University of Virginia Law School
Public Law and Legal Theory Working Paper Series

Year 2004 *Paper* 4

Brown and Lawrence

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Abstract

Brown and Lawrence: One year shy of the fiftieth anniversary of Brown v. Board of Education, the justices issued another equality ruling that is also likely to become an historical landmark. In Lawrence v. Texas, the Court invalidated a state law that criminalized same-sex sodomy. This essay contrasts these two historic rulings along several dimensions, with the aim of shedding light on how Supreme Court justices decide cases and how Court decisions influence social reform movements. The six dimensions along which I compare and contrast these decisions are: (1) the ways in which both cases were hard for several of the justices; (2) how the Court decisions fit within the respective movements for social reform (i.e., was the Court playing the role of vanguard or laggard?); (3) how the respective decisions fit within the spectrum of issues involving race and sexual orientation (i.e., was the Court in Brown and Lawrence tackling issues where opinion was most likely to be with or against the Court?); (4) how and why the Court in both cases desperately evaded the marriage issue; (5) the consequences of both rulings (and, more specifically, the backlash effects they entailed); (6) the extent to which the rulings can be seen as predictions of future developments in the areas of race and sexual orientation

Essay
Brown* and *Lawrence
Michael J. Klarman*

One year shy of the fiftieth anniversary of *Brown v. Board of Education*,[1] the justices issued another equality ruling that is also likely to become an historical landmark.[2] In *Lawrence v. Texas*,[3] the Court invalidated a state law that criminalized same-sex sodomy. This essay contrasts these two historic rulings along several dimensions, with the aim of shedding light on how Supreme Court justices decide cases and how Court decisions influence social reform movements.

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[1] James Monroe Distinguished Professor of Law, Albert C. Tate, Jr., Research Professor, and Professor of History, University of Virginia. I am grateful to Jim Ryan for comments on an earlier draft. I also benefitted from the insightful comments of students at the University of Virginia School of Law, where I presented an earlier version of this essay at a forum sponsored by the American Constitution Society and the Lambda Law Alliance. I dedicate this essay to the memory of my mother, Muriel Klarman (1929-2004).

[2] 347 U.S. 483 (1954).

[3] See Evan Thomas, *The War Over Gay Marriage*, **Newsweek**, July 7, 2003, p.38 (quoting legal scholar David Garrow calling *Lawrence*, along with *Brown*, "one of the two most important opinions of the last 100 years").

[4] 539 U.S. __ (2003).

I. *Why* Brown *and* Lawrence *were Hard Cases*

Most people today would be surprised to learn that *Brown* was a hard case for the justices. If state-mandated segregation in public schools is not unconstitutional, what is? That the ruling in *Brown* was unanimous, moreover, suggests that the justices found the case to be easy. Yet appearances can be deceptive. In fact, the justices were at first deeply divided on how to resolve *Brown*.[5]

In a memorandum to the files that he dictated the day *Brown* was decided, Justice William O. Douglas observed that a vote taken after the case was first argued in 1952 would have been "five to four in favor of the constitutionality of segregation in the public schools."[6] Justice Felix Frankfurter's head count was only slightly different: He reported that a vote taken at that time would have been five to four to *invalidate* segregation, with the majority writing several opinions.[7]

Brown was difficult for many of the justices because it posed a conflict between their legal views and their personal values. The sources of constitutional interpretation to which they ordinarily looked for guidance–text, original understanding, precedent, and custom–indicated

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[5] For a more complete discussion of the justices' internal deliberations in *Brown*, see Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** 292-312 (2004).

[6] Douglas, memorandum for the file, Segregation Cases, 17 May 1954, Box 1149, Douglas Papers, Library of Congress.

[7] Frankfurter to Reed, 20 May 1954, Reed Papers, University of Kentucky.

that school segregation was permissible. By contrast, most of the justices privately condemned segregation, which Justice Black called "Hitler's creed."[8] Their quandary was how to reconcile their legal and moral views.

Frankfurter's preferred approach to adjudication required that he separate his personal views from the law. He preached that judges must decide cases based upon "the compulsions of governing legal principles,"[9] not "the idiosyncrasies of a merely personal judgment."[10] In a memorandum he wrote in 1940, Frankfurter noted that "[n]o duty of judges is more important nor more difficult to discharge than that of guarding against reading their personal and debatable opinions into the case."[11]

That Frankfurter abhorred racial segregation cannot be doubted; his personal behavior clearly demonstrated his egalitarian commitments. In the 1930s he had served on the legal committee of the National Association for the Advancement of Colored People (NAACP), and in

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[8] Del Dickson, ed., **The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions** 639 (2001) (reproducing conference discussion in *McLaurin v. Oklahoma State Regents*, Apr. 8, 1950).

[9] Quoted in Melvin I. Urofsky, **Division and Discord: The Supreme Court Under Stone and Vinson**, 1941-1953, at 130 (1997).

[10] Adamson v. California, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring).

[11] Urofsky, supra note __, at 109 n. 112. This memo was written in conjunction with the first flag-salute case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

1948 he had hired the Court's first black law clerk, William Coleman.[12] Nonetheless, he insisted that his personal views were of limited relevance to the legal question of whether segregation was constitutional: "However passionately any of us may hold egalitarian views, however fiercely any of us may believe that such a policy of segregation . . . is both unjust and shortsighted[, h]e travels outside his judicial authority if for this private reason alone he declares [it] unconstitutional."[13] The Court could invalidate segregation, Frankfurter believed, only if it was legally as well as morally objectionable.

Yet Frankfurter had difficulty finding a compelling legal argument for striking down segregation. His law clerk, Alexander Bickel, spent a summer reading the legislative history of the Fourteenth Amendment, and he reported to Frankfurter that it was "impossible" to conclude that its supporters had intended or even foreseen the abolition of school segregation.[14] To be sure, Frankfurter believed that the meaning of constitutional concepts can change over time,[15] but as he and his colleagues deliberated, public schools in twenty-one states and the District of

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[12] Melvin I. Urofsky, **Felix Frankfurter: Judicial Restraint and Individual Liberties** 128-29 (1991); Urofsky, supra note __, at 260.

[13] Frankfurter, memorandum (first draft), undated, 1, Frankfurter Papers, microfilm edition, part 2, reel 4, frame 378 (University Publications of America 1986).

[14] Alexander M. Bickel to Frankfurter, 22 Aug. 1953, Frankfurter Papers, part 2, reel 4, frames 212-14.

[15] Urofsky, **Supreme Court Under Stone and Vinson**, supra note __, at 217 18, 222.

Columbia were still segregated. He could thus hardly maintain that evolving social standards condemned the practice. Furthermore, judicial precedent, which Frankfurter called "the most influential factor in giving a society coherence and continuity,"[16] strongly supported it. Of forty-four challenges to school segregation adjudicated by state appellate and federal courts between 1865 and 1935, not one had succeeded.[17] Indeed, on the basis of legislative history and precedent, Frankfurter had to concede that "*Plessy* is right."[18]

Brown presented a similar dilemma for Justice Robert H. Jackson, who also found segregation anathema. In a 1950 letter, Jackson, who had left the Court during the 1945-1946 term to prosecute Nazis at Nuremberg, wrote to a friend: "You and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underlie segregation policies."[19] Yet, like Frankfurter, Jackson thought that judges were obliged to separate their personal views from the law, and he was loathe to overrule precedent.[20]

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[16] Mary Frances Berry, **Stability, Security, and Continuity: Mr. Justice Burton and Decision Making in the Supreme Court 1945-1958**, at 142 (1978).

[17] Note, *Constitutionality of Educational Segregation,* 17 **Geo. Wash. L. Rev.** 208, 214 n. 20 (1949).

[18] Douglas conference notes, *Briggs v. Elliott*, 12 Dec. 1953, case file: Segregation Cases, Box 1149, Douglas Papers.

[19] Jackson to Charles Fairman, 13 March 1950, Fairman file, Box 12, Jackson Papers.

[20] United States v. South-Eastern Underwriters' Ass'n, 322 U.S. 533, 589-95 (1944)

Jackson revealed his internal struggles in a draft concurring opinion that began: "Decision of these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so."[21] But because Jackson believed that judges must subordinate their personal preferences to the law, this consideration was irrelevant. When he turned to the question of whether existing law condemned segregation, he had difficulty answering in the affirmative:

> Layman as well as lawyer must query how it is that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved. . . . Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the Fourteenth Amendment.[22]

That the nine justices who initially considered *Brown* would be uneasy about invalidating

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(Jackson, J., dissenting); Helvering v. Griffiths, 318 U.S. 371, 403 (1943); Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and* Brown, 72 **Temple L. Rev**. 51, 52 (1999); Dwight J. Simpson, *Robert H. Jackson and the Doctrine of Judicial Restraint,* 3 **U.C.L.A. L. Rev.** 325, 326-29, 338-41 (1956).

[21] Jackson draft concurrence, School Segregation Cases, 15 March 1954, p.1, case file: segregation cases, Box 184, Jackson Papers.

[22] Id. at 5, 10.

segregation is unsurprising. All of them had been appointed by Presidents Franklin D. Roosevelt and Harry S Truman on the assumption that they supported, as Jackson put it, "the doctrine on which the Roosevelt fight against the old court was based–in part, that it had expanded the Fourteenth Amendment to take an unjustified judicial control over social and economic affairs."[23] For most of their professional lives, these men had criticized untethered judicial activism as undemocratic–the invalidation of the popular will by unelected officeholders who were inscribing their social and economic biases onto the Constitution. This is how all nine of them understood the *Lochner*[24] era, when the Court had invalidated protective labor legislation on a thin constitutional basis. The question in *Brown*, as Jackson's law clerk William H. Rehnquist noted, was whether invalidating school segregation would eliminate any distinction between this Court and its predecessor, except for "the kinds of litigants it favors and the kinds of special claims it protects."[25]

Thus, several justices wondered whether the Court was the right institution to forbid segregation. Several expressed views similar to Vinson's: If segregation was to be condemned, "it would be better if [Congress] would act."[26] Jackson cautioned that "[h]owever desirable it

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[23] Jackson to Fairman, supra note __.

[24] Lochner v. New York, 198 U.S. 45 (1905).

[25] WHR (William H. Rehnquist), "A Random Thought on the Segregation Cases," Box 184, Jackson Papers.

