

ADVOCACY FOR MARRIAGE EQUALITY: THE POWER OF A BROAD HISTORICAL NARRATIVE DURING A TRANSITIONAL PERIOD IN CIVIL RIGHTS

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2015 MICH. ST. L. REV. 1249

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“[T]he arc of the moral universe is long, but it bends toward justice.”

Martin Luther King, Jr., from speech “Our God is Marching On” (Montgomery, Alabama, March. 25, 1965)¹

“The nature of injustice is that we may not always see it in our own times.”

Justice Anthony Kennedy, *Obergefell v. Hodges*²

“Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.”

Judge Richard Posner, *Baskin v. Bogan*³

1. A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 131 (Clayborne Carson & Kris Shepard, eds., 2001) (paraphrasing abolitionist THEODORE PARKER, TEN SERMONS OF RELIGION 84-85 (1853)).

2. 135 S. Ct. 2584, 2598 (2015).

3. 766 F.3d 648, 671 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

INTRODUCTION—CIVIL RIGHTS HISTORY AND STORYTELLING

A. Legal Analysis Bound to History

Legal analysis in the United States is inherently historical in nature. Our robust doctrine of *stare decisis* ensures that the jurisprudence of the past has continuing force absent compelling reasons to change course.⁴ Moreover, judicial interpretation of general or ambiguous language in legislative or constitutional texts often entails journeys to previous centuries in search of legislative history, historical context, and other clues to drafters' apparent intent.⁵

While judges look to the past to guide their decisions in the present, they also keep a wary eye on the future. They consider the implications of their decisions on cases yet to be filed, lest a decision today might send the law down a slippery slope toward unintended consequences or difficult line drawing in future cases.⁶

Arrayed against these conservative bonds are more progressive forces seeking to break from the past. Legislative history might reveal not an original intent to adopt a static meaning, but instead a legislative intent to delegate to the courts the task of adapting the meaning of a text to meet the changing needs and circumstances of society.⁷ Moreover, “[s]tare decisis is not an inexorable command,”⁸

4. *E.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 362 (2010) (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”).

5. *E.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 599-603 (2008) (consulting numerous primary and secondary authorities from the eighteenth, nineteenth, and twentieth centuries, to shed light on the meaning the Second Amendment); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610-11 (1987) (adopting views about ethnic classifications in the nineteenth century, as revealed in legislative history, to define racial discrimination in Civil War era statute).

6. *E.g.*, *Britell v. United States*, 372 F.3d 1370, 1383 (Fed. Cir. 2004) (declining to embark on the “slippery slope” of deciding that the state has no interest in potential human life in a fetus with anencephaly, because it will force courts in similar cases to engage in “line-drawing . . . for which courts are ill-equipped”).

7. *See, e.g.*, *Smith v. Wade*, 461 U.S. 30, 34 & n.2 (1983) (inferring nineteenth century congressional intent to permit courts to take guidance from tort principles as they have evolved, rather than as frozen at the time of enactment); *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) (considering “public education in the light of its full development and its present place in American life,” rather than “turn[ing] the clock back to 1868 when the [Fourteenth] Amendment was adopted”); *Heller*, 554 U.S. at 582 (stating that First, Second, and Fourth Amendments apply to “modern forms of communications,” modern techniques of

so courts do overrule their own precedents in the proper circumstances.⁹ And even when the conditions dictated by *stare decisis* for abandoning precedent¹⁰ have not been met, the precise meaning and reach of retained precedent is frequently subject to reasonable debate.¹¹

Accordingly, judicial decision-making looks to both the past and the future to guide the present, and it often navigates between a bold search for justice and cautious reticence to rock the boat. That reticence stems partly from our system's separation of powers, counseling a degree of judicial deference to the legislature or the will of voters, when an issue is the subject of widespread democratic deliberation.¹² But, if deliberation leads to majoritarian oppression of a minority group, the judiciary has an obligation to act boldly to protect minority rights.¹³

The thesis of this Article is that past civil rights movements in the United States define broad historical patterns that form a narrative helpful to a proper understanding of new controversies. In essence, as a society, we often could benefit from a reminder that our

searching, and “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding”).

8. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (emphasis omitted).

9. *Citizens United*, 558 U.S. at 363-65 (stressing the importance of *stare decisis*, but nonetheless, overruling precedent).

10. *See, e.g., id.* at 362-63 (summarizing criteria for abandoning precedent); *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55, 866-68 (1992) (summarizing criteria in greater detail).

11. *See, e.g., People v. Carney*, 668 P.2d 807, 808, 810, 814 (Cal. 1983) (finding that motor home did not fit within the automobile exception to warrant requirement), *rev'd sub nom. California v. Carney*, 471 U.S. 386, 389 (1985) (differing from California Supreme Court regarding the reach of relevant precedents and extent of the privacy interests in motor vehicles).

12. *E.g., Raftopol v. Ramey*, 12 A.3d 783, 800-04 (Conn. 2011) (identifying legislature as the appropriate body to address public policy issues raised by surrogate mother agreements, but judicially resolving narrow issue by interpreting existing statute); *City & Cty. of S.F. v. Local 38*, 726 P.2d 538, 541-44 (Cal. 1986) (deferring to legislature to resolve policy issues in field of public employee strikes, and thus refraining from developing common law tort liability for strike assumed to be illegal).

13. *E.g., Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (the view of the governing majority in a state that homosexual intimacy is immoral does not justify state criminal law); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (holding that Fourteenth Amendment includes the “right to exemption from unfriendly legislation” targeting African-Americans); *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir.) (“Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.”), *cert. denied*, 135 S. Ct. 316 (2014).

actions today will form the history for future generations, who will judge us with benefit of hindsight and a broader perspective. With each new civil rights controversy, we owe it to ourselves and to the victims of discrimination to ask whether we are once again in a period of transition, where conventional mores of the present will soon sound as jarring as this passage from Justice Bradley's concurrence in *Bradwell v. Illinois*¹⁴ sounds to us now:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

. . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.¹⁵

The recent history of litigation over marriage equality provides a good example for analysis and discussion. This Article argues that marriage equality fits within a recognizable historical pattern within the United States, a pattern first of denying a civil right, then recognizing the right, and later wondering—with some embarrassment—how we could ever have voiced uncertainty about the right.

The remaining issue is whether this civil rights narrative can and should be explicitly incorporated into written advocacy in pending cases in a time of transition, in an effort to minimize the delay in recognizing an important civil and human right. This Article argues that a broad historical perspective can advance a novel claim in some types of civil rights litigation, perhaps as a narrative that can serve as an underlying theme of a brief.¹⁶

14. 83 U.S. 130, 141 (1872), *abrogated by* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 650 (1974) (municipal regulations that categorically required female teachers to take maternity leave several months prior to expected birth, without individualized assessment of ability to work, was not rationally related to legitimate state interest and thus violated the Due Process Clause of the Fourteenth Amendment).

15. *Id.* at 141 (Bradley, J., concurring).

16. *See generally* CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 354-56 (7th ed. 2014) (discussing the technique of embedding a theme into a brief,

B. The Civil Rights Narrative as a Tool of Persuasion

Narrative in litigation frequently takes the form of telling the client's story.¹⁷ In marriage equality litigation, the record often contains compelling stories about the lives of same-sex couples: their aspirations as partners and parents and the burdens they face when denied the rights and dignity that a marriage license affords.¹⁸ Some judicial decisions finding a constitutional right to same-sex marriage have reproduced these client stories in the opinions.¹⁹

But stories are also embedded in the law itself²⁰ and its development over time,²¹ sometimes revealing the deeply seated

to underscore the fairness or justice of a position or encourage a judge to adopt an approach or perspective); RUTH ANN ROBBINS, STEVE JOHANSEN & KEN CHESTEK, *YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING* 292 (2013) ("While every case requires a sound legal theory, the client is better served by the lawyer including an appealing theme as well.").

17. See, e.g., ROBBINS, JOHANSEN & CHESTEK, *supra* note 16, at 292; Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 767-68 (2006); JONATHAN SHAPIRO, LAWYERS, LIARS, AND THE ART OF STORYTELLING 125 (2014) ("The client will be your story's central character, or at least one of them.").

18. E.g., Brief for Petitioners at 6-12, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 860738 (telling the stories of the lives and relationships of petitioning same-sex couples); Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 32-33 (2005) (summarizing the plaintiffs' perspective set forth in the complaint in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)); Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L.J. 237, 252-53 (2001) (quoting preamble of Vermont bill to recognize civil unions, which referred generally to the stories of same-sex couples, drawing parallels to the lives of opposite-sex, married couples).

19. E.g., *Obergefell*, 135 S. Ct. 2595 (summarizing stories showing that the petitioners "seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond"); *Bostic v. Schaefer*, 760 F.3d 352, 368-69 (4th Cir.) (summarizing the stories of plaintiff couples, including the burdens they faced because of the state ban on same-sex marriage), *cert. denied*, 135 S. Ct. 308 (2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1133 (D. Or. 2014) (summarizing the plaintiffs' stories, showing that they "share in the characteristics that we would normally look to when we describe the ideals of marriage and family").

20. See Stephen Paskey, *The Law Is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC: JALWD 51, 52 (2014) ("[E]very governing rule *demands* a story: a story is embedded in the rule's structure, and the rule can be satisfied only by telling a story."); PHILIP N. MEYER, *STORYTELLING FOR LAWYERS* 2 (2014) ("It is impossible to make *any* legal argument, without telling *some* stories about the facts and about

cultural myths that help us make sense of the world, that sit in the background to influence us in our subconscious construction of right and wrong.²² Accordingly, a persuasive narrative may tell a story about the law itself.²³

And, in turn, the law tells a story to society about what it deems to be right, just, and acceptable, and about what is excluded from that realm. As noted by one marriage equality advocate,

[T]he law does more than simply delineate rights and obligations, or distribute benefits and burdens. The law also tells a story. It's a story about who we are as a community, how we view ourselves, and how we view one another. . . . Before July 1, 2000, the story told by the laws of every state in this country was that committed, loving same-sex couples don't exist, or if we do, our relationships have no value, and aren't worthy of equal treatment under the law.²⁴

The civil rights story examined in this Article is largely a story about our law and society, as they evolved together, and about the successes and failures of our law on the long road to justice and

the law.”); Christy H. DeSanctis, *Narrative Reasoning and Analogy: The Untold Story*, 9 LEGAL COMM. & RHETORIC: JALWD 149, 151 (2012) (advancing the argument that “many, if not most, forms of reasoning actually depend on narrative”); see also Linda H. Edwards, *The Convergence of Analogical and Dialectic Imagination in Legal Discourse*, 20 LEGAL STUD. F. 7, 7 (1996) (exploring the relationship between narrative and rule-based reasoning, as well as other forms of reasoning).

21. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 141 (2000) (citing to Ronald Dworkin for the proposition that “a line of precedent is like a continuing story”).

22. See, e.g., Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master's Tools*, 13 CONN. PUB. INT. L.J. 43, 46-59 (2013) (synthesizing the work of other authors); Paskey, *supra* note 20, at 69-70 (discussing other authors' descriptions of stock knowledge structures). Of course, one can tell stories at both levels. Richard Boyd, for example, has examined the story of a sentenced defendant as told by the Supreme Court when upholding California's “three strikes” sentencing law, contrasting it with the story told by the defendant's appellate lawyer, Dean Erwin Chemerinsky. Richard Boyd, *Narratives of Sacrificial Expulsion in the Supreme Court's Affirmation of California's “Three Strikes and You're Out” Law*, 11 LEGAL COMM. & RHETORIC: JALWD 83, 94 (2014). At a higher level, however, Boyd's article tells its own story about “an avenging criminal-justice system.” *Id.* at 86.

23. See, e.g., Paskey, *supra* note 20, at 66 (explaining that stories can encompass plots that center around inanimate objects, and the concept of character should be broad enough to encompass “stories about the law itself”) (citing to Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC: JALWD 81, 89 (2012); Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 884 (2010)).

24. Robinson, *supra* note 18, at 240.

equality. It ends by concluding that references to the arc of civil rights history can advance advocacy in contemporary civil rights movements, by revealing parallels to previously recognized civil rights and to previously rejected grounds for resistance to civil rights.

This Article reaches that destination through the following steps. Part I summarizes the history of same-sex marriage litigation in cases raising constitutional challenges to legislative exclusions of same-sex marriage, or to legislative bans on recognizing same-sex marriages validly concluded in other states. Part II examines several examples of points of indeterminacy in the constitutional analysis, demonstrating how judges could rationally rule either way on the constitutional challenge, hence presenting opportunities for advocating for a result based on broader conceptions of justice and the issue's place in history. Part III presents a civil rights history, places marriage equality litigation within that history, and seeks to demonstrate that an analysis of each new civil rights claim would benefit from an appreciation of previous civil rights struggles.

I. SAME-SEX MARRIAGE: LAW AND SOCIETY IN TRANSITION

A. Breaking Free of *Baker v. Nelson* (1971)

It may come as a surprise to some that in 1971 the U.S. Supreme Court ruled on the merits of a same-sex marriage case, in *Baker v. Nelson*.²⁵ Tellingly, in *Baker* the Court summarily upheld a same-sex marriage ban five years after it had invalidated a state ban on interracial marriage in *Loving v. Virginia*²⁶ and three years after the Stonewall riots had inspired the movement for gay rights.²⁷

In *Baker*, the Minnesota Supreme Court rejected federal equal protection and due process challenges to a state statute that it interpreted to disallow same-sex marriages.²⁸ It set the tone for its opinion with a reference to tradition of especially long standing: "The institution of marriage as a union of man and woman, uniquely

25. 409 U.S. 810 (1972), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

26. 388 U.S. 1, 12 (1967).

27. *See generally, e.g.*, DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (2004); *see also* DeBoer v. Snyder, 772 F.3d 388, 413 (6th Cir. 2014) (referring to the events precipitating the Stonewall riots as an example of prejudice against the gay community), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584.

28. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810, *overruled by Obergefell*, 135 S. Ct. 2584.

involving the procreation and rearing of children within a family, is as old as the book of Genesis.”²⁹

The Minnesota Court then distinguished *Griswold v. Connecticut*,³⁰ which had recognized a privacy interest in a married couple’s decision to use contraceptives. It opined that the substantive due process right in *Griswold* was premised on the state having intruded on an existing marital relationship that it had previously authorized.³¹ It also concluded that the state did not deny equal protection by rejecting same-sex marriages while permitting opposite-sex marriages without any inquiry into the couple’s capacity or willingness to procreate.³² It distinguished *Loving v. Virginia* by finding “in commonsense and in a constitutional sense, . . . a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”³³

On *Baker*’s appeal to the United States Supreme Court, the Court summarily dismissed the appeal in a single sentence: “The appeal is dismissed for want of a substantial federal question.”³⁴ That summary disposition constituted a decision on the merits, and it bound lower courts³⁵ with respect to issues “properly presented”³⁶ to the Court, “except when doctrinal developments indicate otherwise.”³⁷

29. *Id.* at 186 (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), and quoting its linking of marriage to procreation and “survival of the race”).

30. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

31. *Baker*, 191 N.W.2d at 186-87 (citing the majority opinion of *Griswold*, 381 U.S. at 482, 485, and Justice Goldberg’s concurring opinion, *id.* at 496).

32. *Id.* at 187.

33. *Id.* The court quoted a passage from *Loving v. Virginia*, 388 U.S. 1, 12 (1967), which referred to the equality principle of the Fourteenth Amendment and to a deprivation of liberty without due process. *Baker*, 191 N.W.2d at 187.

34. *Baker v. Nelson*, 409 U.S. 810, 810 (1972), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). Further litigation by one member of the same-sex couple in *Baker* is reviewed in *Lawson v. Kelly*, 58 F. Supp. 3d 923, 929 n.5 (W.D. Mo. 2014).

35. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

36. *Id.* at 345 n.14; *see also Mandel v. Bradley*, 432 U.S. 173, 176-77 (1977) (stating that such a dismissal binds lower courts on “the precise issues presented and necessarily decided”).

37. *Hicks*, 422 U.S. at 344 (quoting *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)); *cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining that lower courts should follow the holdings of full opinions of the Supreme Court regardless of doctrinal developments).

Forty-two years after the Supreme Court's summary disposition in *Baker*, intervening Supreme Court case law—culminating in *United States v. Windsor*³⁸—had so undermined the judgment in *Baker* that, after *Windsor*, lower courts nearly universally determined that they could entertain federal due process and equal protection challenges to state bans on same-sex marriage, free of the bonds of *Baker*.³⁹ But, in 1986, the Court's decision in *Bowers v. Hardwick*⁴⁰ had threatened to derail that doctrinal progression.

In *Bowers*, the Supreme Court held that the United States Constitution erected no barrier⁴¹ to a Georgia law criminalizing the act of sodomy in the privacy of the bedroom of the respondent's home.⁴² The Court had previously recognized a constitutional right to privacy in various contexts,⁴³ but it declined to find a substantive due

38. 133 S. Ct. 2675 (2013).

39. See, e.g., *Latta v. Otter*, 771 F.3d 456, 467 (9th Cir. 2014); *Pareto v. Ruvin*, 21 Fla. L. Weekly Supp. 899, 901 (Fla. Cir. Ct. 2014) (observing that, as of July 25, 2014, all cases that had addressed *Baker* since *Windsor*, numbering more than twenty, had viewed *Baker* to be undermined by doctrinal developments); see also *Bostic v. Schaefer*, 760 F.3d 352, 373 (4th Cir.) (citing to eleven federal cases reaching the same conclusion, and describing them as consistent conclusions from every federal case addressing *Baker* since *Windsor* and up to July 29, 2014), cert. denied, 135 S. Ct. 308, 308 (2014); *Searcy v. Strange*, 81 F. Supp. 3d 1285, 1288 (S.D. Ala. 2015). Some courts have proceeded to the merits without discussing *Baker*. See generally, e.g., *Brassner v. Lade*, 21 Fla. L. Weekly Supp. 920a (Fla. Cir. Ct. 2014). Between the Supreme Court's decisions in *Windsor* and *Obergefell*, a few courts concluded that *Baker* still had some bite, apparently on the basis that it would not lose its precedential force unless clearly overruled, rather than simply undermined by intervening authority. *DeBoer v. Snyder*, 772 F.3d 388, 400 (6th Cir. 2014) (finding that *Baker* had not been overruled), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584; *Borman v. Pyles-Borman*, No. 2014CV36, slip op. at 2-3 (Tenn. Cir. Ct. Aug. 5, 2014) (finding *Baker* not overruled “[f]or purposes of passing this issue to the appellate courts without discussion”), *abrogated by Obergefell*, 135 S. Ct. 2584.

40. 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

41. *Id.* at 190-96 (finding no fundamental right at stake, and finding a rational basis for the statute).

42. *Id.* at 188.

43. Justice White's opinion described the relevant precedent in the following way:

The reach of this line of cases was sketched in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977). *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were described as dealing with childrearing and education; *Prince v. Massachusetts*, 321 U.S. 158 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with procreation; *Loving v. Virginia*, 388 U.S. 1 (1967), with marriage; *Griswold v. Connecticut*, 381 U.S. 479

process right to private, consensual same-sex intimate relations,⁴⁴ and it held that a state legislature's judgment that same-sex intimacy is immoral, without more, provided a rational basis for its criminal regulation.⁴⁵ The Court distinguished its decision in *Stanley v. Georgia*:⁴⁶ although *Stanley* had reversed a state conviction for possessing and reading obscene material in the privacy of the defendant's home, "the decision was firmly grounded in the First Amendment," and thus had no applicability to the conduct in *Bowers*.⁴⁷

In a dissent joined by three fellow justices, Justice Blackmun criticized the majority's reliance on long-standing moral condemnation of homosexuality in the general community⁴⁸ and in religious doctrine.⁴⁹ Justice Blackmun argued for recognition of "the fundamental interest all individuals have in controlling the nature of their intimate associations with others,"⁵⁰ explaining:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.⁵¹

Bowers stood for seventeen years until the Court overruled it in 2003, in *Lawrence v. Texas*.⁵² According to the *Lawrence* majority,

(1965), and *Eisenstadt v. Baird*, 403 U.S. 438 (1972), with contraception; and *Roe v. Wade*, 410 U.S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey*, 431 U.S. at 688-89.

Bowers, 478 U.S. at 190.

44. *Id.* at 190-95; see also *id.* at 197-98 (Powell, J., concurring) (finding no substantive due process right, but noting that a conviction and maximum sentence under the state law could raise an Eighth Amendment issue). In dissent, Justice Blackmun noted that the state statute criminalized sodomy whether practiced by opposite-sex or same-sex couples, leading Blackmun to question "the Court's almost obsessive focus on homosexual activity." *Id.* at 200 (Blackmun, J., dissenting).

45. *Id.* at 196.

46. 394 U.S. 557 (1969).

47. *Bowers*, 478 U.S. at 195.

48. *Id.* at 210-11 (Blackmun, J., dissenting).

49. *Id.* at 211-12.

50. *Id.* at 206.

51. *Id.* at 205 (citing primarily to Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 637 (1980)).

52. 539 U.S. 558, 578 (2003).

