when it occurs. Punctuated equilibrium theory argues that sudden change happens because policy entrepreneurs are able to exploit exogenous (or

occasionally endogenous) shocks to the policy subsystem that predominated during the equilibrium period. These shocks may take several forms: a natural disaster, an economic crisis, the mobilization of new interest groups or social movements, and, of particular importance to this analysis, judicial rulings. I focus on how judicial rulings affect the political opportunity structure within which activists operate. These shocks introduce new policy actors into the previously quiescent subsystem, and disrupt the policy image, break up the policy monopoly, and facilitate rapid change. In the period of punctuation, policy change is dramatic, not incremental, because once policy change begins, a positive feedback loop develops that accelerates the pace of change after the policy monopoly that characterized the period of stability was broken. Eventually, the momentum generated by the shock dissipates, and equilibrium is restored. This alternating between stasis and change is cyclical.

Baumgartner and Jones tested their theory in several policy areas: pesticides, urban, drug/alcohol, child abuse, nuclear power, tobacco, and environment. Subsequent authors have expanded the study of punctuated equilibrium to discuss local, state, and national budget/appropriations (True 2000), Pacific Northwest forestry (Worsham 1998), state tobacco (Givel 2008), state and federal immigration (Brenner 2009), gun control (True and Utter 2002), welfare (Sabatier and Jenkins-Smith, 1999), telecommunications (Baumgartner and Jones 2009), national security (May, Sapotichne, and Workman 2009), environmental (Speth 2008) and water policies (Crow 2010). Generally speaking, these empirical studies have upheld the basic tenets of punctuated equilibrium theory, with the exception of the article on state tobacco policy, where Givel found only a “symbolic” punctuation in the form of increased mobilization in favor of high state tobacco taxes, without significant policy consequences.

Though PET has been extensively tested using case study methods, no writer discussing morality policies has employed the framework. Comparing the theories of moral panics discussed above with the predictions of PET, similarities between the two models are immediately apparent.

Conversely, incrementalist theory predicts slow and steady policy change without either the stoppages or dramatic swings of punctuated equilibrium theory. Lindblom, in his paradigmatic “The Science of Muddling Through,” distinguishes between the root method, where policy outputs are rationally planned by a government that agrees on mutually desired goals, and the branch method of incremental policy change based on “successive limited comparison.” The policy agenda is sharply curtailed by existent policy and by the limited resources (limited information, time, money, etc.) of policymakers to deviate drastically from the status quo. Lawmakers exist under conditions of uncertainty, and face steep opportunity costs which further limit the universe of potential policy choices (Lindblom 1959).

However, by the 1980's and 1990's, incrementalism was beginning to fall out of fashion. Berry critiqued incrementalist theory for being overly broad and given to at least twelve different and often internally contradictory definitions: “the restriction to non-innovative alternatives, restricting the number of alternatives, sequential consideration of alternatives, limited assessment of policy consequences, dependency of ends on means, simple decision rules,” and, referring to budgetary politics specifically, “lack of attention to the base, smallness of the ultimate change, negotiation among participants with narrow roles, absence of competition, regularity of relationships, [and] lack of effect of external variables” (Berry 1990).

## 2) Venue Shopping

Both abortion and same-sex marriage are policy areas that, thanks to how case law has developed, offer activists ample opportunity to venue shop different branches and levels of American government. Venue shopping allows activists to seek out the most sympathetic courts and lawmakers and control what Schattschneider called the scope of conflict of a given political issue by shrinking or expanding target constituencies and controlling the degree of public salience (Schattschneider 1960). Karch defined the strategic calculus of venue shopping thusly, “Policy issues may be assigned to any of

a variety of institutions, and "there are no immutable rules that spell out which institutions in society must be charged with making which decisions. Decentralization can therefore lead to venue shopping, in which advocates focus on the institutional setting in which they feel they are most likely to experience success" (Karch 2009).

Venue shopping was built into the institutional framework of the United States from the time of the founding. Federalist Papers forty-six through fifty-one elaborate on this concept. James Madison first discusses the relationship between the state and federal governments under the Constitution, predicting that the public will have a stronger personal attachment to their state representatives and that the state and federal legislatures will have some overlap in interests despite their structural separation. Turning to the distribution of power at the national level, Madison lays out in the next four Federalist Papers the justification for the organization of the federal government. The checks and balances exist to make "ambition...counteract ambition" by creating "distinct and separate departments" with "Constitutional control" over each other. A federalist separation of powers system deliberately disperses power, preventing one branch from dominating another, and creates more institutional spaces for legal innovation and the representation of a broader array of interests (Madison 1788, Pfander 2008). Justice Brandeis famously wrote about that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (*New State Ice Co. v. Liebmann* 285 U.S. 262, 1932).

These features of American government may also stymie productivity and efficiency and create gridlock (Weaver and Rockman 1993), which helps explain the PET dynamic. The separation of powers works to maintain equilibrium due to the checks and balances built into the system. Yet it may also facilitate rapid change by providing many venues for activists to target among different branches of the federal government as well as between the state and federal governments.

While venue shopping has been important to the development of both abortion and same-sex marriage policy, opportunities for strategic venue selection vary significantly in the two policy areas. Abortion is a federally protected constitutional right, which is nonetheless subject to widely varying state regulation. Liberalization of abortion laws began at the state level in the 1960's, and since 1973 there has been a high level of abortion activism at both the federal and state legislative levels as well as a steady stream of cases in both federal and state judicial systems. This means that there has been a high number of political venues within which abortion policy may be contested. I argue this had the effect of perpetuating rather than diffusing policy conflict.

Haider-Markel (1997, 1999), Haider-Markel and Meier (1996), and Mucciaroni (2008, 2011) have both discussed venue shopping among gay rights activists. Each found that gay rights groups succeed when they are able to shrink the scope of conflict and target movement activism towards state and local officials, rather than focus on Congress. Pinello (2003, 2006), focusing on the judicial branch, similarly found that pro-gay decisions occur twice as often in state, as opposed to federal courtrooms. So same-sex marriage proponents were faced with an inhospitable climate if they wanted to target Congress or the federal judicial system. Initial successes at the state level were matched with a large scale moral panic backlash in the form of the Defense of Marriage Act in 1996 and a rash of state level same-sex marriage bans, limiting the number of states that could realistically be targeted for an incremental, state-by-state legalization campaign. When the Supreme Court nationalized the issue in the *U.S. v. Windsor* (570 U.S. \_\_\_\_ 2013) decision, overturning part of the Defense of Marriage Act, the change in venue triggered a massive wave of other cases legalizing same-sex marriage. By 2013, a national judicial venue was more receptive because the moral panic against same-sex marriage had dissipated.

#### 4) Policy Change through Litigation

The concept of political opportunity structure is a widely used component of social movement

and interest group theory. Using this construct, various exogenous contextual variables from the environment within which groups operate are examined to determine what conditions facilitate or inhibit movement success and policy change. Tailoring the concept of political opportunity structure to the judicial system, Andersen writes of the legal opportunity structure in *Out of the Closets and into the Courts* (2007). She focuses on three concepts: access to the courts, configuration of power, and alliance and conflict systems. Access to the courts refers to who is granted standing to sue and in what judicial venue, configuration of power refers to the attitudes and preferences of presiding judges and the emphasis on precedents; and alliance and conflict systems measure the degree of interest group involvement in litigation campaigns. Such support may take the form of funding for legal challenges, provision of lawyers/legal staff, amicus briefs, and other types of legal strategizing. Baird and Jacobi's work (Jacobi 2006, Baird and Jacobi 2009a, 2009b) on "judicial signaling" is also relevant to any analysis of how the judiciary shapes the political opportunity structure interest groups operate in. They argue that appellate judges are engaged in a continuous series of communications concerning what types of cases they do and do not want to hear, and that they strategically time when to take cases to maximize the likelihood of a personally desirable outcome. Epstein et al. (2013) maintain that judges are not only motivated by policy/ideological preferences, but by desires for prestige, avoiding difficult cases that involve hard work, promotions, etc.

Within the scholarly literature, there is a great deal of debate over the efficacy of the courts as political actors. Though he is not the only proponent of a limited view of judicial power, Rosenberg (2008) has become the most prominent proponent of what he calls the "constrained court" view. In the two editions of his *The Hollow Hope*, he argues that the judicial branch is ordinarily too weak to act as an independent source of social change. He argues that the judicial branch is too constrained by its reactive nature and reliance on the other two branches of government to implement its rulings.

Litigation is an at best ineffectual and at worst counterproductive method of seeking policy change. In



both editions of the book, he questions the impact of *Roe v. Wade* and describes the strong backlash it engendered. In the second edition, he tackles same-sex marriage, and is similarly pessimistic about the utility of litigation to widely legalize same-sex marriage. I intend to argue that his data on the difficulty of procuring an abortion in socially conservative states bolster my argument about the payoff of an incrementalist anti-abortion strategy, and that his arguments about same-sex marriage have become outdated by recent developments.

### **Statement of the Argument:**

I argue that the morality policy literature needs to distinguish between two very different types of morality policy, each with different policy dynamics. It is necessary first to distinguish between moral conflicts and moral panics. These two types of morality policies may be differentiated from each other by five characteristics: duration, incrementalist vs. punctuated policy process, scope of conflict, institutional entrenchment, and social construction of stakeholders. I analyze legalized abortion as an example of a moral conflict policy and same-sex marriage bans as a policy area that functioned as a moral panic.

I also posit a series of hypotheses that address the question of why abortion is a moral conflict, not a moral panic, and vice versa for same-sex marriage, these are meant to have broader application beyond the facts of my two case studies. They are listed below:

**H1: Nationalization:** When a moral issue is nationalized early in its political development, it is more likely to take on the dimensions of a moral conflict, as opposed to a moral panic.

**H2: Prevalence of morally contested group/behavior:** More prevalent behaviors/larger target populations are more likely to be subject to moral conflicts rather than panics. However, actual prevalence will not always match perceived prevalence in a moral panic.

**H3: Complexity of policy implementation:** Policies that have complicated implementation

processes are more likely to be moral conflicts as opposed to panics. Debates over implementation extend the length of the policy debate, and alterations to implementation protocols may function as incremental policy change.

**H4: Partisan Strategy:** When the political parties come to rely on a morality policy continually perpetuating itself, it is likely to be a moral conflict rather than a moral panic.

**H5: Legal opportunity structure:** The more often the legal opportunity structure, defined as access to the courts, the “legal stock” of available precedents, and judicial receptiveness (Anderson 2007), encourages “repeat players” (Galanter 1974), the more likely the policy will take on the characteristics of a moral conflict as opposed to a moral panic.

Anti-abortion activists have pursued an incrementalist strategy because post-*Roe* judicial decisions provided ample space for abortion restrictions short of fully banning the procedure, such as waiting periods, parental consent, public funding restrictions, late term abortion bans, restrictions on funding international organizations and NGOs and restrictions governing where abortions may be performed. One of the goals of this dissertation is to discredit the common cliché that abortion remains a hot button issue in American politics because it is an issue uniquely and inherently inimical to compromise. As a detailed survey of judicial and legislative politics will make clear, abortion policy is rife with compromises. Continuous yet incremental adjustment to abortion law is the defining feature of post-*Roe* abortion policy. Mainstream anti-abortion activists see strategic value in pursuing an incremental strategy, public opinion is moderate and stable on the issue, and both parties have come to rely on using the abortion issue to rally voters. Currently there are a variety of pending abortion regulations being debated at the state level, including mandatory transvaginal ultrasounds, so-called “heartbeat bills,” regulations concerning equipment and personnel requirements for abortion clinics, longer waiting periods and attempts to ban certain types of abortion procedures (Guttmacher Institute “Laws Affecting Reproductive Health and Rights” accessed 2013). An example of the latter type of

restriction is Kansas's recent adoption of the “Unborn Child Protection against Dismemberment Abortion Act,” a law which “...does not use medical terminology, and its practical impact is uncertain...[b]ut it appears to ban or require alteration of the method known as dilation and evacuation, which is used in nearly all abortions after the 12th to 14th week of pregnancy and is seen by many doctors as the safest and most convenient technique for most women. (Eckholm and Robles 2015).

Even seemingly unrelated policy debates often become embroiled in abortion politics. This is the second component of the scope of conflict concept discussed earlier. There have been continual political battles over public funding of abortion starting with the passage of the Hyde Amendment in 1976, and continuing through the passage of the Affordable Care Act in 2010. Attorney General Loretta Lynch's confirmation was delayed for months over an abortion related dispute with a Senate human trafficking bill. Consider, for example, the Mexico City Policy, also referred to the “global gag rule” that bans international NGO's that “perform or promote” abortion from receiving federal funds. This policy is continually implemented and revoked based on whether the administration in power is Democratic or Republican. There have been other political battles about the funding of the United Nations Population Fund and Planned Parenthood, and over the use of RU-486 (the abortion pill), fetal tissue research, and partial birth abortion. Anti-abortion activists have also lobbied extensively against contraceptives, such as the “morning after pill.” Laws in completely unrelated policy domains, such as bankruptcy law, also have become ensnared in abortion politics. Abortion attitudes have become a pivotal test issue for aspiring political candidates competing in primary elections and often dominate the Senate confirmation hearings of a president’s judicial and executive branch appointees. Anti-abortion activists have not won every policy battle, but they have successfully prevented pro-choice interests from establishing a policy monopoly and a consensually adopted pro-choice status quo (Luker 1980, Saletan 2003, Page 2006, Goldberg 2009).

Same-sex marriage policy developed along a different course. The first round of same-sex

marriage litigation, which occurred in 1971-1974, typified a policy punctuation as defined by PET. These first cases occurred during a wave of gay activism that was touched off by the Stonewall riots in 1969. Stonewall and the resultant activism was a classic policy punctuation. However, after these first three same-sex marriage lawsuits ended in defeat for proponents, the issue slipped again into equilibrium, as defined by a lack of legislative or judicial activity and low public salience. For both strategic and ideological reasons, gay activists decided not to emphasize the marriage issue again until the 1990's. When the issue re-surfaced, it garnered far more attention than the seventies cases but this attention was heavily negative. The specter of judges contravening public opinion, which was strongly opposed to same-sex marriage, in this area triggered a moral panic. When Massachusetts became the first state to legalize same-sex marriage, a similar wave of fear triggered another moral panic which led to the widespread adoption of state level constitutional amendments banning same-sex marriage.

The policy dynamics of abortion and same-sex marriage are quite different from each other, calling into question the utility of some of the underlying assumptions of the morality policy literature, which hypothesize the same policy processes and outcomes for all morality policies. The passage of same-sex marriage bans fit the predictions of PET, and legalization was partially incremental before a policy punctuation that occurred in 2013. Pivotal to the development of both policy areas has been the political opportunity structure constructed by relevant judicial decisions. Venue shopping is discussed by Baumgartner and Jones as one of the mechanisms that causes PET by either diffusing policy conflict and allowing the creation of policy subsystems (causing equilibrium) or providing a high number of venues for policy entrepreneurs to lobby and eventually destabilize a policy monopoly (causing punctuations). In the case of abortion, however, judicially facilitated venue shopping has prevented the policy from entering equilibrium at any point post-1973. In the case of same-sex marriage, venue shopping becomes important in the 1990's and early twenty-first century, as same-sex marriage proponents strategically targeted friendly jurisdictions for litigation and state level lobbying.

Opponents of same-sex marriage successfully got the federal government to take the unusual step of creating marriage law through simultaneous state and federal prohibition campaigns. This state level variation continued until the *Windsor* decision, which has seemingly created a sweeping repudiation of state same-sex marriage bans, despite the seemingly limited scope of the ruling.

In both areas, judicial decisions have profoundly shaped the political environment activists lobby in. Specifically, the way judicial decisions evolved in both areas incentivized activists to strategically venue shop between different branches and levels of government. Post-*Roe* judicial decisions have created a political environment friendly to anti-abortion activists because courts have allowed an increasing degree of restrictions on abortion access short of prohibition. When discussing permissible abortion regulations in *Roe*, the Supreme Court used the trimester framework of pregnancy to determine when and whether the state could regulate abortion. In the first trimester, the abortion decision rested totally with the woman and her physician. In the second trimester, the state could intervene to protect the health of the pregnant woman. Finally, in the third trimester the potential viability of the fetus allows the state to regulate abortion up to proscription in order to protect the fetus as well as the pregnant woman. The right to choose to have an abortion was constituted as a negative rather than a positive right. *Roe* and its companion case, *Doe v. Bolton*, recognized a constitutional right to receive an abortion free of official interference, at least early in pregnancy, but did not guarantee the means to exercise that right. Thus, in 1977 and 1980 in *Maher v. Roe* and *Harris v. McRae* the Supreme Court upheld the constitutionality of state and federal Medicaid restrictions respectively, and eventually later abortion regulations such as waiting periods and parental consent requirements.

Subsequent Supreme Court developments presented a series of setbacks to the anti-abortion movement, though many of them proved to be temporary. In 1982 and 1986, the Supreme Court struck down several abortion restrictions in Ohio and Pennsylvania. However, by their 1989 decision *Webster*

*v. Reproductive Health Services*, the Court signalled an increasing willingness to regulate abortion and growing dissatisfaction with the trimester classification. Chief Justice Rehnquist's plurality opinion advocated for both a rejection of the trimester system and the use of the strict scrutiny standard to evaluate abortion regulations.

Three years later in *Planned Parenthood v. Casey*, the Court did precisely that. They upheld Pennsylvania's mandatory waiting period, informed consent law, and parental consent law, striking down only the spousal consent law, using a new "undue burden" standard. These subsequent abortion opinions facilitated and validated a key strategic shift in the anti-abortion movement: interest groups changed their tactics from lobbying for a complete repeal of *Roe* to a strategy of pressing for ever more burdensome restrictions on access that could be implemented without an overrule of *Roe* and *Doe*. If abortion could not be made *de jure* illegal again, perhaps it could be made *de facto* illegal through the construction of ever more elaborate barriers to getting the procedure. This strategic shift is apparent at the congressional level, where after years of unsuccessfully introducing anti-abortion constitutional amendments and blanket prohibitions, anti-abortion Congressmen shifted to an incrementalist strategy. Starting with the passage of the Hyde Amendment, this strategy proved more successful. Strategic committee shopping is also apparent in Congress as abortion legislation is considered regularly by four different congressional committees and occasionally by others. Originally, the Judiciary Committee handled the vast majority of abortion legislation but as the prohibition strategy shifted to the incrementalist strategy, however, the Commerce, Appropriations, and International Affairs committees became increasingly prominent (Ainsworth and Hall 2011). This flexibility in committee referrals is yet another example of the ability of anti-abortion activists to prevent abortion from entering a state of equilibrium.

In contrast to the consistent high salience and high level of policy activity that characterizes abortion policy, same-sex marriage initially conforms to the expectations of punctuated equilibrium

theory. As with abortion, litigation was an essential component of gay activist strategy. *Loving v. Virginia*, the Supreme Court decision that struck down Virginia's ban on interracial marriage in 1967, served as the inspiration for the first non-anonymous legal challenge to the restriction of marriage to heterosexual couples, which occurred in the 1971 Minnesota case *Baker v. Nelson*. Richard Baker and John McConnell argued that Minnesota law did not literally specify that a marriage could be only between a man and a woman, and to confine marriage to straight couples violated the Ninth and Fourteenth Amendments. Minnesota's Superior and Supreme Courts denied the couple a marriage license, and upheld the constitutionality of a law that defined marriage as being solely between one man and one woman. The judges treated the cases almost as a joke, writing short opinions that treated the definition of marriage as totally self-evident. The Supreme Court declined to hear the case on appeal for want of a federal question. Similar appeals failed in Kentucky, *Jones v. Hallahan* (1973), and in Washington, in *Singer v. Hara* (1974).

After these failed cases, which were not taken seriously, same-sex marriage was de-emphasized as a political issue for almost twenty years, as punctuated equilibrium theory would predict. Gay rights activists were divided on the desirability of marriage rights as a movement goal on both substantive and strategic grounds. The ideological debate highlights one of the most enduring schisms within the gay rights movement: what Craig Rimmerman called the tension between the assimilationist and liberationist strands of gay activism (Rimmerman 2007). The former argues that gays and lesbians are entitled to marriage, emphasizing the similarities between homosexual and heterosexual relationships. The latter argues that gays should not strive to adopt and replicate straight relationships. There was particularly strong resistance to gay marriage among lesbians during this period of inactivity due to the perception that the institution of marriage was inherently patriarchal (Rimmerman 2007, Pinello 2006, Cain 2000). In addition to these philosophical problems, three consecutive judicial failures, combined with backlash fears and a lack of national co-ordination among litigants, allowed the issue to

die. Activists reoriented their attention towards the repeal of sodomy laws, lobbying for anti-discrimination legislation, and eventually in the eighties dealing with the AIDS crisis. Same-sex marriage dropped off the activists' agenda; it was also a non-issue publicly. Rosenberg, in his revised edition of *The Hollow Hope*, which deals with same-sex marriage, found an almost complete absence of polling data on the topic before the early nineties (Rosenberg 2008).

As was the case in the 1970's, activists chose litigation as the method to revive the issue when the Hawaii Supreme Court found in *Baehr v. Lewin* (1993) that limiting marriage to heterosexual couples was a violation of gay couples' equal protection rights. While the earlier, failed same-sex marriage cases of the 1970's stirred little public attention, Hawaii's decision spurred a strong counter mobilization against same-sex marriage, propelled in part by the fear that if one state legalized same-sex marriages, other states would be obligated to honor them under the Full Faith and Credit Clause of the Constitution. When Congress passed the Defense of Marriage Act in 1996, it drew heavily on the judicial record from *Baehr*, though this decision was eventually rendered moot when Hawaiians passed a state constitutional Amendment banning same-sex marriage. (Murdoch and Price 2002, Mezey 2007, Rimmerman et al. 2000, Rimmerman 2007). Between 1996 and 1998 a flurry of states passed statutory same-sex marriage bans, operating from a perspective of moral panic. Massachusetts' legalization of same-sex marriage occurred after the legalization of civil unions in Vermont in 1999 and after decades of advocacy in other areas. After Massachusetts became the first state to legalize same-sex marriage, the moral panics of the 1990's replicated in a series of campaigns to constitutionally ban same-sex marriage at the state and federal level. The extreme volatility of this policy area is evidence of a moral panic developing, burning out and then dissipating, with post-*Windsor* legalizations occurring because the emotion underlying the panic had ebbed.

### **Methods, Definitions and Measurement:**

I start by describing how I will measure the five characteristics that I argue separate moral



conflicts and moral panics. Duration is straightforward. My case studies cover the entire period that abortion has been legal at the national level, with enough discussion of pre-*Roe* abortion policy to demonstrate the early nationalization of the conflict, as predicted by my first hypothesis of moral conflict. Similarly, my treatment of same-sex marriage is chronologically exhaustive covering every case and the entire legislative history of same-sex marriage policy. The depth and comprehensiveness of these case studies also reveals the scope of conflict in both policy areas.

The terms that require the most extensive definition and explanation are those related to PET and incrementalism. Starting with punctuated equilibrium, there are a few key terms that need to be defined to explain and test the theory. A punctuation in PET occurs when there is dramatic, non-incremental change in policy set off by a triggering event that breaks equilibrium and introduces new information and/or a new understanding about an issue into a policy subsystem and causes rapid policy change. There are two elements of change, then, that have to be operationalized: timing and scale. In PET the time of punctuation is short relative to the equilibrium period. The length of time periods classified as “punctuations” has varied in past literature on the topic, or been underspecified to the point where it is hard to tell when the punctuation period begins or ends. This dissertation sets a cap of three years as the length of time within which non-incremental change has to occur to be counted as a punctuation. For the purposes of this analysis, a punctuation period cannot last for more than three years, before it is no longer considered a punctuation. Moral panics should exhibit this stop and start policymaking; moral conflicts should not.

Change not only has to occur in a short period of time to be considered a punctuation, but as previously mentioned, a punctuation must also be traced back to a specific trigger, an exogenous or endogenous shock to the policy environment that breaks the monopoly of the policy subsystem. So not only should a punctuation be short in duration, but process tracing (defined in greater detail later in this section) should reveal the presence of a triggering event that causes non-incremental policy change,

and within the two year time frame set above.

Scholars have wrestled with a variety ways to quantify the scale of change necessary to classify a policy change as non-incremental. In studies of budgetary incrementalism, non-incremental policy is defined as a budget increase that is larger than a cutoff figure, such as twenty (Fenno 1966, True 2000) or thirty percent (Bailey and O'Connor 1975). In the world of non-budgetary non-incrementalism Paul Schulman, in his article “Non-Incremental Policy Making,” devised a tripartite classification scheme that distinguished non-incremental from incremental policy. Firstly, “[n]onincremental, indivisible policy pursuits are beset by organizational thresholds or “critical mass” points closely associated with their initiation and subsequent development. These policies must rely for their success upon factors which come into play only at high levels of political and resource commitment...Nonincremental policies in particular must expand greatly if they are to expand at all” (Schulman 1975, emphasis in original; Ainsworth and Hall 2011 ). In addition to the outlay of political and financial capital necessary to create non-incremental policy, Schulman also argues that non-incremental policy is inherently unstable, meaning that policy areas typified by non-incrementalism vacillate between periods of sharp expansion or dramatic decline. This instability is inextricably linked to the high resource demands of non-incremental policy; since non-incremental policy requires such an extensive investment of time and money to create, it cannot be sustained once the initial impetus dissipates. Finally, Schulman writes “[n]onincremental policies are beset by an indivisibility which defies disaggregation into piecemeal decisions or additive partial advancements. This means simply that for non-incremental policies a “self-containment” demand must be observed. Policy requirements as well as outputs must be provided at high levels or they cannot be provided at all.” (Schulman 1975, emphasis in original; Ainsworth and Hall 2011). The connection between Schulman's schema and that of Baumgartner and Jones is obvious.

Eskridge and Ferejohn, in their analysis of “super-statutes,” provide another way of

understanding non-incremental legislation. Super-statutes differ from regular laws in both conception and execution. They are designed to be broad in scope, and reshape the “normative and institutional” policy apparatus in a given area. The ambition of super-statutes means they are subjected to high profile debate between political elites before adoption. Eskridge and Ferejohn argue that the following metrics are used to distinguish super-statutes from regular laws: super-statutes “alter substantially the then-existing regulatory baselines with a new principle or policy,” and this alteration has to endure over a long period of time and have a cascading effect on subsequent law.

Eskridge and Ferejohn's framework has commonalities with PET but also an important explanatory difference. Their discussion of how a successful super-statute operates is similar to “equilibrium” in PET: a super-statute becomes the conventional wisdom on how to solve a policy problem; it acts as the logistical, financial, and/or normative bedrock of a given policy area. Until or unless the super-statute is challenged, its disproportionate influence contributes to the maintenance of a policy subsystem and a policy image in equilibrium. However, Eskridge and Ferejohn deviate from Baumgartner and Jones in predicting how super-statutes are generated. Baumgartner and Jones and other punctuated equilibrium theorists argue that non-incremental legislation is quickly created in response to an environmental shock, whereas Eskridge and Ferejohn contend that non-incremental laws are not quick responses to crisis situations, but rather result from a long policy process, as all relevant stakeholders in a policy area hash out the law they hope will become axiomatic (Eskridge and Ferejohn 2001).

In addition to policy change, during a period of punctuation it should be possible to note an increase in attention devoted to an issue, and a change in the policy image of the policy area. This increase in attention should be observable in the media coverage of an issue, public attention measured through polls, and elite attention measured at the congressional and judicial level. Baumgartner and Jones describe the change in attention as a policy problem or proposal moves from “subsystem

politics,” where public salience is low and interest in a policy area is confined to policy experts, to the “macropolitical agenda,” where it will receive media attention and interest from a broader public. They similarly distinguish between serial and parallel processing. Policy subsystems allow politicians to juggle a wide variety of agenda items simultaneously, as occurs during parallel processing. Serial processing is reserved for only a handful of high profile political issues that command a disproportionate share of public, congressional, and judicial attention (Baumgartner and Jones 1993, 2005). The cyclical transitions in the level of attention devoted to an issue as it transitions from the equilibrium phase to the punctuation phase and back again, may be compared to the five steps of the “issue attention cycle” described by Anthony Downs. First, there is the “pre-problem stage,” which may be likened to the equilibrium period in PET. Then, a crisis results in phase two of the issue attention cycle, “alarmed discovery and euphoric enthusiasm” where the public discovers a policy problem and demands immediate action to solve it. When the costs of solving a problem become apparent (step three), there is a gradual decline of public interest (step four), and then finally the post-problem stage after interest ebbs to the same level as it was at the pre-problem stage. Whatever policy changes were enacted during the stage two period of frenzied activity persist until the cycle restarts itself (Downs 1972).

Conversely, equilibrium is defined by two characteristics: maintenance of the policy status quo by a policy subsystem which results in little to no policy change, and a stable, non-controversial policy image. A policy subsystem may be tightly bounded like an iron triangle, which is composed of the congressional committee charged with oversight in a specific policy area, the bureaucracy that oversees it, and the lobbyists who are seeking benefits from both (Freeman 1955). Even if a policy subsystem is more open, what Hugh Hecló first dubbed an issue network (Hecló 1978), the hallmark of the subsystem, the relevant interest groups and policymakers involved, are able to maintain a mutually satisfactory policy status quo. This status quo is maintained by a low level of attention devoted to an

issue outside the subsystem, and by the agreement of all members on shared policy means and ends. So, if a policy is in equilibrium there should be a consistently low number of new laws and regulations in a policy field, and those that are adopted should be modest in design and impact, and not clustered around a triggering event. There will be little media attention surrounding an issue, the general public will not demonstrate much knowledge or interest in the policy area, and to the extent that actors outside the policy subsystem engage the issue, they will do so in a way that reflects the stable policy image constructed and perpetuated by the policy subsystem.

### Policy Image

The concept of the policy image is integral to an understanding of punctuated equilibrium theory: a stable policy image leads to equilibrium; an unstable policy image is part of the process of punctuation. A policy image is considered stable, when one understanding of the scope and nature of a policy area and desired outcomes is widely shared by nearly all the participants in the policy process, and the amount of attention a policy field receives is consistent and not high. A policy image is considered unstable, conversely, when there is controversy over policy goals and/or policy tools, coupled with an increase in media and public attention. This type of controversy is much more common when the scope of conflict surrounding an issue is expanded beyond the actors within a policy subsystem.

I argue that one of the reasons why abortion policy deviates from the expectations of punctuated equilibrium theory is that the policy image has never been stable. There are several reasons why I classify the abortion policy image as unstable for the entire time period my dissertation covers. Firstly, the constitutional right to privacy announced in *Griswold v. Connecticut* and later cited in *Roe v. Wade* as the basis for the constitutional right to abortion access has been continually contested. The very existence of the privacy right itself, which William O. Douglas (in)famously claimed originated from “...specific guarantees in the Bill of Rights [that] have penumbras, formed by emanations from those

guarantees that help give them life and substance” has been widely criticized. Nor has there been agreement on the exact nature of its protections even by those judges who grant its existence in the first place. The Supreme Court created a sliding scale to determine constitutionality of abortion regulations based on the three trimesters of pregnancy in *Roe*, a model they later abandoned in *Planned Parenthood v. Casey*. The Court similarly altered its stance on the constitutionality of parental consent laws and partial birth abortions. There is a lack of consensus on the existence of the constitutional right *Roe* is premised upon, in addition to a lack of consensus as to what extent abortion access may be regulated, short of prohibition. This ambivalence may be measured through an analysis of judicial opinions and scholarly writings, such as law review articles.

Beyond the constitutional controversy abortion engenders, there are continuous political battles over the boundaries of abortion policy and the relevant values at stake in the abortion debate. There has never been widespread agreement on concepts as basic to the abortion debate as when life begins, where the line between contraceptives and abortifacients is drawn, and how to balance the competing rights and obligations of the various stakeholders in the abortion debate (i.e., pregnant women, fathers, the fetus, the woman's physician, etc.). Luker chronicled this extensively in her book on the first wave of pro-choice and anti-abortion activists, *Abortion and the Politics of Motherhood*. In her opening pages Luker writes, “the moral status of the embryo has always been ambiguous” (Luker 1984). Tracing over a hundred years of history, Luker chronicles the activities of primarily Catholic anti-abortion activists, who were motivated by profound moral horror at what they perceived to be legalized infanticide. Beyond these concerns, she argues that the debate about abortion is also a clash between two fundamentally different perceptions of families and the roles of women within them. Women who favor traditional gender roles find abortion, with its potential to de-link sex from procreation and marriage and facilitate careerism, profoundly threatening to their worldview. Petchesky (1984) and Page (2006) also write about the centrality of anti-feminism in the anti-abortion movement in their

analyses of the anti-abortion movement.

The policy image of same-sex marriage was first stable and negative. The nascent same-sex marriage movement of the 1970's faced three legal defeats, widespread public disapproval, little ability to capture public attention in the 1970's, and high profile backlash after *Baehr v. Lewin* in 1993. Gay people were highly stigmatized "folk devils" who lacked political power and a positive social construction. In the years since legalization began in *Goodridge v. Department of Public Health*, the policy image has been neither as stable nor as negative as it once was. Public attitudes towards same sex marriage has vacillated dramatically since 2003, trending from a strong consensus against legalization towards majority support, and the social construction of gay people as deviants has faded.

Judicial decisions are important to the theoretical aims of this dissertation in multiple ways: the decisions themselves are relevant aspects of the policy environment, the decisions are important to the construction of the legislative environment in both policy areas under review, and the legal opportunity structure is one of the determinants as to whether a morality policy will function as a moral conflict or a moral panic. Supreme Court cases not only have an effect on the law; they may also have an effect on both public and elite opinion. Dahl discusses the latter in his "Decision Making in a Democracy," positing the role of the Supreme Court as serving a legitimating function for the dominant national alliance (Dahl 1957). This analysis examines the legal developments in abortion and same-sex marriage law using the relevant universe of Supreme Court, circuit court, and state supreme court decisions in the two fields. Decision text as well as oral argument and amicus curae briefs are analyzed, where applicable and available.

### **Process Tracing**

Process tracing is a method of case study analysis that allows for the identification of causal mechanisms. George and Bennett describe process tracing as a research approach that "examines histories, archival documents, interview transcripts, and other sources" to establish "whether the causal

process a theory hypothesizes or implies is in fact evident in the sequence and values of the intervening variables in that case...The process tracing method attempts to identify the intervening causal process—the causal chain and causal mechanism...” (George and Bennett 2005). Process tracing techniques are frequently used to determine the direction of causality between two correlated variables, and to uncover whether the correlation is spurious or actually the result of the hypothesized independent variable causing the variation present in the dependent variable. (Brady and Collier 2010) Beach and Pedersen (2011, 2013) distinguish between three variants of process tracing: explaining-outcome process tracing, theory testing process tracing and theory building process tracing.

My project involves aspects of both theory testing and theory building process tracing. I am first testing established theories of the policy process such as moral panic theory, punctuated equilibrium theory and incrementalist theory to gauge to what extent their predictions match my two case studies. Beach and Pedersen say that for theory testing process tracing, a researcher should choose “typical cases,” where the hypothesized relationship between variables should be reasonably expected to be present based on the tenets of the theory being tested. The proponents of punctuated equilibrium theory have not limited the scope of the theory by time period or policy type, because the mechanisms that Baumgartner and Jones argue cause punctuated equilibrium theory apply to all policy areas, so my two policy area case studies operate as typical cases, even though they have not been analyzed in this fashion before in the scholarly literature. Abortion and same-sex marriage are the most frequently cited morality policy issues so they are the best test cases to use to study the dynamics of morality policy.

Since I am arguing that abortion and same-sex marriage represent examples of different types of morality policy, I now have “deviant cases” that form the basis of theory building process tracing. In my theory testing, I am arguing some hypothesized causal mechanisms are not present, theory building process tracing will allow me to identify an alternative causal mechanism that explains the dynamics of my two cases. I argue that the alternate causal mechanism, present in both cases when they display an



incrementalist rather than punctuated equilibrium dynamic, is strategic venue shopping facilitated by the political environment constructed by relevant judicial decisions. In both of my cases, status quo challenging groups are trying to prevent the creation of a pro-choice and anti-same-sex marriage policy monopoly, which would lead to equilibrium.

## Chapter Two: The Judicial Politics of Abortion

Abortion shot to its prominent place in national politics as the result of its enshrinement as a constitutionally protected right in *Roe v. Wade* (1973) and *Doe v. Bolton* (1973), so this study of the policy dynamics of abortion must start with a thorough analysis of the judicial record to determine to how these subsequent cases created a moral conflict about abortion. In line with the hypotheses outlined in chapter one, the court cases surveyed here show that judicially abortion is an issue of long duration, characterized (post-*Roe*) by incrementalist policy changes, a high degree of institutional entrenchment, a broad scope of conflict and a non-deviant social construction of the combatant groups. These judicial conditions were created by the early nationalization of the abortion issue by *Roe* and its companion case, the high prevalence of the contested behavior, the complexity of implementing *Roe* and subsequent abortion decisions, partisan strategy, and a legal opportunity structure that encouraged repeated litigation. Court cases have tended to awkwardly skirt fundamental debates, and the result has been a series of fractured, muddled opinions that create additional opportunities for even more litigation.

After *Roe* and *Doe* the Court continually heard abortion cases, almost one a term, until *Planned Parenthood v. Casey* (1992). After that decision the Supreme Court reduced the number of cases they heard but did not totally abandon the issue and the increased level of abortion restrictions allowed by the *Casey* decision combined with the ambiguity of the “undue burden” standard ensured a steady volume of state level cases.

Are these decisions are incrementalist as opposed to PET? There is little scholarly work assessing PET solely in the realm of judicial politics, though Baumgartner and Jones do discuss the courts briefly and generally as an institutional venue for activism, and they occasionally reference court decisions in their policy case studies (Baumgartner and Jones 1993). In a recent article, Robinson has partially addressed this gap in the scholarly literature by outlining first a general and then a policy area

specific theory of punctuated equilibrium at the Supreme Court. In this analysis, he uses “precedential fluidity” as a measure of punctuation by charting variations in how often Supreme Court decisions cite prior cases, drawing upon James Fowler's Supreme Court network analysis, which maps the number of inward and outward citations (how many cases are cited within one opinion and how many subsequent cases cite a decision respectively) each Supreme Court opinion contains. He finds that there is “...systematic evidence that legal policy change—here conceptualized as changes in which precedents the Supreme Court uses to resolve legal disputes—contains PE dynamics” (Robinson 2013). The three punctuations in precedential fluidity occurred in the 1890's, 1940's, and the late 1960's.