[26] Burton conference notes, Segregation Cases, 13 Dec. 1952, Box 244, Burton Papers,

may be to abolish educational segregation, we cannot, with a proper sense of responsibility, ignore the question whether the use of judicial office to initiate law reforms that cannot get enough national public support to put them through Congress, is our own constitutional function."[27] If the Court had to decide the question, Jackson lamented, "then representative government has failed."[28]

Until the current justices' conference notes and memoranda are made public, one cannot be certain as to what internal conflicts they may have experienced in *Lawrence*. Still, it is likely that at least some of the justices in the majority found *Lawrence* hard–and for pretty much the same reasons that several justices were conflicted over *Brown*.

Lawrence, like*Brown* , required the justices to overturn a precedent–*Bowers v. Hardwick*[29]–and a fairly recent one at that. Three of the six justices who voted to invalidate the Texas same-sex sodomy statute–Sandra Day O'Connor, Anthony Kennedy, and David Souter–had co-authored the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[30] which stressed the importance of precedent to the rule of law: "Liberty finds no refuge

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Library of Congress.

[27] Jackson to Fairman, supra note __.

[28] Douglas conference notes, *Briggs v. Elliott*, 12 Dec. 1953, case file: Segregation Cases, Box 1149, Douglas Papers.

[29] 478 U.S. 186 (1986).

[30] 505 U.S. 833 (1992).

in a jurisprudence of doubt."[31] As Justice Antonin Scalia pointed out in his *Lawrence* dissent,[32] the treatments of precedent in *Casey* and *Lawrence* are–to put it mildly–in some tension with one another.

Moreover, *Lawrence*, like*Brown* , adopts an interpretation of the Fourteenth Amendment that significantly departs from its original understanding. The thirty-ninth Congress was no more committed to protecting gay rights than it was to barring school segregation.[33]

Further, because Justices Kennedy and O'Connor generally disfavor identifying new fundamental rights or suspect classes,[34] both of their opinions in *Lawrence* rule the Texas statute

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[31] Id. at 844.

[32] *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting) (accusing the majority of being "manipulative in invoking the doctrine" of stare decisis and criticizing its failure to distinguish *Casey*'s treatment of precedent).

[33] On the original understanding of the Fourteenth Amendment with regard to school segregation, see Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 **Va. L. Rev.** 1881 (1995).

[34] See, e.g., Washington v. Glucksberg, 521 U.S. 702, 736-37 (1997) (O'Connor, J., concurring) (concluding that there is no "generalized right to 'commit suicide' but leaving open "the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives"); Romer v. Evans, 517 U.S. 620 (1996) (invalidating under minimum rationality review Colorado's

deficient under minimum rationality review. That conclusion is difficult to justify, given the extreme deference the Court has traditionally shown when applying that standard of review.[35] Until 1961 every state in the nation had a law forbidding same-sex sodomy.[36] It strains credulity to suggest that all those states were acting irrationally.[37]

Finally, Kennedy and O'Connor reveal discomfort with the stated rationales underlying their opinions by insisting on limiting their reach by fiat. Kennedy insists that the liberty protected by the Due Process Clause "presumes an autonomy of self that includes freedom of

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constitutional amendment denying protected status to homosexuals and declining to rule that homosexuality is a suspect status or that any fundamental right was implicated here); Plyler v. Doe, 457 U.S. 202, 242-54 (1982) (Burger, C.J., dissenting, joined by O'Connor) (denying that illegal aliens are a suspect class or that education is a fundamental right).

[35] See, e.g., McGowan v. Maryland, 366 U.S. 420, 425 (1961) (noting that the Equal Protection Clause is "offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective"); Williamson v. Lee Optical, 348 U.S. 483, 488-89 (1955) (applying an extremely deferential standard under minimum rationality review).

[36] *Bowers*, 478 U.S. at 193.

[37] See *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting) (criticizing the majority for applying "an unheard-of form of rational-basis review"); id. at 2497 (accusing the majority of "having laid waste the foundations of our rational-basis jurisprudence").

thought, belief, expression, and certain intimate conduct."[38] O'Connor both portrays the Texas statute as motivated by simple animus or hatred and rejects "moral disapproval" as a legitimate state purpose.[39] Yet both justices caution that other laws disadvantaging gays and lesbians–for example, bans on same-sex marriage–would not necessarily be susceptible to those objections.[40] They offer no convincing bases for drawing a distinction, however, and Scalia powerfully charges in dissent that "only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court" can such a distinction be maintained.[41]

One cannot know for sure, but *Lawrence* probably presented the same conflict between law and personal values for Justices Kennedy and O'Connor that *Brown* did for Justices Frankfurter and Jackson. Kennedy and O'Connor were likely offended by the criminal prosecution of private, consensual, adult sexual activity; even Justice Thomas, who dissented, thought the statute "'uncommonly silly.'"[42] Yet, these justices' favored approaches to constitutional interpretation revealed no obvious legal flaws in the Texas statute.

That the opinions in *Brown* and *Lawrence* rely partially on unconventional legal sources

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[38] *Lawrence*, 123 S. Ct. at 2475.

[39] Id. at 2485-86 (O'Connor, J., concurring).

[40] Id. at 2484; id. at 2487-88 (O'Connor, J., concurring).

[41] Id. at 2498 (Scalia, J., dissenting).

[42] Id. at 2498 (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

supports the notion that some of the justices found the cases difficult. *Brown*'s famous footnote 11 invoked social science evidence to show that racial segregation in grade school education generated feelings of inferiority among blacks. The use of such evidence in a Supreme Court opinion was virtually unprecedented; the particular evidence invoked was deeply flawed; and the left-wing political credentials of some of the academic experts cited invited criticism from McCarthyites.[43] Justice Jackson himself disparaged the NAACP's brief, which he said "starts and ends with sociology."[44] Judge George Bell Timmerman of South Carolina, alluding to footnote 11, insisted that "[t]he judicial power of the United States . . . does not extend to the enforcement of Marxist socialism as interpreted by Myrdal, the Swedish Socialist."[45] Why Chief Justice Earl Warren chose to insert the controversial social science evidence into the footnote is unclear,[46] but the NAACP relied on it in the litigation partly because the conventional sources of

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[43] Edmond Cahn, *Jurisprudence*, 30 **N.Y.U. L. Rev.** 150, 157-68 (1955); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 **Harv. L. Rev.** 1, 32-33 (1959); Sanjay Mody, Note, Brown, *Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 **Stan. L. Rev.** 793, 801-09 (2002).

[44] Clark conference notes, *Brown v. Board of Education*, Box A27, Clark Papers, Tarlton Law Library, University of Texas.

[45] *Southern School News*, Jan. 1958, p. 6.

[46] For some interesting speculation, see Mody, supra note __, at 814-28 (suggesting that the *Brown* Court relied on social science evidence to help legitimize a ruling that departed from

constitutional interpretation were so unsupportive of the challenge to school segregation.

Similarly in *Lawrence*, the majority opinion relies partly on an unorthodox source for interpreting the American constitution: a decision by the European Court of Human Rights.[47] For the justices to invoke a ruling from a foreign court as authority for interpreting of the U.S. Constitution is virtually unprecedented. As Justice Scalia pointed out in his *Lawrence* dissent, it is also highly controversial.[48] Perhaps one can attribute such a reference to the effects of globalization; these days, the justices spend more time in other countries and interact more with foreign judges. Alternatively, the invocation of a precedent from the European court may reflect the justices' concern in *Lawrence* that the conventional sources of American constitutional law did not adequately support the result.

II. *Court as Vanguard or Laggard?*

In both *Brown* and *Lawrence,* the justices overcame their ambivalence about reaching a politically attractive result that was difficult to justify legally. How were they able to do so? All

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the conventional approach to constitutional interpretation).

[47] *Lawrence*, 123 S. Ct. at 2472 (2002) (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981) as refutation of "the premise in *Bowers* that the claim put forward was insubstant ial in our Western civilization"); id. at 2483 (noting subsequent decisions by the European Court of Human Rights adhering to *Dudgeon*).

[48] Id. at 2495 (Scalia, J., dissenting) (calling the majority's invocation of foreign precedents "[d]angerous dicta").

judicial decision making involves extralegal, or "political" considerations, such as the judges' personal values, social mores, and external political pressure.[49] But when the law–as reflected in text, original understanding, precedent, and custom–is clear, judges will generally follow it.

In 1954 the law–as understood by most of the justices–was reasonably clear: Segregation was constitutional. For the justices to reject a result so clearly indicated by the conventional legal sources suggests that they had very strong personal preferences to the contrary.[50] And so they did. Although the Court had unanimously and casually endorsed public school segregation as recently as 1927,[51] by the early 1950s, the views of most of the justices reflected the dramatic popular changes in racial attitudes and practices that had resulted from World War II.[52] The ideology of the war was antifascist and prodemocratic, and the contribution of African-American soldiers was undeniable. Upon their return to the South, thousands of black veterans tried to vote, many expressing the view of one such veteran that "after having been overseas fighting for

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[49] For elaboration of this view of how judges decide cases, see Klarman, supra note __, at 4-6, 446-54.

[50] For a similar example of this phenomenon, see Bush v. Gore, 531 U.S. 98. See generally Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 **Calif. L. Rev.** 1721 (2001).

[51] Gong Lum v. Rice, 275 U.S. 78 (1927).

[52] The following discussion is based on Klarman, supra note __, at 173-93 (citing relevant sources).

democracy, I thought that when we got back here we should enjoy a little of it."[53] Thousands more joined the NAACP, and many became civil rights litigants. Others helped launch a postwar social movement for racial justice.

Other developments in the 1940s also fueled African-American progress. Over the course of the decade, more than one and a half million southern blacks, pushed by changes in southern agriculture and pulled by wartime industrial demand, migrated to northern cities. This mass relocation–from a region in which blacks were almost universally disfranchised to one in which they could vote nearly without restriction–greatly enhanced their political power; indeed, they became a key swing constituency in the North. Other blacks migrated from farms to cities within the South, facilitating the creation of a black middle class that had the inclination, capacity, and opportunity to engage in organized social protest.

The onset of the Cold War in the late 1940s created another impetus for racial reform. In the ideological contest with communism, American democracy was on trial, and southern white supremacy was its greatest vulnerability. The Justice Department's brief in *Brown*, which urged the Court to invalidate school segregation, emphasized that "[r]acial discrimination furnishes grist for the Communist propaganda mills."[54] After*Brown* , supporters of the decision boasted

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[53] Quoted in Robert J. Norrell, **Reaping the Whirlwind: The Civil Rights Movement in Tuskegee** 60-61 (1985).

