
WINDSOR AND BROWN: MARRIAGE EQUALITY AND RACIAL EQUALITY

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In his second inaugural address in January 2013, President Barack Obama associated the struggle for gay equality with that for racial equality by conjoining, alliteratively, Stonewall with Selma (along with Seneca Falls). The President went on to proclaim that “[o]ur journey is not complete until our gay brothers and sisters are treated like anyone else under the law — for if we are truly created equal, then surely the love we commit to one another must be equal as well.”¹

The President was referring, of course, to the issue of gay marriage, and just five months later, the Supreme Court decided two landmark cases bearing on that issue. In *United States v. Windsor*,² the Court invalidated Section 3 of the Defense of Marriage Act (DOMA), which supplied a definition of marriage for federal law purposes, such as allocating Social Security survivors’ benefits and determining the immigration status of the spouse of a U.S. citizen.³ Under DOMA, marriage consisted only of the union of a man and a woman; the federal government declined to recognize gay marriages lawfully performed in the states.⁴ The Court in *Windsor* invalidated that federal definition of marriage under the Fifth Amendment.

On the same day *Windsor* was decided, the Court in *Hollingsworth v. Perry*⁵ dismissed an appeal from a ruling by the U.S. Court of Appeals for the Ninth Circuit that had invalidated a California initiative (Proposition 8) defining marriage as the union of a man and a woman. *Hollingsworth* had presented the Justices with a wide array of options.⁶ One potential route was simply to reverse the lower court and reject a federal constitutional right to same-sex marriage. Another op-

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¹ Inaugural Address, 2013 DAILY COMP. PRES. DOC. 32 (Jan. 21, 2013).

² 133 S. Ct. 2675 (2013).

³ *Id.* at 2694.

⁴ *Id.* at 2683.

⁵ 133 S. Ct. 2652 (2013).

⁶ See, e.g., Marty Lederman, *The Court’s Five Options in the California Marriage Case*, SCOTUSBLOG (Mar. 1, 2013, 11:11 AM), <http://www.scotusblog.com/2013/03/the-courts-five-options-in-the-california-marriage-case>; Adam Liptak & Alicia Parlapiano, *How the Court Could Rule on Same-Sex Marriage*, N.Y. TIMES, June 14, 2013, at A18.

tion was to affirm the Ninth Circuit — in an opinion that could have assumed various different breadths. The narrowest alternative, known colloquially as the “one-state” solution, was to invalidate Proposition 8, as the Ninth Circuit had done, on the ground that California had no permissible justification for depriving gay married couples of a status that had once been conferred upon them by state law.⁷ A broader option — the so-called “eight-state” solution, advocated by the Justice Department⁸ — was to require those states that had authorized civil unions for same-sex couples, including California, to permit gay marriage on the ground that no legitimate reason existed for granting same-sex couples all of the rights and benefits of marriage while withholding from them the formal title. The broadest option, known as the “fifty-state” solution, was simply to identify a federal constitutional right to same-sex marriage.⁹

Eschewing all of these options, the *Hollingsworth* Court, by a vote of five to four, declined to reach the merits of the constitutional dispute. Instead, in an opinion by Chief Justice Roberts, the majority dismissed the appeal on the ground that the initiative’s official sponsors, who had intervened at trial to defend Proposition 8 after elected officials had declined to do so, lacked standing to prosecute the appeal (either to the Ninth Circuit or to the Supreme Court) of the district court’s decision invalidating the measure.¹⁰

In this Comment, I shall contrast the Court’s marriage-equality rulings with its epic decision in favor of racial equality, *Brown v. Board of Education*,¹¹ with the goal of shedding light on how American constitutional law works. Part I seeks to show that neither *Brown* nor *Windsor* would have been plausible constitutional rulings as little as

⁷ *Perry v. Brown*, 671 F.3d 1052, 1079 (2012) (asking whether “the People of California have legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples the right to have their lifelong relationships dignified by the official status of ‘marriage,’ and . . . to substitute the label of ‘domestic partnership,’” *id.* at 1079, and concluding that they did not, *id.* at 1096).

⁸ Brief for the United States as Amicus Curiae Supporting Respondents at 9–12, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144).

⁹ Brief for Respondents at 21–24, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144).

¹⁰ 133 S. Ct. at 2668. The Court’s decision vacated the Ninth Circuit’s ruling but left intact the district court’s order invalidating Proposition 8 and enjoining its enforcement. The district court’s injunction was ambiguous as to whether it applied only against clerks in the two counties where the plaintiff couples had sought marriage licenses or against clerks everywhere in the state. State officials had embraced the broader interpretation even before the Supreme Court’s decision, and the California Supreme Court subsequently declined to stop those officials from compelling all county clerks to grant licenses to same-sex couples applying for them. See *California: Gay Marriage Opponents Lose Another Round in Court*, N.Y. TIMES, July 16, 2013, at A11; Marty Lederman, *The Fate of Same-Sex Marriage in California After Perry*, SCOTUSBLOG (June 26, 2013, 11:32 PM), <http://www.scotusblog.com/2013/06/the-fate-of-same-sex-marriage-in-california-after-perry>; Jennifer Medina, *For California Couples, Uncertainty on Gay Marriage Turns from ‘If?’ to ‘When?’*, N.Y. TIMES, June 27, 2013, at A21.

¹¹ 347 U.S. 483 (1954).

two decades before the cases were decided. Only dramatic changes in the social and political contexts surrounding these decisions rendered them conceivable. Part II explains how rulings that had become conceivable by the time of the decisions were still not inevitable. The composition of the Court, which is partly fortuitous, plays a critical role in constitutional interpretation. Turning to another possible input into constitutional decisionmaking, Part III argues that constitutional doctrine played little role in the outcomes of *Brown* and *Windsor*. Part IV considers the strategic element in constitutional interpretation. It argues that, in both *Brown* and the recent marriage-equality cases, the Justices hedged their decisions out of concern that broader rulings would have ignited political backlash. Part V addresses a final dimension on which *Brown* and the marriage-equality rulings are similar: the ease of predicting the future on the issues involved.

I. THE ROLE OF POLITICAL AND SOCIAL CONTEXT IN CONSTITUTIONAL INTERPRETATION

Occasionally, landmark Court decisions may seem inconceivable only a decade or two before they are rendered. Twenty years before *Brown*, a Supreme Court ruling against the constitutionality of public school segregation would have been virtually unthinkable.¹² In the 1920s, school segregation was spreading in the North, and it seemed virtually impregnable in the South.¹³ The great African American leader W. E. B. Du Bois thought it “idiotic” for blacks to protest segregation “in an increasingly segregated world.”¹⁴ The National Association for the Advancement of Colored People (NAACP), which brought only constitutional challenges it deemed likely to prevail, was contesting inequalities in teacher pay and in higher education while declining to contest grade school segregation in the South.¹⁵ In 1927, the Supreme Court had unanimously rejected a lawsuit brought by a Chinese family against Mississippi’s practice of segregating Asians into African American schools.¹⁶ Justice Frankfurter later observed that, had he been forced to vote on the constitutionality of public school segregation

¹² MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 147 (2004) [hereinafter KLARMAN, JIM CROW TO CIVIL RIGHTS].

¹³ *Id.*

¹⁴ W. E. B. Du Bois, *The N.A.A.C.P. and Race Segregation*, THE CRISIS, Feb. 1934, at 52, 53.

¹⁵ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 146–52; *see also* MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 36–37 (1987) (describing the appeal of litigating against segregation in higher education).

¹⁶ *Gong Lum v. Rice*, 275 U.S. 78 (1927).

before 1950, he would have upheld it because “public opinion had not then crystallized against it.”¹⁷

Twenty years before *Windsor*, a Supreme Court ruling against the constitutionality of a federal statute defining marriage as the union of a man and a woman would have been similarly inconceivable.¹⁸ Even by the mid-1990s, not a single jurisdiction in the world had adopted same-sex marriage.¹⁹ Very few jurisdictions in the United States had enacted even domestic-partnership legislation.²⁰ Opinion polls revealed that, at most, a quarter of Americans supported gay marriage.²¹ When Alaska and Hawaii in 1998 conducted referenda on proposed constitutional amendments to limit marriage to a man and a woman, roughly 70% of voters approved.²² In 1996, the U.S. House of Representatives and the U.S. Senate passed the Defense of Marriage Act by margins of five and six to one, respectively.²³ A Democratic Justice Department considered the law clearly constitutional.²⁴

Rulings such as *Brown* and *Windsor* became conceivable only because of enormous changes in the surrounding social and political contexts. For *Brown*, the critical development was World War II. The ideology of the war was antifascist and prodemocratic, and President Franklin D. Roosevelt urged Americans to “refut[e] at home the very theories we are fighting abroad.”²⁵ The contributions made by a million African American soldiers to the war effort were undeniable, and many of them shared the view stated by one that “after having been overseas fighting for democracy, I thought that when we got back here we should enjoy a little of it.”²⁶

In addition, more than a million and a half African Americans migrated from the rural South to the urban North during the 1940s. This mass migration greatly enhanced black political power and facili-

¹⁷ William O. Douglas, Memorandum (Jan. 25, 1960), in *THE DOUGLAS LETTERS* 169, 169 (Melvin L. Urofsky ed., 1987) (quoting Justice Frankfurter) (internal quotation marks omitted).

¹⁸ *Windsor*, 133 S. Ct. at 2689 (“It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.”).

¹⁹ The Netherlands was the first, in 2001. See WILLIAM N. ESKRIDGE JR., *EQUALITY PRACTICE*, at ix (2002).

²⁰ MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 45 (2012) [hereinafter *KLARMAN, CLOSET TO ALTAR*].

²¹ *Id.*

²² *Id.* at 66, 68.

²³ *Id.* at 63.

²⁴ See, e.g., Letter from Andrew Fois, Assistant Att’y Gen., to Rep. Henry J. Hyde, Chairman, House Comm. on the Judiciary (May 14, 1996), in H.R. REP. NO. 104-664, at 33, 34 (1996) (stating that the Department of Justice “believes that [the law] would be sustained as constitutional”).

²⁵ KLARMAN, *JIM CROW TO CIVIL RIGHTS*, *supra* note 12, at 175 (alteration in original) (quoting President Roosevelt) (internal quotation marks omitted).

²⁶ *Id.* at 181 (quoting ROBERT J. NORRELL, *REAPING THE WHIRLWIND* 61 (1998)) (internal quotation marks omitted).

tated the creation of a black middle class that had the inclination, capacity, and opportunity to engage in coordinated social protest.²⁷ Finally, the onset of the Cold War in the late 1940s provided another impetus for racial reform. In the ideological contest with communism, American democracy was on trial, and southern white supremacy was its greatest vulnerability.²⁸

Even before *Brown*, such forces for change had produced significant reform in racial practices. In 1940, President Franklin D. Roosevelt appointed the first black general in American history.²⁹ In 1947, Jackie Robinson desegregated the national pastime of major league baseball.³⁰ In 1948, President Harry S. Truman issued executive orders desegregating the federal military and the civil service.³¹

Dramatic changes in racial practices were occurring even within the South. Black voter registration there increased from 3% in 1940 to 20% in 1950. Dozens of urban police forces in the South hired black officers, and blacks began serving on southern juries — both for the first time since the late nineteenth century. In the states of the peripheral South, the walls of segregation were beginning to be breached in public facilities and public accommodations.³²

Such changes in racial attitudes and practices were beginning to affect the constitutional law of race even before *Brown*. In 1944, the Court, overturning a unanimous decision from just nine years earlier,³³ invalidated the white primary.³⁴ In 1948, rejecting an overwhelming body of lower court precedent,³⁵ the Court ruled unconstitutional the judicial enforcement of racially restrictive covenants.³⁶ In 1950, the Justices essentially invalidated racial segregation in public higher education.³⁷

As the Justices in *Brown* deliberated upon the constitutionality of public school segregation, they remarked upon these extraordinary racial developments. Justice Frankfurter noted “the great changes in the relations between white and colored people”³⁸ and remarked that “the

²⁷ *Id.* at 173–74.

²⁸ *Id.* at 182–84. See generally MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS (2011).

²⁹ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 178.

³⁰ *Id.* at 186.

³¹ *Id.* at 181.

³² For this paragraph, see *id.* at 185–86, 188–90.

³³ *Grovey v. Townsend*, 295 U.S. 45 (1935) (holding that a Democratic Party rule excluding African Americans from party primaries did not violate the Fourteenth or Fifteenth Amendments).

