

ON TIPPING POINTS AND NUDGES: REVIEW OF CASS SUNSTEIN'S *HOW CHANGE HAPPENS*

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ABSTRACT

In How Change Happens, Cass Sunstein explores the mechanisms through which social change can occur, the triggers that can cause it, and the pitfalls along the road to change. For Sunstein, small influences, which arise through what he has called “nudges,” can have large impacts, particularly where they indicate that support for existing norms has fallen. When this occurs, it can reveal hidden preferences that might have existed all along, but individuals were discouraged from making them public because of the existence of those norms. Once support for an existing norm begins to disappear, it can create a tipping point and then a “norm cascade”: when support for a new norm takes hold securely in society. In recent years, several works have appeared that have attempted to explain the sources of social change by looking at examples of successful campaigns and trying to divine the sources of such successes. Sunstein offers a different perspective. He provides more of a theoretical view on the sources of social change, not just identifying the levers that can bring it about, but also some guidance on how to utilize them. It is a welcome addition to the scholarship on social change and stands as an elegant and insightful complement to some of the other recent and more inductive scholarship on the subject. As a way to test Sunstein’s theory of social change, this Review asks whether that theory can help explain recent developments, namely, the victory of the marriage equality campaign and the rise of a new and emboldened white nationalism in the wake of the election of Donald Trump to the U.S. presidency. As a review of these phenomena shows, Sunstein’s theory of change helps to provide insights into how such change came about, but it also raises more questions. Indeed, questions still linger, like when is a nudge enough, can we identify what will make something “tip”? Nevertheless, Sunstein offers deep insights into the inner workings of social

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change and how norm entrepreneurs can understand not just how change happens but also how to bring it about.

INTRODUCTION

Election night 2008 in the United States proved to be a key inflection point for social change in America. The victory of Barack Hussein Obama, an American born of a White mother and a Kenyan-born, African father represented for many a critical watershed, proof that the promise of racial equality in the United States was realized.¹ Like an earlier proclamation that we had reached the “end of history,”² some claimed it meant the United States had entered a “post-racial” period.³ Another critical event happened that night as well. While many Americans welcomed and celebrated the election of the first African-American President, with even Obama’s opponent, the late Senator John McCain, recognizing the historic import of the moment in his concession speech,⁴ election results of a ballot referendum in California were met with dismay.⁵ In that election, voters in the liberal state of California, who had overwhelmingly voted to elect President Obama, narrowly approved a ballot initiative that effectively overturned a previous decision of the California Supreme Court recognizing the rights of gays and lesbians to marry.⁶ Californians’ approval of this ballot initiative, which came to be known as Proposition 8, sent shock waves through the LGBTQ community.⁷ The election results in both of these instances unleashed widely disparate reactions. What happened next with respect to both outcomes says a lot about how social change happens in the United States.

Beneath the veneer of defeat, both outcomes generated strong reactions, and would result in the mobilization of forces determined to reverse these results. On the political front, it did not take long for Republicans, who also faced the prospect of strong majorities of Democratic lawmakers in both the House of Representatives and the Senate, to express their opposition to the President and commit to opposing efforts by the new administration to help the

1. For a discussion of the complex nature of the legacy of Barack Obama’s legacy, see, e.g., Ta-Nehisi Coates, *My President Was Black*, ATLANTIC, Jan./Feb. 2017, <https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793>.

2. See Francis Fukuyama, *The End of History?*, 16 NAT’L INT. 3 (1989).

3. See Dewey Clayton & Sean Welch, *Post-Racial America and the Presidency of Barack Obama*, 2017 ENDARCH 6 (describing arguments claiming the United States had entered a post-racial era with the election of President Obama).

4. See *John McCain Concession Speech*, GUARDIAN (Nov. 5, 2008), <https://www.theguardian.com/world/2008/nov/05/john-mccain-concession-speech>.

5. See NATHANIEL FRANK, AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA 186–89 (2017).

6. See *id.*

7. See Molly Ball, *The Marriage Plot: Inside This Year’s Epic Campaign for Gay Equality*, ATLANTIC (Dec. 11, 2012), <https://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865>.

nation dig out of the worst recession in seventy years.⁸ In fact, then-Senate Minority Leader Mitch McConnell vowed that all of his energies would be directed toward ensuring President Obama was a one-term President.⁹ Despite the apparent progress the election of a person of color to the presidency represented, this event also seemed to give individuals license to undermine the President's legitimacy, including charges, lobbied by so-called "birthers," that the President was not actually born in the United States: i.e., that he was "other" and not entitled to serve as President under the U.S. Constitution.¹⁰ One of the most vocal advocates for this position was someone who had mostly skirted electoral politics to this point in his career, preferring to grace the covers of tabloids, star in a reality television series, and engage in international real estate deals: Donald J. Trump.¹¹ Harsh critics of the President and his policies, fueled, likely, by this sense that he was "other," seemed to encourage racially tinged politics, the type that had mostly lurked somewhat near the surface in previous electoral cycles.¹² The election of President Obama seemed to encourage a more aggressive style of race-baiting invective. It was the opposite of post-racial politics. It played the race card, with intention and without shame.¹³

At the same time, the movement for same-sex marriage took the stunning defeat at the polls in California as a critical watershed, as an opportunity to regroup and assess its tactics and, most importantly, its message.¹⁴ For years, such same-sex ballot initiatives had been placed on ballots in different states across the country, mostly initiated by conservative groups looking to not just ban marriage equality in those states but also to drive conservative voter turnout and boost electoral chances for conservative politicians.¹⁵ In the 2004 election cycle, such bans appeared in referenda in states across the country, where conservative voter turnout could tip the election, like Missouri and Ohio. At the same time, pro-same-sex marriage efforts had succeeded, in fits and starts, in states like Massachusetts and Vermont, where victories in court cases under

8. See Daniel Altman, *How Republicans Sabotaged the Recovery*, FOREIGN POL'Y (July 23, 2012, 2:38 PM), <https://foreignpolicy.com/2012/07/23/how-republicans-sabotaged-the-recovery>.

9. See Glenn Kessler, *When Did McConnell Say He Wanted to Make Obama a 'One-Term President'?*, WASH. POST (Sept. 25, 2012, 3:00 AM) <https://www.washingtonpost.com/news/fact-checker/wp/2017/01/11/when-did-mitch-mcconnell-say-he-wanted-to-make-obama-a-one-term-president>.

10. See Claire Jean Kim, *President Obama and the Polymorphous "Other" in Political Discourse*, 18 ASIAN AM. L.J. 165 (2011) (describing "birtherism" and the rhetoric of the "other" in American politics).

11. See German Lopez, *Trump Is Still Reportedly Pushing His Racist "Birther" Conspiracy Theory About Obama*, VOX (Nov. 29, 2017, 10:04 AM), <https://www.vox.com/policy-and-politics/2017/11/29/16713664/trump-obama-birth-certificate>.

12. See, e.g., Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 682–89 (2010) (describing racial overtones of political rhetoric in the 2008 presidential election).

13. See *id.*

14. See Ball, *supra* note 7.

15. See FRANK, *supra* note 5, at 164–68.

state law had often found legal prohibitions banning same-sex marriage or civil unions as violating state constitutions. Movement leaders gathered in the wake of the Proposition 8 loss to try to understand what missteps they might have taken and what new tactics and strategies they might try if they were to attain their ultimate goal of the recognition of same-sex marriage, or, as they began to call it after Proposition 8, marriage equality.¹⁶ This subtle shift in messaging, which the marriage equality advocates learned might help engage a broader base of support, ultimately resulted in a key change in tactics.¹⁷ In four short years, marriage equality advocates won four state ballot referenda, even in the state of Maine, in which they had lost a similar referendum just three years earlier.¹⁸ Following these victories and others, including winning marriage equality by legislative act in New York State,¹⁹ the marriage equality campaign had its greatest victories: two major wins at the U.S. Supreme Court, the first, incremental, the second, sweeping. These victories ultimately meant that states could no longer outlaw marriages between people of the same sex.²⁰

Of course, soon after this second victory, another national election would signify another significant sea change. The “Birther-in-Chief” was not just a real estate mogul and reality TV star, he was the President-Elect.²¹

How did such results come about? What do these outcomes say about how social change happens? Cass Sunstein’s new book attempts to answer these and other questions. In *How Change Happens*,²² Sunstein explores the mechanisms through which social change can occur, the triggers that can cause it, and the pitfalls along the way to bringing about such change, like the backlash that can sometimes occur when advocates promote change that may be rejected by particular individuals and groups within society. For Sunstein, small influences can have large impacts, particularly when they create an environment where the support for particular norms fall, revealing hidden preferences that might have existed all along, but individuals were discouraged from making them public because of the existence of those norms.²³ Once support for an existing norm begins to disappear, it can create a tipping point and then a “norm cascade”: when support for a new norm takes hold securely in society.²⁴ In recent years, several works have appeared that have attempted to explain the sources of social change by looking at examples of successful campaigns and

16. See Ball, *supra* note 7.

17. See *id.*

18. See FRANK, *supra* note 5, at 273.

19. See *id.* at 265–67.

20. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

21. See Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES, Nov. 9, 2016.

22. CASS R. SUNSTEIN, *HOW CHANGE HAPPENS* (2019).

23. *Id.* at 3–4.

24. *Id.* at 10.

trying to divine the sources of such successes.²⁵ Sunstein offers a different perspective: providing a theoretical view on the sources of social change, not just identifying the levers that can bring it about but also setting forth some guidance on how to utilize them. It is a welcome addition to the scholarship on social change and stands as an elegant and insightful complement to some of the other, recent and more inductive scholarship on the subject. This Review proceeds by first outlining some of the critical theoretical points made in *How Change Happens* and then attempts to apply them to some recent instances where social change occurred, or is still unfolding. I will assess not just the successful campaign for marriage equality but also one of the apparent effects of the election of Donald J. Trump to the presidency, namely the re-emergence of very bold white nationalism and even white supremacy. This Review attempts to test some of the elements of Sunstein's theory of change to determine whether they apply to these two, recent phenomena.

I. UNDERSTANDING SUNSTEIN'S THEORY OF CHANGE

Paul Brest identifies a "theory of change" as any "empirical basis underlying any social intervention."²⁶ Sunstein's new work offers not just an empirical argument for how social change occurs but also suggests the ways in which a particular type of social intervention—what he has long called a "nudge"—can help bring about such change in certain circumstances.²⁷ Such nudges can generate subtle shifts in behavior that, in turn, can result in large societal change as individuals' preferences for norms may shift as more and more individuals accept a new norm.²⁸ Sometimes, however, when there is a struggle over an evolving shift in a norm or norms, there is a backlash and a reaction that causes people to dig in, to cling more desperately to their existing norms, and defend them more vigorously.²⁹ In this first Part, I will describe Sunstein's theoretical and empirical claims about how social change occurs, describe the value he places on nudges, and identify the risk he sees in society today, where structural barriers may exist to efforts to change norms. As a result, existing norms might prove too durable in the face of nudges that might prevent change. In the next Part, I will explore how effective this theory is in explaining recent instances of social change, even as such change is still emerging.

25. See, e.g., DAVID COLE, *ENGINES OF LIBERTY: HOW CITIZEN MOVEMENTS SUCCEED* (2017); LESLIE R. CRUTCHFIELD, *HOW CHANGE HAPPENS: WHY SOME SOCIAL MOVEMENTS SUCCEED WHILE OTHERS DON'T* (2018).

26. Paul Brest, *The Power of Theories of Change*, *STAN. SOC. INNOVATION REV.*, Spring 2010, at 46, 49.

27. SUNSTEIN, *supra* note 22, at xi.

28. *Id.*

29. *Id.* at 137–39.

A. Tipping Points, Unleashing, and Cascades

Sunstein begins the work by saying that the sixteen chapters “do not make for a unitary narrative,” but “they are connected by an effort to connect findings in behavioral science with enduring issues in law and policy, and by an effort to show how seemingly small perturbations can often produce big shifts.”³⁰ Such shifts occur through the process of what Sunstein calls “unleashing,” which he describes as follows:

When certain norms are in force, people falsify their preferences or are silent about them. As a result, strangers and even friends and family members may not be able to know about them. People with certain political or religious convictions might just shut up. Once norms are revised, people will reveal preexisting preferences and values, which norms had successfully suppressed. What was once unsayable is said, and what was once unthinkable is done.³¹

When this happens, Sunstein claims, it creates a tipping point and “large-scale change is possible.”³² When people want such change, “[w]hat is needed is some kind of movement, initiated by people who say that they disapprove of the norm, and succeeding when some kind of tipping point is reached, by which time it is socially costless, and maybe beneficial, and maybe even mandatory, to say: *Me Too*.”³³

He takes as an example how a norm against discrimination might evolve in a society. He supposes that many people within that society may already oppose such discrimination, but they keep that to themselves because the existing, revealed norm in that society favors discrimination. Because of that, those who oppose discrimination do not know that others feel the same way and reject the norm. Some, initial “objectors” as Sunstein calls them, might have a low threshold for opposing the norm. Once one person objects to the existing norm, a small number will follow suit. Then, “a few more will do so if a few people challenge or defy the norm; still more will do so if more than a few people challenge or defy the norm; and so on.”³⁴ As Sunstein argues, “[u]nder the right conditions, and with the right distribution of thresholds [for change], a small spark can ignite a conflagration, eventually dismantling the norm.”³⁵

These sorts of changes are possible even with minor tweaks to the norm ecosystem. The task for those who want to change norms—people Sunstein has long called “norm entrepreneurs”³⁶—is to try to “draw attention to what they

30. *Id.* at xi.

31. *Id.* at 4 (footnote omitted).

32. *Id.* at 8.

33. *Id.* at ix.

34. *Id.* at 8.

35. *Id.* On the notion that different people have different thresholds before they participate in social change, see Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. 1420 (1978).

36. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

see as the stupidity, unnaturalness, intrusiveness, or ugliness of current norms.”³⁷ One goal of such entrepreneurs is to reveal “silent majorities” who secretly oppose the norm.³⁸ They might also try to “change the social meaning of compliance with the norm,” by casting that compliance as revealing a “lack of independence and look a bit pathetic” while “those who defy the norm might seem courageous, authentic, and tough.”³⁹

Sunstein uses as an example how an effort to combat discrimination based on sexual orientation might play out.