[54] Brief for the United States as Amici Curiae, *Brown v. Board of Education*, 6, in Philip B. Kurland & Gerhard Casper, eds., 49 **Landmark Briefs and Arguments of the Supreme Court of the United States** 121.

that America's leadership of the free world "now rests on a firmer basis"[55] and that American democracy had been "vindicat[ed] . . . in the eyes of the world."[56]

By the early 1950s such forces had produced concrete racial reforms. In 1947, Jackie Robinson desegregated major league baseball. In 1948, President Truman issued executive orders desegregating the federal military and civil service. Dramatic changes in racial practices were occurring even in the South. Black voter registration there increased from 3 percent in 1940 to 20 percent in 1950.[57] Dozens of urban police forces in the South, including some in Mississippi, hired their first black officers. Minor league baseball teams, even in such places as Montgomery and Birmingham, Alabama, signed their first black players. Most southern states peacefully desegregated their graduate and professional schools under court order. Blacks began serving again on southern juries. In many southern states, the first blacks since Reconstruction were elected to urban political offices, and the walls of segregation were occasionally breached in public facilities and accommodations.

As they deliberated over *Brown*, the justices expressed astonishment at the extent of the

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[55] Mark V. Tushnet, **Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961**, at 172-73 (1994).

[56] *Chicago Defender*, 22 May 1954, p. 5.

[57] David J. Garrow, **Protest at Selma: Martin Luther King, Jr. and the Voting Rights Act of 1965**, at 7 tbl. 1-1, 11 tbl. 1-2 (1978).

recent changes. Sherman Minton detected "a different world today" with regard to race.[58] Frankfurter noted "the great changes in the relations between white and colored people since the first World War" and remarked that "the pace of progress has surprised even those most eager in its promotion."[59] Jackson may have gone furthest, citing black advancement as a constitutional justification for eliminating segregation. In his draft opinion he wrote that segregation "has outlived whatever justification it may have had . . . . Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man."[60] Blacks had thus overcome the presumptions on which segregation was based.

It was these sorts of changes--political, social, demographic, and ideological- that made *Brown* possible. Frankfurter later conceded that he would have voted to uphold public school segregation in the 1940s because "public opinion had not then crystallized against it."[61] The

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[58] Burton conference notes, School Segregation Cases, 12 Dec. 1953, Box 244, Burton Papers.

[59] Frankfurter memorandum, n.d., p. 2, Frankfurter Papers, microfilm edition, part 2, reel 4, frame 379.

[60] Jackson draft concurrence, supra note __, at 1, 19-21.

[61] Quoted in Douglas memorandum, 25 Jan. 1960, *reproduced in* Melvin I. Urofsky, ed., **The Douglas Letters: Selections from the Private Papers of Justice William O. Douglas** 169 (1987).

justices in *Brown* did not think that they were creating a movement for racial reform; they understood that they were working with, not against, historical forces.

Lawrence, like *Brown* , came in the wake of extraordinary changes in attitudes and practices regarding homosexuality. In 1986, Chief Justice Warren Burger in his concurring opinion in *Bowers* recited Blackstone's condemnation of homosexuality as an offense of "deeper malignity" than rape.[62] In the seventeen years between *Bowers* and *Lawrence*, public opinion went from *opposing* the legalization of homosexual relations by 55 percent to 33 percent to *supporting* legalization by 60 percent to 35 percent.[63] Many states, either through legislative or judicial action, nullified laws criminalizing same-sex sodomy.[64] Several states and scores of cities added protection for sexual orientation to their antidiscrimination laws.[65] Nearly two

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[62] *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring).

[63] *Public Opinion Online* (May 20, 2003), accession # 0429847. See also Paul. R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 **J. Pol**. 1208, 1208-09 (2003) (noting a substantial reduction in the 1990s in the percentage of Americans who regard same-sex relations as wrong).

[64] William N. Eskridge, Jr., **Gay Law: Challenging the Apartheid of the Closet** 168 (1999).

[65] Eskridge, supra note __, at 130, 139, 233, 356-61 append. B; Barry A. Adam, **The Rise of a Gay and Lesbian Movement** 123 (1987).

hundred Fortune 500 companies extended job-related benefits to gay partners.[66] The Hawaii supreme court invalidated a ban on same-sex marriage,[67] and the Vermont Supreme Court ruled that same-sex couples must at least be permitted to form "civil unions."[68] In the 1990s, hundreds of openly gay men and women were elected to public offices, and gays and lesbians entered mainstream culture on television, film, and music; in 1998, an openly gay man won a Pulitzer Prize for the first time.[69] In 2003 the Episcopalian Church ordained its first openly gay bishop.[70]

Both *Brown* and *Lawrence* reflected more than they produced changes in social attitudes and practices. This is not to suggest that the Court is a perfect mirror of society. Indeed, the justices share certain characteristics that set them apart from average Americans: They are older, better-educated, and more affluent.[71] On some public policy disputes that become constitutional

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[66] Thomas, supra note __ (noting the number of Fortune 500 companies offering benefits to gay partners rose from one in 1992 to 197 in 2003).

[67] Baehr v. Lewin, 852 P. 2d 44 (Haw. 1993).

[68] Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999).

[69] Craig A. Rimmerman, **From Identity to Politics: The Lesbian and Gay Movements in the United States** 1 (2002).

[70] See Laurie Goodstein, *Openly Gay Man is Made a Bishop*, **New York Times**, Nov. 3, 2003, p. A1.

[71] Michael J. Klarman, What*'s So Great About Constitutionalism?*, 93 **Nw. U. L. Rev**.

issues, these characteristics correlate with certain views. For example, better-educated, relatively affluent people are much more likely to favor abortion rights and to oppose school prayer than are average Americans.[72]

Occasionally, the culturally elite values of the justices make them more receptive than the general population to social reform. In 1954, opinion polls showed that nearly half of all Americans supported racial segregation in public schools, whereas college graduates condemned that practice by nearly three to one.[73] Reflecting the values of the cultural elite, the justices in *Brown* unanimously condemned public school segregation.

Today, attitudes toward homosexuality strongly correlate with socioeconomic status: Better educated, affluent people are generally much more tolerant than are average Americans.[74] Yet, on this issue, another of the justices' systemic biases has a partially offsetting effect: Attitudes toward homosexuality also strongly correlate with age: Older people are generally much less tolerant than are younger people. For example, one recent opinion poll shows that respondents aged eighteen to twenty-nine *favor* legalization of "homosexual relations" by 58 percent to 39 percent, while those aged sixty-five and over *oppose* legalization by 61 percent to

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145, 189-91 (1998).

[72] Id. at 190 n.245.

[73] George H. Gallup, 2 **The Gallup Poll: Public Opinion 1935-1971**, at 1250 (1972).

[74] See, e.g., *Public Opinion Online* (Aug. 22, 2000) (reporting a Roper poll finding that 74 percent of respondents with postgraduate education would vote for a well-qualified homosexual for president but only 46 percent of high school dropouts would do so).

24 percent.[75] On gay rights, then, one might have predicted that the Court would be less far in advance of public opinion than it had been on race. This, in fact, has almost surely been the case. The justices' age bias may help explain why *Bowers v. Hardwick* was decided as it was and why the Court took so long to overrule it.

The main point, though, is that neither *Brown* nor *Lawrence* created a new movement for social reform; both decisions supported movements that had already acquired significant momentum before their grievances reached the Supreme Court.

III. *Hierarchies of Preference*

In at least one interesting and important way, *Lawrence* differs from *Brown*. On subjects such as race and sexual orientation, public attitudes often vary across a range of issues. Under Jim Crow, whites were generally more opposed to interracial marriage and the integration of grade schools than they were to desegregating transportation or permitting blacks to vote.[76]

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[75] Katharine Q. Seelye & Janet Elder, *Strong Support is Found for Ban on Gay Marriage*, **New York Times**, Dec. 21, 2003 . See also NPR, *Gay Marriage and Civil Unions* (Dec. 24, 2003) (noting that people in the age range 18-29 oppose gay marriage by 45 percent to 39 percent, whereas people aged 64 and over oppose it by 75 percent to 18 percent); *Public Opinion Online*, supra note __ (reporting an opinion poll finding that 65 percent of people under age 29 would vote for a qualified homosexual for president but only 39 percent of people age 70 and older).

[76] Gunnar Myrdal, 1 **An American Dilemma: The Negro Problem and Modern**

Similarly, heterosexuals today tend to be far more committed to preventing same-sex marriage than to barring same-sex "civil unions" or to permitting employers to discriminate based on sexual orientation. Heterosexuals are least determined to retain criminal prohibitions on private, consensual, adult same-sex sodomy.

By the early 1950s, many southern cities had relaxed Jim Crow in public transportation, police department employment, athletic competitions, and voter registration.[77] Yet white southerners were more adamant about preserving school segregation, which lay near the top of the white-supremacist hierarchy of preferences. Blacks, conversely, were often more interested in voting, ending police brutality, securing decent jobs, and receiving a fair share of public education funds than in desegregating grade schools. These partially inverse hierarchies of preference among whites and blacks opened space for political negotiation (to the extent that blacks had the power to compel whites to bargain). *Brown* mandated change in an area–grade school education–where whites were most resistant, thus virtually ensuring a backlash (as discussed below). Had the Court first decided a case such as *Gayle v. Browder*,[78] desegregating local bus transportation, the reaction of white southerners would probably have been less vitriolic. Indeed, southern whites had shown far greater restraint in response to earlier Court decisions invalidating the white primary and striking down segregation in graduate and

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Democracy 60-61 (1944).

[77] See Klarman, supra note __, at 188-90.

[78] 352 U.S. 903 (1956).

professional education.[79]

By contrast, *Lawrence* dealt with an issue on which heterosexuals are most tolerant of change. Whatever most Americans today think of gay marriage or gays openly serving in the military, few favor punishing the private sexual conduct of gays and lesbians. As one social conservative put it after*Lawrence* , "even most Christians believe that what is done in the privacy of one's home is not the government's business."[80] In 1961 all fifty states punished same-sex sodomy; in 1986 only twenty-five did so; and only thirteen states did so at the time of *Lawrence* (only four with statutes that were explicitly addressed to *same-sex* sodomy).[81] Even in those holdout states, actual prosecutions were almost unheard of.[82] Thus, *Lawrence* was about as (politically) easy a constitutional case as the Court ever confronts: The justices were asked to translate into constitutional law a social norm that commanded overwhelming popular support.[83]

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[79] See Klarman, supra __, at 238-39, 254-55, 393.

[80] Rosen, supra note __ (quoting Paul Weyrich).