³⁴ *Smith v. Allwright*, 321 U.S. 649 (1944).

³⁵ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 213.

³⁶ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

³⁷ *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

³⁸ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 309 (quoting Memorandum from Felix Frankfurter (undated), *microformed on Felix Frankfurter Papers*, at Part 2, Reel 4,

pace of progress has surprised even those most eager in its promotion.”³⁹ Justice Jackson observed that recent “Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man.”⁴⁰

With regard to *Windsor*, the critical development has been the coming-out phenomenon, which over a period of decades has led to extraordinary changes in attitudes and practices regarding sexual orientation. The modern gay rights movement, conventionally dated to the Stonewall Rebellion in Greenwich Village in June of 1969, has always been grounded upon a core insight: As more gays and lesbians come out of the closet, the social environment becomes more gay friendly. In turn, as the social environment becomes more hospitable, more gays and lesbians feel freer to come out of the closet. This social dynamic is powerfully reinforcing.⁴¹

As more gays and lesbians have openly embraced their sexuality, more parents, children, siblings, friends, neighbors, and coworkers have come to know and love someone who is openly gay. In 1985, only a quarter of Americans reported that a friend, relative, or coworker had told them that he or she was gay; by 2000, that number had tripled to 75%.⁴² In 1986, as the Supreme Court in *Bowers v. Hardwick*⁴³ deliberated over the constitutionality of criminal prohibitions on same-sex sodomy, Justice Powell told his (gay) law clerk that he had never known a gay person.⁴⁴ It is impossible to imagine a Supreme Court Justice saying such a thing a quarter century later.⁴⁵

The principal reason the coming-out phenomenon has been so significant is that knowing someone who is gay powerfully influences support for gay equality.⁴⁶ Because few people favor discrimination against those whom they know and love, every gay person coming out

Frame 378 (Univ. Publ'ns of Am., Inc.) [hereinafter Memorandum from Felix Frankfurter] (internal quotation mark omitted).

³⁹ *Id.* (quoting Memorandum from Felix Frankfurter, *supra* note 38) (internal quotation marks omitted).

⁴⁰ *Id.* (quoting Robert H. Jackson, Draft Concurrence, *Brown v. Board of Education* at 20 (Mar. 15, 1954) (on file with the Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 184) [hereinafter Jackson Draft Concurrence]) (internal quotation marks omitted).

⁴¹ KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 197.

⁴² *Id.*

⁴³ 478 U.S. 186 (1986).

⁴⁴ KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 197.

⁴⁵ Adam Liptak, *Exhibit A for a Major Shift: Justices' Gay Clerks*, N.Y. TIMES, June 9, 2013, at A1.

⁴⁶ KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 197; see Sarah Dutton et al., *Poll: 53% of Americans Support Same-Sex Marriage*, CBS NEWS (Mar. 26, 2013, 7:00 AM), http://www.cbsnews.com/8301-250_162-57576249/poll-53-of-americans-support-same-sex-marriage (“Knowing someone personally who is gay or lesbian appears to be an important factor in how Americans feel about the issue of same-sex marriage. While two-thirds of Americans with a close relationship to someone who is gay or lesbian think same-sex marriage should be legal, most without such a close relationship don’t think so.”).

of the closet has meant more supporters of gay equality. In a 2003 survey, only 13% of those who reported having close friends or family members who are gay agreed with the statement that permitting gay marriage would undermine the morals of the country. By contrast, 63% of those who reported not having any close friends or family members who are gay agreed with this statement.⁴⁷ Another study in 2004 found that among those who reported knowing someone who is gay, 65% favored either gay marriage or civil unions, while only 35% of those who reported not knowing any gay people supported these unions.⁴⁸

The coming-out phenomenon has profoundly influenced popular attitudes toward homosexuality. The number of Americans believing that homosexuals should have equal employment rights grew from 56% in 1977 to 80% in 1997, and the number believing that gays should be legally permitted to adopt children rose from 14% to 50% over roughly the same time period.⁴⁹

Such changes in public opinion were reflected and then reinforced by changes in the media and popular culture. In the mid-1990s, some of the nation's most popular situation comedies, such as *Friends* and *Mad About You*, began dealing with gay marriage — a virtually inconceivable development even five years earlier. In 1997, Ellen DeGeneres famously came out in a special one-hour episode of her popular television show *Ellen* — the first time in television history that a leading prime-time character had come out as gay. Forty-six million Americans watched, and *Time* put her on its cover with the headline, “Yep, I’m Gay.”⁵⁰ A year and a half later, *Will and Grace*, which featured two openly gay men as major characters, launched its run as one of television’s most popular programs.⁵¹

Shifting attitudes on sexual orientation were also reflected in changes in law, business practices, and politics. The number of states with laws forbidding discrimination based on sexual orientation in employment and public accommodations increased from zero in 1980 to 11 in 1998, and by 2000, a dozen states had expanded their hate crimes laws to protect gays and lesbians. In 1992, not a single Fortune

⁴⁷ Clyde Wilcox et al., *If I Bend This Far I Will Break? Public Opinion About Same-Sex Marriage*, in THE POLITICS OF SAME-SEX MARRIAGE 215, 237 (Craig A. Rimmerman & Clyde Wilcox eds., 2007).

⁴⁸ *Id.* By contrast, the absence of a coming-out analog in the race and abortion contexts may help to explain why change on those issues has been slower. The stark racial segregation that persists in most American spheres of life inhibits members of different racial groups from getting to know one another well. See MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 197–98 (2007). Similarly, perhaps one reason why public opinion has not become more supportive of abortion rights is that women who have had abortions infrequently “come out” by publicly sharing their experiences.

⁴⁹ KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 71–72.

⁵⁰ “Yep, I’m Gay,” TIME, Apr. 14, 1997, at cover.

⁵¹ For this paragraph, see KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 73.

500 corporation extended benefits to the partners of gay employees, but by 2000, well over a hundred of them did so. In 2000, both of the leading candidates for the Democratic presidential nomination, Bill Bradley and Al Gore, supported civil unions for same-sex couples, repeal of the military's policy of "Don't Ask, Don't Tell," and a federal law forbidding employment discrimination based on sexual orientation.⁵²

In just the four years prior to *Windsor*, Congress passed a federal hate crimes law covering sexual orientation and repealed Don't Ask, Don't Tell.⁵³ President Obama embraced gay marriage,⁵⁴ as did the Democratic Party⁵⁵ and half of U.S. senators.⁵⁶ For the first time, voters in several states enacted gay marriage,⁵⁷ and in Wisconsin, they elected the first openly gay U.S. senator in American history.⁵⁸ Gay marriage has become so popular among Democrats that some party elected officials now refuse to defend in court laws that exclude same-sex couples from marriage,⁵⁹ which is why serious justiciability issues existed in both *Windsor* and *Hollingsworth*. Cultural changes are happening so rapidly that just in 2012–2013, still-active American athletes have come out of the closet for the very first time in professional men's and women's basketball, professional men's soccer, and professional men's boxing.⁶⁰

⁵² For this paragraph, see *id.* at 71–72, 84; Keith Bradsher, *Reaching Out to Gay Voters, Bradley Calls for Equal Rights*, N.Y. TIMES, Oct. 3, 1999, at A30; Chris Bull, *Al Gore's Gay Vision*, THE ADVOCATE, Sept. 14, 1999, at 40; James Dao & Katherine Q. Seelye, *The Democratic Debate: Gore and Bradley Sing in Harmony in Latest Meeting*, N.Y. TIMES, Mar. 2, 2000, at A24; *The Debate Over Gay Troops*, N.Y. TIMES, Jan. 8, 2000, at A12.

⁵³ KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 156–58.

⁵⁴ Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

⁵⁵ Michael Schwartz, *Democrats Unveil Party Platform*, N.Y. TIMES (Sept. 4, 2012, 12:35 AM), <http://thecaucus.blogs.nytimes.com/2012/09/04/democrats-unveil-party-platform>.

⁵⁶ Sarah Wheaton, *G.O.P. and Democratic Senators Back Gay Marriage*, N.Y. TIMES (Apr. 2, 2013, 12:33 PM), <http://thecaucus.blogs.nytimes.com/2013/04/02/kirk-and-carper-announce-support-for-same-sex-marriage>.

⁵⁷ Erik Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer 'Milestone Year'*, N.Y. TIMES, Nov. 8, 2012, at P7; *Same-Sex Marriage Rivals Concede in Washington*, N.Y. TIMES, Nov. 9, 2012, at A17.

⁵⁸ Michael M. Grynbaum, *Fickle Wisconsin Sends a Trusty Progressive to the Senate*, N.Y. TIMES, Nov. 10, 2012, at A11.

⁵⁹ Democratic Attorneys General in Pennsylvania and New Mexico recently announced their unwillingness to defend laws excluding same-sex couples from marriage. In late July, the Register of Wills in Montgomery County, Pennsylvania, began issuing marriage licenses to same-sex couples on the ground that he believed the state's ban on same-sex marriage was unconstitutional and he would no longer enforce it. Trip Gabriel, *Move for Gay Marriage Gets a Lift in Pennsylvania*, N.Y. TIMES, July 12, 2013, at A12; Chris Johnson, *New Mexico AG Won't Defend State Marriage Law*, WASH. BLADE (July 23, 2013), <http://www.washingtonblade.com/2013/07/23/n-m-atty-genl-wont-defend-state-marriage-law>; Frank Otto, *Pennsylvania Couples Defy State Same-Sex Marriage Ban*, DENVER POST (July 24, 2013, 6:09 PM), http://www.denverpost.com/ci_23725780/pa-couples-defy-state-same-sex-marriage-ban.

⁶⁰ Sam Borden, *A Female Star Comes Out, and the Sports World Shrugs*, N.Y. TIMES, Apr. 19, 2013, at B15; Jason Collins with Franz Lidz, *Why NBA Center Jason Collins is Coming Out*

Such changes in attitudes, practices, and laws influenced the constitutional law of sexual orientation even before *Windsor*. In 1996, the Supreme Court struck down a Colorado constitutional amendment that barred the state and its municipalities from enacting gay rights ordinances and repealed those already adopted.⁶¹ In 2003, the Court invalidated criminal bans on same-sex sexual relations.⁶²

Much as the Justices in *Brown* expressed astonishment at recent changes with regard to race, at the *Windsor* oral argument some Justices remarked upon the extraordinary developments afoot with regard to attitudes and practices involving sexual orientation. Justice Scalia noted a “sea change” with regard to the states’ support of same-sex marriage,⁶³ and Chief Justice Roberts observed that “political figures [were] falling over themselves to endorse” that reform.⁶⁴

Sometimes in American history, social change occurs with extraordinary rapidity. Once that happens, Court decisions that were previously inconceivable become plausible. This happens more often than is commonly appreciated. In addition to the instances of race and sexual orientation just described, constitutional challenges to the death penalty and abortion restrictions were virtually inconceivable only a decade before the Court vindicated them.⁶⁵

II. THE COMPOSITION OF THE COURT MATTERS

Social and political change can render previously inconceivable Court decisions conceivable. Yet such change does not necessarily make those rulings *inevitable*. Constitutional interpretation depends not only on social and political context, but also on the composition of the Supreme Court, which is partly a function of politics but also partly of fortuity.

Now, SPORTS ILLUSTRATED, May 6, 2013, at 34; Bob Velin, *Orlando Cruz Becomes Boxing's First Openly Gay Man*, USA TODAY (Oct. 3, 2012, 10:03 PM), <http://www.usatoday.com/story/gameon/2012/10/03/orlando-cruz-is-boxings-first-openly-gay-man/1612095>; Billy Witz, *Milestone for Gay Athletes as Rogers Plays for Galaxy*, N.Y. TIMES (May 27, 2013), <http://www.nytimes.com/2013/05/28/sports/soccer/milestone-for-gay-athletes-as-robbie-rogers-plays-for-galaxy.html>.

⁶¹ *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

⁶² *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁶³ Transcript of Oral Argument at 107, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter *Windsor* Transcript] (Scalia, J.).

⁶⁴ *Id.* at 108 (Roberts, C.J.); *see also id.* at 107 (asking whether “the lobby supporting the enactment of same sex-marriage laws in different States is politically powerful”). Chief Justice Roberts apparently intended his observation as an argument against the need for judicial intervention on behalf of gays and lesbians.

⁶⁵ *Roe v. Wade*, 410 U.S. 113 (1973); *Furman v. Georgia*, 408 U.S. 238 (1972); *see also* STUART BANNER, *THE DEATH PENALTY* 239 (2002) (noting that as of the early 1960s, commentators considered the constitutionality of the death penalty so obvious as to be “scarcely worth discussion”); DAVID J. GARROW, *LIBERTY AND SEXUALITY*, at ix (1998) (noting that a constitutional right to abortion was “unimagined” before *Griswold v. Connecticut*, 381 U.S. 479 (1965), was decided in 1965).

The Court's ultimate unanimity in *Brown* creates the misleading impression that the result was inevitable.⁶⁶ Yet *Brown* was difficult for the Justices — probably for two primary reasons. First, as one might expect on a race issue, the southern Justices — Justice Black was an exception — were less convinced than their northern colleagues that public school segregation was unconstitutional. Indeed, Justice Reed of Kentucky was quite certain that school segregation was constitutionally permissible — and even that public support for it was “reasonable.”⁶⁷ Chief Justice Vinson, also from Kentucky, and Justice Clark, from Texas, also seemed inclined to uphold school segregation after the initial oral argument in *Brown*.⁶⁸

Second, *Brown* was a hard case for northern Justices Frankfurter and Jackson, even though they did not share their southern colleagues' sympathies for the practice of racial segregation.⁶⁹ Both Justice Frankfurter and Justice Jackson deemed state-mandated segregation to be morally repulsive — “Hitler's creed,” as Justice Black once referred to it.⁷⁰ Yet they prided themselves on separating their moral views from their legal interpretations, and neither Justice was convinced that the traditional sources of constitutional law — such as text, original understanding, and precedent — condemned school segregation. For these Justices, who were appointed to the Court to repudiate the constitutional practices of the *Lochner* era, the invalidation of segregation by judicial fiat was a confession that “representative government has failed.”⁷¹

When *Brown* was first discussed by the Justices in conference in December 1952, there were not yet five certain votes to invalidate public school segregation.⁷² Both the ultimate outcome in *Brown* and the

⁶⁶ For a more detailed discussion of why *Brown* was a hard case for the Justices, see KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 292–312. For an interpretation suggesting less uncertainty about the outcome in *Brown*, see MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 210 (1994) (arguing that as of the initial conference deliberations, “it was clear that a majority was prepared to hold segregation unconstitutional”).

⁶⁷ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 294; *see also id.* at 294–95 (quoting Justice Reed).

⁶⁸ *Id.* at 293–94, 297; *see also id.* at 300 (“Vinson was of the opinion that the *Plessy* case was right and that segregation was constitutional. . . . Clark was inclined that way.” (quoting Memorandum from William O. Douglas to the file (May 17, 1954) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1149)) (internal quotation mark omitted)).

⁶⁹ For further discussion of why these Justices found *Brown* hard, *see id.* at 303–08.

⁷⁰ *Id.* at 303 (quoting Justice Black) (internal quotation marks omitted).

⁷¹ *Id.* at 308 (quoting Justice Jackson) (internal quotation mark omitted); *see also id.* (quoting a memorandum from law clerk William H. Rehnquist to Justice Jackson, in which he questioned whether striking down school segregation would eliminate any distinction between this Court and the *Lochner*-era one, except for “the kinds of litigants it favors and the kinds of special claims it protects,” William H. Rehnquist, A Random Thought on the Segregation Cases (on file with the Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 184) (internal quotation marks omitted)).

⁷² *Id.* at 298.

Court's unanimous vote in favor of it were partly fortuitous. The sudden and unexpected death of Chief Justice Vinson in September 1953 and his replacement by Chief Justice Warren created a clear majority to invalidate segregation.⁷³ Doubters such as Justice Reed came on board only as good soldiers who worried that any hint of dissent emanating from the Court would bolster white southerners' determination to massively resist enforcement of *Brown*.⁷⁴ Achieving unanimity may have been easier in an era in which all of the Justices except the Chief had been appointed by Democratic presidents — either President Franklin Roosevelt or President Truman — and shared a common constitutional philosophy of aversion to Lochnerism.⁷⁵

Today's Supreme Court is deeply divided in most of its important constitutional rulings, though the differences among the Justices are primarily ideological — not regional, as in *Brown*. The current Court consists of one bloc of four liberals and another of four conservatives, and Justice Kennedy provides the swing vote on most issues.⁷⁶ It is impossible to explain these consistent divisions on methodological rather than ideological grounds — for example, that the conservatives favor judicial restraint and the liberals judicial activism. There are simply too many instances in which the conservatives are the ones overturning government action: race-based affirmative action,⁷⁷ voluntary efforts by school boards to promote integration,⁷⁸ campaign finance reform,⁷⁹ a New Jersey public accommodations law preventing the Boy Scouts from excluding gays,⁸⁰ numerous laws raising federalism issues,⁸¹ and *Bush v. Gore*⁸² — to name only the most prominent examples.

The Justices divide five to four on issues such as abortion,⁸³ affirmative action,⁸⁴ the death penalty,⁸⁵ school prayer,⁸⁶ government vouchers used for religious schools,⁸⁷ political gerrymandering,⁸⁸ and various civil liberties issues arising from the War on Terror⁸⁹ primarily

⁷³ *Id.* at 301–02.

⁷⁴ *Id.* at 302.

⁷⁵ *Id.* at 307–08.

⁷⁶ See, e.g., JEFFREY TOOBIN, *THE OATH* 50 (2012) (noting that “so many” of the Roberts Court's rulings are determined by Justice Kennedy's vote).

⁷⁷ E.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁷⁸ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

⁷⁹ E.g., *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁸⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

⁸¹ E.g., *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

⁸² 531 U.S. 98 (2000).

⁸³ E.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁸⁴ E.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁸⁵ E.g., *Roper v. Simmons*, 543 U.S. 551 (2005).

⁸⁶ E.g., *Lee v. Weisman*, 505 U.S. 577 (1992).

⁸⁷ E.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁸⁸ E.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

⁸⁹ E.g., *Boumediene v. Bush*, 553 U.S. 723 (2008).

because they disagree on the underlying policy disputes. Although constitutional interpretation may not be simply reducible to politics, it surely cannot be understood without a substantial emphasis on political considerations.

It seems very likely that politically liberal Justices such as Ruth Bader Ginsburg and Elena Kagan are personally sympathetic to gay marriage. Political and religious conservatives such as Justices Antonin Scalia and Samuel Alito probably are not. Justice Kennedy, the swing vote on nearly all constitutional issues,⁹⁰ has been fairly liberal in cases involving gay rights.⁹¹ Justice Kennedy hails from northern California, one of the most gay-friendly regions of the country (suggesting that regional affiliation may sometimes still matter today, as it apparently did at the time of *Brown*). As early as 1980, then-Judge Kennedy authored an opinion as a Ninth Circuit judge that was remarkably gay friendly for its time, strongly implying in a ruling that sustained the constitutionality of the Navy's policy of dismissing gay service members that the criminal prosecution of private consensual homosexual sex would be unconstitutional.⁹² Moreover, not only did Justice Kennedy vote with the liberals in *Romer v. Evans*⁹³ and *Lawrence v. Texas*,⁹⁴ but he also authored the majority opinions in these landmark gay rights rulings.

Justice Kennedy voted with the liberals in *Windsor*, and he assigned the opinion to himself. Had he been a conservative on gay rights issues, as he is on matters involving campaign finance reform, race-based affirmative action, federalism, and state recounts sought by Democratic candidates in presidential elections, then *Windsor* would have come out the other way.

III. DOCTRINE CONSTRAINS LITTLE IN LANDMARK CONSTITUTIONAL RULINGS

Lawyers and law professors may care greatly about legal doctrine, but the Justices do not appear to be much influenced by it — at least not in landmark cases such as *Brown* and *Windsor*.⁹⁵

⁹⁰ The big exception was health care, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), where Chief Justice Roberts turned out to be the swing vote — for the first time in a constitutional case.

⁹¹ See, e.g., Christian Legal Soc'y Chapter of the Univ. of Cal., *Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). *But see* *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

⁹² See *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980).

⁹³ 517 U.S. 620 (1996).

⁹⁴ 539 U.S. 558 (2003).

⁹⁵ For the longstanding debate over how much traditional legal sources constrain judicial decisionmaking, see, for example, the sources cited in KLARMAN, *JIM CROW TO CIVIL RIGHTS*, *supra* note 12, at 4–5, 5 n.2. I have limited myself in the text to the claim that legal doctrine mat-

Because the result in *Brown* seems so obviously right to us today, we tend to assume that it was also easy as a matter of constitutional doctrine. Yet this assumption turns out to be deeply mistaken.

When the Justices first discussed *Brown* in conference, Justice Jackson began his statement with a series of stark observations: “[There is] [n]othing in the text that says [state-mandated public school segregation] is unconstitutional. . . . [N]othing in the opinions of the courts that says it’s unconstitutional. Nothing in the history of the 14th amendment [that says it’s unconstitutional].”⁹⁶

Elaborating briefly on Justice Jackson’s meaning may be helpful. With regard to the constitutional text, Justice Jackson meant that the Fourteenth Amendment says nothing explicit about race and that “separate but equal” sounds plausibly consistent with the mandate of “equal protection of the laws.” With regard to the original understanding, Justice Jackson meant that no member of Congress who supported the passage of the Fourteenth Amendment said that it would mandate school desegregation; some proponents explicitly denied that it would do so; most of the states that ratified it continued to segregate their public schools; and the Congress that passed the amendment continued to segregate District of Columbia public schools.⁹⁷ With regard to precedent, Justice Jackson meant that of the forty-four cases involving constitutional challenges to school segregation that had been resolved by state supreme courts and lower federal courts prior to 1940, not a single one had found a Fourteenth Amendment violation.⁹⁸ In view of the absence of support in the conventional materials of constitutional

ters little in *landmark* constitutional decisions, and this Comment is hardly the place to defend any broader claim. For what it is worth, though, my own view is that all constitutional rulings are a function of both legal factors — such as text, original understanding, and precedent — and more “political” considerations — such as judges’ views on the underlying policy issues and their strategic calculations regarding whether a ruling will affect courts’ institutional legitimacy and generate political backlash. Moreover, the more passionately judges care about the underlying policy issue, the less constraint they are likely to feel from the traditional legal sources. Thus, for example, in *Bush v. Gore*, where the Justices presumably had strong preferences about the outcome of the 2000 presidential election, the law went pretty much out the window. See Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1724–47 (2001) [hereinafter Klarman, *Bush v. Gore*].

⁹⁶ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 296 (first, second, and sixth alterations in original) (quoting William O. Douglas, Conference Notes, *Brown v. Board of Education* and *Bolling v. Sharpe* (Dec. 13, 1952) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1150) [hereinafter Douglas Conference Notes]) (internal quotation mark omitted). Justice Douglas’s conference notes are not a transcription and may not perfectly capture what was said, but they have generally proved pretty accurate.

⁹⁷ For further elaboration of the argument that the original understanding of the Fourteenth Amendment did not bar school segregation, see Michael J. Klarman, Response, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995). For the best argument to the contrary, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

⁹⁸ Edith Udell Fierst, Note, *Constitutionality of Educational Segregation*, 17 GEO. WASH. L. REV. 208, 214 n.30 (1949).

law for invalidating school segregation, Justice Jackson candidly conceded that *Brown* could be justified only on “political” — not legal — grounds.⁹⁹

Chief Justice Warren’s opinion for the Court in *Brown* was doctrinally unconvincing. With regard to the original understanding of the Fourteenth Amendment, Chief Justice Warren disingenuously portrayed it as indeterminate¹⁰⁰ before dismissing it as irrelevant.¹⁰¹ In response to the segregationists’ argument that racially segregated schools were not necessarily unequal, he cited controversial and — by modern standards — obviously deficient social science evidence to establish that they were.¹⁰² Chief Justice Warren’s brief opinion mainly emphasized the importance of public education rather than the presumptive invalidity of all racial classifications,¹⁰³ which makes it difficult to comprehend the Court’s subsequent rulings extending *Brown*, without explanation, to state-mandated segregation in spheres of life that were ostensibly less important, such as public golf courses and beaches.¹⁰⁴

Justice Kennedy’s majority opinion in *Windsor* is similarly unconvincing as a doctrinal matter. Obviously, it would be difficult to make an originalist case that the drafters and ratifiers of the Fourteenth Amendment intended to protect gay marriage,¹⁰⁵ and Justice Kennedy made no overtures in that direction. Much of Justice Kennedy’s opinion emphasized that the federal government has traditionally deferred to state definitions of marriage,¹⁰⁶ which initially leads one to expect that *Windsor* would invalidate DOMA on federalism grounds. Yet

⁹⁹ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 306 (quoting Harold H. Burton, Conference Notes, School Segregation Cases (Dec. 12, 1953) (on file with the Library of Congress, Manuscript Division, Papers of Harold H. Burton, Box 244)).

¹⁰⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (concluding that the original understanding of the Fourteenth Amendment with regard to school segregation was “inconclusive”).

¹⁰¹ *Id.* at 492 (noting that in determining the constitutionality of public school segregation, “we cannot turn the clock back to 1868 when the Amendment was adopted”).

¹⁰² LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 43 (2000) (describing the deficiencies in the social science evidence).

¹⁰³ *Brown*, 347 U.S. at 493 (“Today, education is perhaps the most important function of state and local governments.”).

¹⁰⁴ For these cases and contemporary criticism of them for being inadequately reasoned, see KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 321.

¹⁰⁵ See Transcript of Oral Argument at 37–41, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) [hereinafter *Hollingsworth* Transcript] (Scalia, J.) (asking respondents’ lawyer Theodore B. Olson when the Constitution came to protect same-sex marriage and Olson responding with his own question — when did it come to bar public school segregation?).

¹⁰⁶ *E.g.*, *Windsor*, 133 S. Ct. at 2689–90 (“By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”); *id.* at 2691 (“[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”).

Justice Kennedy ultimately chose not to do so,¹⁰⁷ probably because it seems preposterous to suggest that Congress may not — subject to individual rights restrictions — define the class entitled to benefit from laws concededly within its enumerated powers.¹⁰⁸

The references in Justice Kennedy’s opinion to the “liberty” protected by the Fifth Amendment against federal government interference hint at a ruling grounded in substantive due process.¹⁰⁹ Yet the Court has typically required that interests protected under this doctrine be grounded in history and tradition,¹¹⁰ which gay marriage clearly is not.¹¹¹ Conventional equal protection analysis, about which Justice Kennedy’s opinion said very little, typically proceeds by identifying the relevant tier of scrutiny.¹¹² Yet the Supreme Court has never ruled that laws classifying on the basis of sexual orientation are subject to a heightened standard of review, which is the path by which most state courts protecting gay marriage have proceeded.¹¹³ Justice Kennedy eschewed this route as well.

In the end, Justice Kennedy’s *Windsor* opinion relied mainly on the assertion that DOMA was motivated by a simple desire to disparage and demean gays and lesbians.¹¹⁴ He failed to say a word in response to the principal justifications proffered for the statute — most notably,

¹⁰⁷ *Id.* at 2692 (“[I]t is unnecessary to decide whether this federal intrusion on state power [inflicted by DOMA] is a violation of the Constitution because it disrupts the federal balance.”).

¹⁰⁸ *See id.* at 2705 n.4 (Scalia, J., dissenting) (arguing that, “given the Federal Government’s long history of making pronouncements regarding marriage,” its enumerated powers undeniably allow it to define marriage for federal law purposes); *see also id.* at 2720 (Alito, J., dissenting) (“Assuming that Congress has the power under the Constitution to enact the laws affected by § 3 [of DOMA], Congress has the power to define the category of persons to whom those laws apply.”); *Windsor* Transcript, *supra* note 63, at 81–82 (Solicitor General Verrilli conceding that DOMA posed only an equal protection issue, not a federalism one).

¹⁰⁹ *See, e.g., Windsor*, 133 S. Ct. at 2692 (addressing whether the “injury and indignity” inflicted by section 3 of DOMA “is a deprivation of an essential part of the liberty protected by the Fifth Amendment”); *see also id.* at 2705–06 (Scalia, J., dissenting) (noting that the majority opinion seems to rely not on equal protection concepts specifically but on the Fifth Amendment more generally).

¹¹⁰ *E.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (noting that interests protected by substantive due process must be “deeply rooted in this Nation’s history and tradition” (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (internal quotation marks omitted))).

¹¹¹ *Windsor*, 133 S. Ct. at 2706–07 (Scalia, J., dissenting) (noting that such a claim would be “quite absurd,” *id.* at 2707); *id.* at 2715 (Alito, J., dissenting) (“It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition.”).

¹¹² *See id.* at 2706 (Scalia, J., dissenting) (labeling the majority’s failure to identify a standard of review “confusing”).

¹¹³ *See, e.g., In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008) (relying on strict scrutiny); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (relying on intermediate scrutiny); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (relying on intermediate scrutiny).

¹¹⁴ *See Windsor*, 133 S. Ct. at 2693 (noting that “[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma” upon same-sex couples lawfully married under state law); *id.* at 2694 (stating that DOMA “demeans” the members of same-sex couples who are lawfully married under state law); *id.* at 2695 (“[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage.”).

honoring the choice of past Congresses to provide benefits to couples satisfying the traditional definition of marriage¹¹⁵ and preserving national uniformity in the definition of marriage for federal purposes.¹¹⁶ Nor did Justice Kennedy offer any elaboration — he offered none in *Romer* either¹¹⁷ — on how one might distinguish a “bare [legislative] desire to harm”¹¹⁸ from a traditional morals justification. To take one specific example, Justice Kennedy says nothing that would help a subsequent court decide whether a criminal ban on polygamy is based on an illegitimate “desire to harm” polygamists or on an acceptable moral or other distinction between monogamous marriage and polygamy that would justify disparate legal treatment of the two.

Judging from *Brown* and *Windsor*, constitutional doctrine seems not to matter very much to the Justices — at least not in landmark cases about which they probably have strong intuitions of fairness and right. Moreover, history’s ultimate judgment on *Windsor* probably will not be greatly affected by whether today’s legal commentators evaluate the decision harshly. Chief Justice Warren’s opinion in *Brown* was widely vilified in the 1950s — not only by southern white supremacists,¹¹⁹ but also by scholars and judges. In his Holmes lecture at Harvard Law School in 1958, for example, Judge Learned Hand denounced the Court’s “assum[ing] the role of a third legislative chamber,” identifying *Brown* as a prime example of such behavior.¹²⁰ In a famous article published the following year in the *Harvard Law Review*, Professor Herbert Wechsler declared that *Brown* was im-

¹¹⁵ See Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives at 37–38, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter Brief on the Merits for Respondent BLAG] (arguing that when past Congresses chose to provide federal benefits to married couples, they were indisputably referring to opposite-sex couples).

¹¹⁶ See *id.* at 33–37 (arguing that a principal justification of DOMA was ensuring a uniform definition of marriage for federal purposes which would, for example, ensure that military members would not resist a posting in a more restrictive state because it would adversely affect their federal benefits); see also *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting) (relying on federal interests in uniformity and stability as sufficient to sustain the constitutionality of DOMA); *id.* at 2707–08 (Scalia, J., dissenting) (noting that the majority does not even bother to describe, much less grapple with, the principal arguments used to defend DOMA).

¹¹⁷ See *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (noting the Court’s conflation of “animus” and moral disapproval (quoting *id.* at 632 (majority opinion) (internal quotation marks omitted))).

¹¹⁸ *Windsor*, 133 S. Ct. at 2693 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

¹¹⁹ Richmond newspaper editor James J. Kilpatrick stated a typical view: “In May of 1954, that inept fraternity of politicians and professors known as the United States Supreme Court chose to throw away the established law. These nine men repudiated the Constitution, sp[ea]t upon the tenth amendment, and rewrote the fundamental law of this land to suit their own gauzy concepts of sociology.” *Court Order Gets Varied Reaction from Region’s Newspapers*, S. SCH. NEWS, June 8, 1955, at 8 (quoting *The Richmond News Leader*) (internal quotation mark omitted).

¹²⁰ LEARNED HAND, *THE BILL OF RIGHTS* 55 (Atheneum 1977) (1958).

possible to justify based on any “neutral principles” that the Court had articulated.¹²¹

Such criticism proved irrelevant to *Brown*’s long-term reputation. As public opinion turned strongly in favor of racial equality through the 1960s, *Brown* was canonized. By 1971, one could not criticize *Brown* and be a viable nominee to the Supreme Court.¹²² By the 1980s, no theory of constitutional adjudication could be taken seriously if it did not endorse the result in *Brown*.¹²³ *Windsor* will probably enjoy a similar canonization if public opinion continues to move sharply in favor of gay marriage, as seems likely.¹²⁴

IV. THE JUSTICES SOMETIMES HEDGE THEIR RULINGS TO MINIMIZE BACKLASH

At first blush, *Brown* certainly seems like a bold pronouncement — and in some ways it was. The Court declined the narrower option of invalidating school segregation on the ground that the South’s educational facilities for African Americans were egregiously unequal.¹²⁵ Further, the Court chose not to postpone resolving the constitutionality of grade school segregation until it had first tackled other facets of white supremacy that were less dear to the hearts of white southerners, such as segregation on local bus transportation.¹²⁶

Yet from a different perspective, *Brown* was indeed an incrementalist ruling. Chief Justice Warren’s opinion emphasized the importance of education rather than announcing a presumptive ban on

¹²¹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

¹²² See, e.g., Letter from William H. Rehnquist, Assistant Att’y Gen., to Sen. James Eastland, Chairman, Senate Comm. on the Judiciary (Dec. 8, 1971), in S. EXEC. REP. NO. 99-18, at 25, 26 (1986) (denying that views hostile to the result in *Brown* expressed in a memorandum he authored as a law clerk to Justice Jackson during the 1952 Term were his own, and stating, “I . . . unequivocally . . . support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision”); see also RICHARD KLUGER, SIMPLE JUSTICE 606 n.* (1975) (describing Rehnquist’s denial that the memorandum bearing his initials represented his own views, and concluding that he was lying); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 445 (2000) (concluding that future Chief Justice Rehnquist understood in 1971 that “you could not disagree with *Brown* and get confirmed” and thus decided to lie about the views he had held in 1952–1953 about the constitutionality of school segregation).

¹²³ See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA 77 (1990) (“[A]ny [constitutional] theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*.”); McConnell, *supra* note 97, at 952 (noting that any theory unable to accommodate *Brown* is “seriously discredited”).

¹²⁴ See *infra* Part V, pp. 154–61.

¹²⁵ See KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 292 (noting that some civil rights leaders criticized the NAACP for not challenging inequality rather than segregation).

¹²⁶ *Id.* at 391–92 (noting that a Court decision invalidating segregation on bus transportation likely would have generated far less political backlash than did *Brown*).

all racial classifications.¹²⁷ Internal evidence suggests that the Justices preferred this more limited ruling because it enabled them to duck the explosive question of whether laws banning interracial marriage were unconstitutional.¹²⁸

More importantly, the Justices in *Brown* deferred a decision on the remedy. When they took up that issue the following Term, rather than adhering to the usual rule that constitutional rights are immediately enforceable, they issued a remedial decree that was so vague — school desegregation was to take place “with all deliberate speed”¹²⁹ — that it seemed to invite delay and circumvention.¹³⁰ Moreover, when the miscegenation issue appeared on the Court’s docket in 1955–1956, the Justices engaged in patent obfuscation — and supinely suffered humiliation at the hands of a truculent state supreme court — in order to avoid resolving that enormously controversial issue.¹³¹

In the Court’s recent pair of marriage-equality rulings, a majority of Justices participated in another transparent dodge.¹³² While Justice Kennedy and the four liberal Justices stretched to reach the merits in *Windsor*, invalidating DOMA after rejecting a substantial challenge to the Court’s jurisdiction,¹³³ an ideologically mixed majority of five Jus-

¹²⁷ See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 238–39, 241–46 (1991) (noting and trying to explain the decision to write the *Brown* opinion this way).

¹²⁸ See GERALD GUNTHER, *LEARNED HAND* 572–77 (2d ed. 2011) (noting Justice Frankfurter’s subsequent explanation).

¹²⁹ See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

¹³⁰ KLARMAN, *JIM CROW TO CIVIL RIGHTS*, *supra* note 12, at 312–20 (explaining why the Justices decided as they did and noting how their decision invited delay and circumvention).

¹³¹ See *id.* at 321–23 (explaining how the Justices ducked the miscegenation issue and noting the humiliation they suffered as a result).

¹³² See *Windsor*, 133 S. Ct. at 2712 (Alito, J., dissenting) (noting that the argument in favor of justiciability was stronger in *Hollingsworth* than in *Windsor*); see also Mark Tushnet, *Perry and the Constitutionalization of Agency Law*, BALKINIZATION (June 26, 2013, 11:24 AM), <http://balkin.blogspot.com/2013/06/perry-and-constitutionalization-of.html> (“[T]he most accurate analysis is almost certainly that five Justices wanted to duck the merits at the moment . . .”).

Interestingly, Justice Frankfurter seems initially to have contemplated a compromise ruling on school segregation that would have been quite similar to the split decision on marriage equality that the Court reached this Term: he would have immediately invalidated school segregation in the federally controlled District of Columbia and either deferred the state segregation cases for reargument or simply rejected the constitutional challenge there. See KLARMAN, *JIM CROW TO CIVIL RIGHTS*, *supra* note 12, at 300–01.

¹³³ The argument against justiciability in *Windsor* was that no Article III case or controversy existed because the Obama Administration, which was appealing technically adverse rulings from the district court and the court of appeals, agreed with *Windsor* that DOMA was unconstitutional (though it continued to enforce the statute until barred from doing so by judicial decree). *Windsor*, 133 S. Ct. at 2700, 2702 (Scalia, J., dissenting) (noting that the Court had never before been willing to decide a case in which both parties agreed with the judgment being reviewed). Nor, on this view, could the presence on appeal of the intervenor, the Bipartisan Legal Advisory Group of the U.S. House of Representatives, fill the adversity void because Congress, let alone one house of Congress, has no Article III standing to defend statutes in court unless the statutes involve some special legislative prerogative, such as the legislative veto that was at issue in *INS v. Chadha*, 462 U.S. 919 (1983). See *Windsor*, 133 S. Ct. at 2700–01 (Scalia, J., dissenting). Regard-

tices (Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Kagan) declined to reach the merits in *Hollingsworth*. Ruling that the official proponents of California's Proposition 8 lacked standing to prosecute the appeal from the federal district court's order invalidating the measure, the majority refused to pronounce on its constitutionality.¹³⁴

Given that the Court had never before ruled on this specific standing question,¹³⁵ one cannot casually disparage the decision in the same way that commentators assailed the Court's dodge of the miscegenation issue in the 1950s.¹³⁶ Still, for two reasons, the four dissenters probably had the better of the standing argument in *Hollingsworth*.

First, the California Supreme Court, the authoritative interpreter of that state's laws, had concluded that California law authorized an initiative's formal sponsors to assert the state's interest in defending the constitutionality of its laws once public officials had declined to do so.¹³⁷ Dicta in a recent U.S. Supreme Court decision strongly implied that such an authorization in state law would conclusively resolve the standing issue under Article III.¹³⁸ Even apart from those dicta, it is hard to see why a state should not be permitted to delegate to an initiative's formal sponsors the task of defending the constitutionality of their measure in federal court.¹³⁹ It is especially difficult to fathom how ordinarily staunch defenders of the states' constitutional preroga-

less of which side had the better of the justiciability argument in *Windsor*, the dissenters plainly had at least a colorable argument — Justice Kennedy's opinion admitted the strength of the argument that the Court should decline to hear the case based on considerations of prudential standing, *see id.* at 2689 (majority opinion) — which supports the notion that the majority was predisposed to reach the merits.

¹³⁴ *Hollingsworth*, 133 S. Ct. at 2659.

¹³⁵ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (“Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.”).

¹³⁶ *See* KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 323 & n.77 (noting such criticism).

¹³⁷ *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011) (“In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”).

¹³⁸ *Arizonans for Official English*, 520 U.S. at 65–66 (noting “grave doubts” regarding the petitioners' standing, *id.* at 66, partly because there was “no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State,” *id.* at 65).

¹³⁹ California did not, of course, delegate the task of defending the constitutionality of an initiative to a random citizen pulled off the street. Initiative proponents are few in number; they have special familiarity with the measure being challenged; and they are unusually well motivated to defend it. *See Hollingsworth*, 133 S. Ct. at 2669–70 (Kennedy, J., dissenting). The majority in *Hollingsworth* was troubled by the fact that initiative sponsors are not in an agency relationship with the state, *see id.* at 2666–67 (majority opinion), but it failed adequately to explain why Article III's standing requirement ought to be construed in light of the Restatement of Agency, *see id.* at 2671–72 (Kennedy, J., dissenting).

tives such as Chief Justice Roberts¹⁴⁰ and Justice Scalia¹⁴¹ could deny states the authority to determine who gets to defend the constitutionality of their laws in federal court.

The second and perhaps more important reason why the official sponsors of an initiative ought to be allowed to defend its constitutionality in federal court once public officials have chosen not to do so comes from a powerful functional argument in Justice Kennedy's dissent. The reason many states embraced the mechanism of initiative early in the twentieth century was to enable the People to circumvent elected officials who proved insufficiently responsive to their will.¹⁴² Empowering those same public officials to block the implementation of a successful initiative by choosing not to defend it in court risks nullifying that mechanism.¹⁴³ Chief Justice Roberts's opinion offers no response to this powerful functional argument in favor of standing in *Hollingsworth*.

Although one cannot know for sure, the Court probably ducked the constitutional issue in *Hollingsworth* because one or more of the five Justices in the *Windsor* majority were not yet prepared to impose gay marriage on the states. Two members of the *Windsor* majority stated at oral argument in *Hollingsworth* that they doubted whether certiorari should have been granted in that case.¹⁴⁴ Moreover, a third member of the *Windsor* majority, Justice Ginsburg, has repeatedly stated that the Court erred in *Roe v. Wade*¹⁴⁵ by intervening too quickly and too

¹⁴⁰ See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623–24 (2013) (Roberts, C.J.) (defending states' "broad powers to determine the conditions under which the right of suffrage may be exercised," *id.* at 2623 (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965)) (internal quotation marks omitted), against the requirement of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973bb-1 (2006 & Supp. V 2011), that "[s]tates . . . beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own," *Shelby Cnty.*, 133 S. Ct. at 2624).

¹⁴¹ See, e.g., *Printz v. United States*, 521 U.S. 898, 928 (1997) (Scalia, J.) ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.").

¹⁴² *Hollingsworth*, 133 S. Ct. at 2670–71 (Kennedy, J., dissenting).

¹⁴³ *Id.* (noting that to afford the governor and attorney general a "*de facto* veto" over whether to defend the constitutionality of an initiative in court would "erode one of the cornerstones of the State's governmental structure," *id.* at 2671); see also *id.* at 2675 (criticizing the majority for "fail[ing] to grasp . . . the basic premise of the initiative process").

¹⁴⁴ *Windsor* Transcript, *supra* note 63, at 47–48 (Kennedy, J.) (noting that the Court was being asked to enter "uncharted waters," *id.* at 47, and wondering whether review was "properly granted," *id.* at 48); *id.* at 64 (Sotomayor, J.) (wondering why now was the time to decide the issue if states were "experiment[ing]" and the issue could instead be left to "per[colate]"). Ironically, Justices Kennedy and Sotomayor were among the dissenters in *Hollingsworth*, who believed that the Court should have reached the merits on the constitutionality of Proposition 8. One may wonder if they would have taken the same position had there not already been a majority of five to dismiss the case on standing grounds.

¹⁴⁵ 410 U.S. 113 (1973).

aggressively on the abortion issue;¹⁴⁶ she reiterated this criticism of *Roe* while the marriage-equality cases were pending in the Supreme Court.¹⁴⁷ How the Justices in the *Windsor* majority would have voted if forced to resolve the constitutionality of state bans on same-sex marriage in *Hollingsworth* is, of course, unknowable. Yet apparently, one or more of them preferred to postpone that day of reckoning.

During the Justices' internal deliberations in *Brown*, Justice Reed urged his colleagues, in light of the extraordinary rapidity with which racial attitudes and practices were changing, to permit the states to work out for themselves the issue of school desegregation.¹⁴⁸ Justice Reed's plea was, of course, unsuccessful. However, his basic approach apparently carried the day in *Hollingsworth*.

One reason that Supreme Court Justices sometimes limit the scope of their decisions is fear of political backlash.¹⁴⁹ The Justices in *Brown* hedged on the remedy partly because they feared that ordering immediate desegregation would produce school closures and violence.¹⁵⁰ They also worried about the effect such a ruling would have on southern politics — that it would play into the hands of extreme segregationists and cut the ground out from beneath racial moderates.¹⁵¹ One year later, the Justices ducked on the miscegenation issue out of a simi-

¹⁴⁶ See, e.g., Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376, 379–82, 385–86 (1985); Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198–200, 1205–08 (1992).

¹⁴⁷ Ruth Bader Ginsburg, Gillian Metzger & Abbe Gluck, *A Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 15–16 (2013); Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, U. CHI. L. SCH. (May 15, 2013), <http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>.

¹⁴⁸ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 295 (Justice Reed remarking on the “constant progress in . . . the advancement of the interests of the negroes” and his contention that “states should be left to work out the problem for themselves” (quoting Douglas Conference Notes, *supra* note 96) (internal quotation marks omitted)).

¹⁴⁹ For scholarship on the strategic element in judicial decisionmaking, see the sources collected in KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 453 n.12. Some of the leading historical exemplars of such judicial strategizing include the supposed “retreat” of the Marshall Court during its final years, the Court's decision in *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), to allow Congress to remove its jurisdiction over a pending case challenging the constitutionality of Reconstruction, the supposed “switch in time that saved Nine” in 1937, and the apparent retreat from the Court's 1957 “Red Monday” decisions two years later. See Klarman, *Bush v. Gore*, *supra* note 95, at 1758–60.

¹⁵⁰ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 294 (noting that Justices Vinson and Black predicted school closures and violence if the Court invalidated school segregation); see also *id.* at 314–15 (noting how white southerners campaigned to convince the Court that immediate desegregation would result in violence).

¹⁵¹ See *id.* at 315–16 (noting the Justices' desire to bolster southern racial moderates); Memorandum from Justice William O. Douglas for the *In re Segregation Cases* File 2 (May 17, 1954) (on file with the Harvard Law School Library) (noting that an unnamed Justice had suggested delaying the release of the school-segregation decision until after the southern primary season had ended in order to avoid adversely affecting election results). In seeking to anticipate and thus diminish backlash, the Justices probably exacerbated it, by rendering a decision that white southerners perceived to be weak and vacillating. KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 319–20.

lar determination to avoid, as Justice Frankfurter put it, “thwarting or seriously handicapping the enforcement of [*Brown*]” by thrusting interracial marriage into “the vortex of the present disquietude [over school desegregation].”¹⁵²

It seems likely that one or more of the Justices in the *Windsor* majority worried that a broad constitutional ruling in favor of gay marriage in *Hollingsworth* would have ignited a powerful political backlash. Many scholars and judges believe that the Court in *Roe* fomented such a backlash by intervening so aggressively on the abortion issue in 1973.¹⁵³ As already noted,¹⁵⁴ Justice Ginsburg seems clearly to accept this view, and many gay-marriage opponents explicitly warned the Justices in *Hollingsworth* to avoid creating “another *Roe v. Wade*.”¹⁵⁵

After *Hollingsworth*, of course, we have no way of knowing whether a broad constitutional ruling in favor of gay marriage would have generated political backlash on the same scale that *Brown* and *Roe* did. Yet there is reason to believe that it would not have. Several factors influence whether Court decisions generate backlash: public opinion on the underlying issue; the relative intensity of preference on the two sides of the issue; the degree to which public opinion is divided along geographic or regional lines; and the ease with which a particular Court ruling can be circumvented or defied.¹⁵⁶

Unsurprisingly, Court decisions generate backlash when they strongly contravene public opinion. In 1993, when the Hawaii Su-

¹⁵² KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 322 (first alteration in original) (quoting Memorandum, *Naim v. Naim*, microformed on Papers of Felix Frankfurter, Part 2, Reel 17, Frames 588–90 (Univ. Publ’ns of Am., Inc.)) (internal quotation marks omitted).

¹⁵³ See, e.g., GERALD N. ROSENBERG, THE HOLLOW HOPE 185–95 (1993); Michael J. Klarman, Why Backlash? 12–19 (Aug. 2010) (unpublished manuscript) (on file with the Harvard Law School Library) [hereinafter Klarman, Why Backlash?]. But see David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 840–41 (1999) (rejecting the backlash thesis with regard to *Roe*); Linda Greenhouse & Reva B. Siegel, Feature, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2071–87 (2011) (same); Geoffrey R. Stone, *Justice Ginsburg, Roe v. Wade and Same-Sex Marriage*, HUFFINGTON POST (May 12, 2013, 11:42 PM), http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa_b_3264307.html (same).

¹⁵⁴ See sources cited *supra* notes 146–147.

¹⁵⁵ Interview by Kathleen Walter with Brian Brown, President, Nat’l Org. for Marriage (Newsmax television broadcast Dec. 10, 2012), available at <http://www.newsmax.com/US/proposition-eight-supreme-court/2012/12/10/id/467145> (“[The Court is not] going to launch another culture war. It does not want another *Roe v. Wade* where the Court steps in and imposes its will on the whole country . . .”); see also Cheryl Wetzstein, *Gay Marriage Ruling May Rival Roe v. Wade in Turmoil*, WASH. TIMES, Mar. 11, 2013, at A1 (quoting John C. Eastman, Chairman of the Board of the National Organization for Marriage, as stating that *Roe v. Wade* “shut that [abortion] debate off, and locked in the country when it was at its greatest loggerheads — and we have remained at that locked-in position ever since” (alteration in original) (internal quotation marks omitted)).

¹⁵⁶ For a descriptive theory of backlash offered in the context of gay marriage litigation, see KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 165–92. For an earlier rendition looking at a wider range of cases, see Klarman, Why Backlash?, *supra* note 153.

preme Court ruled tentatively in favor of gay marriage,¹⁵⁷ Americans opposed that social reform by a margin of at least three to one.¹⁵⁸ When the Massachusetts Supreme Court ruled squarely in favor of gay marriage in 2003,¹⁵⁹ the country was still opposed by roughly two to one.¹⁶⁰ Thus, both decisions generated potent political backlashes — the former leading directly to the enactment of the Defense of Marriage Act in 1996 and the latter to the passage of twenty-five state constitutional amendments barring same-sex marriage.¹⁶¹

By contrast, recent opinion polls consistently reveal majority support among Americans for gay marriage. On average, the polls suggest that supporters now outnumber opponents by roughly ten percentage points, and one recent survey showed a margin of twenty-two percentage points.¹⁶² Thus, a Supreme Court ruling in favor of gay marriage in *Hollingsworth* almost certainly would have generated much less political backlash than an analogous decision ten or twenty years ago would have.

Still, some Court decisions that divide the nation roughly down the middle have generated significant political backlashes. *Brown, Roe, and Furman v. Georgia*¹⁶³ (which provisionally invalidated the death penalty in 1972) had roughly equal numbers of supporters and opponents, and all three ignited powerful political resistance.¹⁶⁴

A court decision is more likely to generate backlash when opponents of the ruling are more intensely committed on the underlying issue than supporters are. When *Brown* was decided in 1954, 70% of whites outside of the South agreed with it, but only 5% of them deemed civil rights the nation's most important issue. By contrast, in the South, where more than three-fourths of whites thought that *Brown* was wrong, 40% regarded segregation as the nation's most pressing issue. In the mid-1950s, the whites with the strongest feelings about *Brown* generally disagreed with it the most vehemently.¹⁶⁵

Similarly, with regard to same-sex marriage in 2004, among the one-third of Americans who supported it, only 6% said they would be

¹⁵⁷ *Baehr v. Lewin*, 852 P.2d 44, 67–68 (Haw. 1993) (holding that a law limiting marriage to the union of a man and a woman was a sex classification and thus subject to strict scrutiny under the state constitution, and remanding the case for a trial to determine if the state had a sufficiently compelling justification for excluding same-sex couples from marriage).

¹⁵⁸ See KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 45 (noting opinion polls conducted around 1990 showing support for gay marriage between 11% and 23%).

¹⁵⁹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

¹⁶⁰ KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 97–98.

¹⁶¹ *Id.* at 48–74, 89–118 (describing the backlashes).

¹⁶² See Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What It Means*, N.Y. TIMES (Mar. 26, 2013, 10:10 AM), <http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means>.

¹⁶³ 408 U.S. 238 (1972).

¹⁶⁴ See generally Klarman, *Why Backlash?*, *supra* note 153.

¹⁶⁵ For this paragraph, see KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 365–66.

unwilling to support a political candidate with whom they disagreed on the issue. But among the two-thirds of Americans who opposed gay marriage, 34% said they would be willing to make it a voting issue.¹⁶⁶ Among evangelicals, 55% said they would not support a political candidate who backed gay marriage. That large disparity in intensity of preference between the two sides of the gay marriage issue no longer exists today.¹⁶⁷

Perhaps more importantly, it is hard to imagine how opponents of same-sex marriage can experience it as affecting their lives as directly and powerfully as critics of *Brown* and *Roe* believed those rulings affected theirs. For white southerners committed to the preservation of white supremacy in the mid-1950s, learning that their children had to go to school with African Americans was the end of the world as they knew it.¹⁶⁸ Similarly, many opponents of abortion regard it as murder; thus, it is not surprising that critics of *Roe* are intensely committed to resisting its implementation and ultimately to overturning it.

What is the analogous interest for opponents of same-sex marriage? Concededly, expanding marriage to include same-sex couples might eventually change the meaning of marriage for religious conservatives who currently understand it as an institution created by God to enable a man and a woman to propagate the species.¹⁶⁹ But that is an abstract and long-term effect. It is hard to see how allowing the gay couple down the street who are already living together to get married will have a direct effect on opponents of same-sex marriage that is even remotely analogous to the effects that *Brown* and *Roe* had on those rulings' opponents.

Another factor that can be conducive to backlash is the regional division of opinion regarding a judicial ruling, which intersects with the incentives that a federal system of politics provides to state and local public officials.¹⁷⁰ In the South in the 1950s, whites overwhelmingly opposed *Brown*, and blacks were still largely disenfranchised. This

¹⁶⁶ KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 173.

¹⁶⁷ Press Release, Langer Research Assocs., Poll Tracks Dramatic Rise in Support for Gay Marriage 1–2 (Mar. 18, 2013), available at <http://www.langerresearch.com/uploads/1147a5GayMarriage.pdf> (“Intensity of sentiment about gay marriage also shows considerable change In 2004, strong opponents outnumbered strong supporters by a broad 34 percentage points. Today strong supporters are ascendant, outnumbering strong opponents by 11 points.”).

¹⁶⁸ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 391–92 (noting that school desegregation was the racial reform to which white southerners were most adamantly opposed).

¹⁶⁹ SHERIF GIRGIS ET AL., WHAT IS MARRIAGE? MAN AND WOMAN 3–4, 6–7, 53–55 (2012) (contrasting “conjugal,” *id.* at 3 (emphasis omitted), and “revisionist,” *id.* at 4 (emphasis omitted), views of marriage and explaining how promoting the latter interferes with the former); see also Brief of Petitioners at 53, *Hollingsworth*, 133 S. Ct. 2652 (No. 12–144) (explaining that permitting same-sex couples to marry would sever marriage from its traditional procreative purpose and reorient it away from raising children and toward satisfying the emotional needs and desires of adults).

¹⁷⁰ See KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 186–92.

meant that southern politicians had strong incentives to aggressively resist implementation. Orval Faubus became invincible in Arkansas politics by blocking enforcement of a federal court desegregation order in Little Rock in 1957, and George Wallace won a landslide gubernatorial victory in Alabama in 1962 by promising to stand in the school-house door to preserve “segregation forever.”¹⁷¹

In some states — especially in the South — opposition to same-sex marriage remains very strong.¹⁷² In 2004, Mississippi voters passed a constitutional amendment to bar gay marriage by 86% to 14%.¹⁷³ Eight years later, opposition to same-sex marriage in that state remained over 65%.¹⁷⁴ A Supreme Court decision imposing gay marriage on Mississippi almost certainly would have elicited denunciations by state politicians.

Interestingly, though, such opposition probably would not have received uniform endorsement from the national Republican Party, as it would have only a few years ago. Three Republican U.S. Senators have recently approved of same-sex marriage.¹⁷⁵ A brief supporting gay marriage was filed in the U.S. Supreme Court by over 100 prominent Republican politicians and party leaders, including the managers of the last two Republican presidential campaigns and a former chairman of the Republican National Committee.¹⁷⁶ Several leading Republican fundraisers — including, most notably, billionaire hedge fund manager Paul Singer — have endorsed gay marriage and contributed millions of dollars to Republican state legislators who have risked primary challenges by voting in favor of it.¹⁷⁷ Republican superstrategist Karl Rove has recently stated that he could imagine a Republican presidential candidate supporting gay marriage in 2016.¹⁷⁸

These endorsements are extraordinary changes from 2004, when Republicans almost uniformly denounced gay marriage and used the

¹⁷¹ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 407 (quoting George C. Wallace, Governor of Ala., Inaugural Address (Jan. 14, 1963)) (internal quotation mark omitted). For this paragraph, see *id.* at 389–408 (describing *Brown’s* radicalization of southern politics and the phenomenon of massive resistance).

¹⁷² See ANDREW R. FLORES & SCOTT BARCLAY, THE WILLIAMS INST., PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE 4 (2013).

¹⁷³ Kate Zernike, *Groups Vow Not to Let Losses Dash Gay Rights*, N.Y. TIMES, Nov. 14, 2004, at N30.

¹⁷⁴ See FLORES & BARCLAY, *supra* note 172, at 4.

¹⁷⁵ Molly Ball, *Now There Are 3 Republican Senators Who Support Gay Marriage*, THE ATLANTIC (June 19, 2013, 1:49 PM), <http://www.theatlantic.com/politics/archive/2013/06/now-there-are-3-republican-senators-who-support-gay-marriage/277021>.

¹⁷⁶ See Brief of Amici Curiae Kenneth B. Mehlman et al. Supporting Respondents at app., *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144).

¹⁷⁷ Nicholas Confessore, *Pushing the G.O.P. to Support Gay Rights*, N.Y. TIMES, Apr. 27, 2013, at A10; see also Thomas Kaplan, *A Campaign Windfall for 4 Republicans Who Voted for Same-Sex Marriage*, N.Y. TIMES, Oct. 13, 2011, at A23.

¹⁷⁸ Sheryl Gay Stolberg, *Strategist out of Closet and into Fray, This Time for Gay Marriage*, N.Y. TIMES, June 20, 2013, at A1.

issue to considerable political advantage.¹⁷⁹ Because of such changes, the likely denunciations by some state officials of a counterfactual Supreme Court ruling in favor of gay marriage would not have elicited anything like unified support from the national Republican Party.

A final factor relevant to predicting backlash is the ease with which a Court decision can be circumvented or defied. *Brown* was easy to evade because, while it barred states from segregating students by race, it left the placement of pupils primarily in the hands of local education officials, who quickly devised schemes that ostensibly eschewed racial considerations but nonetheless managed to leave the schools thoroughly segregated by race.¹⁸⁰ For the better part of a decade after *Brown*, virtually no school desegregation took place.¹⁸¹ Similarly, abortion opponents have whittled away at the right recognized in *Roe* by devising seemingly endless regulations of abortion clinics and procedures that, while ostensibly designed to protect women's health, actually serve the purpose of making abortions more expensive and burdensome to obtain.¹⁸²

By contrast, circumventing a Supreme Court ruling in favor of gay marriage would have proved nearly impossible. The public officials charged with issuing marriage licenses have no discretion over granting them to couples who satisfy the legal criteria.

While county clerks would have had no means of circumventing a broad marriage-equality ruling, some conceivably might have resigned their positions in protest rather than comply with it,¹⁸³ and others might have chosen simply to defy it.¹⁸⁴ Resignations probably would have led to replacements rather than to any lasting impediment to gay marriage. Likewise, defiance probably would have cost people their

¹⁷⁹ See KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 183–86.

¹⁸⁰ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 358–60 (describing the schemes used by southern states to maintain segregation after *Brown*).

¹⁸¹ *Id.* at 362–63.

¹⁸² See, e.g., Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 760–63 (1986) (explaining how the informed consent requirement dissuades some women from obtaining abortions); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 431–37 (1983) (noting the unjustified burden that a hospitalization requirement imposes on women seeking abortions); see also Erik Eckholm, *Virginia Abortion Clinic Rules Get Final Approval*, N.Y. TIMES, Apr. 13, 2013, at A14; Manny Fernandez & Erik Eckholm, *Texas House Restricts Abortions in a Move that Could Force Clinics to Shut*, N.Y. TIMES, June 25, 2013, at A11.

¹⁸³ See, e.g., Steve Inskeep, *Mass. Justice of the Peace Resigns over Gay Marriage*, NPR (May 14, 2004, 12:00 AM), available at <http://www.npr.org/templates/story/story.php?storyId=1896321> (reporting that a Charlton, Massachusetts Justice of the Peace “chose to resign her post rather than perform gay marriages”); Dan Wiessner, *New York Town Clerk Quits over Gay Marriage Licenses*, REUTERS (July 12, 2011, 6:25 PM), <http://www.reuters.com/article/2011/07/12/us-gaymarriage-newyork-resignation-idUSTRE76B7BJ20110712>.

¹⁸⁴ KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 128 (noting a Republican politician in Iowa calling on county recorders to defy the state court's gay-marriage ruling).

jobs,¹⁸⁵ unless state elected officials chose to back them up, which would have placed said officials squarely in opposition to the Court.¹⁸⁶ It seems very unlikely that many state governors would have defied a marriage-equality ruling in a manner analogous to southern governors' standing in schoolhouse doors to block desegregation a half century ago.¹⁸⁷

Court rulings also can be effectively nullified by discouraging beneficiaries from exercising their rights. For a full decade after *Brown*, not a single school desegregation suit was brought in Mississippi because the threat and reality of physical violence deterred prospective litigants.¹⁸⁸ When the first such suit was finally filed in 1963, the lead plaintiff, Medgar Evers, was assassinated within a few months.¹⁸⁹ Similarly, violence against abortion clinics and the murder of several doctors who performed abortions have had some deterrent effect on the exercise of the constitutional right announced in *Roe v. Wade*.¹⁹⁰

Although violence against gays and lesbians is certainly not a relic of the past,¹⁹¹ it is hard to imagine same-sex couples seeking to marry having to endure the same sort of violent intimidation that was routinely deployed against African Americans exercising their constitutional rights in the South during the civil rights era.¹⁹² The country is different; the issue is different; and public officials almost certainly would not slyly encourage violence as extremist southern politicians such as Senator James Eastland of Mississippi and Governor Marvin Griffin of Georgia did a half century ago.¹⁹³

For these reasons, a broad marriage-equality ruling by the Supreme Court in *Hollingsworth* probably would not have fomented a backlash as extreme as those ignited by *Brown* and *Roe*. Because the Court ducked the issue, however, we will never know for sure.

¹⁸⁵ See *id.* at 144 (noting the Iowa Attorney General's warning to county recorders that they must abide by the state court's ruling in favor of gay marriage).

¹⁸⁶ Cf. *id.* (noting a Republican gubernatorial candidate in Iowa promising, if elected, to issue an executive order staying implementation of the state court's decision in favor of gay marriage).

¹⁸⁷ See KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 405–06, 433, 436–38 (describing “school house door” resistance of Ross Barnett and George Wallace, *id.* at 406); cf. KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 150 (noting successful Iowa Republican gubernatorial candidate Terry Branstad ridiculing the idea of gubernatorial defiance of the state court's gay-marriage ruling and explaining that such resistance would only lead to judicial contempt citations).

¹⁸⁸ See KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 352–54.

¹⁸⁹ *Desegregation Suit Filed in Jackson*, S. SCH. NEWS, Mar. 1963, at 6; *Greenwood Salesman Indicted in Death of NAACP Secretary*, S. SCH. NEWS, July 1963, at 2.

¹⁹⁰ See DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT 112–14 (1994).

¹⁹¹ See FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2011, at tbl.1 (2012), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011> (noting that the FBI reported an annual total of 1,508 hate crimes targeting victims because of their sexual orientation in 2011).

¹⁹² See generally MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER (1987).

¹⁹³ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 427–28 (quoting speeches of southern politicians that implicitly encouraged violent opposition to *Brown*).

What we do know is that members of the Court generally, and Justice Kennedy specifically, are more comfortable suppressing outliers than invalidating practices that persist in a majority of states.¹⁹⁴ Unsurprisingly, invalidating outliers tends not to generate much backlash.¹⁹⁵ Neither will striking down a federal statute that no longer commands majority support in the nation. Recent opinion polls reveal that a sizable majority of Americans favored the repeal of DOMA and thus are unlikely to be bothered by its judicial invalidation.¹⁹⁶ The President and his subordinates in the executive branch strongly support *Windsor*, which was precisely the ruling they had been seeking from the Court.¹⁹⁷

Finally and most importantly, neither *Windsor* nor *Hollingsworth* forces any action upon the states, some of which continue to have large majorities opposed to gay marriage. *Hollingsworth* declined to pronounce upon the constitutionality of state bans on same-sex marriage, and *Windsor* did not challenge the constitutionality of section 2 of DOMA, which authorizes states to decline to recognize same-sex marriages lawfully performed elsewhere. Such rulings are unlikely to generate any significant backlash.

V. PREDICTING THE FUTURE

Brown and *Windsor* have something else in common: with regard to both school desegregation and gay marriage, public opinion was deeply divided at the time of the Court's ruling,¹⁹⁸ but future trends were not difficult to predict. During the Justices' conference discussion of *Brown*, Justice Reed predicted that racial segregation would disappear in border states such as Maryland and Kentucky within the next fifteen or twenty years — without judicial intervention.¹⁹⁹ Justice

¹⁹⁴ See *infra* notes 236–237 and accompanying text.

¹⁹⁵ See Klarman, *Bush v. Gore*, *supra* note 95, at 1749.

¹⁹⁶ Press Release, CNN/ORC Poll at 4 (June 11–13, 2013), available at <http://12.cdn.turner.com/cnn/2013/images/06/20/rel7d.pdf> (noting that Americans by a margin of 60% to 39% think that the federal government should recognize same-sex marriages lawfully performed by the states); Press Release, Washington Post/ABC News (June 5–9, 2013), available at <http://apps.washingtonpost.com/g/page/politics/washington-post-abc-news-poll-june-5-to-9/224> (noting that Americans favor by 63% to 34% the federal government's provision of the same benefits to same-sex couples who are lawfully married as it gives to other married couples).

¹⁹⁷ See Brief for Petitioner at 4–5, *Windsor*, 133 S. Ct. 2675 (No. 12-307); see also *Seeing a Step Toward Equality, or a Spark to Fight Gay Marriage*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/us/seeing-a-step-toward-equality-or-a-spark-to-fight-gay-marriage.html> (noting President Obama's applauding of the Court's ruling in *Windsor*).

¹⁹⁸ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 308–09 & n.34 (noting that the nation was split down the middle on *Brown*); Silver, *supra* note 162 (noting that the margin in favor of gay marriage is now 8%).

¹⁹⁹ KLARMAN, JIM CROW TO CIVIL RIGHTS, *supra* note 12, at 295.

Jackson likewise observed that “segregation is nearing an end.”²⁰⁰ In a draft concurring opinion in *Brown* that he ultimately chose not to publish, Justice Jackson observed that “[w]hatever we might say today, within a generation [racial segregation] will be outlawed by decision of this Court.”²⁰¹

The hard issue for the Justices in *Brown* was not predicting what the future would hold with regard to school segregation but deciding whether they should try to accelerate the pace of racial reform or stay their hand and allow it to unfold on its own. Within just a few years of their decision, one opinion poll found that 76% of southerners regarded desegregation as inevitable.²⁰²

The future with regard to marriage equality seems at least as easy to predict. Public support for gay marriage in the United States increased at an average rate of about 1% annually from approximately the early 1990s to 2004 and has increased at an average rate closer to 2% annually since then.²⁰³ According to one poll, the percentage of Americans supporting gay marriage almost precisely doubled between 1996 and 2013 — from 27% to 55%.²⁰⁴

About half of that increased support derives from generational turnover.²⁰⁵ At least 70% — perhaps as high as 80%, according to one recent poll — of younger Americans now support gay marriage.²⁰⁶ One reason that young people are more supportive of gay marriage than their elders is that they are far more likely to know someone who is openly gay. One 2004 poll found that 68% of those aged thirty and under knew someone who was openly gay, as compared with only 26% of those aged seventy-five and over.²⁰⁷

In addition, younger people grow up in an environment that is far more tolerant of homosexuality than the environment in which their parents grew up. They read comic strips that have openly gay characters participating in same-sex marriages. They go to schools that have

²⁰⁰ *Id.* at 296 (quoting Robert H. Jackson, Conference Notes (Dec. 12, 1952) (on file with the Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 184)) (internal quotation mark omitted).

²⁰¹ *Id.* at 310 (quoting Jackson Draft Concurrence, *supra* note 40, at 1).

²⁰² *Id.* at 405.

²⁰³ See Silver, *supra* note 162 (noting that support for gay marriage increased by 6 percentage points from 1996 to 2003 and by 18 percentage points from 2003 to 2013); see also FLORES & BARCLAY, *supra* note 172, at 7 (noting that over the last eight years, the average increase in support for gay marriage across the states has been 1.7% per annum).

²⁰⁴ Susan Page, *Poll: Support for Gay Marriage Hits High After Ruling*, USA TODAY (July 1, 2013, 10:38 PM), <http://www.usatoday.com/story/news/politics/2013/07/01/poll-supreme-court-gay-marriage-affirmative-action-voting-rights/2479541>.

²⁰⁵ Silver, *supra* note 162.

²⁰⁶ Press Release, Langer Research Assocs., *supra* note 167, at 2 (“[G]ay marriage is supported by a vast 81 percent of adults younger than 30, compared with just 44 percent of seniors.”).

²⁰⁷ Clyde Wilcox et al., *supra* note 47, at 237.

gay-straight alliances. And they live in a culture that features gay celebrities whose sexual orientation seems irrelevant to their popularity.²⁰⁸

Finally, younger people are far more likely to believe that a person's sexual orientation is immutable rather than chosen — a belief that highly correlates with support for gay marriage.²⁰⁹ Unless young people become more resistant to marriage equality as they age — and gay marriage does not appear to be a life-cycle issue like wealth redistribution, about which people tend to become more conservative as they grow older — support for gay marriage will continue to increase as older opponents die and are replaced by younger supporters.²¹⁰

Significantly, the other half of the recent increase in support for gay marriage is attributable to older Americans changing their minds.²¹¹ That shift, in turn, is almost certainly a function of the coming-out phenomenon, the importance of which has already been noted.²¹²

Nate Silver, the statistician whose star shone so brightly when the 2012 presidential election results precisely matched his predictions,²¹³ has examined state referenda on gay marriage and constructed a regression model that identifies the variables that predict the outcomes. The relevant factors include the year of the vote (that is, how distant from the present), whether the proposed measure would ban civil unions in addition to same-sex marriages, the percentage of state residents identifying religion as an important part of their daily lives, the median age of adults, and the state's general political leanings. Silver then projects those variables into the future and predicts the year in which each state will have a popular majority in favor of gay marriage.²¹⁴

The results are startling. According to the latest iteration of Silver's study, by 2016, thirty-one states would be likely to vote in favor of gay marriage in a referendum, and by 2020, only six states — all in the Deep South — would still be likely to vote against it.²¹⁵ By 2024,

²⁰⁸ KLARMAN, CLOSET TO ALTAR, *supra* note 20, at 200.

²⁰⁹ *Id.*

²¹⁰ *Id.*; see also Silver, *supra* note 162 (“[I]t’s the steadiness of the trend that makes same-sex marriage virtually unique among all major public policy issues.”).

²¹¹ See Silver, *supra* note 162.

²¹² See *supra* pp. 132–33.

²¹³ See Trevor Butterworth, *Revenge of the Nerd: Nate Silver Is 2012’s Other Winner*, DAILY BEAST (Nov. 7, 2012, 11:09 AM), <http://www.thedailybeast.com/articles/2012/11/07/revenge-of-the-nerd-nate-silver-is-2012-s-other-winner.html> (calling Silver one of the “two big winners” in the presidential election).

²¹⁴ Nate Silver, *Will Iowans Uphold Gay Marriage?*, FIVETHIRTYEIGHT (Apr. 3, 2009, 7:18 PM), <http://www.fivethirtyeight.com/2009/04/will-iowans-uphold-gay-marriage.html>; Nate Silver, *Analysis: Gay Marriage Ban is Underdog in Maine*, FIVETHIRTYEIGHT (Oct. 1, 2009, 6:05 AM), <http://www.fivethirtyeight.com/2009/10/analysis-gay-marriage-ban-is-underdog.html>; Nate Silver, *The Future of Same-Sex Marriage Ballot Measures*, N.Y. TIMES (June 29, 2011, 10:35 AM), <http://fivethirtyeight.blogs.nytimes.com/2011/06/29/the-future-of-same-sex-marriage-ballot-measures>.

²¹⁵ Silver, *supra* note 162.

even the last holdout state, Mississippi, will have a majority in favor.²¹⁶ Studies by other statisticians have yielded broadly similar findings.²¹⁷

According to one recent poll, 72% of Americans now regard gay marriage as inevitable.²¹⁸ Stunningly, even 59% of self-identified opponents regard it as such.²¹⁹ In 2011, Albert Mohler, president of the Southern Baptist Theological Seminary, told the evangelical organization Focus on the Family that “it’s clear that something like same-sex marriage . . . is going to become normalized, legalized, and recognized in the culture.”²²⁰ “It’s time,” Mohler said, “for Christians to start thinking about how we’re going to deal with that.”²²¹

Once public opinion, Congress, and the President caught up with the Supreme Court on race in the early 1960s — in response to the sit-ins, freedom rides, and street demonstrations of the civil rights movement — the Justices became much more aggressive about enforcing school desegregation and more supportive of racial equality generally. In the mid- to late 1960s, the Court warned that desegregation plans that might have been deemed sufficient in 1954–1955 were no longer so,²²² ruled unconstitutional the closing of public schools to avoid court-ordered desegregation,²²³ and required that desegregation plans produce meaningful integration (not just an end to formal segregation).²²⁴ The Court also turned doctrinal somersaults to reverse the criminal convictions of sit-in demonstrators,²²⁵ created new First Amendment jurisprudence to protect the NAACP from legal harassment by southern states,²²⁶ broadened the range of “state action” to which the Fourteenth Amendment’s antidiscrimination command applies,²²⁷ upheld broad exercises of congressional power on behalf of

²¹⁶ Silver, *Will Iowans Uphold Gay Marriage?*, *supra* note 214.

²¹⁷ Patrick J. Egan & Nathaniel Persily, *Court Decisions and Trends in Support for Same-Sex Marriage*, POLLING REPORT, Aug. 17, 2009, available at www.pollingreport.com/penp0908.htm.

²¹⁸ *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as ‘Inevitable,’* PEW RESEARCH CTR. (June 6, 2013), <http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable>.

²¹⁹ *Id.*

²²⁰ David Gibson, *Public Support for Gay Marriage on Verge of Surpassing Opposition*, POL. DAILY (Mar. 5, 2011), www.politicsdaily.com/2011/03/05/public-support-for-gay-marriage-on-verge-of-surpassing-oppositio (quoting Albert Mohler) (internal quotation marks omitted).

²²¹ *Id.* (quoting Albert Mohler) (internal quotation marks omitted).

²²² See *Goss v. Bd. of Educ.*, 373 U.S. 683, 689 (1963).

²²³ *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 225 (1964).

²²⁴ See *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968).

²²⁵ See, e.g., *Bell v. Maryland*, 378 U.S. 226, 228–29 (1964) (vacating a state-court decision affirming the trespass convictions of sit-in demonstrators and remanding to the state court to determine whether a newly enacted state public accommodations law applied retroactively).

²²⁶ See *NAACP v. Button*, 371 U.S. 415 (1963).

²²⁷ See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967).

civil rights,²²⁸ and dramatically expanded the rights of criminal defendants (who were disproportionately members of minority racial groups).²²⁹

Within a few years of *Windsor*, as public support for gay marriage continues to increase and as more states enact it into law, one can imagine some Justices being tempted to extend that ruling to forbid the states from excluding same-sex couples from marriage. Indeed, the *Windsor* dissents of both Chief Justice Roberts and Justice Scalia seem mostly addressed to that eventuality, though their approaches to it differ. Chief Justice Roberts emphasized the federalism language of Justice Kennedy's majority opinion and argued that *Windsor* implies that states are free to recognize or reject same-sex marriage.²³⁰ By contrast, Justice Scalia accused Justice Kennedy of writing an opinion "deliberately transposable," in the near future, into a federal constitutional right to same-sex marriage.²³¹

Whether or not Justice Scalia is right about the motive behind the decision, it is hard to argue with his claim that very little change to the *Windsor* opinion would be required to extend it to forbid state bans on same-sex marriage.²³² Justice Kennedy's emphasis on the dignity and equality of same-sex couples,²³³ and on the interests of children being raised by them,²³⁴ is not easily cabined to the DOMA context — other than perhaps by judicial fiat.²³⁵

Throughout American history, the Supreme Court has frequently used constitutional law to suppress outlier practices in the states.²³⁶

²²⁸ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

²²⁹ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966). On the notion that the Warren Court's criminal procedure decisions should be seen as a function of its solicitude for the rights of racial minorities, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 764–66 (1991), and see also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 216 (2011) (noting that the expanded criminal procedure rights protected by the Warren Court "were supposed to guard defendants against the kind of politics that victimized the poor and blacks while guarding the interests of middle- and upper-class whites").

²³⁰ *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) (noting that the majority's "disclaimer" that its ruling does not decide whether states are constitutionally free to reject same-sex marriage is "a logical and necessary consequence of the argument the majority has chosen to adopt").

²³¹ *Id.* at 2710 (Scalia, J., dissenting) ("[I]t is just a matter of listening and waiting for the other shoe."); see also *id.* at 2705 (noting the majority's "pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government"); *id.* at 2709 (arguing that the view that the Supreme Court will take of state prohibitions on same-sex marriage "is indicated beyond mistaking by today's opinion").

²³² See *id.* at 2709–10.

²³³ See *id.* at 2693–95 (majority opinion).

²³⁴ See *id.* at 2694 (noting that DOMA "humiliates tens of thousands of children now being raised by same-sex couples").

²³⁵ See *id.* at 2709 (Scalia, J., dissenting) (stating that the majority's assurance that the decision does not resolve the issue of whether states must permit same-sex marriages "takes real cheek," given that it was preceded by "a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it").

²³⁶ For some leading exemplars, see *Troxel v. Granville*, 530 U.S. 57 (2000) (parental rights); *United States v. Virginia*, 518 U.S. 515 (1996) (sex-based exclusion from public universities);

Justice Kennedy has been fully on board with that enterprise.²³⁷ Within the next 7 years, 44 states are projected to have voting majorities in favor of gay marriage, assuming support continues to grow at the present rate.²³⁸ All of the remaining holdouts will be in the Deep South, and suppressing southern outliers is, historically, what the Supreme Court has done best.²³⁹

One might object that whether the Justices ultimately require states to recognize same-sex marriage will depend on the Court's future composition. In one sense, that observation is indisputably correct. Had there been five Justice Reeds in 1954, *Brown* almost certainly would have come out the other way. Were there five Justice Scalias on the Court in 2013, *Windsor* surely would have been decided differently.

Yet even Justice Scalia is less immune to construing the Constitution in line with dominant public opinion than he admits. Justice Scalia fiercely defends the result in *Brown*,²⁴⁰ even though, as already noted, reconciling that decision with his commitment to textualism and originalism is nearly impossible.²⁴¹ Justice Scalia, like everyone else, faces enormous pressure to show that his methodological commitments can accommodate the result in *Brown*, as nobody who thinks that decision is wrong will be taken seriously today.²⁴²

Romer v. Evans, 517 U.S. 620 (1996) (state constitutional prohibition on gay-rights ordinances); *Plyler v. Doe*, 457 U.S. 202 (1982) (right of children of illegal aliens to free public education); *Coker v. Georgia*, 433 U.S. 584 (1977) (proportionality review with regard to the death penalty); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right to live with family members beyond the nuclear family); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to use contraceptives); *Brown v. Mississippi*, 297 U.S. 278 (1936) (use of confessions extracted through torture); *Nixon v. Herndon*, 273 U.S. 536 (1927) (state-imposed white primary).

Indeed, it is surprising how often the Court's formal doctrine explicitly contemplates counting the number of states that employ a certain practice in determining whether the Constitution requires it. See Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365 (2009).

²³⁷ See *Graham v. Florida*, 130 S. Ct. 2011 (2010) (life without possibility of parole for juveniles committing nonhomicide offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty for juveniles); *Lawrence v. Texas*, 539 U.S. 558 (2003) (criminal punishment for private same-sex sexual relations between consenting adults); *Atkins v. Virginia*, 536 U.S. 304 (2002) (death penalty for the intellectually disabled).

²³⁸ Silver, *supra* note 162.

²³⁹ See POWE, *supra* note 102, at 490 ("[T]he dominant motif of the Warren Court is an assault on the South as a unique legal and cultural region."); see also *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) (noting that the "once-Confederate Southern state[s]" have been "familiar objects of the Court's scorn").

²⁴⁰ *Scalia Misquoted on Brown v. Board of Education*, HUFFINGTON POST (May 25, 2011, 3:30 PM), http://www.huffingtonpost.com/2009/10/27/scalia-on-brown-v-board-o_n_335591.html (correcting an earlier incorrect report); Nina Totenberg, *Justice Scalia Disputes Accuracy of 'Leak'*, NPR (July 25, 2012, 4:44 AM), <http://www.npr.org/2012/07/25/157319766/justice-scalia-disputes-accuracy-of-leak>.

²⁴¹ See *supra* note 97 and accompanying text.

²⁴² See *supra* notes 122–123 and accompanying text.

Brown is not the only Supreme Court decision that has evolved from deeply controversial to canonical and untouchable. In the 1980s, during Senate hearings to confirm his appointment to the Supreme Court, Judge Robert Bork criticized *Griswold v. Connecticut*,²⁴³ the 1965 decision identifying a constitutional right for married couples to use contraceptives in the privacy of their bedrooms.²⁴⁴ That criticism was widely perceived to have harmed his chance of confirmation.²⁴⁵ By contrast, in 2005–2006, both Chief Justice Roberts and Justice Alito acknowledged during their confirmation hearings that the Constitution protects a right of privacy (without, of course, committing themselves on the far more controversial issue of a constitutional right to abortion).²⁴⁶

A constitutional right to marriage equality is likely to experience a similar history — and rather quickly. As public opinion shifts overwhelmingly in its favor, people will figure out a way to support it — or else their views will come to appear too bigoted to be taken seriously.²⁴⁷ Once that evolution has occurred, a majority of Supreme Court Justices will likely deem marriage equality a constitutional right. That is simply how constitutional law works in the United States.²⁴⁸

²⁴³ 381 U.S. 479 (1965).

²⁴⁴ See *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 116 (1987) (statement of Judge Robert H. Bork) (“[T]he right of privacy, as defined or undefined by Justice Douglas, was a free-floating right that was not derived in a principled fashion from constitutional materials.”).

²⁴⁵ See ETHAN BRONNER, *BATTLE FOR JUSTICE* 74–75 (1989) (noting how Bork’s 1971 article in the *Indiana Law Journal*, which included harsh criticism of *Griswold*, “became Exhibit 2 in the burying of Robert Bork,” *id.* at 74); *id.* at 221–22 (describing how Senators Joseph Biden and Ted Kennedy bludgeoned Bork over his past criticisms of *Griswold* and the constitutional right to privacy).

²⁴⁶ See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318, 441 (2006) (statements of Judge Samuel A. Alito, Jr.) (acknowledging the constitutional right to privacy); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 146–47, 186 (2005) (statements of Judge John G. Roberts, Jr.) (same).

²⁴⁷ See Mackenzie Weinger, *Conservative Pundits Split over Gay Marriage*, POLITICO (Mar. 27, 2013, 2:54 PM), <http://www.politico.com/story/2013/03/gay-marriage-conservative-pundits-split-89382.html> (noting that some conservative pundits are now supporting gay marriage because they believe “the shift toward accepting gay marriage seems inevitable and the conservative party must adjust along with popular opinion”).

Indeed, some conservative opponents of gay marriage have shown a sensitivity to accusations of bigotry. See *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (objecting that to vindicate the constitutional challenge to DOMA is to “cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools”); *Windsor* Transcript, *supra* note 63, at 91 (Roberts, C.J.) (expressing incredulity that the 84 senators who voted for DOMA and the President who signed it were “motivated by animus”); Brief on the Merits for Respondent BLAG, *supra* note 115, at 22 (noting that one of the virtues of democratic decisionmaking is that it puts “a premium on persuading opponents, rather than labeling them as bigots motivated by animus”).

²⁴⁸ Cf. David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009) (explaining how broad swathes of constitutional doctrine illustrate the Court’s “[m]odernizing [m]ission” to align constitutional law with shifting public opinion).