“*Bowers* was not correct when it was decided, and it is not correct today.”⁵³

The opening paragraph of Justice Kennedy’s majority opinion in *Lawrence* suggested that the Court in *Bowers* had failed to appreciate the scope of the liberty interests already reflected in case law⁵⁴ as well as the full implications of *Stanley v. Georgia* regarding state regulation of consensual conduct in the privacy of one’s home:⁵⁵

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.⁵⁶

In further support of the majority’s view that *Bowers* was wrong when decided, Justice Kennedy embraced a passage from Justice Stevens’ dissent in *Bowers*, one that rejected popular moral disapproval as a basis for diminishing liberty interests:

“Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”⁵⁷

In *Lawrence*, Justice O’Connor concurred with the judgment but relied on equal protection because the Texas statute—unlike the Georgia statute at issue in *Bowers*—criminalized sodomy only if practiced by members of the same sex.⁵⁸ Employing equal protection principles to void the statute would remove the need to overrule *Bowers*.⁵⁹ The majority, on the other hand, preferred to measure the

53. *Id.*

54. *Id.* at 562.

55. *See supra* text accompanying notes 46-47.

56. *Lawrence*, 539 U.S. at 562.

57. *Id.* at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

58. *Id.* at 579-85 (O’Connor, J., concurring); *see also id.* at 566 (majority opinion) (distinguishing the Georgia and Texas statutes).

59. *Id.* at 579 (O’Connor, J., concurring).

Texas statute against liberty interests protected by substantive due process, thus directly confronting *Bowers*, and avoiding questions about whether an equal protection infirmity in the statute could be cured by extending its provisions to opposite-sex couples.⁶⁰

The *Lawrence* majority reviewed several pre-*Bowers* precedents that supported a broad conception of substantive due process protecting liberty interests related to privacy: three decisions relating to access to contraception⁶¹ and recognition in *Roe v. Wade*⁶² of a woman's qualified right to elect an abortion.⁶³ These were buttressed by two post-*Bowers* cases: *Planned Parenthood v. Casey*,⁶⁴ and *Romer v. Evans*.⁶⁵

Casey reaffirmed the central holding of *Roe v. Wade*, protecting the qualified right to abortion. *Lawrence* interpreted *Casey* to "again confirm[] that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."⁶⁶

In *Romer*, the Supreme Court invalidated an amendment to the Colorado state constitution, adopted by referendum, which prohibited all state or local government action designed to prevent or redress discrimination on the basis of homosexual orientation.⁶⁷ The amendment placed gay and lesbian Coloradans in a "disfavored legal status" that made it more difficult for them to "seek aid from the government"⁶⁸ simply "to make them unequal to everyone else."⁶⁹ Although the Supreme Court applied equal protection principles,⁷⁰ it found a constitutional defect that applies as well to substantive due process: the absence of a legitimate state interest, and therefore no valid interest to which to link the regulation under any level of

60. *Id.* at 574-75 (majority opinion).

61. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (establishing married couple's right to privacy in using contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972) (invoking equal protection principles to affirm the privacy right of an individual, married or single, to gain access to contraceptives); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693-94 (1977) (invalidating a state law prohibiting the sale of contraceptives to persons under the age of sixteen).

62. 410 U.S. 113, 154 (1973).

63. *Lawrence*, 539 U.S. at 564-66. (citing also to *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

64. 505 U.S. 833 (1992).

65. 517 U.S. 620 (1996).

66. *Lawrence*, 539 U.S. at 573-74 (quoting *Casey*, 505 U.S. at 851).

67. *Romer*, 517 U.S. at 626-27.

68. *Id.* at 633.

69. *Id.* at 635.

70. *Id.* at 631-32, 635.

scrutiny.⁷¹ In an opinion authored by Justice Kennedy, the majority found that the Colorado amendment simply reflected animosity toward the disfavored class, which did not constitute a legitimate state interest.⁷² It gave careful consideration to the amendment and its constitutionality because it was “of an unusual character,”⁷³ and “not within our constitutional tradition.”⁷⁴

On the basis of trends in the law and society,⁷⁵ the *Lawrence* majority concluded, “[t]he rationale of *Bowers* does not withstand careful analysis.”⁷⁶ It recognized that stare decisis is essential to stability in the law but “is not an inexorable command.”⁷⁷ It instead embraced a constitutional concept of personal autonomy articulated in *Casey*:

“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

...

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.⁷⁸

The *Lawrence* majority took pains to limit its holding, specifically reserving the issue of same-sex marriage bans for another day: “[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁷⁹ In his dissenting opinion, however, Justice Scalia ruefully opined that the rationale of the majority opinion would encompass a right to state recognition of same-sex marriage unless “principle and logic have nothing to do with the decisions of this Court.”⁸⁰

For most lower courts, the decisive step in the undermining of *Baker v. Nelson* was the Supreme Court’s 2013 decision in *United*

71. *Id.* at 632-35.

72. *Id.* at 634-35 (citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

73. *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

74. *Id.*

75. *Lawrence v. Texas*, 539 U.S. 558, 568-77 (2003).

76. *Id.* at 577.

77. *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

78. *Id.* at 573-74 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

79. *Id.* at 578; see also *id.* at 585 (O’Connor, J., concurring) (“[O]ther reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”).

80. *Id.* at 605 (Scalia, J., dissenting).

States v. Windsor,⁸¹ striking down the federal Defense of Marriage Act (DOMA) as a violation of the Due Process Clause of the Fifth Amendment.⁸² Justice Kennedy once again authored the majority opinion,⁸³ which dissenting Justice Scalia described as presenting “rootless and shifting” justifications⁸⁴ and “scatter-shot rationales.”⁸⁵

Although the principal rationale of the majority opinion in *Windsor* is difficult to pin down, a few observations are fairly safe. First, the majority acknowledged the historically central role of states in defining marriage, and noted that DOMA exceeded the traditional role of the federal government in domestic relations when it denied recognition of a state-sanctioned same-sex marriage for purposes of applying more than 1,000 federal laws, including tax laws, as well as federal regulations.⁸⁶ To the extent that the majority relied on these federalism principles, its decision could buttress *Baker v. Nelson* rather than undermine it, because *Windsor* could stand for deference to state marriage laws in the face of substantial intrusion from Congress, and it might be interpreted to suggest limits to federal constitutional intervention as well.⁸⁷

But, despite the contrary hopes of dissenting Justices,⁸⁸ the majority expressly disavowed grounding its decision on federalism principles: “Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”⁸⁹ Instead, the majority explained that DOMA “violates basic due process and equal protection principles”⁹⁰ by imposing “a disadvantage, a separate

81. 133 S. Ct. 2675 (2013).

82. *Id.* at 2693-96.

83. *Id.* at 2682.

84. *Id.* at 2705 (Scalia, J., dissenting).

85. *Id.* at 2709.

86. *Id.* at 2689-92 (majority opinion).

87. *See, e.g., id.* at 2696-97 (Roberts, C.J., dissenting) (pressing an interpretation of the majority opinion to rest on federalism principles and emphasizing that the constitutionality of a state’s banning same-sex marriage is not before the court).

88. *Id.*; *see also id.* at 2709 (Scalia, J., dissenting) (stating that courts should adopt Chief Justice Roberts’s interpretation of the majority opinion, *see id.* at 2696-97, but predicting that they will not); *DeBoer v. Snyder*, 772 F.3d 388, 414 (6th Cir. 2014) (concluding that *Windsor* was necessarily grounded on federalism principles), *rev’d sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

89. *Windsor*, 133 S. Ct. at 2692.

90. *Id.* at 2693 (citing to *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

status, and so a stigma” on members of a class to which the state had granted the “equal dignity of same-sex marriages.”⁹¹

Echoing *Romer*, Justice Kennedy gave careful consideration to possible constitutional infirmities, such as “an improper animus or purpose,”⁹² because DOMA represented “[d]iscrimination[] of an unusual character.”⁹³ Congress enacted DOMA “as some States were beginning to consider the concept of same-sex marriage,”⁹⁴ and it represented an “unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage.”⁹⁵ After reviewing the text and history of DOMA, Justice Kennedy concluded that “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal,”⁹⁶ and its “principal purpose is to impose inequality, not for other reasons like governmental efficiency”⁹⁷ but to “demean those persons who are in a lawful same-sex marriage.”⁹⁸

According to the majority, these circumstances compelled the conclusion that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”⁹⁹ The majority also found that DOMA violated the equal protection guarantee of the Fifth Amendment, linking it to the liberty interest,¹⁰⁰ because it “imposes a disability on the class” of persons in same-sex marriages recognized by states to help them “enhance their own liberty.”¹⁰¹ Accordingly, dissenting Justice Alito interpreted the majority’s decision to rest at least partly on both substantive due process¹⁰² and equal protection.¹⁰³

91. *Id.* at 2693 (“[A] bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.” (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973))).

92. *Id.* at 2693.

93. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)); *see also Id.* at 2692 (quoting *Romer*, 517 U.S. at 633) (explaining that DOMA “departs from [a] history and tradition of reliance on state law to define marriage”).

94. *Id.* at 2692.

95. *Id.* at 2693.

96. *Id.* at 2694.

97. *Id.*

98. *Id.* at 2695.

99. *Id.*

100. *Id.*

101. *Id.* at 2695-96.

102. *Id.* at 2714 (Alito, J., dissenting) (observing that the majority’s reference to “liberty of the person . . . suggests that substantive due process may partially underlie the Court’s decision today”).

After *Windsor*, nearly every court that addressed the continuing precedential effect of *Baker v. Nelson* concluded that *Baker* had been undermined by subsequent Supreme Court case law and no longer bound lower courts.¹⁰⁴

B. Marriage Equality in the States Since *Baker v. Nelson*

After courts from four states had rejected constitutional challenges to same-sex marriage from 1971 to 1984,¹⁰⁵ the courts of Hawaii breathed new life into the judicial front of the movement for marriage equality. In 1993, in *Baehr v. Lewin*,¹⁰⁶ a plurality of the court found that the state marriage statute, which limited marriage to opposite-sex couples, triggered strict scrutiny under an equal protection provision of the Hawaii Constitution that specifically prohibited sex discrimination.¹⁰⁷ It remanded to the trial court for further proceedings consistent with the plurality opinion.¹⁰⁸ On remand, the trial court found that the marriage statute violated the state constitution's guarantee of equal protection, and it enjoined state officials from denying marriage licenses to same-sex couples.¹⁰⁹ The Supreme Court of Hawaii affirmed in 1997.¹¹⁰

The backlash came swiftly. Congress enacted DOMA¹¹¹ in 1996, denying federal recognition to state-sanctioned same-sex

103. *Id.* at 2716 (stating that the majority's holding "seems to rest" on equal protection).

104. *See supra* note 39 and accompanying text.

105. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973), *abrogated by* *Obergefell*, 135 S. Ct. 2584; *De Santo v. Barnsley*, 476 A.2d 952, 956 (Pa. Super. Ct. 1984), *abrogated by* *Obergefell*, 135 S. Ct. 2584; *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974), *abrogated by* *Obergefell*, 135 S. Ct. 2584.

106. 852 P.2d 44 (Haw. 1993) (plurality opinion).

107. *Id.* at 60-67. The plurality rejected a claim that the marriage statute violated a fundamental privacy interest protected by due process. *Id.* at 55-57. Intermediate Court of Appeals Chief Judge James M. Burns, sitting by designation, concurred with the order remanding for further proceedings, but only on the ground that the constitutional issue should not be decided on an inadequate factual record. *Id.* at 68-69 (Burns, C.J., concurring).

108. *Id.* at 68 (plurality opinion); *see also id.* at 74 (clarifying that, on motion for reconsideration or clarification, case is remanded for proceedings consistent with the plurality opinion).

109. *Baehr v. Miiike*, No. 91-1394, 1996 WL 694235, at *22 (Cir. Ct. of Haw. Dec. 3, 1996).

110. *Baehr v. Miiike*, 950 P.2d 1234 (Haw. 1997).

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

marriages, and allowing states to deny recognition to same-sex marriages lawfully performed in other states.¹¹² In 1997, Indiana reenacted its same-sex marriage ban and added a provision denying recognition to same-sex marriages from other states.¹¹³ In 1998, Hawaii and Alaska adopted state constitutional amendments prohibiting recognition of same-sex marriage, seeking to place the question outside the reach of their state judiciary.¹¹⁴

In 1999, the Vermont Supreme Court held that the Common Benefits Clause of the Vermont Constitution prohibited state officials from depriving same-sex couples of a legal status that would provide them access to the legal benefits and protections accorded to opposite-sex married couples.¹¹⁵ Then, in 2003, the Massachusetts Supreme Court determined in *Goodridge v. Department of Public Health*,¹¹⁶ that the state's ban on same-sex marriage failed even a rational relationship test under the equal protection and due process guarantees of the state constitution.¹¹⁷ Although the court hinted that its analysis would not necessarily transfer perfectly to a similar challenge under the federal constitution,¹¹⁸ its declining to rely on heightened scrutiny for equal protection and due process claims provided a simplified blueprint for challenging same-sex marriage bans.¹¹⁹

112. See *United States v. Windsor*, 133 S. Ct. 2675, 2682-83 (2013) (quoting and describing statute).

113. *Baskin v. Bogan*, 766 F.3d 648, 664 (7th Cir.), cert. denied, 135 S. Ct. 316 (2014).

114. ALASKA CONST. art. I, § 25 (1998); HAW. CONST. art. I, § 23 (1998); see Steve Sanders, *Mini-DOMAs as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12, 14 (2014) (citing AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX 33 (2012)).

115. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999). The Vermont legislature satisfied this requirement by recognizing civil unions, which would provide equal benefits to same-sex couples. *De Leon v. Perry*, 975 F. Supp. 2d 632, 643 (W.D. Tex. 2014) (citing to An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 § 1(1)).

116. 798 N.E.2d 941 (Mass. 2003).

117. *Id.* at 961-68.

118. See *id.* at 959 (“[T]he Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution . . .”).

119. See *id.* at 959-68. For an excellent exploration of the *Goodridge* decision, its implications and aftermath, within the larger context of the recognition of LGBT rights in Massachusetts, from the insider's perspective of a GLAD attorney, see Bonauto, *supra* note 18.

By this time, opponents of marriage equality were highly motivated and well organized. By 2008, nearly thirty states had enacted constitutional bans on recognition of same-sex marriage.¹²⁰

The tide turned, however, with the Supreme Court's decision in *Windsor*. By 2014, eleven states had recognized same-sex marriage through legislative or popular vote.¹²¹ More tellingly, *Windsor* launched a cascade of judicial decisions striking down state bans on same-sex marriage under the United States Constitution; as stated by a federal district court, "There is a growing national judicial consensus that state marriage laws treating heterosexual and same-sex couples differently violate the Fourteenth Amendment, and it is this Court's responsibility to act decisively to protect rights secured by the United States Constitution."¹²²

Because *Windsor* addressed the constitutionality of a federal refusal to recognize a state's decision to authorize same-sex marriage, it did not directly address the validity of a state's decision to exclude same-sex marriage.¹²³ Nonetheless, after *Windsor*, nearly all of the courts that addressed the constitutionality of state bans on same-sex marriage found state or federal constitutional violations in the bans.¹²⁴ The Sixth Circuit's contrary decision in *DeBoer v.*

120. Sanders, *supra* note 114, at 15 (citing MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 97 (2013)).

121. De Leon v. Perry, 975 F. Supp. 2d 632, 644 (W.D. Tex. 2014).

122. Henry v. Himes, 14 F. Supp. 3d 1036, 1045 (S.D. Ohio), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

123. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) ("This opinion and its holding are confined to those lawful marriages" recognized by states and denied recognition by federal law.); Kitchen v. Herbert, 755 F.3d 1193, 1198 (10th Cir.) (noting that *Windsor* left open the question of the federal constitutionality of state same-sex marriage bans), *cert. denied*, 135 S. Ct. 265 (2014). *But see Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) (fearing that courts will not narrowly interpret the rationale of the *Windsor* majority).

124. See, e.g., Pareto v. Ruvin, 21 Fla. L. Weekly Supp. 899, 901 (Fla. Cir. Ct. 2014) (observing that, as of July 25, 2014, all cases addressing the constitutionality of same-sex marriage bans, since *Windsor*, had found violations of state or federal constitutions); see also Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 916 n.6, 927-28 (E.D. La. 2014) (disagreeing with sixteen federal cases since *Windsor* that had invalidated same-sex marriage bans under various levels of scrutiny), *abrogated by Obergefell*, 135 S. Ct. 2584. The only exceptions to these string of victories for same-sex marriage was *Robicheaux*, 2 F. Supp. 3d at 910, *DeBoer*, 772 F.3d at 421, *rev'd sub nom. Obergefell*, 135 S. Ct. 2584, and *Borman v. Pyles-Borman*, No. 2014CV36, 2014 WL 4251133, at *3 (Tenn. Cir. Ct. 2014) (finding rational basis for Tennessee's mini-DOMA based on deference to voters

Snyder—rejecting a constitutional right to same-sex marriage—set the stage for Supreme Court review.¹²⁵ Before examining the Supreme Court’s reversal of *DeBoer* in *Obergefell v. Hodges*,¹²⁶ it will be instructive to examine the recent transition in social attitudes about same-sex marriage, and the doctrinal uncertainty that permitted judges on state and federal courts to reach different conclusions on the constitutional question, including those on a closely divided Supreme Court.

C. Transition in Social Attitudes

Although Congress has not succeeded in amending Title VII of the Civil Rights Act of 1964 to bar employment discrimination on the basis of sexual orientation,¹²⁷ the American population has for many years tended to accept equal rights in employment in much greater percentages than its acceptance of equal marriage rights for same-sex couples.¹²⁸ To some extent, the greater controversy surrounding same-sex marriage may reflect a tendency by a significant percentage of the population to view state-sanctioned marriages partly through the lens of deeply held religious beliefs

and legislature and on rational basis to encourage union that is viewed as best arrangement for procreation and child-rearing), *abrogated by Obergefell*, 135 S. Ct. 2584.

125. 772 F.3d at 421.

126. 135 S. Ct. at 2608.

127. *See, e.g.*, *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (citing to three congressional bills introduced in 1994, 1995, and 1996, and rejected). As of November 2014, the Senate had passed a bill prohibiting employment discrimination based on sexual orientation or gender identity. Employment Non-Discrimination Act, S. 815, 113th Cong. (2013). The House version of the bill remained in committee. Employment Non-Discrimination Act, H.R. 1755, 113th Cong. (2013).

128. *Compare* GALLUP, *Gay and Lesbian Rights*, <http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx> (last visited Nov. 1, 2015) (approval for same-sex marriage varying between approximately 36% and 46% in the years 2001-2009), *and id.* (finding approval for constitutional amendment banning same-sex marriage varying between 47% and 57% in the years 2003-2008), *with id.* (finding support for equal employment rights without regard to sexual orientation varying between 85% and 89% in the years 2001-2008); *see* *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) (observing that Massachusetts law excluded same-sex marriage even after adopting laws prohibiting discrimination on the basis of sexual orientation in a variety of contexts, such as employment, housing, and public accommodation).

surrounding marriages sanctioned by their church.¹²⁹ Accordingly, many courts have taken pains to explain that their analyses are limited to state-sanctioned civil marriage and have no effect on religious marriage ceremonies sanctioned by a church and restricted by religious tenets.¹³⁰

Notwithstanding possible religious objections to same-sex marriage, the support for legal rights to same-sex marriage have increased in recent years, rising to 55% of those polled in 2014.¹³¹ Some evidence suggests that attitudes about same-sex marriage and other LGBT rights are generational,¹³² so that in a few decades, we

129. See GALLUP, *supra* note 128 (finding in 2012 that 47% who opposed same-sex marriage identified the reason, “Religion/Bible says it is wrong,” far ahead of next highest percentage, 20%, for the reason, without reference to religion, that “Marriage should be between a man and woman”); see also *Goodridge*, 798 N.E.2d at 948 (“Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman”); *Andersen v. King Cty.*, 138 P.3d 963, 1032 (Wash. 2006) (Bridge, J., concurring in dissent) (“To many, same-sex relationships and same-sex marriages are contrary to religious teachings.”), *abrogated by Obergefell*, 135 S. Ct. 2584; *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1143, 1146 (D. Or. 2014) (referring to widespread religious and moral beliefs and objections in the state population); see generally *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (legislative history of federal DOMA reflects intent to impose religious and moral views to limit definition of marriage).

130. *E.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1227 (10th Cir. 2014) (“[T]oday’s decision relates solely to civil marriage . . . but religious institutions remain as free as they always have been to practice their sacraments and traditions as they see fit.”); *Pareto v. Ruvin*, 21 Fla. L. Weekly Supp. 899, 900 (Fla. Cir. Ct. 2014) (“[T]his decision only affects civil marriage. It will not affect any religious institution’s rights involving marriage.”); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 554 (W.D. Ky.) (noting “[t]hrough each faith, minister, and individual can define marriage for themselves, at issue here are laws that act outside that protected sphere”), *rev’d sub nom.* *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014), *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584; *Henry v. Himes*, 14 F. Supp. 3d 1036, 1051 (S.D. Ohio 2014) (quoting *Bourke*, 996 F. Supp. 2d at 554), *rev’d sub nom.* *DeBoer*, 772 F.3d 388, *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584.