[81] *Lawrence*, 123 S. Ct. at 2481; see also Dean E. Murphy, *Gays Celebrate, and Plan Campaign for Broader Rights*, **New York Times**, June 27, 2003, p.A20 (noting that in Harris County, Texas, Lawrence was the only person prosecuted for same-sex sodomy in at least twenty-two years).

[82] Id.

[83] Thomas, supra note __ (noting that the Court in *Lawrence* was "just catching up to public opinion"); Robin Finn, *After Battling for Gay Rights, Time to Shift Energies*, **New York**

Accordingly, they probably anticipated a placid response to their ruling, unlike in *Brown*, where the justices expected white southerners to respond with violence and school closures.[84]

IV. Broader Implications–Evading the Marriage Issue

Brown and *Lawrence* are alike in that both opinions were consciously written narrowly. *Brown* was decided as an education case. The Court emphasized that "*education* is perhaps the most important function of state and local governments"[85] and held only that "[s]eparate *educational* facilities are inherently unequal."[86] The justices deliberately refrained from announcing a presumptive ban on all racial classifications. One principal reason they did so was to avoid calling into question the constitutionality of state laws barring interracial marriage.

Many southern whites had charged that the real goal of the NAACP's school desegregation campaign was "to open the bedroom doors of our white women to the Negro men"[87] and "to mongrelize the white race."[88] For the justices to strike down antimiscegenation

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Times, July 8, 2003, p.B2 (quoting Ruth E. Harlow, legal director of the Lambda Legal Defense and Education Fund, observing that in *Lawrence,* "the majority of the court caught up to the vast majority of Americans").

[84] Klarman, supra note __, at 294.

[85] *Brown*, 347 U.S. 483, 493 (emphasis added).

[86] Id. at 495 (emphasis added).

[87] **Southern School News**, Jan. 1955, p. 2.

laws so soon after *Brown* might have appeared to validate such suspicions. Moreover, opinion polls in the 1950s revealed that over 90 percent of whites–even outside of the South–opposed interracial marriage.[89] During oral argument in one of the original school segregation cases, Justice Frankfurter had seemed relieved when counsel denied that barring school segregation would necessarily invalidate antimiscegenation laws.[90] Frankfurter later explained that one reason that *Brown* was written as it was–emphasizing the importance of public education rather than condemning all racial classifications–was to avoid the miscegenation issue.[91]

However, the justices were quickly confronted with cases that seemed to require them to acknowledge that *Brown*'s logic extended beyond the sphere of education. In 1955-1956 the Court faced challenges to state-mandated segregation of public beaches, golf courses, and local transportation. Because *Brown* had emphasized the importance of public education rather than questioning the validity of all racial classifications, invalidating segregation in these post-*Brown*

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[88] **Southern School News**, Nov. 1955, p. 9. For statements to similar effect, see Judge Walter Jones, *I Speak for the White Race*, **Montgomery Advertiser**, 4 March 1957, NAACP, part 20, reel 4, frame 436; Brady, **Black Monday**, 64-67; Talmadge, **You and Segregation**, 42-44.

[89] 2 Gallup, supra note __, at 1572.

[90] Oral argument in *Bolling v. Sharpe*, 10-11, *reproduced* in 49 Kurland & Casper, eds., supra note __, at 405-06.

[91] Gerald Gunther, **Learned Hand: The Man and the Judge** 664-70 (1994).

cases seemed to require additional explanation. Yet the justices provided none, instead issuing cursory per curiam opinions that merely cited *Brown*.[92] Those legal academics most committed to "reasoned elaboration" in judicial decision making were virtually apoplectic.[93]

Yet even these post-*Brown* per curiams stopped short of invalidating antimiscegenation laws. The justices had an opportunity to determine the constitutionality of such laws, but they refused to take it, even though avoiding it required them to act disingenuously. In *Naim v. Naim*,[94] a Chinese man and a white woman had tried to circumvent Virginia's ban on interracial marriage by wedding in North Carolina. After returning to Virginia, the woman later sought an annulment under the antimiscegenation law, which her husband then challenged as unconstitutional. The trial court granted the annulment, and the Virginia Court of Appeals affirmed, sustaining the statute.

This was the last case the justices wished to see on their docket in 1955, but it seemed to fall within the Court's mandatory jurisdiction. Today the justices have almost complete discretion over their docket, but in the mid-1950s federal law still required them to grant appeals

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[92] E.g., Gayle v. Browder, 352 U.S. 903 (1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

[93] See Henry Hart & Albert Sachs, **The Legal Process: Basic Problems for the Making and Application of Law** 164-70 (1994); Wechsler, supra note __, at 11-12, 15-17.

[94] Naim v. Naim, 87 S.E.2d 749 (1955).

when state courts had rejected federal claims that were not "insubstantial."[95] To say that antimiscegenation laws posed an insubstantial constitutional question would have been absurd. The importance was "obvious," law clerk William A. Norris (later a judge on the U.S. Court of Appeals for the Ninth Circuit) told Justice Douglas, and "[f]ailure to decide the case would blur any distinction remaining between certiorari and appeal."[96] Justice Harold Burton's clerk agreed that the Court could not honestly avoid the case, though he would have preferred to "give the present fire a chance to burn down."[97]

Both clerks underestimated the desperation and creativity of the justices. Though several justices wished to take jurisdiction, others searched for an escape route. Justice Tom Clark suggested one: The plaintiff should be estopped from invoking the antimiscegenation law because she knew of the defendant's race when they married and deliberately evaded the

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[95] 28 U.S.C. § 1257 (1952).

[96] WAN (William Norris) to Douglas, certiorari memorandum, *Naim v. Naim*, 24 Oct. 1955, office memos, nos. 350-399, Box 1164, Douglas Papers; WAN to Douglas, supplemental memorandum, *Naim v. Naim*, undated, ibid. See also Gregory Michael Dorr, *Principled Expediency: Eugenics*, Naim v. Naim *and the Supreme Court*, 42 **Am. J. Leg. Hist.** 119, 149-50 (1998) (noting other similar statements).

[97] Dennis J. Hutchinson, *Unanimity and Desegregation: Decision Making in the Supreme Court, 1948-1958*, 68 **Geo. L.J.** 1, 63 (1979).

statutory prohibition.[98] Burton suggested another: They could dismiss the case on the independent state-law ground that Virginia required residents to marry within the state–a plainly erroneous reading of Virginia law.

Of all the justices, Frankfurter felt the gravest anxiety about the case. If this had been a certiorari petition, he would have rejected it, as "due consideration of important public consequences is relevant to the exercise of discretion in passing on such petitions."[99] (Indeed, in 1954 the Court had denied certiorari in another southern miscegenation case.[100]) But *Naim* was an appeal, and Frankfurter admitted that the challenge to antimiscegenation laws "cannot be rejected as frivolous." Still, the "moral considerations" for dismissing the appeal "far outweigh the technical considerations in noting jurisdiction." To thrust the miscegenation issue into "the vortex of the present disquietude" would risk "thwarting or seriously handicapping the enforcement of [*Brown*]." Frankfurter's proposed solution, which the justices adopted, was to remand the case to the Virginia Court of Appeals with instructions to return it to the trial court for further proceedings in order to clarify the parties' relationship to the commonwealth, which was said to be uncertain from the record; clarification might obviate the need to resolve the

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[98] Clark to Jackson, handwritten note, undated, Box A47, Clark Papers.

[99] Frankfurter memorandum, *Naim v. Naim*, Frankfurter Papers, part 2, reel 17, frs. 588-90; Frankfurter to Clark, handwritten note, undated, Box A47, Clark papers; Hutchinson, "Unanimity and Desegregation," 64-66; Dorr, *Naim v. Naim*, 149-50, 153-54, 156.

[100] Jackson v. Alabama, 72 So. 2d 116 (Ala.), *cert. denied*, 348 U.S. 888 (1954).

constitutional question.[101] On remand, the Virginia jurists refused to comply with the Court's instructions; they denied that the record was unclear and that state law permitted returning final decisions to trial courts in order to gather additional evidence.[102] Virginia newspapers treated the state court's response as an instance of nullification.[103]

The petitioner then filed a motion to recall the Court's mandate and to set the case for argument. Douglas's law clerk, Norris, now identified three options that were available.[104] The Court could summarily vacate the state judgment to "punish" Virginia for its disobedience. Norris thought that this solution would be "intemperate and would unnecessarily increase the friction between this Court and the southern state courts." Second, the justices could circumvent the recalcitrant state high court and remand the case directly to the trial court. Finally, they could take the appeal, which would be a "tacit admission that the Court's original remand was unnecessary." Norris favored the last option and warned that "[i]t will begin to look obvious if the case is not taken that the Court is trying to run away from its obligation to decide the case."

Norris failed even to imagine the option chosen by a majority–dismissing the appeal on the ground that the Virginia court's response "leaves the case devoid of a properly presented

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[101] Naim v. Naim, 350 U.S. 891 (1955).

[102] *Naim*, 90 S.E. 2d 849 (Va. 1956).

[103] Dorr, supra note __, at 156.

[104] WAN to Douglas, certiorari memorandum, *Naim v. Naim*, 1 March 1956, case file: office memos, numbers 350-399, Box 1164, Douglas Papers.

federal question."[105] A majority of the justices apparently preferred being humiliated at the hands of truculent state jurists to further stoking the fires of racial controversy ignited by *Brown*. Once again, those academic commentators most committed to "reasoned elaboration" in judicial decision making scored the Court for taking action that was "wholly without basis in the law."[106] Not until the 1960s would the Court announce a presumptive ban on racial classifications,[107] and not until 1967 would it strike down antimiscegenation laws.[108]

In *Lawrence*, the justices likewise strained to avoid resolving the same-sex marriage issue. Justice Kennedy's majority opinion emphasizes that the case involves "the most private human conduct, sexual behavior, and in the most private of places, the home."[109] He also carefully notes that the case "does not involve whether government must give formal recognition

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[105] Naim v. Naim, 350 U.S. 985 (1956).

[106] Paul Bator, et al., **Hart & Wechsler's The Federal Courts and the Federal System** 660-62 (2nd ed., 1973); Gerald Gunther, *The Subtle Vices of the 'Passive Virtues'–A Comment on Principle and Expediency in Judicial Review*, 64 **Colum. L. Rev.** 11-12 (1964). But see Alexander Bickel, **The Least Dangerous Branch** 174 (1962).

[107] McLaughlin v. Florida, 379 U.S. 184, 192-93, 196 (1964); id. at 197 (Harlan, J., concurring).

[108] Loving v. Virginia, 388 U.S. 1 (1967).

[109] *Lawrence*, 123 S. Ct. at 2478.

to any relationship that homosexual persons seek to enter."[110] Justice O'Connor's concurring opinion similarly stresses that just because "this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review."[111] Further, she notes that in support of its ban on same-sex sodomy, Texas failed to assert a legitimate interest, "such as national security or preserving the traditional institution of marriage."[112] O'Connor even goes so far as to stipulate, without explication, that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[113] She could hardly have been clearer in signaling her unwillingness to commit to invalidating bans on openly gay military service and same-sex marriage.

That Kennedy and O'Connor would go to such lengths to deny that *Lawrence* has implications for same-sex marriage is not surprising. Much as at the time of *Brown* a majority of Americans opposed public school segregation but overwhelmingly supported antimiscegenation laws, so at the time of *Lawrence* public opinion opposed criminal prosecution of private gay sex but supported by a two-to-one margin laws restricting marriage to unions between men and women.

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[110] Id. at 2484.

[111] Id. at 2467 (O'Connor, J., concurring)

[112] Id. at 2488.

[113] Id.

Justice O'Connor's constitutional jurisprudence–and, perhaps to a somewhat lesser extent, Justice Kennedy's–reveals a strong sensitivity to public opinion. On the question of whether it is constitutional to execute the mentally retarded, O'Connor and Kennedy were apparently more influenced than other justices by the number of states that had recently forbidden the practice.[114] They seem more comfortable than the other conservative justices in using the Constitution to suppress outliers but less comfortable than some of the liberals in using the Constitution to resist majority opinion. Likewise, on abortion and affirmative action, O'Connor's apparent shifts over time toward a more liberal position can be plausibly attributed to changes in public opinion.[115] No Court on which O'Connor is the median justice will invalidate any time soon bans on same-sex marriage.

Yet just as *Brown* led inexorably, albeit gradually, to a presumptive judicial ban on all

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[114] Compare Atkins v. Virginia, 536 U.S. 304, 310, 314-15 (2002) (O'Connor and Kennedy joining the majority opinion holding unconstitutional the execution of the mentally retarded, partly on the basis of "the dramatic shift in the legislative landscape that has occurred in the . . . 13 years [since *Penry*]) with Penry v. Lynaugh, 492 U.S. 302 (1989) (O'Connor and Kennedy joining a majority opinion rejecting a constitutional challenge to the execution of the mentally retarded).

[115] On abortion, compare Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (plurality opinion) with Webster v. Reproductive Health Services, 452 U.S. 450 (1989). On affirmative action, compare Grutter v. Bollinger, 539 U.S. __ (2003) with Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

racial classifications, so is *Lawrence* likely to lead eventually to a presumptive judicial ban on all classifications based on sexual orientation. Whereas Kennedy and O'Connor insist that *Lawrence* has no necessary implications for same-sex marriage, Justice Scalia's dissent rightly observes that they offer no basis–other than what he calls a "bald unreasoned disclaimer"–for distinguishing that issue.[116] *Lawrence* denies that "moral disapproval" of homosexuality is a legitimate state interest. It is difficult, however, to identify a state interest other than moral disapproval that would convincingly justify banning same-sex marriage. The recent decision by the Massachusetts Supreme Court invalidating such bans confirms the difficulty of identifying plausible state interests other than moral disapproval that would justify treating gays and straights differently.[117]

Scalia is surely right as a doctrinal matter but just as surely wrong as a practical matter (as he undoubtedly appreciates). Five members of *this* Court are not about to strike down any time soon bans on same-sex marriage–not when public opinion strongly supports such laws. Figuring out how the Court in such a case would distinguish *Lawrence* is an interesting question. Perhaps the Court would simply refuse to take such the case, much as the justices after *Brown* managed to evade the antimiscegenation issue in *Naim*. Alternatively, the justices might adopt

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[116] 123 S. Ct. at 2498 (Scalia, J., dissenting); see also id. at 2496 (noting that Justice O'Connor's equal-protection rationale "leaves on pretty shaky grounds state laws limiting marriage to same-sex couples").

[117] *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (2003).

the unorthodox strategy pursued by Justice Kennedy in *Romer v. Evans*[118] and pretend that *Lawrence* never happened, much as *Romer* fails even to acknowledge the existence of*Bowers* . Regardless of whether they choose to ignore or to distinguish *Lawrence*, Justices Kennedy and O'Connor are not about to create a constitutional right for gays to marry in light of contemporary public opinion.

Yet the Court's refusal after *Brown* to extend its antidiscrimination rationale to the logical conclusion of invalidating antimiscegenation laws lasted only as long as public opinion remained overwhelmingly hostile to interracial marriage. The same is likely to be true for same-sex marriage. If public opinion on that issue becomes more tolerant–as I suggest below is almost certain to happen–then the Court is likely to extend *Lawrence*'s condemnation of "moral disapproval" of homosexuality and invalidate bans on same-sex marriage. The critical development in both arenas will have been changes in public opinion, not the inexorable doctrinal logic of the earlier decision.

V. *Consequences*

Brown produced very little school desegregation in the South for nearly a decade, as white southerners launched a campaign of massive resistance that proved largely successful.[119]

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[118] 517 U.S. 620 (1996).

[119] On massive resistance, see generally Numan V. Bartley, **The Rise of Massive Resistance: Race and Politics in the South During the 1950s** (1969); Neil R. McMillen, **The Citizens' Council: Organized Resistance to the Second Reconstruction** (1971). On the lack

But *Brown* had other, less direct consequences. The Court's ruling dramatically raised the salience of the segregation issue, forcing many people to take a position for the first time.[120] *Brown* was also enormously symbolic to African Americans, many of whom regarded it as the greatest victory for their race since the Emancipation Proclamation.[121] In addition, *Brown* inspired southern blacks to file petitions and lawsuits challenging school segregation, including in dozens of localities in the Deep South, where such challenges would otherwise have been inconceivable in the mid-1950s.[122]

Yet *Brown* may have mattered even more in another way. By the early 1960s, a powerful direct-action protest movement had exploded in the South, featuring sit-ins, freedom rides, and street demonstrations. *Brown* helped to ensure that when such demonstrations came, politicians such as Bull Connor and George Wallace were there to meet them with violence. That brutality, when vividly communicated to national audiences by television, mobilized public opinion in support of transformative civil rights legislation.[123]

In the short term, *Brown* retarded progressive racial reform in the South. With school

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of desegregation for the first decade, see Klarman, supra note __, at 344-63.

[120] Klarman, supra note __, at 364-65.

[121] Id. at 369.

[122] Id. at 368-69.

[123] For a more detailed exegesis of this backlash argument, see Klarman, supra note __, at 385-442.

desegregation lurking in the background, whites in the Deep South suddenly could no longer tolerate black voting. Significant postwar expansions of black suffrage in Mississippi, Alabama, and Louisiana were halted and then reversed.[124] *Brown* also retarded the pace of university desegregation, which had been proceeding slowly but surely under the Court's 1950 ruling in *Sweatt v. Painter*.[125] The post-*Brown* backlash in the South also reversed progress in desegregating sporting competitions, including minor league baseball and intercollegiate football and basketball.[126] Even minor interracial courtesies and interactions that were uncontroversial before 1954 often had to be suspended in the post-*Brown* racial hysteria. In 1959 Governor John Patterson of Alabama barred black marching bands from the inaugural parade, where they had previously been warmly received.[127] Since its founding in 1942, Koinonia Farm, an interracial religious cooperative in Americus, Georgia, had experienced little harassment, but after *Brown* its products were boycotted and its roadside produce stands were shot at. Interracial unions that had thrived in the South for years self-destructed after *Brown*.[128]

Most importantly, in the wake of *Brown*, political contests in southern states assumed a

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[124] Id. at 392-93.

[125] 339 U.S. 629 (1950). See Klarman, supra note __, at 393.

[126] Id. at 393-94.

[127] *Southern School News*, Feb. 1959, p. 16.

[128] Margaret Price, "Joint Interagency Fact Finding Project on Violence and Intimidation" (draft), pp. 51-52, in NAACP Papers, part 20, reel 11, frames 338, 388-89.

common pattern: Candidates maneuvered against one another to occupy the most extreme point on the segregationist spectrum. Racial moderates, who denounced diehard resistance to *Brown*, were labeled "double crossers," "sugar-coated integrationists," "cowards," and "traitors."[129] Most moderates either joined the segregationist bandwagon, or they were retired from service. A Virginia politician observed that it "would be suicide to run on any other platform [than segregation]."[130] A liberal southern editor explained that "it takes guts not to come out for segregation every day."[131]

Although most southern politicians avoided explicit exhortations to violence, the extremist rhetoric they used probably encouraged it. Governor Marvin Griffin of Georgia condemned violence but also insisted that "no true Southerner feels morally obliged to recognize the legality of this act of tyranny [*Brown*]."[132] Senator James Eastland of Mississippi cautioned that "[a]cts of violence and lawlessless have no place," but only after he had incited his audience with reminders that "[t]here is no law that a free people must submit to a flagrant invasion of their personal liberty" and that "[n]o people in all the history of Government have been forced to

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[129] Quoted in Klarman, supra note __, at 391.

[130] *Southern School News*, July 1957, p.3.

[131] Quoted in, Stan Opotowsky, "Dixie Dynamite: The Inside Story of the White Citizens' Councils" (Jan. 1957), p. 18, in NAACP Papers, part 20, reel 13, frames 670, 685.

[132] *Southern School News*, Nov. 1954, p.10.

integrate against their will."[133] Congressman James Davis of Georgia insisted that "[t]here is no place for violence or lawless acts," but only after he had called *Brown* "a monumental fraud which is shocking, outrageous and reprehensible," warned against "meekly accept[ing] this brazen usurpation of power," and denied any obligation on "the people to bow the neck to this new form of tyranny." [134] These politicians either knew that such rhetoric was likely to incite violence, or they were criminally negligent for not knowing it.

The linkage between particular public officials who benefitted from the post-*Brown* political backlash and the brutality that inspired civil rights legislation is compelling. T. Eugene ("Bull") Connor had been on the Birmingham City Commission since 1937. But in the early 1950s, civic leaders, who had come to regard him as an embarrassment because of his extremism and frequent brutality toward blacks, orchestrated his public humiliation through an illicit sexual encounter. Connor retired from public life in 1953, and racial progress ensued in Birmingham, including the establishment of the first hospital for blacks, the desegregation of elevators in downtown office buildings, and serious efforts to desegregate the police force.[135]

After *Brown*, Birmingham's racial progress ground to a halt, and Connor resurrected his

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[133] Sen. James Eastland, "The South Will Fight!," *Arkansas Faith* (Dec. 1955), pp. 8-9, in NAACP Papers, part 20, reel 13, frames 303-04.

[134] Speech of Rep. James C. Davis of Georgia, 31 March 1956, in Extension of Remarks of Rep. John Bell Williams, *Congressional Record,* 23 Apr. 1956, NAACP, part 20, reel 13, frames 346, 347, 351.

[135] For this paragraph, see Klarman, supra note __, at 429-30 (citing relevant sources).

political career. In 1957 he regained his city commission seat, defeating an incumbent he attacked as weak on segregation. In the late 1950s, a powerful Klan element wreaked havoc in Birmingham with a wave of unsolved bombings and brutality. The police, under Connor's control, declined to interfere. Standing for reelection in 1961, Connor cultivated extremists by offering the Ku Klux Klan fifteen minutes of "open season" on the Freedom Riders as they rolled into town. Connor won in a landslide.[136]

In 1963 the Southern Christian Leadership Conference (SCLC) was searching for a southern city with a police chief whose violent propensities could be counted on to produce televised scenes of police brutality against peaceful demonstrators that would shock the nation's conscience. They selected Birmingham because of Connor. The strategy worked brilliantly, as Connor soon unleashed police dogs and fire hoses against the demonstrators, many of whom were children. The national news media featured images of police dogs attacking unresisting demonstrators, including one that President John F. Kennedy reported made him sick. Editorials condemned the violence as a national disgrace. Citizens voiced their outrage and demanded that politicians take action to immediately end such savagery. Within 10 weeks, spin-off demonstrations had spread to over 100 cities.[137]

These televised scenes of brutality dramatically altered northern opinion on race and enabled passage of the 1964 Civil Rights Act. Opinion polls revealed that the percentage of Americans who deemed civil rights the nation's most urgent issue rose from 4 percent before

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[136] Id. at 430-31 (citing relevant sources).

[137] For this paragraph, see Klarman, supra note __, at 433-36 (citing relevant sources).

Birmingham to 52 percent after.[138] Only after Birmingham did Kennedy announce on national television that civil rights was a "moral issue as old as the scriptures and . . . as clear as the American Constitution"[139] and propose landmark civil rights legislation that would end Jim Crow.[140]

Even more than Connor, Governor George Wallace of Alabama personified the post-*Brown* racial fanaticism of southern politics. Early in his postwar political career, Wallace had been criticized as soft on segregation. By the mid-1950s, though, Wallace had felt the shifting political winds and become an ardent segregationist. In 1958, Wallace's principal opponent in the Alabama governor's race, state attorney general John Patterson, received an endorsement from the Ku Klux Klan. Wallace criticized Patterson for not repudiating this endorsement, which unwittingly made him the candidate of moderation. Patterson easily defeated Wallace, leaving the latter to ruminate that "no other son-of-a-bitch will ever out-nigger me again."[141]

Wallace made good on that promise in 1962, winning on a campaign promise of defying

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[138] 3 Gallup, supra note __, at 1812, 1842.

[139] Quoted in Carl M. Brauer, *John F. Kennedy and the Second Reconstruction* 260 (1977).

[140] For this paragraph, see Klarman, supra note __, at 435-36 (citing relevant sources).

[141] Quoted in Dan T. Carter, The Politics of Rage: George Wallace, The Origins of the New Conservatism, and the Transformation of American Politics 96 (1995). For this paragraph generally, see Klarman, supra note __, at 399, 436-37 (citing relevant sources).

federal integration orders, "even to the point of standing at the school house door in person."[142] He declared in his inaugural address: "In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny and I say segregation now, segregation tomorrow, segregation forever."[143]

In the summer of 1963, Wallace fulfilled his campaign pledge to stand in the schoolhouse door at Tuscaloosa, physically blocking the university's entrance before, in a carefully planned charade, stepping aside in face of superior federal force. That September, Wallace used state troops to block the court-ordered desegregation of public schools in Birmingham, Mobile, and Tuskegee, and he encouraged local extremists to wage a boisterous campaign against desegregation.[144]

Threatened with judicial contempt citations, Wallace eventually relented. The schools desegregated, but within a week tragedy had struck. Birmingham Klansmen, possibly inspired by the governor's protestations that "I can't fight federal bayonets with my bare hands,"[145] dynamited the Sixteenth Street Baptist Church, killing four black schoolgirls. Within hours of the bombing, two other black teenagers were killed. It was the largest death toll of the civil

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[142] *Southern School News*, Apr. 1962, pp. 3, 12.

[143] *Southern School News*, Feb. 1963, p.10.

[144] For this paragraph, see Klarman, supra note __, at 437 (citing relevant sources).

[145] Quoted in Carter, supra note __, at 173.

rights era, and Wallace received much of the blame.[146]

Most of the nation was appalled by the murder of innocent schoolchildren. One week after the bombing, tens of thousands of Americans participated in memorial services and marches. Northern whites wrote to the NAACP to join, to condemn, and to apologize. A white lawyer from Los Angeles wrote that "[t]oday I am joining the NAACP; partly, I think, as a kind of apology for being caucasian, and for not being in Birmingham to lend my physical support."[147] A white man from New Rochelle wrote: "How shall I start? Perhaps to say that I am white, sorry, ashamed, and guilty. . . . Those who have said that all whites who, through hatred, intolerance, or just inaction are guilty are right."[148] The NAACP urged its members to "flood Congress with letters in support of necessary civil rights legislation to curb such outrages."[149]

Early in 1965, the SCLC brought its voter registration campaign to Selma, Alabama, in search of another Birmingham-style victory. King and his colleagues chose Selma partly because of the presence there of a law enforcement officer of Bull Connor-like proclivities. Dallas County Sheriff Jim Clark had a vicious temper, especially when it came to black people

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[146] For this paragraph, see Klarman, supra note __, at 437-38 (citing relevant sources).

[147] Donald B. Brown to Wilkins, 18 Sept. 1963, NAACP Papers, part 20, reel 3, fr. 941.

[148] Robert E. Feir to Wilkins, 23 Sept. 1963, NAACP Papers, Part 20, reel 3, fr. 959.

[149] NAACP press release, 21 Sept. 1963, NAACP Papers, part 20, reel 3, fr. 986.

asserting their civil rights.[150]

Selma proved another resounding success (albeit a tragic one) for the civil rights movement, as Clark could not restrain himself from brutalizing peaceful demonstrators. The violence culminated in Bloody Sunday, March 7, 1965, when county and state law enforcement officers viciously assaulted marchers as they crossed the Edmund Pettus Bridge on the way to Montgomery. Governor Wallace had promised that the march would be broken up by "whatever measures are necessary."[151] That evening, ABC television interrupted its broadcast of *Judgment at Nuremberg* for a lengthy film report of peaceful demonstrators being assailed by stampeding horses, flailing clubs, and tear gas.[152]

Most of the nation was repulsed by the ghastly scenes they had watched on television. *Time* reported that "[r]arely in history has public opinion reacted so spontaneously and with such fury."[153] Over the following week, huge sympathy demonstrations took place across the country, and hundreds of clergymen flocked to Selma to show their solidarity with King and his comrades. American citizens demanded remedial action from their congressmen, scores of whom condemned the "deplorable" violence and the "shameful display" of Selma and endorsed

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[150] For this paragraph, see Klarman, supra note __, at 440 (citing relevant sources).

[151] Quoted in Stephen L. Longnecker, Selma's Peacemaker: Ralph Smeltzer and Civil Rights Mediation 176 (1987).

[152] For this paragraph, see Klarman, supra note __, at 440-41 (citing relevant sources).

[153] *Time*, 19 March 1965, pp. 23 -28.

voting rights legislation.[154] On March 15, 1965, President Johnson proposed such legislation before a joint session of Congress. Seventy million Americans watched on television as the president beseeched them to "overcome this crippling legacy of bigotry and injustice" and declared his faith that "we shall overcome."[155]

It was the brutalization of peaceful black demonstrators by white law enforcement officers in the South that repulsed national opinion and led directly to the passage of landmark civil rights legislation. The post-*Brown* fanaticism of southern politics created a situation that was ripe for violence. Much of that violence was encouraged, directly or indirectly, by extremist politicians, whom voters rewarded for the irresponsible rhetoric that fomented brutality. By helping to lay bare the violence at the core of white supremacy, *Brown* accelerated its demise.[156]

It is, of course, too soon to tell what the broader impact of *Lawrence* will be. One might have predicted a fairly mild reaction to a ruling that invalidated criminal prohibitions on same-sex sodomy–a decision that commanded broad support in public opinion. Yet the reaction to

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[154] 111 *Congressional Record* 4984-89, 5014-15 (15 March 1964).

[155] "Special Message to the Congress: The American Promise" (15 March 1965), in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965*, Book 1 (Washington, D.C., 1966): 281, 284. For this paragraph generally, see Klarman, supra note __, at 440-41 (citing relevant sources).

[156] See generally Klarman, supra note __, at 385-442 (describing *Brown*'s backlash, the violence it fostered, and the counterbacklash that violence incited).

Lawrence has been intense and acrimonious.[157] Apparently, both sides of the gay rights debate have appreciated that the decision will have little practical significance when considered narrowly, and they have accordingly shifted their attention to far more controversial issues like gay marriage.[158] Well-publicized developments in Canada during the last year–including both legislative and judicial recognition of gay marital rights–have further increased the salience of

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[157] See, e.g., Jeffrey Rosen, *How to Reignite the Culture Wars*, **New York Times Magazine**, Sept. 7, 2003 (describing how social conservatives swiftly mobilized opposition to *Lawrence*); Thomas, supra note __ (describing conservative groups as "apoplectic" over *Lawrence*); Sheryl Gay Stolberg, *White House Avoids Stand on Gay Marriage Measure*, **New York Times**, July 2, 2003, p.A22 (ruling that conservatives were "outraged" over *Lawrence*).

[158] Rosen, supra note __ (noting that liberal activists and social conservatives both thought that *Lawrence* "made it more likely that lower courts ill come to recognize a constitutional right to gay marriage"); Nancy Gibbs, *A Yea for Gays; The Supreme Court Scraps Sodomy Laws, Setting Off a Hot Debate*, **Time**, July 7, 2003, p.38 (noting that *Lawrence* has mobilized both gay-rights activists and Christian fundamentalists); William Safire, *The Bedroom Door*, **New York Times**, June 30, 2003, p.A21 (predicting, immediately after *Lawrence*, that gay-rights activists would turn same-sex marriage into a dominant political issue); Sarah Kershaw, *Adversaries on Gay Rights Vow State-By-State Fight*, **New York Times**, July 6, 2003, p.A8 (noting that in the wake of *Lawrence*, both sides in the gay-rights debate were "vowing an intense state-by state fight over issues such as same-sex marriage").

that issue.[159]

A decision in the fall of 2003 by the Massachusetts Supreme Court that explicitly addressed gay marriage added fuel to the fiery debate sparked by *Lawrence*. In *Goodridge v. Department of Public Health*,[160] the court held that a ban on same-sex marriage was invalid under the equality provision of the Massachusetts constitution. Almost immediately, social conservatives demanded a constitutional amendment forbidding same-sex marriage, and President George W. Bush later added his support.[161] A very similar ruling in 1993 by the

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[159] See Halpern v. Toronto, 2003 W.L. 34950 (Ontario Ct. App.); Cohen, *Dozens in Canada Follow Gay Couple's Lead*, **Washington Post**, June 12, 2003, p.A25; Clifford Krauss, *Canadian Leaders Agree to Propose Gay Marriage Law*, **New York Times**, June 18, 2003, p.A1.

[160] 798 N.E. 2d 941 (2003).

[161] See, e.g., Elisabeth Bumiller, *Same-Sex Marriage: The President; Bush Backs Ban in Constitution on Gay Marriage*, *New York Times*, Feb. 25, 2004, p. A1; David D. Kirkpatrick, *Conservatives Using Issue of Gay Unions as a Rallying Tool*, *New York Times*, Feb. 8, 2004, p.1 (noting that the same-sex marriage issue is mobilizing social conservatives in a way that no other issue has done in the last several years); id. (quoting a leader of the Southern Baptist Convention: "I have never seen anything that has energized and provoked our grass roots like this issue [same-sex marriage], including *Roe v. Wade*").

Hawaii Supreme Court[162] provoked a similar response; within a few years, more than thirty states (including Hawaii) and Congress had responded by passing Defense of Marriage Acts.[163]

Court rulings like *Brown* and *Goodridge* produce political backlashes for three principal reasons: They raise the salience of an issue; they incite anger over "outside interference" or "judicial activism"; and they change the order in which social change would otherwise have occurred.

Brown was harder to ignore than earlier changes in southern racial practices. Most white southerners did not see black jurors or black police officers, who policed black neighborhoods only, and they would have been largely unaware of the dramatic increases in black voter registration that had occurred since World War II. Even some instances of integration–such as on city buses or golf courses–would have gone unnoticed by many white southerners.[164] But they could not miss *Brown*, which received front-page coverage in virtually every newspaper in the country and was a constant topic of southern conversations.[165] A northern white visitor found after *Brown* that segregation "is the foremost preoccupation of the Southern mind. . . . [It]

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[162] Baehr v. Lewin, 852 P. 2d 44 (Haw. 1993).

[163] These laws are collected in Eskridge, supra note __, at 362-72 append. B-3. See also Rimmerman, supra note __, at 75 (describing an enormous conservative backlash against *Baehr*).

[164] For examples, see *Southern School News*, May 1958, p. 5; Fairclough, *Civil Rights Struggle in Louisiana*, 153.

[165] Pettigrew, "Desegregation and its Chances for Success," 341 table 3.

intrudes into almost every conversation. It nags, it bothers and it will not be ignored."[166] One white-supremacist leader credited the Court with "awaken[ing] us from a slumber of about 30 years,"[167] and an Alabama public official noted that white southerners owed the justices "a debt of gratitude" for "caus[ing] us to become organized and unified.[168]

Lawrence and, to an even greater extent, *Goodridge*, have dramatically raised the salience of gay-rights issues. Many other reforms on issues of sexual orientation–repeal of criminal prohibitions on sodomy, expansion of partnership benefits, and enactment of statutory protections against discrimination in employment and public accommodations–have occurred without riveting public attention.[169] Since *Goodridge*, though, same-sex marriage has constantly captured front-page newspaper headlines, and the issue is certain to play a significant role in the 2004 presidential campaign.[170] *Lawrence* and *Goodridge* have forced people who previously

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[166] Hamilton Basso, letter to the editor, *NYT*, 10 Apr. 1955, p. 10E.

[167] *Southern School News*, Apr. 1955, p. 3.

[168] *Southern School News*, Nov. 1959, p. 16.

[169] John Cloud, *The Battle Over Gay Marriage*," **Time**, Feb. 16, 2004 (noting a dramatic expansion in partnership benefits over the last ten years).

[170] See, e.g., James Dao, *Legislators Push for State Action on Gay Marriage, New York Times*, Feb. 27, 2004 (noting that the gay-marriage issue is "expected to resonate for months and months during the election season"); NPR, Morning Edition, Dec. 26, 2003 (noting that same-sex marriage "will likely be one of the most contentious social issues in the 2004 races"); id.

had not paid much attention to gay-rights issues to notice what is happening and to form an opinion on it. As one social conservative has observed, "the more people focus on [gay marriage], the less they support it."[171] Another expressed hope that *Goodridge* "slapped American Christians in their face and woke them up."[172]

Second, judicial rulings such as *Brown* and *Goodridge* may mobilize greater resistance than reforms that take place through the legislature or with the acquiescence of other democratically run institutions. *Brown* represented federal interference in southern race relations–something that white southerners, harboring deep historical resentments over Reconstruction, military rule, and the imposition of "carpetbagger" governments–could not easily tolerate.[173] Some earlier changes in racial practices–such as the hiring of black police

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(quoting Republican pollster Bill McInturff to the effect that *Lawrence* and *Goodridge* put the same-sex marriage issue "front and center of the 2004 debate").

[171] Seelye & Elder, supra note __ (quoting Rev. Lou Sheldon, chairman of the Traditional Values Coalition); see also Lynn Vincent, *Court's Eye for the Married Guy*, **World Magazine**, Dec. 6, 2003 (quoting a congressional representative who supports a federal constitutional amendment banning same-sex marriage: Until *Goodridge*, "a lot of people didn't realize the gravity of the situation. Sometimes it takes something like this to jolt people into action.").

[172] Vincent, supra note __.

[173] Jackson draft concurrence, supra note __, at 3 (noting that white southerners, "harbor[ing] in historical memory, with deep resentment, the program of reconstruction and the deep humiliation of carpetbag government imposed by conquest," viscerally rejected outside

officers or the desegregation of minor league baseball teams–flowed from choices made by white southerners rather than from judicial decrees. Other changes–such as increases in public spending on black schools and the growing number of blacks registered to vote–had been influenced by federal court decisions, but they still depended on choices made by southern whites. *Brown* was different; it left southern whites no choice but to desegregate their schools. Accordingly, *Brown* was "viewed by many white Southerners as federal intervention designed to destroy their way of life."[174]

Goodridge, decided by the Massachusetts Supreme Court, cannot be seen as outside interference in the same way that *Brown* was regarded by white southerners. However, because it was a decision made by judges, not popularly elected legislators, critics can deride it as a product of the arrogance of "activist judges" defying the will of the people.[175] This contrasts

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interference).

[174] Quoted in Stewart Burns, ed., *Daybreak of Freedom: Montgomery Bus Boycott* 208 (1997) (quoting Bayard Rustin's report on his visit to Montgomery during the bus boycott, March 21, 1956).

[175] See, e.g., Seelye & Elder, supra note __ (quoting Rep. Marilyn Musgrave, sponsor of a constitutional amendment to ban gay marriage, criticizing "activist judges" and observing that "if the definition of marriage is to be changed, it should be done by the American people, not four judges in Massachusetts"); Bumiller, supra note __ (quoting President Bush defending a federal marriage amendment as necessary because of "activist judges" redefining marriage); Lisa Schiffren, *How the Judges Forced the President's Hand*, **New York Times**, Feb. 29, 2004, § 4,

with other gay-rights reforms such as decriminalization of same-sex sodomy or the expansion of antidiscrimination laws to cover sexual orientation, where legislatures have been the driving force. Moreover, because the Full Faith and Credit Clause of the federal constitution may place other states under some obligation to respect Massachusetts marriages, critics of *Goodridge* can rally support for a federal constitutional amendment to protect the rest of the nation from the "activist judges" of Massachusetts.[176] To be sure, in light of the Defense of Marriage Act passed by Congress in 1996, *Goodridge* probably would not have binding effect outside of Massachusetts even without such an amendment. But the ability of critics to rally support for a federal amendment may depend less on the reality of *Goodridge*'s extraterritorial effect than on the perception that it might have such consequences; critics can sow doubts as to how "activist judges" might interpret the Defense of Marriage Act.[177]

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p.13 (arguing that "four Massachusetts judges, looking to bring about radical social change from the bench decided that their commonwealth must begin performing same-sex marriages" and that "[w]hether you favor gay marriage or not, it should be a concern when judges . . . decide to circumvent the democratic process on a core issue").

[176] See, e.g., Dao, supra note __ (noting a Georgia legislator emphasizing the need for a state constitutional amendment forbidding same-sex marriage because of "activist judges").

[177] Bumiller, supra note __ (quoting President Bush warning that the Defense of Marriage Act might itself be struck down by "activist courts"); Pam Belluch, *Massachusetts Gives New Push to Gay Marriage in Strong Ruling*, **New York Times**, Fb. 5, 2004 (noting Tony Perkins, president of the Family Research Council, warning, "If same-sex couples 'marry' in

Third and perhaps most important, court decisions produce backlashes by commanding that social reform take place in a different order than might otherwise have occurred. As we have seen, by the early 1950s, many southern cities had relaxed Jim Crow in public transportation, police department employment, athletic competition, and voter registration.[178] Yet white southerners were more intensely committed to preserving school segregation. Blacks, conversely, were often more interested in voting and receiving a fair share of public education funds than in desegregating grade schools. These partially inverse hierarchies of preference among whites and blacks opened space for political negotiation. Before *Brown*, many politicians in the South had built successful careers by supporting populist economic policies while quietly backing gradual racial reform.[179] *Brown* made that approach untenable by forcing to the forefront an issue–racial segregation of public schools–on which most white southerners were

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Massachusetts and move to other states, the Defense of Marriage Act will be left vulnerable to the same federal courts that have banned the Pledge of Allegiance and sanctioned partial-birth abortion"); see also Schiffren, supra note __ (warning that "[u]ndoubtedly, there are more judges across the country waiting for their chance to be creative, too").

[178] See supra __.

[179] See Numan V. Bartley & Hugh D. Graham, *Southern Politics and the Second Reconstruction* Bartley & Graham, *Southern Politics* 25, 33-37, 50 (1975); Earl Black, *Southern Governors and Civil Rights: Racial Segregation as a Campaign Issue in the Second Reconstruction* 29-31, 37-39, 41-45 (1976);

unwilling to compromise. *Brown* thus virtually ensured a backlash among southern whites.[180]

Goodridge is currently producing a political backlash for the same reason. By the early twenty-first century, most Americans were willing to accept decriminalization of same-sex sodomy, statutory bans on employment discrimination based on sexual orientation, and perhaps even civil unions for same-sex couples.[181] Before *Lawrence* gave gay marriage especial prominence, and before the Massachusetts Supreme Court demonstrated how far courts might go on the issue, many Democratic politicians–including most of those competing for the party's presidential nomination in 2004–supported civil unions, but not formal marriage, for gays and lesbians.[182] This compromise position was an effort to appeal to homosexual voters, who

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[180] For this paragraph, see Klarman, supra note __, at 391-92 (citing relevant sources).

[181] NPR, supra note __ (noting that at the end of 2003, Americans opposed civil unions by only 49 percent to 42 percent); ibid. (noting Democratic pollster Stan Greenberg observing that on the issues of partnership rights and civil unions, the country has evolved "over time pretty rapidly"); Gallup Poll, May 15, 2003 (noting that Americans by 62 percent to 35 percent favor the same legal rights to health care benefits and Social Security survivor benefits for same-sex as for married couples); *Newsweek*, Apr. 27, 2002 (poll showing that Americans by 85 percent to 10 percent favor equal employment opportunities regardless of sexual orientation).

[182] See, e.g., NPR, supra note __ (noting that major Democratic candidates for president opposed by marriage but support civil unions); NPR, Gay Marriage and Civil Unions, supra (noting in December 2003 that Democratic voters in an opinion poll favored civil unions by 55% to 40% while Republicans opposed by 63% to 27%); Belluck, supra note __ (noting that many

disproportionately support the Democratic Party, without alienating those heterosexuals who are willing to countenance progressive change on issues involving sexual orientation but not same-sex marriage.[183] But *Goodridge* effectively rules out such a compromise by constitutionally mandating that same-sex couples be allowed to marry–a position that has not carried the day in the popularly elected branches of a single state government and that opinion polls show is rejected by majorities of roughly two to one.[184] That decision promises to be a godsend to social conservatives and Republicans in the same way that *Brown* proved a boon to such white-supremacist politicians as Bull Connor and George Wallace.[185] Although many liberal

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Massachusetts legislators "had supported civil unions but not gay marriage and were hoping the court would not force them to make an all-or-nothing decision").

[183] See Vincent, supra note __ (noting that "Democratic presidential hopefuls . . . are trying to preserve their political liberal base by expressing support for *Goodridge* while straining not to alienate centrists in the general election with a wholesale endorsement of what remains a radical notion").

[184] Bumiller, supra note __ (noting an opinion polls taken on February 16-17, 2004 revealing 64 percent opposing same-sex marriage); Seelye & Edler, supra note __ (noting another poll showing that respondents oppose same-sex marriage by 61 percent to 34 percent).

[185] See, e.g., NPR, supra (quoting Democratic pollster Stan Greenberg to the effect that same-sex marriage "has the potential to be a wedge issue [with] . . . greater risk for the Democrats"); Robin Toner, *Same-Sex Marriage*, **New York Times**, Feb. 25, 2004, p. A1 (quoting conservative leader Gary Bauer to the effect that on the gay-marriage issue, "[t]he

Democrats support same-sex marriage, other traditionally Democratic constituencies–African-Americans, the elderly, the working-class–generally do not.[186] Opinion polls show that respondents are much more likely to vote for President Bush than the nominee of the Democratic Party after being told of their respective positions on same-sex marriage and civil unions.[187] Polls also reveal that when people listen to a Democratic statement of support for civil unions and a Republican statement of opposition to same-sex marriage, they overwhelmingly favor the latter position, which suggests that the Democrats' preferred strategy of focusing attention on

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public overwhelmingly embraces . . . the conservative side"); Andrew Jacobs, *Black Legislators Stall Marriage Amendment in Georgia*, **New York Times**, March 3, 2004 (reporting that leaders of the Georgia Legislative Black Caucus are predicting that if a state constitutional amendment barring same-sex marriage gets on the ballot this fall, Republicans may take over the lower house of the state legislature); Rosen, supra note __ ("If any single Supreme Court decision can reinvigorate the culture wars today, conservatives say, the court has just handed it to them on a silver platter").

[186] See, e.g., Editorial, *State of the Union*, **Economist**, Nov. 22, 2003 (noting that same-sex marriage "could provide Republicans with a powerful lever to pry away working-class voters [who tend to be more culturally conservative] from the Democratic cause").

[187] See NPR, *Gay Marriage and Civil Unions*, supra (noting that respondents favor Bush over the Democratic nominee by 46 percent to 42 percent before being informed of their respective positions on civil unions and by 51 percent to 35 percent after).

civil unions may not succeed.[188]

Decisions such as *Brown* and *Goodridge* not only mandate change in the abstract, but they inspire activists to take concrete steps to implement them, thus further inciting political backlash. After both *Brown* rulings, the NAACP urged southern blacks to petition school boards for immediate desegregation on threat of litigation. Blacks filed such petitions in hundreds of southern localities, including in the Deep South. In a few cities, such as Baton Rouge and Montgomery, blacks even showed up in person to try to register their children at white schools. In the mid-1950s, but for *Brown*, such challenges would have been inconceivable in the Deep South, where race relations had been least affected by broad forces for racial change. One might have predicted that a campaign for racial reform there would have begun with voting rights or equalization of black schools, not with school desegregation, which was hardly the top priority of most blacks and was more likely to incite violent white resistance. Merely signing one's name to a school desegregation petition was an act of courage for blacks in the Deep South, and it frequently incited economic reprisals and occasionally physical violence. The petition campaign contributed significantly to the rise of massive resistance in the mid-1950s; black efforts to implement *Brown* stimulated more resistance than did the decision itself.[189] As the *Jackson Daily News* editorialized, "there is only one way to meet the attack of the NAACP. Organized

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[188] Id. (noting that respondents by 55 percent to 33 percent identified more closely with the Republican's statement in opposition to same-sex marriage than with the Democratic statement in support of civil unions).

[189] For this paragraph, see Klarman, supra note __, at 368-69 (citing relevant sources).

aggression must be met by organized resistance."[190]

Goodridge is having a similar effect today. Inspired by the ruling of the Massachusetts Supreme Court, thousands of same-sex couples have applied for marriage licenses in San Francisco and smaller numbers in New Mexico; New Paltz, New York; Asbury Park, New Jersey; and Multnomah County, Oregon (which includes Portland).[191] More than 170 gays and lesbians have joined a lawsuit in Florida challenging the law prohibiting same-sex marriages,[192] and in New York City, same-sex couples have begun filing for marriage licenses at city hall.[193] By making concrete the threat that same-sex marriage would expand beyond the boundaries of Massachusetts, these groups have rallied opponents of same-sex marriage to mobilize behind

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[190] Quoted in Report of Secretary to NAACP Board of Directors, Sept. 1955, p. 5, NAACP Papers, part 1, reel 2, frame 786.

[191] See, e.g., Dean E. Murphy, *Groups Ask California Supreme Court to Halt San Francisco Same-Sex Marriages*, *New York Times*, Feb. 26, 2004; Thomas Crampton, *Despite Charges, Mayor Pledges to Keep Marrying Gay Couples*, **New York Times**, March 4, 2004, p.A29; Matthew Preusch, *Oregon County, with Portland, Offers Same-Sex Marriages*, **New York Times**, March 4, 2004, p.A22; Thomas Crampton, *Issuing Licenses, Without Pomp in New Jersey*, **New York Times**, March 10, 2004, p.A24.

[192] See, e.g., Murphy, supra note __.

[193] Robert D. McFadden, *With Polite Refusal, Same-Sex Marriage Issue Reaches City Hall*, **New York Times**, March 5, 2004, p.A19.

state and federal constitutional amendments to limit marriage to unions between men and women.[194] But for *Goodridge*, such measures almost certainly would not be receiving the consideration that they are today.[195]

Thus, the most significant short-term consequence of *Goodridge*, as with *Brown*, may be the political backlash that it inspires.[196] By outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance. And while the violent southern backlash produced by *Brown* generated a

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[194] See, e.g., Dao, supra __ (noting that nearly two-dozen state legislatures are considering constitutional amendments forbidding same-sex marriage and that the granting of marriage licenses to same-sex couples in San Francisco is inspiring much of this activity); id. (Noting a conservative opponent of gay marriage making the point that "social conservatives had been particularly energized by the spectacle of San Francisco officials granting marriage licenses to gay couples").

[195] Cloud, supra note __ (noting little conservative interest until very recently in a federal constitutional amendment banning same-sex marriage).

[196] See Jeff Rosen, *Immodest Proposal: Massachusetts Gets it Wrong on Gay Marriage*, **New Republic**, Dec. 22, 2003 ("By trying to impose gay marriage by judicial fiat, the Massachusetts court may set back the cause of gay and lesbian equality rather than advance it."); Stuart Taylor, Jr., *Gay Marriage Isn't An Issue for the Courts to Decide*, **National Journal**, Nov. 22, 2003 ("The backlash [*Goodridge*] has provoked could conceivably prove powerful enough to set back the gay-rights movement for decades.").

counterbacklash in northern opinion, it is unlikely that gays and lesbians will face pervasive violence of the kind that outrages moderates and turns the tide of public opinion once and for all.[197]

VI. *The Future*

Brown and *Lawrence* have another important feature in common: Although on both the issues of racial equality and gay rights, public opinion was evenly divided at the time of the Court's ruling, future trends were not difficult to predict. In the justices' conference discussion of *Brown*, Stanley Reed predicted that segregation would disappear in the border states within fifteen or twenty years, even without judicial intervention.[198] Justice Jackson similarly observed that "segregation is nearing an end."[199] Given the propensity of constitutional law to suppress outliers,[200] such a shift in social practices might have ensured an eventual judicial ruling against

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[197] But cf. NBC News, *Meet the Press* (Feb. 22, 2004) (Governor Arnold Schwarzenegger reporting on "riots" in San Francisco over same-sex marriage and predicting, "The next thing we know is there are injured or there are dead people. . . .).

[198] