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SHOTGUNS, WEDDINGS, AND LUNCH COUNTERS: WHY CULTURAL FRAMES MATTER TO CONSTITUTIONAL LAW

ANDERS WALKER*

ABSTRACT

Drawing from social movement theory, this Article shows that both the constitutional challenge to gun bans in Illinois and the constitutional challenge to California's same-sex marriage ban have dealt with issues of frame alignment similar to those confronted by the civil rights movement in the 1960s. Yet, it is the Second Amendment litigation, ironically, that has most closely followed the movement's attention to aligning legal claims with cultural trends. Out of this analysis emerges a larger claim that the analytics of frame alignment, and social movement theory generally, deserve more attention by constitutional scholars, both as a uniform analytic for comparing divergent reform agendas, and for better understanding the central role of cultural frames in determining the parameters of constitutional rights.

I. INTRODUCTION

Though most constitutional scholars celebrate the civil rights movement, few have asked whether and to what extent the movement relates to current efforts of constitutional reform. Yet, the rise of direct action in the 1960s marked a bold realignment of the collective action, social movement frames of the civil rights struggle, a movement that has direct relevance to current constitutional battles, particularly over marriage and guns. As this Article will show, both the constitutional challenge to gun bans in Illinois and the constitutional challenge to California's same-sex marriage ban have dealt with issues of frame alignment similar to those confronted by the civil rights movement in the 1960s.[1] Yet, it is the Second Amendment

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1. *See* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); Perry v. Schwarzenegger, No. 3:09-cv-02292-VRW, 2010 WL 3212786 (N.D. Cal. Aug. 16, 2010).

litigation, ironically, that has most closely followed the movement's attention to aligning legal claims with cultural trends.[2]

To illustrate, this Article will proceed in three parts. Part II will introduce the analytics of frame alignment, a subset of social movement theory that has been largely neglected by constitutional scholars. The analytics help explain the persuasive power of the civil rights movement, particularly the sit-ins, together with strategic intersections between the sit-ins and Supreme Court decisions, including *Brown v. Board of Education*[3] and *New York Times Co. v. Sullivan*.[4] Part III will show how gun rights proponents learned from the civil rights movement, ultimately adopting a pragmatic, frame alignment strategy that stressed sportsmanship and self-defense, while conceding federal regulation of automatic weapons banned after the assassination of Martin Luther King, Jr. in 1968. Part IV will show how proponents of same-sex marriage carefully engaged in cultural frame alignment in the 1980s and 1990s, only to be upstaged by conservative lawyer Ted Olson, whose pursuit of litigation in the face of opposing state trends risks ignoring the basic lessons that the civil rights movement has to teach.[5]

Out of this analysis emerges a larger claim that the analytics of cultural frame alignment—a subset of social movement theory—deserve closer scrutiny by constitutional scholars, particularly those who focus on popular constitutionalism, social movements, and civil rights.[6] Though leading authorities like Michael J. Klarman, Reva B. Siegel, and William N. Eskridge, Jr. have recovered rich narratives and articulated important insights about connections between law, culture, and rights, they have tended not to engage social movement scholarship as fully as they might.[7] One reason for this, articulated

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2. Indeed, current battles over guns and same-sex marriage underscore a core aspect of social movement theory that has remained largely ignored by constitutional scholars, namely the centrality of cultural frames to constitutional law. For a discussion of cultural frames, or "stock," see Mayer Zald, *Culture, Ideology, and Strategic Framing*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 261, 266-73 (Doug McAdam, et al. eds., 1996). For a discussion of frame bridging, or frame alignment processes generally, see David A. Snow, et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOCIOLOGICAL REV. 464, 467-76 (1986).

3. 347 U.S. 483 (1954).

4. 376 U.S. 254 (1964).

5. This question is particularly timely given signs that lower courts in California are siding with Olsen. *See* Perry, 2010 WL 3212786.

6. Edward Rubin made a similar claim about the divide between law scholars and social movement theory in a symposium issue of the *Pennsylvania Law Review* dedicated to social movements. *See* Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001). For more on frame alignment, see generally Snow, *supra* note 2 and Zald, *supra* note 2, at 266-74.

7. Perhaps the one legal scholar who has written the most about social movements, yet cited the least social movement theory, is William Eskridge. Though willing to concede that "[l]aw professors have a lot to learn from sociologists and political scientists who have

by Edward L. Rubin, is that social movement theory emerged out of scholarly interest in mass movements, not litigation, and focused on how those movements influenced political opportunities, not constitutional results.[8] Yet, this has begun to change as socio-legal scholars like Ellen Ann Andersen and James Laue have begun to extend political opportunity analysis to "legal opportunity" analysis, indicating that social movement analytics developed in the 1970s and 1980s are not only relevant to the study of constitutional law, but help to explain how key aspects of that law hinge on cultural frames.[9]

The role of culture in American constitutional law remains one of the most undertheorized topics in legal studies.[10] To date, the best

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studied social movements," Eskridge himself spends virtually no time digesting such lessons, preferring instead to argue that "social movements literature does not adequately reflect the importance of law." William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419, 420 (2001) [hereinafter Eskridge, *Channeling*]; *see also* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002). Reva Siegel acknowledges the existence of frame alignment in two articles, describing it as a movement's effort to "represent or reinterpret daily life in terms calculated to move individuals to action." Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008) [hereinafter Siegel, *Dead or Alive*] (discussing the NRA's strategy in terms of "popular constitutionalism," not social movement theory); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 340 (2001) [hereinafter Siegel, *Text in Contest*]. While true, this only partially describes the extent of frame alignment as a set of practices by which social movement actors, including litigators, seek to relate their political goals to the political goals or cultural assumptions of others. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2000 n.170 (2003). Another study that discusses the interaction between social movements, culture and law—but does not invoke social movement theory—includes MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (recovering the interrelationship between constitutional law, politics, and the black struggle for racial equality, without invoking social movement theory).

8. Rubin, *supra* note 6, at 46-47; *see also* Eskridge, *Channeling*, *supra* note 7, at 420-21.

9. James Laue, still the preeminent theorist of the sit-in movement, defines social movements as "broadly based" protests that have their origins in the grassroots, not elites. JAMES H. LAUE, DIRECT ACTION AND DESEGREGATION, 1960-1962: TOWARD A THEORY OF THE RATIONALIZATION OF PROTEST 8-10 (1965). Perhaps the only scholar to truly apply social movement theory to legal actors is political scientist Ellen Ann Andersen, whose path-breaking study on Lambda Legal provides a theoretical model for this work. *See* ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION (2005). Precisely because social movement scholars did not traditionally occupy themselves with constitutional law, constitutional scholars have opted for a separate analytic framework, rooted in terms like mobilization, countermobilization, and popular constitutionalism. *See, e.g.,* Siegel, *Dead or Alive, supra* note 7, at 193. A radical example of this position is maintained by Tomiko Brown-Nagin, who argues that social movements "are generally incompatible with constitutional litigation." Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action* 105 COLUM. L. REV. 1436, 1439 (2005).

10. The best studies focus on "constitutional culture," or the "interactions among members of the polity and between members of the polity and government officials," to create constitutional meaning. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323,

work focuses on a relatively limited definition of "constitutional culture," meaning the discursive field in which judges, lawyers, and social movement actors interact, altering constitutional meanings in the process.[11] Yet, such studies ignore the full scope of cultural formations, or what Stuart Hall calls the "actual, grounded terrain of practices, representations, languages and customs" that animate society at any given time, and that inform the manner in which social movement actors, and constitutional litigators, choose to frame or align their specific legal claims.[12] The constantly shifting nature of culture writ large, in other words, both precludes legal opportunities and, at the same time, opens them but only so long as social movement litigators think strategically about the alignment of legal claims with cultural trends.[13] To illustrate, this Article borrows from social movement theory to articulate explicitly that which is implicit in most of the best studies of constitutional change but also to stress the practical value of thinking about the relationship between constitutional law and culture in systematic, cross-disciplinary terms, reconciling the fields of law, sociology, and political science. Even lawyers might benefit from such an approach, for it is they who suffer most without an appropriate theoretical understanding of when litigation should be initiated, how it should be framed, and ultimately how constitutional law and social movements intersect.

II. THE SIT-INS AND THE CULTURAL FRAMES

Perhaps no better example of the alignment between cultural frames and constitutional results exists than the civil rights move-

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1325 n.6 (2006) [hereinafter Siegel, *Constitutional Culture*]; Robert M. Cover, *The Supreme Court 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (arguing that "the creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium"); *see also* Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149 (1997) (endorsing an ethnographic approach to studying legal texts). For an examination of law as a cultural form, see PAUL W. KAHN, THE CULTURAL STUDY OF LAW (1999).

11. Siegel, *Constitutional Culture*, *supra* note 10, at 1325 n.6; *see also* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689 (2005); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537 (2004); Brown-Nagin, *supra* note 9.

12. Stuart Hall, *Gramsci's Relevence for the Study of Race and Ethnicity* (1986), *reprinted in* STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 439 (David Morley & Kuan-Hsing Chen eds., 1996).

13. *See* ANDERSEN, *supra* note 9; ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 4 (2009) [hereinafter WALKER, THE GHOST OF JIM CROW]; Sidney Tarrow, *Mentalities, Political Cultures, and Collective Action Frames: Constructing Meanings Through Action*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 174, 189 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

ment of the 1950s and 1960s. Two pivotal cases—*Brown v. Board of Education* and *New York Times Co. v. Sullivan*—illustrate how constitutional litigation stemming from the movement intersected directly, albeit differently, with social movement organizing on the ground, both involving strategic decisions by litigants interested in aligning legal claims with prevailing cultural frames.[14] As we shall see, however, *Brown's* success at linking civil rights with cultural concerns became complicated by popular consternation over the consequences of school desegregation, resulting in southern hostility and northern apathy, while *Sullivan's* alignment of civil rights with free speech proved conducive to maintaining the media apparatus through which the civil rights movement would eventually win national support.[15]

To explain how this is so, a short introduction to social movement theory and frame alignment is helpful. Beginning in the 1970s, sociologists and political scientists inspired by the civil rights movement began to take an interest in the various ways that movement organizers articulated reform agendas in terms that average people could understand.[16] Average understandings, they theorized, hinged on "frameworks," or "schemata of interpretation" that lay individuals use to "locate, perceive, identify," and in short explain events.[17] To be successful, social movement actors needed to construct their own frames, or schematic interpretations, that diagnosed social problems, identify a clear prognosis of those problems, and then mobilize target audiences to solve them.[18] These "collective action frames," as they came to be called, worked best when aligned with the ideas, assumptions, and beliefs—in short cultural frames—already held by target audiences, a technique that David A. Snow, Robert Benford, and others have termed "frame alignment."[19]

Beginning in the 1980s, socio-legal scholars began to identify different types of frame alignment, ultimately settling on four basic categories.[20] In the first, social movement actors who attempt to link two

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14. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

15. Anders Walker, *"Neutral" Principles: Rethinking the Legal History of Civil Rights, 1934-1964*, 40 LOY. U. CHI. L.J. 385, 426-32, 435 (2009) [hereinafter Walker, *"Neutral" Principles*].

16. Early works on the civil rights movement tended to focus on the formation of movement structures. *See, e.g.,* ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984); Lewis M. Killian & Charles U. Smith, *Negro Protest Leaders in a Southern Community*, 38 SOC. FORCES 253 (1960); August Meier, *Negro Protest Movements and Organizations*, 32 J. NEGRO EDUC. 437 (1963).

17. ERVING GOFFMAN, FRAME ANALYSIS 21 (1974).

18. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. OF SOCIOLOGY 611, 615-18 (2000).

19. *See, e.g.,* Snow, *supra* note 2, at 464.