Robinson offers several reasons why punctuated equilibrium occurs at the Supreme Court level. Firstly, PET is driven by large scale shifts in how much attention an issue gets and how it is understood by policymakers. Baumgartner and Jones expand on this “disproportionate information processing” in their second volume explaining PET (Jones and Baumgartner 2005). The Supreme Court's agenda is shaped by the rule of four, requiring four justices to grant certiorari on a case in order to hear it, the nature of cases presented to it each year, the Court's discretion over which cases to hear, and an inability to hear all potential cases. Ideological disagreement amongst the justices and congressional removal of much of the Court's mandatory appellate jurisdiction has led to a decline in the number of cases the Court hears (Owens and Simon 2011). Lifetime tenure and low personnel turnover, adherence to precedent, lack of implementation power, and belief in judicial restraint all result in the Court experiencing long periods of equilibrium according to Robinson. Conversely, “critical nominations” that reshape a previous majority coalition and thus instantly reorient the Court, the interconnectedness of precedent, and venue shopping by tactical interest groups may cause the positive feedback of the punctuation period (Robinson 2013).

While anti-abortion activists would later characterize *Roe v. Wade* and its companion case *Doe v. Bolton* as sudden and shocking developments (Luker 1984), these decisions occurred after years of a

fitfully successful movement to liberalize or repeal existent abortion restrictions, including a *Roe*-esque full repeal in four states before 1973. High profile debates about the morality and legality of abortion were spurred both by dramatic events, such as a high profile German measles outbreak from 1962-1965, and the Thalidomide birth defects, publicized by Sherri Chesson Finkbine in 1962, and a gradual public disenchantment with extant abortion law, first from medical professionals and later from feminist groups, such as the National Organization for Women (NOW).

“The climate that permitted a broad reexamination of America’s abortion laws was not born of any single event, nor did it grow from any single vision” (Tribe 1992). As late as the early 1950’s “...the level of open discussion of the subject, even in limited circulation professional journals, was truly miniscule” (Garrow 1998). This silence was punctured by The American Law Institute, a consortium of judges, lawyers and legal scholars, in 1959. This organization had become aware of a low profile abortion conference sponsored by Planned Parenthood in 1955 due to connections many ALI members had with members of the medical community. These legal professionals felt a kinship with their perceived peers in the medical field and felt that doctors should not be prevented from performing abortions under certain circumstances (Reagan 1996). The ALI proposed a piece of model legislation in 1959 that would legalize abortion if the pregnancy “would gravely impair the physical or mental health of the mother,” if the child would be born with “grave physical or mental defects,” or if the pregnancy was the result of rape or incest. In 1961, New Hampshire’s legislature passed a law allowing “therapeutic” abortions based on this ALI model over the strong objections of the Roman Catholic Bishop of Manchester. Governor Wesley Powell, however, vetoed the legislation. California’s legislature considered a similar bill in 1961 and 1962, but progress stalled without a vote. There was also “...a low visibility statutory reform effort was also being made in New Mexico” in 1965, but the campaigns in all these states, however, were dwarfed by the publicity surrounding attempts to reform abortion laws in New York (Garrow 1998).

Nineteen sixty-seven was a pivotal year for the fledging attempts to liberalize abortion laws, with twenty-five states considering ALI inspired abortion reform bills. This higher level of activity continued until 1971. Despite this flurry of activity from 1967-71, the state legislative campaign to legalize abortion beyond the categories outlined by the ALI guidelines was rarely successful even with increasing public support due in part to the organizational power of the anti-abortion Catholic Church. For example, the public health committee of Arizona's senate approved an ALI abortion law before back tracking and killing the bill when a letter from a Catholic bishop combined with a coordinated letter drive from several churches expressed opposition. The same thing happened in Georgia and Indiana. Thirty-four states considered legislation liberalizing or repealing state abortion laws in 1971, following New York's repeal of its laws in 1970, but none of these laws passed (Greenhouse and Siegel 2011, Greenhouse and Siegel 2012, Lazarus 1999, Garrow 1998).

Due to the difficulties present when lobbying state legislatures litigation increasingly became viewed as the best way to change abortion laws by pro-choice activists. Silverstein (2009, 2010) uses the term juridification to discuss the “increasing role of, and reliance upon judicial decision making, legal reasoning and legal language” in the resolution of political controversies. He lists the following reasons for individuals or groups to prefer litigation over legislation as a way of achieving political goals: efficiency, “normative superiority,” meaning that a judicial decision will be perceived as more objective and non-partisan and non-political and thus be given more respect, fewer institutional logjams (such as the Senate filibusters or bottleneck committees), and that litigation might be the only option for unpopular causes with which elected politicians do not want to associate. In the case of abortion, the blocking power of the Catholic Church at the state legislative level made the courts particularly appealing.

State courts were more amenable to reform of pre-*Roe* abortion law. The Supreme Court of California invalidated much of the state's Therapeutic Abortion Act, an ALI law, for unconstitutional

vagueness (*People v. Belous*, 458 P.2d 194 1969). Washington, D.C.'s abortion laws were repealed for the same reason (*U.S. v. Vuitch*, 402 U.S. 62, 1971). The District Court of Connecticut ruled in the 1972 case *Abele v. Markle* that a legal right to abortion existed through the Ninth Amendment and the Due Process Clause of the Fourteenth, a rationale similar to the one adopted in the majority *Roe* opinion less than a year later (*Abele v. Markle*, 342 F.Supp. 800 197; Linton 2007).

The constitutional right to privacy upon which the *Roe* and *Doe* majority opinions were premised upon was developed and implemented in the contraception case, *Griswold v. Connecticut* (1965). By a seven to two vote, the Court struck down an 1879 Connecticut Comstock law, which prohibited the use of "any drug, medicinal article or instrument for the purpose of preventing conception." William O. Douglas's majority opinion argued that the right to privacy was derived from the "penumbras" in the First, Third, Fourth, Fifth, and Ninth amendments. He cited prior cases, which upheld the NAACP's First Amendment right to freedom of association and assembly, and a First and Fourteenth Amendment right to educate ones' children, and emphasized how the protections against forced troop quartering, warrantless search and seizure, and self-incrimination all demonstrate the constitutional commitment to the right to privacy. The Third and Fourth amendments are meant to preserve the inviolability of the home, which Douglas argues is similarly threatened by a law that aims to regulate a married couple's use of contraception. The *Griswold* decision is primarily concerned with the privacy rights of the marital couple as a unit rather than an individual privacy right, a vein of argumentation that would be abandoned in subsequent jurisprudence, as the Court expounded upon an individual right to privacy in later cases. Douglas concludes this litany by referencing the Ninth Amendment, which Arthur Goldberg used as the sole basis of the right to privacy in his concurrence (*Griswold v. Connecticut*, 381 U.S. 479, 1965).

Even in 1965, the potential of this newly enumerated privacy right to legalize abortion was warily realized. During *Griswold* oral arguments, Hugo Black, one of *Griswold's* two dissenters, asked

whether the right to privacy if recognized “would invalidate all laws that punish people for bringing about abortions.” Thomas Emerson, arguing for the appellant, declined to link the law banning contraception to the laws prohibiting abortion. His rationale was that enforcing a law against contraceptive use includes violating the sanctity of the marital home in a way that a ban on abortions does not. William Brennan responded with a comment about the presence of fetal life distinguishing the two types of laws, which Emerson cagily acknowledged without committing to the idea that abortion is an act of killing (Griswold Oral Arguments accessed 2013). The potential of the *Griswold* decision to be used as a stepping stone to abortion legalization was apparent to Chief Justice Earl Warren. He was eager to strike down Connecticut’s law but was struggling for an appropriate constitutional rationale to do so. Warren was unsympathetic to the privacy argument, and he also rejected a First Amendment right of doctors claim, an equal protection claim, a substantive due process argument, and finally he said “I cannot say the state has no legitimate interest—that would lead me to trouble on abortions” (Garrow 1998).

The *Griswold* decision was a constitutional smorgasbord, with three different constitutional arguments offered by the justices in the majority: Douglas’s five amendments which create a right to privacy, Goldberg’s Ninth Amendment explanation, and John Marshall Harlan and Byron White’s Fourteenth Amendment due process concurrences. Despite the reference to it during oral arguments, there is no mention of abortion in any of the majority or dissenting opinions. Since *Roe* was held over for an extra term and reargued, however, the justices had already heard the first round of *Roe* and *Doe* oral arguments when they heard their first post-*Griswold* contraception case, *Eisenstadt v. Baird* (1972). Massachusetts had a law banning the distribution of contraceptives to unmarried persons, which was struck down on a six to one vote, though the majority did not invoke the right to privacy to do so. Rather, Brennan, writing for the majority, argued that Massachusetts’s legal distinction between married and unmarried people could not be sustained under even rational basis review despite the

centrality of marriage to the reasoning in *Griswold*, and thus violated the equal protection clause of the Fourteenth Amendment. Despite the fact that *Eisenstadt* was an equal protection case, Brennan nonetheless invoked *Griswold* and strategically included language in his majority opinion that could later be cited in a pro-choice abortion decision (Stern and Wermiel 2010, *Eisenstadt v. Baird*, 405 U.S. 438, 1972). After approvingly citing *Griswold* he wrote, “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,” and then referenced three additional cases: *Stanley v. Georgia* (394 U.S. 557, 1969), *Skinner v. Oklahoma* (316 U.S. 535, 1942), and *Jacobson v. Massachusetts* (197 U.S. 11, 1905), all of which were tenuously at best connected to abortion. The trio of cases protected the right of an individual to privately own obscene material, prohibited states from applying compulsory sterilization laws in a discriminatory manner, and upheld the validity of compulsory vaccination laws, respectively. In none of these cases was there a potential competing claim, like the claim of a right to life on behalf of a fetus. Only *Skinner* dealt with child bearing, and the decision, while invalidating Oklahoma’s sterilization law, did so not out of some generalizable belief in privacy or a woman’s right to control her fertility, but rather because the law excluded white collar crimes from the compulsory sterilization requirement. Compulsory sterilization in and of itself was not imperiled by the *Skinner* decision.

While the *Eisenstadt* decision would shortly be used to bolster the constitutional right to abortion access, the Supreme Court’s pre-*Roe/Doe* abortion case had a less promising outcome for supporters of legalized abortion. Two years before *Roe v. Wade*, the Supreme Court heard the comparatively low profile abortion case, *U.S. v. Vuitch*, in which a physician indicted in Washington, D.C., for performing illegal abortions argued that the District of Columbia's abortion laws, which forbade abortion except to preserve the life or health of the pregnant woman, were unconstitutionally vague because they failed to define these terms. Vuitch's appeal of his indictment was initially



successful, and the district court of Washington D.C. became the first federal court to strike down an abortion law as unconstitutional (*U.S. v. Vuitch*, 402 U.S. 62, 1971). While this was reversed in *Vuitch*, where the majority found the law constitutionally permissible, the case was nonetheless seen as beneficial to the nascent abortion rights movement because of its endorsement of abortion access to maintain mental as well as physical health, because it shifted the burden of proof to the state in establishing that an abortion was unnecessary rather than to the physician to prove necessity, and because of Douglas's dissent arguing for a general right to abortion (Garrow 1998). The day after handing down its decision in *Vuitch*, the Court granted cert to both *Roe v. Wade* and *Doe v. Bolton*.

*Roe's* transformative potential was not immediately apparent when it was presented before the Court. In the first round of oral arguments, the justices were concerned with two standing issues related to the case: whether Roe had the right to petition the federal government before her state appeal was concluded, and whether her case would be moot because her pregnancy would come to term before the Court could decide the case. After an initial vote count, which was conducted after the first round of oral arguments, Harry Blackmun was assigned the case by his best friend from childhood and “Minnesota Twin,” Chief Justice Warren Burger. As Woodward and Armstrong (1979) note, Douglas, a strong proponent of a constitutional right to abortion and the writer of the *Griswold* majority, was apoplectic. “The abortion assignment really amounted to nothing more than a request that Blackmun take first crack at organizing the issues. It was one of those times when the conference had floundered, when the briefs and oral arguments had been inadequate, when the seemingly decisive issue in the case, jurisdiction, had evaporated...Blackmun was not so naïve as to think the Chief had given him the abortion cases with the intention of having him find a broad constitutional right to abortion.”

Blackmun's first opinion struck down Texas's abortion law as void for vagueness, without any reference to a constitutional right to abortion. This was dissatisfying to the Court's liberals both because of its narrowness and timidity in failing to create a constitutional right to abortion access and because it could

be seen as overturning the recent *Vuitch* decision (Lazarus 1999).

As Blackmun worked on the opinion for several months, it expanded in scope. In striking down Texas's abortion law because it violated the constitutional right to privacy as embodied in the due process clause of the Fourteenth Amendment, Blackmun's opinion not only argued that a constitutional right to choose to have an abortion existed, but that it was a fundamental right, any attempt to abridge it would be subject to strict scrutiny, meaning restrictions would be constitutionally acceptable only if they were narrowly tailored in service of a compelling state interest. He dismissed the state's right in protecting fetal personhood by stating that the Fourteenth Amendment was not written or construed as protecting fetal life at the time it was adopted, though he acknowledged some level of fetal rights post-viability. In order to balance the competing interests of the state, the woman, the doctor, and eventually the fetus, Blackmun created a balancing test based on the trimesters of pregnancy. This trimester framework laid out a sliding scale of permissible abortion regulations based on the stages of pregnancy. It was justified on the basis of medical data about the safety of abortion relative to pregnancy. During the first trimester of pregnancy, the right to terminate a pregnancy belonged exclusively to the patient and her attending physician, without interference from the state. The safety of the abortion procedure meant that the state had little interest in regulating abortion to preserve a woman's health, save the requirement that abortions be performed by medical professionals. Additionally, at this early gestational age the fetus lacks any interests for the state to protect. In the second trimester, the state had a compelling interest in regulating abortion only as necessary to protect the woman's health. Finally, during the third trimester, at which time the fetus had become viable, the state could regulate abortion up to and including prohibiting it (as long as the state maintained a life/health exemption to any ban) because of its interest in protecting fetal life (*Roe v. Wade* 410 U.S. 113, 1973, Woodward and Armstrong 1979, Tribe 1992, Garrow 1998).

*Roe* eventually became bolder and broader in its constitutional reasoning, but in retrospect it is

surprising how little the Court anticipated the intensity of the *Roe* backlash, as well as the tenor of subsequent arguments about abortion access. For example, because Blackmun had worked as counsel for the Mayo Clinic before his tenure on the Court and was thus primarily concerned with how abortion regulations restricted the rights of doctors to perform medicine unfettered by anachronistic and/or harmful state regulation, the physician rather than the pregnant woman is central to the reasoning of *Roe*. The opinion also focused heavily on historical information about abortion regulation, with the actual constitutional reasoning section of the opinion comparatively short (Lazarus 1999, Siegel 2007).

*Roe's* less famous companion case, *Doe v. Bolton* (1973), delivered on the same day, invalidated Georgia's abortion law, which had been developed using the American Law Institute's model legislation as a guide. Georgia prohibited abortion unless pregnancy endangered a woman's life or caused "serious and permanent" health problems, the fetus had a "grave, permanent and irredeemable physical or mental defect," or the pregnancy was the result of rape. Even if these criteria were met, there were a number of other hurdles that needed to be cleared before an abortion could be performed. A woman had to prove Georgia residency to receive an abortion in-state. A physician had to file a report testifying to the necessity of abortion, and have this opinion reaffirmed by two other physicians who needed to physically examine the pregnant woman. The abortion had to be performed in a hospital and cleared by a three person abortion committee on the hospital staff, in addition to the three doctors who needed to examine the woman. Finally, if the pregnant woman was seeking an abortion as a result of a rape, she had to provide "certification" that a rape had occurred. Any hospital had the right to deny admittance to an abortion, if a doctor or staff member felt abortion violated their conscience. Since the theoretical and constitutional case had already been made in *Roe*, the *Doe* decision focused extensively on a thorough rundown of these aspects of the Georgia law and the logistical problems inherent in the law (*Doe v. Bolton* 410 U.S. 179, 1973).

While the importance of *Roe* has been subject to some scholarly challenge (Rosenberg 2008), this analysis accepts that these cases are policy punctuations of high importance. The rulings overturned forty-six state laws, and acted as a permanent re-organizer of partisan attachments and political attitudes (Abramowitz 1995, Layman 2001). Abortion has become the central issue in judicial confirmation battles (Greenburg 2007). In the public eye, the Supreme Court is synonymous with *Roe*. In a C-SPAN poll commissioned in 2009 about public knowledge about the Court, *Roe* dominated the discussion. “Of the 49% of those surveyed who could name any case heard by the Court, one case predominates: *Roe vs. Wade* (named by 84%). A few respondents were able to cite other cases: *Brown vs. Board of Education* (9%); *Plessy vs. Ferguson* (3%); *Bush vs. Gore* (1%); *District of Columbia vs. Heller* (1%); *Marbury v. Madison* (1%)” (C-SPAN, accessed 2013). *Roe* and *Doe* nationalized the abortion debate early in its lifecycle. There was not a lot of data yet from states that had adopted ALI inspired abortion laws or the few states that had liberalized beyond that. There was not a lot of case law in the area either (Forsythe 2013). The timing and scope of the decisions ensured that the abortion issue would become an enduring moral controversy in American politics.

These two cases count as a policy punctuation under PET, but no other subsequent abortion cases would. The sweeping nature of the Court's decisions dramatically expanded the scope of conflict and created a rash of implementation questions that would have to be litigated as abortion opponents sought to restrict access. Within a few years, the Supreme Court took the incrementalist course that would mark the rest of its abortion jurisprudence. The first incrementalist abortion restrictions upheld by the Court occurred when it decided a trio of cases on June 20, 1977. State Medicaid funding restrictions on non-therapeutic abortions (i.e., abortions not deemed medically necessary) were upheld in *Maher v. Roe* (432 U.S. 464, 1977) and *Beal v. Doe* (432 U.S. 438, 1977), and a prohibition on abortions performed in publicly funded hospitals was validated in *Poekler v. Doe* (432 U.S. 59, 1977). In *Maher*, a woman on Medicaid challenged Connecticut's ban on providing coverage for non-

therapeutic abortion on multiple grounds. Firstly, she claimed the proscription on public funding violated the Fourteenth Amendment right to abortion recognized in *Roe* and *Doe*. Since the trimester framework outlined in *Roe* conceptualized the first trimester abortion right so expansively, the public funding prohibition could conceivably be construed as in conflict with it. Secondly, since the ban on public funding would disproportionately affect poor women, opponents of Connecticut's law argued that indigent women should be classified as a suspect class, and thus any law that disadvantages them should be subject to strict scrutiny. In *Beal*, Pennsylvania's restriction on Medicaid funding was challenged in a slightly different fashion, though similar Fourteenth Amendment constitutional arguments were used in both cases. In *Maier*, the plaintiff's goal was to compel Connecticut to fund abortions in the same way they funded childbirth expenses, in *Beal* the goal was to get the federal government, under Title XIX of the Social Security Act, to compel states that participated in Medicaid to provide abortion coverage (Garrow 1998, Gall-Clayton 1978, Horan and Marzen, 1978).

The prohibition on Medicaid funding was upheld in both instances. Justice Powell, who wrote the majority opinion in both cases, wrote in *Beal*, "As we acknowledged in *Roe v. Wade*, the State has a valid and important interest in encouraging childbirth...That interest alone does not, at least until approximately the third trimester, become sufficiently compelling to justify unduly burdensome state interference with the woman's constitutionally protected privacy interest. But it is a significant state interest existing throughout the course of the woman's pregnancy. Respondents point to nothing in either the language or the legislative history of Title XIX that suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth" (*Beal v. Doe*, 432 U.S. 438, 1977). Having gotten the constitutional go-ahead, these state level Medicaid funding prohibitions proliferated. Currently, thirty-two states plus the District of Columbia decline to provide Medicaid coverage for abortions. In a short per curiam opinion, six justices in *Poelker* voted to preserve Missouri's law, which banned abortions in city owned hospitals,

using the same rationale proposed in *Maher and Beal* (Poelker v. Doe, 432 U.S. 59, 1977).

Nineteen seventy-seven was also the year the Hyde Amendment, an annual rider attached to the federal Medicaid budget, was first applied after passing Congress in September, 1976. The Hyde Amendment, proposed by Illinois Republican Henry Hyde, prevents any federal funds from subsidizing abortion services, unless the pregnant woman's life is in danger, or her pregnancy is the result of rape or incest. John F. Dooling, Jr., a district judge in Brooklyn, instituted injunctions against the Hyde Amendment first in 1977 (subsequently overruled by the Second Circuit) and again in 1980, finding the law in violation of the First and Fifth amendments. Dooling argued that the legislation was motivated by a Catholic conception of when life begins, and thus represented an unconstitutional establishment of a particular religious ideology. Additionally, he claimed that the negative health consequences of the funding ban and its disproportionate effect on poor women violated the Fifth Amendment (*McRae v. Matthews*, 421 F. Supp. 533, 1976). In keeping with its earlier funding decisions, the Supreme Court in *Harris v. McRae* (1980) upheld the constitutionality of the Hyde Amendment, overturning Dooling's injunction. This federal funding restriction has been in place ever since. This first wave of post-*Roe* cases set the template for successful anti-abortion activism in the post-*Roe* era: attempts to curtail access incrementally have proven more successful than the failed campaigns to overturn *Roe* directly (Rosenberg 2008, Perry 1980, Yeoman 2001, Metzger 2006).

While the Court has consistently endorsed funding restrictions as constitutionally permissible, it evaluated other types of abortion restrictions less positively during this period. A viability testing protocol in Pennsylvania was struck down as unconstitutionally vague in *Collauti v. Franklin* (439 U.S. 379, 1979). Spousal and parental consent requirements were struck down in *Planned Parenthood v. Danforth* (428 U.S. 52, 1976), though specific record keeping obligations and a rule that only physicians perform abortions were sustained. Generally speaking, the Court supported parental consent prerequisites only if they provided some type of bypass option, usually a form of judicial bypass, where

a judge's consent could be sought instead of one or both parents, provided the state could demonstrate that its judicial bypass system was actually functional. This distinction was clarified in the two *Bellotti v. Baird* cases, argued in 1976 and 1979. In the former case, Massachusetts's parental consent law was upheld; in the latter it was rejected. The difference between the two was the presence of a viable judicial bypass option. In order to pass constitutional muster, there had to be proof that the judicial bypass option actually functioned (*Bellotti v. Baird* 428 U.S. 132, 1976, *Bellotti v. Baird* 443 U.S. 622 1979).

The absence of evidence of actual successful implementation was why a judicial bypass option was rejected, along with a raft of other regulations in *City of Akron v. Akron Center for Reproductive Health* (462 U.S. 416, 1983). Ohio's contested laws were as follows: all post-first trimester abortions were required to be performed in a hospital, minors under the age of fifteen required parental consent, doctors were subject to an "informed consent" requirement where they had to counsel the patient about the health risks of abortion, the availability of adoption and childbirth resources, and instruct the patient that the "fetus is a human life from the moment of conception," there was a mandatory twenty-four waiting period before an abortion could be performed, and fetal remains had to be disposed of in a "humane" fashion. The Court struck down every one of these requirements as either a violation of the *Roe* standard or unconstitutionally vague. Many similar restrictions would later be deemed permissible in *Planned Parenthood v. Casey* (505 U.S. 833, 1992) nine years later.

Cognizant of the legislative and judicial failures of the attempts to repudiate *Roe* and *Doe*, anti-abortion activists began wavering on earlier commitments to seek the total repeal of these decisions in their legal arguments before the courts. While repeal remained a goal of the movement, the Court continually emphasized its commitment to *Roe* in the steady stream of abortion cases it heard in the 1970's and 1980's. Attempts to circumvent judicial authority by passing a Human Life Amendment, subjecting abortion cases to referendum, or removing the jurisdiction of the Court to hear abortion

cases were all unsuccessful. Despite the controversy engendered by *Roe*, it endured. This level of institutional entrenchment is one of the things that distinguishes moral conflicts from moral panics. By the mid-eighties, the futility of the anti-*Roe* approach was evident and the anti-abortion movement was strategically re-orienting itself towards incrementalism. Ironically this occurred just as the prospects for overturning *Roe* were actually improving, given the more conservative judicial appointments of the Reagan administration and the inevitable attrition of the 1973 *Roe* majority. The increasingly anti-*Roe* cast of the Court reinvigorated dormant hopes of *Roe's* repeal by the end of the decade, though a pragmatic incrementalism also remained central to the anti-abortion movement (Calabresi 2008). This tactical ambivalence within the right to life movement over how to exploit the more favorable opinion environment of the Rehnquist Court is particularly evident in the argumentation of *Webster v. Reproductive Health Services* (492 U.S. 490, 1989) and *Planned Parenthood v. Casey* (505 U.S. 833, 1992), where proponents of the challenged regulations in Missouri and Pennsylvania, respectively, employed a hodgepodge of claims that simultaneously called for the repeal of *Roe*, while still trying to justify these new laws within its framework (Rosenberg 2008, Perry 1980, Yeoman 2001, Metzger 2006).

*Webster* was a decision that was viewed as a potential game changer from the beginning. It generated by a large margin more amicus briefs than any other case in American history up to that time, in large part because the Court agreed not only to examine the Missouri laws challenged, but also to rule on *Roe* directly. President Reagan's solicitor general, Charles Fried, wrote a brief arguing that this would be a propitious time to overrule *Roe*, an argument he would later put forward during oral arguments. The case also spurred a great deal of public and media attention, and large dueling pro-choice and right to life rallies. At issue were a series of regulations passed by the Missouri state legislature, which prevented public employees from performing or assisting in the performance of abortions, encouraging or counseling patients about abortion, prohibiting publicly owned facilities from



providing abortions even if they were funded by private money, and requiring that doctors perform a series of viability tests if the fetus is believed to be twenty weeks along to measure height, weight, and lung majority. This series of regulations was preceded with a preamble that states that life begins at conception. These laws were designed to trigger a legal challenge that could potentially be used to repeal *Roe*, though Missouri attorney general William Webster disavowed this in the state's brief and in oral arguments (Garrow 1998, Gorney 2000, Lazarus 1999).

Webster eventually argued that Missouri's laws were not in conflict with *Roe* and could exist simultaneously with it. The opening text of the legislation, which seemingly adopted one theory of when life begins, directly in opposition to *Roe*, was a mere semantic flourish, Webster contended. The restrictions on the actions of state employees fit comfortably with the Court's string of abortion funding decisions, and thus required no re-evaluation of *Roe*. Finally, the viability testing scheme represented a statement of what a conscientious doctor would do in evaluating whether a fetus was viable, not a command to conduct unnecessary, expensive, and invasive tests. Fried, arguing for the United States, was left to make the more sweeping argument that *Roe* needed to be overturned. His primary purpose was to assure Justices O'Connor and Kennedy that *Roe* could be overturned without losing the concept of the right to privacy in its entirety. Frank Susman, arguing for Reproductive Health Services, argued that *Roe* was not severable from other privacy cases, and could not be overruled in isolation (Lazarus 1999, Webster Oral Arguments accessed 2013).

There was a five vote majority to uphold Missouri's regulations, but serious disagreements within the majority as to the scope of the decision and the rationale to use. Stealthily, Rehnquist, tasked with writing the majority opinion, endeavored to eviscerate *Roe* without facially overruling it by both eliminating the trimester framework and using rational basis review to determine the constitutionality of abortion restrictions. Anthony Kennedy and especially Antonin Scalia were displeased with what they perceived to be Rehnquist's attempts at subterfuge. They wanted the case clearly and openly to

reject to *Roe*, rather than disingenuously to dismantle it. O'Connor wanted to sidestep the issue by upholding the Missouri restrictions, while reaffirming *Roe*. She thought the contested laws did not directly challenge *Roe*, so there was no need to re-adjudicate its legitimacy. Facing dissent from the left and the right, Rehnquist's decision hewed closely to Missouri's contention that its laws could be upheld without repealing *Roe*, upholding aspects of the law save the counseling requirement, which the majority argued had become moot. Though technically sustained, the explosive viability testing requirement was neutered when Rehnquist re-interpreted the second line requiring specific tests as in conflict with the opening line that physicians exercise their "reasonable and professional skill" in determining viability. Rehnquist subsumed the second line into the first, granting physicians more latitude than they would have had otherwise. Presciently, however, Rehnquist also called for the abandonment of the trimester framework (*Webster v. Department of Public Health Services*, 492 U.S. 490, 1989).

After the muddle of the *Webster* decision, the Supreme Court took up a challenge to a 1988 Health and Human Services regulation that prevented clinics receiving federal funding under Title X from providing abortion counseling or referral services, *Rust v. Sullivan* (500 U.S. 173, 1991), and returned to the issue of parental consent laws yet again in *Hodgson v. Minnesota* (497 U.S. 417, 1990) and *Ohio v. Akron Center for Reproductive Health* (497 U.S. 502, 1990). The Court interpreted *Rust* in line with its previous abortion funding rulings, and sustained the Title X funding restrictions against a two pronged First and Fifth Amendment challenge. The Court used the latter two cases to further refine its stance on when parental consent requirements were constitutional. *Hodgson's* onerous two parent requirement combined with a forty-eight hour waiting period was struck down, and replaced with a two parent notification requirement with the option for judicial bypass. Like *Webster* before it and *Casey* after, the *Hodgson* majority was an ungainly mixture of concurring opinions and shifting vote coalitions, with differing groups of justices striking down the first variant of the Minnesota law

and upholding the second. Ohio's parental notification laws were upheld by the Court, though the majority demurred when confronted with the question of whether a judicial bypass option was constitutionally required, or just preferred.

Taking its cue from the recommendation in *Webster*, the Supreme Court overturned the *Roe* trimester framework in *Planned Parenthood v. Casey*. Like *Webster* before it, *Casey* was a high profile case with the potential to overturn *Roe*. Planned Parenthood challenged five of Pennsylvania's abortion regulations: a parental consent requirement, a spousal consent requirement, an informed consent rule that mandated doctors relay potential negative consequences of abortion to their patients, a mandatory twenty-four waiting period before an abortion could be obtained, and abortion clinic reporting requirements. Also like *Webster*, *Casey* produced a highly fractured decision with no opinion capturing the support of more than three justices. In yet another similarity between the two cases it was Planned Parenthood's lawyer, Kathryn Kolbert, arguing that the case should be understood as a referendum on *Roe* during oral arguments, and that Pennsylvania's laws and *Roe* could not co-exist, while the representative for the state tried to downplay the impact of the laws and any incompatibility with *Roe*, saying during oral arguments, "It is a statute that is carefully drafted and it has been amended to reflect the teachings of this Court's jurisprudence since *Roe*" (*Casey* Oral Arguments accessed 2013). Ultimately the Court deemed all the regulations legitimate, save the spousal consent requirement. It also eliminated the trimester framework established in *Roe*, instituting the "undue burden" standard O'Connor had first developed almost a decade prior in her *Akron* dissent. The undue burden standard replaced both the trimester framework and the requirement that abortion regulations represent a "compelling state interest." The undue burden standard "... exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability" (*Planned Parenthood v. Casey*, 505 U.S. 833, 1992). The *Gonzales* ruling fifteen years later alluded to two factors that could be used to clarify the content of the

undue burden test: the number of women who would be prevented from obtaining an abortion if a challenged regulation was upheld, and, in terms of proscribing abortion methods, whether other methods were available. “[T]he undue burden test is *not* intended to guarantee a woman or an abortion provider the abortion method of their choice.” (Gonzales v. Carhart, 550 U.S 124, 2007).

However, as Borgmann (2004, 2009) has chronicled, the undue burden standard is not only murky, but it is applied inconsistently throughout *Casey* and later abortion cases. When the Court used information from the legislative history and amicus briefs it uncritically accepted information about the difficulties presented by the spousal notification requirement, but rejected data from the same sources about the onerous nature of the twenty-four hour waiting period and parental notification requirements. The justices also considered each regulation in isolation, without considering the potential cumulative impact of a state that applied several of the permitted restrictions simultaneously (Planned Parenthood v. Casey, 505 U.S. 833, 1992). Tribe (1992) described the differing ways that the Court interpreted factual presentations from the district court using distinctions based on “hyper-technicalities,” such as the usage of the phrase “particularly burdensome” rather than “a substantial obstacle.”

*Casey* represented the last gasp of the failed twenty year campaign to overturn *Roe* and *Doe*. In an uncharacteristic departure from how the Court usually represents itself and its role, the plurality opinion discussed at length the value of stare decisis and the necessity of preserving *Roe*. A substantial portion of the opinion was devoted to this defensive assertion of the Court’s legitimacy, and a distinguishing of *Roe* from the discredited *Plessy v. Ferguson* (163 U.S. 537, 1896) and *Lochner v. New York* (198 U.S. 45, 1905). The Court not only had an obligation to precedent, but it had an obligation to preserve the status quo for the generation that had come of age post-*Roe*, with the expectation that abortion was and would remain legal. Reversing *Roe* might make the Court seem inconsistent and affected by political factors, and this might undermine the Court’s legitimacy. The *Casey* opinion is unusual in the extent to which it plainly addresses these extra-judicial political considerations in text,

rather than merely privately in conference. This extended digression on the importance of precedent demonstrates how entrenched *Roe* had become, and how difficult it is to overturn even high profile, controversial Supreme Court decisions.

If any time was ripe for an overturning of *Roe*, it was the year *Casey* was on the docket and yet it did not happen. By 1992 seven of the nine justices were Republican appointees, with the lower federal courts similarly lopsidedly Republican. Conservative politicians had used opposition to *Roe* as a litmus test for judicial appointment, as abortion politics became central to the appointment process. With yet another reaffirmation of *Roe* delivered by a conservative Court, the four anti-*Roe* justices on the court in 1992 no longer saw the strategic wisdom in granting cert on abortion cases. Between *Roe* and *Casey*, the Supreme Court had agreed to hear over twenty cases and it was usually conservative justices who pressed to grant cert in these instances (Lazarus 1999), in the hope that one of them would be a vehicle to overturn *Roe*. The First Amendment rights of anti-abortion protesters defined the Supreme Court's post-*Casey* abortion agenda for the rest of the 1990's, but these cases were only tangentially related to the types of legal debates about the right to abortion cited above.

There are several reasons for *Roe*'s durability despite the criticism it engendered from a variety of conservative (Calabresi 2008, Linton 1993) and liberal (Ely 1973, Ginsburg 1985) critics. One of the key reasons is the increasing degree of state regulation of abortion rights that post-*Roe* cases have allowed. Even with the trimester framework in place, within five years, the Court was upholding state level abortion regulations. In its modified post-*Casey* iteration, the right to abortion has been further altered and narrowed to permit states to modify it substantially at all stages of pregnancy, allowing states significant flexibility in tailoring abortion laws to fit the political and public demands of each state. The doctrine of stare decisis further compels the justices to leave precedent intact, unless the constitutional rationale underpinning it has become completely untenable. As previously mentioned, the Supreme Court has also curtailed the frequency with which it grants cert in abortion cases,

diminishing the number of future opportunities to re-try *Roe* (Dutra 2010). The justices also fear the perceived threat to their legitimacy and the backlash that would follow the repeal of *Roe*. Perennial swing justice Anthony Kennedy is particularly motivated by this concern (Greenburg 2007). Despite the centrality of *Roe* in judicial backlash narratives, there is significant evidence that even in the absence of *Roe* abortion politics would have been divisive (Post and Siegel 2007, Greenhouse and Siegel 2011), especially considering reversing *Roe* would not ban abortions but merely leave the issue to the political process of the states.

In keeping with prior trends, the more recent judicial victories of the anti-abortion movement continue to be incremental in nature. Consider the ban on one of a group of late term abortion procedures termed by opponents “partial birth abortion.” This ban was enacted nationally in the Partial Birth Abortion Act of 2003 and upheld in *Gonzales v. Carhart* (550 U.S 124, 2007) which prohibited one type of late term abortion procedure called intact dilation and extraction (hereafter called D&X in keeping with Court terminology; the same procedure also has the acronym IDX in other texts). This procedure entailed the dilation of the cervix, rotation of the fetus into breech position, partial delivery of the intact fetus into the vaginal canal up to the head (which was left in utero), where the doctor then collapsed the head by suctioning out the brain to facilitate removal (American Medical Association 2007). This is just one of a variety of second trimester abortion methods, and is less commonly used than either suction-aspiration abortion or dilation and evacuation (D&E). According to a Guttmacher Institute survey conducted in 2000, only 0.17% abortions performed nationally were done using the D&X method, or about 2,200 of 1.3 million abortions performed annually (Rovner 2006). Late term abortions are rarely performed and politically unpopular. The latter fact made the crusade against D&X abortion an important part of anti-abortion politics in the 1990’s and into the twenty-first century. The abortion of potentially viable fetuses was particularly gruesome to anti-abortion activists, who viewed abortion as infanticide. Continuing with the trend towards incrementalist abortion restrictions, Ohio

was the first state to pass a partial birth abortion ban in 1995 that outlawed a wider range of procedures than the later legislation. A similar law was passed in Congress in 1995, but was vetoed by President Clinton, who stated that the procedure was "potentially life-saving, certainly health-saving [for] a small but extremely vulnerable group of women and families in this country, just a few hundred a year" (CNN "Clinton Vetoes Partial Birth Abortion Bill" accessed 2015). Between 1995 and 2000, twenty-eight states passed laws which prohibited some combination of D&E and D&X abortions (Devins 2006).

Initially, these laws did not fare well in the courts. Ohio's law was struck down by the sixth circuit in 1997 as a violation of the undue burden standard because it lacked a health exception (*Women's Medical Professional Corp. v. Voinich*, 130 F. 3d 187 1997). Using a similar rationale, the Supreme Court found that a ban on partial birth abortion violated the undue burden standard established in *Casey*, and thus the Fourteenth Amendment in its first partial birth abortion case, *Stenberg v. Carhart* (530 U.S. 914, 2000). Nebraska passed a law banning partial birth abortions with an exception only to preserve the life of the pregnant woman. Justice Breyer's majority opinion opened on a conciliatory note by acknowledging two deeply felt and irreconcilable views on abortion: that life begins at conception and that legalized abortion is thus akin to mass murder, and that re-criminalizing abortion would reduce women to second class citizenship, depriving them of "dignity and equality" and lead to a resurgence in dangerous back alley abortions. He continued that the goal of the Court and the Constitution was to uphold "fundamental individual liberties" in governing a society, where citizens "sincerely hold directly opposing views" on moral issues. The majority found that the lack of a health exception in Nebraska's law violated the Constitution, as did the law's vagueness concerning specifically what types of abortion procedures were banned. The majority was worried that the law would be broadly applied to more than just D&X abortions.

Justice Kennedy had been subject to blistering conservative criticism after voting with Justices O'Connor and Souter to reaffirm *Roe* in *Casey*, and he viewed the *Stenberg* decision as a violation of the standards he had endorsed in that case and a personal betrayal by O'Connor and Souter (Greenburg 2007, Toobin 2008). His argument relied heavily on what he perceived to be the broad right of state governments to regulate abortion access as long as abortion was not simply outlawed. Though Kennedy was writing from the minority when he penned the following words, the basic logic behind them animates previous Court decisions on the rights of states to favor childbirth dating back to *Maher*, and would eventually command the majority in *Gonzales v. Carhart*. Kennedy writes,

...a central premise [of *Roe* as affirmed in *Casey*] was that the States retain a critical and legitimate role in legislating on the subject of abortion...The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential...The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus (*Stenberg v. Carhart*, 530 U.S. 914 192 F.3d 1142 2000).

*Stenberg* was not the end of the road for opponents of late term abortion. Michigan, Utah, and Virginia passed laws closely modeled after the Nebraska law, and Congress retooled its earlier version of the Partial Birth Abortion Act with *Stenberg's* objections in mind. Congress also passed a national prohibition in 2003, clarifying that it only applied to the D&X procedure. More importantly, O'Connor was replaced by Samuel Alito, who joined the four justices dissenting from *Stenberg* to form a new anti-D&X majority.

Finally, the Supreme Court heard *Gonzales v. Carhart* in 2007. Like the Nebraska statute, the congressional law had no health exemption; however, it was more explicit about which abortion procedure it was banning. With O'Connor's retirement, there was now a majority on the court opposed to D&X abortion. Writing for the majority, Justice Kennedy forwarded a health argument that prioritized protecting a woman from the supposed barbarity of D&X abortions, and the potential



physical as well as psychological consequences of choosing to abort in this fashion. Moral condemnation of the procedure itself is more plainly apparent in both partial-birth abortion cases than in many previous abortion rulings, though that condemnation remains squarely on the procedure itself and the doctors who administer it, rather than on the women who seek to obtain it. The starry eyed reverence for the judgment of medical professionals that animated *Roe* is missing in Kennedy's argument. *Gonzales* inverts the health based arguments used in earlier abortion cases, which were concerned with the potential for physical and mental injury from childbearing, rather than from abortion. In arguing as he did, Kennedy utilized what Rebecca Ivey calls the "woman protective discourse," which assumes

(1) that the woman has a natural predisposition toward a maternal role, and thus will have a natural "bond of love [with] her child";<sup>182</sup> (2) that the woman is unable to rationally understand that this bond exists; (3) that the woman is unable to rationally understand that she has the option to carry the pregnancy to term as well as to abort; (4) that the woman is unable to rationally understand the benefits and risks of both procedures and make a responsible decision; (5) that medical professionals providing abortions are unwilling to assist women in making an informed and rational choice; and (6) that a woman cannot be held liable for the repercussions of her own choice, such as regret, depression, or physical consequences, as if she were a rational, responsible, adult human...In sum, by suggesting that regulations on abortion promote a woman's health by protecting her, the woman-protective discourse reconfigures the undue burden test by aligning the woman's interest in her own mental health with the state's interest in fetal life (Ivey 2008).

Even though the upheld law banned only the D&X procedure, the *Gonzales* decision emboldened states to extend their late term abortion restrictions beyond the narrow scope of that ruling. Currently thirteen states ban abortion at twenty weeks of pregnancy, in contradiction with the constitutional requirement that late term abortion prohibitions contain life and health (including mental health) exceptions. Eleven of these thirteen laws have passed in the last three years, and many of these laws are premised on dubious concerns about fetal pain at that level of development. The Supreme Court has not heard any post-*Gonzales* cases on late term abortion, though laws banning abortion at twenty weeks were enjoined by district judges in Idaho, North Dakota, and Arizona and the state

Supreme Court in Georgia, pending litigation. Arkansas and North Dakota’s heartbeat bills, which would ban abortion after detection of a fetal heartbeat was possible, were also judicially overturned.

Another recent incrementalist tactic has been the adoption of so-called “TRAP” (i.e., targeted regulation of abortion providers) laws. TRAP laws can entail a variety of requirements that are applied only to abortion providers. While the onerousness of TRAP laws varies significantly from state to state, thirty-four states have some type of medical regulations meant to apply only to abortion clinics. These regulations “...impose licensing requirements, authorize state inspections, regulate wide-ranging aspects of abortion providers’ operations—including, for example, staff qualifications and minimum hallway dimensions—and impose civil and criminal penalties for noncompliance. Although the adoption of such abortion regulations is frequently mandated by statute, the specific content of the resultant requirements (often quite detailed) is set by state agencies. Moreover, the resultant regulatory schemes themselves expand administrative oversight and control of abortion providers by mandating periodic licensing and inspection of abortion facilities, which can lead to frequent interaction with health department officials as well as adjudicatory hearings or other administrative proceeding” (Metzger 2006).

TRAP laws have existed since *Roe*, but they have expanded greatly in popularity as courts have become more amenable to them post-*Casey*. The legal battles concerning this second generation of TRAP rules have occurred outside the purview of the Supreme Court, in the lower federal and state courts. The three circuit courts that have addressed TRAP laws, the fourth, eighth, and the ninth, have reached different conclusions about similar regulations. The fourth circuit court found in *Greenville Women’s Clinic v. Bryant* (222 F.3d 157, 2000) that all the challenged laws were constitutional because they did not impede access to abortion directly and the state had a rational basis for treating abortion services differently than other medical procedures. Conversely, the ninth circuit found in *Tucson Woman’s Clinic v. Eden* (379 F.3d 531, 2004) that TRAP laws constituted an unacceptable undue

burden. The eighth circuit, in *Planned Parenthood of Iowa v Atchinson* (126 F.3d 1042, 1997), in line with the reasoning of the ninth circuit, found that Iowa was treating Planned Parenthood in a discriminatory fashion, thus creating an undue burden on women seeking an abortion by requiring them and only them to receive what was called a certificate of need. The requirements set for this certificate of need were so arcane and anachronistic that not a single prospective family planning clinic which applied for one was able to receive one for over a decade. District courts in Oklahoma, Missouri, Mississippi, and South Dakota, preliminarily struck down TRAP laws in those states, though Missouri's TRAP laws were later re-instated when the clinic suing to enjoin them closed.

TRAP laws seek to prevent abortion by, at their most draconian, regulating clinics out of existence. In Texas, thirteen of thirty-six abortion clinics were threatened with closure because the doctors who work there lack admitting privileges in a nearby hospital (Eckholm 2013). Initially, Judge Yeakal from the District Court of Austin blocked the implementation of this law. However, in October 2013 the fifth circuit overruled him and said the law should stand. In 2015 the Supreme Court stayed the law, preventing its implementation (Chappell 2015). Another variant of incrementalist abortion regulation attempts to make women feel guilty for choosing abortion by stirring up maternal, protective feelings about the fetuses they carry. Informed consent laws have a long history of being championed by abortion opponents for this reason (Sawicki 2011). Continuing in the vein of those early informed consent laws, which usually required doctors to give a prepared speech before performing abortions, twenty-two states now have some type of ultrasound regulation for abortion providers; twelve states require doctors to perform pre-abortion ultrasounds, even if they are not medically necessary, and three states (Louisiana, Utah, and Texas) require a woman seeking an abortion to be subjected to an ultrasound accompanied by a verbal description of its contents. In the other states, doctors must ask patients if they wish to view the ultrasound. Recently, the Supreme Court allowed a lower court's overturning of part of North Carolina's "Woman's Right to Know Act" to stand because it was found to

violate doctors' free speech rights despite the legality of such laws in other states. The law required that after performing an ultrasound a doctor must describe the fetus in detail including limb and organ size and has to provide this information whether the patient wants it or not (Merlan 2015).

Like the TRAP laws discussed previously, these laws have had a mixed judicial record. They have fared poorly in state supreme and district courts, where they have been subject to a preliminary injunction in North Carolina and a permanent injunction in Oklahoma, while a law virtually identical to the stricken Oklahoma statute was upheld by the fifth circuit in *Texas Medical Providers Performing Abortion Services v. Lakey* ( 667 F.3d 570, 2012). In November 2013, the Supreme Court dismissed two certiorari requests from Oklahoma, allowing the state's Supreme Court's overturning of two abortion regulations to stand. In the first of these two cases, *Cline v. Oklahoma Coalition for Reproductive Justice* (OK 93 133 S. Ct. 2887, 2013) the Supreme Court of Oklahoma found the state's regulation of mifepristone, commonly known as RU-486 and misoprostol, as well as methotrexate, which is administered to treat ectopic pregnancies, violated the undue burden standard by virtually banning medication abortions. The United States Supreme Court granted certiorari in June 2013 but on November 4 dismissed the writ of certiorari as improvidently granted. The Court similarly dismissed a challenge to the injunction against Oklahoma's mandatory ultrasound law in *Pruitt v. Nova Health Systems* (U.S. Supreme Court No. 12-1170).

The only contemporary deviation from this incrementalist strategy has been almost uniformly unsuccessful, in keeping with past non-incrementalist attempts to alter abortion law. Personhood amendments have never made it to the judicial branch because one has never been adopted. As the name suggests, a personhood amendment defines an embryo as a person from the moment of fertilization onward. Such a law would not only ban all abortions, but jeopardize the legality of contraceptives, such as IUDs and Plan B, as well as in vitro fertilization. North Dakota has come closest to enacting a personhood amendment, legislatively passing a personhood amendment subject to

referendum in 2014. Similar legislation failed in Georgia, Virginia, and Washington. Comparable ballot initiatives failed in Colorado and Mississippi and failed to qualify for ballot access in Ohio, Florida, and Nevada (Borgmann 2011). When the Oklahoma Supreme Court prevented a personhood amendment from going on the ballot, the Supreme Court declined to consider an appeal on the decision in 2012 without comment.

The judicial politics of abortion have proceeded in a steadily incrementalist course since *Roe* and *Doe*. This incrementalist tack has persisted through personnel and ideological changes on the Court, shifts in which party controls the elected branches of government, forty plus years of intense right-to-life and pro-choice activism, and decades of failed attempts to overturn *Roe* directly. In the forty plus years abortion has been legal, it has never been in a state that can be classified as judicial equilibrium, but neither have any cases punctuated abortion law, as *Roe* and *Doe* did. The Court has created this incrementalist policy course not only through its actions, but also through its inaction. The Supreme Court has cut back on the number of abortion cases it hears in the post-*Casey* years, which has facilitated even greater variation in abortion access at the state level as state courts, district courts, and circuit courts forge their own paths without input from the highest court, creating a contradictory hodgepodge of constitutional interpretation.

In 2014 the Supreme Court heard a case that showcased this lack of consensus over what should be classified as an abortifacient, and demonstrated how broad the scope of conflict has become on the abortion issue. This case was *Hobby Lobby v. Burwell* (573 U.S. \_\_\_ 2014), where the arts and crafts chain Hobby Lobby, owned by the devoutly evangelical Green family, and Conestoga Wood Specialties, a furniture company owned by the Mennonite Hahn family challenged the constitutionality of the contraception mandate, a provision of the Affordable Care Act, because they believed that four of the twenty FDA approved contraceptives covered under the mandate acted as abortifacients. The owners of both businesses argued that they believed life began at conception, specifically fertilization.

Two types of emergency contraception, Plan B and ella, and two IUDs on the market, Mirena and ParaGard, they argued could theoretically prevent implantation of a fertilized egg and thus were morally equivalent to abortion. Making the companies' health insurance provide for these types of contraception is tantamount to covering abortions the plaintiffs argued.

The plaintiffs' relied on the Religious Freedom Restoration Act (RFRA), a law passed in 1993 to overturn the Supreme Court's 1990 decision in *Employment Division v. Smith* (494 U.S. 872). In that case, two Native American men named Alfred Smith and Michael Galen were fired from their jobs at a drug rehabilitation center for ingesting peyote during a religious ritual. They sued when their claim for unemployment was denied, and won before the Oregon Court of Appeals and Oregon Supreme Court, though the two courts used different legal rationales. The U.S. Supreme Court heard the case twice. Initially it remanded the case back to the Oregon Supreme Court for clarification over whether or not religious drug use violated state law. Oregon ruled for the plaintiffs again finding that the state's ban on peyote violated the Free Exercise Clause. On its second hearing of the case the U.S. Supreme Court disagreed. The majority opinion, authored by Justice Scalia argued that Smith and Galen's religious beliefs could not allow them to violate a “neutral law of general applicability” and thus they had no right to be exempted from the state's prohibition on peyote usage. The backlash to this decision led to the passage of RFRA, which re-instituted the strict scrutiny standard for laws which appear on their face to infringe on the Free Exercise Clause of the first amendment first articulated in *Sherbert v. Verner* (374 U.S. 398, 1963). The law passed unanimously by the House and on a 97-3 vote in the Senate.

Despite the Court's finding that the RFRA was unconstitutional when applied to state governments, they found that it was a constitutional regulation of congressional activity. By a 5-4 vote, the Court found that the contraceptive mandate violated the RFRA because it failed to provide the least

restrictive means of ensuring contraceptive access for the employees of Hobby Lobby and other “closely held” religious companies with religious objections to some forms of contraception. Even though these drugs are not abortifacients, the mere fact that the owners of the companies believed they were was sufficient for them to argue successfully that their corporate religious rights were being unconstitutionally infringed upon (*Hobby Lobby v. Burwell* 573 U.S. \_\_ 2014).

Discussions of morality are going to take a different cast in a judicial context than they would in a legislative or executive one. While judges have political and ideological goals, they are bound by precedent and the expectations of their office to eschew blatantly partisan or utility maximizing public position-taking. The Court’s opinions, regardless of its members' motivations, rhetorically rely on legal rather than moral justifications. However, that does not mean that law is devoid of morality, or that we cannot analyze judicial opinions to see how moral issues are dealt with in America's political system. For example, natural law theory explicitly links legal and moral argumentation. Conversely, legal positivism de-links morality from legality in its analysis of legal validity.

Natural law legal authority comes from the congruence of a law with universal standards, which are discovered through the reasoning power of lawmakers. Under natural law, “unjust laws are not laws” (Edlin 2008). Moral analysis is inextricably connected to legal reasoning. Natural law comes either from God in its theological form or from some combination of evolution and human nature in its secular formulation. Natural law assumes then that there exists worldwide, objective moral principles that can be deduced by lawmakers, and applied in the creation of law. The goal of a judge, then, is to evaluate law using the natural law standard. Normative assessment is thus central to the judge's job. (Hamburger 1993, Finnis 2011). This is a dramatic departure from legal positivism, which argues, according to Austin, that law is the enforceable command of the sovereign. Thus, “[t]he fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for

doubting it. According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.); as we might say in a more modern idiom, positivism is the view that law is a social construction." (Green 2003).

In critiquing existent abortion law, Blackmun's majority opinion in *Roe* goes to great lengths to demonstrate Texas abortion laws are anomalously harsh and not well supported by the historical record. He cites historical data from a variety of civilizations spanning millennia to show that legalizing abortion would not be a radical break from past practice. Blackmun stops short of making a natural law argument in favor of abortion rights, and he never uses the term, but he does demonstrate that there is no reason to assume there is an anti-abortion natural law consensus and that pre-*Roe* abortion laws have less common law support than the legalization scheme the majority employs. Narrowing their time frame considerably, *Casey* and *Stenberg* justify *Roe* not only legally but morally by referring to the obligation the Court has to preserve legalized abortion for the generation of women who have come of age expecting the right to exist and have shaped their lives accordingly. This justification seems based in legal pragmatism (Posner 2003, Morris 2007, Grey 1989): laws are instrumental in nature, and precedent should be maintained when overturning it would have negative consequences. While pro-choice justices do reference historical precedent rather than just legal precedent in several high profile abortion cases, they do this to illustrate a lack of moral consensus on abortion.

So a natural law perspective provides a way for justices to talk about morality without lapsing into partisan or utilitarian arguments, if they so desire. Yet, the judicial debates about abortion have rarely been waged using moral argumentation for decades. Consider the *Roe* dissent of Rehnquist and joined by Byron White. Rehnquist does not rest his opposition to the recognition of a legal right to abortion on moral grounds, or use moral language. He opens by citing his respect for Blackmun's research and reasoning before providing a litany of problems with the majority, which is conspicuous in how blatantly it ignores any of the moral debates surrounding abortion, then or now. Rehnquist's first



objection relates to the lack of a plaintiff in the first trimester of pregnancy for Blackmun to use as a basis for his trimester framework. He writes, “the Court departs from the longstanding admonition that it should never ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’ ” After this point he states the right to privacy is not indicated in this case because abortions involve a transaction between a doctor and a patient in a public location (public relative to the home, that is). He goes on to conclude with the claim that the Fourteenth Amendment is being wrongly and over broadly applied, and that rational basis review is appropriate for abortion restrictions. White’s *Doe* dissent condemns the decision as an act of “raw judicial power,” and he criticizes the Court for “improvident and extravagant exercise of the power of judicial review,” without engaging in many of the particulars of the abortion debate specifically. In a later dissent for the case *Thornburgh v. American College of Obstetricians and Gynecologists* (476 U.S. 747, 1986) he directly references the moral disputes that animate the abortion controversy but again argues he is opposed to the judiciary creating a constitutional right to abortion, rather than abortion per se. Arguing for judicial restraint he writes

Both the characterization of the abortion liberty as fundamental and the denigration of the State's interest in preserving the lives of nonviable fetuses are essential to the detailed set of constitutional rules devised by the Court to limit the States' power to regulate abortion. If either or both of these facets of *Roe v. Wade* were rejected, a broad range of limitations on abortion (including outright prohibition) that are now unavailable to the States would again become constitutional possibilities.

In my view, such a state of affairs would be highly desirable from the standpoint of the Constitution. Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted.<sup>[n5]</sup> *Roe v. Wade* implies that the people [p797] have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never -- not in 1787, 1791, 1868, or at any time since -- done any such thing. I would return the issue to the people by overruling *Roe v. Wade*. (*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 1986)

Rehnquist and White were the original dissenters in *Roe* and *Doe*. In the years following these decisions the Court became increasingly conservative and gained more anti-*Roe* justices but the tendency to eschew moral condemnation of women who obtain abortions in favor of other types of criticism of the decision remained. Even when the rhetorically fiery Justice Scalia joined the Court and began to pen scathingly anti-*Roe* opinions, he directed his fire primarily at the idea of judicial usurpation of the legislative prerogative to legalize or prohibit abortion, and the violence done to his originalist conception of constitutional interpretation, rather than impassioned pleas for fetal life. The most openly moralistic Supreme Court abortion decisions, *Stenberg* and *Gonzales*, do morally condemn specific abortion procedures in no uncertain terms, but not in a way that demonizes women. Sandel argues that this is part of a consistent judicial strategy on the part of pro-*Roe* and anti-*Roe* justices alike to “bracket” the question of fetal life and other moral quandaries of abortion by rhetorically adopting “... neutral[ity] among conceptions of the good life in order to respect the capacity of persons to choose their values and relationships for themselves” (Sandel 1989, Borgmann 2009b, Bridges 2013). Sandel challenges both the possibility and desirability of this bracketing, but many of the justices have remained steadfast in their attempts to sidestep the thorny moral questions that surround abortion.

The body of post-*Roe* cases show a great deal of negotiated half-measures, carefully brokered compromises, and incrementalist alterations to the body of law, rather than dramatic swings in interpretation. The issues that have come up most often before the Court are incremental and the Court has repeatedly used these cases as opportunities to narrow their focus and parse minute changes in the law, rather than deliver sweeping changes to abortion law. While the Court did an about face quickly on D&X abortion in *Gonzales*, the opinion reverses its stance on a procedure that was used in less than one percent of all abortions. The narrow scope of both *Stenberg* and *Gonzales* still classify them as incrementalist abortion decisions. Even the *Casey* decision, which resulted in the abandonment of the trimester framework and institution of the “undue burden” standard, while significant, was the result of

years of incremental encroachment on the supposedly inviolate early abortion right. The funding decisions, which impact the abortion decision at any stage of pregnancy date back to *Maher v. Roe* in 1977, and conceivably laid the groundwork for the subsequent developments in *Casey* fifteen years later. *Casey's* protracted paean to the virtues of stare decisis is an obvious attempt on the part of the justices to demonstrate how non-radical the *Casey* opinion is. Even accepting that judicial opinions have a strategic dimension and that judges may alter their content accordingly does not undermine the earlier points because the incrementalist language is significant whether it is employed strategically, sincerely, or in some combination of the two.

The majority of the cases discussed above also considered questions that could be highly technical in nature. A clear example of the technicality of the abortion debate may be seen in the Court's reckoning with injunctions against specific abortion procedures, such as the ultimately unsuccessful attempt by Missouri to ban saline injection abortion in *Danforth*, as well as the lengthy disquisitions on the variety of late term abortion procedures in *Stenberg* and *Gonzales*. The mechanics of these procedures are discussed at length by the Court in rendering their opinions. The other issues discussed here, such as certification and record keeping requirements, various types of required parental, spousal, and informed consent, the mandatory ultrasound requirement, funding restrictions of various types covering both state and federal programs, are not discussed in the broad, simplistic terms that typify moral panics. The Supreme Court even in its decisions that endorse certain abortion restrictions are hesitant to vilify women rhetorically for getting abortions.

The incrementalism of post-*Roe* abortion regulation hews closely to public opinion, which is more nuanced and muddled than the typical portrayal of diametrically opposed pro-choice and pro-life camps would suggest. Fiorina in his *What Culture Wars?* presents a raft of statistics, which show a broad range of opinion on abortion, with a decided minority taking absolutist stances on either side of

the debate. As with all issues, question wording and order have a significant effect on public opinion but even with that caveat Fiorina finds that a sizable, stable majority supports *Roe*, as well as most of the abortion regulations discussed above. He calls the public “pro-choice but...,” and argues that “...in abortion decisions the Supreme Court followed public opinion” (Fiorina et al. 2005). Lazarus concludes “[*Casey*] solved the problem by creating a mushy, let-the-details-be-worked-out-later legal standard that reflected the views of the vast majority of Americans: abortion should be available, especially early in pregnancy, but it should be a rare, considered, even discouraged choice” (Lazarus 1999). Saletan similarly described how pro-choice sentiment was usually leavened with a libertarian aversion to state assistance in providing abortions, and a distaste with the idea of “abortion as birth control.” Public opinion swings dramatically based on the reason behind a woman’s abortion decision, with abortions for reasons of rape, incest, fetal abnormality, and health threat to the mother far outpacing public support for abortions undertaken for reasons of financial instability, lack of romantic partner, and desire not to have any(more) children (Saletan 2004). Court decisions have not strayed far from public opinion on the abortion issue.

The stability of public attitudes about abortion muddled, incrementalist cast of post-*Roe* abortion law are two of the things that make abortion a moral conflict type of morality policy instead of moral panic. The cases discussed above demonstrate that abortion meets the five characteristics of a moral conflict I outlined in the introduction: a moral conflict is a moral debate of long duration, characterized by incremental policy change, and features a broad scope of conflict, high level of institutional entrenchment and a social construction of the issue that acknowledges multiple legitimate moral positions held by groups with relatively equal social constructions.

The Supreme Court hearing *Roe* and *Doe* when they did and delivering decisions of such broad scope nationalized the abortion issue in a way that ensured a large scale backlash response. This early nationalization of a moral debate is one of the five factors I identify that causes an issue to become a

moral conflict rather than a moral panic. Nationalization expands the scope of conflict by increasing the number of relevant judicial and legislative venues where abortion regulations can be contested. The lack of resolution at both the state and federal levels routinizes abortion conflict and ensures the long duration of the issue. The prevalence of the behavior or group subject to moral debate also affects whether an issue will become a moral conflict or panic. The pool of individuals directly affected by the legality of abortion is far larger than that directly impacted by the legality of same-sex marriage. This means more people perceive the issue as relevant, and since both supporters and opponents of *Roe* can argue that they have the support of the public in at least some aspects of their arguments, it is harder for either side to assume definitive moral authority and demonize the other as deviant.

The legal opportunity structure also encourages the abortion moral conflict. Rulings discussed in this chapter incentivize repeat players to continually bring abortion cases to court. Because the abortion issue has been partitioned into so many sub-issues by the broad scope of conflict and the complexity in defining what the right to abortion means in practice, the potential for litigation is boundless. Constant incremental tinkering has been the hallmark of post-*Roe* abortion cases, not sweeping changes.

### Chapter Three: The Judicial Politics of Same-Sex Marriage

The judicial history of same-sex marriage is quite different from that of abortion, as befitting the fundamentally different nature of these two moral issues. Same-sex marriage bans were motivated by moral panic. The role of the courts in the maintenance of the same-sex marriage moral panic was two-fold: rebuffing plaintiffs suing to allow gays to marry and allowing same-sex marriage bans (enacted by statute and later state constitutional amendment) to stand when legally challenged. When the moral panic was operational, the courts accepted both the characterization of gays as deviant and the necessity of protecting children and regulating procreation by forbidding them to marry. Each state used almost identical language to defend its same-sex marriage bans. After the 1970's, there was little variation in the legal arguments offered by supporters or opponents of same-sex marriage bans once the issue returned to the judicial agenda in the 1990's. "Challenges were largely identical because the bans in every state were substantially identical...[same-sex marriage was] unique among constitutional litigation [because there was] no possibility of legal, factual, remedial, or administrative differences among different cases of plaintiffs" (Blackman and Wasserman 2015). What changed was judicial receptiveness to these arguments based on how threatening same-sex marriage appeared to be at any given time.

There was a cluster of same-sex marriage cases in the early 1970's precipitated by the growth in gay activism that followed the Stonewall Riots in 1969 and the Supreme Court's finding that bans on interracial marriage violated the Constitution in *Loving v. Virginia* (1967). These cases not only failed to change marriage laws, but were practically laughed out of court. The plaintiffs' legal arguments were rejected without serious consideration, eliciting dismissive opinions and personal reprisals for their involvement. Even the plaintiffs understood they were long shot efforts at best (Boucai 2015). The treatment of gay litigants not only in these early same-sex marriage cases but in other gay rights

cases of the time demonstrated their social construction as deviants undeserving of the legal protections heterosexuals received. After these defeats, the topic largely slipped off the agenda for almost twenty years. The self contained nature of these state level cases combined with how radically they challenged public attitudes about both marriage and homosexuality ensured that they would lack the transformational capacity of *Roe*. Supporters of legal abortion decided to embrace a litigation strategy and quickly made it to the Supreme Court, but the Court would not hear a same-sex marriage case until 2013. State cases did not begin their proliferation until the late 1990's and early 2000's, inspired by positive (though quickly overturned) rulings in Hawaii and Alaska. Instead of ensuring the duration of this legal debate or broadening its scope of conflict, the courts muted it through their derisive rejection of these litigants. Federal judicial venues were closed to same-sex marriage proponents, further constraining reform by narrowing the available legal opportunity structure.

Interest in same-sex marriage was reinvigorated by the AIDS crisis, which threw into stark relief how vulnerable same-sex couples were without the legal rights that marriage provided (Chauncey 2004). This second generation of same-sex marriage cases, which began to be adjudicated in the 1990's, demonstrated a greater degree of strategic sophistication on the part of same-sex marriage proponents in terms of venue selection and plaintiff resources. However, these cases also generated an even greater degree of backlash at the state and federal level. Same-sex marriage was first legalized in 2003 and incrementally legalized in thirteen states over the next ten years. The *Windsor* decision, which struck down the Defense of Marriage Act in June 2013, created a policy punctuation, with over twenty states interpreting it as requiring the legalization of same-sex marriage. *Obergefell v. Hodges* (2015) finished the job, requiring the fourteen states that had not legalized same-sex marriage post-*Windsor* to do so. Unlike the constant steady stream of incrementalist post-*Roe* abortion cases, the judicial dynamics of same-sex marriage conform much more closely to the expectations of PET, both in

terms of timing and the substantive content of rulings. Same-sex marriage cases do not lend themselves to follow up litigation concerning implementation as abortion cases have, and lack an equivalent level of institutional entrenchment, favoring one shot rather than repeat player litigants. Overall, the judicial history of same-sex marriage shows an issue of shorter duration, (mostly) PET rather than incrementalist policy change, with a narrower scope of conflict, lesser degree of institutional entrenchment and a social construction of gay stakeholders as deviant while the bans enjoyed judicial protection. When it became too difficult to defend a deviant construction of gay people before the courts due to changing social norms, same-sex marriage bans were overturned with great speed. Same-sex marriage was banned and then later legalized in the particular way because the issue became nationalized, the narrow segment of the population affected, the comparative lack of complexity present in the implementation of same-sex marriage, and a legal opportunity structure that favored one shot litigation and a partisan strategy of selective engagement with the issue. Abortion is perceived as a matter of life and death, the impact of same-sex marriage on the rest of society is harder to determine aside from the religious rationale of dwindling importance in an increasingly secular nation.

Gay rights organizations, such as the Mattachine Society and the Daughters of Bilitis, existed before Stonewall and during a time of intense post-war repression, as part of what was called the homophile movement. But they differed from post-Stonewall groups in their aims and influence and were less aggressive and openly political than post-Stonewall groups. These groups existed as much to provide social support and community for their membership as to advance political goals. The Mattachine Society, formed by Henry Hay and a handful of friends in Los Angeles in 1951, was structurally modeled after the American Communist party, of which Hays was also a member. The group was deliberately decentralized into a collection of “underground” cells with varying levels of



security clearance and was thus prone to schism. Within a year of its formation One Inc., a mixed gender group of lesbians and gays, had split off from the Mattachine Society. In 1953, Hay was dismissed from his own organization due to his Communist ties and perceived radicalism, as the Mattachine Society membership embraced a more conciliatory, assimilationist stance meant to defuse heterosexual hatred and fear by demonstrating the similarities between gays and straights. The Daughters of Bilitis, founded in San Francisco in 1955, hewed closely to this post-1953 Mattachine strategy, emphasizing educational campaigns rather than direct confrontational action and requesting members to present themselves in feminine clothing at public gatherings (D'Emilio 1998, Newton 2009).

After the Stonewall Riots in 1969, there was a large scale mobilization of gays and lesbians into newly formed organizations and an orientation away from the perceived timidity of the homophile groups.

The brazenness of the riots, which lasted nearly a week, was unlike anything that had ever happened in the history of homosexuality. The movement that followed Stonewall represented a sharp break with the past... Stonewall turned what had been a cautious and invisible campaign aimed at improving the public image of homosexuals into a mass movement that would take the issue of gay rights into the mainstream of American life" (Gorton 2009).

The Gay Liberation Front and the Gay Activists' Alliance, both formed within six months of the Stonewall riots, were the first advocacy organizations to use the word "gay" in their names. The first gay pride marches were scheduled on the anniversary of the Stonewall riots (Gorton 2009). As the Stonewall momentum continued into the 1970's the Gay Rights National Lobby (now the Human Rights Campaign), Lambda Legal, the National Gay Task Force, and the Lesbian Rights Project all also formed. By the 1970's, most urban areas had at least one gay rights organization (Rimmerman 2007).

The other part of this first policy punctuation was the *Loving v. Virginia* decision in 1967. Parallels have frequently been drawn between earlier restrictions on interracial marriage and contemporary same-sex marriage bans by same-sex marriage proponents (Eskridge 1993, Coolidge 1997, Lenhardt 2008, Wardle and Oliphant 2007). The first cluster of same-sex marriage cases in the 1970's cited *Loving* as precedent to support their legal right to same-sex marriage, as did many later cases. The California Supreme Court had invalidated its ban on interracial marriage in *Perez v. Sharp* (32 Cal.2d 711, 1948) but other state courts failed to follow California's lead. Of the twenty-nine states that forbade interracial marriage when *Perez* was decided, thirteen had dropped their bans by *Loving* legislatively or through non-enforcement without repeal. When the Supreme Court finally found anti-miscegenation laws unconstitutional in *Loving* (after dodging earlier attempts to rule on the issue in 1955 and 1956, perhaps out of fear of judicial backlash) it provided an inspiration to gay marriage activists a few years later (Liptak 2014, Klarman 2005, Coolidge 1997).

*Loving* challenged Virginia's anti-miscegenation statute, the Racial Integrity Act of 1924. Mildred and Richard Loving married in Washington D.C. in 1958, where interracial marriage was legal, and returned to their home in Virginia. They were promptly arrested and pled guilty to the crime of miscegenation. They each received a one year prison sentence that would be suspended if they promised to move out of Virginia and not return for twenty-five years. The couple agreed to relocate to Washington, D.C., where they lived until 1964 when financial difficulties and frustration with their inability to see family in Virginia caused them to file a lawsuit challenging the law (*Loving v. Virginia*, 388 U.S. 1, 1967).

The Virginia Supreme Court of Appeals ruled against the Lovings, citing its decision in *Naim v. Naim* (1955). In that case Justice Buchanan wrote:

We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship. Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius. (*Naim v. Naim*, 197 Va 80; 87 S.E.2d 749, 1955).

The case was appealed to the Supreme Court. When defending the Racial Integrity Act before that body, Virginia offered several justifications for the statute. In addition to asserting a state interest in preventing race mixing, which had been deemed legitimate in both *Naim* and the Loving's earlier legal challenge, the state also argued that there was no Equal Protection Clause violation because the law applied equally to white and non-white individuals. In *Pace v. Alabama* (106 U.S. 583, 1883), the Supreme Court had upheld Alabama's anti-miscegenation law using this same rationale.

The Supreme Court unanimously found that bans on interracial marriage violated the due process and equal protection clauses of the Fourteenth Amendment, invalidating anti-miscegenation statutes in sixteen states. The Racial Integrity Act had been motivated by nativism and white supremacy and served no legitimate purpose besides “invidious racial discrimination.” In striking down the law, Chief Justice Warren's opinion also expounded upon the importance of marriage as a fundamental right. He wrote that, “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival” (*Loving v. Virginia*, 388 U.S. 1, 1967).

The initial round of same-sex marriage litigation did not show the same level of strategic selection of plaintiffs and venues by interest groups that would characterize later cases due to a lack of national coordination capacity on the part of nascent gay rights organizations that were forming in the

post-Stonewall foment, though three of the four couples who initiated this first generation of cases themselves were active in gay rights organizations. Rather than an organization bundling multiple couples together to form a suit, in each of these first four cases one couple sued in their home state. In addition to the cases discussed below, there were couples who unsuccessfully petitioned to receive marriage licenses in Tampa, Chicago, Hartford and Milwaukee (Chauncey 2004).

The first case to consider whether a same-sex marriage was legitimate was decided in New York in August of 1971, though this case bore little similarity to the others that would follow. *Anonymous v. Anonymous* (67 Misc.2d 982, 1971) was an inauspicious beginning to the legal debate over the validity of same-sex marriage. The plaintiff in this case married the defendant, whom he presumed was female but was in fact legally male at the time of the marriage. And when the plaintiff tried to consummate his marriage and discovered he was in fact married to a man he fled his apartment. His spouse promised to receive gender reassignment surgery to become female. Immediately following their marriage, the plaintiff deployed and spent just over a year overseas. During this time the army deducted payments from his wages to support the defendant, who also forwarded credit card and medical bills to the plaintiff and received unspecified surgery to transition to being female. The couple only reunited again when the plaintiff bailed the defendant out of jail in San Francisco. After this brief reunion the defendant remained on the west coast, while the plaintiff returned to New York. The couple continued to live apart, with the defendant only communicating with the plaintiff by mailing bills. The plaintiff sued in 1971 to “obtain a declaration as to his marital status with the defendant.” The case was considered under section 140 of New York's domestic relations law, which governs the conditions under which marriages are annulled. The defendant refused to appear before the court, but retained a lawyer to argue that the marriage was legitimate and could not be annulled under section 144 of the domestic relations law. The state found that the couple never had a legally valid marriage because they

were both male at the time the marriage ceremony was conducted. It could not be annulled because it never existed in the first place (*Anonymous v. Anonymous*, 67 Misc.2d 982, 1971).

Two gay student activists, Jack Baker and Michael McConnell, launched the first direct constitutional challenge to existent marriage law in *Baker v. Nelson* (191 N.W.2d 185, 1971). Baker was a member of the University of Minnesota's FREE (Fight Repression of Erotic Expression) organization, a newly formed gay rights organization. Baker and McConnell wanted to get married for personal reasons, but they primarily viewed their legal case as serving a symbolic purpose critiquing the institution of marriage for its inherently sexist and economically oppressive nature. They also viewed marriage as a form of “advertisement” for the gay liberation movement (Boucai 2015). “With the marriage lawsuit, Baker hoped to “cause a cultural revolution!” He predicted that “within five years we can turn the whole institution of marriage upside down!” His lover Michael McConnell agreed: “We want to cause a re-examination and re-evaluation of the institution of marriage. We feel we can be the catalyst for that. Our getting married would be a political act with political ramifications.” The couple posed for a three page photo spread in the *Look* magazine issue on “The American Family” (Chauncey 2004).

Deviating from the focus on state constitutional rights that would typify the majority of later same-sex marriage cases, Baker argued that Minnesota restricted several federal constitutional rights, specifically: the First Amendment rights to freedom of speech and association, the Eighth Amendment protection against cruel and unusual punishment, the unenumerated right to privacy contained within the Ninth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment. The plaintiffs also cited *Loving v. Virginia* and *Griswold v. Connecticut* as cases which implied the existence of a constitutional right to same-sex marriage. They also contended that Minnesota’s marriage law did not explicitly define marriage as between one man and one woman.

The Minnesota Supreme Court ruled against Baker. The court implicitly dismissed the First and Eighth Amendment claims by not mentioning them at all. The Court found the Ninth Amendment untenable because of a lack of valid precedent and because the Ninth Amendment did not bind state governments. The due process and equal protection arguments were also rejected and the court found no support for the application of *Griswold* or *Loving*. Connecticut's anti-contraception law, stricken in *Griswold*, represented an unlawful intrusion into state authorized marriages, and its abolition could not be extrapolated to legitimize new marital relationships. The court found that regulating marriage based on “the fundamental differences [of] sex” was not “irrational or invidious discrimination” of the type banned under *Loving*. (*Baker v. Nelson*, 191 N.W.2d 185, 1971). The case was dismissed by the Supreme Court after the Minnesota Supreme Court ruled.

This dismissal of the *Baker* appeal had long lasting ramifications. Firstly, the Supreme Court did not merely decline to grant certiorari, but dismissed it on the merits after a request to hear it under mandatory appellate review. This meant that their dismissal acted as a decision on the merits that there was no substantial federal question implicated in the case, and thus no lower federal court could reach a different conclusion using the same constitutional rationale offered in *Baker v. Nelson*. This dismissal was cited in seven subsequent district and circuit court cases and four state courts cases as evidence of the lack of federal recognition for a right to same-sex marriage. The federal judicial system was closed off as a venue for potential same-sex marriage litigants, requiring a state by state campaign.

Consider the differences in the legal opportunity structure between those suing to liberalize abortion laws and those wanting to legalize same-sex marriage. Same-sex marriage could not become the national issue abortion would become in the 1970's because gays would not have access to the federal courts. They had no precedent to draw from, and the judges they dealt with made no effort to hide their disdain for the litigants and their arguments. There was also no opportunity for repeated

litigation in same-sex marriage cases. This would handicap litigants going forward. As Galanter (1974) explains, the resources of “one shot” claimants, who have only one opportunity to litigate, differ substantially from “repeat players,” who are engaged in “many similar litigations over time.” Repeat players have the following advantages in terms of attaining desired legal and political outcomes: they have advance intelligence based on prior rulings, expertise and access to specialists, “facilitative informal relations” with “institutional incumbents,” established credibility in terms of demonstrated commitment to a cause and an established bargaining reputation, the ability to play the odds over many cases and the ability to play for “rules changes” rather than just “immediate policy gains.” Their experience also better allows them to determine which rules can be changed and which cannot, and which policy changes would be merely symbolic and which would have tangible benefits. By nationalizing the abortion issue so early in *Roe*, the Supreme Court ensured repeat players in abortion litigation from 1973 onward. Conversely, for same-sex marriage litigation, this one line dismissal remained the Supreme Court’s only ruling on same-sex marriage until it took up *United States v. Windsor* and *Hollingsworth v. Perry* in 2013.

Two years after *Baker* two women named “Tracy Knight” (this was a stage name Knight adopted as a go-go dancer that stuck) and Marjorie Jones applied for a marriage license in Kentucky after being recruited by “...reputation hunting criminal lawyer Stuart Lyon, who wanted controversial cases.” Knight and Jones were a short lived couple who wanted to revolutionize the timid, closeted gay community in Louisville. The Kentucky Civil Liberties Union declined to participate in the case because “any lawyer [involved] will be suspected queer.” These women were cognizant of the *Baker* case and thought “we couldn't let the boys get ahead of us” and were eager to litigate after being sought out by Lyons. They argued that their freedoms of association and religion were abridged, and that they were subject to cruel and unusual punishment by being denied these rights. The treatment they

received in court demonstrated how little regard the court had for both the merits of the case and the women litigating it. When Knight wore a beige pantsuit to the proceedings she was sent home by the judge to change into a dress. When she returned in a dress the judge openly ogled her legs and asked “who is the he-she and who is the she-she?” (Boucai 2015). The short opinion from the Kentucky Court of Appeals unanimously found that there was “no constitutional issue is involved. We find no constitutional sanction or protection of the right of marriage between persons of the same sex.” As in *Baker v. Nelson*, Kentucky relied on the dictionary definition of marriage as being between one man and one woman (Jones v. Hallahan, 501 S.W.2d 588, 1973).

*Singer v. Hara* (522 P. 2d 1187, 1974) marked the debut of two enduring legal strategies of the same-sex marriage movement: a reliance on state constitutional guarantees and a claim that laws banning same-sex marriage should be considered under strict scrutiny rather than rational basis review because gay people constitute a suspect class and/or the right to marry is a fundamental right. Seattle, as “one of most highly and harmoniously organized cities in the gay movement” seemed a more hospitable venue than Minnesota or Kentucky. Paul Barwick and John Singer lived in a commune with other gay activists in Seattle, where they assisted the commune in running a halfway house for gay parolees, a gay community center, and a counseling group. Singer had been born in New York City to activist leftist parents. He had been part of the City College of New York's “Homosexuals Intransigent” group, had participated in AmeriCorps civil rights missions, and had been a conscientious objector during the Vietnam War. He co-founded the Gay Liberation Front of Seattle. When Seattle abruptly ceased its “tolerance policy” of gay clubs in 1970, Singer and other members of his compound felt compelled to do something. They too were familiar with the case in Minnesota and settled on marriage litigation as a strategy. Singer lived in a polyamorous commune and did not have a steady boyfriend. Paul Barwick, Singer's friend and “occasional lover” was selected because it was



determined he could best handle the public scrutiny of the case. The American Civil Liberties Union of Washington was wary to help the couple because they were poor plaintiffs who “didn't really want to get married” but eventually consented to filing an amicus brief (Boucai 2015). When they were denied a marriage license they sued, arguing that in addition to violating the Eighth, Ninth, and Fourteenth Amendments, Washington’s restriction of marriage to one man and one woman violated the Equal Rights Amendment in the state constitution. This constitutional grab bag strategy was reminiscent of the similarly failed rationale employed in *Baker*; and demonstrated a lack of sophistication relative to later cases. The King County Superior Court rejected their claims, emphasizing the centrality of procreation to the marriage right, a frequent argument invoked against same-sex marriage rights. Singer and Barwick decided not to appeal their case due to a lack of money and a fear that the state supreme court would rule against them, setting a negative precedent for subsequent cases (*Singer v. Hara* 522 P. 2d 1187, 1974).

This decision to utilize state constitutions to broaden the array of constitutionally protected rights is part of a strategy famously endorsed by Justice Brennan in an influential article that appeared in 1977. He argued that

State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections of ten extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective forces of state law - for without it, the full realization of our liberties cannot be guaranteed (Brennan 1977).

When Brennan wrote this law review article he was a liberal Justice bridling under the more conservative regime of the Burger court. He feared that the ideological work of the Warren Court would be undone, and he saw state constitutionalism as one tool to continue the work of the preceding Warren Court, especially given how many parts of the Bill of the Rights had been incorporated between

1962-69. This line of reasoning motivated a movement in constitutional interpretation called the “new judicial federalism,” which saw state constitutions as viable alternative ways of creating and applying constitutional protections. (Shephard 1996, Price 2012). The federal Constitution sets a minimum standard of constitutional rights that must be recognized, but it does not prohibit the recognition of additional rights by individual states (Gardner 2005).

Most same-sex marriage cases before *Windsor* were premised on state, rather than federal constitutional rights for several reasons. Marriage law is primarily state law, the federal courts were closed off by the denial of *Baker*, and despite the disadvantages inherent in one shot versus repeated court cases, same-sex marriage proponents believed they would have a better chance of success in asserting state constitutional claims in carefully chosen states. Twenty six years after Brennan’s article Daniel Pinello demonstrated the utility of the Brennan strategy for gay rights claims through his empirical analysis of how level of government, region, precedent and a host of other legal and demographic factors determine the likelihood of a court reaching a pro-gay rights decision. Generally speaking, state courts resolved cases in a pro-gay rights fashion more than twice as often as their federal counterparts. This disparity became even stronger when states relied on their own constitutions rather than the U.S. Constitution.

*[S]tate courts interpreting state constitutions were far more receptive to the lesbian and gay rights than either court system was in applying the federal Constitution. In particular, state supreme courts construed state constitutions at a rate greater than two and a half times more favorable to gays than the U.S. Supreme Court did when reading the federal charter” (Pinello, 2003, emphasis in original).*

Pinello also found that pro-gay outcomes varied significantly by region, with Southern states being the most sympathetic and Northeastern and Western states being the most sympathetic to gay rights claims, underlining the importance of strategic venue selection. Mucciaroni (2008) finds similar results and offers four explanations: “the salience of national political debates and Washington’s conservative and

partisan political climate [which makes policy change more difficult]; the distribution of political attitudes across states and local communities; opportunities for “retail politics” in smaller jurisdictions and [lastly] diffusion effects.”

While these cases were low profile compared to the same-sex marriage litigation of the nineties and twenty-first century, they attracted enough attention to trigger a backlash response. On a personal level three of the six plaintiffs (McConnell, Jones, and Singer) lost their jobs as a result of participating in the cases (Boucai 2015). On a broader level, since the plaintiffs in *Baker*, *Jones*, and *Singer* had all argued that Minnesota, Kentucky, and Washington’s laws were vague about whether only men and women could marry, six states passed legislation codifying marriage as an exclusively opposite-sex institution between 1973 and 1978. Nineteen seventy-seven in particular was a year of intense conservative anti-gay activism set off by the Anita Bryant campaign against a gay rights ordinance passed and then overturned in Miami (Chauncey 2004). The adoption of state level so called “mini-DOMAs” and state constitutional amendments would also cluster in 1996 to 1998 and 2004, respectively.

By 1974 four judicial reaffirmations of marriage as an exclusively opposite sex institution in three years combined with a lack of logistical support and national coordination from the roster of newly formed post-Stonewall gay rights organizations stalled this first legal push for same-sex marriage. Until *Baehr v. Lewin* nineteen years later, only two same-sex marriage cases were decided: one in the ninth circuit in 1982 and one in Pennsylvania in 1984. These cases were no more successful than their predecessors in the 1970’s, and were not undertaken strategically either by individual activist couples (as in the 1970’s) or sponsored by gay interest groups. In the former case, *Adams v. Howerton* (673 F.2d 1036 1982), Richard Adams petitioned the INS to have his partner Australian citizen Anthony Sullivan classified as an immediate relative for immigration purposes on the basis of their

marriage after they received a marriage license in Boulder, Colorado. The INS denied their petition on the grounds that their marriage was not legal either in the state of Colorado or federally. Adams sued, arguing that his Fifth Amendment rights were being violated. The ninth circuit did not rule on whether Adam's and Sullivan's marriage was valid under Colorado law, because such a determination was not necessary to find that Congress had a rational basis for preventing gay couples from being considered spouses for immigration purposes. The case was appealed to the Supreme Court, which declined to grant certiorari (*Adams v. Howerton*, 673 F.2d 1036, 1982, *Murdoch and Price* 2002).

The second 1980's same-sex marriage case, *Desanto v. Barnsley* (328 Pa. Superior Ct. 181, 1984), decided by the supreme court of Pennsylvania, concerned whether a gay couple could be considered common law married under Pennsylvania law. Citing the legal and practical undesirability of expanding the definition of common law marriage, the court declined to recognize a gay relationship as a common law marriage. Common law marriages were vestigial remnants of nineteenth century frontier America, where some sparsely populated towns lacked access to courts or clergymen to solemnize their marriage. In the contemporary legal environment they were a "fruitful source of perjury and fraud" according to the court and to be "tolerated but not encouraged." Any "social relationship" gay couples had should not be sanctioned under the banner of common law marriage, which is meant to supplement statutory marriage without providing any additional rights (*Desanto v. Barnsley*, 328 Pa. Superior Ct. 181, 1984).

The period between the failure of *Singer v. Hara* in 1974 and *Baehr* was an equilibrium period. Neither *Adams* nor *DeSanto* disrupted the anti-same-sex marriage consensus. They were not launched by individual or group activists as part of any same-sex marriage movement, nor did they alter the policy image of marriage as a straights only institution. Same-sex marriage was largely off the radar in the gay community as well as the broader public. This equilibrium period may be measured not just by

the paucity of cases, but also by the almost total absence of any public and media attention devoted to same-sex marriage (Rosenberg 2008).

There were other factors beyond failure that motivated activist disengagement from the marriage issue, which were touched upon in chapter one. Other issues seemed more pressing and timely, such as the declassification of homosexuality as a mental disorder by the American Psychiatric Association, passage of anti-discrimination ordinances, and repeal of sodomy laws. Many gay and lesbian activists also had serious philosophical problems with the institution of marriage. Firstly, the feminist critique of marriage as a constraining and patriarchal institution was widely shared amongst lesbians. Secondly, the marriage debate illuminated a central ideological tension within the gay rights movement dating back to its homophile period: to what extent should gays and lesbians emphasize their similarity to straights as opposed to creating unique social and cultural arrangements? Since the first same-sex marriage cases were uniformly unsuccessful, tabling the issue that aroused so much within movement disagreement seemed logical and desirable (Cain 2000, Eskridge 1993, Rimmerman 2007).

The AIDS crisis reinvigorated the moribund same-sex marriage movement, though not as quickly and directly as Stonewall and *Loving* had galvanized the first wave. The relationship between the AIDS crisis and the same-sex marriage movement is complex. On the one hand, the devastation caused by AIDS was so intense that it could be seen as shoving other gay rights items off the agenda. However, as the years wore on, gay couples where one or both partners had AIDS struggled with legal, medical and financial burdens that would not have existed had they been married. The median age of an AIDS patient at this time was 36, meaning that few sufferers had made formal estate plans or crafted documents such as wills and powers of attorney to give their partners legal rights concerning their care. Even when these documents did exist, they were often ignored by their biological families. These

issues included rights to hospital visitation, medical decision making, ability to make funeral arrangements, and protection against eviction from a shared home (Chauncey 2004, Frank 2014, NeJaime 2013). While the AIDS crisis did not lead to immediate mobilization on the marriage issue, “[t]he early battles to protect the rights of people with AIDS and their partners nonetheless had an enduring impact on many gay people’s thinking by abruptly confronting them with the legal inequality of their relationships” (Chauncey 2004). Marriage was also seen as an increasingly desirable way to curb promiscuity and “civilize” or “domesticate” gay relationships (Eskridge 1996, Sullivan 1996, NeJaime 2013).

While the Supreme Court did not hear any same-sex marriage cases until *Windsor* and *Hollingsworth*, there are still several earlier Supreme Court cases that shaped the same-sex marriage debate. Though the Constitution contains no explicit right to marry, it has nonetheless repeatedly been acknowledged as a fundamental right. In addition to *Loving*, discussed above, the Supreme Court further elaborated upon marriage rights in a pair of cases heard during this same-sex marriage equilibrium period: *Zablocki v. Redhail* (434 U.S. 374, 1978) and *Turner v. Safley* (482 U.S. 78, 1987). In both these cases, as in *Loving* before them, the right to marry was upheld against state encroachment. They would both be cited in many of the cases discussed below. For proponents of same-sex marriage, these cases were a latent resource. During the same-sex marriage moral panic was raging, they were of limited use; however, once the moral panic subsided they were cited favorably in *Obergefell* as pro-same sex marriage precedents.

The challenged law in *Zablocki* required any noncustodial parent to receive a court order before marrying in the state of Wisconsin, a prerequisite that could only be met if the noncustodial parent was up to date on his or her child support payments. The purpose of this bill was to compel parents to remain up to date on support payments and thus decrease the number of impoverished children

needing state welfare payments. Roger Redhail fathered a child in high school and, given his youth, lacked the financial wherewithal to make support payments. When he was prevented from obtaining a marriage license two years later he sued, alleging Wisconsin's law violated the equal protection clause. By an eight to one vote, the court agreed that the Wisconsin law was unconstitutional. Justice Marshall's opinion cited *Loving, Griswold, Skinner v. Oklahoma* (discussed in chapter two), and *Meyer v. Nebraska* (262 U.S. 390, 1923), a case that found a ban on foreign language instruction violated the Due Process Clause and which was cited as an example of the right to "marry, establish a home and bring up children." Three justices wrote concurring opinions, each finding the statute unconstitutional because it infringed on the right to marry. In *Turner v. Safley*, Missouri's prohibition on prison inmate marriage without the permission of the warden was found to violate their constitutional right to marry (*Zablocki v. Redhail* 434 U.S. 374, 1978 and *Turner v. Safley* 482 U.S. 78, 1987).

The Supreme Court's two sodomy cases also had ripple effects that shaped the jurisprudence of same-sex marriage. The first, *Bowers v. Hardwick* (478 U.S. 186, 1986), concerned a Georgia law that banned straight and gay sodomy, though since the man challenging the law was gay and he had been arrested for engaging in oral sex with another man (a heterosexual couple who sought to join Hardwick's lawsuit were found to lack standing since they had never been prosecuted under the law), the Court discussed the law and the constitutional issues at stake solely through the lens of whether a constitutional right to gay sodomy existed. Justice White, who wrote the majority opinion, was concerned that a decision invalidating sodomy laws would result in the decriminalization of incest and other sex crimes and he was not convinced that consensual sodomy's status as a victimless crime meant it was constitutionally protected, citing laws against home drug use. Heightened scrutiny should not be applied because sodomy was not considered "implicit in the concept of ordered liberty," or "deeply rooted in this Nation's history and tradition." He found that Georgia's moral qualms with sodomy

satisfied rational basis review. The majority ruled against *Hardwick*, finding that Georgia's sodomy statute was constitutional and that the right to privacy did not cover gay sex. The majority opinion cited the long historical tradition of sodomy bans, and argued against expansion of Fourteenth Amendment protections in the name of judicial restraint. (*Bowers v. Hardwick* 478 U.S. 186, 1986, Murdoch and Price 2002, Cain 2000, Sheyn 2009). In 1990 Justice Powell, the *Bowers* swing vote, confessed to an NYU Law School class that upon reflection he had ruled incorrectly in the *Bowers* case (Greenhouse 2002). He assumed he had never met a gay person, being oblivious to the fact that one of his clerks was gay.

*Bowers vs. Hardwick* had a chilling effect on the campaign to legalize same-sex marriage in a few respects. It was repeatedly cited as precedential justification for employing rational basis rather than intermediate or strict scrutiny in adjudicating same-sex marriage cases, which helped legitimate same-sex marriage bans. It also allowed judges to continue to adopt negative attitudes toward homosexuality, perpetuating the deviant classification of gays that underlied the same-sex marriage moral panic. As Judge Ferren wrote in Washington D.C.'s same-sex marriage case, *Dean vs. District of Columbia* ( 653 A.2d 307, 1995):

Before considering whether any combination of factors, if satisfied, would require intensive judicial scrutiny of the prohibition against homosexual marriage, it is necessary to note that four federal courts of appeals have ruled—primarily by reference to the Supreme Court's due process decision in *Bowers v. Hardwick, supra*—that homosexuals do not comprise a suspect or quasi-suspect class.”

*Bowers* was also unusual in the degree to which it embraced the idea of homosexuality as morally deviant and used moralistic language and justifications in its ruling. Compared to the oft detached, morally dispassionate language used by anti-abortion justices discussed in chapter two, this language is particularly jarring. Goldberg (2004) writes “[t]he last several decades of cases bring into sharp relief that the post-World War II Court has *never* relied exclusively on morality to sustain government action with the exception of the now discredited *Bowers v. Hardwick*.”



When the Court overturned *Bowers* in *Lawrence v. Texas* (539 U.S. 558, 2003) Justice Kennedy's majority decision and Justice O'Connor's concurrence both strove to distance their opinions on the unconstitutionality of sodomy laws from an endorsement of same-sex marriage. They both asserted that the state had a legitimate interest in the "traditional definition of marriage" beyond bigotry against homosexuals and repeatedly stressed that their decision should not be used to legitimate same-sex marriage (Ball 2003).

In his blistering dissent, Justice Scalia attacked both the majority's decision and their assurance that it could not be used to bolster a legal case for same-sex marriage. He started by denouncing three members of the majority for being hypocritical in crafting a long ode to stare decisis in *Planned Parenthood v. Casey* and upholding *Roe*, while voting to strike down *Bowers* seventeen years after it had been decided. After drawing extensive negative parallels between the Court's treatment of precedent in *Roe* as compared to *Bowers*, Scalia laments how the *Lawrence* decision undermines the case for maintaining prohibitions on same-sex marriage, arguing that it "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned" (*Lawrence v. Texas*, 539 U.S. 558, 2003). Lending some credence to this fear on Scalia's part, when conducting field research interviewing activists for and against same-sex marriage, Daniel Pinello interviewed Roey Thorpe, the executive director of Basic Rights Oregon. Thorpe said: "So for us, this started in the summer of 2003, after the [U.S. Supreme Court's] *Lawrence* decision. I remember the day after the decision, the press called me and asked, "Is gay marriage next?" And I said, "Oh, that's just what [Supreme Court] Justice [Antonin] Scalia is saying. That's a smokescreen. That's blah blah blah." Then the reporter said to me, "No, actually that's what gay rights activists are saying on the national level," and read me a

couple of quotes. And I said, “Oh!” So a lot of people were thinking it was the next logical step” (Pinello 2006).

Showing the continued ambivalence that had yet to dissipate entirely, Lambda Legal declined to represent the three plaintiff couples in the Hawaii case *Baehr v. Lewin* (Pinello 2006). The first same-sex marriage case of the 1990s was temporarily more successful than its earlier brethren, however. The plaintiffs alleged their rights under the privacy and equal protection clauses of the Hawaii constitution were being violated. The majority was unconvinced by the privacy argument, finding no basis for a right to same-sex marriage “...rooted in the traditions and collective conscience of our people,” and adding “Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy.” However, the supreme court considered the equal protection clause under strict scrutiny, accepting the prohibition against same-sex marriage as an example of sex discrimination (*Baehr v. Lewin* 74 Haw. 530, 852 P.2d 44 1993).

The state was tasked with providing compelling, narrowly tailored reasons for banning same-sex marriage. In the aftermath of *Baehr*, Hawaii formed the “Commission on Sexual Orientation and the Law” to study the legal benefits offered to heterosexual vs. homosexual couples, and then to recommend a policy response to the *Baehr* decision. The second commission, empanelled after the first one dissolved due to a legal challenge, argued that Hawaii should both legalize same-sex marriage and create domestic partnerships for all couples to utilize if they so chose. The state did not embrace this and offered five reasons it deemed compelling to prevent same-sex marriage: “protecting the health and welfare of children and other persons, fostering procreation in a marital setting, securing or assuring recognition of Hawaii marriages in other jurisdictions, protecting the State's public [treasury]

from the reasonably foreseeable effects of State approval of same-sex marriage in the laws of Hawaii," and "protecting civil liberties, including the reasonably foreseeable effects of State approval of same-sex marriages, on its citizens" (*Baehr v. Miike*, 910 P.2d 112, 1996). The supreme court of Hawaii had remanded the decision back to a trial court which was charged with reviewing these claims.

The trial court was unmoved by the state's argument, and Judge Chang ruled that the state of Hawaii had no reason not to issue same-sex marriage certifications. A mere twenty-four hours later, however, Chang stayed his decision because he feared it would be overruled by the state supreme court, legally dooming any same-sex marriages performed in Hawaii (Oshiro 2012, Leonard 1996). In 1997, Hawaii created a new legal partnership for couples who could not marry called reciprocal beneficiary relationships. This was an incrementalist step that granted same-sex couples approximately sixty of one hundred and sixty marital rights, such as rights of inheritance, health insurance and pension benefits for state employees, and health care decision making rights, without changing Hawaii's existing marriage law (Rosenberg 2008). In 1998, the Hawaii state constitution was amended via ballot initiative to define as marriage as between one man and one woman.

In between the first and second arguing of *Baehr*, Washington D.C. heard its own same-sex marriage case in *Dean v. District of Columbia* (653 A.2d 307, 1995). The legal arguments of the plaintiff couple proceeded as follows. Washington had passed two laws that the couple suing for a marriage license said necessitated the granting of marriage licenses for same-sex couples: the Anti-Sex Discriminatory Act of 1976 and the 1982 Gender Rule of Construction. Both laws were passed with the goal of removing gender bias in statutory language. The stated purpose of the former law was "...to achieve equality under the law for men and women by eliminating sex-based distinctions in the District of Columbia Code, so that the rights and responsibilities of persons under D.C. law will not be different solely on the basis of their sex." Similarly the text of the latter reads in part, "...Unless the Council of

the District of Columbia specifically provides that this section shall be inapplicable to a particular act or section, all the words thereof importing one gender include and apply to the other gender as well.”

The plaintiffs argued that these two laws should be construed to eliminate the gender requirement that marriage must be an opposite-sex institution. The court rejected this analysis, finding that the changes were meant to equalize the status of men and women relative to each other, not to place gay and straight men on equal legal footing or to change the character of marriage. After dispatching with this contention, the court took up the argument that the District of Columbia’s marriage laws violated D.C.’s Human Rights Act and the due process clause of the Fifth Amendment. The court found that the Human Rights Act was not meant to eliminate all types of discrimination and that if it had been meant to change the definition of marriage, it would have said so explicitly. The Fifth Amendment claim was dismissed on the basis of the *Bowers* decision (which meant that legal discrimination against same-sex couples should be analyzed under rational basis review, rather than either type of heightened scrutiny) and because the fundamental rights to marriage and privacy had been inextricably linked to procreation by the Supreme Court (*Dean v. District of Columbia*, 653 A.2d 307, 1995).

Same-sex marriage supporters achieved another short-lived victory two years after *Baehr v. Miike* and the same year that Hawaii’s constitution was amended. In the 1998 case, *Brause v. Bureau of Vital Statistics*, the superior court of Alaska found that the law restricting marriage to heterosexual couples was subject to strict scrutiny because it involved the fundamental right of marriage. Like the Hawaii supreme court in *Baehr*, the court required extra hearings to determine what, if any, compelling reason(s) existed for prohibiting same-sex marriage and whether doing so would violate the Alaskan constitution’s rights to privacy and equal protection. The plaintiffs cited two Alaska privacy cases, one which forbade high schools from setting restrictions on student hair length and one which found a fundamental right to privacy in the home and struck down a state law criminalizing the home

possession and use of small amounts of marijuana. *Loving* and *Griswold* were cited as federal precedents. Before these hearings could take place, however, Ballot Measure 2, which defined marriage as between one man and one woman, was passed and added to the Alaskan constitution, rendering *Brause* moot (*Brause v. Bureau of Vital Statistics*, WL 88743 1998).

The choice of Vermont for the next lawsuit was deliberate. Vermont had several characteristics that made it appealing as a venue to sue for same-sex marriage rights. There was a prior history of sympathy to other gay rights causes: Vermont had passed hate crimes legislation in 1990, added sexual orientation to its anti-discrimination laws in 1992, and allowed same-sex adoption in 1993. The state constitution contains a common benefits clause which allows the state to ensure rights not protected by the federal Constitution. Additionally, the state constitution is difficult to amend, decreasing the likelihood a new constitutional amendment would be enacted to nullify a judicial victory, as had occurred in Hawaii and Alaska (Moats 2004, Johnson 2000).

Chief Justice Amestoy, writing for a unanimous court distinguished at length between the common benefits clause of the Vermont constitution and the equal protection clause of the Fourteenth Amendment of the United States Constitution. The former “differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development” and the latter “...does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters.” The level of judicial review employed is different than the tripartite levels of scrutiny in federal constitutional analysis. To be legitimate under Vermont’s constitution, any variation in public benefits, such as those that are gained through marriage, have to be justified by the presence of an “appropriate and overriding government interest.” This is determined through a balancing test of the rights of the individuals affected with the objectives of the state, though the mechanism used to determine which claim was heavier was not specified. The burden of proof placed on the state is heavy and hard to meet. In this

case, Vermont justified its restriction of marriage to opposite sex couples as an assertion of the state's right to connect the act of procreation with responsible child rearing in stable marital relationships (Baker v. Vermont, 744 A.2d 864, 1999).

The procreation argument is a mainstay of same-sex marriage opponents, first cited in *Baker v. Nelson*, and reiterated in almost every subsequent same-sex marriage case. This time, however, the Vermont court found it unpersuasive, citing both the reality of same-sex parents and the contingent of heterosexual couples who cannot or will not procreate over the course of their own marriages.

Furthermore, since the state of Vermont already changed its laws to facilitate childrearing by same-sex couples, the state could not claim that it had an interest only in preserving stable heterosexual couples through access to marriage benefits. The court was similarly unmoved by the state's claim that legitimizing same-sex marriage would lead to "marriages of convenience" and cause "jurisdictional issues" if Vermont's marriage laws were different than its sister states (Baker v. Vermont, 744 A.2d 864, 1999).

Despite these findings, the Vermont supreme court stopped short of requiring the state to authorize same-sex marriage. In the section of the majority opinion tasked with remedying the constitutional problems inherent in Vermont's then marriage laws, Amestoy wrote:

We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as "domestic partnership" or "registered partnership" acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners...Further, while the State's prediction of "destabilization" cannot be a ground for denying relief, it is not altogether irrelevant. A sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences. Absent legislative guidelines defining the status and rights of same-sex couples,

consistent with constitutional requirements, uncertainty and confusion could result. Therefore, we hold that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion (*Baker v. Vermont*, 744 A.2d 864, 1999).

While civil unions were initially hailed as a success of the same-sex marriage movement, they quickly became unpalatable to activists who resented their inferiority relative to marriage. Logistical complications with cross-state recognition of civil unions also quickly developed. *Baker* required that the Vermont legislature, if it did not legalize same-sex marriage outright, create a separate system that was equal in all respects to marriage but other states remained under no obligation to recognize civil unions. For example, in *Rosengarten v. Downes* (71 Conn. App. 372, 2002), a couple who had received a civil union in Vermont sought the dissolution of that union in a Connecticut court. Both the trial and appellate courts found that the state lacked the jurisdiction to dissolve a civil union. Georgia, in a custody case *Burns v. Burns* (560 S.E.2d 47, 2002), similarly declined to recognize a civil union performed in Vermont. The custody agreement between Darian and Susan Burns precluded either parent from having visitation rights on nights they had an overnight guest who was not a spouse or relative. Susan Burns claimed her civil union qualified her partner as a spouse under the terms of their divorce agreement, but she lost her case because Georgia did not recognize civil unions as equivalent to marriage. New York reached the same conclusion that Connecticut and Georgia had in *Langan v. St. Vincent's Hospital* (25 A.D.3d 90, 802 N.Y.S.2d 476, 2006) when a man suing the hospital for wrongful death was not recognized as a spouse under New York law after he obtained a civil union in Vermont.

Civil unions were quickly shown to be deficient relative to marriage, even within the states that granted them. The New Jersey Civil Unions Review Commission, created to monitor implementation of the state's Civil Union Act, found that non-recognition of civil unions by employers and hospitals was a widespread problem because they did not function as legally equivalent to marriage in key

respects. Civil unions create “second class citizens” the Commission found (New Jersey Civil Unions Review Commission First Report and Final Report, accessed 2013).

Same-sex marriage was first legalized in Massachusetts in *Goodridge v. Department of Public Health* (440 Mass. 309, 2003). Massachusetts had the most gay friendly judicial record in the country (Pinello, 2003) at the time the case was being argued, and like Vermont before it, had been chosen by activists on the basis that the political and legal culture of the state would be amenable to legalization of same-sex marriage. Also, like Vermont, the Massachusetts constitution is very difficult to amend. In fact, Massachusetts’s constitution has been amended less often than any other state's, and is one of only nineteen state constitutions that has been in place continuously since its adoption (Nevins 2011).

Additionally, the Massachusetts constitution is “...more protective of individual liberty and equality than the federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life” (Pinello 2006, *Goodridge v. Department of Public Health* 440 Mass. 309, 2003). In response to *Baker v. Vermont*, the plaintiffs disavowed civil unions in their case, arguing that only marriage would meet the constitutional requirements of Massachusetts’s equal protection and due process guarantees. Chief Justice Marshall, writing for the majority, agreed with this distinction, writing, “[t]he dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous. It is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual couples to second class status” (Liptak 2013, *Goodridge v. Department of Public Health* 440 Mass. 309, 2003).

Though *Goodridge* was decided primarily on state constitutional grounds, the majority opinion positively cited *Lawrence* in its opening page. “[In *Lawrence*] the Court affirmed the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution which precludes government intrusion into the deeply personal realms of consensual adult expressions



of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity." *Lawrence* was cited later by the majority again, in conjunction with *Planned Parenthood v. Casey*, as evidence of the fact that "moral disapproval with no other state interest cannot justify law that discriminates against groups of persons" and that the court's obligation is to "...provide liberty for all, not mandate our own moral code" (*Goodridge v. Department of Public Health* 440 Mass. 309, 2003).

As this chapter has demonstrated, arguments about procreation and childrearing are frequently invoked to defend an exclusively heterosexual conception or marriage. The majority in *Morrison v. Sadler* (821 N.E.2d 15, 2005) however, added a novel twist to this old argument that simultaneously argued against same-sex marriage rights, while holding up gay and lesbian couples as in some ways morally superior in their ability to create stable family units. *Morrison's* plaintiffs challenged the legitimacy of Indiana's state DOMA law under its state constitution, contending that the legislation violated the equal privileges and immunities clause of Indiana's constitution, the "core values component" of Article I section I, and the section of Article I Section 12 which states "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

The discussion of procreation was confined to the court's evaluation of the equal privileges and immunities clauses claim. For the state to justify unequal treatment of individuals without violating this constitutional guarantee, it must demonstrate that the challenged legislation is "reasonably related to inherent characteristics which distinguish the unequally challenged classes." Additionally, any preferential treatment must be equally available to every member of the "similarly situated" class. There is no heightened scrutiny classification utilized, so distinctions need only be justified under

rational basis review. Rather than discussing procreation in general terms in justifying a ban on same-sex marriage, the court focused its discussion on unintended and unplanned procreation, which the majority argued was the exclusive province of heterosexual couples. Indiana thus has a rational reason to limit marriage to opposite-sex couples in order to stabilize potentially transient heterosexual relationships. The decision argued:

Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the “protections” of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.

By contrast, procreation by “natural” reproduction may occur without any thought for the future. The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from “casual” intercourse.<sup>11</sup> Second, even where an opposite-sex couple enters into a marriage with no intention of having children, “accidents” do happen, or persons often change their minds about wanting to have children ( *Morrison v. Sadler*, 821 N.E.2d 15, 2005)

The same-sex marriage movement had another partial victory akin to *Baker v. Vermont* in *Lewis v. Harris* (908 A.2d 196, 2006). The New Jersey Supreme Court unanimously found that existent marriage law violated the equal protection clause of the New Jersey constitution but they split over the appropriate remedy. The four justice majority argued that either civil unions or same-sex marriages were constitutionally acceptable, while the three justice minority contended that only same-sex marriage would be constitutionally permissible. New Jersey legalized civil unions in 2007. Previously, the state had legalized domestic partnerships in 2003.

The second state to legalize gay marriage was California in *In Re Marriage Cases* (43 Cal.4th 757, 2008). California had long been a site of gay activism and the concept of domestic partnerships “traces its roots to California” (NeJaime 2013). This case stemmed from then San Francisco mayor Gavin Newsom’s decision to issue marriage licenses to same-sex couples in February, 2004. San

Francisco issued these licenses for a month before the city was forced to stop by a judicial stay. The city joined five other litigants in a lawsuit to challenge California's marriage laws. The majority decision extensively cited *Perez v. Sharp*, again drawing an equivalency between same-sex marriage and interracial marriage because in both a fundamental right, the right to marry, was implicated. By 2008, California had domestic partnership laws (NeJaime 2013), but these were found constitutionally lacking and a violation of the right to privacy of same-sex couples, in addition to the equal protection clause (*In re Marriage Cases*, 43 Cal.4th 757, 2008 George 2008).

The effect of this ruling was temporary, however. California's constitution is easily and constantly amended (it has been altered well over 500 times as of this writing), and is one of the longest constitutions in the world. Its mutability made it a prime target for backlash against the decision. The California constitution is amended in one of two ways: by a two-thirds super-majority in the state legislature, or by a voting majority through the initiative process. Proposition 8, an initiative to prohibit same-sex marriage, had been planned even before the *Marriage Cases* ruling and was passed during the 2008 elections (Nevins 2011).

Later in 2008, the decision in *Kerrigan v. Commission of Public Health (2008)* made Connecticut the third state to legalize same-sex marriage. Like Vermont and Massachusetts, Connecticut presented same-sex marriage advocates a comparatively good legal environment in which to operate. The state had decriminalized sodomy in 1969, added sexual orientation to its anti-discrimination laws in 1991, and authorized adoption by gay couples in 2000. Further, one week before *Kerrigan* oral arguments the judiciary committee of the state legislature had voted to approve same-sex marriage legislation (Mezey 2009). Connecticut legalized civil unions in 2005, but in creating civil unions the legislature simultaneously defined marriage as between one man and one woman. The plaintiffs' argument, and the majority's opinion, relied heavily on the weakness of civil

unions relative to marriages and how they represented an unacceptable half-measure incapable of remedying the constitutional problems in Connecticut's marriage laws. Civil unions were "less prestigious, less advantageous institution[s]." Citing a long history of anti-gay discrimination, the court found no legitimate reason to deny gay couples access to the institution of marriage. While it acknowledged the worthwhile intent behind the creation of civil unions, it compared them to the racially segregated institutions of the Jim Crow era. Using intermediate scrutiny the majority found that civil unions violated the equality and liberty provisions of the Connecticut Constitution (*Kerrigan v. Commission of Public Health*, 957 A.2d 407, 2008).

The next successful enactment of same-sex marriage laws came in Iowa in *Varnum v. Brien* (763 N.W.2d 862, 2009). The plaintiffs argued that Iowa's marriage laws violated the fundamental right to marry. The court used intermediate scrutiny to evaluate the state's claims that banning same-sex marriage served the state's interest in maintaining a traditional definition of marriage, promotion of procreation and a healthy childrearing environment, conservation of state resources and promotion of stability in opposite sex relationships. In a much milder version of the argument offered by the state in *Morrison v. Sadler*, the state focused on the need to buttress potentially weak and dysfunctional heterosexual relationships by denying same-sex marriage rights. As in *Goodridge*, *Lawrence* was cited repeatedly by a unanimous court to demonstrate that intermediate scrutiny was necessary, writing for the unanimous court (Cady 2011).

The legal wrangling continued in California as the California supreme court upheld a constitutional challenge against Proposition 8 in *Strauss v. Horton* (46 Cal.4th 364, 2009). Proposition 8 opponents made several constitutional arguments: that Proposition 8 counted as a revision of the California constitution and not merely an amendment and thus required a legislative super-majority to vote for it, in addition to the ballot initiative; that Proposition 8 violated the California separation of

powers by usurping the judiciary's exclusive right to protect minority groups through constitutional interpretation; and that the initiative process could not be used to remove rights granted in California's Declaration of Rights without a "compelling justification." Also at stake was how to legally handle the 18,000 same-sex marriages that had been conducted when the practice had been legal in California..

When the Supreme Court granted certiorari in *United States v. Windsor* (570 U.S. ----, 2013) section three of the Defense of Marriage Act had already been found unconstitutional by six courts in the two years preceding the Court's 2012-2013 term: the southern district court of New York, the second circuit, the district court of Massachusetts, the first circuit, the district court of Connecticut, and the district court of Northern California.

Edie Windsor, who had married Thea Spyer in Canada in 2007 before returning to New York, paid \$363,053 in estate taxes upon Spyer's death in 2009 that she would have been exempt from, had she qualified for the federal spousal exemption from estate taxes. By a five to four vote section, the Supreme Court struck down section three of DOMA. After affirming that the Bipartisan Legal Advisory Group (BLAG) had standing to defend DOMA, Justice Kennedy wrote that DOMA violated the due process clause of the Fifth Amendment because it was motivated by unconstitutional animus towards a particular group and it created two separate and unequal marriage classes within a state. While the case was not decided primarily on federalism grounds, Kennedy repeatedly asserted the right of state governments to define marital relationships, a right DOMA undermined by preventing any state from giving its gay residents full marriage rights. By legalizing same-sex marriage in the first place, the state of New York signaled that Windsor and Spyer should have been treated equivalently to a heterosexual married couple. "The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to

dignify. And it humiliates tens of thousands of children now being raised by same-sex couples” (*United States v. Windsor* 570 U.S. ----, 2013).

Kennedy's opinion argued that DOMA was motivated by unconstitutional animus against gays. Unconstitutional animus has been defined by four characteristics. First, “...animus analysis is especially alert to laws of a broad character aimed at a particular class. Such laws inflict broad injury on a single group.” Second, this harm is the primary goal of the legislation. Third, “the Court need not have direct evidence of animus or inquire into the subjective motivations of legislators or voters. An assessment of the real aim of the law can be gleaned from objective considerations of scope and justification.” Finally and relatedly, the Court takes a more skeptical look at the arguments used by the state to justify a challenged law, looking for a disconnection between the stated rationale for a law's enactment and impact and its actual effect (*Carpenter* 2014b, *Pollvogt* 2012). In evaluating these latter two points, judges look to five areas to see whether animus is present. They consider statutory text, the “political and legal context of passage,” the legislative history, real world consequences, and the failure of non-animus explanations for passage (*Carpenter* 2014a, *Pollvogt* 2012).

The first case that was decided employing the animus argument was *U.S. Department of Agriculture vs. Moreno* (413 U.S. 528, 1973). In that case, the Court overturned a 1971 Amendment to section 3(e) of the Food Stamp Act of 1964 which prohibited persons from receiving food stamps if they cohabitated with anyone they were not related to through blood or marriage. The stated purposes of the amendment were to ensure adequate nutrition and strengthen the agricultural market, but the majority found the law was motivated by unconstitutional animus against hippies. When the law was challenged, the government asserted additional interests in preventing food stamp fraud and fostering morality by discouraging unmarried cohabitation. The legislative history was scant, since the amendment was added without any committee debate, but the Court found based on the evidence

available that “The legislative history of the Act indicates that the 'unrelated' person provision of the Act was to prevent 'essentially unrelated individuals who voluntarily chose to cohabit and live off food stamps'—so-called 'hippies' or 'hippy communes'—from participating in the food stamp program.” (U.S. Department of Agriculture vs. Moreno 413 U.S. 528, 1973). The majority, led by Justice Brennan found that these arguments unpersuasive, and concluded the law was motivated by the desire to discriminate against a politically unpopular group and thus violated the Due Process Clause of the Fifth Amendment even under rational basis review and without hippies being a suspect class (Carpenter 2014b).

Twelve years later the Supreme Court returned to the animus concept in *City of Cleburne v. Cleburne Living Center* (473 U.S. 432 1985). There, the Court found that Cleburne's denial of a special use permit to an intended group home for the cognitively disabled violated the Equal Protection Clause. The majority explicitly stated that the mentally disabled were neither a suspect class nor a quasi-suspect class so rational basis was the appropriate level of scrutiny but the city's actions were still unconstitutional. The city argued the permit denial was motivated by seven factors:

- (a) the attitude of a majority of owners of property located within two hundred (200) feet of 210 [sic] Featherston; (b) the location of a junior high across the street from 201 Featherston; (c) concern for the fears of elderly residents of the neighborhood; (d) the size of the home and the number of people to be housed; (e) concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take; (f) the home's location on a five hundred (500) year flood plain; and (g) in general, the presentation made before the City Council.

The Court was unmoved by these arguments and found that the permit denial was evidence of unusual discrimination against the mentally disabled due to the lack of public concern about group homes such as dormitories, fraternities, boarding houses and nursing homes (Carpenter 2014b), and found that the city was really motivated by “irrational prejudice” against the cognitively impaired.

Striking down a law due to animus has been a way for the Supreme Court to protect the rights of groups that are not designated as suspect or quasi-suspect classes. After the two decisions having to do with the rights of hippies and the mentally disabled, the subsequent animus cases have had to do with gay rights. The first of these was *Romer v. Evans* (517 U.S. 620 1996). In 1992, Colorado passed a referendum called Amendment 2 which forbade any level of state or local government from passing any laws banning discrimination against gays. In the Supreme Court's decision, Justice Kennedy wrote that the referendum was unconstitutionally "...at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence" (*Romer v. Evans* 517 U.S. 620 1996). In *Lawrence*, Justice O'Connor's concurring opinion argued for striking down Texas's sodomy ban due to the animus evidenced by its selective criminalization of gay sodomy. Finally, the *Windsor* decision completes the trio of gay rights animus cases. "[I]n the Supreme Court, animus analysis has successfully done the work that arguments for heightened scrutiny of sexual-orientation discrimination have failed to do" (Carpenter 2014a).

There were five potential ways of resolving the Proposition 8 lawsuit presented in the amicus briefs in *Hollingsworth v. Perry* (570 U.S. ----, 2013). Firstly, the Supreme Court could have overturned the decisions of Northern California district court and the ninth circuit and found that California had the right to restrict marriage rights to opposite-sex couples. A ruling upholding the constitutionality of Proposition 8 would have reaffirmed the decision reached by the California supreme court in *Strauss v. Horton*. Conversely, the Court could have found that the Fourteenth Amendment confers a national right to same-sex marriage and that any state that currently prohibited it (forty-one at the time *Hollingsworth* was before the Court) must allow it. A ruling this sweeping was always considered a distant possibility at best, but nonetheless represented one potential outcome of the



case. Narrower in scope was a potential judicial remedy that would apply either only to those states which had granted same-sex couples civil unions/domestic partnerships (there were eight states in this category at the time *Hollingsworth* was being argued: California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island). Narrower still would have been a ruling that applied only to California. Finally, the Court could have dismissed the appeal on standing grounds and let the lower court decisions overturning Proposition 8 stand without a broader ruling on the merits of same-sex marriage bans (Lederman 2013).

The ideologically heterodox majority coalition of Justices Roberts, Scalia, Breyer, Ginsburg, and Kagan found that the proponents of Proposition 8 lacked standing to argue for its reinstatement because they lacked direct injury from its repeal. The state's refusal to defend the initiative meant that no actor with standing to defend the initiative existed. The lower court decision overturning Proposition 8 was thus upheld and same-sex marriage was re-legalized in California (*Hollingsworth v. Perry*, 570 U.S. ----, 2013).

Though neither *Windsor* nor *Hollingsworth* compel states to recognize same-sex marriage, the *Windsor* decision nonetheless created a momentous policy punctuation. After *Windsor*, Lambda Legal applied for a summary judgment in its pending New Jersey same-sex marriage case, *Garden State Equality v. Dow* (79 A.3d 1036 2013). The plaintiffs argued that New Jersey's ban on same-sex marriage violates both the Fourteenth Amendment of the federal Constitution and the equal protection clause of New Jersey's constitution. While the majority in *Lewis* had found no "...fundamental right to same-sex marriage exists in this state" it nonetheless required "under the equal protection guarantee of Article I, paragraph I of the New Jersey Constitution, [that] committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." As

previously mentioned, the New Jersey Civil Union Review Commission had discovered that civil unions did not provide the legal equality necessitated by *Lewis*.

The *Windsor* decision further devalued civil unions in several key respects. *Windsor* requires that same-sex marriages be treated equivalently to opposite-sex marriages under federal law, not to civil unions. In the aftermath of *Windsor*, the Office of Personnel Management, the State Department, the Federal Election Commission, the Department of Defense, the Office of Government Ethics, the Department of Labor, the Centers for Medicare and Medicaid Services and the IRS all released statements stating they would extend benefits to and recognize only same-sex marriages, not civil unions. In the post-*Windsor* age the legal gulf between same-sex marriages and civil unions widened even more drastically. Where the plaintiffs in *Dow* and the state differed in interpreting and resolving this legal disparity is in determining whether the state or federal government should remedy the problem. Garden State Equality argued that only by legalizing same-sex marriage could the equality mandated by the New Jersey constitution and the *Lewis* decision be achieved. New Jersey replied that the onus was on the federal government to recognize civil unions as equivalent to marriage, not on the state to legalize same-sex marriage. The majority found for the plaintiffs, “Following the *Windsor* decision of the United States Supreme Court and the subsequent implementation of that decision by several federal agencies,” it said, “same-sex couples are only afforded the same rights and benefits of opposite sex-couples married couples if they are married. The parallel legal structures created by the New Jersey Legislature therefore no longer provide same-sex couples with equal access to the rights and benefits enjoyed by married heterosexual couples, violating the mandate of *Lewis* and the New Jersey Constitution’s equal protection guarantee” and requiring that New Jersey start offering same-sex couples marriage licenses on October twenty-first (*Garden State Equality v. Dow* 79 A.3d 1036 2013). The very short term nature of civil unions shows the tendency towards non-incremental policy change

in this policy area and the binary nature of how the same-sex marriage issue is conceived by the courts and the public.

Following New Jersey, New Mexico was the next state in the cascade of post-*Windsor* legalizations. In *Griego v. Oliver* (NMSC 3 2014), the New Mexico court unanimously found, using intermediate scrutiny, that restricting marriage to opposite sex couples violated the equal protection clause to the New Mexico state constitution, which bans discrimination “on the basis of sex.” Before this ruling, New Mexico was unique amongst the fifty states for having neither banned same-sex marriage via statute/constitutional amendment nor legalized it. New Mexico’s marriage laws were textually gender neutral, and counties could theoretically allow same-sex marriage at any time. This lack of definitional clarity gave Sandoval County the legal flexibility necessary to perform same-sex marriages briefly in February, 2004. In August and September 2013 eight New Mexico counties, comprising over half the state’s population, began issuing same-sex marriage licenses (Santos 2013).

The *Griego* case was filed in March 2013 by three couples, and amended with additional complainant couples and a new legal rationale after the *Windsor* decision in June. In August, New Mexico district judge Alan Mallot heard *Griego* and ruled that Bernallilo County was constitutionally compelled to issue same-sex marriage licenses in August, 2013. The next month, as more counties began issuing them the New Mexico Association of Counties petitioned for a ruling on the *Griego* case to create a uniform standard for all thirty-three of New Mexico’s counties. The New Mexico supreme court rejected the ever familiar argument that the state could ban same-sex marriage to encourage “responsible procreation and childrearing” by opposite sex couples (Santos 2013).

One day later, on December 20<sup>th</sup>, a U.S. district court in Utah overturned the state’s constitutional Amendment banning same-sex marriage in *Kitchen v. Herbert* (WL 2868044 2014). The plaintiffs argued that Utah's same-sex marriage ban violated the Due Process and Equal Protection

Clauses of the U.S. Constitution. The ban was struck down for violating the fundamental right to marry promised by the Fourteenth Amendment. The Supreme Court's dismissal of *Baker* was disregarded in light of the “doctrinal developments” that occurred in *Romer* and *Windsor*. The decision declined to invoke heightened scrutiny on the basis of either gender discrimination or discrimination on the basis of sexual orientation but judge Robert Shelley's opinion also stated that *Lawrence* made it so the state could not argue that moral disapproval of homosexuality was a legitimate purpose for banning same-sex marriage. The interests the state of Utah asserted were the familiar justifications: encouraging responsible procreation, optimal child-rearing, proceeding with caution, and defending the traditional definition of marriage. After the decision was issued, Utah applied for the decision to be stayed. This stay was denied three times in the days immediately following the decision before the Supreme Court granted it in January. The tenth circuit heard oral arguments on the *Kitchen* appeal in April and delivered its opinion on June 25, affirming the decision of the Utah district court, that there was “insufficient causal connection to [Utah's] stated goals” since a ban on same-sex marriage would have no impact on heterosexual couples (*Kitchen v. Herbert* 2014 WL 2868044).

Oklahoma was the next state to legalize same-sex marriage, in *Bishop v. Oklahoma* (4:04-cv-00848-TCK-TLW 2014, decided three weeks later in January, 2014. This was an old lawsuit, first filed in 2004 (unlike the other post-*Windsor* cases which were mostly filed in 2013). District court judge Terence Kern's opinion distinguishes Oklahoma's same-sex marriage ban from DOMA by discussing how it was not an “unusual deviation” from the balance of power between the state and federal government as DOMA was found to be. Kennedy found that the federal government's unprecedented involvement in preemptively banning same-sex marriage was evidence of animus based “improper purpose.” State marriage bans do not show this, according to Kern, because marriage law is usually the purview of state governments. However, despite the lack of improper purpose demonstrated by

Oklahoma's legislation, Kern nonetheless ruled that the marriage ban failed to pass even rational basis review. The state had argued the ban was to promote responsible procreation, optimal child-rearing, and avoid a potentially negative effect on the institution of marriage. The state also alleged it had no interest in gay couples, and could ban same-sex marriage due to this lack of interest in solemnizing gay relationships. There were four reasons why these arguments failed to pass constitutional muster: there was no link between the current law and the historical tradition of marriage being tied to procreation, no rational connection between banning same-sex marriage and encouraging responsible procreation, no similar law existed to regulate other “similarly situated” i.e., non procreative couples, and finally the state could not forbid same-sex marriage due to lack of state interest. Kern further noted “...civil marriage in Oklahoma is not an institution with moral requirements for any other group of citizens” (*Bishop v. Oklahoma* 4:04-cv-00848-TCK-TLW 2014).

A month later Virginia overturned its same-sex marriage ban. The District Court for the Eastern District of Virginia found in *Bostic v. Schaefer* (originally *Bostic v. Rainey*) that Virginia's prohibition violated the Fourteenth Amendment (2014 WL 3702493). Virginia's attorney general Mark Herring, declined to defend the ban, leaving Governor Bob McDonnell as the state's first representative before he was replaced by the state's vital registrar, Jane Rainey. Virginia's marriage ban was analyzed under strict scrutiny because it involved the fundamental right to marry. The state's arguments that it forbade same-sex marriage to preserve its interests in tradition, federalism, and “responsible procreation and optimal child-rearing” were rejected. This decision was appealed to the fourth circuit and argued there in May, 2014. During oral arguments, there was a strong division between two of the three judge panel, with the third judge remaining largely silent. Judge Paul Niemeyer was sympathetic to the state, saying that there was no historical support for requiring a state to recognize same-sex marriages, that the fundamental right to marriage specifically referred to the “union of husband and wife,” and that the

biological impossibility of same-sex couples bearing their own children rendered them unfit for marriage. Judge Roger Gregory, conversely, made an argument very similar to Justice Kennedy's, focusing on how the marriage ban degraded the integrity of gay couples, particularly in front of their children. Judge Floyd, who had been perceived as “neutral” and “quiet” during oral arguments authored the majority opinion affirming the decision of the Virginia district court and overturning the ban by a 2-1 vote (Gerstein 2014).

Two weeks later Texas's same-sex marriage ban was overturned in *DeLeon v. Perry* (975 F. Supp. 2d 632 2014). Judge Orlando Garcia found that gay people were a suspect class, but the law failed even rational basis review and violated the Fourteenth Amendment. Like the cases before and after *DeLeon*, Texas asserted that the same-sex marriage ban was justified by the interest in regulating procreation and childrearing and preserving tradition. The plaintiffs claimed nine financial and legal injuries as well as alleging they “...suffered state sanctioned discrimination, stigma, and humiliation” due to the ban.

On March 21 Michigan overturned its same-sex marriage ban in *DeBoer v. Snyder* (973 F. Supp. 2D 757 2014). Judge Friedman did not consider the due process clause and heightened scrutiny arguments, finding that the violation of the equal protection clause was grounds enough for the ban to be lifted. Attacking Michigan's familiar argument about creating optimal childrearing conditions Friedman wrote, “Taking the state defendants’ position to its logical conclusion, the empirical evidence at hand should require that only rich, educated, suburban-dwelling, married Asians may marry, to the exclusion of all other heterosexual couples. Obviously the state has not adopted this policy and with good reason. The absurdity of such a requirement is self-evident. Optimal academic outcomes for children cannot logically dictate which groups may marry” (*DeBoer v. Snyder* 973 F. Supp. 2D 757 2014). Friedman declined to determine whether the ban was motivated by

unconstitutional animus because the court “...cannot ascribe such motivations to the approximately 2.7 million voters who approved the measure” but found Michigan's asserted interest in protecting traditional morality unpersuasive, finding that the First Amendment offered adequate protection to churches that would refuse to solemnize same-sex marriages.

The next same-sex marriage case came out of Idaho, *Latta v. Otter* (14-35420 & 14-35421 2014). Idaho was the first state in the ninth circuit to deliver a post-*Windsor* same-sex marriage ruling (beating the Oregon decision discussed below by six days). This is significant because in January 2014 the ninth circuit found in *SmithKline Beecham Corp v. Abbott Labs* (740 F.3d 471 2014) that *Windsor* required heightened scrutiny to be used in any case that involved discrimination on the basis of sexual orientation. The case involved a peremptory challenge used to strike a gay juror from an anti-trust case against Abbott Labs. Abbott quadrupled the cost of its drug Norvir, used to treat HIV, and SmithKline Beecham Corp subsequently sued over this pricing. The decision found that peremptory challenges could not be used to strike jurors on the basis of sexual orientation, expanding on prior decisions which banned race and sex based peremptory challenges. *Latta* discussed this decision at length, using heightened scrutiny to Idaho's marriage ban and strike it down on equal protection grounds. The court dismissed Idaho's stated interest in “child welfare,” “focusing governmental resources on couples with biological procreative capacity,” “federalism,” and “accommodating Religious Freedom, avoiding civic strife, and assuring social consensus.”

Less than a week later, Oregon joined the increasingly long list of states ruling to legalize same-sex marriage in *Geiger v. Kitzhaber* (994 F. Supp. 2D 1128 2014). The state attorney general declined to defend the ban, and the court, although also located in the ninth circuit, did not address the heightened scrutiny question by striking the law down under rational basis review.

As in Oregon and Virginia, Pennsylvania's attorney general declined to defend the state's ban before the middle district court in *Whitewood v. Wolf* (992 F. Supp. 2D 410 2014), decided on May

twentieth. The court used intermediate scrutiny to overturn the ban, finding it in violation of the Fourteenth Amendment. In addition to the usual arguments about tradition and child-rearing, Pennsylvania also claimed that preventing same-sex marriages offered “economic protection of Pennsylvania businesses.” Since neither the attorney general nor the governor appealed the decision it was not stayed like most of these cases and same-sex marriage was legalized.

Continuing the breakneck pace of rulings, Wisconsin's Western District Court found the state's anti-same-sex marriage law in violation of the Fourteenth Amendment in *Wolf v. Walker* (14-cv-64-bbc 2014). The majority also used intermediate scrutiny to analyze the ban, drawing from the *SmithKline* decision to do so. The court also found that the *Romer* and *Windsor* decisions both suggested some level of heightened scrutiny was being used by the Supreme Court, even if it was not stated. Judge Crabb rejected the state's tradition argument by writing how historically the most common form of marriage has been marriage between one man and multiple women, so tradition did not privilege only one variant of marriage. Crabb also wrote that there was no reason to believe that forbidding same-sex marriage would have any consequences in regards to heterosexual marriages or procreation. The seventh circuit unanimously confirmed this ruling in August, 2014, with the decision stayed awaiting a Supreme Court ruling.

Both Kentucky and Ohio's same-sex marriage cases involved whether the state has to recognize same-sex marriages performed in other jurisdictions, and were decided within forty-eight hours of each other. Ohio's *Obergefell v. Wymyslo*, (962 F. Supp. 2d 968 - Dist. Court, SD Ohio 2013), decided on February 10, found that *Windsor* compelled the state to recognize marriages performed in other states. On February 12, Kentucky judge John Heyburn found in *Bourke v. Beshear* ( 996 F. Supp. 2D 542 2014) that the state was compelled under the Fourteenth Amendment to recognize same-sex marriages performed elsewhere, citing *Romer*, *Lawrence* and *Windsor* as the relevant precedents. A second Kentucky case decided in July 2014 *Love v. Beshear* (3:13-cv-00750 2014) expanded this to require the



state to perform same-sex marriages itself.

Indiana's same-sex marriage ban was overturned in *Baskin v. Bogan* (2014 WL 4359059). The court applied rational basis review to strike the ban for violating the Fourteenth Amendment. The court cited the high number of states that interpreted the *Windsor* decision to compel this outcome, and found Indiana would suffer no injury if same-sex marriage was legalized. The decision was upheld on appeal by the Seventh Circuit in September 2014.

The pair of decisions in Arkansas, *Wright v. Arkansas* (60CV-13-2662 Ark. Cir. Ct. 2014) and, Colorado *Brinkman v. Long* (No. 2013-CV-32572 2014), differed from the many cited in that they were heard in state rather than federal courts but they nonetheless reached the same conclusions as the many post-*Windsor* cases discussed above and struck down their states' marriage bans for violating the Fourteenth Amendment. Judge Piazza, writing in Arkansas, likened anti-gay discrimination to racial discrimination and referenced *Dred Scott v. Sanford* and *Loving*. The Arkansas decision was not stayed immediately, allowing approximately 400 marriages to be performed before the stay pending appeal.

Amidst this flood of pro-same-sex marriage decisions, the sixth circuit deviated from the trend of post-*Windsor* legalizations by upholding the marriage ban, based on the *Baker* precedent. This created a circuit split between the sixth circuit, which found that same-sex marriage bans are constitutional and the fourth, seventh, ninth and tenth circuits which all found them unconstitutional. This split ensured that the Supreme Court would hear another same-sex marriage case. By the time the Court heard *Obergefell v. Hodges* (576 U.S. \_\_\_ 2015) thirty-six states plus Washington D.C. Had legalized same-sex marriage.

*Obergefell* set a record for the most amicus briefs filed during a case with 148. Quantifying the harm of same-sex marriage has proved increasingly difficult as anti-gay stigma has faded. Scalia's former clerk, Gene Schaerr, authored a creative brief, signed by 100 conservative lawyers and

academics, that argued that same-sex marriage should not be legalized because its legalization would increase the abortion rate. The argument is that legalizing same-sex marriage would make heterosexuals less likely to marry. The brief used a “conservative” estimate of a five percent reduction in the heterosexual marriage rate over the next thirty years if same-sex marriage was legalized, based on marriage rate data from four states that had legalized same-sex marriage (Massachusetts, Connecticut, Iowa, Vermont) in addition to international data from the Netherlands, Belgium and Canada. Such a reduction would lead to

...[I]ncreases in the percentage of children living in poverty, experiencing psychological or emotional problems, suffering from teenage pregnancy, doing poorly in school, engaging in substance abuse, committing crimes, and obtaining abortions— all with adverse impacts on society...Additionally, again under conservative assumptions and over the next 30 years, this would lead not only to hundreds of thousands fewer births, but also to nearly 900,000 more abortions” (Schaerr 2015). As a last ditch effort to retain some same-sex marriage bans, opponents sought to tap into the more potent and enduring opposition to abortion.

Unsurprisingly, given the *Windsor* decision and all the legalizations that followed, the Supreme Court ruled that same-sex marriage bans violated the Due Process and Equal Protections clauses of the Fourteenth Amendment by a five to four vote. Kennedy's majority opinion argued that the “history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time,” and that marriage has been “strengthened, not weakened” by previous changes to the definition of marriage. After discussing the changes in public and judicial attitudes towards homosexuality he moved to discussing the relevance of *Griswold* and the other marriage cases like *Zablocki*, *Turner* and *Loving*.

Both the content and timing of same-sex marriage cases display characteristics of moral panic. In the early 1970's a wave a same-sex marriage litigation was triggered by a policy punctuation, the growth of gay activism that followed the Stonewall riots. When these cases failed, the issue vanished, dissipating as abruptly as it materialized. After a period of dormancy AIDS laid bare how vulnerable

gay relationships were without legal recognition, and so the legal campaign for same-sex marriage was rekindled, first in Hawaii. The Hawaii case created a backlash discussed in detail in chapter five.

After same-sex marriage was first legalized in *Goodridge* there was some incrementalist policy change until *Windsor*. States that legalized same-sex marriage (without having that legalization overturned as in California and Maine) were less susceptible to the same-sex marriage moral panic due to demographic characteristics and a legal opportunity structure that was amenable to legalization: a history of previous gay rights laws and a lack of tools that opponents could use to overturn the decisions such as the initiative process or an easily amended state constitution. Same-sex marriage cases of this ilk were an example of the new judicial federalism, where rights are expanded based on state rather than federal constitutional guarantees. Relying on state constitutional guarantees means that decisions will have limited legal relevance outside the state in which they are adjudicated. There was also significant variation in the levels of judicial scrutiny used to adjudicate same-sex marriage cases that restricted the portability of judicial rationales across jurisdictions. Not all states use the rational basis/intermediate scrutiny/strict scrutiny metric employed by the Supreme Court, and even those that do came to different conclusions vis-a-vis what standard to use to judge same-sex marriage cases. Incrementalism was also driven by the inherently state-centric nature of marriage law and the deliberate targeting of perceived gay friendly states. However, once the Supreme Court nationalized the issue, this variation ended and PET again re-asserted itself in this policy area.

The timing of both the lawsuits and the decisions fits the expectations of PET to a tee. With the exception of the Oklahoma case, which was filed in 2004, the post-*Windsor* cases were filed in 2013 and processed with remarkable speed. The uniformity of these post-*Windsor* decisions amply demonstrates the dramatic change in what had been a previously stable policy image. Not only have the outcomes been the same in almost every instance, but the constitutional rationales and the state

justifications of the bans have all been almost identical. The litany of post-*Windsor* cases have relied on federal rather than state constitutional arguments, a departure from the strategy that marked the incrementalist phase from 2003-2013. The only significant variation in the argumentation used has been the level of judicial scrutiny used. The legal arguments used by states to defend their same-sex marriage bans once challenged not only varied little from state to state, but varied little over the forty-three years under review here. Virtually every one of these many cases cites the procreation rationale as a reason to ban same-sex marriage. Adherence to tradition, states rights, and legislative/popular majorities are also mainstays of same-sex marriage opponents. These arguments had a one hundred percent success rate until 2003, and were successful in many jurisdictions until 2013.

Since then, however, they have immediately and completely fallen out of fashion as a result of the *Windsor* and *Obergefell* decisions, despite that case explicitly stating it does not require states to legalize same-sex marriage. The legal arguments for same-sex marriage did not change, what changed was judicial receptivity to the notion that allowing gays to marry harmed children and straight couples. When the social construction of gay people as deviant was widely held, the idea of allowing such people to sully the institution of marriage was unthinkable. The emotional response was so intense rational argumentation was almost superfluous. The issue waxed and waned on the judicial agenda, in contrast to the consistent presence of incrementalist abortion cases. The legal opportunity structure of same-sex marriage law also favors one shot rather than repeat litigation, which narrows the scope of conflict. Follow up litigation contesting the implementation of same-sex marriage bans or legalizations is not possible in the same way abortion has lent itself to dozens of post-*Roe* controversies.

## Chapter Four: The Legislative Politics of Abortion

In chapter two this study discussed the development of abortion jurisprudence and argued that abortion law has developed in a way that suggests abortion is a moral conflict as opposed to a moral panic. Turning now to legislative politics, this chapter argues that legislative abortion policy has similarly developed in a way to create long running conflict as opposed to moral panic about abortion. Just as with the courts, conflict over abortion has been a mainstay of congressional politics since 1973. Abortion policy outcomes have been consistently incrementalist since abortion was first legalized. The scope of conflict has been broad both institutionally, that is in terms of how many different internal organs of Congress are involved in creating abortion policy (congressional committees and caucuses, party leadership and party organizations), and in terms of how abortion is defined and what other political issues are deemed part of the abortion debate. The abortion debate is deeply institutionally entrenched in Congress, the fifty state legislatures and the “informal party organizations” of the two parties. Finally, while the social construction of women who get abortions can certainly be negative, it is too varied and nuanced to fit into the deviant classification that a moral panic would exhibit.

To demonstrate this it necessary to show both why there have been no policy punctuations and no equilibrium period. Post-*Roe* policy punctuations have not occurred for several reasons. When abortion was first legalized the issue cut across rather than re-enforced existing partisan and ideological configurations, leaving Democrats and Republicans internally divided on how to address the topic. In 1973 the division between cultural liberals and conservatives had not yet become a partisan division between Republicans and Democrats, as it would later (Wuthnow 1989, Hunter 1991, Layman 2001). Abortion gradually became a partisan issue, with politicians and highly engaged party activists developing distinct stances on abortion starting in 1980. The best way to conceptualize this change is through the “issue evolution” perspective, a variation of realignment theory that seeks to explain why certain issues endure politically and change the publics' orientation towards the two parties. According

to this framework, issue evolution is a phenomenon where partisan elites, defined as politicians, employees of the national parties and highly motivated partisans such as convention delegates, either take new stands on an existent political issue or respond to a completely new issue. Once partisan elites take disparate stances on an issue at what Carmines and Stimson call the “critical moment” this new position becomes part of the party's public image and voters respond to the party's reputation. If the issue that spurs the new position taking is sufficiently powerful in terms of salience, emotional engagement from the electorate, and lingers on the political agenda, it will cause people to change their partisan identification along a new issue dimension and thus change the electoral fortunes of the parties (Carmines and Stimson 1986, 1989, Carmines and Wagner 2006, Stimson 2004). Carmines and Stimsons discuss issue evolution along the “social welfare” dimension, which caused the New Deal realignment in 1932, and along a racial dimension which started a realignment process that began in the 1960's and concluded by 1980. In the latter case Carmines and Stimson describe how the Democratic and Republican parties shifts in their stances on race and racial issues created a realignment along a new issue dimension that partially supplanted the social welfare dimension of the New Deal realignment (Carmines and Stimson 1989).

What leads political parties to innovate by changing their issue stances in the first place? In evaluating the likelihood of partisan realignment along a new issue dimension, James Sundquist (1983) establishes five variables that impact the probability realignment will occur. These variables are “...the breadth and depth of the underlying grievance, the capacity of the proposed remedy to provoke resistance, the motivation and capacity of party leadership, the division of polar forces between the parties, and the strength of the ties that bind voters to the existing parties.” Potentially realigning issues are usually (but not always) cross-cutting issues that are powerful enough to “dominate and polarize” the political community. Partisans face a strategic dilemma when it comes to positioning themselves on a new issue. Ideally each party seeks to take a stance that reinforces its coalition and splits the

coalition of the opposing party. If the minority party sees electoral opportunity in position taking on a new political issue that party will be especially motivated to introduce the new issue into the existent political environment (Sundquist 1983).

When *Roe* and *Doe* were decided the parties were not highly polarized on the abortion issue and partisan affiliation was not a strong predictor of abortion attitudes on either the elite or mass level. This evolution may be observed in several ways. One of these ways is examining roll call voting on abortion bills. Adams (1997) found that the parties in the House became increasingly polarized on the abortion issue from 1973-1994. Democratic pro-choice votes grew from approximately twenty-five percent to just under ninety percent in this time period, whereas Republican pro-choice votes increased from around five percent to a high of twenty percent in 1977/1978 before settling down to approximately fifteen percent. In the Senate, this increasing partisan divergence occurred to an even greater degree. In 1974, Senate voting behavior for Democrats and Republicans was identical, with members of both parties casting pro-choice votes forty percent of the time. Twenty years later, ninety percent of Senate Democrats were casting pro-choice votes compared to just over twenty percent of Republicans.

One manifestation of this cultural shift has been the change in the attitudes of party convention delegates. Layman (2001) measured the “partisan differences in delegates' cultural attitudes” from 1972-1996 in relation to five policy areas/groups: abortion, the Equal Rights Amendment (ERA), the women's movement, the Moral Majority, gay rights, and pro-life groups. He found “differences in the cultural attitudes of Republican and Democratic activists grew considerably...partisan polarization increased in regard to each of these issues and groups and the growth was especially impressive in regards to attitudes towards abortion.” Breaking down the delegate groups by religious affiliation Layman also found that the two groups most staunchly opposed to each other, secular Democrats and regularly church attending evangelical Protestants, were more likely to be political amateurs and

“purists” and were “markedly more likely than other Democratic and Republican delegates to identify a cultural or moral issue as the primary issue motivating their party activity.” In the Republican Party the number and influence of these evangelical delegates grew steadily between 1972-1996. In the Democratic Party, the number of self-described secularists ebbed and flowed by year though their clout within the Democratic Party had grown significantly by the 1990's. It was high during the McGovern campaign in 1972, fell in 1976 when the openly religious Jimmy Carter won the nomination, rose again in 1980 and 1984, fell in 1988, rose again in 1992 and 1996 (Layman 2001, Carmines and Woods 2002, Bolce and DeMaio 1999, Bolce and DeMaio 2002).

There was a similar change at the mass level. (Layman 2001, Adams 1997, DiMaggio et al. 1996). When abortion was legalized, the Democratic Party at this point still enjoyed strong Catholic support, as well as a significant Evangelical Protestant contingent, ensuring the party was more culturally conservative than it is now. The anti-abortion movement in these early years was largely Catholic, with approximately eighty percent of anti-abortion activists being Catholic in the years immediately following legalization (Emerson 1996, Luker 1984). Abortion thereby became the fulcrum for a political realignment that has persisted to this day.

In addition to the economic and racial issues discussed above, more recently cultural issues such as abortion have been identified by scholars as new issues that realigned public attitudes toward and affiliation with the two parties. Echoing some of Sundquist's points, Layman (2001) outlines four conditions that need to be present to produce a “transformation of party politics...the conflict over the issues has to be both broad and deep, the issues must be on the political agenda for a relatively long time, the issues have the capacity to provoke resistance, and the new conflict must cut across the existing lines of partisan cleavage.” In 1973 abortion met all four of these requirements. From 1973 to approximately 1984 there were low levels of elite polarization on abortion and no connection between partisanship and abortion attitudes amongst the general public (Adams 1997, Carmines and Woods



2002). Political elites and, eventually, the general public reconfigured their partisan attachments based in part on the stances the two parties took on the issue. If the issue is high profile and enduring enough, it may cause partisan realignment in the electorate. Starting at the level of sitting politicians and party activists and then trickling down to a lesser extent amongst the general electorate, the Republican Party became decisively affiliated with opposition to abortion and the Democratic Party became the party of abortion rights. This was a gradual process motivated by the strategic calculation of politicians as well as the large scale grassroots mobilization of evangelical Christians.

First, it split the traditional Democratic coalition by breaking the bond between the party and Catholic voters. Since 1973, Catholic support for Democrats has dropped by 64%-- today only 40% of Catholics identify with the party. Meanwhile, Republican support among Catholics has grown by 41%-- now almost one third of Catholics identify with the Republican Party. Second, abortion was the banner issue used to mobilize evangelical Protestants in large numbers to the Republican Party, many of whom had largely stayed away from politics in the past (Munson 2011)

Additionally, there were massive disagreements between Catholic and Protestant anti-abortion advocates, as well as “purist” vs. “incrementalist” abortion foes (Luker 1984, Munson 2011, Moen 1989). Some of this debate concerned the desirability of pursuing a total repeal of *Roe* versus incremental anti-abortion restrictions, discussed in greater detail below. Public opinion is similarly muddled and moderate on the issue, with a majority of the public supporting legalized abortion and not wanting *Roe* to be overturned, but also condoning abortion for a limited number of reasons (with the strongest degree of public support for abortion in the cases of threat to the health of the pregnant woman, pregnancies that result from rape/incest, and fetal birth defects) and under limited circumstances (such as the decline in public support for legal abortion in later stages of pregnancy). These divisions did not prevent the formulation of non-incrementalist policy, but they did prevent its adoption. After years of non-incremental failure, combined with successful incrementalist anti-abortion policy that won passage as early as 1973 and regularly thereafter, incrementalism became a strategy as well as a policy outcome. An incrementalist approach also better matches public opinion on

abortion issues (Jelen et al. 1992, Craig et al. 2002, Fiorina 2005, Layman et al. 2005, Fiorina et al. 2008) These strong ideological and tactical disagreements first within and then between the parties, coupled with increasing partisan polarization on the abortion issue and the frequency of divided government all worked to defeat non-incremental legislation.

While partisan disagreements, public opinion and “strategic incrementalism” (Ainsworth and Hall 2011) have all prevented a policy punctuation equivalent to *Roe*, pro-choice legislators have also been prevented from maintaining policy equilibrium. Equilibrium in PET occurs when issues are

...within the confines of the policy subsystem... subsystem politics is the politics of equilibrium the politics of the policy monopoly, incrementalism, a widely accepted supportive image, and negative feedback. Subsystem decisionmaking is decentralized to the iron triangle and issue networks of specialists in the bureaucracy, legislative subgroups, and interested parties. Established interests tend to dampen departures from inertia...” (Baumgartner, Jones and True 2007).

Supporters of legal abortion in Congress have failed to create these conditions. There has been a consistent number of abortion bills introduced and abortion legislation passed into law, and eighty percent of proposed legislation since *Roe* has sought to limit access to abortion either through total prohibition or incremental regulation (Ainsworth and Hall 2011). Baumgartner and Jones argue that the creation of a policy subsystem and a stable, positive policy image are necessary to the maintenance of policy equilibrium. There are several things that have hampered the creation of a pro-choice policy subsystem and policy monopoly.

First is the divisiveness of the issue itself. While this chapter argues that abortion politics are incremental in nature, and policy outcomes do not reflect extreme variation or volatility, abortion nonetheless is an issue that inspires intense activism and variations in abortion attitudes reflect deep seated value disagreements about sex, morality, women's rights, and personhood (Luker 1984, Petchesky 1984, 2003). While mass attitudes about abortion have been stable and do not embody the

stark choices, elite opinion has polarized far more dramatically on the issue.

Additionally, abortion is a policy area where it is difficult for a small group of elite actors to determine policy outcomes. For example, it is not a policy area dominated by a single industry or interest group. Religious opposition to abortion is spread over many denominations and organizations and is comprised of both single issue anti-abortion groups and multi-issue socially conservative organizations. The amount of money spent lobbying politicians on abortion is small, with yearly spending for anti-abortion groups topping out at \$3.3 million dollars in 2012 (\$430,000 in individual contributions, \$430,000 in PAC money and \$2.1 million in “outside money”). (OpenSecrets.org, accessed 2014). This is due to the expectation that politicians will follow their own moral compasses on abortion related issues and will not be persuaded to act by interest group contributions (Oldmixon 2005). Abortion policy is considered by multiple committees and by a broad array of members of Congress. In their analysis of House committee action Ainsworth and Hall (2011) focus on the four committees that most commonly hear abortion legislation: Judiciary, Appropriations, Commerce and International Affairs Committees. Cumulatively, these four committees handle over eighty percent of abortion proposals but every single House standing committee has had abortion related legislation referred to it. No one committee chair or policy community can bottleneck proposed abortion bills because they are heard by so many different committees. This prevents the creation or maintenance of the policy subsystems that are necessary to create equilibrium. “When dominated by a single interest, a subsystem is best thought of as a policy monopoly. A policy monopoly has a definable institutional structure responsible for policymaking in an issue area, and its responsibility is supported by some powerful idea or image. This image is generally connected to core political values and can be communicated simply and directly to the public” (True et al. 2007). Policy subsystems create PET policy dynamics by preventing policy change until a policy shock breaks the subsystem and creates non-incremental change.

While interest group money is a marginal factor in abortion politics, there are other forms of interest group influence. In her analysis of the relationship between pro-life groups and the Republican Party and gay rights groups and the Democratic Party, Allen (2007) distinguishes between “collaborative” and “coercive” resources of “social movement interest groups [SMIGs].”

Collaborative resources involve services that SMIGs deliver to political parties. Coercive resources involve services that enhance SMIG’s bargaining position with the home party. Collaborative and coercive resources can overlap but together they include: mobilizing voters, mobilizing opposition, the liaison function both within Congress and between Congress and SMIG membership, recruiting and training candidates, strength of the movement, public opinion, strategic alliances with other groups, radical SMIGs and money.

Interest groups who lobby for or against legalized abortion use these other resources extensively. In her interviews with Congressional liaisons for 10 anti-abortion interest groups, Allen found that “Pro-life SMIGs gained access to the Republican Party primarily through legislative service organizations (LSOs), which are working groups or caucuses that are structured to provide assistance to members of Congress in their legislative duties. LSOs are certified by the Committee on House Administration and paid for by official government resources.” Additionally, “ a major source of their leverage came from extensive grassroots activity, which is present in every state [and] there are many organizations that recruit and train pro-life candidates for political office.” (Allen 2007).

The majority of successfully passed anti-abortion legislation has been budgetary in nature. Historically, incrementalist theory has been most commonly applied to budgetary policy, and this makes the theory a particularly good tool to analyze abortion because successful abortion restrictions have overwhelmingly been funding restrictions. The politics of abortion policy is overwhelmingly the politics of the appropriations process. As the appropriations process is a standard, routinized and inevitable part of the policymaking process, debates about abortion also become standard, inevitable and constant. Congressmembers and their staffs believe the appropriations process can defuse contentious moral issues by turning them into

discussion about dollars. Ideally, difficult decisions about the direction and substance of a policy...have already been made by authorizers. Appropriators set funding levels. Among Republican and Democratic appropriators, traditionally there has been consensus that their task is to “protect the Federal Treasury” and serve their parent chamber. Guided by that consensus, legislators who are otherwise prolife or prochoice may have some flexibility to compromise in committee (Oldmixon 2005).

Conversely, Oldmixon also finds that at times regular bargaining between members of Congress on budget issues is hampered by a “strategic moral reframing” of fiscal issues.

In addition to adding to the literature on PET and incrementalism this chapter will expand the existent literature on abortion policy in Congress. When scholars have written about abortion in Congress in the past, their focus has been largely on determinants of roll call voting behavior, rather than on the longitudinal analysis of both policy proposals and policy outcomes provided here. Past studies have measured the impact of partisanship, public opinion, personal ideology and religiosity in shaping voting behavior.

This chapter, however, challenges their contention that abortion is an area where legislative compromise is difficult and where interest groups only advocate for extremist positions. This view may describe abortion policy propositions in the first years after legalization but every single successful anti-abortion law and the majority of proposed anti-abortion laws have been incrementalist in nature. Writing in 1988, Allen Hertzke interviewed religious leaders and found that “...in their attempts to shape public policy through congressional lobbying, [they] themselves [were] molded by the congressional milieu, with its norms and unwritten rules...[T]he actual lobby approach is more strategic and mundane...[there] is an acceptance of incremental strategies and compromise as imperatives of successful long run congressional lobbying” (Hertzke 1988). This strategic sophistication was borne partially of failure as the Christian Right faced legislative defeat, internecine strife, and was privately derided as “amateurish” in its lobbying efforts. One example of this perceived lack of lobbying sophistication was the doomed campaign to support the Family Protection Act of 1981. This grab bag

of culturally conservative proposals included a federal parental consent requirement. In his treatments of Christian Right lobbying and legislative outcomes Moen separated into three phases: the expansionist phase (1978-84), the transition phase (1985-1986) and the institutionalization phase (1986-on). The latter phase was marked by the abandonment of moral rhetoric and its replacement with a rights-based discourse rooted in classical liberalism and the adoption of more moderate policy goals (Moen 1989, 1992).

There was relatively little congressional time or agenda space devoted to the abortion issue before 1973. Abortion rights proponents were focusing their efforts on court cases and state legislatures rather than Congress. One exception to this general inattention was the controversy over the family planning policies of the Nixon administration. Starting in the 1950's and continuing into the early 1970's, a kind of neo-Malthusian panic about large scale population growth domestically and abroad in developing nations gripped American politicians of both political parties. Stanford biologist Paul Erhlich had authored *The Population Bomb* in 1968 which predicted mass starvation of "hundreds of millions" of people in the 1970's and 1980's as runaway population growth strained resources. After lamenting the infeasibility of introducing "temporary sterilants" into the water and/or food supply, he suggested punitive taxes, widespread sexual education and legalized abortion to check population growth in America. Erhlich's books were bestsellers, and he parlayed his success to television appearances on shows like the Johnny Carson show. Erhlich also endorsed compulsory sterilization of men in India with more than three children, and said food aid should be denied to countries that did not adopt strict family planning programs (Erhlich 1968). The "Zero Population Growth" movement was in vogue during this time as well. There was also a concern that explosive population growth would economically destabilize countries of the third world and make them more susceptible to Communism. Domestically, the population control movement feared that Americans bearing unplanned children would overburden welfare programs. (Buss and Herman 2003, Goldberg 2009). These concerns led to

the adoption of national and international family planning programs during the first Nixon administration. In 1969 Nixon empaneled the Commission on Population Growth and the American Future, chaired by John D. Rockefeller III, brother of then New York governor Nelson Rockefeller, who had presided over New York's legalization of abortion in 1970, to study the impact of anticipated population growth on American politics and society. These groups were different ideologically from the cultural conservatives that would later come to define the anti-abortion movement.

While many members of the Republican Party had embraced spending on contraceptive and reproductive health services to stem population growth, abortion was perceived as a bridge too far. When it became apparent Rockefeller's Commission would endorse legalized abortion, Nixon and congressional Republicans planned to distance themselves from it. Nixon saw the abortion issue as lose-lose. He thought solidly pro-choice voters were unlikely to support his candidacy even if he endorsed legal abortion, and his Southern Strategy relied in part on peeling culturally conservative Democrats away from their party. The man who would later tar George McGovern as the candidate of the three A's "amnesty, abortion and acid" figured he would alienate far more voters than he would attract by appearing to accept liberalization of abortion laws (Perlstein 2000). After noting the moral complexity of abortion as an issue and that certain members of the Commission opposed it, the Commission report argued that "laws restricting abortion be liberalized along the lines of the New York State statute, such abortions to be performed on request by duly licensed physicians under conditions of medical safety." Additionally, the Commission stated "That federal, state, and local governments make funds available to support abortion services in states with liberalized statutes. That abortion be specifically included in comprehensive health insurance benefits, both public and private" (Rockefeller Commission on Population Growth and the American Future 1972). In anticipation of these findings, a "Pro-Life Report on Population Growth and the American Future" prepared by journalist Randy Engels on behalf of Women Concerned for the Unborn Child and Pennsylvanians for

Human Life was released to argue against the findings of the Rockefeller Commission (Hoff 2010).

Though policy outcomes have been consistently incremental in nature since the legalization of abortion in *Roe*, the content of legislation introduced by anti-abortion Congressmembers in the first years following the Supreme Court's decision was often non-incremental in nature. In characterizing abortion policy during the years 1973-1984, Ainsworth and Hall write, "In the 1970's, the percentage of abortion related legislative proposals that were nonincremental exceeded 60 percent in every Congress up to 1980. The number of nonincremental proposals reached its peak in the 94th Congress (at 97 percent). The number of nonincremental began to decline with the 97th and 98th Congresses...and continued to decline thereafter...For the 101st through the 108th Congresses, the percentage of incremental activity in the House has never dipped below 78 percent" (Ainsworth and Hall 2011). In the immediate aftermath of *Roe*, the most frequently introduced legislation sought to overturn the decision through either the passage of a Human Life Amendment, or removal of the Supreme Court's jurisdiction over abortion. Often the members of Congress who introduced this non-incremental legislation knew it had little chance of passing, but they forwarded the legislation to appease its supporters and for symbolic reasons and to rally public support.

Since 1973, there have been 330 attempts to pass a constitutional amendment overturning *Roe*. In the 94th Congress alone there were almost eighty proposed amendments (National Committee for a Human Life Amendment accessed 2014, Shimabukuro 2013). Most of these proposals adopted one of two strategies. The first type of Human Life Amendment bans abortion through either an establishment of fetal personhood and/or through an explicit statement that abortion violates the Fifth and Fourteenth Amendments. The very first proposed amendment of this type, the Hogan Amendment introduced eight days after *Roe* and *Doe* were handed down, exemplifies this first type and states:

SECTION 1. Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws. SECTION 2.



Neither the United States nor any State shall deprive any human being of life on account of illness, age, or incapacity. SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation (Joint resolution proposing an Amendment to the Constitution of the United States guaranteeing the right to life to the unborn, the ill, the aged, or the incapacitated., H.J. Res. 261, 93<sup>rd</sup> Congress).

Another example of this type comes from Senator Jesse Helms, who would successfully author the first post-*Roe* incrementalist abortion restriction in 1973:

SECTION 1. The right to life is the paramount and most fundamental right of a person. SECTION 2. With respect to the right to life guaranteed to persons by the fifth and fourteenth articles of Amendment to the Constitution, the word `person' applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development including fertilization. SECTION 3. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law allowing justification to be shown for only those medical procedures required to prevent the death of either the pregnant woman or her unborn offspring, as long as such law requires every reasonable effort be made to preserve the life of each. SECTION 4. Congress and the several States shall have the power to enforce this article by appropriate legislation (S.J. Res. 137, 97<sup>th</sup> Congress).

Other Human Life amendments merely tried to overturn *Roe* and return abortion policy to the states without enacting a blanket federal ban. A proposed amendment of this latter type was the only one to receive a floor vote, ten years after *Roe*.

While twenty-three days of hearings were conducted on various Human Life amendments between 1974-1976 (Munson 2011), only one of them ever received a floor vote in one of the two houses of Congress. A version of the Human Life Amendment called the “Human Life Federalism Amendment,” or the Hatch-Eagleton Amendment made it out of the Senate Judiciary committee and was voted on in the Senate on June 28, 1983, where it was defeated. Forty-nine Senators voted in favor of the amendment and fifty voted against it, eighteen votes short of the necessary two-thirds needed to approve a constitutional amendment. The final text of the Hatch-Eagleton Amendment stated, “A right to abortion is not secured by this Constitution.” The goal of the Amendment was to make abortion a matter of state rather than federal law and permit states to ban it. An earlier version of the Amendment also stated that “The Congress and the several States shall have the concurrent power to restrict and

prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern.” After the failure of the Hatch Eagleton Amendment the volume of anti-abortion constitutional amendments dropped significantly (Shimabukuro 2013). Legislative attempts to remove the Supreme Court's jurisdiction over abortion cases were similarly unsuccessful (Miller 1989, Linton 2011).

The failure of the Human Life Amendments was not surprising, given the dismal track record of constitutional amendments. While abortion has served this symbolic function primarily within the Republican Party, it is not completely absent amongst Democrats. For example, the Congressman who has introduced the most anti-abortion constitutional amendments was James Oberstar, a Democratic representative from Minnesota who served from 1975-2011. He introduced as many as twelve amendments in one congressional term, and introduced at least one for every term in office he served. None of his proposed amendments advanced legislatively after their initial referral to the House Judiciary committee. Oberstar kept introducing the legislation for symbolic reasons, and as a way to demonstrate his staunch Catholicism (Ainsworth and Hall 2011).

This creates a strategic conundrum for anti-abortion politicians. As convinced as they and their supporters may be about the immorality of abortion, if it ever was made illegal again it would unmake the important political alliances forged within the anti-abortion movement and deprive the Republican Party's base of an important rallying issue. Overturning *Roe* would force the abortion issue to be hashed out at the state level, where anti-abortion politicians and activists would be forced to take potentially controversial and internally divisive steps to create post-*Roe* abortion policy.

Abortion is not solely a domestic policy issue. In addition to the pre-*Roe* family planning controversy discussed above anti-abortion considerations have continually factored into America's funding (or non-funding) of international organizations, and adoption (or non-adoption) of certain U.N. declarations. This further demonstrates how wide the scope of conflict is for abortion, and how

complex, technical implementation debates ensure the indefinite perpetuation of abortion conflict. Periodically during these foreign policy funding controversies, conservative attitudes against abortion expand beyond abortion itself to also imperil funding for international contraception programs. Running adjacently to the failed attempts to pass a Human Life Amendment, the first post-*Roe* restriction on abortion funding was enacted in 1973. Senator Helms, the controversial North Carolinian who served five terms in the Senate where he was known for his unapologetically Dixiecrat attitudes towards race and extreme cultural conservatism, authored a successful amendment to the Foreign Assistance Act (FAA) of 1961, the “cornerstone of permanent foreign aid authorization law.” The Act delineates five categories of assistance, “...including development assistance (part I); military and security assistance (part II); general, administrative, and miscellaneous provisions (part III); the Enterprise for the Americas Initiative (part IV); and debt reduction for developing countries with tropical forests (part V).” Helms's Amendment was enacted under part I of the Act, and stated that “None of the funds made available to carry this part may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions” (Blanchfield 2013). As Helms was amending the FAA he was simultaneously championing multiple Human Life Amendments, one of which would give the fetus due process rights and another which would allow states to define life at fertilization (“Anti-Abortion Drive Suffers a Setback,” *The New York Times* October 9, 1974). Helm's FAA text was included in each version of the bill until it was modified by the Leahy Amendment in 1994, which sought to clarify the term “motivate” in a pro-choice direction. This amendment stated that the term “motivate” should not be construed to prevent pregnancy counseling consistent with local law.

The next opportunity to limit access to abortion through the appropriations process came in 1974. The newly created Legal Services Corporation was created to provide funding for poor individuals to launch civil cases. Among the restrictions placed on organizations that receive LSC

funding is a prohibition against providing legal help for individuals trying to obtain “non-therapeutic” (a term that is not defined in the text of the statute) abortions, a condition that has been re-enacted in every year since (Solomon-Fear 2013). These early funding bans were passed because they represented minor amendments of complex appropriations legislation, and got little media coverage.

Continuing the trend of successful restrictions on federal abortion funding, the Hyde Amendment was first passed as a rider to Medicaid funding in 1976. Written by long serving Illinois Republican Henry Hyde, when first enacted, it prevented Medicaid from covering abortions unless the pregnant woman's life was endangered. While the Hyde Amendment has been added to each Health and Human Services budget since its initial passage, the text has changed over time. Only one year after the Hyde Amendment's passage its language was altered to permit Medicaid to fund abortions that resulted from rape or incest or if the pregnancy would cause “severe and physical health damage.” For fiscal years 1977-1980, the Hyde Amendment was passed in this form. Following the 1980 elections, the Hyde Amendment language reverted back to its original state, and the rape/incest exception to the funding prohibition was eliminated. This version of the Hyde Amendment passed every year until 1993, when the election of Bill Clinton led to the reinsertion of a clause allowing Medicaid to fund abortions if the woman became pregnant from rape/incest. Once added again in 1993, the language allowing Medicaid to fund abortions in cases of rape or incest has remained in every version of the Hyde Amendment passed since. Since Medicaid is a program jointly funded and administered by each state as well as the federal government, the Hyde Amendment does not prohibit states from using their own money to cover abortions for Medicaid patients, which seventeen states currently do (National Committee for a Human Life Amendment Fact Sheet accessed 2014, National Abortion Federation Abortion Facts accessed 2014).

The Hyde Amendment has been one of the most hotly contested pieces of anti-abortion legislation. There has also been some debate about measuring its impact. In 2009, the Guttmacher

Institute surveyed thirty-eight studies that investigated the impact of the Hyde Amendment on the abortion rate, as well as child outcomes, sexual behavior and transmission of sexually transmitted diseases, public finances, and availability of abortion providers. After discussing methodological problems in many of these studies (particularly a lack of control variables), the literature review found that twenty-five percent of women who would have had Medicaid funded abortions gave birth without access to this funding. For the rest of the women affected by the Hyde Amendment, their abortions were delayed by anywhere from a few days to two-three weeks, depending on the study. Attempts to measure the impact of the Hyde Amendment on mother and child health outcomes were hobbled by “methodological shortcomings” (Hemshaw et al. 2009).

After the Hyde Amendment there were a flurry of other anti-abortion riders added to appropriations bills. In 1978, the Civil Rights Act of 1964 was amended to include the Pregnancy Discrimination Act, which forced employers to treat pregnancy equivalently to other health conditions, but did not require them to provide health insurance coverage for abortions. That same year, a rider was also added to prevent members of the Peace Corps from receiving government funded abortions under any circumstance, and the FAA was amended to prevent any American funds from going towards “involuntary sterilization.” At this time forced sterilizations in China were receiving a lot of attention. In 1979, money appropriated to Washington, D.C. was subject to Hyde style funding prohibition, a ban that was expanded in 1989 to local D.C. money as well, though both these proscriptions were lifted in 2009. Continuing in the tradition established by the Helms Amendment of 1973, the Biden Amendment in 1981 was added to the FAA, which stated that no money may be used to provide assistance for biomedical research related to abortion/involuntary sterilization. In 1983, Congress prevented Federal Health Employee Benefits insurance from abortions. This ban was briefly revoked during the 103<sup>rd</sup> Congress (1993-1994) before being reinstated when the Republican Party gained the majority in the 104<sup>th</sup>. The Department of Defense and Department of Justice added anti-abortion riders

preventing spending on abortions for women in the military and prisoners respectively. Finally, the Civil Rights Commission Amendment of 1994 prohibits the U.S. Civil Commission on Civil Rights from studying, collecting, or disseminating information about federal law and policy concerning abortion (Shimabukuro 2013, Blanchfield 2013).

In 1985, the prohibition on funding “coerced sterilization,” enacted in 1978, was broadened by the Kemp Kasten Amendment to ban funding directed towards any country or organization that practiced involuntary sterilization. Since pro-choice advocates were also opposed to involuntary sterilization the controversy over this change to the law dealt not with whether the government should support the practice, but rather with whether certain groups actually supported the practice and the continual controversy over whether and to what extent America should provide funding to the U.N. Population Fund (UNFPA). When this amendment was first passed, its provisions were cited to UNFPA for supposedly assisting China in performing forced sterilizations and abortions. In the 1990’s, similar allegations were lodged against UNFPA for condoning involuntary sterilizations in Peru. Despite the fact that multiple independent organizations, including one conducted by the State Department, found no evidence of UNFPA’s participation in China’s forced sterilization, these allegations were used to deny funds fifteen of the last twenty-six years to this organization (Goldberg 2009, Blanchfield 2013).

Also added to the FAA in 1985 was the DeConcini Amendment, which was intended as a corrective to perceived bias on the part of the Reagan administration and congressional Republicans towards organizations that advocated natural family planning. Under the DeConcini Amendment, only family planning organizations that provide a range of family planning services either directly or through referral could receive FAA aid (Barot 2013). Coming just one year after the DeConcini Amendment and seemingly contradicting it the Livingston Amendment to the FAA was added in 1986, stating that the U.S. cannot discriminate against organizations that for religious reasons offer only

natural family planning. Both amendments remain part of the act (Blanchfield 2013).

The size and intensity of the abortion backlash prompted a pro-choice legislative response, though attempts to expand abortion rights beyond those secured first in *Roe* and later in *Casey* have been unsuccessful nationally. Anti-abortion Congressmembers successfully thwarted the Freedom of Choice Act each time it was introduced in 1989, 1991, 1993, 2004 and 2007. Each of these dates is connected to a perceived threat on the part of pro-choice Congressmembers and may be seen as reactions to *Webster v. Reproductive Health Services*, *Planned Parenthood v. Casey*, the passage of the Partial Birth Abortion Act of 2003, and *Gonzales v. Carhart*, respectively. The bill was seen by its supporters as a necessary legislative codification of abortion rights as well as a bulwark against encroachment. In each of its permutations, the Freedom of Choice Act started with findings that reiterated the constitutionality of abortion, and listed problems that came from lack of access, such as deaths from illegal abortions, financial and logistical difficulties caused by a dearth of providers, and spillover effects from anti-abortion regulations to contraceptive access. The proposed legislation stated:

#### INTERFERENCE WITH REPRODUCTIVE HEALTH PROHIBITED

##### (a) Statement Of Policy

It is the policy of the United States that every woman has the fundamental right to choose to bear a child, to terminate a pregnancy prior to fetal viability, or to terminate a pregnancy after fetal viability when necessary to protect the life or health of the woman.

##### (b) Prohibition Of Interference

A government may not—

(1) deny or interfere with a woman's right to choose—

(A) to bear a child;

(B) to terminate a pregnancy prior to viability; or

(C) to terminate a pregnancy after viability where termination is necessary to protect the life or health of the woman; or

(2) discriminate against the exercise of the rights set forth in paragraph (1) in the regulation or provision of benefits, facilities, services, or information.

##### (c) Civil Action

An individual aggrieved by a violation of this section may obtain appropriate relief (including relief against a government) in a civil action.

(Freedom of Choice Act, S.J. 1173, 110<sup>th</sup> Congress)

While its opponents have successfully fended off every attempt to pass the Freedom of Choice Act, anti-abortion Congressmembers were unable to stop the passage of the Freedom of Access to Clinic Entrances (FACE Act) in 1994. This legislation, which “prohibited by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;” (Freedom of Access to Clinics Act, P.L. 113-52, 103<sup>rd</sup> Congress) punished offenders with civil penalties of \$5,000-10,000 for first violations and \$10,000-\$25,000 for subsequent violations. The bill was passed in response to the escalation of violent protests in front of abortion clinics, protests that in addition to physically blockading entrances also included arson, bomb threats, vandalism, and kidnappings. This type of violent protest increased steadily for years before sharply peaking in 1994, with the murder of four and the attempted murder of eight doctors for performing abortions. (Jacobson and Royer 2003).

Twenty years after abortion was legalized, anti-abortion legislators had been very successful in their attempts to enact anti-abortion appropriations but had to reach other, non-incremental, legislative goals. After blocking federal money from subsidizing abortions for Medicaid recipients, members of the Peace Corps, military servicewomen, prisoners, federal employees, and women who live in Washington, D.C. anti-abortion legislators were running out of opportunities to reduce abortion access through the appropriations process, and sought additional incremental abortion restrictions to complement the amendments discussed above. In the 1990's, anti-abortion Congressmembers began their long legislative campaign against so-called “partial birth abortion.” The Partial Birth Abortion Act of 1995, introduced by Charles Canady in the House, criminalized the procedure, defined as “...an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery” (The Partial Birth Abortion Act, 1995, H.R. 1833, 104<sup>th</sup>



Congress) by instituting a fine and/or two year prison sentence for any physician who performed one unless the procedure was necessary to save the life of the pregnant woman and no other procedure could be substituted for it. The law also contained a provision for the husband of a pregnant woman or the parents of a pregnant minor to sue for damages if they did not consent to the abortion. It concluded with language stating that the pregnant woman herself would not be prosecuted under the law. The bill passed by a 288-139 margin in the House and 54-44 in the Senate, but President Clinton vetoed it because it lacked a health exception. A successful veto override was held in the House but failed in the Senate.

Clinton had written in his veto message that he was amenable to a partial birth abortion ban with a health exception; majority support in both houses of Congress and public opinion polls showed support for legislation banning partial birth abortion. Gallup polled on the topic annually from 1996 to 2003 and found support for the ban climbing from fifty-seven to seventy percent over the seven year period (Gallup Brain, accessed 2014). Gerald Solomon in the House and Rick Santorum in the Senate reintroduced the same legislative text that Clinton had vetoed as the Partial Birth Abortion Act of 1997. Aiming to craft a bill that would pass muster in the Republican Congress and avoid a Clinton veto, Senator Tom Daschle suggested an Amendment barring all post-viability abortions unless the pregnant woman's life was endangered by her pregnancy and Senators Diane Feinstein and Barbara Boxer tried to add the health exception Clinton had referenced. Neither Amendment passed but the Partial Birth Abortion Act passed both Houses of Congress by an even larger margin than its predecessor, 296-132 in the House and 64-36 in the Senate. Clinton vetoed the legislation again and again his veto was overridden in the House but not in the Senate (Annas 1998).

In the interim period between Clinton's two Partial Birth Abortion Act vetoes anti-abortion language was successfully added to the Telecommunications Act of 1996, though it was never implemented. Section five of the Act, titled the Communications Decency Act, among its other

restrictions on lewd and lascivious internet content criminalized the posting of information about abortion online by a \$5,000 fine and/or up to five years in prison for a first offense, and a \$10,000 fine and/or ten years in prison for any subsequent offense. In his signing statement Clinton said he would not enforce this provision, a position also taken by his attorney general, Janet Reno. Nine individuals and groups including Planned Parenthood and the ACLU, sued in New York over the enforcement of the anti-abortion provision. In 1997, their case was dismissed as moot, given that no one had been prosecuted under it, and in that same year the whole Communications Decency Act was overturned by the Supreme Court in *Reno v. American Civil Liberties Union* (521 U.S. 844 1997) for violating the First Amendment.

The Personal Responsibility and Work Opportunity Act of 1996, commonly known as welfare reform, also included a provision meant to non-coercively lower the abortion rate. The section of the law titled “Combating Out-of-Wedlock Birth and Promoting Paternity Establishment,” provided financial incentives in the form of twenty to twenty-five million dollar grants (with up to 400 million dollars spent allocated to be spent in total) to states that had the largest reductions in out of wedlock births while simultaneously lowering their abortion rate (Personal Responsibility and Work Opportunity Act of 1996, PL 104-193, 104<sup>th</sup> Congress).

The Foreign Assistance Act was again amended through the adoption of the Tiahrt Amendment in 1998. This amendment had five components. First, no funded organization could set numerical goals for number of births, or usage of particular types of family planning. Relatedly, no organization could offer financial inducements to workers or clients for meeting numerical targets or deny anyone program benefits for refusing to accept family planning. Also any organization was required to provide comprehensive information on the risks and benefits of experimental contraceptives and could only distribute experimental contraceptives using informed consent trial protocols.

Three years later, Nebraska's state level version of the failed federal law was found

unconstitutional in *Stenberg v. Carhart* (2000). Despite this ruling, the political commitment to a partial birth abortion ban remained strong in Congress, and the election of George W. Bush ensured overcoming a presidential veto would no longer be a problem. The Partial Birth Abortion Act of 2003 was introduced in the Senate in 2003 by Senator Rick Santorum. The first section of the bill directly challenged the fact-finding of the district court that originally handled the case cited by the Supreme Court in *Stenberg*, and presented evidence to demonstrate that the targeted procedure was never medically necessary. The findings section of the final legislation stated that partial-birth abortion was dangerous to the health of the woman undergoing the procedure, unsupported by “credible medical evidence” or controlled study, violated the ethical obligation of a physician to his patient and the fetus, and was “brutal,” “gruesome” and “inhumane” and “blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth” (The Partial-Birth Abortion Act of 2003, PL 108-105, 108<sup>th</sup> Congress).

During Senate deliberations Senator Tom Harkin suggested an amendment reaffirming the chamber's commitment to the legitimacy of *Roe* by explicitly stating the ruling was “appropriate and should not be overturned.” This passed by a 52-46 vote before being dropped during conference committee. Senator Patty Murray unsuccessfully tried to amend the legislation to increase availability of contraceptives by preventing health insurance companies from treating contraception differently from other medications among other provisions meant to decrease out of pocket contraceptive costs. This partisan disagreement over contraception is an issue that recurred during the controversy over the FDA's treatment of Plan B and later over the passage of the Affordable Care Act and subsequent litigation over the contraceptive mandate discussed in chapter six. Despite the universality of contraceptive use, and its potential to preclude the need for abortion by preventing unwanted pregnancy, certain types of contraception have been conflated with abortion by its opponents. Senators Dick Durbin and Diane Feinstein also both futilely sought a title change to the legislation as well as a

health exception to the ban (Esacove 2004, Schonhardt-Bailey 2008).

At times, partisan disagreements about abortion delayed action on seemingly unrelated legislation. The five years of delays that preceded the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) is a good example of this phenomenon. One of the primary goals of the legislation was to make it more difficult for individuals and organizations to file for bankruptcy. At issue was the right of anti-abortion activists and interest groups to avoid paying court costs incurred through violation of the FACE Act or other laws to avoid paying mandated fines by filing for bankruptcy. Randall Terry, the founder of Operation Rescue and perennial political candidate publicly declared in 1998 that he was filing for bankruptcy to deny the government money they would put to “the killing of the unborn.” Senate hearings on earlier versions of the BAPCPA turned up evidence of other anti-abortion protesters deliberately “divesting themselves of assets” before protest to avoid paying court ordered fines (Shenon 2002a, Shenon 2002b, Reynolds 2005).

During the long legislative battle over the Patient Protection and Affordable Care Act concerns about whether the bill would violate the Hyde Amendment led to months of debate, the failed Stupak-Pitts Amendment, and finally Executive Order 13535. There were two major points of contention for abortion opponents when the bill was first introduced. While the “public option” remained in the legislation, the goal was to ensure that the public option would not cover abortions. Even when that provision was removed from the legislation, federal health insurance exchanges where individuals without insurance would buy insurance policies, many with the assistance of a tax credit, remained a key part of the bill. Led by Congressman Bart Stupak, a group of fifteen to twenty Democrats in the House threatened to join the unanimous Republican opposition to the legislation if it was not amended to prevent the indirect financing of abortions through preventing any private insurance plan on the exchanges from covering non-Hyde Amendment compliant abortions. Part (a) of the Amendment stated that “No funds authorized or appropriated by the Act (or Amendment made by this Act) may be

used to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion,” (Stupak-Pitts Amendment to H.R. 3962). Parts (b) and (c) stated that nothing in the amendment should prevent an individual or state from allowing the purchase of a supplemental health plan that could be used to pay for abortions with exclusively non-federal money. Stupak and his supporters argued that the Stupak-Pitts Amendment merely brought the Affordable Care Act in line with Hyde Amendment. Forty Democrats who threatened to vote against the bill if Stupak-Pitts was added to it, in addition to pro-choice organizations such as NARAL, opposed Stupak-Pitts because it was a regulation placed on private insurance companies that would not be using any federal money. Eventually, President Obama signed Executive Order 13535, which promised that no federal money would subsidize abortions because insurers would keep money used to pay abortion claims in a separate fund, which would be audited to ensure compliance. Stupak-Pitts passed the House but was not taken up in the Senate, and thus was not part of the final legislation (Congressional Record House H12921, Stupak of Michigan Amendment to H.R. 3692 as reported by the Committee on Rules, Rosenberg et al. 2009).

There is a current attempt on the part of anti-abortion Congressmembers to defund Planned Parenthood. Title X funds have never been spent on abortions, and Planned Parenthood never uses federal money to provide abortions. However, using the same logic that animated the Stupak-Pitts Amendment, proponents of defunding argue that by funding Planned Parenthood the federal government indirectly funds abortions by subsidizing the organization's non-abortion services. Since money is fungible, without federal money, Planned Parenthood would either have to close completely or redirect the money separately allotted for abortions towards other means to keep providing preventive care and reproductive health services. In 2009 and 2011, then Congressman Mike Pence introduced the “Title X Abortion Provider Prohibition Act” and attached a rider to a 2011 continuing resolution defunding Planned Parenthood that passed the House by a 240-185 vote. Legislation similar

to Pence's was also introduced in 2013 by Marsha Blackburn and Diane Black (Ziegler 2012, Gdicks 2014). After heavily edited videos from the anti-abortion group the Center for Medical Progress in 2015, which alleged Planned Parenthood was profiting off the sale of fetal tissue from aborted fetuses, the movement to defund the organization re-emerged on both the federal and state legislative agendas. Three states, Arkansas, Alabama and Louisiana, defunded their Planned Parenthoods and a federal defunding bill was voted on in the Senate in August 2015 but could not overcome a Democratic filibuster (Cote 2015).

This chapter argues that abortion policy has been consistently incremental since 1973, and has never demonstrated the qualities described in PET. Chapter one laid out several ways to measure whether policy is incremental. In the literature on budgetary incrementalism, year-to-year spending changes above a certain threshold are considered non-incremental. While most of the anti-abortion legislation surveyed here is budgetary in nature, its goal has been to prevent spending rather than create it so there is not much in the way of yearly fiscal variation. The various appropriations laws and riders discussed above have been subject to debate and revision over the years. Beyond that, though, there has been no consensus, no stable policy subsystem and/or domination of the abortion issue by policy experts, no post-*Roe* super-statute (Eskridge and Ferejohn 2001).

One of the most consistent findings in the scholarly literature about abortion is the congruence between public opinion and policy outcomes. Laws closely reflect public opinion at both the federal and state level. This is also one of the predictions of the morality politics literature, that policy will closely model public opinion because the high salience, lack of technical complexity and strong emotional commitments of voters require that elected officials accurately represent the views of their constituents. How closely do congressional policy outcomes match public opinion?

There are a number of ways to measure public opinion on abortion. First, pollsters have asked respondents whether and under what conditions abortion should be legal. The findings here have been

“remarkably stable” (Leonhardt 2013, Bowman and Marisco 2014). The General Social Survey has since 1972 asked respondents whether they think abortion should be legal under seven different conditions: if the fetus will be born with birth defects, if the woman was raped, if the pregnancy endangers the woman's health, if a married woman does not want additional children, if the woman is too poor to afford children, if she is unmarried and does not want to marry the man who impregnated her, and finally, if the woman wants it for any reason. A large majority of the public has consistently supported abortion under the first three conditions, with support for legal abortion never dipping below seventy percent for any of the first three conditions and reaching as high as ninety percent support for legal abortion if a pregnancy endangers a woman's health. The other four conditions garner significantly less public support however, with only low income breaking fifty percent support and only then from 1972-1978. (General Social Survey Final Report 2012 “Trends in Public Attitude Towards Abortion” accessed 2014) Since 1975, Gallup has asked whether abortion should be “legal under any circumstances,” “legal under some circumstances,” or “illegal in all circumstances.” In 1975, public support for these positions was twenty-two percent, fifty-five percent and nineteen percent respectively. In 2013, the figures were twenty-six percent, fifty percent and twenty percent. None of these three figures has varied by more than ten percent, and the illegal under all circumstances figure has not varied more than five percent since Gallup started measuring public opinion on the issue (Gallup accessed 2014). The Hyde Amendment and other restrictions on federal abortion funding similarly draw the support of the majority of the public (CNN/ORC Poll accessed 2015).

The legislative drive to outlaw “partial-birth” abortion was also something that was broadly popular with the public. Gallup polls from 2003, Pew polls from 2008 and 2011 and ABC News polls from 2003 all registered opposition to late term abortion that ranged from sixty to seventy percent of the public. “The main one is that most Americans support abortion access with some significant restrictions. If you were going to craft a law based strictly on public opinion, it would permit abortion

in the first trimester (first 12 weeks) of pregnancy and in cases involving rape, incest or threats to the mother's health. The law, however, would substantially restrict abortion after the first trimester in many other cases" (Leonhardt 2013).

Mulligan et al (2012) calculated an aggregate measure of cultural conservatism/liberalism using over two thousand surveys concerning sixteen different policy areas that could be classified as morality policy (abortion, alcohol, birth control, crime, death penalty, divorce, drugs, gay rights, guns, marriage, pornography, school prayer, sex education, euthanasia, women's rights/roles). Their research sought to determine whether or not there was a common "cultural policy mood" undergirding changes in public opinion in these issue areas. Measuring from 1972-2010, the authors found that for fourteen of the sixteen issues the cultural policy mood became progressively more liberal over time. The two exceptions were the death penalty and abortion. Unlike the steady and unchecked liberal progression in most morality policies, abortion had moved in a slightly conservative direction.

Just as with the court cases discussed in chapter two, *post-Roe* abortion policy has developed in a consistently incrementalist direction in Congress. Initially this incrementalism occurred as a result of failed non-incremental laws, specifically anti-abortion constitutional amendments. The success of incremental abortion regulation however caused a strategic change in the types of bills introduced by the 1980's. Incrementalism became a choice rather than just a result. Anti-abortion Congressmembers were able to pass a series of funding restrictions and a ban on a specific abortion procedure, and were successful at connecting abortion to other political issues, successfully broadening the scope of conflict.



## Chapter Five: The Legislative Politics of Same-Sex Marriage

The content and timing of legislation banning same-sex marriage exhibits all the qualities of a moral panic. The duration of the issue was short, policy change occurred in keeping with the predictions of PET rather than incrementalism, the scope of conflict was not as broad as a moral conflict nor was the degree of institutional entrenchment as high, and the social construction of gays as deviants provided the context for policymakers. As the social construction of gays became more positive; and the lack of tangible harm caused by same-sex marriage became apparent, the animus underlying the moral panic dissipated and same-sex marriage bans were overturned.

The issue appeared on the legislative agenda due to policy punctuations from three court cases: *Baehr v. Lewin* (1993), *Goodridge v. Department of Public Health* (2003) and *Lawrence v. Texas* (2003). Same-sex marriage bans were clustered in two time periods: 1996-1998 and 2004-2006. The issue's sudden appearance, disappearance, and then reappearance on the Congressional and state legislative agenda matches the expectations of PET. Also corresponding with PET, it was a disruption in the policy image more than concrete changes in the policy environment that triggered the non-incremental response to these court cases. DOMA and its various state equivalents (many of which also banned civil unions/domestic partnerships) was passed seven years before a state would legalize same-sex marriage, based on the hypothetical fear that one state's legalization would force every other state to recognize same-sex marriages performed in that jurisdiction under the Full Faith and Credit Clause. The second wave of anti-same-sex marriage legislation was characterized by the passage of twenty-five state constitutional amendments in 2004-2006 and the attempted passage of a national constitutional Amendment because *Goodridge* and *Lawrence* convinced lawmakers that mere statutory prohibition of same-sex marriage was legally insufficient.

The changes in public opinion on same-sex marriage have been dramatic. Initially, same-sex marriage was so unpopular that bans were passed by huge popular vote majorities via ballot initiative

and by large, bipartisan coalitions in Congress and in state legislatures. The breadth and strength of opposition to same-sex marriage resulted in a very different pattern of partisan engagement with the issue than was present in the case of abortion. Instead of a cross-cutting issue that firmly embedded itself into the informal party organizations of the two parties, same-sex marriage never had any realigning potential.

Since marriage is largely the province of state law, this chapter will survey state same-sex marriage law, passed through state legislatures and ballot initiatives/referenda as well as congressional activity in the area. Congress deviated from its historical pattern of federal non-involvement with marriage law first with the successful passage of DOMA in 1996, and later with the multiple failed attempts to pass a Federal Marriage Amendment (FMA).

The same-sex marriage cases of the 1970's were comparatively low profile so they only triggered a modest legislative response. Six states (Maryland in 1973, Arizona and Virginia in 1975, Florida, California and Wyoming in 1977) passed laws explicitly stating that marriage was between one man and one woman. These laws, which reinforced the legal status quo, were passed either to close a potential legal loophole, (e.g., the lack of gender specific terms used in marriage statutes); or as part of a more generalized anti-gay backlash.

Three of these early six laws were passed in 1977, a year identified by Klarman (2012) as the first major backlash year following the post-Stonewall gay rights movement. In the years between 1969 and 1977 the American Psychological and Medical Associations had declassified homosexuality as a mental illness, twenty-three states had repealed sodomy bans and twenty-eight cities or counties had passed some form of anti-discrimination ordinances. These laws varied in scope, but all prevented some level of employment and/or housing discrimination on the basis of sexual orientation. These local laws, were passed in liberal college towns such as Berkeley, California, and Ann Arbor, Michigan, and cities with large politically active gay communities, such as San Francisco and New York City

(Ellis and Kasniunas 2011, Eskridge 2002). In 1977, Dade County Florida passed an ordinance prohibiting discriminations against gays in employment, housing, and public accommodations. The passage of this law garnered national attention and triggered a nationwide repeal campaign spearheaded by Anita Bryant, a former beauty queen and orange juice spokeswoman. She was the public face of the hastily assembled "Save Our Children" Incorporation formed in Miami to overturn the law on the basis that it imperiled children by exposing them to recruitment into homosexuality. The organization's taglines were "Save Our Children From Homosexuality!" and "Homosexuals cannot reproduce, so they must recruit." The ordinance was quickly rescinded in a county referendum election. (Andersen 2007). In 1978, anti-discrimination ordinances in Eugene, Oregon, St. Paul, Minnesota, and Wichita, Kansas, were overturned after similar local campaigns against them (Cleniden and Nagourney 2001). Bryant's public career as an anti-gay crusader ended as quickly as it began: she lost her Florida Citrus Commission contract due to the controversy surrounding her activism and she was shunned by fundamentalist Christian audiences when she divorced her husband in 1980. This pattern of gay rights policy victories triggering a violent and disproportionate backlash response will occur repeatedly when dealing with same-sex marriage specifically, and is evidence of a moral panic response to the specter of deviant gays gaining rights that threaten the heterosexual family and children.

After this cluster of laws passed between 1973-1977, only one state (New Hampshire in 1987) passed an anti-same-sex marriage law before *Baehr* was decided in 1993. This lack of activity fits the definition of policy equilibrium in PET. However, in the year preceding that momentous Hawaii Supreme Court decision, Washington, D.C. legalized domestic partnerships with the "Health Benefits Expansion Act" that authorized domestic partnerships for both gay and straight couples. Registering as domestic partners would allow couples to make medical decisions for each other, receive health insurance coverage, and inherit money and property as married couples do. Though the law was passed in 1992, it was not implemented for ten years because the federal government refused to appropriate

money for the District of Columbia (DC Law 9-114, 1992, “D.C. Domestic Partnership Program”).

Historically, Congress has been a poor venue for gay rights laws relative to state and local governments. There are several reasons for this. Attitudes towards gay rights vary dramatically based on a variety of characteristics, such as age, educational attainment, and religiosity (Pinello 2003, 2006, Mucciaroni 2008) and these factors vary enough from state to state to create pronounced variation in state level public opinion about gay rights. In his studies comparing the lobbying success of gay rights advocates at the state versus the federal level, Haider-Markel (1996, 2001) found that decreased visibility increased the likelihood of gay rights laws passing, and it was easier to lobby state legislatures due to the lower level of public and media attention typically devoted to their activity. Unsurprisingly, Democratic state legislatures were far more likely to legalize same-sex marriage (Heersink and Short 2014) so the Republican Party's control of both houses of Congress between 1994-2006 and the House of Representatives from 2010-present also makes Congress less hospitable to gay rights. Chapter three discussed how inhospitable the federal court system was to same-sex marriage until 2013, forcing a state-centric legal approach. The same dynamic is apparent when comparing Congress to state legislatures.

The first federal gay rights legislation was introduced by New York House members Ed Koch and Bella Abzug in May 1974. The Equality Act of 1974 would have added protection against discrimination on the basis of sexual orientation to the Civil Rights Act of 1964.

Equality Act - Prohibits, under the Civil Rights Act of 1964, discrimination on account of sex, marital status or sexual orientation in places of public accommodation, and under color of State law. Provides for civil actions by the Attorney General where there is discrimination on account of sex, marital status, or sexual orientation in public facilities or in public education. Prohibits discrimination on account of sex, marital status, or sexual orientation in federally assisted programs, and in housing sales, rentals, financing, and brokerage services. Provides penalties for anyone who willfully injures, intimidates or interferes with any person because of his or her sex, marital status or sexual orientation. Defines the term "sexual orientation" as used in this Act as meaning choice of sexual partner according to gender. (Equality Act of 1974, H.R. 14752, 93<sup>rd</sup> Congress).

The Equality Act was referred to committee and never acted upon. Abzug re-introduced a version of The Equality Act in January, 1975 with the words “sexual orientation” deleted but it also died in committee.

While the Equality Act never went anywhere in the 1970's, it was the germ of the Employment Non-Discrimination Act (ENDA), introduced in every Congress from 1994 to the present, with the exception of the 109<sup>th</sup> (2006-2007). The Equality Act, in trying to extend all the protections of the Civil Rights Act to gays, was seen as too broad and out of step with public opinion. The Employment-Non Discrimination Act was more narrowly targeted to businesses with more than fifteen employees from discriminating on the basis of sexual orientation, and offered an exemption for religious organizations and soldiers employed by the army. Additionally, if an employer's practices had a “disparate impact” against gay employees, this could not be used as evidence of violation of ENDA, a deviation from the standard used to judge racial discrimination under the Civil Rights Act.

Initially introduced by Gerry Studds, a gay Democratic House Member from Massachusetts, in June 1994, the legislation died in committee in both the House and the Senate. For the next twelve years the Republican Party controlled both houses of Congress, and despite being consistently introduced in the House and the Senate, the legislation was only reported out of committee for a floor vote once, in September 1996, when it failed by a 49-50 vote. In his analysis of moralistic language used in congressional debates on gay rights issues Mucciaroni (2011) found that this discussion of ENDA was highly, morally charged in 1996 (unlike subsequent congressional debates), with the majority of floor speeches citing the immorality of homosexuality. When the Democratic Party won majorities in both houses after the 2006 midterm elections, Congressman Barney Frank amended ENDA to ban employment discrimination on the basis of gender identity. In this new incarnation, the legislation passed 235-184 in the House in 2007, but died in the Senate. Six years later the legislation would pass the Senate 64-32 but never come up for a vote in the Republican House (Mucciaroni 2008,

Feder and Brougher 2013). ENDA has been supported by large majorities of the public for years. In 1977, a backlash year when public opinion was far less tolerant of homosexuality, fifty-six percent of the public thought that “homosexuals should...have equal rights in terms of job opportunities,” according to Gallup. By 1996, this had climbed to eighty-four percent of the population, peaking at eighty-nine percent in 2008 (Gallup accessed 2014).

Klarman (2013) identifies 1993/1994 as a second anti-gay backlash period. This backlash was in response to Clinton’s election, after courting the gay vote, and the legislative fracas over the right of openly gay servicemembers to serve in the military which culminated in Clinton’s “Don’t Ask Don’t Tell” executive order. 1993 was also the year Hawaii issued its same-sex marriage decision in the *Baehr* case. The legislative response to that decision at the state and federal level is a paradigmatic example of both a moral panic and a policy punctuation.

Mucciaroni, in his comparative analysis of the successes and failures of the gay rights movement in six policy areas found that “...two basic conditions shape the level of success that gay rights advocates encounter: *whether Americans perceive their demands as threatening and how political institutions mediate the resistance that arises from those perceptions.*” He finds “*..a clear pattern: issues related to sexual conduct and family life threaten Americans more than issues related to marketplace discrimination, the military and hate crimes*” (Mucciaroni 2008, emphasis in original). Same-sex marriage, allowing gay couples to adopt children, and repealing sodomy laws are grouped together as threatening policies. He cites three reasons for why these issues would be particularly threatening to heterosexuals: these policies emphasize the intimate nature of gay relationships, specifically sexual intimacy that some heterosexuals are repulsed by (the so called “ick factor”), they will strive to create “social equality” between gay and straight couples by making their relationships legally equivalent to each other, and they threaten “heterosexual identity.”

Same-sex marriage is an issue then that is well suited to triggering a moral panic. To start, in

the 1990's there was still significant moral disapproval of homosexuality amongst the general public. Gallup data on “homosexuality as an acceptable alternative lifestyle” and “the moral acceptability of homosexual relations” showed that the majority of respondents found that homosexuality was not an acceptable lifestyle and was morally wrong (Gallup accessed 2014). A much larger majority, however, disapproved of same-sex marriage specifically. “To most people's understanding, marriage is intrinsically a heterosexual institution. Marriage and coparenting have been exclusively heterosexual privileges and have constituted part of what it means for many heterosexuals to be complete...If heterosexuals share ownership of marriage with 'inferior' homosexual couples, then the institution's value as a signifier of status declines” (Mucciaroni 2008). The fact that marriage is simultaneously a civil institution that bestows a panoply of legal rights and a religious ritual also means that any attempts to alter it will be contentious because they threaten long running religious views of what marriage is and what purpose it serves.

Throughout history there have frequently been comparisons drawn between the health of marriages and families and the health of the polity. “The idea that a significant link between the state of families and the state of the nation, and that strong, healthy families undergird a strong nation, are animating a number of social movements as well as governmental efforts to strengthen families” (McClain 2006). However, the type of family enshrined as the constitutional ideal has been contested. Brandon (2013) argues that in early American history three models of the family competed as representatives of the ideal: the Jeffersonian/agrarian model of the personally owned family farm, the Hamiltonian model of “commercial, capitalist modes of production and to the nationalist, liberal and individualistic virtues”, and the slaveholding family which was based on “...the Bible, to sociology and to a form of Aristotelian natural law.” All three of these versions of the family featured exclusively male/female marriages but the slaveholding family was not nuclear nor were marriages within it consistently monogamous. It was not until the abolition of slavery and the subsequent legal battles

with the Mormon Church, culminating in the anti-polygamy decision *Reynolds v. U.S.* (98 U.S. 145 1878), that the court system “read a form of family into the Constitution” and the monogamous nuclear family became the ideal. Even now, there remains a tension between the idea of the family as a private space that should remain free of government regulation, on the one hand, and an institution that needs to be relied upon to perpetuate civic virtue and support the healthy functioning of the state on the other (McClain 2006, Brandon 2013).

There is an additional reason that the specter of same-sex marriage was so threatening to its opponents. One of the most frequent arguments employed against same-sex marriage was that it was a radical deviation from how a bedrock social institution works and has always worked. This deference to tradition was a frequent component of both the judicial and legislative debates surrounding same-sex marriage. Opponents to same-sex marriage often cited the need to preserve the transcendent, unchanging, timeless nature of marriage. This was brought up in the floor debates of federal and state same-sex marriage bans. States repeatedly cited caution, traditionalism, and unwillingness to change a historically static institution. On the Supreme Court, consider Alito's comments during *Hollingsworth* oral arguments arguing for “...the need to be cautious in light of the newness of the — the concept of — of same-sex marriage. The one thing that the parties in this case seem to agree on is that marriage is very important. It's thought to be a fundamental building block of society and its preservation essential for the preservation of society. Traditional marriage has been around for thousands of years. Same-sex marriage is very new...[Y]ou want us to step in and render a decision based on an assessment of the effects of this institution which is newer than cell phones or the Internet?” (Hollingsworth Oral Arguments accessed 2014).

However it is precisely the dramatic changes in recent marriage practices that made same-sex marriage seem particularly threatening during the same-sex marriage moral panics. Over the past fifty years there have been major changes in the marriage rate, age at first marriage, rates of cohabitation



before marriage, the spread of no-fault divorce laws, and the rise in out-of-wedlock births. The number of adults married fell from seventy-two to fifty-one percent. This was due to an increase in the number of adults never married (which grew from fifteen to twenty-eight percent) and the number of adults divorced or separated (which grew from five to fourteen percent). The median age of first marriage increased from 20.3 for women and 22.8 for men to 26.5 for women and 28.7 for men. As of 2011 only twenty percent of adults age 18-29 were married, as compared to fifty-nine percent in the in the year 1970. By 2011 “nearly four in ten say marriage is becoming obsolete” (Pew Research Center “Record Share of Americans Have Never Married” accessed 2014, Pew Research Center “Marriage Rate Declines and Marriage Age Rises” accessed 2014). This is also around the time the percentage of out-of-wedlock births began its growth, going from under ten percent to forty percent (National Vital Statistics Report Birth Data accessed 2014).

It is these changes in heterosexual marriage, combined with moral disapproval with homosexuality, that made the concept of same-sex marriage seem so menacing. In his congressional testimony in favor of the Federal Marriage Amendment, Southern Baptist Convention “Ethics and Religious Liberty Commission” President Richard Land, citing an article from the Weekly Standard called “The End of Marriage in Scandinavia,” argued that legalizing same-sex marriage led to a decline in the heterosexual marriage rate. He spoke darkly of the low marriage rates and high non-marital birthrate, and argued that gay couples divorced at a higher rate than straight couples in Sweden, Denmark, and Norway.

The Equality Act and later ENDA were congressional nonstarters, but Congress did not enter the realm of same-sex marriage policy until the passage of the Defense of Marriage Act (DOMA) in 1996. The passage of DOMA, introduced in May, 1996 by Bob Barr in the House and Don Nickles in the Senate, was a classic example of a PET response to the *Baehr* decision. Despite the lack of legal precedent in this area, the proponents of DOMA thought it was a necessary response to the possibility

that one state legalizing same-sex marriage would require other states and the federal government to do the same under the Full Faith and Credit Clause of the Constitution. To bolster the case that DOMA was a necessary response to this potential legal threat the House Judiciary Committee cited a Lambda Legal memorandum written by Evan Wolfson entitled, “Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr v. Lewin*?” This memorandum stated that couples would go to Hawaii to get married if legalization occurred and then travel back and petition to get their marriages recognized. Lambda pledged to assist couples in travelling to Hawaii to accomplish this goal. This document was taken as proof of the Full Faith and Credit Clause threat, despite the fact that it was based on a hypothetical situation not well supported in prior constitutional interpretation.

The Full Faith and Credit Clause forces states to recognize “...the public records, acts and judicial proceedings” of other states. However, there is a “public policy exception” to the Full Faith and Credit Clause. This exception formed the basis of two worker's compensation cases from the 1930's *Alaska Packers Association v. Industrial Accident Commission* (294 U.S. 532 1935) and *Pacific Employers Insurance Company v. Industrial Accident Commission* (306 U.S. 493 1939). The latter case stated that:

in the case of statutes, the extra- state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.

The Supreme Court has never considered this question in regard to same-sex marriage, nor has any circuit court. One district court in Florida dismissed a lawsuit from a couple who married in Massachusetts and sought to have their marriage recognized there (*Wilson v. Ake* 354 F. Supp 2d 1298 2005). During the debates over DOMA and later the FMA, there was no reason to assume a Full Faith and Credit Clause challenge would work given the public policy exception and previous case law. The

American Law Institute's Restatement (Second) of Conflict of Laws (1971) says in regard to marriage, "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." Before same-sex marriage became a political issue, states had varied in their treatment of interracial marriage, and cousin marriage, and set different age limits for marriage without triggering a federal attempt at standardization under the Full Faith and Credit Clause, nor was any state that banned interracial marriage or cousin marriage forced to recognize them due to the Full Faith and Credit Clause (Singer 2005, Rosen 2006).

Beyond this argument, which also came paired with condemnations of judicial activism, the Committee Report also opined at length about the government's interest in protecting traditional notions of marriage and morality. This was stated first in the opening lines of the document: "H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to defend the institution of traditional heterosexual marriage." Later on in a footnote, the goals of state marriage policy are listed as "Upholding traditional morality, encouraging procreation in the context of families, encouraging heterosexuality." The argument that the state must ban same-sex marriage to protect the link between marriage and procreation, which was featured prominently in almost every court cases discussed in chapter three, was also reiterated in the discussion of DOMA. The moralistic language is especially prominent in Section B of the Committee Report, entitled "H.R. 3396 Advances the Government's Interest in Defending Traditional Notions of Morality." This section states:

Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. It is both inevitable and entirely appropriate that the law should reflect such moral judgments. H.R. 3396 serves the government's legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws. (104<sup>th</sup> Congress 2<sup>nd</sup> Session Committee Report 104-664 "Defense of Marriage Act").

Classifying all the congressional debates used by proponents of DOMA Mucciaroni (2011) found the seven most common arguments in favor of the bill were, in order from most commonly to least commonly used, “negative impact on marriage/family,” “tradition,” “federal protection of state's rights,” “immorality of homosexuality,” “gay relationships inferior/not equivalent to heterosexual relationships,” “high cost to the federal government,” and “public/bipartisan opposition to gay marriage.” Suggesting some spillover effect from the morally charged discussion of DOMA, in 1996 fifty-seven percent of congressional speeches concerning ENDA mentioned the immorality of homosexuality, a dramatic departure from the zero percent of speeches that would cite the immorality of homosexuality in later years (Mucciaroni 2011).

The Defense of Marriage Act moved quickly through Congress and was passed overwhelmingly by both Houses, 342-67 in the House and 85-14 in the Senate. President Clinton signed the bill into law in September 1996. He had opposed the legislation during its development but signed it because it passed with a veto proof majority, and he did not want the issue to come up in the 1996 election, especially given his party's losses in the 1994 midterm elections and the criticism over Don't Ask Don't Tell. Based on focus group data gathered by GOPAC, a political action committee which recruits Republican candidates to run for office and helps them create campaign messages based on focus group data, House Speaker Newt Gingrich was advising Republican candidates to pigeonhole the Democratic Party as “sick” and “pathetic” and to align themselves with the causes of family and morality (Drew 1997). Note the large, bipartisan majorities in favor of DOMA. State level DOMAs were passed by similarly lopsided margins. Anti-same-sex marriage ballot initiatives were hugely popular. Since public opinion was so strongly against same-sex marriage at this time, there was no strategic reason for the Democratic Party to adopt the pro-same-sex marriage cause as the Republican Party did the pro-life one. There was a marked difference in partisan strategy apparent in how these two moral issues were

treated by the two parties. Writing about the Democratic Party, gay rights groups and same-sex marriage from the 1970's to 2006 Allen (2007) said:

[T]he gay rights SMIGs often lobby for a policy agenda that the Democratic Party refuses to address. Gay rights SMIGs are subsequently forced to eliminate certain items from their agenda in order to achieve larger policy goals. Issues like same-sex marriage and transgender rights are not broadly supported by Democratic Congressmen. Further, the Democratic platform has failed to advocate for gay rights issues in any substantial way with the exception of the 1992 platform. As a result of the negative response these proposals received, they were largely excluded from the 1996 platform. Today the Democratic Party supports legislation barring discrimination of gay men and lesbians but generally fails to advocate for other key movement goals. The insistence of gay rights SMIGs to continue to lobby for contentious movement goals is presently a losing proposition in Congress. The chasm between the policy goals of the broader gay rights movement and those of the Democratic Party is vast.

There has never been a deliberate effort to recruit gay rights SMIGs and their supporters into the Democratic Party as there was with the Republican Party and pro-lifers. The Democratic Party took on the gay rights issue more by default as the party was already affiliated with the women's and pro-choice movements. Still the Democratic Party has never fully embraced the gay rights movement and its core policy priorities. Additionally, even though there is support for gay rights policy from the women's movement, women's rights SMIGs have not taken up the gay rights issue to the degree that the Christian Right did when it moved abortion to the top of its agenda. Further, there has been no great outcry for gay rights legislation within Congress (even among liberal Democrats).

DOMA created a federal definition of marriage as between one man and one woman, a decision that pre-emptively cut off access to approximately 1,100 federal marriage benefits including Social Security, private pension plans, access to health insurance and COBRA, income and estate taxes (the latter would be the basis for the *Windsor* decision), visa access, veteran's benefits, surviving spouse rights to the maintenance of a copyright, federal employee benefits, and hundreds of other laws (Government Accountability Office 1997, 2004).

Earlier this chapter several ways were discussed to measure the concept of moral panic and it was argued that two intense periods of anti-same-sex marriage activism were caused by moral panic. Applying the concepts of: volatility, hostility, measurable concern, consensus, and disproportionality it becomes clear that federal and state DOMAs exemplify all five aspects of the moral panic.

Considering these characteristics beginning with volatility, the connection between PET and the predictions of the moral panic literature are obvious. Moral panics develop and abate in much the same way that issues suddenly erupt as predicted by PET. Same-sex marriage was an issue that exploded into the public consciousness in 1996 in a way that demonstrated a high level of volatility. Despite the cluster of seventies cases discussed in chapter three, the issue received very little public or media attention before 1996. Rosenberg (2008) found very little pre-1996 polling data of the issue, or media attention devoted to it as befits an issue in policy equilibrium. Gallup began polling on the issue only in 1996. Only a handful of state legislatures had addressed the issue before 1996. Then there was two years of high level policy activity before policy activity dropped again. Only two additional states banned same-sex marriage between Vermont's legalization of civil unions in 1999 and Massachusetts's legalization of same-sex marriage in 2003, which took effect in 2004. The years of inactivity punctuated by short bursts of high level policy activity matches the expectations of both a moral panic and PET.

When the issue did jump onto the public and legislative agenda the idea of same-sex marriage was greeted with hostility. The General Social Survey did ask a same-sex marriage question in 1988, where same-sex marriage was approved by 10.7% of respondents. Since the issue was so low profile, it is hard to find any other pre-DOMA polling debate. By 1996, the public was still strongly opposed to same-sex marriage, with support for same-sex marriage at twenty-five to twenty-seven percent when DOMA was passed. In the eight years between DOMA and the first legalization of same-sex marriage in Massachusetts, support for same-sex marriage generally hovered in the thirties, though this did not include broader support for civil unions. In the congressional debate about DOMA supporters stressed its moral disapproval of homosexuality. The wave of legislation and public attention is also evidence of measurable concern. During the anti-same-sex marriage policy punctuations there was strong consensus against legalization as evidenced both by the high level of public disapproval of same-sex

marriage as well and by the large and bipartisan coalition of DOMA supporters in both houses of Congress. DOMA was passed by a veto proof majority during a period of divided government.

Finally, the policy punctuation of 1996-98 demonstrates the disproportionality of the moral panic response. DOMA and its state equivalents were a premature response to a non-issue. No state had legalized same-sex marriage when DOMA was drafted, debated and passed. The Hawaii decision had been stayed before a single marriage had been performed. There were no cases like *Baehr* being litigated in any other state. DOMA was passed three years before the legalization of civil unions and eight years before the legalization of same-sex marriage. As discussed above the purported threat of other states being forced to recognize same-sex marriages under the Full Faith and Credit Clause was chimerical.

DOMA was not the end of the same-sex marriage moral panic. Many states rushed to pass their own same-sex marriage bans between 1996-1998. Berry and Berry (1999) handily summarize the most common prevailing theories concerning policy diffusion. States have three common reasons for adopting new policies: policy learning occurs as states watch other states experiment with new policies, states innovate to compete with each other economically, or states initiate new policies because of outside pressure to conform to national or regional standards. Additionally, Berry and Berry describe two differing models of geographic policy diffusion: the National Interaction Model and Regional Diffusion Model. Both models assume that states engage in policy learning from each other, but they differ in how they predict that learning occurs. The National Interaction Model discounts the importance of geographic proximity, and looking at how state policy makers learn from national communication networks. The Regional Diffusion Model argues that states are more likely to learn from their regional neighbors.

In most instances, state level policy adoption will be shaped by internal state characteristics, as well as regional and national effects. Between 1993 and 1998 forty-eight states attempted to pass

legislation banning same-sex marriage. Only Massachusetts and Nevada considered no same-sex marriage legislation during this time. Of the forty-eight states that considered it, twenty-eight states passed mini-DOMAs and Louisiana passed a “non-binding resolution” mini-DOMA. One anti-same-sex marriage law was passed at the state level in 1994, one in 1995, eighteen in 1996, eight in 1997, and one in 1998 (plus the two constitutional amendments passed in Alaska and Hawaii through the initiative process).

This policy diffusion occurred far too quickly to be a response to policy learning or economic competition among states. Of the eighteen states that passed mini-DOMAs in 1996, many did so as the federal DOMA was being debated or immediately after its implementation. The federal legislation was introduced in May and passed in September. Meanwhile, conservative Christian interest groups were very active lobbying for state DOMAs. The state and federal policy responses were coordinated by a group called the National Campaign to Protect Marriage, formed in January 1996. Existent Christian Right groups, Focus on the Family, the Traditional Values Coalition and Concerned Women for America also contributed to the state campaign against same-sex marriage (Johnson 1996). Haider-Markel (2001) found that in thirty-nine of the forty-eight states, which considered same-sex marriage bans, the legislations' sponsor(s) were “linked to conservative religious groups.” Of the nine states where Haider-Markel did not find a definitive link between a bill's sponsor and one of the four national interest groups working to ban same-sex marriage, he did not disprove involvement, but rather found that “information sources could not confirm or reject” interest group involvement. Additionally, in twenty-six of the forty-eight states these interest groups provided “known help in bill drafting” and all forty-eight states had evidence of “known lobbying.”

The DOMA policy punctuation ended by 1998. There were a few additional same-sex marriage bans passed in the years between the end of the DOMA moral panic and the beginning of the next one in 2004, but the successful passage of so many state DOMAs as well as the federal law



combined with the bipartisan consensus that same-sex marriage should not be legalized temporarily helped neutralize the issue.

The first states to prohibit same-sex marriage constitutionally did so in 1998. Hawaii and Alaska both adopted constitutional amendments that had the effect of banning same-sex marriage in 1998 in response to litigation. Hawaii's Amendment did not directly ban same-sex marriage, but rather empowered the state legislature to do so. The ballot question read "Shall the Constitution of the state of Hawaii be amended to specify that the Legislature shall have the power to reserve marriage to opposite-sex couples?" It was passed with the support of 69.2% voters and the state legislature immediately banned same-sex marriage (Gima 1998). Alaska's more traditionally worded constitutional Amendment stated "To be valid or recognized in this State, a marriage may exist only between one man and one woman." (Alaska State Constitution accessed 2014). Nebraska also constitutionally banned same-sex marriage in 2000. Nebraska's constitutional amendment was broader in scope than the ones passed in Alaska and Hawaii because it also banned civil unions. Nevada also banned same-sex marriage in 2002, after a constitutional amendment was sustained by consecutive majorities in two elections sessions as required by state law. This amendment too banned same-sex marriage but not civil unions.

The quest to outlaw same-sex marriage did not permanently end with the passage of DOMA and its state level equivalents. The temporary equilibrium the policy area had entered after 1998 was shattered by two court cases. These cases, *Lawrence v. Texas* (2003) and *Goodridge v. Department of Public Health* (2003), saw United States Supreme Court and the Massachusetts Supreme Judicial Court decisions that found sodomy bans unconstitutional and legalized same-sex marriage, respectively, triggered both a federal and dozens of state campaigns to ban same-sex marriage via constitutional amendment.

At the federal level, the Federal Marriage Amendment (FMA) was first introduced in 2002. In section one it stated: “Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.” (Federal Marriage Amendment, H.J. Res 93, 107<sup>th</sup> Congress). This language was drafted by Judge Robert Bork and professors Robert George and Gerard Bradley for an organization called the Alliance for Marriage. It was introduced by Mississippi Democrat Ronnie Shows and attracted twenty-two co-sponsors before dying without any further legislative action being taken in the House subcommittee on the Constitution.

The amendment was re-introduced in the House in May 2003 by Colorado Republican Representative Marilyn Musgrave. The text remained unchanged from the 2002 incarnation. No action was taken on it until May 13, 2004, four days before same-sex marriages would start being conducted in Massachusetts when the House Subcommittee on the Constitution held hearings. These hearings reiterated some of the legal arguments from the DOMA debates concerning the Full Faith and Credit Clause, supplemented with a great deal more complaints about judicial activism and the horrors of unelected judges inflicting same-sex marriage on an unwilling public. This anger at the *Lawrence* and *Goodridge* decisions is a constant part of the hearings on the FMA. First, these decisions were cited as imperilling DOMA. Judge Bork testified that in light of *Lawrence* “I think DOMA is absolutely a dead letter constitutionally, not because it would be under the original Constitution but because it is under the way this Court is behaving. I suspect the vote against DOMA would be six to three. I do not see any prospect of sustaining it” (108<sup>th</sup> Congress 2<sup>nd</sup> Session Committee Report).

There was no Senate equivalent to the 2002 version of the FMA, but Wayne Allard (R-Colorado) introduced a differently worded FMA in 2003. The phrase “marital status” was replaced by “marriage” and “any union other than the union of a man and a woman” was substituted for “unmarried

couples or groups.” Allard said the language was changed to allow states to recognize civil unions if they chose to.

The FMAs introduced in 2002 and 2003 were low profile in contrast to the 2004 legislative campaign to enact a constitutional Amendment to ban same-sex marriage. The 2004 version of the FMA, which was identical to the 2003 Senate version in both houses, collected far more co-sponsors than the earlier variants, proceeded farther in the legislative process (coming to a filibuster vote in the Senate and a floor vote in the House), and was publically endorsed by George W. Bush. Bush and his strategic team saw the same-sex marriage issue as a potential boon to his re-election prospects. They thought the issue would bolster evangelical turnout as well as swing some votes away from the Democrats. This is why Ken Mehlman, Bush's campaign manager and his strategic advisor Karl Rove coordinated with state Republican parties to sponsor anti-same-sex marriage ballot initiatives in 2004 and 2006. (Moore and Slater 2007, Ambinder 2011).

In addition to the FMA, thirteen states also had constitutional amendments banning same-sex marriage on the ballot in 2004. These proposed amendments varied in scope across the states. Four of them, in Mississippi, Missouri, Montana and Oregon simply banned same-sex marriage using similar language to the FMA. The other nine amendments, in Michigan, North Dakota, Ohio, Arkansas, Georgia, Kentucky, Utah, Oklahoma and Louisiana went further and banned civil unions in addition to same-sex marriages.

In July 2004, the FMA was unable to overcome a Senate filibuster, with forty-eight Senators voting to invoke cloture and fifty voting against. In the House, the amendment was voted on in September 2004. It garnered 227 votes in favor and 186 against, falling short of the two-thirds supermajority requirement.

The desire of the Republican Congress to protect DOMA did not end with the FMA. The Marriage Protection Act (MPA) was introduced in 2003, 2004, 2005, 2007, 2009 and 2011. The MPA

was jurisdiction stripping legislation meant to deny federal courts the right to hear any cases pertaining to the constitutionality of DOMA or the MPA. It was written “[t]o amend title 28, United States Code, to limit Federal court jurisdiction over questions under the Defense of Marriage Act...” and stated “No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or determine any question pertaining to the interpretation of section 1738c of this title or of this section. Neither the Supreme Court nor any court created by Act of Congress shall have any appellate jurisdiction to hear or determine any question pertaining to the interpretation of section 7 of title 1” (The Marriage Protection Act, H.R. 3313, 108<sup>th</sup> Congress). Of all the times the MPA was introduced, it was only voted on once in September 2004 in the House, where it passed 233-194. It died in the Senate Judiciary Committee in 2004. In each subsequent introduction the bill was never acted upon after being referred to committee.

The state amendments fared far better in 2004. All thirteen passed, mostly by large margins. The popular vote tally varied from a low of fifty-seven percent support in Oregon to a high of eighty-six percent support in Mississippi. (CNN.com Election 2004 “Ballot Measures” accessed 2014). Beyond the impact of these amendments on the laws of their respective states, their broader effect on the 2004 election and Bush's re-election remain contested even now, almost ten years later. Klarman (2013) identifies 2004 as another backlash year and argues that the issue cost John Kerry the election despite Kerry's opposition to same-sex marriage. The scholarly record on the same-sex marriage and the 2004 election is mixed, with the majority of analyses finding that the initiatives had little impact on Bush's re-election prospects (Abramowitz 2004, Lewis 2005, Smith et al. 2006. For arguments that support Klarman's contention about the consequences of same-sex ballot initiatives on the 2004 election see Campbell and Monson 2008).

Upon securing re-election, Bush's public commitment to the FMA faded. In a pre-inauguration interview with the *Washington Post* Bush said that he was no longer going to use the presidential bully

pulpit to advocate for passage of the FMA, unless or until DOMA was struck down by the Supreme Court. Apart from this interview, Bush largely stopped referencing the FMA when laying out his second term agenda (Gilgoff 2007). Despite the Bush administration post-election abandonment of the FMA, it was re-introduced by Senator Allard and Rep. Musgrave in 2005, with votes scheduled in June 2006 and July 2006. The timing of these votes coincided with Bush's public recommitment to the FMA before the 2006 midterms. (Associated Press, "Bush Urges Federal Marriage Amendment" accessed 2014). As was the case in 2004, the FMA was filibustered in the Senate, with only forty-eight Senators voting to invoke cloture. The FMA got marginally more votes in the House in 2006, getting 236 supporters instead of 227, which was still far short of the two-thirds requirement. The FMA was reintroduced in 2008 and in June 2013, in response to the *Windsor* decision, but no legislative action was taken on these latter versions of the FMA.

There were eight same-sex marriage ballot initiatives in 2006: Arizona, Colorado, Idaho, South Dakota, South Carolina, Tennessee, Virginia, and Wisconsin. Colorado and Tennessee banned same-sex marriage exclusively; the other six states' amendments also banned civil unions. Seven of them passed, with the sole failure garnering forty-nine percent of the vote in Arizona. There were several reasons why Arizona became the only state at that point to reject a same-sex marriage constitutional amendment. Supporters of the ban, Proposition 107, were outspent two to one by supporters of same-sex marriage, and were also contending with a poor electoral year for the Republican Party. The fact that the amendment also banned civil unions also left it out of step with public opinion in Arizona (Vance 2008).

After 2006, the tide of same-sex marriage bans began to recede as the second same-sex marriage moral panic dissipated. 2006 would be the last year of the second anti-same-sex marriage policy punctuation. While the majority of the public still remained opposed to same-sex marriage between 2007 and 2011/2012 (depending on the poll), the intensity of that opposition began to lessen.

Research conducted in 2006 by the Pew Charitable Trust found:

The turnaround over the past two years is particularly distinct in the change among those who say they “strongly oppose” legalizing gay marriage. Just 28% take this position today, down from 42% in February of 2004, and the decline has been sharpest among seniors, Republicans and more moderate religious groups. Fully 58% of Americans age 65 and older strongly opposed gay marriage in 2004; only 33% are strongly opposed now. Two years ago 59% of Republicans strongly opposed gay marriage, while just 41% take this position today. And both white Catholics and non-evangelical Protestants are half as likely to strongly oppose gay marriage today as they were in 2004. Opposition remains strongest among white evangelical Protestants, 56% of whom strongly oppose legalizing gay marriage, down from 65% two years ago (Pew Polls, “Less Opposition to Gay Marriage, Adoption and Military Service” accessed 2014).

After the pro-same-sex marriage policy punctuation discussed in chapter three, the intensity of opposition to same-sex marriage, now a minority position, had faded even more dramatically. In June 2014, Mitt Romney’s former data director, Alex Lundry, conducted a poll to gauge the backlash response, if any, to the *Windsor* decision that had such a profound ripple effect in the year since it was delivered. The prompt for the poll was a quote by the Family Research Council’s Tony Perkins about the need for revolution to combat the recent acceptance of same-sex marriage. Lundry’s poll shows a dramatic ebb in the intensity of anti-same-sex marriage sentiment. Fifty eight-percent of surveyed individuals who were opposed to same-sex marriage said they would do “nothing” to combat pro-same-sex marriage court decisions even if they found them disappointing. A mere three percent of respondents mentioned protesting these decisions. Fifty-six percent of respondents supported same-sex marriage, with forty-four claiming “strong support.” Opposition ranged from twenty-eight to thirty-seven percent based on question wording, and seventy-four percent of respondents said same-sex marriage would have no direct effect on their lives (Dovere 2014). Contrast these figures with 2004, when “...among the one-third of Americans who supported gay marriage, only 6% said the issue would influence their choice of political candidates. Among the two-thirds who opposed gay marriage, 34% deemed it a voting issue” (Klarman 2013).

In terms of the number of initiatives, 2008 was not a banner year, with only three constitutional

amendments on the ballot. Arizona, the only state that had rejected a same-sex constitutional amendment in 2006, passed an amendment in 2008 that banned only marriages and not civil unions. Florida supplemented its 1977 and 1997 statutory bans of same-sex marriage with a constitutional Amendment that banned both same-sex marriages and civil unions. Finally, dwarfing these other two amendments in money spent and publicity generated, California, which legalized same-sex marriage in May 2008, had this legalization overturned by the passage of Proposition 8. Unsurprisingly given California's size and robust historical tradition of high profile ballot initiatives, spending for and against Proposition 8 outstripped all twenty-two prior anti-same-sex marriage ballot campaigns combined. Proponents of Proposition 8 spent thirty-nine million dollars compared to forty-four million dollars spent by the opposition. Twenty-nine and thirty percent, respectively, of this money came from out of state (Los Angeles Times "Proposition 8: Who Gave in the Gay Marriage Battle?" accessed in 2014). The ballot measure passed, with the support of fifty-two percent of voters, and same-sex marriage was rendered illegal again in California.

So what factors increased the likelihood that states would constitutionally prohibit same-sex marriage? Lupia et al. (2010) study this question at length in "Why State Constitutions Differ in Their Treatment of Same-Sex Marriage." Their analysis emphasizes the institutional conditions that incentivize states to forbid same-sex marriage constitutionally. First, they looked at whether states permit citizens to place constitutional amendments on the ballot without legislative input. These states were classified as direct constitutional initiative (DCI) states. There are fifteen states that are DCI states and they all had banned same-sex marriage by 2008. Lupia et al. also measured whether states that require the legislature to participate in some fashion in the placement of constitutional amendments on the ballot required only simple legislative and/or public majorities to ban same-sex marriage or whether some super majority or multi-year ratification was required. The former states were classified as simple DCI states and the latter were classified as complex DCI states. The ease or difficulty of

amending the constitution had a pronounced impact on the likelihood of a state constitutionally banning same-sex marriage. “[T]he public has voted to constitutionally restrict same-sex marriages in *all* fifteen DCI states. The same is not true in non-DCI states. The pattern in non-DCI states, however, is consistent with the hypothesis' second part. Ten of the nineteen simple non-DCI states (53%) have restrictive amendments. Only five out of sixteen (31%) complex non-DCI states have such restrictions. Hence, a crude version of the hypothesis that reads, “simple and DCI states will have restrictions, complex states will not” explains current constitutional outcomes in thirty-six of fifty states (72%). This crude hypothesis performs at least as well as the “amendments follow attitudes” hypothesis” (Lupia et al., 2010).

Lewis (2011), in his study of same-sex marriage and direct democracy, found that states that allowed for direct democracy were almost three times more likely to ban same-sex marriage constitutionally than those that did not, and that the likelihood of banning same-sex marriage decreased as “legislative insulation” against same-sex marriage increased. Remember that in chapter three the difficulty of amending both the Vermont and Massachusetts state constitutions were noted by supporters of same-sex marriage when choosing those states for litigation. Lupia et al. contended that in 2009, California, Colorado, and Michigan would not have banned same-sex marriage if they were complex DCI states, and Maryland, Minnesota, and Virginia would have if they had been DCI states. Both these studies contradict earlier work done by Lax and Phillips (2009), who find institutional arrangements insignificant in shaping same-sex marriage policy outcomes. That study did not distinguish between different types of direct democracy, and it conflated statutory and constitutional same-sex marriage bans.

In addition to these institutional factors concerning the ease by which state constitutions can be amended Olson et al. (2006) conducted a survey in 2004 to measure opinion on the FMA. They were particularly interested in parsing out what separated individuals who were opposed to same-sex



marriage but also opposed a federal constitutional amendment to ban it from those who supported passage of the FMA. While this chapter has discussed the importance of religiosity and denominational affiliation in determining whether people oppose same-sex marriage generally, it was religious activity levels rather than beliefs that increased the likelihood of support for the amendment, and the effect while statistically significant was small relative to the impact of political conservatism and Republican affiliation (Olson et al. 2006, Sherkat et al. 2011).

2012 was a pivotal year for the same-sex marriage movement because it saw legalization upheld by popular vote for the first time in three states: Maine (where it had previously been outlawed by initiative in 2009), Maryland, and Washington State. Additionally, voters in Minnesota rejected a constitutional amendment banning same-sex marriage. So why the change in these states at this time?

Maine presents an interesting case because within the space of three years the state legislatively legalized same-sex marriage, had this legalization repealed at the ballot box, and then re-instated same-sex marriage through the initiative process. In 2009, Dennis Damon introduced “An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom,” which legalized same-sex marriage in Maine while allowing churches to refuse to perform same-sex marriages (SP0384, LD 1020, item 1, 124th Maine State Legislature). The law passed 21-14 in the Senate, after an Amendment to submit the law to public referendum failed, and 89-58 in the House. Governor John Baldacci became the first governor to sign a law legalizing same-sex marriage.

Why the change? Public opinion became more supportive of same-sex marriage in the years between 2009 and 2012. However, more important than these shifts in public opinion was the makeup of the electorate in 2009 compared to 2012. When Equality Maine and GLAD organized the initiative campaign, they knew that its best chance for success was a presidential election year, when voter turnout rates would be much higher, particularly among young voters who tend to be supportive of same-sex marriage. The Catholic Church, while still opposed to same-sex marriage, was also less

active in contesting its legalization in 2012 than it was in 2009 (Fried and Shaw 2013). The original text of the 2012 ballot question drafted by these groups, like the 2009 legislation, emphasized the right of churches to decline to perform same-sex marriage. It first stated: “Do you favor a law allowing marriage licenses for same-sex couples, and that protects religious freedom by ensuring that no religion or clergy be required to perform such a marriage in violation of their religious beliefs?” This was the wording used during the signature gathering phase. The Maine attorney general rejected that wording and replaced it with the simpler “Do you want to allow same-sex couples to marry?” under the assumption that a church's right not to perform same-sex marriages was already protected and not under threat (Harrison and Michelson 2012).

Maryland was the first state to ban same-sex marriage explicitly in 1973, in response to the ratification of a state level Equal Rights Amendment that banned gender discrimination. In 1997, a state DOMA and two bills legalizing same-sex marriage both died in committee. (The Advocate Report, “Death of a Gay Marriage Ban,” 1997). In 2004, the House of Delegates rejected a constitutional Amendment banning same-sex marriage. In 2008, both proponents and opponents of same-sex marriage resurrected the issue. A new constitutional amendment banning it was introduced at the same time that the “Religious Freedom and Civil Marriage Protection Act” legalizing same-sex marriage was introduced. Both laws died in committee, though Maryland legalized domestic partnerships in July 2008. The “Civil Marriage Protection Act” was reintroduced in 2011, when it unexpectedly passed the Maryland Senate by a 25-21 vote. The House of Delegates proved to be a challenge, though. The law was barely passed out of committee after contentious hearings, when the committee chair departed from a tradition of non-voting to support it and two members skipped the vote to delay action on it, citing religious objections. In March, 2011, the bill was tabled by the majority whip in the House of Delegates, who refused to consider it until January 2012 due to electoral concerns (Wagner 2011). In February 2012, the law was passed, 72-67 in the House of Delegates and

25-22 in the Senate. After passage the law was placed on the November ballot as referendum question six.

Washington also legalized same-sex marriage in February, 2012. Washington had been the site of one of the first, failed same-sex marriage cases, *Singer v. Hara* in 1974. The state passed its DOMA in 1998, prohibiting same-sex marriage and the ban was upheld in *Andersen v. King County* (138 P.3d 963 Wash. 2006). Despite this legal setback, there was reason to believe that the court was more sympathetic to same-sex marriage than the ruling suggested. The plurality opinion upheld the right of Washington to ban same-sex marriage due to its interest in “further[ing] procreation, essential to the survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents” but two concurring opinions emphasized that Washington’s legislature could legalize same-sex marriage and that the *Andersen* ruling should not be construed as discouraging legalization of same-sex marriage at a later date. In April 2007, Washington’s legislature passed a law legalizing domestic partnerships in response to the *Andersen* decision. Since the state had linked marriage to procreation in its successful defense of its same-sex marriage ban, supporters of same-sex marriage devised a ballot initiative that they sought to pass and use as the basis for another case that would overturn *Andersen* and legalize same-sex marriage. Initiative 957, written in 2007 in preparation for the 2008 election, would have made procreation a requirement for all legal marriages in Washington State. Initiative 957 was pulled in July 2007 due to lack of support. In 2009 Washington’s domestic partnerships were strengthened to be as legally equivalent to marriage as possible. The new law, frequently referred to as the “Everything but Marriage” bill by both state legislators and the press, was passed in May 2009. When this law was subject to approval or rejection by referendum in November 2009, it was upheld by fifty-three percent of voters, the first time a law that recognized gay relationship rights was approved by voters. The

ballot question read, “It is the intent of the legislature that for all purposes under state law, state registered domestic partners shall be treated the same as married spouses ...The provisions of this act shall be liberally construed to achieve equal treatment, to the extent not in conflict with federal law, of state registered domestic partners and married spouses.” Finally same-sex marriage was legalized in February 2012, to be implemented in June 2012, but this legalization was stayed until after the referendum on the 2012 ballot.

Before it was partially repealed in *Windsor*, proponents of same-sex marriage had tried to repeal DOMA legislatively by passing the Respect for Marriage Act. First introduced by Rep. Jerrold Nadler in 2009 (D-NY), the legislation was written to repeal DOMA and make federal law recognize same-sex marriages as legally equivalent to opposite sex marriages in any state that chooses to recognize them. If a couple moves from a state that recognizes same-sex marriage to one that does not, federal law would still recognize the couple as married, as long as at least one state would deem the marriage valid. No action was taken on the Respect for Marriage Act when it was initially introduced in 2009. Rep. Nadler re-introduced it in March of 2011, with Sen. Dianne Feinstein (D-CA) introducing a corresponding Senate version. In October 2011 the Senate version of the legislation passed the Senate Judiciary committee and was sent to the floor where no subsequent action was taken. It was reintroduced for a third time on June 26, 2013, the day the *Windsor* decision was delivered, where it died in committee (The Respect for Marriage Act, H.R. 2523, S. 1236, 113<sup>th</sup> Congress).

A third attempt to pass the Respect for Marriage Act was not the only legislative response to *Windsor*. In January 2014, Rep. Randy Weber (R-TX) and Senators Ted Cruz (R-TX) and Mike Lee (R-UT) introduced the State Marriage Defense Act, an anti-same-sex marriage response to the *Windsor* decision. The bill seeks to challenge the federal government's implementation of *Windsor* in one key respect. Federal agencies have interpreted *Windsor* to mean that a marriage is federally valid if it is

legal at either the “place of celebration” (where the marriage took place) or the “place of domicile” (where the married couple lives). The State Marriage Defense Act would prohibit the federal government from using the place of celebration criteria to find marriages legally valid. Using some of the same argumentation about state's rights and judicial activism that was employed during the legislative debate over DOMA and FMA, Cruz and Lee argued that the State Marriage Defense Act was necessary to allow states to preserve their own definitions of marriage (The State Defense of Marriage Act of 2014, S. 2024 113<sup>th</sup> Congress).

Just as opponents of abortion have championed “conscience clauses” that excuse doctors and pharmacists from performing abortions or prescribing contraceptives they believe are abortifacients, opponents of same-sex marriage have advanced their own variants of conscience based “religious freedom” legislation in the aftermath of *Obergefell*. The “First Amendment Defense Act,” introduced by Idaho Republican Raul Labrador in the House and Mike Lee in the Senate to safeguard the rights of tax exempt religious organizations, would ban the federal government from “...tak[ing] any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman” such as revoking tax exemption, denying access to federal grants and/or benefits, and forbidding contributions to these organizations to be tax deductible (The First Amendment Defense Act, H.R. 2802, 114<sup>th</sup> Congress). The legislation has attracted over 130 co-sponsors in both houses but it is also seen as potentially inflammatory or unnecessary due to the extreme rarity of religious organizations losing their tax exempt status and was tabled after introduction (Weisman 2015). There have also been a handful of counties where clerks will not issue marriage licenses in protest of *Obergefell*, most prominently in Rowan County Kentucky but also in thirteen Alabama counties (Stolberg 2015).

PET predicts that policy punctuations will be triggered by changes in the policy image surrounding a given policy area and morality politics theory predicts a strong congruence between public opinion and policy outcomes given high salience and lack of barriers to participation in the policy process. Generally speaking same-sex marriage bans have been well supported by public opinion, and when public opinion swung on the issue, policy changed. Now that same-sex marriage has the support of the majority of the public, it has been subject to a legalization policy punctuation both legislatively and especially judicially. When same-sex marriage was being banned by statute and later by state constitutional amendment, it was highly unpopular. The two anti-same-sex marriage policy punctuations were triggered not by changes in public sentiment towards same-sex marriage, but rather by changes in the perception of threat posed by legalization of same-sex marriage. Opposition is strongest amongst evangelical Protestants whose religious views are challenged by its legalization. (Olson et al 2006, Sherkat et al 2008, Pew Charitable Trust “Changing Attitudes on Gay Marriage” accessed 2014). Veigh and Diaz (2009) found that counties that most strongly supported same-sex marriage bans were typified by lower income and education rates than more liberal counties, as well as by “traditional family structures and gender roles.” They write “Where there is economic deprivation and limited opportunities for social mobility, community residents are more likely to perceive themselves as vulnerable to economic competition that may result when discriminatory barriers are lifted.”

Every state constitutional amendment attempted between 1998 and 2012 passed save one. Most passed with large majorities, regularly topping sixty-five percent. The failure of the FMA does not deviate from this general congruence between public opinion and policy outcomes, even though it registered the support of majorities in several polls conducted between 2003 and 2006 by Gallup. The polling outfit found support for the FMA to be fifty percent in May 2004, fifty-seven percent in March 2005, and fifty-three and fifty percent in April and May of 2006 respectively (Gallup accessed 2014).

However, this level of support is far below the supermajority requirement of constitutional amendments. In terms of the FMA, opponents of same-sex marriage might have been victims of their own success at the state level, because large pluralities supported state constitutional amendments instead of a federal one to ban same-sex marriage. In May and July 2013, one month before and one month after the *Windsor* decision, respectively, Gallup found fifty-three and fifty-two percent of the public favored a federal law legalizing same-sex marriage in all fifty states (Gallup.com accessed 2014, Pew Polls, “Resources on the Federal Marriage Amendment,” accessed 2014).

## Chapter Six: Conclusion

A nuanced understanding of morality policy is critical to a proper understanding of contemporary American politics. Morality policy has contributed to partisan realignment by introducing a new dimension of conflict into American politics (Layman 2001), and by highlighting the role of the regulatory apparatus of the state in personal matters (Morone 2003). While scholars have been writing about morality policy in various capacities for decades, the typical treatment of these issues has been to treat all morality policies as being similar enough to have the same general policy characteristics. Of course, some level of simplification is unavoidable in the search for generalizations; otherwise there could be no advance beyond individual case studies. However, putting all morality policies in a single conceptual basket obfuscates more than it clarifies, and this in turn leads to a misunderstanding of a key dimension of American politics.

Case study analysis of abortion and same-sex marriage policy makes this abundantly clear. While these are both undoubtedly morality policies, the trajectories of these two policies have been very different. Conflict over abortion has been a mainstay of American politics since 1973. Conversely, same-sex marriage went from being absent on the national policy agenda to a topic of controversy to a constitutional right with broad public support, all within this same period of time. Both same-sex marriage bans and legalizations were temporally clustered, and public opinion on the issue changed rapidly from overwhelming disapproval to majority support in less than a decade. But as the debate over same-sex marriage reaches its conclusion, abortion retains its primacy for party activists, its centrality to the judicial and executive branch nominating process, and an unremittingly high level of judicial and legislative policy making. There is a lack of consensus over many aspects of abortion policy and, unlike the dramatic swings in public opinion that have typified same-sex marriage, public opinion has changed little in more than forty years (Pew Research “5 Facts about abortion” accessed 2015).



Why have these two policies, which are hypothesized to operate in fundamentally similar ways because they are both morality policies, developed in such different ways? This dissertation investigates this question through case study analysis of abortion and same-sex marriage legislation and judicial rulings. My study had two principal components. First was the development of an argument outlining the five critical differences between abortion and same-sex marriage policy. I then advanced five hypotheses to explain why these differences between the two policy areas in both process and outcome existed. I then marshalled this evidence to argue that rather than propounding a general theory of morality policy that lumps all morality policies together, a more useful classification scheme would be to create a two-part typology of morality policy that distinguished between moral conflicts, of which abortion would be an example, and moral panics, of which same-sex marriage would be an example. The five hypotheses I forwarded to explain the disparate development of abortion and same-sex marriage policy should be used to classify morality policies as either moral conflicts or moral panics.

### **Summary of Findings:**

Starting with part one of my argument, in chapters one through five, I discussed five key differences between abortion and same-sex marriage policy.

#### 1) Duration

Abortion and same-sex marriage are policies that have varied dramatically in terms of how long they have been issues on the agenda of lawmakers and general public. The drive to liberalize abortion laws began in earnest in the 1960's, and achieved some modest successes by the early seventies. Staunch opposition from the Catholic Church limited gains by pro-choice activists that was only overcome in California and New York among the thirty plus state legislatures that considered liberalizing legislation in the years before *Roe*. (Greenhouse and Siegel 2011, Greenhouse and Siegel 2013, Lazarus 1999). Once abortion was nationally legalized by *Roe*, it has remained a prominent

issue subject to a constant level of policy activity at the federal and state legislative and judicial levels. It was an issue where partisanship was not a predictor of public opinion, where opinion cut across 1973 partisan attachments rather than re-enforcing them. Both parties had strategic reasons to attempt to create abortion policy and to publically appeal to voters through public position taking for or against abortion rights. Party activists polarized on the issue, which led to public partisan polarization (Layman 2001, Adams 1997, Carmines and Woods 2002). Conflict over abortion has been built into the institutional structure of the two parties, ensuring its perpetuation as a political issue.

Same-sex marriage has been quite different in its duration as a political issue. While there were same-sex marriage cases in the 1970's, the issue did not exist as a national issue until the 1990's. Even then, the 1990's raft of anti-same-sex marriage laws passed in response to *Baehr* re-enforced the legal status quo by more explicitly banning that which had already been illegal. There were twelve years between the first same-sex marriage legalization and the Supreme Court's requiring every state to legalize same-sex marriage, a blink of an eye in judicial time and very short compared to abortion. While there were twenty-two years between Hawaii finding a right to same-sex marriage in its constitution and the Supreme Court finding that same-sex marriage bans violate the Fourteenth Amendment of the United States Constitution, most same-sex marriage policy was clustered in 1996-1998, 2004-2006, and 2013-2015. This is unsurprising, given that opposition to same-sex marriage was rooted in moral panics, and moral panics do not last long. Moral panics range from a few months (Denham 2013, Ungar 2013, Cohen 2004, Lewin 2005) to a few years at most (Schinkel 2013, Victor 1993, Thompson 2005).

## 2) Incrementalism vs. PET

Related to the differences in the duration of the two policy issues, same-sex marriage and abortion have demonstrated different dynamics of policy change. Since 1973, abortion policy has been consistently incrementalist in nature. Initially, this was not an incrementalism borne of design but

rather of the failure of non-incrementalist anti-abortion measures. Attempts to overturn *Roe* wholesale met years of failure, while incremental anti-abortion measures were getting passed legislatively and allowed by the courts within a few years of *Roe*.

Despite the widely held perception that abortion is an issue that does not lend itself to compromise, abortion actually lends itself to incremental regulation for several reasons. Public opinion, which is moderate and closely divided and stable over long periods of time, favors incremental policy change and morality policies usually hew closely to public opinion since their high level of salience and apparent lack of complexity give voters ample opportunity to understand policy debates and hold their elected officials accountable for their choices (Mooney 1995, 2000, 2001). Secondly, the Supreme Court's explication of the abortion right has never required that states provide affirmative assistance to women who want to obtain an abortion, such as by providing funding or mandating a certain level of access. With the abandonment of the trimester framework and the adoption of the undue burden standard in *Casey*, a greater array of abortion restrictions became constitutional. Saletan (2004), in arguing that “conservatives won the abortion war,” claimed that the primary reason for this triumph is that abortion rights are understood in a minimalist, libertarian way that did nothing to guarantee abortion access for marginalized women. Additionally, as discussed in chapter four, both political parties also have a vested interest in perpetuating the abortion issue and that perpetuation is best accomplished through continuous “strategic incrementalism” (Ainsworth and Hall 2011).

Nothing about either the opposition to same-sex marriage or its legalization has been incrementalist. The issue was first dealt with judicially in the 1970's, where a cluster of cases were quickly dispatched sending it into oblivion for twenty years. Bans were passed in rapid succession in 1996-1998 and 2004-2006, and legalizations were similarly clustered in 2013-2015. Unlike the remarkable stability of public opinion on abortion, same-sex marriage demonstrates dramatic swings in public opinion from opposition to support (Pew Polls, “Less Opposition to Gay Marriage, Adoption

and Military Service” accessed 2014, Gallup.com accessed 2014). There was the brief experiment with civil unions, but, generally same-sex marriage is treated as a binary issue: it is legal or illegal. Same-sex marriage was legalized and then repealed in two states (California and Maine), but the post-legalization attempts to prevent implementation of same-sex marriage have been weak and largely ineffective.

### 3) Scope of Conflict

I have defined scope of conflict in two ways. I use Schattschneider's (1960) definition, which states “[t]he scope of conflict is an aspect of the scale of political organization and the extent of political competition. The size of the constituencies being mobilized, the inclusiveness or exclusiveness of the conflicts people expect to develop have a bearing on all theories about how politics is or should be organized.” I measure this aspect of the scope of conflict by looking at the level of government where policy activity is primarily occurring. An issue being debated at the federal level involves a broader scope of conflict than an issue being dealt with only at the state level. Both my case studies involve policy areas where there is both state and federal policy activity simultaneously at some stage of policy process, but abortion policy is marked by consistent dual activity at multiple levels of government, whereas the scope of conflict in same-sex marriage policy was only intermittently national until 2013. In terms of “scale of political organization,” “size of constituencies being mobilized,” and “inclusiveness or exclusiveness of...conflicts,” abortion soundly trumps same-sex marriage. *Roe* made abortion rights a national issue by recognizing abortion as a constitutional right, ensuring that subsequent attempts to overturn the decision would be targeted at Congress and the Supreme Court. However, state courts and legislatures are also suitable arenas for creating abortion policy as long as they do not violate the standards set by the Supreme Court.

I also consider how the boundaries of the policy area are conceived when evaluating the scope of conflict on an issue. One way to expand the scope of conflict of an issue is for policymakers and/or

the public to enlarge their definition of an issue by classifying other issues as related closely enough to it to be considered under the same umbrella. By this standard, the scope of conflict has also been much broader for abortion than for same-sex marriage.

The same-sex marriage issue was not nationalized in this same way for decades. The Supreme Court's one line dismissal of *Baker v. Nelson* closed off any attempts to petition the Supreme Court for the kind of all-encompassing decision *Roe* provided abortion rights activists for forty years. Until *Windsor*, same-sex marriage was exclusively a province of state courts. Congress was also hostile not only to same-sex marriage, but to gay rights more generally. When same-sex marriage was debated at the national level, policies such as DOMA re-enforced the existing status quo by re-stating the exclusively heterosexual character of marriage. Targeting states was pursued in part as a tactical necessity, but it was also seen as a superior strategy by same-sex marriage activists, who knew they would have more policy success when the scope of conflict was smaller (Haider-Markel 1996, Pinello 2003, Pinello 2006). Pursuing a judicial rather than legislative strategy also seemed preferable to having to deal with elected officials, given public opposition to same-sex marriage. Nationalizing the issue in 2013 dramatically expedited the pace of same-sex marriage legalization and *Obergefell* finalized the issue, mandating legalization in fourteen states in 2015.

Not only have the issues deemed relevant to the abortion debate expanded, but anti-abortion activists have also tried to enlarge the definition of abortion to include certain methods of contraception as abortifacients. The *Hobby Lobby* decision in 2014 is an example of this attempt to expand the scope of conflict for abortion policy. Hobby Lobby's objection to the contraceptive mandate was that the company did not want to indirectly subsidize emergency contraception and intrauterine devices by providing employees insurance that would cover these methods of contraception. The moral objection to these types of contraception was that they in fact acted as abortifacients, not contraceptives. Even though this is not medically accurate, the mere fact that the company believed it to be true was

sufficient for the Supreme Court to rule that “closely held” companies did not have to honor aspects of the Affordable Care Act that they found religiously objectionable (*Hobby Lobby v. Burwell*, 573 U.S. \_\_\_\_ ). The objections against initial FDA approval of emergency contraception in and later approval for over the counter distribution were motivated by a similar attempt to re-classify a type of contraception as a form of abortion. As the definition of abortion was taking on amoeboid flexibility, the topic was addressed by a wide range of congressional committees, each utilizing jurisdictional flexibility to attach abortion language to a wide variety of bills. Abortion also assumed outsized importance during the confirmation process, particularly of federal judges (Ainsworth and Hall 2011).

#### 4) Institutional Entrenchment

When defining institutional entrenchment, I focused on political parties. The differing ways these institutions treated abortion and same-sex marriage helped maintain abortion's position as a long running moral conflict, while keeping same-sex marriage firmly in the moral panic mode. I found significant variation in how important these two policies relate to the Republican and Democratic parties. Analyzing the activities of party activists within party organizations, polling data, historical information about partisanship amongst the public and legislation (both passed and attempted), and judicial opinions to represent the stances of party in government, I found that abortion was much more important to the political character of the parties than same-sex marriage. When abortion was first legalized, there was no connection between partisanship and abortion attitudes at either the mass or elite level. So this was a cross-cutting political issue. The Republican Party saw the potential for it to be a realigning issue, one that would bolster its partisan fortunes by stealing culturally conservative voters away from the Democratic Party.

The importance of the issue to the parties is much higher in moral conflicts than moral panics. If there is no strategic reason for the parties to take differing positions on an issue, that issue will either not be part of the policy agenda at all, or it will be resolved quickly. Moral panics consist of a powerful

and positively constructed majority that politically dominates a negatively constructed minority group rather than political combat between relatively equally matched political groups.

#### 5) Social construction of stakeholders

In their development of the social construction of policy design, Ingram and Schneider have argued that substantive and symbolic policy benefits and burdens are distributed on the basis of the social construction of the target population of the policy. Social construction is measured by the degree of power a group has, and whether it is perceived positively or negatively. The advantaged get symbolic and substantive policy benefits, contenders get symbolic burdens and substantive benefits, dependents get symbolic benefits and substantive burdens, and deviants receive symbolic and substantive policy burdens (Ingram et al. 2007). Morality policy, which involves competition among interests of conflicting moral viewpoints, is a policy area that seems well suited to social construction analysis. When the two sides of a moral dispute are of relatively equal power and positive or negative construction, that is a moral conflict. Moral panics depend on negative social constructions of the target of the panic. Cohen's "folk devils," (or Ingram and Schneider's "deviants") are populations that lack power and are hated and/or feared by the majority of the population.

Gay people were at one time heavily stigmatized in American politics. They were folk devils perceived as debauched, immoral, and dangerous to children. The legalization of same-sex marriage was highly threatening, as long as this social construction of homosexuality prevailed. Allowing gays to marry would remove them from the deviant category by granting them entry into a revered institution, thus changing the social construction of both homosexuality and marriage in a way the majority of the public found unsettling for years. Eventually, gay people became less demonized and the institution of marriage itself became less valued by a majority that is marrying later and/or eschewing marriage in larger numbers. While antipathy towards homosexuality has not completely abated, there have been significant changes in how the public perceives gay people that have made

them unsuitable folk devils in recent years. As anti-gay stigma has ebbed, the opposition to same-sex marriage ebbed with it. The magnitude of the change in public sentiments is in keeping with other moral panics, where the subject of the panic either becomes forgotten or is no longer feared and hated.

If abortion is infanticide, one of the most horrible crimes, demonizing the women who obtain abortions should be easy politically. Yet, historically, they have made poor folk devils, at least in mainstream political discourse. First, it is easy to imagine them as victims of predatory men, and to conceive the difficult choices that pregnancy has imposed upon them. In Ingram and Schneider's terms, they are more dependents than deviants. The potentially tragic conditions surrounding a woman's decision to have an abortion inspire more pity than hatred. So in Ingram and Schneider, many women would be "dependents" rather than deviants. This was present in the "woman protective discourse" (Ivey 2008) used by Kennedy in the *Gonzales* opinion, upholding a law banning so called "partial birth" abortions where he presented pregnant women as innately maternal creatures who need to be protected from unscrupulous doctors who would kill their fetuses in contravention of their true maternal desires. Second, women who have had abortions are outwardly indistinguishable from other women. They literally could be almost any woman. And with over a million abortions performed every year, the sheer number of women is substantial. Thus, even the staunchest anti-abortion politicians back away from suggesting criminal penalties for women who get abortions, focusing their ire on doctors who perform abortion. This is not the way subjects of moral panics are conceived.

After advancing this two pronged typology of moral conflicts and panics and the ways they differ from each other, I forwarded a second set of hypotheses to explain why these differences occurred between the two policy areas. In presenting this causal argument, I made the transition from a descriptive argument analyzing two case studies to offering a causal argument about how certain political conditions create either moral conflicts or moral panics.

1) Nationalization



Early nationalization of a moral issue increases the likelihood it will be a moral conflict, as opposed to a moral panic. Nationalization increases the number of institutional venues for policy activity to occur, which expands the scope of conflict, lays the groundwork for institutional entrenchment, and ensures the longer duration of the moral issue in question. The increased number of policy venues increases the salience of the issue, which also increases the likelihood of partisan position taking and increases the number of interests involved in an issue.

## 2) Prevalence of targeted group or behavior

The prevalence of abortion is much higher than the prevalence of same-sex marriage and the number of people who are directly affected by the legal status of abortion is far higher than those people directly affected by the legal status of same-sex marriage. The variation in the prevalence of the two issues means that abortion is a moral conflict, not a moral panic.

One of the key aspects of a moral panic is its disproportionality (Goode and Ben-Yehuda 1994). By definition moral panics are overreactions that cannot be justified rationally. Many targets of moral panics are totally chimerical. Satanic ritual abuse was not happening in American daycare centers; the witches of Salem were not real; rainbow parties,” where teenage girls wearing different colored lipsticks repeatedly performed oral sex on boys to create a “rainbow” pattern on their penises did not exist. Even when moral panics are based on actual issues, like drug abuse, the response is out of sync with the actual threat. A generation of “crack babies” failed to materialize.

The disproportionality present during same-sex marriage bans was two fold. First, the bans were legally redundant and preceded the actual threat of same-sex marriage by several years. Same-sex marriage was first legalized in 2003, while the federal government and virtually every state passed statutory bans between 1996-1998. When one state legalized same-sex marriage, a cascade of state constitutional bans followed. While those opposed to same-sex marriage were eventually vindicated in their belief that it would happen, they were incorrect in predicting when it would occur and were

unable to advance arguments successfully about the harm of legalization over the long term.

The failure to articulate a consistent argument about the tangible harm of same-sex marriage to heterosexuals represents even stronger evidence of the disproportionate nature of same-sex marriage opposition. The most commonly used argument against the legalization of same-sex marriage is that marriage is an institution to regulate heterosexual procreation and ensure the healthy rearing of children, and therefore that allowing gays to marry would compromise these goals. This argument is a mainstay in virtually every gay marriage case. But in an America increasingly committed to Mill's harm principle – “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (Mill 2002) – this argument simply deflated like a week old balloon. How did same sex marriage harm heterosexuals? How did it interfere with procreation? There seemed no obvious answer. The inability to present a coherent, secular rationale for how legalizing same-sex marriage would undermine society or complicate procreation meant that opponents literally had nothing to say to the large number of persons who were more or less indifferent and conceivably might have been open to persuasion.

Conversely, the opposition to the abortion is not disproportionate in the same way, both because of the higher number of people directly affected and because it is easier to identify a tangible harm. If same sex marriage is an act between consenting adults that causes no apparent harm to anyone else, abortion involves the death of a fetus and thus is different from an ordinary surgery, for example, removing a cataract or installing an artificial hip. If one believes that a fetus has rights and/or personhood or a soul, on the other hand, its death is a harm of the most serious sort.

### 3) Complexity of policy implementation

The policy process does not end when a law is passed or a judicial decision is handed down. Laws may be profoundly altered by how they are implemented, but the degrees of freedom that implementers have varies from policy area to policy area.

In terms of same-sex marriage policy, individual clerks in many states that legalized same-sex marriage publically resigned, rather than implement laws they felt morally disagreeable, but these isolated protests were of limited effectiveness despite the publicity they generated. The presence of DOMA prevented individuals in states that legalized same-sex marriage from gaining access to federal marriage benefits, but that was a restriction that applied equally to all states until 2013. There was a high degree of uniformity in the implementation of same-sex marriage laws and judicial rulings, as there was little capacity for bureaucratic sabotage of same-sex marriage once legalized. Attempts to issue marriage licenses when same-sex marriage was illegal, while more common and more high profile, were similarly unsuccessful in the long term. Same-sex marriage is not an issue that lends itself to lengthy implementation battles. The most high profile post-*Obergefell* protest, that of Rowan Kentucky County Clerk Kim Davis, who refused to issue same-sex marriage licenses for religious reasons, ignored a federal appellate decision to comply with *Obergefell* and petitioned the Supreme Court for the right to refuse to issue marriage licenses. She is not part of a larger general trend, nor is she considered likely to win her case.

By contrast, abortion lends itself to endless legal and political debates over implementation. Debates over funding, parental consent, “informed” consent laws, spousal consent, regulations of abortion facilities, waiting periods, varieties of ultrasounds, specific types of abortion procedures, restrictions on abortion at different stages of pregnancy, medication abortions, international organizations and abortion, all of these dimensions of the abortion issue may be altered in a continual series of incremental ways.

#### 4) Partisan Strategy

The Republican and Democratic parties both have a vested interest in abortion conflict enduring in American politics. Neither party had a similar level of motivation to perpetuate the same-sex marriage debate long term. When same-sex marriage was unpopular, Democrats had little incentive to

embrace the issue. This meant that in addition to Republican opposition, many Democrats also opposed same-sex marriage, and those who supported it rarely emphasized the issue. So it was in the interest of Republicans to emphasize same-sex marriage, and Democrats to de-emphasize it. Once the public sentiment towards the issue changed, the reverse became true. While Democrats saw the virtue in advocating legalization of same-sex marriage, some Republicans began to avoid the issue. This avoidance did not take the form of full fledged endorsement in most cases, but rather strategic avoidance of the issue or procedural arguments against same-sex marriage that avoided moral condemnation of homosexuality. In both cases, only one of the two parties is motivated to emphasize same-sex marriage in their public appeals and in their legislative activities. Same-sex marriage never possessed the potential of a cross-cutting partisan issue, one that can alter existent partisan alignments.

The importance of abortion policy to party activists within both the formal and informal party organizations far outstrips the importance of same-sex marriage to these institutions at any point. The initial basis of this importance lay in the potential for the issue to realign partisan attachments. In the 1970's, there were enough culturally conservative Democrats and culturally liberal Republicans for the issue to have disruptive potential to existing partisan attachments. This led to a multi-stage process, where activists were motivated to take decisive stances on abortion and the public re-oriented their perspectives on the two parties based on these positions.

#### 5) Legal opportunity structure

The legal opportunity structure is defined as access to the courts, configuration of power, and alliance and conflict systems (Andersen 2007). The legal opportunity structure of abortion decisions encourages repeat players to continually litigate and re-litigate abortion policy, while disincentivizing similar activity in regards to same-sex marriage. There are multiple parties who can demonstrate standing to challenge abortion restrictions, and there is sufficient ambiguity in many precedents to make the issue prone to repeat litigation.

Contrast this with same-sex marriage. Access to the federal judicial system was cut off until 2013, reducing access to the courts. Since state based calls to legalize same-sex marriage were often based on state constitutional claims, their portability to other states was non-existent. There is far less gray area in same-sex marriage jurisprudence. The constitutional right to same-sex marriage was quickly and completely rejected when first asserted in the 1970's, and Hawaii and Alaska's attempts to legalize it in the 1990's were blocked by pre-emptive state constitutional amendments. Only the decisions in Vermont and New Jersey allowing for the creation of civil unions demonstrate some measure of ambiguity over constitutional law and same-sex marriage. Just as with the implementation of same-sex marriage laws, the courts have generally conceived the right to same-sex marriage as being present or absent, not present but subject to a varying degree of regulation that is difficult to predict without continuous litigation due to the use of an unclear standard. There is enough ambiguity over how the courts will interpret the undue burden standard to incentivize a steady stream of abortion restrictions, many of which will end up in court. There is no comparable ambiguity in same-sex marriage policy. Even in the unlikely event that *Obergefell* is ever overturned by a subsequent Court, the fourteen states directly affected would have a simple choice in front of them: legalize same-sex marriage or ban it.

### **Suggestions for further research**

There is still much to study in the field of morality policy. I developed my causal theory of moral conflicts and moral panics using two case studies. I chose abortion and same-sex marriage because of their importance both to American politics and to the morality policy literature.

The first step should be applying my framework to other cases. Additional policies that have been classified as morality policy include the death penalty, regulation of gambling, drug and alcohol policy, other gay rights policies, euthanasia, and gun control (Tatalovich and Daynes 2011). How similar or different are these morality policies from each other? To what extent are these issues pure

morality policies and to what extent are they impacted by non-moral considerations? I have demonstrated how different the paradigmatic morality policies of abortion and same-sex marriage are in fact from each other. Applying my arguments about how variations in nationalization, prevalence, complexity of implementation, partisan strategy and the legal opportunity structure determine whether a moral issue will take the form of a moral conflict or a moral panic to other policy areas would help further strengthen and refine the theory. Relatedly, further research to evaluate the relative impact of these five factors would also be helpful.

Same-sex marriage is now legal in all fifty states. Despite some critical statements and threatened foot dragging over the issuance of marriage license in some Southern states, there is no reason to believe that opposition to same-sex marriage will have the stamina or success of opposition to abortion (Leber 2015, Bernstein 2015). Same-sex marriage's time as a prominent morality policy issue is over, while the abortion controversy soldiers on. Within days of the Supreme Court legalizing same-sex marriage in the fourteen states that had yet to allow it, the Court also prevented the implementation of Texas's restrictive abortion laws, which would require all abortion clinics to meet the standards of a surgical center and have admitting privileges at a nearby hospital, though the Court did not invalidate the restrictions themselves (de Vogue 2015).

These are both morality policies with long policy histories and ample historical data to draw upon. Another future application for the explanatory framework developed in this dissertation would be to use it to anticipate the trajectory of new morality policy issues based on what characteristics they display in terms of nationalization, prevalence, complexity of implementation, partisan strategy, and legal opportunity structure.

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