131. GALLUP, *supra* note 128. After 2005, the polling question changed from asking about “marriages between homosexuals” to “marriages between same-sex couples.” *Id.* (emphasis omitted). Moreover, support for same-sex marriage is growing among those with religious affiliations. Robert P. Jones, *Attitudes on Same-Sex Marriage by Religious Affiliation and Denominational Family*, PUB. RELIGION RES. INSTIT. (Apr. 22, 2015), http://publicreligion.org/2015/04/attitudes-on-same-sex-marriage-by-religious-affiliation-and-denominational-family/#.VZRr_WDFE9c (finding that religiously affiliated supporters now outnumber opponents, reflecting an increase in support of twenty percentage points since 2003).

132. See, *e.g.*, *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RES. CTR. (Mar. 20, 2013), <http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and->

likely will look back on the same-sex marriage debate the way that we now look back on controversies about racial integration and interracial marriage.

II. CLASHING LEGAL PERSPECTIVES

In the many states that enacted state constitutional amendments barring same-sex marriage,¹³³ court challenges required resort to federal constitutional guarantees under the Fourteenth Amendment.¹³⁴ Challenges under the Fourteenth Amendment typically have sought to vindicate liberty interests, in the form of privacy interests, protected by substantive due process,¹³⁵ frequently combined with equal protection claims.¹³⁶

Majority and dissenting opinions in the lower courts reveal several points of analysis about which reasonable jurists could differ. A brief exploration of these points of controversy will help introduce a sharp division between the Supreme Court's majority opinion and the dissenting opinions in *Obergefell*. More germane to the theme of this Article, the points of controversy will reveal the indeterminacy that could place any judge on the proverbial fence, in a position of indecision. When the precedent is thus uncertain in its application, an appeal to broad historical patterns might provide the impetus for choosing the application that avoids repeating the mistakes of the past and that continues the line of progress traced in the patterns.

The following sections do not attempt to thoroughly analyze and resolve the merits of points of controversy. For purposes of this Article's thesis, it suffices to identify issues that indicated uncertainty in the analysis prior to the Supreme Court's decision in *Obergefell* in June 2015.

changing-demographics/ (finding in 2013 that 70% of those polled who were born after 1980 supported gay marriage, "far higher than the support among older generations").

133. See, e.g., *supra* notes 109-14.

134. See, e.g., *Kitchen*, 755 F.3d at 1198-99 (invoking federal constitutional guarantees to invalidate state statutes and state constitutional amendment that state legislators and citizens had adopted in reaction to state court opinions allowing same-sex marriage).

135. See, e.g., *id.* at 1207-08.

136. See, e.g., *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir.) (holding encompasses due process and equal protection), *cert. denied*, 135 S. Ct. 308 (2014).

A. *Baker v. Nelson* as Precedent with Continuing Force

If it still had full force as precedent, *Baker v. Nelson* would have precluded courts, other than the U.S. Supreme Court itself, from employing federal equal protection or due process principles to invalidate a state's ban on same-sex marriage.¹³⁷ On the other hand, *Baker's* summary dismissal of the appeal would have lost its binding force if intervening Supreme Court case law had undermined its terse determination that the appeal presented no substantial federal question.¹³⁸

Although nearly all courts since *Windsor* found *Baker* to be undermined by intervening case law,¹³⁹ the majority and dissenting opinions in the Tenth Circuit's 2014 decision in *Kitchen v. Herbert*¹⁴⁰ illustrate points of good-faith debate.

Writing for the majority in *Kitchen*, Circuit Judge Lucero concluded that the Supreme Court's decisions in *Lawrence* and *Windsor* had undermined *Baker*.¹⁴¹ Judge Lucero emphasized the import of *Windsor*,¹⁴² which admittedly did not directly address the issue of state bans on same-sex marriage.¹⁴³ He brushed aside arguments that *Windsor* was grounded on federalism principles and seized on *Windsor's* references to the indignity, stigma, and other injuries visited by the federal DOMA of legally married same-sex couples, injuries similar to those denied same-sex marriage by the State of Utah.¹⁴⁴

137. See *supra* notes 28-29. The Full Faith and Credit Clause, not addressed in *Baker*, would remain available as a potential means of challenging a state's denial of recognition of same-sex marriages legally performed in other states. See, e.g., *DeBoer v. Snyder*, 772 F.3d 388, 418-19 (6th Cir. 2014) (but finding that full faith and credit did not require a state to recognize same-sex marriages in violation of its own public policy), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

138. See *supra* note 34.

139. See *supra* notes 38-39.

140. 755 F.3d 1193, 1228, 1240 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014).

141. *Id.* at 1206, 1217.

142. See *id.* at 1206-07. In section III of its opinion, the majority referred briefly to *Lawrence's* affirmation of personal autonomy in intimate relations, but it discussed *Windsor* in approximately six paragraphs. See *id.* at 1205-07, 1213.

143. *Id.* at 1206 ("We acknowledge that the question presented in *Windsor* is not identical to the question before us.").

144. See *id.* at 1207-08.

Circuit Judge Kelly concurred with the majority that the plaintiffs had standing, but he dissented on the merits.¹⁴⁵ He disagreed that the court could disregard the summary disposition of *Baker*, even if intervening case law had undermined *Baker*. Judge Kelly opined that lower courts must still wait for the Supreme Court to overrule its own precedent.¹⁴⁶ He argued that the weaker application of stare decisis to a summary disposition of the Supreme Court applies only to the Supreme Court's own reconsideration of the precedent and not to a lower court's duty to adhere to the holding of the summary disposition: "Though the Supreme Court may not accord *Baker* the same deference as an opinion after briefing and argument, it is nonetheless precedential for this court."¹⁴⁷

Applying the majority's standards for sake of argument, Judge Kelly disagreed that *Baker* had been undermined by intervening case law.¹⁴⁸ He characterized intervening case law, including *Lawrence* and *Windsor*, as "[a]t best . . . ambiguous" and as "certainly [not compelling] the conclusion that the Supreme Court will interpret the Fourteenth Amendment to require every state to extend marriage to same-gender couples, regardless of contrary state law."¹⁴⁹ Judge Kelly cited to a pre-*Windsor* decision of the First Circuit, holding that *Romer* and *Lawrence* did not undermine the binding effect of *Baker*.¹⁵⁰

Although the dissent in *Kitchen* represented a minority view on the continuing force of *Baker* after *Windsor*,¹⁵¹ it did reveal a good-faith controversy and uncertainty on that issue. It also suggests that

145. See *id.* at 1230 (Kelly, J., concurring in part and dissenting in part).

146. See *id.* at 1232 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

147. *Id.* at 1232 (citing *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979)); see also *DeBoer v. Snyder*, 772 F.3d 388, 401 (6th Cir. 2014) (requiring overruling rather than simply undermining of *Baker*), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

148. *Kitchen*, 755 F.3d at 1232 (Kelly, J., concurring in part and dissenting in part). In passing, Judge Kelly also rejected the plaintiffs' argument that the issue in *Kitchen* was different from that in *Baker* because the Utah ban in *Kitchen* was direct and explicit in contrast to the marriage statute in *Baker*, which required interpretation. *Id.*

149. *Id.* at 1232-33.

150. See *id.* at 1233 (citing *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012)).

151. See *supra* note 147; see also *DeBoer*, 772 F.3d at 430 (Daughtrey, J., dissenting) ("If ever there was a legal 'dead letter' . . . [*Baker*] is a prime candidate. It lacks only a stake through its heart.").

disregarding *Baker* would have been a more challenging position to defend prior to *Windsor*.¹⁵²

B. Level of Scrutiny

Once a court deemed itself free to address due process and equal protection claims under the Fourteenth Amendment, free of the bonds of *Baker*, it typically addressed the threshold issue of the appropriate level of scrutiny. Under the lowest, most deferential level of scrutiny, on a claim of either substantive due process or equal protection, a state law will be upheld if it is rationally related to a legitimate state interest.¹⁵³ A state's denial of a fundamental right, or its use of a suspect classification such as one based on race or national origin,¹⁵⁴ triggers strict scrutiny,¹⁵⁵ under which the law will be upheld only if it is narrowly tailored to advance a compelling state interest.¹⁵⁶ Intermediate scrutiny in an equal protection analysis is triggered by a quasi-suspect classification, such as one based on sex or illegitimacy.¹⁵⁷ Under intermediate scrutiny, a state law will be

152. See *Kitchen*, 755 F.3d at 1205-06 (majority opinion) (citing two pre-*Windsor* cases noting the binding effect of *Baker* on issues decided by *Baker*).

153. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (rational relationship test for due process if no fundamental liberty interest at stake); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (rational relationship test under equal protection); *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 77 P.3d 451, 460-65 (Ariz. Ct. App. 2003) (applying rational relationship test in due process analysis of same-sex marriage ban).

154. *Clark*, 486 U.S. at 461.

155. E.g., *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir.) (citing to Supreme Court authority for the proposition that “[u]nder both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny”), *cert. denied*, 135 S. Ct. 308 (2014); *Kitchen*, 755 F.3d at 1218 (citing to Supreme Court authority regarding strict scrutiny triggering fundamental rights under due process and suspect classifications under equal protection analysis), *cert. denied*, 135 U.S. 265 (2014).

156. *Kitchen*, 755 F.3d at 1218 (citing to *Reno v. Flores*, 507 U.S. 292, 302 (1993) (due process); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (equal protection)).

157. E.g., *Clark*, 486 U.S. at 461; see also *Griego v. Oliver*, 316 P.3d 865, 879 (N.M. 2013) (stating that sensitive classifications, such as “persons with a mental disability,” trigger intermediate scrutiny under state law); *id.* at 880-85 (noting that sex is viewed as a suspect classification under the state constitution, and finding that a classification based on sexual orientation triggers intermediate scrutiny under state law).

upheld if it is substantially related to an important government interest.¹⁵⁸

The varying levels of scrutiny, and the rights or classifications that trigger them, have invited debate about how the standards apply to a state ban on same-sex marriage. Uncertainty surrounded questions such as whether the ban implicated a fundamental interest or a suspect or quasi-suspect class, and whether it served a legitimate governmental interest under even a rational basis review.

1. *Fundamental Right Triggering Strict Scrutiny: Competing Analytic Frameworks*

Claims by same-sex couples that the state denied them a fundamental right gave rise to competing approaches to framing the issue and the analysis.

Defendants or skeptical judges pointed to the statement in *Washington v. Glucksberg*¹⁵⁹ that heightened scrutiny is reserved for “fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”¹⁶⁰ They often conceded that the right to marry is a fundamental right,¹⁶¹ and one court even conceded that “recent history and tradition may also be relevant” to the inquiry.¹⁶² But they asserted that same-sex marriage is such a recent and still controversial phenomenon that it is hardly established in American history and tradition, whether in deeply rooted traditions or relatively recent history.¹⁶³ Thus, they argued, plaintiffs

158. *United States v. Virginia*, 518 U.S. 515, 532 (1996) (requiring careful inspection “[w]ithout equating gender classifications, for all purposes, to classifications based on race or national origin”).

159. 521 U.S. 702 (1997).

160. *See id.* at 720-21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

161. *Glucksberg*, 521 U.S. at 720 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

162. *Andersen v. King Cty.*, 138 P.3d 963, 977 (Wash. 2006) (en banc) (stating this point after referring to a decline in state laws banning interracial marriage at the time of *Loving*, and citing to *Loving*, 388 U.S. at 6 n.5), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

163. *See, e.g., Andersen*, 138 P.3d at 979 (“[A]lthough marriage has evolved, it has not included a history and tradition of same-sex marriage in this nation or in Washington State.”); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 923 (E.D. La. 2014) (“Public attitude might be becoming more diverse, but any right to same-sex

cannot claim a fundamental right to same-sex marriage,¹⁶⁴ and a ban on same-sex marriage is subject to rational basis review.¹⁶⁵

Plaintiffs and sympathetic judges have responded that defenders of the bans have misstated the issue: rather than ask whether plaintiffs have a right to “same-sex marriage,” courts should recognize the fundamental right to *marriage* and then apply strict scrutiny to laws that exclude same-sex couples from that right.¹⁶⁶ They have observed that *Loving v. Virginia* did not ask whether the right to interracial marriage was deeply rooted in our nation’s history; it instead recognized the “the freedom of choice to marry,”¹⁶⁷ and then asked whether a state could deny this “fundamental freedom” on the basis of racial classifications.¹⁶⁸ Similarly, in

marriage is not yet so entrenched as to be fundamental.”), *abrogated by Obergefell*, 135 S. Ct. 2584.

164. *E.g.*, *Andersen*, 138 P.3d at 979 (characterizing as “astonishing” the dissent’s proposition that “there is a fundamental right to marry a person of the same sex”); *Robicheaux*, 2 F. Supp. 3d at 923 (“There is simply no fundamental right, historically or traditionally, to same-sex marriage.”); *see also* *DeBoer v. Snyder*, 772 F.3d 388, 411 (6th Cir. 2014) (observing that previous cases recognized a fundamental right to marry in various contexts, but always on the assumption of opposite-sex marriage), *rev’d sub nom. Obergefell*, 135 S. Ct. 2584; *Ex parte State ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 892752, at *30-34 (Ala. Mar. 3, 2015), *abrogated by Obergefell*, 135 S. Ct. 2584.

165. *E.g.*, *Andersen*, 138 P.3d at 980; *Robicheaux*, 2 F. Supp. 3d at 923.

166. *E.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1216-26 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992-93 (N.D. Cal. 2010) (determining that same-sex couples are not seeking a new right; they seek the same right to marry that opposite sex couples have enjoyed, a right to join an institution that has abandoned the starkly defined gender roles that it once encompassed), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2011), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (finding no standing to appeal); *Latta v. Otter*, 771 F.3d 456, 478-79 (majority opinion), 476-96 (Reinhardt, J., concurring) (9th Cir. 2014) (reviewing Supreme Court case law on marriage and fundamental rights); *see also Bostic v. Schaefer*, 760 F.3d 352, 375-76 (4th Cir.) (determining that *Glucksberg*’s requirement of grounding in history and tradition applies only to expanding the concept of fundamental rights, and not to established fundamental rights, like the right to marry), *cert. denied*, 135 S. Ct. 308 (2014).

167. *Kitchen*, 755 F.3d at 1210 (quoting *Loving*, 388 U.S. at 12).

168. *Loving*, 388 U.S. at 12; *De Leon v. Perry*, 975 F. Supp. 2d 632, 659 (W.D. Tex. 2014) (noting that *Loving* found that the right to marry included interracial marriage, rather than finding a new right to interracial marriage); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003) (stating that *Loving* makes clear that “the right to marry means little if it does not include the right to marry the person of one’s choice”); *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1065 (D. Alaska 2014) (noting that *Loving* “hinged on” recognition of “the freedom to marry, without an additional descriptor”); *Pareto v. Ruvin*, 21 Fla. L. Weekly

Lawrence, the Supreme Court rejected the framing of the issue stated in *Bowers* as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,”¹⁶⁹ stating that this framing in *Bowers* failed “to appreciate the extent of liberty at stake.”¹⁷⁰ According to this line of argument, fundamental rights should not be defined in terms of those who have been excluded from them and are challenging the exclusion.¹⁷¹

This dispute about the proper analytic framework for identifying a fundamental right created uncertainty at an important juncture in the analysis.

2. Heightened Scrutiny for Quasi-Suspect Class

When advancing equal protection claims, some plaintiffs have sought to trigger heightened scrutiny either by (a) establishing sexual orientation as a suspect or quasi-suspect class, or (b) characterizing bans on same-sex marriage as a form of sex discrimination, which triggers intermediate scrutiny under the federal equal protection clause¹⁷² and strict scrutiny under some state constitutions.¹⁷³

a. Sexual Orientation as a Quasi-Suspect Class

When invalidating the federal DOMA, the majority in *Windsor* failed to provide clear guidance on its level of scrutiny, but its analysis led Justice Scalia to note in dissent that the majority “does not apply anything that resembles” deferential, rational basis

Supp. 899, 899 (Fla. Cir. Ct. 2014) (drawing direct analogy between *Loving*'s holding and same-sex marriage rights).

169. *Andersen*, 138 P.3d at 1021 (Fairhurst, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003)).

170. *Id.* at 1021-22 (quoting *Lawrence*, 539 U.S. at 566-67).

171. *Bostic*, 760 F.3d at 376-77 (noting that *Loving* and other Supreme Court decisions did not define fundamental rights in terms of the classes excluded); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1046 (S.D. Ohio) (“The Supreme Court has consistently refused to narrow the scope of the fundamental right to marry by [referring to] . . . the characteristics of the couple seeking marriage.”), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Goodridge*, 798 N.E.2d at 972-73 (Greaney, J., concurring) (characterizing it as “conclusory” to “define the institution of marriage by the characteristics of those to whom it always has been accessible”).

172. *See supra* notes 155-56.

173. *See, e.g.,* *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (plurality opinion) (interpreting state constitution prior to its amendment in 1998).

review.¹⁷⁴ When reading “the tea leaves of *Windsor* and its forebears,” one federal trial court was able to “apprehend the application of scrutiny more exacting than deferential,” leading it to cautiously conclude that “heightened scrutiny is, at minimum, not foreclosed” by *Windsor* when reviewing classifications on the basis of sexual orientation.¹⁷⁵ After reviewing *Windsor* extensively,¹⁷⁶ the United States Court of Appeals for the Ninth Circuit stated somewhat more confidently, “[a]t a minimum . . . *Windsor* scrutiny ‘requires something more than traditional rational basis review.’”¹⁷⁷

In light of uncertainty surrounding this issue, some courts have exercised caution by applying the rational basis level of review, requiring substantial deference to the legislature.¹⁷⁸ Others have found a basis for intermediate scrutiny¹⁷⁹ after applying the lodestar

174. *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (emphasis omitted).

175. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425 (M.D. Pa. 2014).

176. *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-83 (9th Cir. 2014).

177. *Id.* at 483 (quoting *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 813 (2008)).

178. *E.g.*, *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir.) (holding that, even if heightened scrutiny does not apply, discrimination against same-sex couples is irrational, “which is why we can largely elide the more complex analysis found in more closely balanced equal-protection cases”), *cert. denied*, 135 S. Ct. 316 (2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 548-50 (W.D. Ky.) (applying rational basis test in light of uncertainty in *Windsor*, but finding that state law failed this deferential test), *rev’d sub nom.* *DeBoer v. Snyder*, 772 F.3d 388, 406 (6th Cir. 2014) (finding no constitutional violation after applying an extremely deferential rational basis review, which was satisfied despite “foolish, sometimes offensive, inconsistencies that have haunted marital legislation from time to time”), *rev’d sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also Andersen v. King Cty.*, 138 P.3d 963, 980 (2006) (applying rational basis test in pre-*Windsor* case), *abrogated by Obergefell*, 135 S. Ct. 2584; *see generally Baskin*, 766 F.3d 648 (finding no need to apply heightened scrutiny, because states’ bans on same-sex marriage fail the rational basis test); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (determining, in pre-*Windsor* case, that the court could apply heightened scrutiny to same-sex marriage ban as sex discrimination, but finding such scrutiny to be unnecessary because ban fails rational relationship test), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2011), *vacated sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

179. *E.g.*, *Whitewood*, 992 F. Supp. 2d at 427-30 (applying the factors to sexual orientation and finding a quasi-suspect class warranting intermediate scrutiny); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 987-91 (S.D. Ohio 2013) (applying the factors and adopting “a heightened scrutiny” to sexual orientation), *rev’d sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584; *see also id.* at 978-79 (applying intermediate scrutiny to equal protection claim against law that does not recognize lawful same-sex marriage

factors relevant to determining suspect status: whether a group is politically powerless and has been subjected to a history of discrimination, and is defined by traits that are immutable or distinguishing and that bear no relation to ability to contribute to society.¹⁸⁰

In some courts, classifications based on sexual orientation appear to have triggered a level of scrutiny in equal protection analysis that lies somewhere between rational basis review and intermediate scrutiny.¹⁸¹ Some judges have referred generally to “heightened” scrutiny,¹⁸² or have purported to test for a rational relationship but then have applied that test with less deference than is normally associated with the test.¹⁸³

from other states while recognizing opposite-sex marriage from other states); *Baskin*, 766 F.3d at 654 (“[M]ore than a reasonable basis is required because this is a case in which the challenged discrimination is, in the formula from the *Beach* case, ‘along suspect lines.’” (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993))); *cf.* *Griego v. Oliver*, 316 P.3d 865, 871-72, 879 (N.M. 2013) (under state constitutional law, applying intermediate scrutiny to a “sensitive” classification).

180. *See, e.g.*, *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (citing to Supreme Court case law for each factor), *aff’d*, 133 S. Ct. 2675; *Baskin*, 766 F.3d at 655, 657 (among other things, citing to studies about immutability of sexual orientation after raising issue about whether characteristic is “immutable or at least tenacious”); *Whitewood*, 992 F. Supp. 2d at 427.

181. *See generally* *Sanders*, *supra* note 114, at 25 (interpreting the Supreme Court’s decisions in *Romer*, *Lawrence*, and *Windsor* to apply “a form of heightened scrutiny . . . sometimes called ‘rational basis with a bite’” but critiquing those cases for failure to clearly justify heightened scrutiny); *cf.* *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (noting that Court has applied “a more searching form of rational basis review” under equal protection analysis when state law reflects a “desire to harm a politically unpopular group”).

182. *E.g.*, *Wymyslo*, 962 F. Supp. 2d at 987 (embracing “the conclusion that sexual orientation classifications should be subject to some form of heightened scrutiny”); *id.* at 991 (state ban must withstand “a heightened scrutiny analysis”).

183. As a benchmark, some judges have applied a traditional, highly deferential, rational basis test to same-sex marriage bans. *E.g.*, *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 77 P.3d 451, 461-64 (Ariz. Ct. App. 2003), *abrogated by Obergefell*, 135 S. Ct. 2584; *Andersen*, 138 P.3d at 980-84 (finding rational basis on any conceivable state of facts, and leaving it to the legislature to resolve debates in the literature about optimal setting for child-rearing); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 915-16, 922-23 (E.D. La. 2014), *abrogated by Obergefell*, 135 S. Ct. 2584; *Kitchen v. Herbert*, 755 F.3d 1193, 1237-40 (10th Cir.) (Kelly, J., concurring in part and dissenting in part) (seeing no equal protection violation after applying highly deferential rational basis test), *cert. denied*, 135 S. Ct. 265 (2014). Other judges, in contrast, have applied or advocated for a more searching level of scrutiny, while still referring to a rational basis test. *See Andersen*, 138 P.3d at 1015-16 (Fairhurst, J., dissenting) (applying rational basis test with “teeth” and with focus on whether excluding same-sex couples from marriage

b. Same-Sex Marriage Bans as Sex Discrimination

Plaintiffs could more directly trigger intermediate scrutiny if they could establish that bans on same-sex marriage constitute a form of discrimination not just on the basis of sexual orientation,¹⁸⁴ but on the basis of sex, in the sense of discrimination based on one's status as male or female.¹⁸⁵ Attempts to do so have led to another duel between competing analytic frameworks.

Opponents of the claim for sex discrimination have relied on a perspective that asks how a same-sex marriage ban affects broad populations of women and men. According to this argument, "traditional-marriage laws do not discriminate on the basis of gender

further the state's purpose, rather than whether including opposite-sex marriage furthers that purpose); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 960 n.20 (Mass. 2003) (citing to Massachusetts and U.S. Supreme Court authority for proposition that rational basis test is not toothless); *id.* at 966 n.31 (deference to legislature must be balanced against court's authority to decide constitutional questions); *id.* at 980 (Sosman, J., dissenting) ("Although ostensibly applying the rational basis test to the civil marriage statutes, it is abundantly apparent that the court is in fact applying some undefined stricter standard."); *Kitchen*, 755 F.3d at 1237 (Kelly, J., concurring in part and dissenting in part) (charging that the district court "misunderstood the essence of rational basis review" and adopted a level of scrutiny that was inconsistent with "extreme deference, the hallmark of judicial restraint"); *cf.* *Huntsman v. Heavilin*, 21 Fla. L. Weekly Supp. 916, 918 (Fla. Cir. Ct. 2014) (finding that proponents of state constitutional amendment harbored animus toward same-sex couples, justifying application of "the heightened rational basis test").

184. One opponent of the claim for sex discrimination opines that same-sex marriage bans do not even discriminate on the basis of sexual orientation: "The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into marriage. All individuals, with certain exceptions not relevant here, are free to marry." *Goodridge*, 798 N.E.2d at 975 (Spina, J., dissenting). However, "it is equally imprudent to conclude that the [Washington state] DOMA is not discriminatory because it affords homosexuals the ability to marry a person for whom they have no romantic or sexual attraction." *Andersen*, 138 P.3d at 1035 n.11 (Bridge, J., concurring in dissent).

185. See *supra* note 157 and accompanying text (intermediate scrutiny for quasi-suspect class, such as sex). Another basis for disparate treatment, by state versions of DOMA, lies in a state's recognizing a heterosexual marriage performed lawfully in another state but not a same-sex marriage from another state, thus discriminating against the same-sex couple rather than an individual within it. See, e.g., *Wymyslo*, 962 F. Supp. 2d at 984-85. This section, however, focuses on the theory that bans on same-sex marriage discriminates against an individual within the couple on the basis of that person's sex.

because all men and all women are equally restricted to marriage between the opposite sexes.”¹⁸⁶

Proponents of the claim for finding sex discrimination respond that *Loving v. Virginia* rejected a group-based perspective when invalidating bans on interracial marriage.¹⁸⁷ Specifically, *Loving* rejected the argument that “racial classifications do not constitute an invidious discrimination based upon race” simply because they “punish equally both the white and the Negro participants in an interracial marriage.”¹⁸⁸ Although this passage refers only to a single interracial couple, the argument it rejects assumes equal application within the general population: Members of all races are prohibited from entering into marriage with a member of a different race. *Loving* proclaimed that “equal application does not immunize the statute” from the “heavy burden” of justifying a classification based on “race.”¹⁸⁹

Accordingly, rather than focusing on equal application of a restriction to all members of a population, proponents of the claim for sex discrimination have argued that marriage is an individual right.¹⁹⁰ They accordingly argued from a perspective that assumes a particular individual and then asks whether the statute discriminates on the basis of sex because of restrictions on who a person of that individual’s sex can marry:

As a factual matter, an individual’s choice of marital partner is constrained because of his or her own sex. Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because

186. *Ex parte State ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 892752, at *30 (Ala. Mar. 3, 2015), *abrogated by Obergefell*, 135 S. Ct. 2584; *see also Andersen*, 138 P.3d at 969 (determining that Washington state’s “DOMA treats both sexes the same; neither a man nor a woman may marry a person of the same sex”); *Kitchen*, 755 F.3d at 1233 (Kelly, J., concurring in part and dissenting in part) (finding no sex discrimination because ban operates similarly to male and female same-sex couples and does not disadvantage either as a class); *Robicheaux*, 2 F. Supp. 3d at 919 (“Louisiana’s laws apply evenhandedly to both genders—whether between two men or two women.”); *Baehr v. Lewin*, 852 P.2d 44, 71 (Haw. 1993) (Heen, J., dissenting) (explaining that the ban on same-sex marriage does not discriminate on the basis of sex, because “[a] male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female”).

187. *E.g.*, *Baehr*, 852 P.2d at 67-68.

188. *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

189. *Id.* at 9.

190. *E.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 957 n.15 (Mass. 2003); *see also id.* at 971 (Greaney, J., concurring) (“[C]onstitutional protections extend to individuals and not to categories of people.”).

he (Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law.¹⁹¹

In response, opponents of the sex discrimination claim point out that *Loving's* analysis was premised on racial animus toward non-whites and a desire to maintain "White Supremacy," whereas the bans on same-sex marriage did not reflect animus toward men or toward women.¹⁹²

Thus, sex discrimination has provided a possible, but uncertain basis for triggering heightened scrutiny of a ban on same-sex marriage.¹⁹³

191. *Id.* at 971 (Greaney, J., concurring); see also *Andersen*, 138 P.3d at 1037 (Bridge, J., concurring in dissent) ("A woman cannot marry the woman of her choice but a man can marry the woman of his choice [T]he only thing preventing plaintiff Heather Andersen from marrying her partner, Leslie Christian, is the fact that Andersen is a woman."); *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) ("A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians."); *Latta v. Otter*, 771 F.3d 456, 485-90 (9th Cir. 2014) (Berzon, J., concurring) (discussing at length why bans on same-sex marriage represent discrimination on the basis of sex and sex stereotyping); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014) ("The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification."). As recognized by some judges, a same-sex marriage ban can discriminate on the basis of both sex and sexual orientation. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (noting that the two forms of discrimination were interrelated and equivalent), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2011), *vacated sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); see also *Latta*, 771 F.3d at 484-85 (Berzon, J., concurring) (explaining that a ban on same-sex marriage operates most clearly as discrimination on the basis of sex, although it was intertwined with discrimination on the basis of sexual orientation).

192. *E.g.*, *Goodridge*, 798 N.E.2d at 992 & n.13 (Cordy, J., dissenting) (quoting *Loving*, 388 U.S. at 11).

193. A similar debate unfolded in the courts over interracial relationships as a form of race discrimination under Title VII and under 42 U.S.C. § 1981, although the weight of authority has sided with finding race discrimination on an individualized framework of analysis: An employer discriminates on the basis of race if it fires a White employee who married a Black spouse but would not have fired a Black employee who married the same spouse. *E.g.*, *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 890-91 (11th Cir. 1986) (citing to other cases on either side of the debate). This theory could apply equally well to workplace bans on same-sex relationships: John would be fired if he had a romantic relationship with Paul, but Mary could date Paul without any consequences from her employer; thus, the employer is discriminating between John and Mary on the basis of John's status as a male. *E.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994). Unfortunately for proponents of this individualized approach in the Title VII context, courts initially rejected it for discrimination based on sexual orientation. *E.g.*, *DeSantis v. Pac. Tel.*

C. Degree of Appropriate Deference to Political Processes

Aside from the substantial judicial deference to legislatures if a court subjects a law to rational basis scrutiny,¹⁹⁴ judicial pronouncements sometimes reflect an extra degree of caution before cutting short public debate or interfering with a legislature's resolution of a contentious policy issue such as marriage equality.¹⁹⁵

Dissenting in *Lawrence*, Justice Scalia invoked this concern in 2003 to argue that the majority—in overruling *Bowers v. Hardwick*—was taking a position in a culture war, a matter that should be left to democratic majority will.¹⁹⁶ Three years later, the

& Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979). These judicial interpretations then triggered congressional attempts to add sexual orientation to Title VII, which failed, thus signaling to courts that Congress did not intend to reach sexual orientation discrimination or to reverse judicial findings that such discrimination did not constitute sex discrimination. *E.g.*, *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001). This legislative history, however, might not fully undermine a finding that an employer's reaction to an employee's homosexuality contributed to the employer's sex discrimination in the form of unlawful sex stereotyping under the doctrine of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See, e.g.*, *Terveer v. Billington*, 34 F. Supp. 3d 100, 115-16 (D. D.C. 2014) (complaint stated claim of sex discrimination by alleging that an employee's homosexuality did not conform to his supervisor's sex stereotypes about men); Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465 (2004) (even otherwise gender-conforming gay or lesbian employees can be victims of sex stereotyping if they do not conform to the employer's view that employees should be sexually attracted only to members of the opposite sex); *Castello v. Donahoe*, EEOC No. 0520110649, 2011 WL 6960810, at *2-3 (Dec. 20, 2011) (on reconsideration, prohibiting sex stereotyping in an employer's stereotype that a female employee should have sexual relationships only with men and not with women); *see also* Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Anti-Discrimination Law*, 124 YALE L.J. 396, 409 (2014) (exploring this and other applications of sex stereotyping).

194. *See supra* notes 153, 178, 183 and accompanying text.

195. *See, e.g.*, *City & Cty. of S.F. v. United Assn. of Journeymen*, 726 P.2d 538, 541-43 (Cal. 1986) (complex public policy issues surrounding public employee labor relations counsels court to wait for legislative action rather than create common law action in tort for damages for illegal public employee strike); *see also* *Raftopol v. Ramey*, 12 A.3d 783, 793-804 (Conn. 2011) (deciding narrow question through interpretation of statute, but leaving further public policy determinations on gestational agreements to legislature). *But cf. id.* at 816 (Zarella, J., concurring) (critiquing the majority for both formally deferring to legislative action and providing "the legislature with a detailed road map indicating how the law on gestational agreements should be clarified").

196. *Lawrence v. Texas*, 539 U.S. 558, 602-04 (2003) (Scalia, J., dissenting); *see also* *United States v. Windsor*, 133 S. Ct. 2675, 2718-19 (2013) (Alito, J.,

question of judicial deference to the legislatures surfaced in several opinions in the en banc decision of the Washington Supreme Court, upholding a state ban on same-sex marriage, in *Andersen v. King County*.¹⁹⁷ The strongest reference to judicial deference was penned by Justice Johnson, concurring with the plurality's decision upholding the state's DOMA: "[W]here courts attempt to mandate novel changes in public policy through judicial decree, they erode the protections of our constitutions and frustrate the constitutional balance, which expressly includes the will of the people who must ratify constitutional amendments."¹⁹⁸ Similar sentiments appear in the plurality opinion¹⁹⁹ and that of concurring Justice Alexander,²⁰⁰ both of which add some gentle encouragement for further democratic deliberation, and perhaps reconsideration, in the populace and legislature.²⁰¹

Similarly, when dissenting from the Massachusetts decision recognizing a right to same-sex marriage under the state constitution, and in light of the numerous states banning same-sex marriage in 2003, Justice Cordy argued in favor of waiting for greater national consensus before finding that fundamental interests were at stake:

dissenting) (arguing that the majority is choosing between two theories of marriage, a matter best left to the legislative branch).

197. 138 P.3d 963, 1010 (2006), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

198. *Id.* at 998 (Johnson, J., concurring) (discussing the need to consult history and tradition to define fundamental interests); *see also id.* at 1003-04 (noting that DOMA reflects legislative effort to prevent judicial decisions from other states to dictate marriage policy in Washington); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 1050 (Mass. 2003) (Cordy, J., dissenting) ("[T]he issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.").

199. *See Andersen*, 138 P.2d at 968 ("[W]e have engaged in an exhaustive constitutional inquiry and have deferred to the legislative branch as required by our tri-partite form of government."); *see also id.* at 969 ("[W]hile same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it.").

200. *Id.* at 991 (Alexander, C.J., concurring) (explaining that, by overturning the state DOMA, "we would be usurping the function of the legislature or the people as defined in article II of the constitution of the state of Washington").

201. *Id.* at 968 (plurality opinion) ("We see no reason, however, why the legislature or the people acting through the initiative process would be foreclosed from extending the right to marry to gay and lesbian couples in Washington."); *id.* at 991 (Alexander, C.J., concurring) ("[N]othing in the opinion that I have signed . . . should be read as casting doubt on the right of the legislature or the people to broaden the marriage act or provide other forms of civil union if that is their will.").

As this court noted in considering whether to recognize a right of terminally ill patients to refuse life-prolonging treatment, “the law always lags behind the most advanced thinking in every area,” and must await “some common ground, some consensus.”

. . . .

. . . No State Legislature has enacted laws permitting same-sex marriages; and a large majority of States, as well as the United States Congress, have affirmatively prohibited the recognition of such marriages for any purpose.

. . . In such circumstances, the law with respect to same-sex marriages must be left to develop through legislative processes, subject to the constraints of rationality, lest the court be viewed as using the liberty and due process clauses as vehicles merely to enforce its own views regarding better social policies, a role that the strongly worded separation of powers principles in . . . [the state] Constitution forbids, and for which the court is particularly ill suited.²⁰²

On the other hand, many judges have countered that courts cannot evade their responsibilities to protect minority rights and to decide difficult constitutional questions. Judge Posner has commented succinctly on the first responsibility: “Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.”²⁰³ The Tenth Circuit addressed the second of these judicial responsibilities:

As a matter of policy, it might well be preferable to allow the national debate on same-sex marriage to play out through legislative and democratic channels. . . . But the judiciary is not empowered to pick and choose the timing of its decisions. . . . We may not deny [the plaintiffs] relief based on a mere preference that their arguments be settled elsewhere. Nor may we defer to majority will in dealing with matters so

202. *Goodridge*, 798 N.E.2d at 989-91 (Cordy, J., dissenting) (internal citations omitted); see also *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 919-20 (E.D. La. 2014) (exercising judicial caution in the face of perceived uncertainty about the consequences of judicial interference with the democratic process), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

203. *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir.) (referring to the operation of a state democratic process in which homosexuals made up only a tiny fraction of the population), *cert. denied*, 135 S. Ct. 316 (2014). The popular vote in favor of same-sex marriage in Ireland, in May 2015, stands as the only instance in which a majority of the electorate of a nation has approved marriage equality by popular vote, thus protecting the rights of a small minority of the electorate. Danny Hakim & Douglas Dalby, *Irish Legalize Gay Marriage by Big Margin*, N.Y. TIMES, May 24, 2015, at A1.

central to personal autonomy. The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box.²⁰⁴

Indeed, precisely because they are shielded from the political forces that more directly influence the other branches of government, some courts have undertaken a special responsibility to protect individual rights.²⁰⁵ The California Supreme Court shouldered this responsibility when it invalidated that state's ban on interracial marriage in *Perez v. Lippold*²⁰⁶ in 1948, almost two decades before *Loving v. Virginia*. *Perez* served as inspiration for the Massachusetts Supreme Court in its recognition of a state constitutional right to same-sex marriage:

When the Supreme Court of California decided *Perez* . . . racial inequality was rampant and normative, segregation in public and private institutions was commonplace, the civil rights movement had not yet been launched, and the “separate but equal” doctrine . . . was still good law. The lack of popular consensus favoring integration (including interracial marriage) did not deter the Supreme Court of California from holding that that State’s antimiscegenation statute violated the plaintiffs’ constitutional rights. Neither the *Perez* court nor the *Loving* Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus.²⁰⁷

Accordingly, in finding no likelihood of success in the State’s defense of New Jersey legislation providing only civil unions to same-sex couples, the New Jersey Supreme Court rejected the State’s argument for giving “the democratic process ‘a chance to play out’ rather than act now”:

When courts face questions that have far-reaching social implications, there is a benefit to letting the political process and public discussion proceed first. . . . But when a party presents a clear case of ongoing unequal treatment, and asks the court to vindicate constitutionally protected rights, a court may not sidestep its obligation to rule for an indefinite amount of time. Under those circumstances, courts do not have the option to defer.²⁰⁸

204. *Kitchen v. Herbert*, 755 F.2d 1193, 1228 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *see also Andersen*, 138 P.3d at 1025 (Fairhurst, J., dissenting) (“[P]opular opinion cannot dictate our interpretation of the constitution.”), *abrogated by Obergefell*, 135 S. Ct. 2584.

205. *Varnum v. Brien*, 763 N.W.2d 862, 875-76 (Iowa 2009) (discussing separation of powers under Iowa constitution).

206. 198 P.2d 17, 27 (Cal. 1948).

207. *Goodridge*, 798 N.E.2d at 958 n.16.

208. *Garden State Equality v. Dow*, 79 A.3d 1036, 1045 (2013) (internal citations omitted).

Similarly, in finding federal due process and equal protection violations in a citizen-led ballot initiative that amended the state constitution to deny recognition to same-sex marriage, a Florida trial court rejected an argument that it defer to the “will of the voters”:

While citizen-participation in government and the right to vote are the hallmarks of a democracy, it is also the judiciary’s responsibility to examine the constitutionality of the laws of this State when they are called into question. *See Marbury v. Madison*, 5 U.S. 137 (1803). . . . This Nation and State . . . are *constitutional* democracies with certain principles enshrined into a governing text. A state’s constitution cannot insulate a law that otherwise violates the U.S. Constitution. . . . Accordingly, the “will of the voters” does not immunize [the state constitutional provision] from judicial review. . . . To hold otherwise would sanction the “tyranny of the majority.”²⁰⁹

In sum, the appropriate degree of judicial deference to the political process, when minority interests are implicated, is a matter of continuing debate and provided further grounds for division between jurists in same-sex marriage litigation.

D. *Obergefell v. Hodges*—Clashing Legal Perspectives in the Supreme Court

In *Obergefell v. Hodges*,²¹⁰ a 5–4 decision, Justice Kennedy wrote for the majority, joined by Justices Ginsburg, Breyer,

209. *Pareto v. Ruvin*, 21 Fla. L. Weekly Supp. 899, 901 (Fla. Cir. Ct. 2014); *see also Bostic v. Schaefer*, 760 F.3d 352, 379 (4th Cir.) (“[T]he people’s will is not an independent compelling interest that warrants depriving same-sex couples of their fundamental right to marry.”), *cert. denied*, 135 S. Ct. 308 (2014). The theme of protecting minority rights from the majority’s use of democratic machinery was echoed by another Florida trial court:

This court is aware that the majority of voters oppose same-sex marriage, but it is our country’s proud heritage to protect the rights of the individual, the rights of the unpopular, and the rights of the powerless, even at the cost of offending the majority. . . . All laws, passed whether by the legislature or by popular support must pass [constitutional scrutiny], to do otherwise diminishes the Constitution to just a historical piece of paper.

Huntsman v. Heavilin, 21 Fla. L. Weekly Supp. 916, 919 (Fla. Cir. Ct. 2014); *see also Varnum*, 763 N.W.2d at 876 (declaring that state constitutional rights must be enforced “even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time”); *DeBoer v. Snyder*, 772 F.3d 388, 436 (6th Cir. 2014) (Daughtrey, J., dissenting) (stating that courts have the responsibility to ensure that rights are not “held hostage by popular whims”), *rev’d sub nom. Obergefell*, 135 S. Ct. 2584.

210. *Obergefell*, 135 S. Ct. 2584.