20. *Id.* at 467.

separate collective action frames, like gun rights and abortion, for instance, engage in "frame bridging."[21] In the second, movement strategists who focus on one particular issue that average people may otherwise be apathetic towards, like global warming, engage in "frame amplification."[22] Third, social movement actors who find little support for their particular positions may have to broaden their reform agenda, or engage in "frame extension" by expanding the boundaries of their claims to "encompass interests or points of view that are incidental" to their own goals, but popular among their target audience.[23] Finally, movement actors who take on a subject that has very little support at all, say plural marriage, might have to completely transform popular opinion in what is called "frame transformation."[24]

While the various strategies of frame alignment can help effect social change, they by no means guarantee that movement actors will be able to overcome, or for that matter transform the collective "stock of meanings, beliefs, ideologies, practices, values," and "myths," shared by average people, or what socio-legal scholars call culture.[25] Interest in the cultural boundaries of reform has led some scholars to conclude that reform is ultimately contingent on either appealing to or changing prevailing cultural norms, or frames, what Mayer Zald has called "cultural stock."[26] While movement campaigns that reject cultural stock fail, argues Zald, movement efforts that draw from existing stock, or reveal "contradictions" in that stock, i.e., between prevailing prejudice and popular ideals, tend to succeed.[27] As do movements that successfully transform cultural stock, either by altering popular opinions, beliefs, or practices (frame transformation), for example, or by linking movement claims to larger majority values (frame bridging), both processes that fall under the larger theoretical umbrella of "cultural framing."[28]

To show how cultural framing impacted the trajectories of civil rights, it is helpful to look at the decisions made by litigants in *Brown v. Board of Education*. When Thurgood Marshall first decided to file *Brown* in 1950, his decision reflected a prognosis that constitu-

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21. *See id.* at 467-69.
22. *See id.* at 469-72.
23. *Id.* at 472.
24. *See id.* at 473-76.
25. This particular definition of culture is taken from Benford & Snow, *supra* note 18, at 629. Benford and Snow were themselves influenced by Stuart Hall. *See, e.g.,* Hall, *supra* note 12, at 439. Other scholars interested in the limits that cultural frames place on reform include JAMES M. JASPER, THE ART OF MORAL PROTEST: CULTURE, BIOGRAPHY, AND CREATIVITY IN SOCIAL MOVEMENTS 74-77 (1997) and Jeff Goodwin & James M. Jasper, *Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory*, 14 SOC. F. 27, 28 (1999).
26. Zald, *supra* note 2, at 267.
27. *Id.*
28. Tarrow, *supra* note 13, at 188.

tional litigation, as opposed to voter registration, mass demonstration, or congressional lobbying, represented a more effective tool for social change.[29] Of course, this coincided with Marshall's professional background.[30] As a lawyer, he represented a particular type of social movement actor, an individual bound by procedural rules and doctrinal parameters, or legal frames, who at the same time shared the social movement goal of effecting political reform.[31]

Interestingly, Marshall's decision to focus on desegregation in the decade after World War II marked a prescient awareness of what socio-legal scholars would later call frame alignment.[32] Intuitively, Marshall knew that by linking a formal legal claim rooted in equal protection with the plight of African Americans living under Jim Crow, he could take advantage of larger cultural shifts occurring in the United States, particularly among national elites.[33] As early as July of 1946, for example, Attorney General Tom Clark spoke out against racial violence in Georgia, declaring it " 'an affront to decent Americanism.' "[34] One year later, a civil rights committee appointed by President Truman published *To Secure These Rights*, a bold report identifying civil rights—including voting rights, segregation, and restrictive covenants—as important areas of needed reform.[35] Shortly thereafter, Truman himself publicly endorsed the need for robust action in the civil rights arena, ordering desegregation of the armed forces.[36] The Supreme Court joined, declaring racially restrictive covenants unconstitutional in 1948 and undermining segregation in higher education in 1950.[37]

Though southern officials rankled at such moves, other changes materialized at the grassroots that boded positively for Marshall as

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29. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 293-94 (1975).

30. *Id.*

31. *See id.*

32. For Marshall's decision to target segregated schools directly, see *id.*

33. *Id.* at 290-91.

34. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 20 (William Chafe, Gary Gerstle, & Linda Gordon eds., 2000).

35. CHARLES E. WILSON, ET AL., TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947).

36. *See* DAVID MCCULLOUGH, TRUMAN 569-70 (1992); WILLIAM H. CHAFE, THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II 91 (3d ed. 1995) [hereinafter CHAFE, UNFINISHED JOURNEY].

37 *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948). Though often overlooked, *To Secure These Rights* provided a blueprint for much of the civil rights reform that would emerge in the 1950s and 1960s, including the ruling against covenants, which borrowed the Committee's theory that although covenants were private in nature, they depended on "court orders enforcing the private agreement." WILSON, *supra* note 35, at 169. In 1950, the Court decided *Sweatt v. Painter* holding that the University of Texas Law School had to admit a black applicant, and *McLaurin v. Oklahoma State Regents*, holding that Oklahoma could not segregate black students within its university system. Sweatt v. Painter, 339 U.S. 629, 642 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637, 642 (1950).

well.[38] One such change—ironically—was a surge of interest in the psychological development of youth, particularly teenagers.[39] Harvard Professors Sheldon and Eleanor Glueck spearheaded such interest by conducting a massive study of 1000 children to discern what precisely led some to become productive citizens and others to break the law.[40] Others followed suite, including New York psychiatrist Fredric Wertham who became nationally known for exposing the harmful effects of violent "crime comics" on youth, even as he became interested in the effects of segregation on race.[41] In 1946, for example, Wertham served as the "guiding force" behind the creation of a free psychiatric clinic in Harlem, geared towards helping African Americans deal with the debilitating psychological effects of racism.[42]

Impressed, NAACP lawyer Jack Greenberg contacted Wertham to see if he might bring black school children from Delaware to be examined at the free clinic.[43] Wertham agreed, later volunteering as an expert witness for Greenberg in the Delaware case *Belton v. Gebhart*,[44] one of the five segregation cases that would be consolidated into *Brown v. Board of Education*.[45] In court, Wertham argued that segregated schools engendered an "unsolvable emotional conflict" in the minds of minority youth, ultimately causing "tension in all interpersonal relationships."[46]

Wertham's testimony in the Delaware portion of *Brown*, together with the work of social scientists Franklin Frazier, Kenneth B. Clark, and others, proved a strategic success.[47] Not only did the scien-

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38. Trends in the South actually went against racial equality as South Carolina Senator Strom Thurmond led a revolt by southern democrats in the aftermath of Truman's civil rights plank, creating a third "States' Rights," or "Dixiecrats" Party. *See* MICHAEL R. GARDNER, HARRY TRUMAN AND CIVIL RIGHTS 99, 101-03 (2002).

39. *See* JAMES GILBERT, A CYCLE OF OUTRAGE: AMERICA'S REACTION TO THE JUVENILE DELINQUENT IN THE 1950S 183 (1986).

40. *Education: Blueprint of Danger*, TIME, Oct. 30, 1950, at 79.

41. *See* BART BEATY, FEDRIC WERTHAM AND THE CRITIQUE OF MASS CULTURE 134 (2005).

42. KLUGER, *supra* note 29, at 442-43.

43. *See* BEATY, *supra* note 41, at 95.

44. 87 A.2d 862 (Del. Ch. 1952).

45. *See* KLUGER, *supra* note 29, at 443-44.

46. *Id.* at 444; Fredric Wertham, *Psychological Effects of School Segregation*, Papers of the NAACP, Part 3, Ser. C, Reel 4.

47. To support the theory that segregation damaged black youth, the NAACP not only sent black children to be examined in New York, but invited Wertham down to serve as an expert witness in Delaware. BEATY, *supra* note 41, at 95. Wertham testified in *Belton v. Gebhart*, the Delaware portion of the series of cases that would eventually be consolidated into *Brown v. Board of Education*. In his testimony, Wertham contended that although "the physical differences" between black and white schools in Delaware was "not at all really material" it was nevertheless true that "segregation in general" was "anti-educational." KLUGER, *supra* note 29, at 445. By this he meant that "most of the children" that he examined "interpret segregation in one way and only one way—and that is they interpret it as punishment." *Id.* Whether the state of Delaware wanted to punish black children or not, continued Wertham, had "nothing to do with it." What he was interested in

tists testify to the psychological development of children, an issue that possessed a high level of what socio-legal scholars call "resonance," but their very presence aligned the cultural authority of the scientific establishment with Marshall's diagnostic framing of segregation as an institution that caused harm—not something that white southerners were willing to admit.[48] The Supreme Court proved so impressed with Marshall's social science evidence that Chief Justice Earl Warren used it to support the core legal claim that segregation violated the Equal Protection Clause of the Fourteenth Amendment because it harmed black youth.[49] "Segregation of white and colored children in public schools," asserted Chief Justice Earl Warren, two years after Wertham testified in Delaware, "has a detrimental effect upon the colored children."[50] To support its assertion, the Court cited a string of sociological studies, gathering them in footnote eleven of its ruling.[51]

Of course, white southerners disagreed. Aghast that the Court had invoked science to overturn Jim Crow—a legal system that had enjoyed longstanding constitutional support—southern segregationists engaged in what social movement theorists call counter framing, or a contest to undermine the alignments made by social movement actors; in this case Marshall.[52] "I submit that white children also have rights," proclaimed Mississippi Senator James O. Eastland, only weeks after *Brown* was handed down.[53] "[T]ensions and frictions generally found in an interracial school," continued Eastland, "certainly will have a bad effect on a white child, and in my judgment

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was "what is in the minds of children." *Id.*; JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 137 (1994).

48. *See* Benford & Snow, *supra* note 18, at 619.

49. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954).

50. *Id.* at 494.

51. *Id.* at 495 n.11. The footnote specifically cited: Kenneth B. Clark, *Effects of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); HELEN LELAND WITMER & RUTH KOTINSKY, PERSONALITY IN THE MAKING, THE FACT-FINDING REPORT OF THE MIDCENTURY WHITE HOUSE CONFERENCE ON YOUTH AND CHILDREN 135-58 (1952); Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCH. 259-87 (Oct. 1948); Isidor Chein, *What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities?* 3 INT.J. OPINION & ATTITUDE RESEARCH 229-34 (1949); Theodore Brameld, "Educational Costs," *in* DISCRIMINATION AND NATIONAL WELFARE 44-48 (Robert M. MacIver ed., 1949); E. FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES 647-781 (1949); GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944). The Court did not cite Frederic Wertham, perhaps because it did not want to confuse the debate over segregation with larger debates over mass culture at the time. Wertham's larger work, because it focused so extensively on comic books, may have threatened to introduce issues of censorship and the First Amendment into what was otherwise a decision on race. If segregation harmed black children and therefore should be abolished, for example, then why shouldn't comic books, which did the same thing, be banned?

52. *See* Benford & Snow, *supra* note 18, at 617.

53. 100 CONG. REC. 11523 (daily ed. July 23, 1954) (statement of Sen. Eastland).

will interfere with the white child's ability to learn."[54] South Carolina journalist William D. Workman echoed Eastland's concerns in a book that earned him region-wide acclaim.[55] "[T]he integrationists, who cry for racial admixture in the cause of bolstering the personality development of a Negro minority," complained Workman, "do not hesitate to compel the mingling of a white minority with a black majority without any consideration of the inevitable psychological impact upon the personalities of the *white* children."[56]

To support the counter-thesis that integration would harm whites, segregationists employed elaborate compilations of crime rates, venereal disease rates, and illegitimacy rates, even manipulating state law to exacerbate seeming disparities in these rates.[57] For example, in 1955 Mississippi invalidated common law marriage in the hopes it might artificially boost the appearance of black illegitimacy rates in the state.[58] North Carolina, conversely, manipulated state law to mask the compilation of white illegitimacy rates by encouraging adoptions.[59]

Segregationist manipulations of statistics sought to align the southern position on race with an aspect of the national concern over child development that Marshall had not anticipated, namely white delinquency.[60] Though concerns over juvenile delinquency and crime had existed as early as the 1920s, such fears exploded in the 1950s—after Marshall had already decided on his litigation strategy in *Brown*.[61] Part of the reason for this was an actual increase in the rate of juvenile crime, a jump of fifty-five percent between 1952 and 1957.[62] Though partially explained by changes in the types of crimes that were tabulated, mass media portrayals of teen rebellion exacerbated public perceptions of the crisis.[63] Hollywood films like *The Wild One*, *Blackboard Jungle*, and *Rebel Without a Cause* all stoked popular concern over youth crime.[64]

Even Fredric Wertham, the same psychiatrist who testified for the NAACP in *Belton v. Gebhart*, published a book on delinquency entitled *Seduction of the Innocent* in 1954, the same year that *Brown* was

54. *Id.*
55. *See* WILLIAM D. WORKMAN, JR., THE CASE FOR THE SOUTH (1960).
56. *Id.* at 241.
57. WALKER, THE GHOST OF JIM CROW, *supra* note 13, at 41-42, 77-82.
58. *Id.* at 42.
59. *Id.* at 80-81.
60. *See generally* Anders Walker, *Blackboard Jungle: Delinquency, Desegregation, and the Cultural Politics of Brown,* 110 COLUM. L. REV. 1911, 1953 (2010).
61. *See* GILBERT, *supra* note 39, at 3.
62. GRACE PALLADINO, TEENAGERS 161 (1996).
63. For example, while the FBI reported that juvenile delinquency rose fifty-five percent between 1952 and 1957, the majority of reported crimes were vaguely described as incorrigible behavior, disorderly conduct, and violation of curfew. *Id.* at 161.
64. *See* GILBERT, *supra* note 39, at 182, 183, 188.

decided.[65] While the book concentrated on the negative effect of crime comics, illustrated serials with titles like *Tales from the Crypt*, *Reform School Girl*, and *Crime Detective*, Wertham endorsed a larger theory that children were uniquely vulnerable to negative influences in their surroundings, a claim made again and again by segregationists.[66] "Even more than crime," wrote Wertham, "juvenile delinquency reflects the social values current in a society."[67] Both adults and children absorb these social values in their daily lives, argued Wertham, whether at home, in school, at work, or "in all the communications imparted as entertainment, instruction or propaganda through the mass media, from the printed word to television."[68]

As the cultural frame of delinquency became more and more pervasive, Thurgood Marshall found northern support for public school desegregation waning. Though opinion polls registered initial support for *Brown*, that support never rose to a level significant enough to overcome southern opposition to civil rights bills in Congress in the 1950s.[69] For example, a civil rights bill aimed at curbing massive resistance to *Brown* was almost completely gutted by southern congressmen in 1957, while a similar bill was neutered by southern elected officials in 1959.[70] Even antics like Governor Orval Faubus's refusal to protect black students from white mobs in Little Rock in 1957 only triggered a temporary spike in northern outrage, doing relatively little to stoke sustained northern support for *Brown*.[71] For example, one year after President Eisenhower sent federal troops into the city to maintain peace, Orval Faubus closed Central High School, effectively ending integration, without significant northern complaints.[72]

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65. FREDERIC WERTHAM, THE SEDUCTION OF THE INNOCENT (1954). For a description of the popularity and influence of Wertham's work, see GILBERT, *supra* note 39, at 103-04. In part due to its emphasis on mass conditioning, *The Seduction of the Innocent* received widespread acclaim and transformed Wertham into a popular authority not only on comic books, but on the social psychiatry of children in general. For a nation seized by concern over errant youth, Wertham gave structure to popular fears by rooting delinquency not in nebulous forces, but distinct, controllable causes. As he summarized in *Seduction*, "You cannot understand or remedy a social phenomenon like delinquency by redefining it simply as an individual emotional disorder. It is on the basis of such an approach, however, that important mass influences on the child's mind have for years been completely overlooked." WERTHAM, *supra*, at 156-57.

66. *See* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S 176-77 (1999).

67. WERTHAM, *supra* note 65, at 149.

68. *Id*.

69. *See* BARTLEY, *supra* note 66, at 60-61.

70. CHAFE, UNFINISHED JOURNEY, *supra* note 36, at 157; *see* BARTLEY, *supra* note 66, at 60-61.

71. *See* BARTLEY, *supra* note 66, at 277.

72. *See id.* at 328-29. Though northern audiences recoiled at the violence in Little Rock, even they seemed ambivalent about integration when it came to their own children's

In fact, just as the problems in Little Rock subsided, opposition to school desegregation actually began to grow in the North, particularly in northern cities like New York.[73] As early as 1957, for example, white parents in Brooklyn resisted NAACP efforts to redistrict public schools in Bedford-Stuyvesant, desperately attempting to keep their children separated from blacks.[74] Animating white fears were concerns over juvenile delinquency, reinforced by a grand jury investigation in November 1957 that found remarkable levels of youth violence and crime in New York City, so much so that the jury recommended police officers be stationed in schools to maintain peace.[75] In December, disaster struck when George Goldfarb, the principal of an integrated high school in Brooklyn, committed suicide after being called to testify before a grand jury investigating school violence, including the rape of a female student in his school's basement.[76]

Pleasantly surprised, southern newspapers and political leaders trained their sights northward. Racially "[m]ixed school violence" led to Goldfarb's suicide, announced Mississippi's Jackson *Daily News*.[77] "[I] would 'hate to think what the metropolitan press would have done to us,' " exclaimed Arkansas Governor Orval Faubus in January 1958, "if the Brooklyn school violence had happened in Little Rock."[78] "Racists" at the New York Times were trying to hide the role that blacks played in the violence, announced the Montgomery's *Advertiser*.[79] White southerners were "deeply sympathetic with the citizens of Brooklyn in the difficulties they are experiencing in maintaining the integrity and independence of their public schools," announced former Senator of Georgia Herman Eugene Talmadge.[80]

Southern exuberance over New York's racial quandaries coincided with a larger shift in the South away from defiant opposition, or massive resistance, and towards a more moderate, legalist stance against integration.[81] Though legal historian Michael Klarman argues that the extremist backlash to *Brown* lasted into 1963, a close survey of the evidence indicates that this might be an overstate-

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well-being. *See* CLARENCE TAYLOR, KNOCKING AT OUR OWN DOOR: MILTON A. GALAMISON AND THE STRUGGLE TO INTEGRATE NEW YORK CITY SCHOOLS 72-83 (1997).

73. *See* Benjamin Fine, *City to Spur Integration By Building of 60 Schools*, N.Y. TIMES, Oct. 31, 1957, at 1; *see also* TAYLOR, *supra* note 72, at 72-83.

74. Fine, *supra* note 73, at 34.

75. Lawrence Fellows, *Policeman for Each City School Urged by Brooklyn Grand Jury*, N.Y. TIMES, Nov. 26, 1957, at 1.

76. Emanuel Perlmutter, *Head of School Beset by Crime Leaps to Death*, N.Y. TIMES, Jan. 29, 1958, at 1; *Outrage in Brooklyn*, TIME, Feb. 10, 1958, at 36.

77. *Depth from Dixie*, TIME, Mar. 10, 1958.

78. *Faubus Scores School Violence*, N.Y. TIMES, Feb. 1, 1958, at 10.

79. *Depth from Dixie*, *supra* note 77.

80. *2 Senators Clash on City's Schools*, N.Y. TIMES, Feb. 5, 1958, at 16.

81. *See* WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA AND THE BLACK STRUGGLE FOR FREEDOM 80-82 (1980); WALKER, THE GHOST OF JIM CROW, *supra* note 13, at 116.

ment.[82] By the spring of 1959, the more radical aspects of the backlash to *Brown* in the South had begun to fizzle, entering what historian Numan V. Bartley has called a "thermidorean reaction," as moderates replaced massive resisters across the region.[83]

Meanwhile, debate broke out in elite legal northern circles over the wisdom of the Court's foray into school segregation in the first place. In January 1958, Learned Hand, a revered federal circuit judge, publicly criticized the Supreme Court for exceeding its constitutional bounds, behaving like a "third legislative chamber" and even jeopardizing American democracy.[84] According to Hand, "nothing" in the Constitution granted the Court the power to invalidate state law, including Jim Crow laws in the South.[85] In fact, the federal circuit judge went so far as to attack the theory of judicial review itself, arguing that it was "not a logical deduction from the structure of the Constitution," but amounted instead to a "practical condition" that should only be invoked when absolutely necessary to preserve democratic government.[86] Such was not the case with school desegregation, he maintained, a policy issue that had little, if anything, to do with vital national interests.[87] According to Hand, questions of public education and race constituted little more than debates over "relative values" best left to the legislative branch of government.[88] Judicial interventions in the matter, argued Hand, amounted to little more than dubious grabs for power that failed to "accord" with the "underlying presuppositions of popular government."[89]

Stunned, leading constitutional scholar Herbert Wechsler responded directly to Hand's critique of judicial review during a spring address at Harvard Law School in 1959.[90] To Wechsler's mind, the Court had not been wrong to go down the road of liberal reform, but had done so in an inappropriate, "*ad hoc*" manner.[91] Of particular concern was *Brown's* reliance on social science evidence, particularly data on child psychology, that the Court used to bolster its claim that segregation, per se, violated equal protection by harming black children.[92] "I find it hard to think [that *Brown*] really turned upon the

82. *See* KLARMAN, *supra* note 7, at 421.

83. BARTLEY, *supra* note 66, at 320; *see also* WALKER, THE GHOST OF JIM CROW, *supra* note 13, at 118-19. *But see* Klarman, *supra* note 7, at 421 (arguing that the backlash to *Brown* continued well into the 1960s).

84. LEARNED HAND, THE BILL OF RIGHTS 55 (1958).

85. *See id.* at 54-55.

86. *Id.* at 15.

87. *See id.* at 54.

88. *See id.*

89. *Id.* at 72-73.

90. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1 (1959).

91. *Id.* at 31.

92. *Id.* at 32-33.

facts," declared Wechsler to a shocked audience at Harvard.[93] What if, he pondered, students were actually "hurt" by integration?[94]

The idea that students might be hurt by integration was not something that either Thurgood Marshall or the Warren Court had considered in 1954, yet cultural frames had shifted to the point that it was on people's minds by 1959, particularly in New York. Not only had the *New York Times* provided extensive coverage of violence and crime in desegregated schools in Brooklyn, but the paper had also covered shocking abuses endured by black students in the American South. Almost immediately after federal forces left Little Rock, Arkansas in November 1957, for example, the *New York Times* reported a campaign of cruel harassment by white students against their black peers that lasted for the remainder of the school year.[95] Instead of psychological healing, the nine black students found themselves kicked, pushed, showered with food, and, in the case of one unfortunate African American girl, pushed down a flight of stairs.[96]

Not only were the above instances of racial harm all reported in the *New York Times*, where Herbert Wechsler and others could read about them, but one of the Little Rock Nine actually abandoned Little Rock for New York City in January 1958.[97] In a well-publicized move, Minnijean Brown left Central High School and accepted a scholarship to attend the private New Lincoln School on West 110th Street in Manhattan, claiming it unlikely that her eight black peers could withstand much more abuse from their white counterparts.[98]

Though Wechsler did not mention Little Rock directly in his Harvard address, Minnijean Brown's flight helps contextualize his observation that integration might, in some cases, have "hurt" blacks.[99] To his mind, this meant that *Brown's* equal protection argument was itself unstable, a complaint that he chose to articulate in terms of the ruling's lack of neutrality. Though many took Wechsler's words to be an overly-legalist approach to constitutional reasoning, the kind of

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93. *Id.* at 33.

94. *Id.*

95. *See, e.g., Negro Suspended at Central High: Girl Dumps Food on White Boys in Little Rock—New Attack on N.A.A.C.P. Aide*, N.Y. TIMES, Dec. 18, 1957, at 31 (describing an incident where an African American female student lost her temper and dumped food on a group of white boys).

96. *See White Girl Reports Little Rock Penalty*, N.Y. TIMES, Jan. 11, 1958, at 23; *Little Rock Gets Guard at Night: Troops Posted at School as 'Precautionary' Step After Clash of 2 Students*, N.Y. TIMES, Jan. 17, 1958, at 10 (discussing incidents of intimidation including throwing soup and bomb threats); *Little Rock High Ousts Negro Girl: Student Was Involved in Several Racial Incident—3 Whites Suspended*, N.Y. TIMES, Feb. 18, 1958, at 25.

97. *See* Mildred Murphy, *School Welcomes Little Rock Girl: Director Greets Expelled Negro Pupil Here—She Hopes for Calm Stay*, N.Y. TIMES, Feb. 25, 1958, at 29; *Little Rock Girl Sees More Strife: Expelled Pupil Doubts that 8 Remaining Negroes Can Stand Harassment*, N.Y. TIMES, Feb. 23, 1958 at 59 [hereinafter *Little Rock Girl Sees More Strife*].

98. *Little Rock Girl Sees More Strife*, *supra* note 97.

99. *See* Wechsler, *supra* note 90, at 33.

argument that someone who knew nothing about actual racial conditions in the South might make, Wechsler had in fact been involved in southern racial politics since the 1930s.[100] As a young attorney, he had worked for three years to free black communist, Angelo Herndon, from a chain gang in Georgia, ultimately writing the bulk of Herndon's briefs before the Supreme Court between 1934 and 1937.[101] In 1941, Wechsler struck a crippling blow to white supremacy in the South by arguing *United States v. Classic*,[102] a case that declared Louisiana's white primary a form of state action thereby paving the way for Thurgood Marshall's death blow to the white primary in *Smith v. Allwright*.[103]

Rather than an outsider who understood little about racial issues in the South, Wechsler had in fact been deeply involved in those issues for almost three decades.[104] However, the cases that he argued tended to be aligned much more closely with national and even regional, cultural frames than *Brown*—particularly after the moral panic over delinquency. How so? In *Herndon*, Wechsler had been careful to frame his appeal in terms of First Amendment free speech, not black rights or communism.[105] This represented a type of frame bridging, an effort to link the legal argument of a relatively unpopular client to a cause that enjoyed relatively widespread support, indeed what some identified as a " 'bedrock principle' " of American democracy, the First Amendment.[106] Similarly, even though *United States v. Classic* had huge implications for black voting rights in the Deep South, a fact that Wechsler was well aware of when he took the case, he refused to even mention the disfranchisement of black people in his Supreme Court briefs, focusing instead on whether the level of state involvement in Louisiana's white primary was sufficient to make it a form of state action.[107]

Once Wechsler's past involvement in civil rights is recovered, his plea for neutral principles emerges, not as an insensitive bid for legal formalism, but as a call for more diligent frame alignment, a more strategic attention to how the Court framed its civil rights rulings so as to maximize cultural synergy and minimize popular backlash. Not only had this become an issue with *Brown*, but the Court had decided

100. Walker, *"Neutral" Principles*, *supra* note 15, at 385-87.

101. *Id.* at 394-95.

102. United States v. Classic, 313 U.S. 299 (1941).

103. *Classic*, 313 U.S. 299; Smith v. Allwright, 321 U.S. 649 (1944); Walker, *"Neutral" Principles*, *supra* note 15, at 411.

104. *See* Walker, *"Neutral" Principles, supra* note 15, at 389-408.

105. *See id.* at 400-01.

106. For a discussion of the First Amendment's central role in the "Imagined Communities" of the United States, see ROBERT L. TSAI, ELOQUENCE & REASON: CREATING A FIRST AMENDMENT CULTURE 31-34 (2008).

107. *See* Walker, *"Neutral" Principles*, *supra* note 15, at 408-12.

a string of cases based on *Brown* that had nothing to do with the psychological development of children, cases that bothered Wechsler because they extended the child-centered harm argument to adult contexts, including public buses, parks, and golf courses.[108] "What shall we think," he queried, "of the Court's extension of [*Brown*] to other public facilities, such as public transportation, parks, golf courses, bath houses, and beaches, which no one is obliged to use—all by per curiam decisions?"[109]

Dubious of the Supreme Court's reasoning in civil rights cases beginning with *Brown*, Wechsler offered to formulate his own reasoning on civil rights in a libel case filed by Montgomery Police Commissioner L.B. Sullivan against the *New York Times* for running a full page ad criticizing Montgomery's handling of sit-in demonstrations in 1960.[110] Though different from most of the lawsuits that arose out of the sit-ins—almost all of which focused on whether evicting demonstrators from private restaurants was a form of state action—*New York Times v. Sullivan* focused on whether the South could keep the national media out of the region by way of frivolous libel suits.[111] This question touched directly on the larger issue of cultural framing, for without the media, direct action protest would arguably never have been able to reach national audiences, or have a national effect.[112]

Aware that the fate of direct action protest might be in jeopardy, Wechsler engaged in a deft example of frame bridging, linking civil rights in the American South to the nationally popular First Amendment right to free speech.[113] Specifically, he likened Alabama's libel law to the widely unpopular Sedition Act of 1798, a measure so repressive that it had gone down in American history as an example of government oppression.[114] Gambling that most Americans would not approve of an overly aggressive libel doctrine that allowed for the curtailment of speech when the speaker did not have actual malice, Wechsler convinced the Supreme Court to rule in favor of the *Times* and impose a more onerous burden on libel cases in the future, an

108. *See id.* at 419.

109. Wechsler, *supra* note 90, at 22.

110. *See* Walker, *"Neutral" Principles*, *supra* note 15, at 426-32.

111. *See* GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 239-41, 357-58 (2006).

112. *See id.*

113. For the popularity of the First Amendment, see TSAI, *supra* note 106, at 32-34. For Wechsler's role in *Sullivan*, see Walker, *"Neutral" Principles*, *supra* note 15, at 428.

114. Walker, *"Neutral" Principles*, *supra* note 15, at 429-30. *See generally* JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1952); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

argument that led many news organizations, including the *Times*, to send reporters back into Dixie.[115]

Though rarely compared to *Brown*, *New York Times v. Sullivan* was similar in that the lead attorneys in both cases, Thurgood Marshall and Herbert Wechsler, both tried to align their legal claims with prevailing cultural norms. In Marshall's case, this meant aligning civil rights with national concern for youth, while in Wechsler's, it meant aligning civil rights with national support for the First Amendment. Both succeeded at the Supreme Court level, yet *Brown* encountered considerable resistance, arguably failing to do what it set out to accomplish by 1959. *New York Times v. Sullivan*, by contrast, helped the movement win federal legislation that removed obstacles to black voting rights.[116]

In the next section, we will see how proponents of gun rights learned from the movement, carefully aligning their own legal claims with prevailing cultural trends. Though culture, as Marshall learned, can be hard to read, Second Amendment advocates, like the National Rifle Association (NRA) began to successfully align their interests with popular concerns in the 1970s, arguably even shaping those concerns by building popular support for sportsmanship and self-defense. This process of frame alignment reinforces the notion that lawyers, like social movement actors, must frame their agendas in terms that most people can support and understand.

III. THE SECOND AMENDMENT AND CULTURAL FRAMES

Though generally not associated with the civil rights movement, the American gun lobby proved an astute imitator of movement tactics, arguably even emerging like a phoenix out of the movement's ashes. Prior to the 1960s, for example, organizations like the NRA had little interest in lobbying to curb federal gun controls. Founded in 1871, the NRA began its career primarily interested in target-shooting, not defending the right to bear arms. In fact, from 1871 to 1977 the organization's main agenda was promoting marksmanship and safety.[117] Organized by Civil War veterans disgruntled with the Union Army's lack of emphasis on "target practice," a skill the military believed would instill a negative "sense of individualism among the soldiers," the NRA built a "state-of-the-art rifle range" at Creedmoor, New York to train soldiers, primarily National Guardsmen, in

115. *See* Walker, *"Neutral" Principles*, *supra* note 15, at 430-31. To Pulitzer Prize-winning journalists Gene Roberts and Hank Klibanoff, *New York Times v. Sullivan* represented "a form of liberation." *See* ROBERTS & KLIBANOFF, *supra* note 111, at 364.

116. *See* WALKER, THE GHOST OF JIM CROW, *supra* note 13, at 131, 140-41 (discussing legal rights for African Americans and the Voting Rights Act).

117. *See* OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 22 (expanded ed. 1998).

marksmanship.[118] The NRA also began holding shooting competitions, including an international competition that drew almost 8000 spectators to Creedmoor in 1874.[119] From 1874 to 1977, "marksmanship training" and "firearms safety" remained the primary concerns of the NRA while lobbying formed only a "minor part" of its institutional mission.[120]

Evidence of the NRA's initial lack of political interest in gun control emerged in 1934, when Congress enacted a sweeping National Firearms Act regulating certain types of machine guns, short-barreled shotguns, and silencers.[121] While a strict textualist reading of the Second Amendment might have justified challenging such a law, the NRA refrained.[122] Part of this was due to the negative connotations of the guns themselves, all of which were identified by the Court as gangster weapons, made famous during a frightening wave of organized gang violence during the first half of the 1930s.[123]

By contrast, the 1934 Act did not regulate military-style weapons, heavier arms that the National Guardsmen training at Creedmoor might use.[124] In a 1939 case challenging the Act, the Supreme Court of the United States declared, ironically, that the Second Amendment only protected military-style weapons from federal regulation, not gangster weapons, hunting rifles, or any other type of small arm that did not have an obvious military use.[125] To support this view, the Court cited the text of the Second Amendment itself, which rationalized limits on federal gun regulations because of the need for " 'well regulated' " state militias to the " 'security of a free State.' "[126]

Precisely because the NRA was in the business of training state militias, it did not rankle at regulations controlling nonmilitia style guns. This apolitical stance changed, however, when the federal government moved to control military-style weapons in 1968. That year, Congress enacted a sweeping Gun Control Act (GCA), spurred by outrage over the assassinations of Robert F. Kennedy and Martin

118. *Id.* at 21, 22.
119. *Id.* at 23.
120. *See id.* at 23, 35-36.
121. *See* Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & LIBERTY 48, 60-63 (2008).
122. *See* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").
123. *Cf.* United States v. Miller, 26 F. Supp. 1002 (W.D. Ark. 1939), *rev'd,* 307 U.S. 174 (1939) (addressing the constitutionality of regulating short-barrel weapons).
124. United States v. Miller, 307 U.S. 174, 178 (1939).
125. *Id.*
126. *Id.* (quoting U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.")).

Luther King, Jr.[127] While older NRA leaders tended to support the legislation, which recodified the National Firearms Act of 1934, a younger cadre of activist-oriented "hard-liners" viewed the GCA to be the beginning of a larger, liberal assault on gun rights generally in the United States.[128] Led by a former Border Patrol officer named Harlon Carter, these "Young Turks" voted proponents of the GCA out of power in 1977 and quickly made lobbying against gun regulations one of the primary functions of the association.[129]

For constitutional scholar Reva Siegel, Harlon's insurgents mounted a relatively straightforward campaign of "popular constitutionalism" aimed at upholding an individual, not collective right to bear arms.[130] To do this, they joined an "emergent New Right movement" that also "sought restoration of the Constitution in matters concerning criminal defendants' rights, gun control, and other 'social issues,' including prayer, busing, and abortion."[131] While Siegel might have identified this move as a type of frame bridging, she avoids any discussion of frame alignment in her analysis, focusing instead on the insurgents' use of direct mail techniques to push the NRA to the right and, ultimately, contribute to a larger transformation of "the Republican Party platform."[132] A crucial part of this platform, argues Siegel, was the appointment of Republican judges willing to frame conservative legal causes, like the individual right to bear arms, in terms of " 'original intent,' " a skillful way of "changing the Constitution" by avoiding the amendment process and calling instead for the restoration of first principles.[133]

While all of this is true, Siegel's reluctance to focus on frame alignment obfuscates the level of strategy that went into the NRA's litigation campaigns. For example, despite the fact that the NRA vigorously pursued an individual right to bear arms, as Siegel argues, it never challenged the 1968 Gun Control Act in court.[134] Much like civil rights attorneys Thurgood Marshall and Herbert Wechsler, NRA lawyers carefully aligned their legal claims with cultural positions

127. James M. Naughton, *U.S. Panel Urges Handgun Seizure to Curb Violence*, N.Y. TIMES, July 29, 1969, at 1, 18; *see also Crisis in the Cities*, N.Y. TIMES, July 29, 1967, at 24; *Hruska Opposed on Violence Unit: Schlesinger Says Senator Fought New Gun Curbs*, N.Y. TIMES, June 10, 1968, at 29; *Transcript of Johnson's TV Address on the Riots*, N.Y. TIMES, July 28, 1967, at 11.

128. DAVIDSON, *supra* note 117, at 30; *Registration Due on Certain Weapons*, N.Y. TIMES, Oct. 31, 1968, at 17; *see also* Anders Walker, *From Ballots to Bullets:* District of Columbia v. Heller *and the New Civil Rights*, 69 LA. L. REV. 509, 513 (2009) [hereinafter Walker, *From Ballots to Bullets*].

129. DAVIDSON, *supra* note 117, at 30-36.

130. Siegel, *Dead or Alive*, *supra* note 7, at 201.

131. *Id.* at 212.

132. *Id.* at 212, 215.

133. *Id.* at 217, 220.

134. Arguably the only challenge to the 1968 Gun Control Act, as Siegel notes, was the 1986 Firearm Owners Protection Act, which limited aspects of the earlier law. *Id.* at 216.

that they believed most Americans would condone at the time, positions that did not include combat weapons. This meant that widespread, private ownership of military-style weapons—AK-47s, M-16s, and so on—never made it onto the NRA's litigation agenda, even though past Supreme Court rulings like *Miller* indicated that these were precisely the type of weapons that the Second Amendment did indeed protect.[135]

Why did the NRA, a diligent if not aggressive lobbying group, not promote deregulating military-style weapons through court cases?[136] Perhaps the best answer is that American attitudes towards military-style weapons—their cultural frame, if you will—evolved considerably after 1939 away from images of responsible National Guardsmen keeping guns safely in their homes, to radical extremists plotting government overthrow. To take just a few examples, not long after the GCA's passage in 1968, stories began to break of people arrested under the law, many with ties to right-wing extremism and organized crime. On June 5, 1969, for example, Alcohol, Tobacco, and Firearms agents arrested Arthur Needles, a supplier to right wing groups and the mob in Suffolk County, New York, seizing "dynamite bombs, machine guns, and dozens of rifles, shotguns, and handguns."[137] On July 19, 1969, federal agents arrested "Robert Bolivar DePugh, founder of the ultra-right Minutemen," a covert organization dedicated to "stockpiling weapons" in preparation for "a Communist take-over of all governmental machinery in the United States."[138] More raids followed of Nazis, the Ku Klux Klan, the Black Panthers, and other groups, none of whom enjoyed majority support.[139]

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135. A distinction must be made here between the NRA's actual litigation strategy and some of the rhetoric of its leaders. As Siegel notes, prominent NRA officials like Tanya Metaksa did voice opposition to regulations of automatic weapons, though they never dared bring a legal Second Amendment challenge to them in court. *See id.* at 228.

136. Some might argue that the NRA's participation in *Printz v. United States* was part of a larger opposition to federal regulation of automatic weapons, but this overreads the claim in *Printz*, which opposed background checks required by the Brady Bill. *See* Printz v. United States, 521 U.S. 898 (1997).

137. Robert D. McFadden, *Weapons Cache is Seized With 4 Suspects in Suffolk*, N.Y. TIMES, June 6, 1969, at 1, 21; *see also High Bail Imposed in L.I. Arms Case: Raids Yielded Big Caches of Guns and Ammunition*, N.Y. TIMES, June 7, 1969, at 45.

138. Donald Janson, *Fugitive Minutemen Never Aroused Suspicion in New Mexico*, N.Y. TIMES, July 20, 1969, at 47; *see also 2 Held in Seizure of Machine Guns In California Raid*, N.Y. TIMES, Dec. 1, 1969, at 51 (describing federal raid of weapons cache owned by "Nazi buff" James Gary Steuard).

139. *See* Martin Waldron, *Militants Stockpile Illegal Guns Across the U.S.*, N.Y. TIMES, Dec. 28, 1969, at 42; *see also 2 Held with Truck Carrying Dynamite*, N.Y. TIMES, Jan. 21, 1970, at 94; *6 Men and 1,151 Guns Seized in New York Area*, N.Y. TIMES, July 30, 1980, at B8 (describing suspects arrested for sale of "gangster guns" that looked like "ball point pens and fire[d] one bullet"); 15 *Are Arrested in Weapon Raids: U.S. Agents in Midwest Act on 'Illicit Gun Dealing'*, N.Y. TIMES, July 25, 1971, at 38; *Rap Brown Resentenced in New Orleans*, N.Y. TIMES, June 3, 1972, at 18 (describing sentencing of black militant for violation of the GCA).

In 1995, popular opposition to extremist militias exploded when Timothy McVeigh, a disgruntled ex-soldier with militia ties bombed a federal building in Oklahoma City.[140] While Siegel notes that the NRA took an overtly public stand against militias at this point, even hiring Charlton Heston to soften the organization's image, she does not invoke the analytic of frame alignment to explain the organization's actions.[141] Yet, such an analytic shows how the NRA engaged in a strategy similar to the one that civil rights lawyers first attempted in *Brown* and then again in *Sullivan*, namely aligning legal claims with prevailing cultural trends, in this instance frames that opposed militias but supported self-defense.[142] Indications of such a trend emerged early. In 1969, Republican Senator Roman Hruska of Nebraska declared that handgun regulations should be left to the states.[143] "[U]rban unrest" contributed to this sentiment, as riots "spurred sales of guns" for use in self-defense.[144] When Chicago Congressman Abner Mikva proposed a ban on handguns in Illinois in 1971, he confronted significant opposition in the state house and senate.[145] Indiana Senator Birch Bayh encountered similar problems in 1972 when he tried to increase regulation of handguns following an assassination attempt on Alabama Governor George Wallace.[146] Both Senators Jacob K. Javits of New York and Charles H. Percy of Illinois confronted problems when they tried to introduce a federal ban on handguns in "areas where violent crime is 20 per cent or more above the national average."[147] Though local urban populations tended to favor such bans, national majorities proved skeptical.[148]

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140. *See* Todd S. Purdum, *Clinton Assails The Preachings Of the 'Militias'*, N.Y. TIMES, May 6, 1995, at 1, 9.

141. *See* Siegel, *Dead or Alive*, *supra* note 7, at 232.

142. *See Gun Club President Reports an Easing In Demand for Curb*, N.Y. TIMES, Apr. 4, 1971, at 35.

143. Naughton, *supra* note 127, at 18.

144. *Id.* at 18.

145. Abner Mikva, *A Plea for Gun Control Legislation*, CHIC. TRIB., Sept. 16, 1971, at 24; *Gun Controls Too Hot for Most Politicians*, CHI. TRIB., June 29, 1972, at 1, 4.

146. Bayh recommended an amendment to the GCA banning "the sale or transfer of any handgun to anyone but a law enforcement officer" unless the gun was considered primarily aimed at " 'lawful sporting purposes.' " Ben A. Franklin, *Shooting of Wallace Spurs a New Effort to Tighten Gun Controls*, N.Y. TIMES, May 17, 1972, at 29.

147. Nancy Hicks, *Javits and Percy Ask Handgun Curb: Bill Calls for Prohibition in High Crime-Rate Areas*, N.Y. TIMES, July 22, 1975, at 32.

148. *See* William E. Farrell, *Majority at Hearing in Chicago Urges Congress to Ban Pistols*, N.Y. TIMES, Apr. 16, 1975, at 24; Wayne King, *Efforts to Curb Cheap Pistols Called Failure*, N.Y. TIMES, June 20, 1975, at 32; Robert Pear, *Crime Bill Challenged by Conservative Republicans*, N.Y. TIMES, Sept. 15, 1980, at A17 (describing opposition to federal criminal code restricting firearms by the conservative Senate Steering Committee). National opposition to gun control led to a more localized approach, focusing on municipal bans. *See, e.g.,* Joanna Dember, *Trying a New Tactic in Handgun Control*, N.Y. TIMES, Dec. 2, 1979, at 32.

Political support also began to build for sportsmen. In October 1969, Massachusetts Senator Edward M. Kennedy failed to block an exception to the 1968 Gun Control Act exempting certain types of shotgun shells popular among hunters from licensing requirements.[149] Taking this as a sign that sportsmen should be exempted, Indiana Senator Birch Bayh attempted to push through a more restrictive federal gun control law, making sure to exempt weapons used for " 'sporting purposes,' " but failed.[150] Such political trends sent clear signals to the NRA. Regardless of the Second Amendment's text and the Supreme Court's ruling in *United States v. Miller*, frame alignment placed the greatest chance of success on hunting weapons and handguns.[151]

By the 1990s, rights-based Second Amendment claims were joined by another argument, one that countered historians who challenged the idea that the Second Amendment could be understood outside the militia context. Specifically, NRA advocates fleshed out the dual position that not only was the right to bear arms an individual constitutional right, but also that the right to bear arms in self-defense was an even greater, absolute right worthy of constitutional protection independent of the Second Amendment.[152] For example, NRA official Wayne LaPierre argued in 1994 that the "use of arms for self-defense" was a right that derived from natural law itself, predating the founding.[153] One year later, Tanya Metaksa, executive director for the NRA's Institute for Legislative Action, maintained that self defense was nothing less than "the *primary* civil right" without which "there are no rights."[154]

Though Siegel does not mention it, Metaksa and Pierre's attempt to frame self-defense as a civil right represented yet another example of cultural frame alignment by the NRA. Conscious of popular opposition to militia related violence like the Oklahoma City bombing, both Metaksa and Pierre shored up the NRA's legal position by aligning their legal claims with the civil rights tradition of the 1960s, even

149. *Kennedy Plea Fails to Retain Gun Curb*, N.Y. TIMES, Oct. 10, 1969, at 13.

150. Franklin, *supra* note 146, at 29.

151. John Hinckley's attempted assassination of Ronald Reagan created a surge of popular support for gun regulation, culminating in the Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 921-922 (2006). President Clinton signed the Brady Bill into law in 1993. *Clinton Signs Bill on Guns into Law,* N.Y. TIMES, Dec. 1, 1993, A12. A provision of the bill was invalidated by the Supreme Court in *Printz v. United States*, 521 U.S. 898, 933 (1997).

152. *See* Wayne LaPierre, *Self-Defense: The Right and the Deterrent, reprinted in* GUNS IN AMERICA: A READER 173, 174 (Jan E. Dizard et al. eds., 1999).

153. *Id.* at 174.

154. Tanya K. Metaksa, *Self-Defense: A Primary Civil Right*, *reprinted in* GUNS IN AMERICA: A READER 194, 195, 198 (Jan E. Dizard et al. eds., 1999).

declaring the NRA "America's oldest civil rights organization," a not-so-subtle allusion to the 1909 founding of the NAACP.[155]

Perhaps because she does not focus on frame alignment, Siegel misses the reinvention of self-defense as a civil right. Yet, this is arguably one of the more interesting aspects of the NRA litigation story. Indeed, the NRA and other gun groups would stress ties to the civil rights movement even more explicitly in the litigation challenging Washington, D.C.'s handgun ban in 2008. That year, the NRA joined other social movement actors interested in gun rights, including the libertarian Institute for Justice, Washington attorney Alan Gura, a majority of senators and representatives in the United States Congress, and, perhaps surprisingly, the Congress of Racial Equality, or CORE.[156] Founded in 1942, "CORE spent over two decades advocating non-violent protest as a means of dismantling racial segregation in the American South."[157] In 1947, CORE targeted segregation on interstate carriers by sending integrated buses through the Deep South, an endeavor that it repeated in 1961 only to find its "freedom riders" targeted by white racists in places like Anniston and Montgomery, Alabama.[158]

Precisely because CORE activists found themselves confronting repeated instances of white violence, the organization gradually grew weary of nonviolence as a political strategy, particularly nonviolent refusals to engage in armed self-defense.[159] Indeed, by the close of 1966, CORE president Floyd McKissick joined black activists like Stokely Carmichael, who rejected Thurgood Marshall's early push for integration, and opted instead for "Black Power."[160] McKissick even went so far as to call nonviolence "a dying philosophy."[161]

Convinced that nonviolence had become ineffectual and that black equality hinged on gun ownership and armed self-defense, CORE focused its *Heller* brief on the Fourteenth Amendment, arguing that many of the amendment's framers intended that the Due Process and Privileges and Immunities Clauses be used to protect the rights of freed slaves to own guns.[162] Though the NRA resisted such an argument, Alan Gura, the Institute for Justice, and a majority of United States senators and congressmen agreed, marking a significant effort

155. Brief for the Nat'l Rifle Ass'n and the NRA Civil Rights Def. Fund as Amici Curiae in Support of Respondent at 1, Dist. of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

156. Brief of Amicus Curiae Congress of Racial Equality in Support of Respondent, Dist. of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

157. Walker, *From Ballots to Bullets*, *supra* note 128, at 515-16.

158. *Id.* at 516.

159. *Id.* at 517-19.

160. AUGUST MEIER & ELLIOT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT, 1942-1968 412 (1973).

161. *Id.* at 414.

162. Brief of Amicus Curiae Congress of Racial Equality in Support of Respondent at 10, 11, Dist. of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

to align the legal frame of private gun ownership with the cultural frame of black rights.[163]

The Supreme Court, perhaps surprisingly, sanctioned this reasoning, adopting the originalist claim that the Fourteenth Amendment was designed to protect black gun ownership, even though the Amendment itself did not technically apply to the District of Columbia.[164] Why the Court cited such evidence was not clear as a matter of law, a point that Siegel notes.[165] Yet, the Court's decision to cite the Fourteenth Amendment argument may ultimately have had less to do with legal doctrine than frame alignment. Because CORE linked gun ownership to black rights, the citation to black history might have appealed to the Court as an olive branch to the black community of D.C. that had, after all, voted for the gun ban. Whether this was true or not, prominent African Americans, including future president Barack Obama, endorsed the Supreme Court's opinion in *Heller*.[166]

Immediately following the Supreme Court's ruling against D.C., Alan Gura filed a follow-up case in the Northern District of Illinois, arguing that Chicago's handgun ban, dating to 1982, violated the Second Amendment. Parallel suits followed, including two suits by the NRA, one against the Village of Oak Park, Illinois and the other against the City of Chicago.[167]

Both the NRA and Gura argued, as in *Heller*, that the Fourteenth Amendment was intended to protect freed people of color in the post-Civil War South by protecting their right to bear arms against confiscation by Klan-governed southern states.[168] However, the NRA stressed the Amendment's Due Process Clause, while Gura dedicated a majority of his brief to the Amendment's privileges and immunities clause.[169] This divergence, though subtle, represented its own form of frame alignment. By aligning his brief with privileges and immunities, Gura hoped to gain the support of legal academics and liberals who opposed the Supreme Court's narrow curtailment of the clause in the Reconstruction era *Slaughterhouse Cases*. He, agreed that an expanded reading of the clause might be used not only to help gun owners, but also to help other, more liberal interests, not least of

163. *See* Walker, *From Ballots to Bullets*, *supra* note 128, at 527-33.

164. *See id.* at 534-35, 539.

165. Siegel, *Dead or Alive*, *supra* note 7, at 239, 242.

166. *See* Robert Barnes, *Justices Reject D.C. Ban On Handgun Ownership*, WASH. POST, June 27, 2008, at A1.

167. Nat'l Rifle Ass'n v. Vill. of Oak Park, 617 F. Supp. 2d 752 (N.D. Ill. 2008). After the district judge ruled in favor of the bans, both Gura and the NRA appealed, and the Seventh Circuit joined their appeals in a single case, titled *McDonald v. Chicago*.

168. Brief for Petitioner at 6, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

169. Robert Barnes, *NRA Avoids Getting Shut Out of Gun Case*, WASH. POST, Feb. 8, 2010, at A13.

them free speech, abortion, and, perhaps ironically given *Perry v. Schwarzenegger's* challenge to Proposition 8 in California, gay rights.[170] Gura's decision to focus on privileges and immunities, in other words, represented a classic case of frame bridging, by connecting the cause of gun owners to a larger panoply of liberal positions.

Conversely, the NRA pursued a more conservative, less liberal line of argument, pushing the Court to incorporate the Second Amendment through the Due Process Clause of the Fourteenth Amendment.[171] While this position also required the overruling of precedent—the Supreme Court's decision in *United States v. Cruikshank*[172]—it held less interest for law scholars and liberals. Of course, this represented its own form of frame alignment, a bid to keep conservative support for gun rights high, including conservative support on the Supreme Court. During oral argument, for example, Justice Scalia endorsed the idea of incorporating the Second Amendment to the states through the Due Process Clause of the Fourteenth Amendment, but objected to the privileges and immunities argument, the so called "darling of the professoriate."[173] Justice Alito agreed, making it clear in the Court's majority opinion that the Privileges and Immunities Clause would be untouched, while holding that the Second Amendment should in fact be incorporated to the states because "the right to keep and bear arms was highly valued for purposes of self-defense."[174]

The Court's emphasis on self-defense in *McDonald* was revealing, an indication that the gun lobby's frame alignment strategies had worked. Despite differences in litigation strategy, both the NRA and Alan Gura had agreed on one thing, litigating against handgun bans as infringements on the right to self-defense represented a more strategic alignment of legal and cultural frames than trying to overturn more stringent regulations, like the GCA's limits on automatic weapons. Though the Supreme Court had once maintained that military-style weapons were the only weapons protected by the Second Amendment, the NRA, and other proponents of gun rights like Gura, realized that such a position had become politically and culturally untenable by the close of the twentieth century. Indeed, while the NRA did indicate support for a bill tightening the definition of machine guns in 2007, its litigation team steered clear of an outright

170. *See* Adam Liptak, *Justices Will Weigh Challenges to Gun Laws*, N.Y. TIMES, Oct. 1, 2009, at 17; Tony Mauro, *Liberals Use Supreme Court Gun Ban to Bolster Other Rights*, LEGAL TIMES, Feb. 24, 2009.

171. For the dispute between Gura and the NRA over litigation strategy, see Robert Barnes, *supra* note 169, at A13.

172. 92 U.S. 542 (1874).

173. Adam Liptak, *Justices Seem to Lean Toward Extending Individual Right to Own Guns*, N.Y. TIMES, Mar. 3, 2010, at 14.

174. McDonald v. City of Chicago, 130 S. Ct. 3020, 3038 (2010).

challenge, indicating that the lobby had learned the value of prudent frame alignment.[175] The fact that both the NRA and Gura made black rights a cornerstone of their Second Amendment arguments in *Heller* and *McDonald* indicates that at least some of this strategy might have derived from earlier lessons learned by the civil rights movement.[176]

In the next section, we will see how lessons from the civil rights movement shaped not only gun litigation, but litigation on behalf of lesbian, gay, and bisexual (LGB) social movement groups as well. As with the Second Amendment, LGB litigators, like Lambda Legal, worked diligently to align legal claims with cultural frames, achieving generally positive results. However, the decision by conservative lawyer Ted Olson to bring a legal challenge to California's same-sex marriage ban indicates a radical departure from the frame alignment lessons that the civil rights era has to teach.