Suppose that a community has long had a norm in favor of discrimination based on sexual orientation; that many people in the community abhor that norm; that many others dislike it and that many others do not care about it; that many others are mildly inclined to favor it; and that many others firmly believe in it. If norm entrepreneurs make a public demonstration of opposition to the norm, and if the demonstration reaches those with relatively low thresholds for opposing it, opposition will immediately grow. If the growing opposition reaches those with relatively higher thresholds, the norm might rapidly collapse. But if the early public opposition is barely visible or if it reaches only those with relatively high thresholds, it will fizzle out and the norm might not even budge.⁴⁰

Examples of this sort of norm shifting are revealed in both experimental and real-world settings. In one study, subjects who were exposed to an area where there was litter were more likely to litter compared to those who found themselves in an area that was clean. This occurred regardless of whether they witnessed someone near them who littered.⁴¹ In another, when visitors to the Arizona petrified forest park were informed in signage at the park that other visitors were stealing pieces of petrified wood, a small piece at a time (which the park managers were trying to prevent), such visitors were more likely to steal such wood than those visitors who were asked simply to not take the wood in order to preserve the park’s natural resources. In other words, the signage communicated the norm that theft of the wood was commonplace, and it also

37. SUNSTEIN, *supra* note 22, at 8.

38. *Id.*

39. *Id.* at 8–9.

40. *Id.* at 9.

41. See Robert B. Cialdini et al., *A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places*, 58 J. PERSONALITY & SOC. PSYCHOL. 1015, 1017 (1990). The same forces are present in so-called “broken windows” situations, where, according to broken windows theory, poor maintenance and upkeep of homes, sidewalks, and public places can lead to anti-social behavior. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465>. Tragically, that theory has been utilized as a pretext for aggressive prosecution of low-level crimes, too often in communities of color. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

gave visitors instructions as to how to do so: that is, take a small piece at a time. When the park administrators changed the norm, and communicated that the theft was not commonplace (and did not tell the visitors how to execute it), the behavior changed.⁴² In another example, when the administrators of a daycare center sought to limit parents picking up children late from the center, they imposed a small fee on those parents who did so, thinking it would penalize such behavior and curtail it. In reality, the parents responded to the fee as seeing it as a late charge only, not as something that was forbidden. Indeed, instances of parents picking up their children late actually increased as the norm was communicated to the parents that they could pick up their children late as long as they paid the fine.⁴³ Finally, social media has proven an effective means of shifting norms. In one study, tens of thousands of Facebook users were encouraged to vote when they were shown evidence that their close friends had voted. The experiment yielded a significant increase in voter turnout among those who were shown information about those friends' voting behavior.⁴⁴ In each of these instances, individual behavior adapted and even conformed to a shifting of norms. The task, then, for a norm entrepreneur is to try to manipulate the norm environment, to expose people to new norms that, hopefully, either comport with how people see the world and want to engage with it, or, if they have no strong preference, are willing to go along with what appears to be how the crowd wants them to behave.

B. The Value of Nudges in Creating Tipping Points

For Sunstein, norms are subject to manipulation, and subtle shifts in the perceptions around what are acceptable norms can lead to larger-scale change. If norms are subject to this sort of manipulation, his next claim is that this can occur, and, more importantly, *should* occur, through what he calls “nudges.” And it is the concept of nudging that has become Sunstein’s intellectual calling card for over a decade.

As Sunstein describes them, “[n]udges are choice-preserving interventions, informed by behavioral science, that can greatly affect people’s choices.”⁴⁵ With his co-author, Nobel-prize-winning economist Richard Thaler, Sunstein published *Nudge: Improving Decisions About Health, Wealth, and Happiness*,⁴⁶ which popularized the notion of nudging. Such approach uses principles of behavioral economics to create “choice architecture”—the contexts in which people make decisions—that helps them make better

42. See Robert B. Cialdini et al., *Managing Social Norms for Persuasive Impact*, 1 SOC. INFLUENCE 3, 5–8 (2006).

43. See Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 5–8 (2000).

44. See Robert M. Bond, et al., *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 489 NATURE 295, 296–98 (2012).

45. SUNSTEIN, *supra* note 22, at xi.

46. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (rev. & expanded ed. 2009).

decisions.⁴⁷ Whether it is default rules that automatically enroll employees into retirement plans rather than ask them to choose to join them, or the placement of healthier options in the front of restaurant or cafeteria buffets, such choice architecture is supposed to help people make better decisions, while leaving the ultimate choice to them. This is what Thaler and Sunstein call “Libertarian Paternalism”: which embraces “self-conscious efforts, by institutions in the private sector and also by government, to steer people’s choices in directions that will improve their lives.”⁴⁸ For these authors:

A nudge . . . is any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting the fruit [in a buffet] at eye level counts as a nudge. Banning junk food does not.⁴⁹

The concept of nudging has been embraced by many as a relatively inexpensive way to try to generate better behavior and better outcomes. Whether it is default enrollment rules, graphic warnings, or precommitment strategies,⁵⁰ nudges have proven an effective means of changing peoples’ behavior and channeling them toward desired outcomes.⁵¹ In the United Kingdom, there is an entire division of the national government dedicated to using behavioral insights to help construct choice architecture that can lead to better outcomes. The Behavioural Insights Team (BIT), more commonly referred to as the “Nudge Unit,” has been in action in the UK for almost a decade now and has had significant success in leading to behavioral change through the kinds of nudges imagined by Thaler and Sunstein. As one of the chief “choice architects” of the BIT explains:

BIT’s experiments showed that seemingly small changes could have big effects. The team found that adding a simple (and true) statement on tax reminders that ‘most people pay their tax on time’ encouraged far more people to do so. Such changes, based on social norms and other effects, were shown to bring forward hundreds of millions of pounds of revenue in a year and helped change the way that the Revenue Service operated. Getting the unemployed to think about what they could do in the next two weeks, instead of asking

47. *Id.* at 3–4.

48. *Id.* at 5–6.

49. *Id.* at 6.

50. Such precommitment strategies, where people agree to do something in advance, like agreeing to vote or make a contribution, have proven an effective way to get them to make good on their commitment when the time comes to do so. On the value of precommitment strategies for shaping behavior, see Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996). On the use of precommitment strategies in promoting and increasing voter turnout in the 2008 presidential primaries, see SASHA ISSENBERG, *THE VICTORY LAB: THE SECRET SCIENCE OF WINNING CAMPAIGNS* (2012).

51. Sunstein describes several nudging strategies in what he calls “ten important nudges,” in SUNSTEIN, *supra* note 22, at 62–65.

them what they had done in the *previous* two weeks, significantly increased the numbers off benefits at three months, getting tens of thousands back to work faster and trimming millions of days off benefits. Getting rid of a form that employees had to sign to join their pension scheme, but still leaving them the choice of opting out, led to more than five million (and still rising) new savers. Other experiments showed how simple ‘nudges’ could reduce carbon emissions, increase organ donation, increase quit rates of smoking, reduce missed medical appointments, help students finish their courses, reduce discrimination and boost recruitment. And most of the interventions cost virtually nothing.⁵²

This notion that small, often inexpensive changes to the choice architecture can bring about larger-scale change is central to Sunstein’s theory of change. He believes that, in certain situations, we can create norm cascades and tipping points by subtle, simple shifts in the ways in which we see, approach, and engage with the world. At the same time, such nudges “preserve full freedom of choice.”⁵³ And when that choice is made freely by the individual, and is not imposed on him or her, there is less of a risk of what Sunstein calls “reactance”: a pushback or backlash to the effort to bring about the desired change which results in people digging in their heels and embracing the existing norms with more zeal, as the following discussion shows.

C. The Risk of Reactance

Whenever there is a push to change norms, there is always the risk of this reactance, which, as Sunstein describes it, “refers to people’s tendency to do something precisely because they have been told not to do it.”⁵⁴ For Sunstein, this reactance is just one example of a more general phenomenon. As he writes: “much of the time, control, understood as liberty of action, has intrinsic and not merely instrumental value. When people feel that their control is being taken away, they will often rebel, even if exercising control would not result in material benefits or might produce material harms.”⁵⁵ Sunstein calls this phenomenon the “Lockean Exclamation,” because, he asserts, philosopher John Locke “disliked being told that he could not do things.”⁵⁶ Sunstein asserts further that this phenomenon “played a large role in Trump’s presidency, not least in his attitudes toward immigration, NATO, and the Paris agreement on climate change,”⁵⁷ an issue I will take up again in Part II, B., *infra*. For the norm entrepreneur interested in promoting social change, she must always stay attuned to the ways in which an effort to shift norms can actually result in people

52. DAVID HALPERN, *INSIDE THE NUDGE UNIT: HOW SMALL CHANGES CAN MAKE A BIG DIFFERENCE* 8–9 (2016) (ebook).

53. SUNSTEIN, *supra* note 22, at 60.

54. *Id.* at 137.

55. *Id.*

56. *Id.*

57. *Id.* at 138.

reacting negatively to that effort, resisting change, and even driving people to head in the opposite direction merely because they feel they are being told they should not. Sunstein uses, as an example of this type of reaction, the backlash to then-Mayor Michael Bloomberg's effort to ban the sale of large containers of sugary soft drinks in New York City.⁵⁸ The opposition to what were perceived as so-called "Nanny State" practices was significant,⁵⁹ and the effort ultimately failed when the ban was struck down by New York State's highest court.⁶⁰

D. The Role of "Enclave Deliberation" in Norm Shifting or Maintenance

Another phenomenon that affects social change that Sunstein discusses is what he describes as "enclave deliberation," which is "deliberation within small or not-so-small groups of like-minded people."⁶¹ For Sunstein, this enclave deliberation "is, simultaneously, a potential danger to social stability, a source of social fragmentation, and a safeguard against social injustice and unreasonableness."⁶² On the positive side, enclave deliberation, particularly in a heterogeneous community, tends to create clusters of like-minded people who may explore and press the boundaries of existing norms. This type of deliberation "promotes the development of positions that would otherwise be invisible, silenced, or squelched in general debate."⁶³ Smaller groups can thus serve as test-beds for new norms, and it is easier to spread such norms in such circumscribed and like-minded groups. Norm entrepreneurs can then press for their adoption in different, similar enclaves. They thus can create spaces in which those new norms can emerge and spread to other enclaves. This form of enclave diversity helps to nurture the emergence and spread of new norms when those norms can emerge out of one enclave and into others. As Sunstein asserts, "[h]eterogeneity, far from being a source of social fragmentation, can operate as a creative force, helping to identify problems and even solutions that might otherwise escape notice."⁶⁴

Sunstein is not universally sanguine about enclave deliberation, however, realizing that its strength—that like-minded individuals might engage in communication within such enclaves—can also lead to less norm change, or norm change that is not beneficial. As Sunstein explains:

[I]t is impossible to say, in the abstract, that those who sort themselves into enclaves will move generally in a direction that is

58. *Id.*

59. See Karen Hamed, *The Michael Bloomberg Nanny State in New York: A Cautionary Tale*, FORBES (May 10, 2013, 8:00 AM), <http://www.forbes.com/sites/realspin/2013/05/10/the-michael-bloomberg-nanny-state-in-new-york-a-cautionary-tale>.

60. See N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014).

61. SUNSTEIN, *supra* note 22, at 20.

62. *Id.*

63. *Id.* at 35.

64. *Id.* at 37.

desirable for society at large or even for its own members. It is easy to think of examples to the contrary—for example, in the rise of Nazism, hate groups, and numerous “cults” of various sorts.⁶⁵

Indeed, enclaves can prove resistant to norm change when there is a degree of “groupthink” that prevents the emergence of new norms or reactance to the change occurring in broader society. Members of such enclaves may “double down” and embrace current norms, or worse, look to halt any form of progress: to take the conservative stance and, in the famous words of William F. Buckley Jr., “stand[] athwart history, yelling Stop.”⁶⁶

These sorts of enclaves are also potentially impervious to outside influences. When information is shared within them and not tested against information from outside the enclave, it can contribute to a belief in misinformation. In such situations, as recent research shows, a willingness to allow in outside influences can help temper the spread and effect of such bad information.⁶⁷ At the same time, other research shows that when media outlets engage in what the researchers called a closed, “propaganda feedback loop” and were immune to norms of transparency and fact-checking, they were more likely to generate and spread false news stories.⁶⁸ Thus, a failure to allow in such outside influences, at a time when we are more able to engage with narrower and narrower sources of hermetically sealed information, helps to render such enclaves impervious to outside information that could help to provide more accurate information about what is really happening in the world, such that individuals and groups can make informed decisions based on that information.

Sunstein thus charts the contours of social change, including the opportunities and potential pitfalls associated with trying to bring about such change. While social change can be a product of deliberate efforts designed to trigger tipping points and norm cascades, and such efforts can start small, with small nudges, and can end up having large and wide-ranging effects, they can also result in backlash and an adverse reaction through which individuals cling to their existing norms and resist efforts at change. Sunstein is willing to admit that not all norms are susceptible to these sorts of small changes. In other words, not all efforts to bring about such norm change are best served by nudges. Sometimes more aggressive efforts are needed. Nevertheless, he still believes that true social change comes about when individuals choose to make change on their own by shifting norms. With this as Sunstein’s theory of change, can we look at recent instances in which social change has come about to determine whether Sunstein’s views hold water and serve to not just explain how social

65. *Id.* at 36.

66. William F. Buckley Jr., *Our Mission Statement*, NAT’L REV. (Nov. 19, 1955, 1:00 PM), www.nationalreview.com/article/223549/our-mission-statement-william-f-buckley-jr.

67. Damon Centola, Robb Willer & Michael Macy, *The Emperor’s Dilemma: A Computational Model of Self-Enforcing Norms*, 110 AM. J. SOC. 1009 (2005).

68. See YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 386–87 (2018).

change occurs but also operate as a playbook for bringing such social change about?

II. DOES SUNSTEIN'S THEORY OF CHANGE HELP EXPLAIN SOME RECENT INSTANCES OF NORM CHANGE?

To utilize Brest's theory-of-change lens once again, in order for a theory of social change to have utility, it must enjoy an empirical basis and must help explain the effect of interventions designed to bring about social change. Thus, to test Sunstein's arguments, I will look to the ways that two recent social change trends might support those arguments. The first is the effort to bring about marriage equality for the LGBTQ community. The second is the apparent resurgence of white nationalist sentiments, in the United States and around the world. While some may cheer the latter, I, personally, do not see that as an example of positive social change. It would appear to be a change nonetheless to what are generally seen as acceptable norms of speech and conduct. Can Sunstein's views help to explain either or both of these phenomena? It is to this question that I now turn.

A. Marriage Equality

Over the course of roughly twenty years, advocates secured landmark victories at the Supreme Court that established critical LGBTQ rights: from *Romer v. Evans*,⁶⁹ and *Lawrence v. Texas*,⁷⁰ which helped secure basic "negative" rights, like the freedom from discriminatory statutes and statutes that criminalized private, consensual behavior; to *United States v. Windsor*,⁷¹ and *Obergefell v. Hodges*⁷²—which ultimately established a "positive right," namely the freedom to marry and marriage equality. But these lawsuits, and the opinions from the Supreme Court, did not occur in a vacuum; they were the conscious and deliberate result of norm entrepreneurs who engaged in wide-ranging advocacy that not only culminated in this string of successful Court victories, but also helped to shape norms considerably. With the marriage equality effort in particular, these Court decisions both preceded norm change, but also were products of it, and such norm change was the result of a multi-pronged and incremental strategy that started at the local and state level to try to force the issue, create norm cascades, and generate a tipping point.

The string of victories at the U.S. Supreme Court, first around negative rights, and then around the positive right of marriage equality, emanated from a concerted strategy that, in retrospect, looks careful and calculated, but was also, in reality, the product of fits and starts and disagreement within the LGBTQ advocacy community around tactics. The most significant of the differences within the community centered around, first, whether to press for marriage

69. *Romer v. Evans*, 517 U.S. 620 (1996).

70. *Lawrence v. Texas*, 539 U.S. 558 (2003).

71. *United States v. Windsor*, 570 U.S. 744 (2013).

72. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

equality at all, and, second, what were the right approaches to bring it about once a decision was made to press for this right.⁷³ For those who supported the campaign for marriage equality, the recognition of same-sex marriage was really about something bigger: a norm around acceptance that rejected marginalization. If same-sex couples could gain recognition of their marriages, these strategists concluded, it could shift the norm of homophobia, bringing about broader acceptance of the LGBTQ community itself.⁷⁴ Once enough advocates within the movement had reached a degree of consensus that this was the right strategy to take to try to achieve that broader acceptance, there were still arguments over tactics: should they launch a broadside legal challenge under the U.S. Constitution that would be filed in federal court, with the expectation that it would ultimately be decided by the Supreme Court or should they try a different, “federal” and incremental approach?⁷⁵ Due to the disagreement over whether the Supreme Court might be poised to rule in the favor of marriage equality, and the fear that a defeat at the high court might set the effort back a generation, caution won out, at least initially, and advocates tried different legal strategies, focusing, instead on incremental wins within state court systems, seeking some degree of recognition for same-sex relationships, including civil unions.⁷⁶

This incremental effort started in the states. Advocates had sought out jurisdictions where they thought the courts might be receptive to same-sex claims. Long before these strategy discussions occurred and these tactics deployed, however, Hawaii’s state supreme court recognized same-sex unions in the early 1990s.⁷⁷ This early decision would prompt a Republican Congress, with support from a Democratic President, to pass the Defense of Marriage Act (DOMA),⁷⁸ which allowed states to choose not to recognize same-sex marriages from other states. Even with the passage of DOMA, it would be nearly another decade until state courts in states like Vermont and Massachusetts would grant some recognition to same-sex unions.⁷⁹

But after those victories, opponents of marriage equality did not just begin to organize themselves, they saw opposition to same-sex marriage as having broader, electoral benefits: i.e., it could be used as a “get-out-the-vote” tool for conservative voters generally.⁸⁰ In late winter 2004, as then-Mayor of San Francisco, Gavin Newsom, would begin recognizing same-sex marriages out of

73. For a discussion of this tension within the advocacy community, see for example, JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* 28–29 (2015).

74. For the arguments in support of efforts to seek recognition of same-sex marriage as a strategy for greater acceptance of LGBTQ communities, see FRANK, *supra* note 5, at 7–9.

75. See *id.* at 33 (describing strategy discussions).

76. See *id.* at 68–76 (describing early incremental approach).

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

78. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

79. See *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

80. See NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* 109–10 (2013) (describing Republican get-out-the-vote strategy).

City Hall there,⁸¹ the opposition to same-sex marriages worked on a parallel track and sought to place state-based referenda on ballots across the nation, including in states critical to the 2004 re-election campaign of George W. Bush. For his supporters, they saw opposition to same-sex marriage as a “wedge issue” that could galvanize and mobilize conservative voters to get to the polls. As these referenda passed, it signified that, at least in these states, opposition to same-sex marriage was strong.⁸²

Several years later, when opponents of same-sex marriage sought to place a ballot initiative before the voters in the liberal state of California, advocates believed the opponents had gone too far and had chosen a state where the forces in favor of same-sex marriage would coalesce and defeat Proposition 8.⁸³ On election night 2008, when Californians would vote for Barack Obama for President by a wide margin, Proposition 8 passed by a narrow one, to the great dismay of advocates.⁸⁴

But the advocates did not take the defeat lying down. They began an aggressive effort to figure out what had gone wrong. They went door-to-door and asked voters the reasons why they might have voted in favor of Proposition 8. What they learned was that the way the advocates had promoted same-sex marriage had led many voters to believe the advocates were seeking special treatment for same-sex couples.⁸⁵ The campaigns typically centered around gaining access to hospital rooms for loved ones and survivor benefits. In other words, not only were they perceived as seeking special benefits, they were also casting their effort in very legalistic terms. That is, they were perceived as promoting an ethic of special treatment, or what Arlee Russell Hochschild might call “line cutting.”⁸⁶

Learning from this review of their efforts, the advocates began thinking about and talking about same-sex marriage differently. They began to use the term “marriage equality” and started describing how LGBTQ couples were not seeking special treatment, but, rather, were merely advocating for what heterosexual couples had. This was not special treatment that advocates wanted, but, rather, the same treatment.⁸⁷

Following this subtle shift in messaging, the norm of opposition to marriage equality began to erode. Lesbian, gay, bisexual and transgender

81. See Rachel Gordon, *The Battle Over Same-Sex Marriage*, S.F. GATE (Feb. 15, 2004, 4:00 AM), <https://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-Uncharted-2823315.php>.

82. See *Overview of Same-Sex Marriage in the United States*, PEW RES. CTR. (Dec. 7, 2012), <https://www.pewforum.org/2012/12/07/overview-of-same-sex-marriage-in-the-united-states> (describing history of ballot referenda related to marriage equality in the United States).

83. See FRANK, *supra* note 5, at 177–78 (describing confidence of some advocates who thought Proposition 8 would fail).

84. See *id.* at 180–82.

85. See Ball, *supra* note 7.

86. ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT 135–38 (2016).

87. See Ball, *supra* note 7.

people also began to “come out” in greater and greater numbers, which helped lower the stigma that was associated with not being heterosexual. In states where marriage equality was recognized, like Massachusetts and New York (New York being the first state to recognize full marriage equality by legislative action), more and more people began to realize that there was nothing threatening about same-sex marriage.⁸⁸ Moreover, as Sunstein might say, people were unleashed to reveal their support for marriage equality as the norm began to shift. On election night in 2012, the norm had shifted so much that in four states, voters voting in ballot referenda supported marriage equality: in three states they would vote in favor of pro-marriage equality initiatives, and, in a fourth, they would vote to reject an initiative opposing marriage equality.⁸⁹

These victories would begin to mark the beginning of the end of opposition to marriage equality. In 2013, the Supreme Court would hold that portions of DOMA were unconstitutional.⁹⁰ In 2015, it would reach its landmark decision in *Obergefell*, in which all state laws against same-sex marriage were deemed unconstitutional as well, affirming the marriage equality message of equal treatment and not special treatment. As Justice Kennedy, for the majority, would write:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.⁹¹

But trends toward greater inclusiveness and diversity are not the only social change that the United States has seen over the last decade. The candidacy and then the presidency of Donald Trump would prove that other forces also seem at work in American culture, and around the world, as the following discussion shows.

B. Speaking the Unspeakable: The Re-Emergence of White Nationalist Views

When Donald Trump announced his bid for the U.S. presidency in the spring of 2015, he declared that he would build a wall to keep Mexicans out of

88. See FRANK, *supra* note 5, at 265–67 (describing passage of legislation in New York State recognizing marriage equality).

89. See *Overview of Same-Sex Marriage in the United States*, *supra* note 82.

90. See *United States v. Windsor*, 570 U.S. 744 (2013).

91. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

the United States, calling them rapists and criminals.⁹² On the campaign trail, he would call for a “total and complete shutdown” of Muslims entering the United States,⁹³ and state that his campaign would put “America First.”⁹⁴ Whether it was known to Trump or not, there had been an America First Committee in the United States in the years preceding its entry into WWII and the group actively advocated for the nation to stay out of the war.⁹⁵ During his presidency, Trump has continued to take racially tinged positions: claiming that there were “very fine people on both sides” of a white supremacist rally in Charlottesville, Virginia;⁹⁶ backing a travel ban against immigrants from predominantly Muslim countries;⁹⁷ describing certain nations populated predominantly by people of color as “shithole countries”;⁹⁸ and criticizing predominantly African-American athletes for protesting police misconduct,⁹⁹ to name just a few examples of the President’s official acts that reveal his willingness to engage in advocacy that has an explicit race-based focus. While some argue that this proves Trump is a racist, I do not wish to engage in that discussion and leave that to others.¹⁰⁰ My purposes here are to explore whether these actions and President Trump’s statements have created the sort of environment where norms appear to be shifting, creating the “unleashing” phenomenon Sunstein identifies. It is hard to argue that they have not.

92. See Amber Phillips, ‘They’re Rapists.’ *President Trump’s Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/?noredirect+on>.

93. See Ryan Teague Beckwith, *President Trump’s Own Words Keep Hurting His Travel Ban*, TIME (Mar. 16, 2017), <https://time.com/4703614/travel-ban-judges-donald-trump-words>.

94. See Dennis Ross, Opinion, *What Trump Means by ‘America First,’* WALL ST. J. (Jan. 8, 2019, 7:07 AM), <https://www.wsj.com/articles/what-trump-means-by-america-first-11546992419>.

95. See WAYNE S. COLE, CHARLES A. LINDBERGH AND THE BATTLE AGAINST AMERICAN INTERVENTION IN WORLD WAR II 157–68 (1974).

96. See Rosie Gray, *Trump Defends White-Nationalist Protesters: ‘Some Very Fine People on Both Sides,’* ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012>.

97. See Steve Almasy & Darran Simon, *A Timeline of President Trump’s Travel Bans*, CNN (Mar. 30, 2017, 4:01 AM), <https://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/index.html>.

98. See Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html.

99. See Rick Maese, *Trump Scolds NFL Players ‘Making \$15 Million a Year’ for Mixing Politics with Sports*, WASH. POST (Jun. 15, 2018, 12:01 PM), <https://www.washingtonpost.com/news/sports/wp/2018/06/15/trump-scolds-nfl-players-making-15-million-a-year-for-mixing-politics-with-sports>.

100. See Steve Phillips, *Is Trump a Racist?*, NATION (Feb. 20, 2019), <https://www.thenation.com/article/donald-trump-racist-democratic-party>.

Soon after Trump was elected, at a meeting of white nationalists, Richard Spencer, an avowed white nationalist, cheered Trump's victory, proclaiming "Hail Trump," as many individuals in the room gave the Nazi extended-arm salute.¹⁰¹ Months later, at a torch-lit rally in the college town of Charlottesville, Virginia, ostensibly organized around the preservation of Confederate statues, attendees chanted "[b]lood and soil," a white supremacist rallying cry; "Jews will not replace us"; and "[B]lack will not replace us."¹⁰² In early 2018, a vocal and avowed Trump supporter sent package bombs to leaders of the Democratic Party and members of the media,¹⁰³ which Trump has described as the "enemy of the American People."¹⁰⁴ Mass murders at the Tree of Life synagogue and at mosques in Christchurch, New Zealand, were carried out by individuals who explicitly referenced Donald Trump in their public statements about their actions, although with the former, he stated that he did not think Trump was anti-Semitic enough.¹⁰⁵

For Sunstein, norms shift when norm entrepreneurs begin to test the boundaries of existing norms and then others feel unleashed to embrace such norms, either because they held them all along or they realize that it is acceptable to hold such views and become converts to the cause, coming around to espousing those views themselves. President Trump has made it clear that he is comfortable utilizing racially tinged rhetoric to attack individuals from ethnic or racial minority groups and to withhold criticism of white nationalists and racists who engage in murderous terrorist attacks. Whether Trump intends to or not, he would appear to have created an environment in which norms have shifted, unleashing white nationalists to speak out and share their racist views and take actions motivated by racist and anti-Semitic sentiments. Again, whether intending to or not, Trump would appear to have emboldened these individuals. One does not need to determine whether Trump is racist; the

101. See Daniel Lombroso & Yoni Appelbaum, *'Hail Trump!': White Nationalists Salute the President-Elect*, ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/richard-spencer-speech-npi/508379>.

102. *What Charlottesville Changed*, POLITICO MAG. (Aug. 12, 2018), <https://www.politico.com/magazine/story/2018/08/12/charlottesville-anniversary-supremacists-protests-dc-virginia-219353>.

103. See Benjamin Weiser, *Mail Bomb Suspect Accused of Targeting Clinton, Obama and Other Democrats to Plead Guilty*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/nyregion/mail-bomber-cesar-sayoc.html>.

104. Amanda Erickson, *Trump Called the News Media an 'Enemy of the American People.' Here's a History of the Term*, WASH. POST (Feb. 18, 2017, 3:44 PM), <https://www.washingtonpost.com/news/worldviews/wp/2017/02/18/trump-called-the-news-media-an-enemy-of-the-american-people-heres-a-history-of-the-term>.

105. See Wajahat Ali, Opinion, *The Roots of the Christchurch Massacre*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/opinion/new-zealand-mosque-shooting.html?login=email&auth=login-email>; Julie Turkewitz & Kevin Roose, *Who Is Robert Bowers, the Suspect in the Pittsburgh Synagogue Shooting*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/robert-bowers-pittsburgh-synagogue-shooter.html>.

avowed racists appear to believe he is¹⁰⁶ and take comfort in his rhetoric and pleasure in his refusal to strongly disavow their words and actions.¹⁰⁷

III. DOES SUNSTEIN'S THEORY OF CHANGE HELP EXPLAIN THE MARRIAGE EQUALITY VICTORY AND THE RE-EMERGENCE OF WHITE NATIONALISM AND SUPREMACY?

The victory of advocates in the marriage equality campaign might appear as a political polar-opposite to the re-emergence of a strident white nationalism. For Sunstein, though, since they both reflect social change, can one explain the change they each reflect as a product of unleashing of attitudes that emerged as a result of norm entrepreneurs using nudges to send a signal that views inconsistent with the status quo were becoming acceptable? On the marriage equality front, could it have been a simple nudge, or a series of nudges, that helped move the Supreme Court to hold, first, that portions of DOMA were unconstitutional, and then, ultimately, that laws against same-sex marriage violated the Equal Protection Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution? Are the Justices of the U.S. Supreme Court susceptible to nudges or were other forces at play?

There is no doubt that views of same-sex marriage changed in the United States from the late 1980s to the early 2010s, when the battles over marriage equality seemed to emerge in communities across the nation. In 1988, by a strong majority, many Americans opposed same-sex marriage, and such opposition was present in all demographic groups, with support for marriage equality seemingly reserved for only smaller sectors of society. Twenty years later, views on same-sex marriage would flip. Support was broad-based, across many demographic groups, whereas opposition remained in smaller demographic pockets.¹⁰⁸ Other research suggests that one of the likely reasons for this shift was that more and more Americans came in contact with individuals who self-identified as LGBTQ. It would appear that the emergence of a willingness of individuals who were LGBTQ to come out helped lower social distance between them and individuals from the heterosexual community. As this process unfolded, support for marriage equality rose.¹⁰⁹

106. To echo Florida gubernatorial candidate Andrew Gillum's words about his opponent: "Now, I'm not calling Mr. DeSantis a racist. I'm simply saying the racists believe he's a racist." Eugene Scott, *'Racists Think He's a Racist': Gillum on White Supremacists' Support for DeSantis*, WASH. POST (Oct. 25, 2018, 1:26 PM), <https://washingtonpost.com/politics/2018/10/25/racists-think-hes-racist-gillum-white-supremacists-support-desantis>.

107. Libby Nelson, *"Why We Voted for Donald Trump": David Duke Explains the White Supremacist Charlottesville Protests*, VOX (Aug. 12, 2017, 3:16 PM), <https://www.vox.com/2017/8/12/16138358/charlottesville-protests-david-duke-kkk>.

108. See Dawn Michelle Baunach, *Changing Same-Sex Marriage Attitudes in America from 1988 through 2010*, 76 PUB. OP. Q. 364 (2012).

109. See Sandra Waddock et al., *The Transformational Change Challenge of Memes: The Case of Marriage Equality in the United States*, BUS. & SOC'Y ONLINEFIRST (Dec. 2018), at 1, <https://journals.sagepub.com/doi/10.1177/0007650318816440>.

This process seemed to affect public opinion. Indeed, conservative advocates utilized ballot initiatives in the 2004 election cycle to improve voter turnout of individuals they felt were more likely to support Republican candidates. In just eight years, public opinion appeared to shift to such an extent that it was liberal advocates who began using pro-marriage equality ballot initiatives to spur voter turnout for Democratic candidates.

Was this attitudinal shift likely caused, at least in part, by the advocates' shift in tactics? The marriage equality movement altered its approach and promoted a vision of greater equality as opposed to more legalistic tactics that could be perceived as a desire for some sort of special treatment. Could this have affected public opinion, generally, but also the Justices on the Supreme Court in particular? While it is difficult to trace when exactly this attitudinal shift occurred, it was after the marriage equality advocates conducted their review of the tactics that failed in California, and retooled their advocacy, that they began to have electoral and legislative victories. It was in April of 2011 that Adam Liptak of the *New York Times* would ask whether it was "A Tipping Point for Gay Marriage?"¹¹⁰ What may have signified this potential tipping point? For Liptak, it was when a private law firm decided it would not work for congressional Republicans who were trying to defend DOMA in court (after the Obama Administration refused to defend it). Liptak would describe this tipping point as follows: "For many gay rights advocates, the decision amounts to a turning point in the debate—the moment at which opposition to same-sex marriage came to look like bigotry, similar to racial discrimination and the subordination of women."¹¹¹ But do such tipping points of public opinion affect judicial decision making and, ultimately, the rulings of the Supreme Court?

Jack Balkin has argued that Supreme Court majorities often take what he calls a "nationalist" bent. Trying to explain the Court's pro-affirmative-action ruling in *Grutter v. Bollinger*,¹¹² when a conservative bloc within the Court may have been expected to rule against affirmative action, he would argue that the Court often follows what the Justices perceive as national, primarily elite, opinion: "Although the Supreme Court may contain many conservative Justices, the Supreme Court as an institution does not stray too far from the political center—wherever that center happens to be—and from the views of national elites."¹¹³ Further, as Balkin also argues, "when judges respond to appeals to elite values, they tend to see themselves as reacting appropriately and wisely to long term societal trends."¹¹⁴

110. Adam Liptak, *A Tipping Point for Gay Marriage?*, N.Y. TIMES (Apr. 30, 2011), <https://www.nytimes.com/2011/05/01/weekinreview/01gay.html>.

111. *Id.*

112. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

113. Jack M. Balkin, Brown, *Social Movements, and Social Change*, in CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE 246, 246–47 (Robert L. Hayman Jr. & Leland Ware eds., 2009).

114. 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, 34 (2005).

Can we understand the landmark rulings in *Windsor* and *Obergefell* as the Court responding to this sense of public opinion, particularly elite public opinion, and, if we can, is it possible to trace these decisions to the actions of millions of Americans, in communities across the nation, who were “unleashed,” to use Sunstein’s term, to come out and self-identify as being members of the LGBTQ community? To attribute the outcomes of such landmark decisions to public opinion alone, of course, does not do justice to the many norm entrepreneurs, from groups like Freedom to Marry and the American Civil Liberties Union, who engaged in a carefully calibrated, decades-long effort to bring about marriage equality, which they saw as an effort to affirm the dignity of LGBTQ individuals more broadly. It is also difficult to tease out the reasons why public opinion changed, and how it changed. Sunstein’s unleashing thesis would seem to be as good a reason as any to explain some of this change, but can one characterize these actions as “nudges”? Did these relatively inexpensive, simple acts, accumulating over time, and combined with a powerful and multi-pronged litigation and organizing strategy, turn into a fairly powerful “shove” rather than a nudge? It likely is not enough to say that the shift in public opinion was evidence of norm cascades that produced a tipping point. Rather, the campaign for marriage equality was a product of a careful campaign orchestrated by brilliant tacticians. Did nudges play into the shift in public opinion—the countless conversations people had across the nation, identifying as gay, lesbian, bisexual, and transgender? Probably. But were they enough? Was more needed? Did the campaigns in state after state, and the orchestrated litigation in various states and different fora help to shift public, and, ultimately, judicial opinion? For sure. So it does not appear that it was just nudges or just something else. It appears likely that the monumental shift in public opinion, and the ultimate outcomes in landmark cases at the Supreme Court, were a product of millions of interpersonal nudges combined with national, federated, incremental, and carefully calibrated legal, legislative, and electoral tactics. While Sunstein’s vision of social change would appear to offer some explanatory value, it may not tell the whole story.

At the same time, when it comes to the actions, omissions, and words of Donald Trump, and whether he appears to be unleashing a resurgent white nationalism, Sunstein’s vision seems to hit closer to the mark, or offer a more complete picture of the dynamics at play in this movement’s rise. In some respects, President Trump’s election may very well be a function of reactance as Sunstein describes it, a backlash aimed at elites and the establishment,¹¹⁵ just as the Brexit vote may have represented similar sentiments.¹¹⁶ But I choose to look at the emergence of a very public manifestation of white nationalism as representing a form of social change in itself, and to test Sunstein’s theories against its reemergence. While President Trump certainly evokes strong

115. Or, as CNN commentator Van Jones described it, a “whitelash.” See Josiah Ryan, *This Was a Whitelash: Van Jones’ Take on the Election Results*, CNN (Nov. 9, 2016, 9:16 AM), <https://www.cnn.com/2016/11/09/politics/van-jones-results-disappointment-cnntv/index.html>.

116. See, e.g., PIPPA NORRIS & RONALD INGLEHART, *CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM* (2019).

emotions, both supportive and resistant, and there is no shortage of individuals who call the President a racist and describe him as a white supremacist and/or white nationalist himself, we need not rely solely on his critics for commentary that identifies him as contributing to an environment in which racist invective is encouraged. Some of President Trump's most ardent supporters in the media can be found on Fox News, and yet a host on the Fox Business network, Gerry Baker, recently described this environment as follows: "I think there is no question that white supremacists, large numbers of white supremacists, see Donald Trump and other people like him as kind of on their side."¹¹⁷ This, after the gunman in Christchurch, New Zealand, posted a manifesto that described Trump as a "symbol of renewed white identity and common purpose."¹¹⁸

It would seem that the Sunstein unleashing thesis offers a fairly accurate analysis of the forces at work in the resurgence of white nationalism and even white supremacy. President Trump evokes imagery—like decrying "invaders" from Latin American and "shithole" countries—that align with the arguments of avowed and publicly violent white nationalists. It does not really matter whether one thinks of the President as a racist or white nationalist. His rhetoric seems to have emboldened avowed racists, like Richard Spencer and David Duke, to express their support for the President. At the same time, it is hard to say that David Duke, former Grand Wizard of the Ku Klux Klan, has needed any unleashing; he is a former candidate for national elected office as an avowed racist.¹¹⁹ Moreover, acts of white supremacist violence predated the rise of Donald Trump as a candidate for the presidency, as the bombing in Oklahoma City in 1995 and the Charleston church shootings in 2015 attest.¹²⁰ Nevertheless, a late 2018 poll taken by Quinnipiac University found that fifty-six percent of Americans believe the President encouraged white supremacist groups, with roughly two-thirds of those believing such encouragement was

117. Justin Wise, *Fox Business Host: 'No Question' White Supremacists See Trump as 'Kind of on Their Side'*, HILL (Mar. 19, 2019, 9:50 AM), <https://thehill.com/homenews/media/434682-fox-business-host-no-question-white-supremacists-see-trump-as-kind-of-on-their>. See also Ellis Cose, Opinion, *One Year After Charlottesville, Trump Has Normalized Racism in America*, U.S.A. TODAY (Aug. 10, 2018, 11:48 AM), <https://www.usatoday.com/story/opinion/2018/08/10/white-supremacists-neo-nazis-charlottesville-unite-right-rally-trump-column/935708002>.

118. Daniel Victor, *In Christchurch, Signs Point to a Gunman Steeped in Internet Trolling*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/world/asia/new-zealand-gunman-christchurch.html>.

119. See Corky Siemaszko, *Who Is David Duke, the White Supremacist Who Endorsed Donald Trump?*, NBC NEWS (Feb. 29, 2016, 6:37 AM), <https://www.nbcnews.com/news/us-news/who-david-duke-white-supremacist-who-endorsed-donald-trump-n528141>.

120. See Janelle Bouie, Opinion, *The March of White Supremacy, from Oklahoma City to Christchurch*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/opinion/mcveigh-new-zealand-white-supremacy.html>.

deliberate. At the same time, only three percent of those polled believed that he discouraged them.¹²¹

While some might say the election of Donald Trump, events like Brexit, and the rise of a conservative populism across the world are evidence of wide-ranging social change unfolding before our eyes and the reasons for that change are varied, including globalization, economic inequality, the long-term effects of the Great Recession of 2008, and a growing anti-immigrant bias and nativism,¹²² it is difficult to lay all of that at the feet of Donald Trump, and, in many ways, he may be a symptom of these forces and not a cause of any of them. At the same time, the fact that he has the largest bully pulpit and the most powerful megaphone in the world as President of the United States means that he is in a prime position to both set norms, but also to break them. There were white supremacist strains in American culture long before Trump became President, and they will most surely exist long after his tenure is over. Nevertheless, at best, his cavalier attitude toward white supremacists appears to have created an environment in which they are emboldened and feel unconstrained, willing to enter the public discourse, making their opinions more common, perhaps unleashing others to feel the same. This phenomenon would appear consistent with Sunstein's social change thesis.

We can thus see that Sunstein's theory of change appears to accurately describe at least some forces that create social change. At the same time, he recognizes that not all situations are susceptible to nudges, and the marriage equality effort seems to show that nudges have only partial explanatory utility. If I had a criticism of *How Change Happens* it is this: while it would certainly appear to tell part of the story of social change, and Sunstein recognizes that nudges are not the only way, or even the best way, to bring about social change in every situation,¹²³ it is harder to discern when and where nudges are appropriate and when they are not, when they can do all of the work necessary to advance social change and when more is needed. As a theory of change as Brest describes it,¹²⁴ Sunstein's approach tells us a lot about how social change occurs; yet it is not complete. Change still needs norm entrepreneurs, and sometimes those entrepreneurs can manipulate nudges in effective ways to unleash latent opinions, harness public sentiment, and create norm cascades, but sometimes they also have to do more, like organize other like-minded people, protest, sue, boycott, and engage in social media campaigns: that is, they can use the whole range of what are sometimes referred to as "collective-action

121. Press Release, Quinnipiac University, No Politics with My Turkey, U.S. Voters Say 2-1, Quinnipiac University National Poll Finds; Hate Talk, Violence, White Supremacists Are Problems 13-14 (Nov. 21, 2018), https://poll.qu.edu/images/polling/us/us11212018_upbd58.pdf.

122. See YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* (2018).

123. SUNSTEIN, *supra* note 22, at 92-98 (discussing some situations in which more than a nudge might be required to produce social change).

124. See Brest, *supra* note 26.

repertoires.”¹²⁵ Similarly, Sunstein believes tipping points are central to change, although they get scant actual discussion in the book.¹²⁶ I would have liked to have known more about these aspects of change: how can we know when social change has reached such a tipping point; how can we force them; when do we know we are close? Is it simply a question, to echo Potter Stewart’s famous adage, that “we know it when we see it,” or, put another way, “we know it when it happens”?¹²⁷ While nudges alone can do at least some of the work of social change, if not much of it, they cannot do it all, and we are left deciding for ourselves when they can be deployed effectively; what situations are ripe for nudging; and which need more aggressive, and sometimes costly, efforts.

CONCLUSION

Sunstein’s *How Change Happens* is a powerful and welcome contribution to the growing scholarship on law, social movements, and social change.¹²⁸ While most of that research offers retrospective analyses on how social change has come about through an excavation of past successful social movements, Sunstein offers more of a theoretical—even *a priori*—analysis of the potential triggers of social change. Armed with such a theoretical—yet empirically grounded—grasp of the levers of social change, norm entrepreneurs, as Sunstein calls them, who seek to bring about such change can draw inspiration and guidance from *How Change Happens* as they embark on efforts to drive norm change, norm cascades, and tipping points. While Sunstein’s thesis does not explain all social change, particularly that which requires major societal and cultural shifts, his important ideas can help guide change large and small. When norms appear ready to fall, entrepreneurs can strive to nudge them over the edge and bring about effective social change in real and powerful ways. *How Change Happens* helps explain how they might learn to do so.

125. See Charles Tilly, *The Web of Contention in Eighteenth-Century Cities*, in CLASS CONFLICT AND COLLECTIVE ACTION 27, 40–41 (Louise A. Tilly & Charles Tilly eds., 1981). For an argument that progressive lawyers must deploy varied, pluralistic tactics, see generally Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 101 (2009).

126. SUNSTEIN, *supra* note 22, at 7, 273 (discussing tipping points).

127. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (admitting inability to devise a definition of obscenity under the law, “But I know it when I see it.”). To be fair to Sunstein, Malcolm Gladwell, who perhaps popularized the notion of the tipping point, also failed to answer these questions to this author’s satisfaction. See MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000).

128. See Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 360 (2018) (describing recent rise in social movement scholarship).