Sotomayor, and Kagan. Building on the foundations he laid in *Romer*, *Lawrence*, and *Windsor*,²¹¹ Justice Kennedy relied on both due process and equal protection to find a constitutional right to same-sex marriage,²¹² overruling its own dismissal of appeal in *Baker v. Nelson*.²¹³ The majority opinion, however, contains only a single paragraph that independently discusses the equal protection analysis;²¹⁴ the constitutional analysis focuses almost entirely on due process and on the interrelationship between due process and equal protection.²¹⁵

Justice Kennedy's majority opinion invokes the Due Process Clause of the Fourteenth Amendment to protect fundamental liberties extending to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."²¹⁶ The opinion discusses "four principles and traditions" that explain the fundamental nature of the right to marry:²¹⁷ (1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy;"²¹⁸ (2) no other institution matches marriage in its importance to committed couples as a means of supporting their union;²¹⁹ (3) marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education,"²²⁰ rights relevant to many same-sex couples who are raising children;²²¹ and (4) "marriage is a keystone of our social order," forming "the basis for an expanding list of governmental rights, benefits, and responsibilities."²²² Although the Court had previously established the right to marry in the context of opposite-sex unions,²²³ the *Obergefell* majority

211. See *supra* Section I.A.

212. *Obergefell*, 135 S. Ct. at 2604. In three paragraphs near the end of the majority opinion, in Section V, Justice Kennedy explained that the same constitutional principles invalidated state laws that refused recognition of same-sex marriages validly concluded in other states. *Id.* at 2607-08.

213. *Id.* at 2605 (overruling *Baker v. Nelson*, 409 U.S. 810 (1972)). For a discussion of *Baker*, see *supra* notes 25-37 and accompanying text.

214. *Obergefell*, 135 S. Ct. at 2604.

215. *Id.* at 2597-604.

216. *Id.* at 2597.

217. *Id.* at 2599.

218. *Id.*

219. *Id.* at 2599-600.

220. *Id.* at 2600.

221. *Id.* at 2600-01 (rejecting any conclusion, however, that "the right to marry is less meaningful for those who do not or cannot have children").

222. *Id.* at 2601.

223. *Id.* at 2598.

concludes that these reasons “apply with equal force to same-sex couples.”²²⁴

In response, Chief Justice Roberts’s dissent accuses the majority of engaging in the kind of judicial activism and intervention associated with the discredited decisions of the Court in *Dred Scott* and *Lochner v. New York*.²²⁵ On a more specific plane, of the several clashing legal perspectives that had divided judges in state courts and lower federal courts,²²⁶ the majority and dissenting opinions in the Supreme Court divide primarily on two issues: (1) whether a ban on same-sex marriage denies a fundamental right,²²⁷ and (2) whether courts should defer to ongoing democratic deliberation in political arenas on the issue of same-sex marriage.²²⁸

1. *The Fundamental Right to Marry*

The respondents in *Obergefell* set the stage for the clash over fundamental rights by framing the petitioners’ claim as one for “a new and non-existent ‘right to same-sex marriage,’” rather than for a general right to marry grounded in history and tradition.²²⁹ In his dissenting opinion, Chief Justice Roberts similarly notes that the precedent supporting a right to marry deals solely with opposite-sex marriages, and he characterizes the petitioners’ claim as one seeking “to make a State change its definition of marriage.”²³⁰

224. *Id.* at 2599.

225. *Id.* at 2615-19 (Roberts, C.J., dissenting) (referring to the Court’s invoking due process to strike down the Missouri Compromise in *Dred Scott v. Sandford*, 60 U.S. 393, 451-52 (1856) and a state law regulating maximum hours for bakery employees in *Lochner v. New York*, 198 U.S. 45, 58 (1905)).

226. Because of the majority’s minimalist treatment of equal protection, the Justices did not address the issue of whether a ban on same-sex marriage constitutes a form of sex discrimination, triggering intermediate scrutiny, nor did it articulate the level of scrutiny generally appropriate for classifications based on sexual orientation. *See supra* notes 171-90 and accompanying text. The majority opinion characterizes the state laws as denying benefits to same-sex couples that are accorded to opposite-sex couples, and it refers to subordination of gays and lesbians. *See Obergefell*, 135 S. Ct. at 2604; thus, it appears to find an equal protection violation in a classification based on sexual orientation. To support any heightened scrutiny, however, it appears to rely on a state’s heavy burden to justify its exclusion of gays and lesbians from the fundamental right to marry, “[e]specially against a long history of disapproval of their relationships.” *See id.*

227. *See supra* notes 159-68 and accompanying text.

228. *See supra* notes 194-209 and accompanying text.

229. *Obergefell*, 135 S. Ct. at 2602 (quoting Brief for Respondent at 8).

230. *Id.* at 2611, 2614 (Roberts, C.J., dissenting); *see also id.* at 2640 (Alito, J., dissenting) (“[I]t is beyond dispute that the right to same-sex marriage is not

The majority opinion rejects the petitioner's framing of the issue, noting that the Court's precedent establishing the right to marry in various contexts has consistently recognized a general right to marry and then scrutinized exclusions from that right.²³¹ Although marriage has been historically viewed as the "union of a man and a woman," the majority opinion adopts the petitioners' contention that the "cases cannot end there".²³² "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."²³³

2. Deference to Democratic Deliberation

But the greatest rift between the majority and dissenting opinions arises over the question of deference to democratic deliberation. Justice Kennedy's majority opinion emphasizes the responsibility of the Court to protect a fundamental right: "Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights."²³⁴ The majority opinion treats democratic deliberation in the political arena not solely as a means to resolve an issue in various ways in different jurisdictions, but also as a means of informing the courts about an issue, to better enable courts to recognize and protect constitutional rights, with "an enhanced understanding of the issue."²³⁵

In retort, Chief Justice Roberts's dissent proclaims, "this Court is not a legislature," and argues that "debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will."²³⁶ Opinions authored by each of the remaining dissenting Justices characterize the majority opinion as a "threat to American democracy,"²³⁷ a "usurp[ation of] the constitutional right

among" the rights "deeply rooted in this Nation's history and tradition." (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

231. *Id.* at 2598 (majority opinion) (citing to cases recognizing the right of interracial couples, inmates, and fathers owing child support to marry, without characterizing the asserted rights in terms of the excluded class).

232. *Id.* at 2594, 2599.

233. *Id.* at 2602.

234. *Id.* at 2605.

235. *Id.*

236. *Id.* at 2611, 2624 (Roberts, C.J., dissenting).

237. *Id.* at 2626 (Scalia, J., dissenting).

of the people to decide,”²³⁸ and a means of “undermining the political processes that protect our liberty.”²³⁹

This author believes that the majority opinion reaches the right result in an exceedingly thoughtful opinion that will be regarded as a milestone in civil rights history. Nonetheless, the 5–4 split in the Supreme Court, with four passionate dissenting opinions, helps to reveal the indeterminacy of the legal issues. In light of that doctrinal uncertainty, a long view of civil rights history and the place of a civil rights claim within that history, might help our constitutional law to evolve in a way that later will withstand the judgment of history.

III. IN THE FACE OF UNCERTAINTY, TAKING GUIDANCE FROM A LONG VIEW OF CIVIL RIGHTS HISTORY

Windsor had so abruptly turned the tide in same-sex marriage litigation,²⁴⁰ one could almost sense by the end of 2014 that universal recognition of same-sex marriage in the United States was then inevitable and that lower-court judges felt they had permission to board the train toward that destination. Throughout 2014, the sense in our society was one of surprisingly rapid transition toward the recognition of same-sex marriage, both in the courts²⁴¹ and in popular opinion.²⁴²

Of course, *Windsor* did not compel that conclusion in the Supreme Court.²⁴³ Moreover, prior to *Windsor*, in the decade after *Lawrence*, or in the two decades following *Casey* and *Romer*, courts adjudicating federal constitutional challenges to same-sex marriage bans were faced with evolving Supreme Court precedent that sent mixed signals.²⁴⁴ In the meantime, forty-five years had passed since the plaintiffs challenged the denial of a marriage license in *Baker v. Nelson*,²⁴⁵ and advances in the two decades after the successful

238. *Id.* at 2642 (Alito, J., dissenting).

239. *Id.* at 2638 (Thomas, J. dissenting).

240. *See supra* notes 121-22 and accompanying text.

241. *See supra* notes 121-24 and accompanying text.

242. *See supra* notes 129-32 and accompanying text (showing majority popular support for same-sex marriage, and strong support among youth). Global momentum for same-sex marriage seemed to peak one month before the Supreme Court’s June 2015 decision in *Obergefell*, when the solidly Catholic country of Ireland approved same-sex marriage rights by popular vote. Hakim & Dalby, *supra* note 203.

243. *See supra* note 123 and accompanying text.

244. *See supra* notes 62-65 and accompanying text.

245. *See supra* notes 25-29, 34-37 and accompanying text.

challenge in *Baehr v. Lewin*²⁴⁶ frequently drew a backlash that blocked or matched the advances.

A cynic might argue that the pre-*Windsor* precedent dictated rejection of constitutional challenges to state bans on same-sex marriage, because it was not until *Windsor* that the Supreme Court finally and thoroughly undermined *Baker v. Nelson*. In the face of such an argument, however, one might remember Justice Blackmun's dissenting commentary to the Supreme Court's rejection of a substantive due process claim in a different context:

Like the antebellum judges who denied relief to fugitive slaves the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.²⁴⁷

In light of the uncertainty inherent in evolving precedent, including the "clashing legal perspectives" examined in Part II, one wonders whether the lower courts could have turned the tide earlier, perhaps after *Romer* and *Lawrence*. If so, one might also wonder whether a long view of civil rights history could have helped to shape the argument and analysis.

Section A below tells the story that places same-sex marriage rights within the arc of civil rights history. Section B explores the extent to which such a story should profitably be included in one form or another within formal advocacy.

A. A Progression of Struggles for Civil Rights

Each new civil rights struggle in the United States echoes familiar themes from previous movements. In the midst of each movement, the demand for rights runs against the grain of current social mores, generating controversy that seems jarring in subsequent generations, at which time we shake our heads in disbelief—or at least dismay—at the resistance to rights that seem so self-evident in the later generation. Moreover, in a pattern that has repeated itself with surprising consistency, the resistance often has been stiffened with similar justifications, based on appeals to majoritarian views of

246. See *supra* notes 106-09 and accompanying text.

247. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 212-13 (1989) (Blackmun, J., dissenting) (internal citations omitted).

tradition, morality, religion, and what is deemed to be consistent with the laws of nature.

For example, nineteenth century case law refers to the blessing of the church for European enslavement of Native Americans and Africans, as purportedly legitimate treatment of “heathen” non-Christians.²⁴⁸ Case law and other literature from that era refers to the ancient traditions of slavery,²⁴⁹ to Biblical and otherwise Divine support for slavery,²⁵⁰ and to the slave status of Africans and their descendants as their “natural position,”²⁵¹ so much so that this status

248. *Fable v. Brown*, 11 S.C. Eq. (2 Hill Eq.) 378, 393-94 (1835) (analogizing a slave’s rights to receive property to that of an enemy alien, and reviewing approval from church authorities for early enslavement of Native Americans and Africans), *abrogated by* U.S. CONST. amend. XIII; *see also* *Bryan v. Walton*, 14 Ga. 185, 202 (1853) (“The blacks were introduced into” white Christian communities “as a race of Pagan slaves.”), *abrogated by* U.S. CONST. amend. XIII; *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134, 139 (1806) (referring to an 1682 Virginia law providing that “all servants brought into this country . . . not being *Christians*, whether *negroes*, *Moors*, *mulattoes*, or *Indians* . . . and all *Indians* . . . sold by neighbouring *Indians* . . . as *slaves*, should be slaves to all intents and purposes”), *abrogated by* U.S. CONST. amend. XIII.

249. *E.g.*, *Pirate v. Dalby*, 1 Dall. 167, 168 (Pa. 1786) (noting that “[s]lavery is of a very ancient origin,” referring to descriptions in the Bible and to the practices of Greeks, Romans, and Germans), *abrogated by* U.S. CONST. amend. XIII; *see also* *Bryan*, 14 Ga. at 203-04 (referring to Roman law to support the conclusion that a freed slave did not enjoy all the rights and benefits of citizenship).

250. *E.g.*, *Pirate*, 1 Dall. at 168 (“By the sacred books of *Leviticus* and *Deuteronomy*, [slavery] appears to have existed in the first ages of the world.”), *abrogated by* U.S. CONST. amend. XIII; JOHN PATRICK DALY, *WHEN SLAVERY WAS CALLED FREEDOM: EVANGELICALISM, PROSLAVERY, AND THE CAUSES OF THE CIVIL WAR* 32, 35-37, 60-67, 85, 92-93, 100 (2002). One popular religious defense of slavery was simply that an all-powerful God had permitted it to persist: “God had clearly not destroyed the system, so if it was a violation of His Kingdom on earth, abolitionists were accusing God of incompetence or of complicity in sin.” *Id.* at 92; *see also id.* at 35 (referring to the belief that “God was frustrating the anti-slavery movement at every turn while blessing the kingdom of cotton and evangelicalism, which was spreading across the land with an ease that had to be divinely inspired”).

251. *State v. Belmont*, 35 S.C.L. (4 Strob.) 445, 451-52 (S.C. Ct. App. 1847) (quoting Matthew Estes, *A DEFENSE OF NEGRO SLAVERY, AS IT EXISTS IN THE UNITED STATES* (1846), and recommending it as “a book destined to enlighten the public mind”), *abrogated by* U.S. CONST. amend. XIII; *see also* *Pirate*, 1 Dall. at 168-69 (determining that the slave status of the illegitimate son of a slave mother and a free man is “strongly authorized by the civil law, from which this sort of domestic slavery is derived, and is in itself . . . consistent with the precepts of nature”); *Mitchell v. Wells*, 37 Miss. 235, 258-59 (1859) (stating that African slavery “is in no wise opposed to the law of nature as it exists here,” and citing to an author whose work was “distinguished alike for ability, research, and a clear and lucid perception”), *abrogated by* U.S. CONST. amend. XIII; *see also* *Scott v. Sanford* (*Dread Scott Case*), 60 U.S. (1 How.) 393, 407-23 (1856) (noting that the American

was acknowledged in the Constitution²⁵² and constituted an “excepted case” from the “great principles of natural right asserted in the Declaration of Independence.”²⁵³

In 1865, at the conclusion of the Civil War, our country finally broke with its tradition of slavery through adoption of the Thirteenth Amendment.²⁵⁴ In 1866, Congress enacted legislation intended to advance the economic integration of newly freed slaves by, among other things, prohibiting racial discrimination in the making and enforcement of contracts:

[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts²⁵⁵

colonies viewed Africans as inferior beings doomed to slavery and reduced to merchandise), *abrogated* by U.S. CONST. amend. XIV; JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 12-13 (Susan Moller Okin ed., Hackett Publ’g Co., Inc. 1988) (1869) (referring to the view both in antiquity and in American slavery, that the dominion of a class of masters over a class of slaves was “natural”).

252. See U.S. CONST. art. 1, § 2 (1787), *amended* by U.S. CONST. amend. XIV, § 1) (apportioning Representatives and taxes by “adding to the whole Number of free Persons . . . three fifths of all other Persons”); *Dred Scott Case*, 60 U.S. at 403-04 (holding that descendants of slaves are not citizens under the U.S. Constitution, but were considered at the time of adoption “as a subordinate and inferior class of beings, who had been subjugated by the dominant race”); see also *Mitchell*, 37 Miss. at 257 (“[B]y the common consent of all the States, at the adoption of our Constitution, the negro race was excluded from association and political equality with the whites, as an inferior class . . .”).

253. *State v. Hoppess*, 1 Ohio 105, 110 (1845) (referring ruefully to a “matter of compromise as to an existing and admitted evil, necessary to the formation of the union”).

254. The Thirteenth Amendment to the U.S. Constitution provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

255. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. The first clause of the quoted text recognized the citizenship of all those born in the U.S., thus overruling the *Dred Scott* decision. *Dred Scott Case*, 60 U.S. at 403-04 (1856); see also *supra* notes 251-52 and accompanying text. Two years later, that important provision was echoed in the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1. The language guaranteeing equal rights in contracting was reenacted in § 16 of the Civil Rights Act of 1870, 16 Stat. 144, to permit the newly adopted Fourteenth Amendment to act as constitutional support for the legislation, in tandem with the Thirteenth

In 1870, adoption of the Fifteenth Amendment and implementing legislation, guaranteed the right to vote without discrimination on the basis of “race, color, or previous condition of servitude.”²⁵⁶ Although the struggle to perfect and implement these civil rights has continued well more than a century after Reconstruction,²⁵⁷ the Thirteenth Amendment represented an end to the legally sanctioned evil of slavery.²⁵⁸

Amendment. *See* Gen. Bldg. Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 389 & n.17 (1982). After the 1874 recodification, the provision of equal rights to make and enforce contracts appeared in § 1981 of Title 42 of the United States Code:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1874). After falling into disuse, § 1981 was revived when the U.S. Supreme Court confirmed that it reached private discrimination in contracting. *Runyon v. McCrary*, 427 U.S. 160, 168-74 (1976) (relying on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420-21 (1968), which had held similarly for a companion statute). In the Civil Rights Act of 1991, 105 Stat. 1071, Congress divided § 1981 into three subsections, adding (1) a provision that codified the Supreme Court’s holding that § 1981 reaches private discrimination as well as discrimination under the color of state law, 42 U.S.C. § 1981(c), and (2) a provision that overruled another Supreme Court decision by defining the existing statutory language “make and enforce contracts” to include all benefits of the contractual relationship, including the “performance, modification, and termination of contracts.” 42 U.S.C. § 1981(b) (superseding *Patterson v. McClean*, 491 U.S. 164, 175-85 (1989), which had held that “make and enforce” contracts did not reach discrimination in the performance of a contract).

256. U.S. CONST. amend. XV; Civil Rights Act of 1870 (The Enforcement Act), 16 Stat. 140 (1870).

257. *See, e.g.*, THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS 3-70 (4th ed. 1996) (observing that, for a century, Reconstruction-era civil rights legislation and constitutional amendments were largely ineffective tools for vindication of civil rights due to restrictive judicial interpretations); Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1387-1410 (2015) (tracing efforts to suppress the Black vote throughout much of the twentieth century, but concluding that partisan efforts at restricting the vote are not as clearly tied to race in the twenty-first century); Cody Ross, *The United States Police-Shooting Database: A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014*, at 5 (2015), <http://ssrn.com/abstract=2534673> (“[O]n average across counties in the United States,” an unarmed-black individual is as likely to be shot by police as an armed-white individual); U.S. DEP’T JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62-78 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding unlawful

But in the same era, women were treated as persons with less than full legal status and agency. States could and did deny women the right to vote, a state of affairs that persisted until well into the twentieth century, when the Nineteenth Amendment prohibited sex discrimination in voting.²⁵⁹ In 1874, just four years after adoption of the Fifteenth Amendment, the Supreme Court upheld states' rights to deny the vote to women, citing to "uniform practice long continued,"²⁶⁰ noting that "[w]omen were excluded from suffrage in nearly all the States by the express provision of their constitutions and laws,"²⁶¹ and adding that "[n]o new State has ever been admitted to the Union which has conferred the right of suffrage upon women."²⁶²

True, women had always been accorded citizenship,²⁶³ which had been denied to the descendants of slaves prior to the 1866 Civil Rights Act and the Fourteenth Amendment.²⁶⁴ Their brand of citizenship, however, was decidedly second-class in the nineteenth century. Aside from the denial of voting rights, the laws of many states formally denied to women the economic opportunities that the post-Civil War amendments and legislation sought to accord to male former slaves.²⁶⁵ Justice Bradley's now jarring explanation of "the

discriminatory intent and disparate impact in policing practices affecting the African-American community).

258. See *supra* note 254.

259. U.S. CONST. amend. XIX.

260. *Minor v. Happersett*, 88 U.S. (18 Wall.) 162, 178 (1874).

261. *Id.* at 176.

262. *Id.* at 177.

263. *Id.* at 165-70.

264. See *supra* notes 259-62 and accompanying text.

265. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) ("The common law was exceptionally harsh toward women who became wives: a woman's legal identity all but evaporated into that of her husband," and the relationship of a wife to husband was viewed as similar to that of slave to master.); *Latta v. Otter* 771 F.3d 456, 475 (9th Cir. 2014) (reviewing legal disabilities imposed on married women in the nineteenth century, and later abandonment of them, to reject argument that same-sex marriage bans should be upheld to protect the tradition of opposite-sex marriage); *id.* at 487-89 (Berzon, J., concurring) (tracing these legal disabilities, as well as their repeal and replacement in the twentieth century); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 958-59, 992-93 (N.D. Cal. 2010) (discussing principles of coverture and sharply defined gender roles in marriage, but noting "[t]hat time has passed") *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (no standing to appeal); *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 77 P.3d 410, 458 n.10 (Ariz. Ct. App. 2003) (citing to nineteenth century case law), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

civil law, as well as nature herself,"²⁶⁶ appeared in his concurrence to a Supreme Court decision in 1872 upholding a state law barring women from the practice of law.²⁶⁷ As Justice Bradley explained, this restriction was related to a married woman's more general surrender of legal status and agency:

The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.²⁶⁸

The Court's decision, and especially Justice Bradley's concurrence, must have felt like a direct rebuke to women activists who had gathered at Seneca Falls in 1848 to demand their civil rights, and who stated in part:

Resolved, That all laws which prevent woman from occupying such a station in society as her conscience shall dictate, or which place her in a position inferior to that of man, are contrary to the great precept of nature, and therefore of no force or authority.

Resolved, That woman is man's equal - was intended to be so by the Creator, and the highest good of the race demands that she should be recognized as such.²⁶⁹

266. *Supra* note 15 and accompanying text.

267. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring), *abrogated by* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (finding that municipal regulations that categorically required female teachers to take maternity leave several months prior to expected birth, without individualized assessment of ability to work, were not rationally related to legitimate state interest and thus violated the Due Process Clause of the Fourteenth Amendment).

268. *Id.* at 141 (1872) (Bradley, J., concurring).

269. DECLARATION OF SENTIMENTS [hereinafter DECLARATION], *reprinted in* 2 HISTORY OF WOMAN SUFFRAGE 68, 72 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage, eds., Source Book Press 1970) (1881) [hereinafter SUFFRAGE] (quoting the second and third resolutions of the Declaration).

Nineteenth century racial and sexual stereotypes likely provided similar justifications for subordination on the basis of both race and sex.²⁷⁰ Prominent advocates for women's civil rights in decades after the Civil War, while noting some progress during that time, characterized the condition of women as a form of slavery.²⁷¹ In short, in the Reconstruction Era, federal law protected newly freed slaves from racial discrimination, but it did nothing to protect women—whether former slaves or members of high society—from sex discrimination.²⁷²

One might then ask how laws restricting women's autonomy could persist in the era of abolition of slavery and related landmark constitutional and statutory protections accorded to newly freed slaves. One answer is that discrimination on the basis of race and sex both persisted at an elevated level because the post-Civil War civil rights laws were interpreted in a restrictive manner and largely lay dormant until revived in the twentieth century.²⁷³ Moreover, the legal and social status of women likely reflected a paternalistic view, promoted by men, that the legal state of affairs benefitted both sexes,²⁷⁴ just as some had perversely argued that slavery was beneficial to the slaves.²⁷⁵

270. For example, according to one scholar of the era:

[A prominent Reverend's statement that slaves' capacity for religious love] was little different from similar statements about women's religious propensity and moral elevation used to perpetuate subordination. . . . This standard extended beyond the church walls to canonize slaves' and women's social roles, whereas it was not deemed appropriate to Christian manliness or the force of character men were expected to display in their social roles. A proslavery pamphlet by a Presbyterian minister's son recorded that "it is not degrading for a slave to submit to a blow—neither is it to a priest or woman."

DALY, *supra* note 250, at 88.

271. SUFFRAGE, *supra* note 269, at 13-14; MILL, *supra* note 251, at 4-17 (characterizing the subjugation of women in the nineteenth century as a mitigated form of slavery, maintained through law, education, and force stemming from the superior strength of their husbands, and justified by the purportedly different natures of the sexes).

272. Although the Supreme Court would eventually apply mid-level heightened scrutiny to sex-based classifications challenged under the Fourteenth Amendment, it did not do so until a century after Reconstruction. *See, e.g.*, Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970-80*, 25 COLUM. J. GENDER & L. 41, 41-43 (2013) (summarizing litigation in the 1970's that elevated the level of scrutiny for sex-based classifications above the lowest tier).

273. *See* EISENBERG, *supra* note 257, at 70.

274. Justice Bradley, for example, sought to justify the legal restrictions on a woman's economic autonomy by referring to her assigned role of wife and mother

But one might still strive to explain the juxtaposition of the flurry of congressional activity to protect the economic and voting rights of newly freed slaves while state law still denied women the right to vote and denied economic agency to married women.

To support a point about a fallacy in civil rights opposition that likely is repeated through history, this author suggests a simple answer: sex is “*different*.” Sex and sexual roles implicated issues relating to procreation, child-rearing, and a learned or instinctual need of men to view themselves as the smarter, stronger sex,

as “noble and benign,” and by recognizing a man’s obligation to serve as “woman’s protector and defender” in light of her “natural and proper timidity and delicacy *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring); *SUFFRAGE*, *supra* note 269, at 13 (“Another writer asserts that the tyranny of man over woman has its roots, after all, in his nobler feelings; his love, his chivalry, and his desire to protect woman But wherever the roots may be traced, the results at this hour are equally disastrous to woman.”); *see also* *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (upholding restriction on women’s occupations partly to protect them in the name of true equality), *abrogated by* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651 (1974) (finding that municipal regulations that categorically required female teachers to take maternity leave several months prior to expected birth, without individualized assessment of ability to work, was not rationally related to legitimate state interest and thus violated the Due Process clause of the Fourteenth Amendment); *DECLARATION*, *supra* note 269, at 72 (noting that man “does accord to woman moral superiority” while he claims intellectual superiority).

275. A particularly strong and racially charged statement to this effect appears in a nineteenth century judicial opinion, which quotes from a book of Dr. Matthew Estes, which the court lauds as “a book destined to enlighten the public mind”:

All history assures us that the negro race thrive in health, multiply greatly, become civilized and religious, feel no degradation, and are happy, when in subjection to the white race. Estes says, “they feel and acknowledge their inferiority; and in consequence slavery is not in the least regarded as a degradation, but as their proper and natural position.” . . . “I do not believe,” he continues, “conscientiously, that one slave in ten could be induced to accept the offer of freedom if accompanied with the condition that they were to leave the United States. This has been attested again and again.”

State v. Belmont, 35 S.C.L. (1 Strob.) 445, 451-52 (S.C. Ct. App. 1847) (quoting Matthew Estes, *A DEFENSE OF NEGRO SLAVERY, AS IT EXISTS IN THE UNITED STATES* (1846), in attempting to explain laws that distinguished between Native Americans and Africans in slaveholding). Some proslavery evangelical writers argued curiously that slavery saved slaves from homelessness, provided “providential guardians” in slaveholders, who saved slaves from extinction through their own improvidence, and elevated slaves’ character, primarily through church attendance. *DALY*, *supra* note 250, at 80, 85-87. *But cf. id.* at 35-36, 40, 52, 85 (explaining that relatively few southerners sought to justify slavery in such positive terms and were content to argue in the negative that slavery was evil primarily in individual cases of abusive slaveholders).

uniquely capable of democratic self-governance and performance of the role of family breadwinner. And, even as one civil rights movement succeeded, our society had a great capacity to see the next cause as different, as distinguishable, as justifying renewed resistance.²⁷⁶

What else can explain the persisting opposition to interracial marriage in the early 1960s, several years after *Brown v. Board of Education*²⁷⁷ ruled that racial segregation in public schools violated the Constitution, more than four decades after women gained the right to vote, and at the same time that the 1964 Civil Rights Act,²⁷⁸ among other things, prohibited employment discrimination based on race or sex?²⁷⁹ In the years prior to *Loving v. Virginia*,²⁸⁰ while several states still banned interracial marriage, national public opinion polls revealed that the vast majority of Americans disapproved of interracial marriages,²⁸¹ and a majority even supported laws that banned such marriages.²⁸²

As noted by Richard Delgado:

[I]f whites and nonwhites cannot marry and make lives together, what does it matter if they can attend the same movie theater or swim in the same public pool? The prohibition of intermarriage would seem to violate *Brown*'s mandate as glaringly as any other.²⁸³

But, again, in the eyes of those defending the bans, interracial marriage was *different* from previous civil rights issues. It triggered

276. One 1915 political ad in Massachusetts warned that women's suffrage was supported by "ENEMIES OF THE HOME AND OF CHRISTIAN CIVILIZATION," and would increase taxes, encourage divorce, and threaten "the Family as the Unit of the State." *Political Advertisement*, Bos. J. (Oct. 30, 1915), <http://vintage-ads.livejournal.com/2405721.html>.

277. 347 U.S. 483 (1954).

278. Pub. L. 88-352, 78 Stat. 241, 255-57 (1964).

279. 42 U.S.C. § 2000e-2 (2012).

280. 388 U.S. 1 (1967).

281. When asked in a 1958 Gallup poll whether those polled approved of marriage "[b]etween white and colored people," only 4% expressed approval. GALLUP NEWS SERV., GALLUP POLL SOCIAL SERIES: MINORITY RIGHTS & RELATIONS 3-4, http://www.gallup.com/file/poll/163703/Interracial_marriage_130725.pdf. Even after the Supreme Court's 1967 decision in *Loving*, a 1968 Gallup poll asking about personal approval or disapproval of marriage "[b]etween whites and non-whites" revealed only 20% approval and 73% disapproval. *Id.*

282. According to a poll conducted by the National Opinion Research Center, 53% of Americans favored "laws against marriages between Negroes and whites" in 1964, three years before *Loving v. Virginia*. Hazel Erskine, *The Polls: Interracial Socializing*, 37 PUB. OPINION Q. 283, 291 (1973).

283. Richard Delgado, *Naim v. Naim*, 12 NEV. L.J. 525, 525 (2012).

new fears and sensitivities about race coupled with sexual relations,²⁸⁴ procreation,²⁸⁵ and child-rearing.²⁸⁶ Echoing previous forms of discrimination, some viewed interracial marriage as unnatural and inconsistent with religious doctrine²⁸⁷ and with long-standing tradition.²⁸⁸

284. Some anti-miscegenation statutes, for example, criminalized interracial sexual cohabitation, regardless of marriage. *E.g.*, 1927 No. 214, 1927-214 Ala. Adv. Legis. Serv. 219 (LexisNexis) (amending § 5001 of the Code of 1923) (providing for imprisonment of two to seven years if “any white person [or] any negro . . . intermarry, or live in adultery or fornication with each other.”), *abrogated by* *Loving v. Virginia*, 388 U.S. 1 (1967). Of course, interracial sexual relations were widespread during slavery, although largely in the form of a slaveholder’s inherently coercive use and abuse of his “property.” *See* DALY, *supra* note 250, at 80 1, 4-5, 8, 91 (southerners often admitted to charges of sexual abuse in slavery but simply “pointed to northern urban prostitution as a similar failing”). American society faced a new challenge when contemplating the open and voluntary decision of an interracial couple to marry and become loving, committed sexual partners, and otherwise “mak[ing] lives together,” as Delgado puts it. Delgado, *supra* note 283, at 525.

285. *See, e.g.*, *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955) (in upholding state regulation of marriage to avoid “a mongrel breed of citizens,” the court found “no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship.”), *abrogated by Loving*, 388 U.S. 1. Some nineteenth century case law speaks of mixed race offspring with even greater disdain. *E.g.*, *Scott v. State*, 39 Ga. 321, 323 (1869) (“The amalgamation of the races is . . . always productive of deplorable results. . . . [T]he offspring of these unnatural connections are generally sickly and effeminate, and . . . they are inferior in physical development and strength, to the full-blood of either race.”), *abrogated by Loving*, 388 U.S. 1; *Lonas v. State*, 50 Tenn. 287, 311 (1871) (viewing “any effort to intermerge the individuality of the races as a calamity full of the saddest and gloomiest portent to the generations that are to come after us,” while purporting to protect civil rights guaranteed by the recent constitutional amendments), *abrogated by Loving*, 388 U.S. 1; Greg Johnson, *We’ve Heard This Before: The Legacy of Interracial Marriage Bans and the Implications for Today’s Marriage Equality Debates*, 34 VT. L. REV. 277, 281-82 (2009) (collecting cases and quotations regarding procreation and its effect on racial integrity).

286. In *Perez v. Lippold*, 198 P.2d 17, 26 (Cal. 1948), the County Clerk defended the state ban on interracial marriage partly by arguing that “the progeny of a marriage between a Negro and a Caucasian suffer not only the stigma of such inferiority but the fear of rejection by members of both races.” The Court responded: “If they do, the fault lies not with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices by giving legal force to the belief that certain races are inferior.” *Id.*

287. *See, e.g.*, *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) (“[T]he Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural[.]”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) (“Alarms about the imminent erosion of the ‘natural’ order of marriage were sounded over the demise of anti-miscegenation

Those objections to interracial marriage have so faded that the approval rate for interracial marriage rose from 4% in 1958 to 87% in 2013,²⁸⁹ and stood in 2013 at 96% for those 18 to 29 years of age.²⁹⁰ Today, objections to interracial marriage on the basis of nature, scripture, or tradition would sound as jarring to most ears as do Justice Bradley's appeals to God and nature to justify a state law banning women from the practice of law or similar rationales for slavery.²⁹¹

And—while writing this passage one week after our oldest son joyfully entered into a same-sex marriage with his partner of seven years—I predict that similar objections to same-sex marriage will sound equally jarring a few decades from now. Yet, insufficient or improper motivations such as religious objections or simple animus sometimes surfaced as explicit justifications for same-sex marriage bans,²⁹² or can be inferred from the unusual nature of a regulation²⁹³ or the implausibility of the justifications advanced for it.²⁹⁴

laws; *Naim*, 87 S.E.2d at 752 (“[T]he natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures.” (quoting *State v. Gibson*, 36 Ind. 389, 404 (1871)); *Kinney v. Commonwealth*, 30 Va. (1 Gratt.) 858, 869 (1878) (“[T]hey should be kept distinct and separate, and . . . connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law[.]”); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 985 (N.D. Cal. 2010) (referring to “religious arguments that were mobilized in the 1950s to argue against interracial marriage and integration as against God’s will”), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2011), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (no standing to appeal).

288. As explained by Judge Posner:

[T]he limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it [in *Loving* in 1967]. Laws forbidding black-white marriage dated back to colonial times and were found in northern as well as southern colonies and states.

Baskin v. Bogan, 766 F.3d 648, 666 (7th Cir.) (citing PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 20 (2009)), *cert. denied*, 135 S. Ct. 316 (2014).

289. *GALLUP*, *supra* note 281 and accompanying text (2013 poll asked about approval or disapproval of “marriage between Blacks and Whites”).

290. *Id.* (third chart, listing approval “by Subgroup”).

291. *See Perry*, 704 F. Supp. 2d at 992 (“Race restrictions on marital partners were once common in most states but are now seen as archaic, shameful or even bizarre.”).

292. *See, e.g., Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (referring to the Book of Genesis in emphasizing the longstanding view of marriage as a heterosexual institution advancing procreation), *appeal dismissed*, 409 U.S. 810 (1972), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *ex parte State ex rel. Alabama Policy Inst.*, No. 1140460, 2015 WL 892752, at *7 (Ala. Mar. 3, 2015)

Moreover, in conversations over the years with friends, colleagues, and former students, when this author compared the same-sex marriage movement with the fight for interracial marriage and voiced his prediction about eventual acceptance of same-sex

(citing to nineteenth century case law, which in turn quotes a nineteenth century contracts treatise, for the proposition that marriage is “founded on the will of God.”), *abrogated by Obergefell*, 135 S. Ct. 2584; *Perry*, 704 F. Supp. 2d at 945, 955-56, 985-86 (reviewing evidence that religious arguments were advanced to support Proposition 8’s ban on same-sex marriage); *Pareto v. Ruvin*, 21 Fla. L. Weekly Supp. 899, 904 (Fla. Cir. Ct., 2014) (noting that amici curiae associate same-sex marriage with the spread of HIV/AIDS); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 975 (S.D. Ohio 2013) (recounting fear-mongering in campaign for constitutional amendment banning recognition of same-sex marriage) *rev’d sub nom.* *DeBoer v. Snyder*, 772 F.3d 388, 390 (6th Cir. 2014), *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584; *Huntsman v. Heavilin*, 21 Fla. L. Weekly Supp. 916, 918 (Fla. Cir. Ct. 2014) (finding animus when “[t]he Amici Curiae’s memorandum paints a picture of homosexuals as HIV infected, alcohol and drug abusers, who are promiscuous and psychologically . . . incapable of long term relationships or . . . raising children”); *Andersen v. King Cty.*, 138 P.3d 963, 1013-18, 1042 (Wash. 2006) (en banc) (Bridge, J., dissenting) (legislative history shows that ban on same-sex marriage reflected sectarian religious views, and animosity rooted in religious and moral objection), *abrogated by Obergefell*, 135 S. Ct. 2584. *But cf. DeBoer*, 772 F.3d at 388, 408-09 (stating its unwillingness to infer the intentions of voters, and thus having insufficient basis to find animus), *rev’d sub nom. Obergefell*, 135 S. Ct. 2584.

293. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (finding that state constitutional amendment banning state and local laws protecting gay rights was “so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects”); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (“DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage . . . is strong evidence of a law having the purpose and effect of disapproval of that class.”); *cf. Bishop v. Smith*, 760 F.3d 1070, 1100-04 (10th Cir.), (Holmes, J., concurring), *cert. denied*, 135 S. Ct. 271 (2014) (explaining that unusual structure of a regulation can suggest animus, but explaining why court found no such basis for animus in this case).

294. See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir.) (finding that Indiana’s recognition of out-of-state marriages between fertile cousins, though banned in Indiana, coupled with its failure to recognize out-of-state same-sex marriages, and its “inability to make a plausible argument” for the latter ban, “suggests animus against same-sex marriage[s]”), *cert. denied*, 135 S. Ct. 316 (2014); *Perry*, 704 F. Supp. 2d. at 1002-03 (finding that post-hoc justifications for Proposition 8 are such poor fits as to be irrational, supporting inference that this referendum banning same-sex marriage was motivated by the view that opposite-sex couples are superior to same-sex couples); *Latta v. Otter* 771 F.3d 456, 495-96 (9th Cir. 2014) (Berzon, J., concurring) (observing that sexual orientation discrimination in employment, housing, and participation on juries is primarily motivated by stereotypes, animus, and distaste); *cf. Johnson*, *supra* note 285, at 284 (“[T]he debate about same-sex marriage is more about sexual orientation than it is about marriage. The debate is, in short, a referendum on homosexuality and gay rights.”).

marriage, those who disagreed did so on familiar grounds: on religious convictions,²⁹⁵ on the basis of what seemed “natural” to them,²⁹⁶ and on the belief that the issue of same-sex marriage is “different” from earlier issues such as interracial marriage.²⁹⁷

Of course it’s different. Each new civil rights claim is different from the last; otherwise, it would already be assimilated into the culture and would not meet resistance from the majority in society. But, it is revealing that our society seems to repeat the patterns of resistance that are ultimately rejected in each new step forward.

And meritorious civil rights claims need not be equivalent on some moral scale. For example, banning interracial marriage is undoubtedly less horrible than buying, selling, and holding human beings for slave labor, but they are both terribly wrong. Our nation need not weigh marriage equality against other civil rights claims to know that the law should not prohibit loving and committed consenting adults from sharing their lives together with dignity and legal rights. As stated by Greg Johnson, “It is not necessary to claim that homophobia is as bad as racism, or that [the] lesbian and gay[] [population ha[s] been discriminated against in the same ways as have people of color, to make the legal comparison between the two movements for marriage equality.”²⁹⁸

It may be that unnecessary difficulty was introduced to the same-sex marriage debate because our society has used the same word, “marriage,” for both a church-sanctioned religious marriage and the issuance of a state license to wed with the consequent legal rights and responsibilities. If these two ceremonies are conflated, religious objections to marriage equality can migrate from the church to the state.²⁹⁹ Of course, equality in the issuance of a state license

295. See also Johnson, *supra* note 285, at 281 (“Religious arguments against same-sex marriage have fallen out of favor in the courts, but they are still an important part of the popular discourse.”).

296. See also *Latta*, 771 F.3d at 486 (Berzon, J., concurring) (noting that state officials defending state marriage ban argued that the ban communicates that state’s view about what is “normal,” and thus reinforces the state’s view about the “natural[]” sex roles in a marriage and parenting).

297. Indeed, as explained by Greg Johnson, “Gay rights advocates are split on the merits of the comparison [between interracial marriage and same-sex marriage bans]. Some fear the ‘sameness’ argument risks contributing to injustice and alienating potential supporters in the African-American community by ignoring the differences between the two civil rights struggles.” Johnson, *supra* note 285, at 278-79 (citing to other commentators).

298. *Id.* at 287.

299. See, e.g., *ex parte State ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 892752, at *7 (Ala. Mar. 3, 2015) (citing to nineteenth century case law, which in

will leave unimpeded an organized religion's freedom under the First Amendment to limit church-sanctioned religious unions as dictated by the tenets of the religion.³⁰⁰ However, one wonders whether the issue of equality in the issuance of state licenses to wed might have been less contentious if it had always been known by a different name, for opposite-sex as well as same-sex couples.

The question arises whether civil rights advocates can advance a meritorious civil rights claim, such as that for same-sex marriage, by explicitly addressing our society's tendency to repeat the mistakes of the past, often with strikingly similar justifications. Would explicit presentation of a broad historical view, coupled with a judicial desire to avoid playing the role of Justice Bradley to future generations,³⁰¹ help courts to recognize minority rights at an earlier stage in the national debate? One wonders, for example, whether a broad historical view might have spurred lower courts to have more quickly recognized the undermining of *Baker v. Nelson*³⁰² and the constitutional infirmities of bans on same-sex marriage, perhaps acting after *Romer* or *Lawrence* rather than waiting for the cue of *Windsor*.³⁰³

B. Judicial Incrementalism

Civil rights' rapid progress in the courts is moderated by at least two forces, often interrelated: (1) the role of courts to narrowly

turn quotes a nineteenth century contracts treatise, for the proposition that marriage, generally, is "founded on the will of God"), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

300. *E.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1227 (10th Cir.) ("[R]eligious institutions remain as free as they always have been to practice their sacraments and traditions as they see fit."), *cert. denied*, 135 S. Ct. 265 (2014).

301. *See supra* notes 14, 15 and accompanying text (quoting Justice Bradley in *Bradwell v. Illinois*, 83 U.S., 130 (1872)).

302. *See supra* notes 25-28, 34-39 and accompanying text.

303. Indeed, U.S. Court of Appeals Judge Marsha Berzon believes that *Baker* was undermined as early as 1976, when the Supreme Court clarified, a "fundamental doctrinal change," that sex-based classifications warrant intermediate scrutiny. *Latta v. Otter*, 771 F.3d 456, 485 (9th Cir. 2014) (Berzon, J., concurring) (citing to Justice Rehnquist's dissenting opinion in *Craig v. Boren*, 429 U.S. 190, 218-21 (1976), in which Justice Rehnquist characterized the majority's level of scrutiny as elevated above rational basis scrutiny although not to the level of strict scrutiny). Judge Berzon's view about this early undermining of *Baker* is premised on her conclusion that at least some same-sex marriage bans classify on the basis of sex, even more so than on the basis of sexual orientation. *Id.* at 495-96.

decide only the cases before them, rather than broadly legislate,³⁰⁴ and (2) judicial hesitation to wade in too quickly when a contentious issue is the subject of democratic deliberation in other forums.³⁰⁵

1. *Resolving Only the Dispute before the Court*

The first factor implicates our doctrine of stare decisis, which limits the precedential effect of a decision to its holding, as defined by the facts and reasoning that support the decision.³⁰⁶ Courts honor this limitation by restricting their decisions to the disputes before them,³⁰⁷ sometimes accompanied by supplementary dictum designed to illustrate the breadth or narrowness of the holding.³⁰⁸ Conversely, a court strays from the premises underlying a conventional view of stare decisis when it reaches well beyond the dispute before it, and attempts to resolve a broader array of controversies with dicta that is

304. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 4 (1999) (stating that judicial minimalism means, in part, “that courts should not decide issues unnecessary to the resolution of a case”); *id.* at 10 (explaining that judicial minimalists “decide the case at hand; they do not decide other cases too, except to the extent that one decision necessarily bears on other cases, and unless they are pretty much forced to do so”).

305. See *id.* at 5-6, 24-26; *supra* notes 194-209 and accompanying text.

306. See, e.g., *King v. Love*, 766 F.2d 962, 966 (6th Cir. 1985) (determining that statements about judges in courts of limited jurisdiction were nonbinding dicta when appearing in Supreme Court precedent about immunity of judges in courts with general jurisdiction); *Howard v. Dorr Woolen Co.*, 414 A.2d 1273, 1274 (N.H. 1980) (adopting and adhering to a narrow interpretation of the holding of a previous decision of the court); SUNSTEIN, *supra* note 304, at 4-5 (judicial minimalism means, in part, “that courts should follow prior holdings but not necessarily prior dicta”); see also *id.* at 19-20 (discussing holding, dicta, and stare decisis).

307. See *supra* note 304.

308. As this author has explained in a textbook:

“Dictum”. . . is a statement in the opinion that helps explain the court’s reasoning by addressing questions not squarely presented in the dispute before the court. . . . As a means of explaining the reasons supporting its holding, a court may in dicta compare its rule of decision with other rules that it does not apply to the dispute, or it may discuss in dicta how its rule of decision would apply to facts other than those presented in the dispute before it.

CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 130 (7th ed. 2014). A good example is presented by *Barnes v. Costle*, 561 F.2d 983, 990-95 (D.C. Cir. 1977), which held that male on female unwelcome sexual advances constituted a form of sex discrimination under Title VII of the 1964 Civil Rights Act. The court explained its analysis partly in an often cited footnote, which stated in dicta that the result would be the same for female on male harassment, or same-sex harassment of either gender, but not for purely bisexual harassment that applied equally to male and female subordinates. *Id.* at 990 n.55.

unnecessary to explain the current holding.³⁰⁹ As explained by Cass Sunstein:

A court may well blunder if it tries, for example, to resolve the question of affirmative action once and for all, or to issue definitive rulings about the role of the First Amendment in an area of new communications technologies. A court that decides relatively little will also reduce the risks that come from intervening in complex systems, where a single-shot intervention can have a range of unanticipated bad consequences.³¹⁰

In its decisions on the road to *Obergefell*, paving the way to same-sex marriage rights, the Supreme Court has appeared to adhere to the model of limiting each decision to the dispute before it.³¹¹ It resolved equal access to the political process in *Romer*, established the right to private consensual homosexual intimacy in *Lawrence*, and accorded federal recognition to lawful same-sex marriages in *Windsor*,³¹² each time refraining from opining directly on the constitutionality of state bans on same-sex marriage.³¹³ Indeed, in

309. See, e.g., SUNSTEIN, *supra* note 304, at 20-21 (describing “the ordinary picture of Anglo-American common law”); *id.* at 36-39 (discussing *Dred Scott* and *Roe v. Wade* as maximalist decisions, and *Brown v. Board of Education* as less maximalist than it might appear); *id.* at 48 (“[M]inimalism might make special sense in view of the pervasive possibility of changed circumstances.”); Delgado, *supra* note 283, at 526 (stating the view of judicial incrementalists that *Roe v. Wade* was a “sweeping decision” that intervened when “public discussion of abortion was not complete”); Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, UNIV. 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> (observing that Justice Ruth Bader Ginsburg, a strong champion of women’s rights, critiqued *Roe v. Wade* as too far-reaching and sweeping, providing an easy target for opponents).

310. SUNSTEIN, *supra* note 304, at 4.

311. See generally *id.* at 47 (opining that the Court’s deciding *Romer* in minimalist fashion, without even mentioning *Bowers v. Hardwick*, is likely the product of the difficulty of securing agreement on broader principles within a diverse court).

312. See *supra* notes 52-130 and accompanying text.

313. See, e.g., SUNSTEIN, *supra* note 304, at 150-52 (explaining that, although *Romer* intervened during democratic deliberation, it was sufficiently “subminimalist” that it failed to even mention *Bowers v. Hardwick*, which seemed to be inconsistent with *Romer*’s premises); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”); *Latta v. Otter*, 771 F.3d 456, 466 n.6 (9th Cir. 2014) (quoting *Lawrence* and *Windsor* as leaving this question open); *supra* note 123 (noting that *Windsor* expressly reserved the question of the constitutionality of state bans on same-sex marriage, although dissent feared that the majority’s reasoning would extend to same-sex marriage rights).

reviewing the successful challenge to California's ban on same-sex marriage through Proposition 8, the Supreme Court avoided the merits altogether by finding that the Court of Appeals should have dismissed for lack of standing to appeal.³¹⁴ This brand of incrementalism appears to have allowed the law to develop with appropriate care and deliberation, culminating in marriage equality, a civil rights milestone in the United States.

A related factor may affect the precedential effect of a decision, even when a court formally resolves only the dispute before it. A court may resolve that dispute through the application of one or more legal principles, which may vary in the degree to which they might naturally extend to other kinds of cases.

In *Lawrence*, for example, Justice O'Connor concurred with the majority's judgment but argued that the case could have been decided more narrowly on equal protection grounds, which would have allowed the Court to distinguish *Bowers v. Hardwick* and avoid a more far-reaching rationale based on due process.³¹⁵ Similarly, in *Windsor*, the majority opinion explicitly declined to rely solely on federalism principles to strike down the federal DOMA, and rested the decision as well on other rationales³¹⁶ that could later be extended to scrutinize state bans on same-sex marriage.³¹⁷ The multiple legal rationales in *Windsor* prompted an expression of hope from Justice Scalia that lower courts would seize on the federalism rationale, but also an accurate prediction from him that courts would invoke the alternative rationales to strike down same-sex marriages bans.³¹⁸

This author finds it difficult to criticize a court for applying any legal rationale, or combination of rationales, that thoroughly explains the Court's resolution of that dispute, rather than resting solely on the narrowest possible legal rationale, one that would advance the law to the least degree. If a court chooses a legal rationale that can be extended by analogy to other disputes in future cases, it is fulfilling its institutional function of developing the law in a clear and orderly fashion,³¹⁹ while allowing the extensions to take place incrementally,

314. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

315. *See supra* notes 58, 59 and accompanying text.

316. *See supra* notes 86-91 and accompanying text.

317. *See supra* note 124 and accompanying text.

318. *See supra* notes 84, 85 and accompanying text. Justice Scalia had earlier opined that the majority opinion in *Lawrence* logically led to recognition of a right to same-sex marriage. *Supra* note 80.

319. *See, e.g.*, Shirley M. Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971); Charles Alan

as the new disputes make their way through the courts. True, courts frequently prefer to avoid a constitutional issue if they can resolve a dispute on a statutory basis,³²⁰ and they frequently avoid ruling on a novel constitutional question if they can resolve the dispute through application of a more settled constitutional standard.³²¹ However, stare decisis and judicial moderation do not require such restrained reasoning that the law remains mired in a sea of mud that barely creeps forward.

For example, in *Saucier v. Katz*,³²² the Supreme Court mandated that federal courts resolve underlying constitutional issues in civil rights litigation prior to addressing official immunity from damages, so that courts would continue to develop the body of constitutional law, even in cases in which they could have dismissed solely on the narrow ground of official immunity.³²³ In *Pearson v. Callahan*,³²⁴ the Court retreated from the mandatory character of this rule, once again permitting lower courts the flexibility to avoid the constitutional question in appropriate cases.³²⁵ *Pearson* noted, however, that *Saucier*'s protocol "is often beneficial," and that "the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent."³²⁶

In sum, an appellate court's choosing or developing a rationale with a solid legal grounding should be viewed as a perfectly appropriate legal method for resolving and explaining the decision and advancing the law, even though the court did not limit its reasoning to the narrowest possible basis for its decision. Choosing a rationale that arguably applies equally or nearly as well to other

Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 779 (1957).

320. SUNSTEIN, *supra* note 304, at 4 (stating that judicial minimalism means, in part, "that courts should avoid deciding constitutional questions"). This approach was famously articulated by Justice Brandeis in a concurring opinion in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).

321. See, e.g., *supra* note 178 and accompanying text (explaining that some courts have applied rational basis test to strike down same-sex marriage bans, because application of heightened scrutiny in that context was not firmly established); SUNSTEIN, *supra* note 304, at 146-48 (discussing a trio of cases that found equal protection violations, partly on the basis of illegitimate legislative animus toward targeted groups, while avoiding ruling on arguments that the classifications should trigger heightened scrutiny).

322. 533 U.S. 194 (2001).

323. *Id.* at 200-01.

324. 555 U.S. 223 (2009).

325. *Id.* at 236.

326. *Saucier*, 555 U.S. at 236.

classes of disputes sends helpful guidance to lower courts without actually deciding those other disputes prematurely.

2. *Deferring to Democratic Deliberation*

The second moderating force on judicial advances in constitutional civil rights applies with greatest force when an issue is the topic of public debate and is under consideration for regulation in another branch of government, raising concerns about separation of powers.³²⁷ This factor divided many state and lower federal courts,³²⁸ and it spurred the sharpest division between the majority and dissenting opinions of the Supreme Court in *Obergefell*.³²⁹ Indeed, in dissent, Chief Justice Roberts predicted that the Supreme Court's intervention would prolong the controversy: "Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."³³⁰

Similarly, in his majority opinion for the Sixth Circuit, Judge Jeffrey Sutton argued that judicial deference could eventually lead to a more satisfying consensus in favor of minority rights:

When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.³³¹

But the confidence of Chief Justice Roberts and Judge Sutton in political processes places an unfair burden on the minority group to effect change. Dissenting from Judge Sutton's majority opinion, Judge Martha Craig Daughtrey observed that "these plaintiffs are not political zealots trying to push reform on their fellow citizens; they

327. *Goodridge v. Dep 't of Pub. Health*, 798 N.E.2d 941, 991 (Mass. 2003) (Cordy, J., dissenting) (referring to "the strongly worded principles of separation of powers" in the state constitution).

328. *See supra* notes 194-209 and accompanying text.

329. *See supra* notes 224-28 and accompanying text.

330. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, J., dissenting).

331. *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584.

are committed same-sex couples, many of them heading up de facto families, who want to achieve equal status.”³³²

Moreover, deference to democratic processes controlled by majority sentiments can extend the deprivation of civil rights for many years, to the detriment of the affected minority group and ultimately to the detriment of society as a whole.³³³ Particularly if state constitutional amendments during a period of backlash have erected an impediment to democratic deliberation and correction,³³⁴ many judges could be receptive to arguments that the judiciary should take an “aggressive stance” in protecting minority rights.³³⁵

Still, Anthony Michael Kreis not only argues that recognition of same-sex marriage through legislative action, rather than judicial intervention, is consistent with a healthy balance of powers between branches of government,³³⁶ he concludes that the actions and debates of state legislators reflect a form of popular constitutionalism that helps to advance the development of constitutional rights:

Indeed, the marriage equality movement has been propelled by elected officials whom, while representing diverse interests, engage in a deliberative democratic process as informed statesmen, interpreting the Constitution and squaring a distilled analysis of popular opinion with

332. *Id.* at 421 (Daughtrey, J., dissenting) (emphasis omitted).

333. Delgado, *supra* note 283, at 527-28 (arguing that the Supreme Court’s failure to strike down bans on interracial marriage a dozen years earlier deprived interracial couples of important rights, harmed society as a whole, emboldened resistance to civil rights on other issues, and lessened the significance of *Loving* when it was issued); Latta v. Otter, 771 F.3d 456, 478-89 (9th Cir. 2014) (Reinhardt, J., concurring) (the discrimination invalidated in *Loving* and *Lawrence* restricted freedoms in a way that infringed on the rights of all citizens of the state); *see also id.* at 469 n.10 (the state’s unsupported speculation about adverse effects from same-sex marriage “cannot justify the indefinite continuation” of harmful discrimination).

334. *See, e.g., supra* notes 109-14 and accompanying text.

335. SUNSTEIN, *supra* note 304, at 159-60 (reciting argument about an aggressive judicial stance, and stating that “the anti-caste principle . . . draws discrimination on the basis of sexual orientation into considerable doubt,” at least as a matter of “abstract constitutional theory”). *But cf. id.* at 160-62 (writing in 1999, prior to the backlash that led to numerous state constitutional amendments, that pragmatic and strategic considerations might justify a delay beyond 2001 or 2003 before the Supreme Court invalidated a ban on same-sex marriage, even if the constitutional claim were clear).

336. Anthony Michael Kreis, *Marriage Equality in State and Nation*, 22 WM. & MARY BILL RTS. J. 747, 750 (2014) (“[A] process in which courts give due diligence to consensus-driven constitutional interpretation in the legislative process while robustly exercising judicial review embraces a balance of constitutional prerogatives . . .”).

constitutional values through a dual cooperative citizen-legislator educational process—a hallmark of popular constitutionalism.³³⁷

Kreis concludes further that courts should look to legislative debates to enhance their understanding of constitutional rights:

Through the legislative looking glass, courts can glean a popular understanding of constitutional provisions that have survived “the best test of truth” that underpins the “theory of our Constitution.” . . . As state and federal courts continue to assess the constitutional merits of challenges to state same-sex marriage bans, judges should give ample consideration to robust constitutional dialogue in state legislative bodies. In doing so, judges can enhance their own understanding of how same-sex marriage naturally fits within American constitutional history and tradition and bolster opinions extending constitutional protections to same-sex couples without ceding claims of furthering republican virtues to same-sex marriage opponents.³³⁸

On the other hand, judicial enlightenment from robust political debate need not preclude judicial protection of minority rights; this much is reflected in Justice Kennedy’s acknowledgment in *Obergefell* that decades of political and academic debate had indeed informed the Court before it acted to protect the right to marry.³³⁹ Moreover, Kreis tells the story of legislatures that retained the power under their state constitutions to recognize same-sex marriage. Steve Sanders argues that widespread state constitutional amendments denying recognition to same-sex marriage “represent a troubling failure of the political process”:

By strong-arming marriage discrimination into state constitutions—which typically are far more difficult to change than ordinary statutes—during a relatively brief period from 1998 to 2012, mini-DOMA proponents intended to freeze marriage discrimination in place and put it beyond the reach of ordinary democratic deliberation, future legislative reconsideration, and state judicial review. And so the remaining mini-DOMAs should receive searching, skeptical judicial review of their *substance* because they are the products of a constitutionally suspect lawmaking *process*.³⁴⁰

337. *Id.* at 749 (citing generally to Larry D. Kramer, “The Interest of the Man”: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 VAL. U. L. REV. 697 (2006)).

338. *Id.* at 810 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); *see also id.* at 750 (“Courts adjudicating constitutional questions on issues previously subjected to intense legislative scrutiny, in turn, can then explore those well-reasoned constitutional interpretations for guidance.”).

339. *Obergefell*, 135 S. Ct. at 2605.

340. Sanders, *supra* note 114, at 14; *see also id.* at 15 (in early 2014, thirty-one states banned same-sex marriage, twenty-eight by constitutional amendment,

Sanders argues that the state constitutional amendments, adopted “in an atmosphere that was often polluted by evident animus and ill will,”³⁴¹ hampered “the process of democratic dialogue as translated through the normal legislative process,” undermining the argument for judicial restraint.³⁴²

In sum, judges should allow ample breathing space for democratic deliberation by deciding no more than the disputes before them and by subjecting state law to constitutional scrutiny rather than to scrutiny based on personal feelings or values.³⁴³ However, judges cannot dodge questions placed squarely before them, simply to defer to deliberation in another forum, and they must not fail to protect the legitimate rights of a minority simply to protect the sensibilities of a majority seeking to maintain the status quo.³⁴⁴

Indeed, in appropriate cases, and in contrast to Chief Justice Roberts’s admonition, a court can seek to smooth the way for an eventual consensus toward greater inclusiveness. Concurring in the Massachusetts Supreme Court’s recognition of same-sex marriage rights, Justice Greaney made a remarkable plea for acceptance:

I am hopeful that our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgment of the court’s authority to adjudicate the matter. My hope is more liberating. The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher,

even though a majority of the population of those states by then supported marriage equality, with greater majority support in the nation as a whole).

341. *Id.* at 24.

342. *Id.* at 25-26.

343. See *Brassner v. Lade*, No. 13-012058 (37), slip op. at 2 (Fla. Cir. Ct. Aug. 4, 2014) (“With a full understanding of the politically and emotionally charged sentiments behind the issue of same-sex marriage, this Court’s analysis of the law and its ruling is based solely on the law, independent of bias, personal feelings or beliefs, which is the role of the judiciary.”).

344. *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir.) *cert. denied*, 135 S. Ct. 316 (2014) (“Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.”). Or, as stated in one of the trial court opinions overturned by Judge Sutton: “Although . . . issuing an injunction will temporarily stay the enforcement of democratically enacted laws, that is essentially the case with any federal decision that overturns or stays enforcement of a state law that violates the federal Constitution.” *Tanco v. Haslam*, 7 F. Supp. 3d 759, 771 (M.D. Tenn. 2014), *rev’d sub nom. DeBoer*, 772 F.3d 388, *rev’d sub nom. Obergefell*, 135 S. Ct. 2584; see also *Bonauto*, *supra* note 18, at 37 (“[T]here has never been a marriage exception to the power of courts to decide constitutional questions.”).

therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do.³⁴⁵

C. Storytelling—An Advocate’s Invocation of Civil Rights History

1. *Legal Uncertainty, Leaving Room for Persuasion*

A theme of this Article is the tendency of our society to repeat civil rights history periodically, resisting each new claim for civil rights on similar grounds of religion, tradition, and personal views about what is natural.³⁴⁶ Later, we look back with some wonderment about how a previous generation could have defended slavery, racial segregation of public schools, bans on women practicing law and on married women entering into contracts, denial of women’s suffrage, and bans on interracial marriage.³⁴⁷ Yet, we seem to have a limited capacity for recognizing when we are in the midst of new civil rights struggles, ones that likely will prompt future generations to wonder how the current generation could have denied basic rights to minorities.³⁴⁸

In the struggle for same-sex marriage rights, and especially before the Supreme Court decided *Windsor*,³⁴⁹ courts faced legal uncertainty on the constitutional issues,³⁵⁰ as well as debates about the degree to which courts should proceed cautiously and defer to democratic deliberation.³⁵¹ The marriage equality issue provides a

345. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring).

346. *See supra* Section III.A.

347. *See supra* Section III.A; *see also supra* notes 14-15, 264-66 and accompanying text (presenting and commenting on now embarrassingly outdated nineteenth century judicial statement about the natural place of women).

348. The topic of this Article is same-sex marriage, but one could identify a number of other issues that could cause future generations to wonder at this one, such as wondering why we still cannot achieve equal pay for equal work, why we do not have the political will to tackle immigration reform, why many elected officials are apparently intent on voter suppression, and why members of various racial groups experience the criminal justice system in such a disparate manner.

349. *See supra* notes 81-103 and accompanying text.

350. *See supra* Part II.

351. *See supra* Section II.C.

good example of the value of placing a civil rights issue in its historical context, to encourage judges to adopt the more favorable of competing analytic frameworks.³⁵²

2. *The Appeal of the Civil Rights Story*

In the midst of a civil rights struggle, this Article proposes that advocates strive for progress in the courts by drawing parallels to previous civil rights struggles, by reminding judges of landmark decisions leading the way to progress in the face of injustice, and even by gently showing how a decision that cautiously maintains the status quo may be viewed one day as “a timid act that misjudged the times.”³⁵³

In judicial rulings on LGBT civil rights, courts themselves have occasionally made explicit reference to generational progress in civil rights. In overruling *Bowers v. Hardwick*, the *Lawrence* majority referred to the difficulty of appreciating truths that a later generation will accept as obvious:

[T]hose who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.³⁵⁴

Washington Supreme Court Justice Bobbe J. Bridge extended this thread from *Lawrence* in his dissent from the plurality’s opinion upholding that state’s mini-DOMA: “The passage of time and prudent judgment revealed the folly of *Bowers*, a mistake born of bigotry and flawed legal reasoning. Alas, the same will be said of this court’s decision today.”³⁵⁵ Justice Bridge ended her dissent with a particularly clear reference to the judgment of future generations:

Future generations of justices on this court and future generations of Washingtonians will undoubtedly look back on our holding today with

352. See *supra* Part III.

353. Delgado, *supra* note 283, at 531 (referring to the Supreme Court’s denying certiorari from a decision upholding a state ban on interracial marriage).

354. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003); see also Latta v. Otter, 771 F.3d 456, 476 (9th Cir. 2014) (reviewing our constitutional history of “inclusion,” which “strengthens, rather than weakens, our most important institutions”).

355. *Andersen v. King Cty.*, 138 P.3d 963, 1028 (Wash. 2006) (Bridge, J., concurring in dissent) (justice’s citation to *Lawrence*, 539 U.S. at 562-78 omitted), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

regret and even shame, in the same way that our nation now looks with shame upon our past acts of discrimination. I will look forward to the time when state-sanctioned discrimination toward our gay and lesbian citizens is erased from our state's law books, if not its history. I dissent.³⁵⁶

Such a generational perspective may not be sufficient to overcome the instinct of a more cautious judge to defer to ongoing democratic deliberation.³⁵⁷ In the Washington litigation, for example, the plurality opinion responded directly to Justice Bridge's reference to future generations:

Justice Bridge's dissent claims that gay marriage will ultimately be on the books and that this court will be criticized for having failed to overturn DOMA. But, while same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it.³⁵⁸

In sum, as with all forms of advocacy, the advocate must know her audience and advance arguments that will be most persuasive to that audience. Placing a novel claim within its larger context in civil rights history may be ineffective with some audiences.

In many cases, however, if uncertainty in the law provides support for a court either maintaining the status quo or leading the way to the next stop on our country's civil rights journey, a civil rights advocate may do well to explicitly place the claim within the larger historical context. Perhaps more attention to our past missteps and the likely judgment of future generations would have helped some judges to find that *Baker v. Nelson* was undermined after the Supreme Court's decision in *Lawrence*, or even after the earlier decision of *Romer*, rather than waiting for *Windsor*.³⁵⁹ And it might have helped other courts to join the Massachusetts Supreme Court in

356. *Id.* at 1040. In this spirit, and in support of its decision striking down a ban on same-sex marriage, a Florida trial court opined that this form of discrimination would someday be viewed as such an anachronism that the classification itself would fall into disuse: "The Court . . . foresees a day when the term 'same-sex marriage' is viewed in the same absurd vein as 'separate but equal' and is thus forsaken and supplanted by ordinary 'marriage.'" *Pareto v. Ruvin*, 21 Fla. L. Weekly Supp. 899, 907 (Fla. Cir. Ct. 2014) (citing to and quoting from *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014)).

357. *See, e.g., Delgado, supra* note 283, at 526 (discussing the incrementalist view).

358. *Andersen*, 138 P.3d at 969.

359. *See supra* Section I.A.

finding a state constitutional right at a relatively early stage, 2003,³⁶⁰ rather than waiting for consensus in the general population.

3. *Techniques of Advocacy—Telling the Civil Rights Story*

In advancing the civil rights story, the advocate should remember that a theme or perspective, even when presented effectively, can do no more than encourage an undecided judge to lean toward one of two or more defensible interpretations of the law, such as deciding to define a fundamental right as a right to *marriage* rather than a right to *same-sex marriage*.³⁶¹ Moreover, “[t]he most persuasive writing style may be one that the judge hardly notices.”³⁶² Accordingly, a perspective based on civil rights history might most gracefully appear in citations and analogies to conventional legal authority. For example, even at a relatively early stage of the movement for marriage equality, an advocate could cite to cases such as *Perez* and *Loving* in response to arguments that courts should delay until democratic deliberation has produced a consensus.³⁶³

But advocates should consider a more direct approach if they believe a court would be receptive to it.³⁶⁴ For example, in rejecting tradition and history as a basis for barring same-sex marriage, the Introduction to the Respondent’s brief in *Hollingsworth v. Perry*³⁶⁵ compared the current marriage equality issue to a number of civil rights landmarks:

360. See *supra* notes 116-19. The Hawaii Supreme Court set a positive precedent a decade before that, but it’s perhaps not realistic to think of the possibility of other courts following that example in light of the ensuing backlash. See *supra* notes 105-15.

361. See *supra* Subsection II.D.1.

362. CALLEROS, *supra* note 16, at 376; see also STEVEN D. STARK, WRITING TO WIN: THE LEGAL WRITER 149 (2012) (“Able litigators make clear arguments quietly, in contrast to many litigators who scream out an analysis in a way likely to be ignored.”); MEYER, *supra* note 20, at 3 (“[E]ffective storytelling demands that the audience not be distracted by, or even be aware of, the technical craft that shapes the material . . .”).

363. See Appendix (citing to the overturning of interracial marriage bans in *Perez* and *Loving* at times when popular opinion supported such bans).

364. See generally WILSON HUHNS, THE FIVE TYPES OF LEGAL ARGUMENT 189-92 (2002) (explaining that judges are receptive to various kinds of arguments depending on their judicial philosophies).

365. 133 S. Ct. 2652, 2659 (2013) (vacating decision below because proponents lacked standing to appeal, thus leaving in effect the trial court’s decision striking down California’s initiative banning same-sex marriage, Proposition 8).

If a history of discrimination were sufficient to justify its perpetual existence, as Proponents argue, our public schools, drinking fountains, and swimming pools would still be segregated by race, our government workplaces and military institutions would still be largely off-limits to one sex—and to gays and lesbians, and marriage would still be unattainable for interracial couples.³⁶⁶

Once the historical door is opened a crack, advocates should consider opening it fully with a more comprehensive treatment, at least in an amicus brief, which can provide a supplementary perspective. The multi-page Introduction in the Appendix is based on one that appeared in an amicus brief in 2004 in support of a petition for state supreme court review of a lower court's decision upholding state bans on same-sex marriage.³⁶⁷ It was designed to encourage justices in a very conservative state to give serious consideration to the legal arguments that populated the remainder of the amicus brief. It represents a fairly bold approach, adopted by an amicus—the ACLU—that is known for bold advocacy. The state supreme court denied review without comment, leaving open to speculation whether the Introduction edged some justices closer to accepting the legal arguments of the amicus brief, was counter-productive with some justices, or had each of these effects with different justices.

This author, however, promotes the idea of making explicit this nation's civil rights history, and its probable projection into the future. In the right case, such a narrative can help courts and court watchers to fully appreciate the extent to which a denial of a new civil right, like marriage equality, will be viewed by future generations much the same way we view past denials of rights that we now take for granted. References to the arc of civil rights history could establish an underlying theme to a brief, could surface in occasional comparisons or predictions in oral argument, could anchor a brief or oral argument in an introduction to either, or could inform legislative committee reports and debates.

If a character is a critical ingredient of storytelling,³⁶⁸ the central character of the story in the Appendix is the judiciary itself, cast in the role as hero,³⁶⁹ but with some flaws in its backstory.³⁷⁰ The

366. Brief for Respondent at 4, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144), 2013 WL 648742.

367. Brief of the Arizona Civil Liberties Union as Amicus Curiae in Support of Petitioners, *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, No. CV-03-00422-PR (Ariz. Mar. 31, 2004).

368. ROBBINS, et al., *supra* note 16, at 38.

369. *Cf. id.* at 89 (discussing the “client as hero”). Federal judges in the Sixth Circuit have debated about the degree to which courts should play the role of hero.

conflict confronting this hero³⁷¹ is the challenge of recognizing the place of the current dispute in historical context and reaching a just result, one that will withstand the test of time and the judgment of future generations, typically in the face of contrary popular opinion, and while working within the bounds of precedent and with appropriate regard for democratic deliberation in other forums.

CONCLUSION

The progression of civil rights is not a single story with an ending. Rather, it is a continuing narrative. Indeed, marriage equality will not spell the end of the civil rights movement for the LGBT community; challenges remain, for example, in securing equality in employment, adoption, housing, and public accommodations.³⁷² And, we have hardly seen the end of our continuing quest for racial equality, including in the criminal justice system.³⁷³ Perhaps the new and continuing struggles will benefit from a broad historical perspective, adopted by farsighted jurists, with the gentle urging of graceful advocates.

Supra text accompanying notes 331, 332. Robbins cautions against casting the judge in the role of hero in litigation, arguing that the client should be cast as hero, because it allows the client to possess flaws and still be considered in a positive light. Robbins, *supra* note 16, at 775-77. This author, however, argues that litigation can present different stories at various levels: The same-sex couple may play the role of hero in the underlying dispute and in their quest for equal rights and dignity, while the judiciary can play the role of hero in the separate story of the law itself and its journey through generations of changing social norms. *See generally supra* notes 16-21 and accompanying text.

370. *See* ROBBINS, et al., *supra* note 16, at 91-92 (discussing the client's backstory, the inevitable unfavorable facts in a story, and flaws in the hero of the story).

371. *See id.* at 96-98 (discussing the need of a story to pose a conflict or obstacle for the protagonist to overcome before reaching a goal).

372. *See, e.g.,* Katie Eyer, Brown, *Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L.J.F. 1 (2015).

373. *See, e.g.,* U.S. DEP'T. JUST., CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62-78 (March 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding unlawful discriminatory intent and disparate impact in policing practices affecting the African-American community).

APPENDIX
SAMPLE INTRODUCTION TO A BRIEF

The following Introduction is taken, with some editing and revision, from an Introduction drafted by this author for a brief to the Arizona Supreme Court in 2004;³⁷⁴ accordingly, it does not rely on authority beyond that date. The story it tells seeks to place Arizona courts in the role of hero, summoning the courage to blaze a trail for constitutional rights, as an Arizona court had done so nearly a half-century earlier when it struck down Arizona's anti-miscegenation law. Although it mainly looks backward, to draw historical parallels to the current dispute, it also glances forward, to remind the justices that future generations will assess this generation's response to a plea for equal rights.

I. Introduction—Lessons from *Loving*

Throughout our nation's history, American courts have come to the aid of minority groups that large segments of the population viewed with fear, derision, or condescension. Although courts accord appropriate deference to the majority will as expressed through democratic institutions, they have also recognized that some constitutional principles are designed to protect minority groups from oppression at the hands of those who are sufficiently numerous, powerful, or motivated to wield control of political processes. See generally *Brown v. Board of Education*, 347 U.S. 483 (1954); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down state constitutional amendment, approved by voters in a statewide referendum, that infringed on fundamental rights of gay and lesbian citizens to participate in the political process).

In striking down a state law that limited jury service to “white male . . . citizens,” the Supreme Court described an important goal of the Due Process and Equal Protection Clauses of the Fourteenth Amendment:

The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity . . . the right to exemption from unfriendly legislation against them distinctively as colored—

374. Based on the Introduction, Brief of the Arizona Civil Liberties Union as Amicus Curiae in Support of Petitioners at 2-9, *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, No. CV-03-00422-PR (Ariz. Mar. 31, 2004), *petitioning for review from* 77 P.3d 451 (2003), *review denied* No. 1 CA-SA 03-0150 (Ariz. S. Ct. May 26, 2004).

exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880).

In retrospect, the judicial decisions that recognized emerging civil rights are viewed today as courageous, principled, and prescient, while opponents of civil rights movements, and the discriminatory laws that they championed, are viewed as embarrassing anachronisms of a less enlightened past. In the nineteenth century, for example, the United States Supreme Court might have seemed sensible and appropriately cautious when it upheld a state's ban on the admission of women to the practice of law. *Bradwell v. State*, 83 U.S. 130 (1872). Especially anachronistic now, however, is Justice Bradley's concurring opinion, in which he sought to justify the state legislation as an appropriate reflection of social and religious values:

. . . [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

Id. at 141 (Bradley, J., concurring).

Much more recently, "sex" as a protected classification was introduced into Title VII of the Civil Rights Act of 1964 at the last minute by a Southern congressman who opposed the bill; he apparently gambled that a majority of his colleagues would be so repulsed by the notion of equal rights in the workplace for women that they would withdraw their support from the entire bill. See Charles Whalen & Barbara Whalen, *The Longest Debate* 84, 115-16 (1985). Although his strategy backfired, his confidence in the strategy—just forty years ago—reflected the fragility of popular and legislative support for equal rights that we take for granted today. Today, some religions may still preach the benefits of recognizing starkly different roles for men and women, but few would seriously dispute the wisdom of equal rights for women in the employment arena.

Of the profiles in judicial courage, perhaps the most celebrated is *Brown v. Board of Education*, 347 U.S. 483 (1954), striking down racial segregation in public educational facilities. The principle of *Brown* is beyond any serious debate today, but it cut hard against the grain of segregationist state legislative and executive policies that persisted for many years after the decision. In 1962, for example, Mississippi Governor Ross Barnett, cheered by state legislators, gave action and voice to popular sentiment against admitting an African-American student to the University of Mississippi, relenting only to overwhelming pressure from the federal judicial and executive branches. Taylor Branch, *Parting of the Waters* 597-98, 647-72 (1988). Similarly, the United States Supreme Court's recognition of a constitutional right to privacy that encompasses family planning and contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), cut against the grain of popular moral sensibilities that were reflected at the time in state legislation and that are still reflected in opposition to contraception in some religions.

The Arizona court system, too, can lay claim to a particularly proud moment when an Arizona Superior Court, rather than waiting for evolution in democratic institutions, upheld a constitutional right to interracial marriage. *Oyama v. O'Neil*, No. 61269 (Pima Cty. Superior Court, Dec. 23, 1959). In *Oyama*, Judge Herbert Krucker struck down a state law banning interracial marriage seven years before the United States Supreme Court accomplished that task for the nation in *Loving v. Virginia*, 388 U.S. 1 (1967). Judge Krucker did not bow to public opinion, which then supported interracial marriage bans.

The wisdom and foresight reflected in *Oyama* stands in stark contrast to the words of the Indiana Supreme Court, which upheld a state legislative ban on interracial marriage by reciting popular religious and social values:

In this State marriage is treated as a civil contract but it is more than a mere civil contract. It is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, . . . happiness, and well-being of society The right, in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the states suffer or permit any interference therewith.

State v. Gibson, 36 Ind. 389, 402-03 (1871) (as quoted with approval in *Naim v. Naim*, 197_Va. 80, 84 (1955)). The court in *Gibson* further

used religion and tradition to shield itself from being portrayed as discriminatory:

[Interracial marriage bans stem not from] prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of the races established by the creator himself, and not to compel them to intermix contrary to their instincts.

Id. at 405.

Other courts invoked tradition to justify the invidious discrimination inherent in interracial bans. For example, in addition to quoting the passage from *Gibson* with approval, the Virginia Supreme Court justified its approval of a ban on interracial marriage by referring to cultural traditions and state interests in regulating the institution of marriage:

The institution of marriage has from time immemorial been considered a proper subject for State regulation in the interest of the public health, morals and welfare, to the end that family life, a relation basic and vital to the permanence of the State, may be maintained in accordance with established tradition and culture and in furtherance of the physical moral and spiritual well-being of its citizens.

Naim, 197 Va. at 89.

Other courts and public officials justified bans on interracial marriage by invoking concerns about procreation and child-rearing. The Georgia Supreme Court, for example, stated that “amalgamation of the races is not only unnatural, but it is also productive of deplorable results.” *Scott v. State*, 39 Ga. 321, 323 (1869). In California, a county clerk defended the state ban on interracial marriage partly by arguing that “the progeny of a marriage between a Negro and a Caucasian suffer not only the stigma of such inferiority but the fear of rejection by members of both races.” In *Perez v. Lippold*, 198 P.2d 17, 26 (Cal. 1948).

Fortunately, in *Perez*, the California Supreme Court declared that state’s anti-miscegenation law unconstitutional, despite the State’s warnings that the multi-racial offspring of interracial marriages would not fare well in our society. *Id.* at 18. Yet one wishes for the opportunity to visit the segregationists of decades past, or those who opposed equal employment opportunities for women, and ask them to consider the natural evolution of society and to predict how their actions would appear to the next generation and beyond. If only they could have recognized their eras as ones of historic transition in our society, transition for positive change that was long overdue.

Loving, Brown, Perez, and Oyama demonstrate that courts often make decisions that cut against deeply and religiously held societal ideals and values. Similar to the opponents of gender equality, family planning, and interracial marriages, those opposed to same-sex marriage invoke the Bible, natural law, and the welfare of children. Fortunately, our nations' social values have evolved and our judiciary has helped society accept basic constitutional rights that stand separate from private religious convictions. Otherwise, contraception and interracial marriage would still be barred, and women would be the property of their husbands. See *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (describing the highly restricted legal status of married women in the nineteenth century, which helped to justify barring women from the practice of law).

The Arizona Civil Liberties Union ("AzCLU") predicts that laws that bar loving, committed same-sex couples from securing full marriage rights will eventually be viewed the way that we now look back on racial segregation, discrimination against women, and anti-miscegenation laws. The percentage of Americans who favored "laws against marriages between Negroes and Whites" stood at 53% in 1964, just three years before *Loving v. Virginia*. Hazel Erskine, *The Polls: Interracial Socializing*, 37 Pub. Opinion Q., 283, 291 (1973). When asked in a 1968 Gallup poll about their personal approval or disapproval of "marriage between whites and non-whites/blacks," rather than their support for laws banning such marriages, a substantial 72% disapproved. *Id.* at 292. In comparison, 53% of Americans stated in January 2004 that they would oppose a law allowing same-sex marriage, and 65% of participants opposed same-sex marriage when they were not allowed the neutral choice of "no opinion." *American Public Opinion About Gay and Lesbian Marriages*, Gallup (Jan. 27, 2004), <http://www.gallup.com/poll/focus/sr040127.asp>.

Even the religious hostility toward same-sex marriage likely will fade in most churches with the passage of time and the evolution of society, so that current hostility will strike the same sour note that Justice Bradley's once timely concurrence in *Bradwell* strikes today. More tellingly, although some religions may continue to promote the biblical condemnation of homosexuality and concept of "sanctity of marriage" that excludes same-sex marriage, our society soon will leave such religious matters to religion and make governmental discrimination obsolete.

In light of the prospect of societal evolution, some might argue that same-sex couples should wait for democratic institutions to reflect majority support for same-sex marriage. True, in periods of transition, courts often proceed cautiously, allowing democratic deliberation to help define solutions in a variety of political arenas, rather than leading the way with bold judicial strokes. See Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999). A few times in a generation, however, in a time of great social transition, a case implicates the plight of a minority group that cannot count on majority-controlled political processes for progress and should not be compelled to wait to exercise their constitutional rights. It is in cases such as these that a courageous and forward-looking court has the opportunity, if not the duty, to help lead the way, securing equal rights with decisions such as that of Arizona Superior Court in *Oyama v. O'Neil*.

Interestingly, judicial recognition of constitutional rights to same-sex marriage is analytically a relatively easy step. Under one analytic framework, a state law discriminates on the basis of race when it provides that a Black woman can marry a Black man but that a White woman cannot. By the same token, a state law discriminates on the basis of sex when it provides that a man can marry a woman, but another woman cannot. Alternatively, a court can recognize, under either the state or federal constitution, that a marriage statute limited to same-sex couples is not rationally related to a legitimate state policy, particularly when evidence shows that the asserted state policy masks a general antipathy toward same-sex couples.

These and other analytic arguments are discussed in this brief. They can be accepted or rejected by courts with relative ease, depending on the values that are placed on the end result and depending on our collective sense of this dispute's place in evolution of our society. As stated by Justice Blackmun, dissenting from a decision limiting the parameters of substantive due process:

Like the antebellum judges who denied relief to fugitive slaves . . . the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our 14th Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.

DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

Although Justice Blackmun's inspiring words did not carry the day in *DeShaney*, the eventual recognition of the invidious nature of discrimination on the basis of sexual orientation is all but inevitable within our generation and the next. Same-sex marriage may seem as controversial now as inter-racial marriage seemed a half-century ago, but the Arizona Superior Court waded into the struggle for civil rights in the earlier battle. The current quest for equal treatment under the law for loving, committed gay and lesbian couples has equal merit.

Moreover, a decision prohibiting government from discriminating on the basis of sexual orientation in marriage licenses does not foreclose a variety of personal and religious beliefs and practices in the conducting of marriage ceremonies. The granting of a marriage license would not compel any private person authorized to perform a marriage ceremony to marry any couple other than one that satisfies the criteria demanded by the religious organization with which he or she is affiliated. As a result, some couples may be excluded from, for example, marriage ceremonies in the Catholic Church and will be satisfied to be married by a Justice of the Peace. Such is the proper venue for the expression of the view that same-sex marriage does not comport with popular views about the "sanctity of marriage."