IV. SAME-SEX MARRIAGE AND CULTURAL FRAMES

Though generally not associated with guns, another area of constitutional law heavily implicated in the alignment of legal and cultural frames is gay rights, an issue that, not coincidentally, can also trace its lineage to the end of the civil rights era. Prior to the 1970s, for example, most states criminalized sexual conduct between persons of the same sex, and no organized movement existed to lobby for legal protections on their behalf.[177] This began to change in the 1960s, however, when the American Law Institute recommended the decriminalization of sodomy and the American Civil Liberties Union amended its policy on homosexuality, agreeing to represent gay plaintiffs in discrimination suits.[178] Expressly gay litigation groups

175. Gary Emerling & David C. Lipscomb, *Gun Control Still in Force, Chief Says—Semiautomatics Banned*, WASH. TIMES, June 28, 2008, at A1.

176. Popular support for gun control dwindled during the first decade of the Twentieth Century, increasing the Legal Opportunity Structure for federal cases like *Heller* and *McDonald*. To take just a few examples, a 2008 Gallup poll indicated that only twenty-eight percent of Americans favored an absolute ban on handguns, significantly lower from the time the poll was first taken in 1959, when sixty percent of the population favored a total ban. Jeffrey M. Jones, *In U.S., Record-Low Support for Stricter Gun Law*s, GALLUP (Oct. 9, 2009), http://www.gallup.com/poll/123596/in-u.s.-record-low-support-stricter-gun-laws.aspx. According to a CNN/Opinion Research Corporation poll conducted in 2009, only thirty-nine percent of Americans favored stricter gun laws of any kind, much less outright bans. Bill Schneider, *Poll: Fewer Americans Support Stricter Gun Control Laws*, CNN (Apr. 8, 2009), http://www.cnn.com/2009/POLITICS/04/08/gun.control.poll/#cnnSTCText.

177. WILLIAM N. ESKRIDGE, JR., GAYLAW 65, 99 (1999) [hereinafter ESKRIDGE, GAYLAW]. Perhaps the largest gay rights group in existence in the 1960s was the North American Homophile Conference, which boasted a relatively meager 6000 members. Webster Schott, *Civil Rights and the Homosexual: A 4-Million Minority Asks for Equal Rights*, N.Y. TIMES, Nov. 12, 1967, at 47.

178. *See* Schott, *supra* note 177, at 451. One of the first gay plaintiffs represented by the ACLU was Clive Boutilier a Canadian immigrant deported for being homosexual pursuant to the Immigration and Nationality Act of 1952. *High Court Denies Homosexual Plea*, N.Y. TIMES, May 23, 1967, at 49.

formed not long thereafter, including the Lambda Legal Defense Fund in 1972, the Gay Rights Advocates (GRA) in 1977, and the Gay and Lesbian Advocates and Defenders (GLAD) in 1978.[179]

While gay litigation groups like Lambda factor into most legal histories of LGB social movements, a dramatically different level of granularity emerges in the work of socio-legal scholars who focus on cultural frame alignment rather than in the work of law scholars who simply focus on mobilization, counter-mobilization, and "rights discourse."[180] Leading LGB litigation scholar William Eskridge provides an example. Following the traditional legal perspective that "social movements literature does not adequately reflect the importance of law," Eskridge cites relatively few social movement studies in his work.[181] Yet, as this section will show, this approach misses important strategic aspects of constitutional litigation surrounding issues of gay rights, a point best made by comparing the history of gay rights as recounted by Eskridge to the history of gay rights as recounted by Ellen Andersen, a social movement theorist and political scientist at the cutting edge of merging the study of constitutional litigation with cultural frame alignment.[182]

At first glance, Andersen and Eskridge appear quite similar. Both discuss significant historical events that impacted the LGB movement, including the 1948 Kinsey Report, the Model Penal Code's decriminalization of sodomy in 1962, and the Stonewall Riot.[183] Both also discuss the formation of litigation groups like Lambda Legal as well as the broader implications of conservative reactions to such developments.[184]

Yet, Eskridge and Andersen differ in their recovery of the strategic frame alignment that went into LGB litigation decisions. For example, Eskridge describes the litigation campaign against sodomy laws in the 1970s to be a factor of Supreme Court privacy rulings, opinions which encouraged groups like the ACLU to challenge state sodomy statutes.[185] By contrast, Andersen shows how the decision to pursue privacy litigation was not simply a factor of Supreme Court privacy rulings, but a strategic choice not to pursue more common

179. ANDERSEN, *supra* note 9, at 19.

180. ESKRIDGE, GAYLAW, *supra* note 177. at 100.

181. ANDERSEN, *supra* note 9, at 17-26; Eskridge, *Channeling*, *supra* note 7, at 420.

182. *See generally* ANDERSEN, *supra* note 9; ESKRIDGE, GAYLAW, *supra* note 177, ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996) [hereinafter ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE]; WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003 (2008) [hereinafter ESKRIDGE, DISHONORABLE PASSIONS].

183. ESKRIDGE, GAYLAW, *supra* note 177, at 109-11.

184. ANDERSEN, *supra* note 9, at 19; ESKRIDGE, GAYLAW, *supra* note 177, at 107; ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 160.

185. *See* ESKRIDGE, GAYLAW, *supra* note 177, at 105; ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 184-85.

claims by LGB parents desiring legal custody of their children.[186] Cognizant that the Supreme Court's privacy jurisprudence aimed to shield heterosexual couples from the state, Lambda made the strategic decision to attack laws limiting what private couples could do in the privacy of their own homes, including sexual acts that applied to both heterosexual and homosexual pairs.[187] By contrast, Lambda lawyers deliberately avoided lawsuits that aimed to extend custody rights to gay parents, reasoning that such a move would lack the kind of general support that a more neutral push for privacy might achieve.[188] Lambda's strategic decision to downplay custody and emphasize privacy reflected an astute alignment of the legal frame of gay rights with the cultural frame of heterosexual, middle class privacy interests.[189]

Despite privacy's promise, lawsuits challenging sodomy statutes based on a privacy theory confronted their own strategic challenges, a problem that Andersen identifies but Eskridge occludes. For example, in one of the first suits to challenge a state sodomy statute, *Doe v. Commonwealth's Attorney*, the ACLU brought a legal challenge to Virginia's sodomy law in federal district court in 1973.[190] As Eskridge tells it, the fact that a three-judge panel was assigned to hear the case bore little significance. "The majority of the three-judge court rejected the ACLU arguments," writes Eskridge, and "[t]he Supreme Court summarily affirmed."[191] To Andersen, however, the ACLU's decision to appeal the ruling of a three-judge panel was a strategic frame alignment mistake, one that exacerbated the challenge of overturning sodomy laws in court.[192] How so? Because of the three-judge panel, the ACLU was able to exploit a rare procedural provision that allowed for direct, automatic appeal to the Supreme Court.[193] Under this rule, the Supreme Court could not choose to deny certiorari but had to review the case, leading Andersen to conclude that the ACLU actually forced a decision that may have been better left for some later date, when the legal and cultural frames regarding sodomy laws were more closely aligned.[194] As it was, however, the Supreme Court

186. *See* ANDERSEN, *supra* note 9, at 32.
187. *Id.* at 33-34.
188. *Id.* at 32-33.
189. *Id.* Initially the concern of elites, privacy became a middle class concern following World War II as thousands of American families adopted new modes of living—suburbanization—and embraced new modes of leisure, including consequence-free, contraceptive-protected sex—both of which amplified popular interest in privacy, an "interest whose importance," notes William J. Stuntz, "grows with one's bank account, or one's square footage." William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1289 (1999).
190. 403 F. Supp. 1199, 1200 (E.D. Va. 1975).
191. ESKRIDGE, GAYLAW, *supra* note 177, at 105.
192. *See* ANDERSEN, *supra* note 9, at 66.
193. *Id.*
194. *Id.* at 66-67.

ended up affirming a district court decision holding that privacy protections did not extend to homosexual couples, a ruling that arguably had some precedential weight.[195] Though Eskridge is correct that the Supreme Court affirmed *Doe*, his account misses a potentially important lesson for both social movement scholars and litigators, namely the question of how structuring appeals might factor into cultural frame alignment.

More occlusions emerge in Eskridge's account of the events that led from *Doe* to *Bowers v. Hardwick*, decided in 1986.[196] While Eskridge acknowledges that state trends toward overturning sodomy laws increased from 1976—the year *Doe* was decided—to 1982, the year *Hardwick* was filed, he omits at least two reasons why LGB lawyers felt that a federal challenge to sodomy statutes made strategic sense. First, Eskridge neglects to mention Ronald Reagan's presidential victory in 1980, which according to Andersen caused LGB litigators to accelerate an appeal before more conservative justices could be appointed to the court.[197] Second, Eskridge avoids discussing a Texas district court's ruling in *Baker v. Wade*,[198] a case similar to *Bowers* decided in 1982, the same year that *Bowers* was filed.[199] In *Baker*, the plaintiff presented evidence suggesting that social and even medical attitudes towards homosexuals were changing, essentially altering the structure of legal opportunity for gay rights claims.[200] For example, the plaintiffs presented evidence that the American Psychiatric Association had removed homosexuality from its list of mental disorders; that homosexuality had no statistical correlation to higher crime; and that homosexuality was not simply a matter of moral choice.[201] Much of this testimony was delivered by experts, indicating that views of homosexuality were changing rapidly, at least among elites.[202]

Ironically, just as elites seemed to be softening their attitudes towards homosexuality, more conservative rustlings could be heard coming from the base, leading to the third omission that Eskridge leaves out of his analysis.[203] Specifically, the election of Ronald Rea-

195. *Doe*, 403 F. Supp. at 1203, *summarily aff'd*, 425 U.S. 901 (1976), *reh'g denied*, 425 U.S. 985 (1976).

196. 478 U.S. 186 (1986).

197. ANDERSEN, *supra* note 9, at 82.

198. 553 F. Supp. 1121 (N.D. Tex. 1982).

199. Eskridge mentions the Fifth Circuit opinion overturning *Baker*, but not the district court opinion upholding it. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 238-39.

200. ANDERSEN, *supra* note 9, at 70-71.

201. *Id.* at 71.

202. *See id.*

203. Eskridge mentions the Reagan election in passing, noting that it constituted one of the "calamities of the decade," but fails to show how it accelerated LGB litigation in *Bowers*. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 235.

gan in 1980 tolled an ominous bell for gay rights activists, not because Reagan personally made homosexuality a campaign issue, but because much of his support came from moral reactionaries associated with the Christian Right.[204] Though Reagan never identified himself as an evangelical, his victory raised questions for gay litigants, convincing some that assaults on sodomy laws should wait, while persuading others that legal attacks should commence forthwith before Reagan could appoint moral conservatives to the federal courts.[205] Ambivalence ensued. When a legal group called the Gay Rights Advocates, or GRA, challenged an Oklahoma law making " 'public homosexual conduct or activity' " grounds for firing school teachers, Lambda counseled against pursuing the matter out of fear that a loss at the circuit level might preclude future gay rights claims.[206] Andersen covers this reluctance, showing how it illustrates conscious frame alignment, but Eskridge ignores it, even indicating that Lambda was in favor of the litigation.[207]

By omitting strategic considerations like Lambda's reluctance to participate in the Oklahoma case, Eskridge fails to fully explain why *Bowers v. Hardwick* was filed when it was.[208] This, in turn, precludes a larger understanding of how strategic frame alignment works. As we have seen, reasonable choices can misfire in the long run, but still constitute reasonable choices at the time, arguably like Thurgood Marshall's decision to focus on child psychology in *Brown*.[209]

Conversely, lawyers who appear to be making unreasonable choices may have a deeper theory guiding their litigation decisions, as did Lambda in *Bowers*. For example, Eskridge himself notes that lawyers for the plaintiff in *Bowers* focused on Lewis F. Powell, Jr., a Nixon appointee who was socially conservative yet favored privacy protections of abortion.[210] Andersen indicates this emphasis was even more strategic, influenced in part by Powell's vote to strike down a New York law limiting the distribution of contraceptives in 1977, again on privacy grounds.[211] Powell's recurring interest in privacy led Lambda to suspect that he may have been prone to expanding privacy protections even more, including to consensual behavior be-

204. LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT 259 (2001).

205. *Cf.* Kenneth A. Briggs, *Evangelicals Debate Their Role in Battling Secularism*, N.Y. TIMES, Jan. 27, 1981, at A12 (discussing antihomosexual evangelical Christian influence in national politics and electing Reagan).

206. ANDERSEN, *supra* note 9, at 82-83.

207. *See id.*; ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 226.

208. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 238-39.

209. *See supra* Part II.

210. *See* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 243-47.

211. ANDERSEN, *supra* note 9, at 88-89. The decision striking down New York's anti-contraceptive law was *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

tween same-sex adults.[212] Yet, even though the legal frame of gay rights and the cultural frame of privacy seemed like they might line up, Powell proved unwilling. He conceded that if Hardwick had been incarcerated he might have ruled in his favor, reasoning that it was a violation of the Eighth Amendment to punish someone as severely for sodomy as for "aggravated battery . . . first-degree arson . . . and robbery," but Powell ultimately found that because Georgia had dropped its prosecution of Hardwick, he suffered no real harm.[213]

Though Lewis Powell proved to be the critical vote against Michael Hardwick, larger historical forces contributed to the decision's outcome as well. One, clearly, was the election of Ronald Reagan in 1980, which placed Sandra Day O'Connor on the Court, giving Georgia a critical conservative vote in what would become a five-to-four decision.[214] Another factor was a shift in the cultural frame of gay rights due to AIDS.[215] First recognized as a health crisis in the mid-1980s, the emergence of AIDS engendered a backlash in many states against homosexuality on the grounds that gays jeopardized public health.[216] In 1986, for example, Missouri's Supreme Court upheld the state's sodomy law not on moral grounds, but out of a concern for public health, holding that "the general promiscuity characteristic of the homosexual lifestyle made such acts among homosexuals particularly deserving of regulation."[217] Here, health concerns over AIDS helped to explain how the state could rationalize the decriminalization of oral and anal sex between people of the opposite sex, meanwhile retaining criminal sanctions for same-sex couples.[218]

Health concerns over AIDS, conservative appointments to the federal judiciary, and *Bowers v. Hardwick* all reduced the structure of legal opportunities open to gay rights advocates in the 1980s, marking a shift in the nation's cultural frame against homosexual litigants. Yet, *Bowers* arguably had a positive impact as well, one that Andersen documents but Eskridge largely ignores. To Eskridge, *Bowers*' main contribution was pedagogical, a point he makes by noting that the ruling "transformed the constitutional law curriculum of

212. ANDERSEN, *supra* note 9, at 89.

213. Bowers v. Hardwick, 478 U.S. 186, 197-98 (1986) (Powell, J., concurring).

214. ANDERSEN, *supra* note 9, at 75. *See generally* HERMAN SCHWARTZ (1988). For the impact of this campaign on actual cases, see Steven Alumbaugh & C.K. Rowland, *The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgments*, 74 JUDICATURE 153 (1990).

215. *See* Sara Rimer, *Fear of AIDS Grows Among Heterosexuals*, N.Y. TIMES, Aug. 30, 1985, at A1; *see also* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 261-62; ANDERSEN, *supra* note 9, at 78-81.

216. *See* Rimer, *supra* note 215, at B2; ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 261-62; ANDERSEN, *supra* note 9, at 78-81.

217. State v. Walsh, 713 S.W.2d 508, 512-13 (Mo. 1986).

218. *See* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 261-62; ANDERSEN, *supra* note 9, at 80-81.

Yale and every other law school in America."[219] To Andersen, by contrast, *Bowers*'s primary contribution was political: together with the crisis over AIDS, argues Andersen, *Bowers* helped encourage social movement organizing.[220] Rather than accept the Supreme Court's opinion, LGB activists rallied against it, holding a March on Washington for Lesbian and Gay Rights in 1987—a clear parallel to the civil rights movement—and tripling donations to Lambda from 1985 to 1986.[221]

While Andersen arguably does a better job of capturing the link between constitutional litigation and social movement organizing than Eskridge, both Eskridge and Andersen show how LGB mobilization polarized electoral politics in states across the country, pitting urban cosmopolitans against rural evangelicals.[222] "Between 1972 and 1992," observes Eskridge, LGB activists "persuaded dozens of city and county councils to adopt ordinances prohibiting employers, public accommodations, and landlords from discriminating against employees, tenants, and patrons on the basis of their sexual orientation."[223] Though moral conservatives tried to fight such initiatives at the local level, they tended to be out-numbered, leading to statewide, conservative coalitions that sought to overturn localized gay protections through state referenda.[224]

When Colorado enacted such a referendum in 1992, it triggered an automatic LGB response.[225] Rather than engage in the political spade-work necessary to transform majority opinion, Lambda Legal and others made a direct appeal to the courts, gambling that the legal frame of equal protection, the same constitutional provision used in *Brown*, would sway the federal judiciary.[226] Lambda even mimicked the NAACP's strategy in *Brown* by introducing sociological data showing that "LGB people posed neither physical nor psychological harm to children."[227] Though such evidence played less of a role in *Romer v. Evans*[228] than it did in *Brown*, the end result proved the

219. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 266.

220. ANDERSEN, *supra* note 9, at 95-96.

221. *See id.* at 95.

222. *See* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 279; ANDERSEN, *supra* note 9, at 153.

223. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 279.

224. *Id.*

225. *Id.* at 280-81; ANDERSEN, *supra* note 9, at 160. Amendment 2 barred the state from granting LGB people any kind of "protected status," effectively invalidating anti-discrimination ordinances passed in Aspen, Boulder, and Denver. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 280; *see also* COLO. CONST. art. II, §30b.

226. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 281; ANDERSEN, *supra* note 9, at 160.

227. ANDERSEN, *supra* note 9, at 171.

228. 517 U.S. 620, 635-36 (1996).

same: Lamba's appeal inspired the Court to overturn Amendment 2 in 1996.[229]

For Eskridge, *Romer* represented "that rare Supreme Court decision that successfully anticipated changes in public opinion before they were clear to other officials."[230] Yet, the question of just how far public opinion would go in the direction of gay rights remained uncertain. Attuned to cultural frames, Andersen provided a more conservative analysis, positing that *Romer* represented a combination of legal frames undergirding the case particularly equal protection jurisprudence, and cultural frames, or liberal values held by legal elites.[231] That *Romer* represented an elite view, something that Andersen stresses, is important to note for at least two reasons. One, it illustrates the complexity of cultural frames, indicating how diverging opinions, beliefs, and moral frameworks can exist in the same culture at the same time, making it hard to determine whether certain legal frames will align or not. Two, it underscores the problem of intracultural conflict, or warring values, the victor of which can prove determinative of legal results.

Out of all the Justices on the Court at the time *Romer* was decided, only Antonin Scalia identified the cultural tensions at stake in the decision. To his mind, the Court had interfered in nothing less than a "Kulturkampf" or cultural war between secular homophiles and "modest" Coloradans interested in preserving "traditional sexual mores."[232] While one way to interpret this was that Scalia endorsed "a state-sponsored campaign to force a minority into conformity," another possible interpretation, discredited by Eskridge, was that Scalia really meant a "culture clash between fundamentalists and progay *nomoi*," or interests.[233]

Pursuant to this view, progay and antigay activists were literally engaged in a battle for hearts and minds, a cultural conflict with direct political results, something that cultural theorist Stuart Hall called a "war of position."[234] However, neither Andersen nor Eskridge invoke Hall's analytic, limiting the extent to which either successfully convey the role that culture played in the post-*Romer* era. For example, even though Andersen mentions that fears of AIDS declined in the 1980s, she fails to mention obvious cultural flashpoints like Ryan White, who contracted AIDS from a blood transfusion when he was fourteen years old and quickly became a national celeb-

229. *See* Linda Greenhouse, *Colorado Law Void: Majority Says Measure was Discriminatory—Hostility Cited*, N.Y. TIMES, May 2, 1996, at A1.

230. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 289.

231. ANDERSEN, *supra* note 9, at 164-67.

232. *Romer*, 517 U.S. at 636 (1996) (Scalia, J., dissenting).

233. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 288; ESKRIDGE, GAYLAW, *supra* note 177, at 294.

234. Hall, *supra* note 12, at 439.

rity after fighting local opposition to enroll in public school in Kokomo, Indiana in 1985.[235] Andersen also omits mention of National Basketball Association star Magic Johnson who contracted the disease through heterosexual sex and proved, to many, that one could live with the condition.[236] Such figures helped "pierce myths" about AIDS, convincing average voters that the disease was not simply a homosexual threat.[237]

The emergence of respectable victims like Magic Johnson and Ryan White in the 1980s prefigured a much more aggressive campaign to normalize homosexuality undertaken, perhaps ironically, by corporate interests involved in media and marketing in the 1990s.[238] As Eskridge—who actually cites more pop culture references than Andersen—puts it, "homosexuality began to saturate public culture, with more positive and complex depictions of gay people showing up in the movies, on Broadway, in popular stories and novels, and even on television," presumably all with profitable results.[239] For example, Eskridge cites *Will and Grace,* a National Broadcasting Corporation (NBC) sitcom featuring Debra Messing and Eric McCormack as a straight woman and gay man sharing an apartment.[240] While critics complained that the program limited gay roles to instances where "sexually viable" gay males were "safely (albeit chastely) paired with a heterosexual woman," the series, which premiered in 1998 went on to draw an average weekly audience of almost seventeen million viewers, making it the "third-most watched sitcom on network television" in 2002.[241]

Perhaps just as groundbreaking was *Ellen*, another popular sitcom that predated *Will and Grace* by a year, and focused on comedian Ellen DeGeneres.[242] Though lesbian, DeGeneres did not make her sexual preference clear until after building a dedicated viewing audience, at which point the show's writers consciously devised a sympathetic coming-out moment, when Ellen declared offhandedly at an airport that she was, in fact, gay.[243] Though controversial, *Ellen's*

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235. Dirk Johnson, *Ryan White Dies of AIDS at 18; His Struggle Helped Pierce Myths*, N.Y. TIMES, Apr. 9, 1990, at D10; ANDERSEN, *supra* note 9, at 119.

236. Richard W. Stevenson, *Basketball Star Retires on Advice of His Doctors*, N.Y. TIMES, Nov. 8, 1991, at A1; Anna Quinden, *Believe in Magic*, N.Y. TIMES, Nov. 9, 1991, at 23.

237. Johnson, *supra* note 235, at D10.

238. *See supra* notes 214-17.

239. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 267-68.

240. *Id.* at 268; Stephen McCauley, *He's Gay, She's Straight, They're A Trend*, N.Y. TIMES, Sept. 20, 1998, at 31.

241. McCauley, *supra* note 240 at 31; Bernard Weinraub & Jim Rutenberg, *Gay-Themed TV Gaining a Wider Audience*, N.Y. TIMES, July 29, 2003, at C5.

242. Lawrie Mifflin, *Title Character in 'Ellen' May Come Out as Gay*, N.Y. TIMES, Sept. 16, 1996, at C14.

243. Lawrence Van Gelder, *Celebrations as a TV Lesbian Goes Prime Time*, N.Y. TIMES, May 1, 1997, at B15.

ratings remained high, making her the first "avowedly gay leading character in television history."[244]

Perhaps even more importantly, *Ellen's* advertisers stayed.[245] Once pioneering progay business models like *Ellen* succeeded, corporations felt more comfortable reaching out more openly to gay consumers, a market demographic that some estimated to be worth over $400 billion.[246] To take just one example, in 1998, the same year that *Will & Grace* premiered, Levi Strauss & Co. embarked on an "ambitious marketing campaign aimed at gay men and lesbians," in the hopes that it might "reverse flagging sales" by appealing to "trend-setting consumers."[247] Other companies followed, "aiming sales pitches at homosexuals for products from cars to computers."[248]

Such shifts in consumer culture are not mentioned by Andersen or Eskridge, but help explain why Lambda decided to revisit the Court's position on state sodomy laws in 1998, over ten years after *Bowers*.[249] Also, a string of victories against sodomy statutes at the state level, together with a string of legislative repeals of sodomy laws, which Andersen and Eskridge do mention, all indicated that cultural frames regarding sodomy were veering in the direction of LGB interests.[250] Sensing opportunity, Lambda attorneys challenged the arrest of a gay man for sodomy in Houston, Texas in 1998, arguing that the state sodomy statute violated both equal protection and privacy.[251]

In a cautionary 2003 ruling, Justice Anthony Kennedy marshaled a majority declaring that the Texas law violated privacy, but not equal protection.[252] Though some took this to be a categorical victory for LGB interests, both Eskridge and Andersen picked up on the mixed signals, namely that while some cultural progress in the direction of gay rights had been achieved, more aggressive initiatives on

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244. *'Ellen' a Test Case for Publicity and Ratings: After the Hype, the Numbers*, N.Y. TIMES, Apr. 30, 1997, at C18; Courtney Kane, *Only Real Surprise on 'Ellen' Was Lineup of Advertisers*, N.Y. TIMES, May 2, 1997, at D2; Saralyn Chestnut, Letter to the Editor, *'Ellen' Opened Our Eyes to Gay Humanity*, N.Y. TIMES, May 5, 1997, at A14.

245. Kane, *supra* note 244, at D2.

246. *See* Stuart Elliott, *Levi Strauss Begins a Far-Reaching Marketing Campaign to Reach Gay Men and Lesbians*, N.Y. TIMES, at Oct. 19, 1998, at C11. Some estimated the buying power of the gay community to exceed $300 billion a year. *MTV and Showtime Plan Cable Channel for Gay Viewers,* N.Y. TIMES, Jan 10, 2002, at C1, 5.

247. Elliott, *supra* note 246, at C11.

248. *Id.*

249. According to Lambda's attorneys, "the legal and political context surrounding sodomy and homosexuality" had changed dramatically since 1986, warranting a frontal assault on precedent. ANDERSEN, *supra* note 9, at 122.

250. Andersen makes this point explicitly. *See id.* at 136; *see also* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 289-98.

251. Lawrence v. Texas, 41 S.W.3d 349, 350, 359 (Tex. App. 2001), *rev'd,* 539 U.S. 558 (2003).

252. Lawrence v. Texas, 539 U.S. 558, 574-75, 578-79 (2003).

behalf of LGB interests were unlikely to prevail.[253] To Eskridge, *Lawrence* indicated "a confluence of opinion" between "sexual pro-choice liberals, . . . relationals who understood that gay people formed families and committed unions, and . . . pragmatic traditionalists who believed the legal line should be drawn at gay marriage rather than homosexual criminality."[254] To Andersen, the ruling reflected a simple matter of frame alignment.[255]

While both analytical descriptions were arguably correct, Andersen's was less idiosyncratic. Rather than invoke arcane terms like "relationals" and "pragmatic traditionalists" she made the simple, straightforward case that cultural frames had evolved since *Bowers*, but not as far as LGB activists might have liked. Based on her analysis of *Lawrence*, one could deduce that moves in the direction of more outwardly gay causes like same-sex marriage were likely to fail. Even same-sex marriage cases seemed to suggest as much. As Andersen herself illustrates, two same-sex plaintiffs in Alaska sued the state for marriage licenses in 1998, the same year that *Lawrence* was filed, only to precipitate a constitutional backlash as heterosexual voters approved an amendment restricting marriage to persons of the opposite sex, indicating cultural frames were resistant to same-sex marriage.[256] Meanwhile, two same-sex plaintiffs in Hawaii met similar resistance as voters amended the state constitution to prohibit same-sex marriage there as well.[257] By 2008, twenty-nine states had enacted bans on gay matrimony.[258]

While anyone versed in cultural frame alignment might have interpreted the rise of nearly thirty state bans against same-sex marriage as an indication that cultural frames were closing, this did not occur to constitutional attorney Ted Olson, a well-known conservative who had argued against affirmative action in federal contracting, assisted in the impeachment of President Clinton, and served as President George W. Bush's solicitor general.[259] Only ten days after California voters approved a proposition banning same-sex marriage, Michele Reiner, Hollywood director Robert Reiner's wife, recommended that a friend contact Olson about the possibility of an ap-

253. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 378-86; ANDERSEN, *supra* note 9, at 136.

254. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 332.

255. ANDERSEN, *supra* note 9, at 136.

256. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI., 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998); ANDERSEN, *supra* note 9, at 175.

257. Baehr v. Lewin, 852 P.2d 44, 48-49 (Haw. 1993).

258. Hendrick Hertzberg, *Eight is Enough*, THE NEW YORKER, Dec. 1, 2008, at 27; Margaret Talbot, *A Risky Proposal; Is it too soon to petition the Supreme Court on Gay Marriage?*, THE NEW YORKER, Jan. 18, 2010, at 40.

259. Jo Becker, *A Conservative's Road to Same-Sex Marriage Advocacy*, N.Y. TIMES, Aug. 18, 2009.

peal.[260] After a meeting at Reiner's home, Olson took the case, prompting speculation that he might have been interested in seeing the appeal lose.[261] While evidence emerged suggesting that this was not the case, leading gay-rights organizations like Lambda Legal issued a public statement opposing Olson's advocacy, arguing that the "odds of success" for a Supreme Court ruling were not good, and that the Court "typically does not get too far ahead of either public opinion or the law in the majority of states."[262] Instead of rushing to court, Lambda counseled patience, and attention to the democratic process.[263] "We lost the right to marry in California at the ballot box," declared the group, and "[t]hat's where we need to win it back."[264] While Lambda had once urged a rush to the Court in *Bowers*, afraid that newly elected President Ronald Reagan would appoint conservatives to the nation's highest tribunal, Barack Obama's victory in 2008 indicated that discretion might be a more prudent strategy here, particularly given the likelihood that Obama might appoint liberals to the Court over the course of his administration.[265]

Even William Eskridge, who had not invoked frame alignment in any of his studies of LGB legal campaigns, publicly declared that he remained "pessimistic" about Olson's chances for success.[266] Paralleling Lambda, Eskridge expressed concern that since Proposition 8 had been approved, Maine had passed a referendum overturning its same-sex marriage law, meanwhile the senates of New York and New Jersey, both liberal-leaning, had decided not to allow gay marriage.[267] This meant that, while a handful of states allowed same-sex couples to marry, a significant majority opposed it.[268]

Ignoring obvious trends, Olson began a bizarre frame transformation effort, hoping to use his conservative credentials as leverage against opponents of same-sex unions, and to use the case, *Perry v. Schwarzenegger*, as a "teaching opportunity."[269] Sure that he alone could convince conservative America of the intrinsic morality of gay marriage, Olson cavalierly declared that "people will listen to us talk

260. Becker, *supra* note 259; Hertzberg, *supra* note 258, at 27; Talbot, *supra* note 258, at 40.

261. Talbot, *supra* note 258, at 40. Olson's case is not to be confused with *Strauss v. Horton*, the 2009 California case that upheld Proposition 8 on the grounds that it was an ordinary amendment and not a more far-reaching revision. *See* Editorial, *A Setback for Equality*, N.Y. TIMES, May 27, 2009, at A26; Cheryl Wetzstein, *California High Court Explains its Decision—Gay Marriage Ban Lawfully Established*, WASH. TIMES, May 28, 2009, at A18.

262. Talbot, *supra* note 258, at 40.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id*

267. *Id.*

268. *Id.*

269. *Id.*

about the importance of treating people with dignity and respect," an unlikely outcome, particularly given the fact that even better-known conservatives than Olson, including Vice President Dick Cheney, had come out in favor of gay marriage, with little visible impact on conservative voters.[270] Unswayed, Olson published an article entitled "The Conservative Case for Gay Marriage," in *Newsweek* two days before the beginning of trial, positing that same-sex marriage advanced "values [that] conservatives prize," among them "a stable bond between two individuals," and a commitment to the "bedrock . . . principle of equality" sanctified by the "noble and elegant" words of the Declaration of Independence.[271]

While Ted Olson's cavalier foray into LGB litigation is probably more attributable to vainglory than to the failure of law schools to train students in cultural frame alignment, his case provides an excellent example of why cultural frames matter. Though largely ignored by constitutional scholars like Eskridge, Siegel, and Klarman, frame alignment theory provides a uniform analytic for comparing litigation strategies in separate constitutional areas, and even constitutional times, like the Second Amendment, same-sex marriage, and civil rights for example. Indeed, once compared to the civil rights litigation in *Sullivan* and *Brown* and the Second Amendment litigation in *McDonald* and *Heller*, Olson's approach in *Perry v. Schwarzenegger* appears to blithely ignore troubling cultural developments, not least of them a groundswell of conservative, evangelical opposition to the notion of same-sex marriage. Even if Olson succeeds in his litigation campaign his victory may prove Pyrrhic as conservatives use Perry to marshal evangelical support against him. By contrast, the NRA's careful strategizing in *Heller* and *McDonald*, neither of which evoked a backlash, emerge a much closer cousin to civil rights cases like *New York Times v. Sullivan* in the 1960s.

V. CONCLUSION

At a symposium on social movements and law reform held at the University of Pennsylvania Law School in 2001, Edward L. Rubin lamented that legal academics remained "largely oblivious" to work done by social movement scholars in sociology and political science.[272] Despite Rubin's plea that law scholars "mak[e] contact with the social movements literature," however, relatively little has been done in that direction, particularly in regard to the subfield of social movement theory known as frame alignment.[273] As this Article has

270. *Id.*

271. Theodore B. Olson, *The Conservative Case for Gay Marriage; Why same-sex marriage is an American value*, NEWSWEEK, Jan. 9, 2010, at 48.

272. Rubin, *supra* note 6, at 2.

273. *See id.* at 3.

attempted to show, leading scholars of civil rights, Second Amendment litigation, and LGB litigation have all ignored frame alignment theory and in so doing not only missed strategic aspects of their own chosen areas of inquiry, but also failed to see the degree of similarity across divergent constitutional fields.

To illustrate, Michael J. Klarman's analysis of civil rights activism in the aftermath of *Brown* posits that a southern backlash to the opinion created an opportunity that civil rights activists could exploit through the use of direct action protest.[274] Missing from this analysis, however, is any awareness of the fact that cultural frames surrounding school integration in the 1950s became inextricably linked to cultural frames surrounding delinquency, and that northern interest in desegregation and southern hysteria over desegregation both declined rapidly by the end of the decade.[275] When civil rights activists decided to stage sit-in demonstrations in 1960 they did not benefit from a backlash to *Brown* so much as work to create a new backlash, one that recast cultural assumptions about race to the nation.[276]

Meanwhile, civil rights litigators shifted their frame alignment strategies to match new developments initiated by social movement actors on the ground.[277] Whereas Thurgood Marshall had once gambled that aligning the legal frame of civil rights with cultural frames surrounding the psychological development of children, this frame alignment strategy failed to be of any use to the direct action phase of the civil rights movement.[278] In fact, focusing on the psychological development of children only aided counterframing moves initiated by segregationists.[279] Consequently, civil rights litigator Herbert Wechsler, a veteran of aligning civil rights legal claims with larger cultural frames going back to the 1930s, took a new tact, defending northern media interests who had covered the sit-in demonstrations from southern libel suits.[280] Not attuned to the subtle shifts in frame alignment being carried out by litigators like Wechsler, Klarman occludes the significance of *New York Times v. Sullivan* to the race beat, reinforcing a larger misconception about the central role of culture in civil rights reform, and about the precise manner in which legal cases facilitated cultural frame alignment and impacted constitutional results.[281]

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274. *See supra* Part II.
275. *See supra* Part II.
276. *See supra* Part II.
277. *See supra* Part II.
278. *See supra* Part II.
279. *See supra* Part II.
280. *See supra* Part II.
281. To Pulitzer Prize-winning journalists Gene Roberts and Hank Klibanoff *New York Times v. Sullivan* represented "a form of liberation." *See* ROBERTS & KLIBANOFF, *supra* note 111, at 364.

Reva Siegel makes a similar mistake in the Second Amendment context. Just as Klarman reads civil rights strategy in broad brush strokes, lumping over a decade of strategic decisionmaking into an overly simplistic backlash thesis, so too does Siegel read Second Amendment litigation as a relatively monolithic process of "popular constitutionalism."[282] To Siegel, gun rights groups like the NRA mounted a four-decade campaign to associate the Second Amendment with an individual right to bear arms, particularly handguns and hunting rifles.[283] Though true in the broad sense, missing from Siegel's analysis is any sense of the strategic frame alignment choices that groups like the NRA made, particularly their decision not to deregulate the ownership of automatic weapons.[284] Precisely because cultural frames regarding automatic weapons were relatively negative following the Gun Control Act of 1968, the NRA's litigation strategy was actually a relatively conservative frame alignment approach, one that stressed culturally popular notions of sportsmanship and self-defense.[285]

Further missing from Siegel's analysis of Second Amendment litigation is the extent to which the NRA went to establish the right to self-defense, and to some extent the individual right to bear arms as "civil rights."[286] Again, this strategy represented an exercise in frame alignment inspired, in large part, by the success of the civil rights movement, a movement that the NRA consciously sought to identify itself with, both by designating the nation's "oldest" civil rights organization in its *Heller* brief, and by stressing the role that gun ownership played in denying African Americans their citizenship rights during both the Colonial and Reconstruction eras.[287]

Finally, a third example of missed opportunities due to avoidance of social movement theory can be found in William Eskridge's recovery of LGB litigation strategies.[288] When compared to the work of social movement scholars like political scientist Ellen Andersen, Eskridge's recovery of critical moments in the legal history of the LGB succumbs to the same problems of overgeneralization that can be found in Siegel and Klarman's work. To take just a few examples, while Eskridge contends that the decision by organizations like Lambda to focus on privacy concerns in the 1970s were logical outgrowths of the Warren Court's privacy jurisprudence, missing is any awareness of the strategic frame alignment choices that went into

282. *See supra* Part III.
283. *See supra* Part III.
284. *See supra* Part III.
285. *See supra* Part III.
286. *See supra* Part III.
287. *See supra* Parts II & III.
288. *See supra* Part III.

the LGB movement's privacy based assault on state sodomy laws.[289] As Andersen shows, the most common legal complaints to emerge in LGB communities in the 1970s did not involve sodomy statutes but custody claims by gay parents.[290] Yet, Lambda recognized that the cultural frames surrounding gay parenthood were much more negative than cultural frames surrounding privacy, hence the frame alignment choice to target sodomy statutes.[291]

Once into his discussion of sodomy cases, Eskridge occludes alignment choices that involved appellate procedure as well.[292] In discussing the ACLU's decision to attack Virginia's sodomy statute in 1973, for example, Eskridge fails to note that the ACLU's decision to appeal a three-judge panel ruling at the federal district level constituted a strategic mistake.[293] While a normal appeal would have allowed the Supreme Court to consider whether or not to grant certiorari, the three-judge appeal forced the Supreme Court to hear the case, leading to a negative ruling that, Andersen posits, may have actually have rushed the issue, generating a negative precedent counterproductive to the legal assault on sodomy laws generally.[294]

While other omissions emerge regarding both *Bowers* and *Lawrence*, what makes such occlusions particularly baffling is that Eskridge actually cites Andersen's work for minor issues of fact, meanwhile neglecting her analytic framework.[295] Why? Presumably more is going on than simply a different set of scholarly concerns, for the concerns that Eskridge pursues would actually be better served by Andersen's approach.[296] This indicates that Eskridge has been captured by a larger reluctance to cross disciplinary lines, a reluctance that might explain the general resistance to cultural frame analysis evident not only in his work, but Siegel and Klarman's as well.

What can be gained from encouraging law scholars to reach across interdisciplinary bounds and engage more fully with social movement theory? As this Article has tried to illustrate, social movement theory provides an analytic framework that lends itself to the excavation of strategic choices otherwise submerged in simplistic conceptions of popular constitutionalism and backlash. Further, sub-fields of social movement theory like frame alignment help to foreground culture in the analysis of constitutional rights, even as they help to reconcile unnecessarily disparate discourses in law, sociology, and political science. Finally, even lawyers stand to benefit from cultural

289. *See supra* Part IV.
290. *See supra* Part IV.
291. *See supra* Part IV.
292. *See supra* Part IV.
293. *See supra* Part IV.
294. *See supra* Part IV.
295. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 182, at 463 n.14.
296. *See supra* Part IV.

frame alignment for it is they who suffer most without at an appropriate theoretical understanding of when litigation should be initiated, how it should be framed, and ultimately how constitutional law and social movements intersect.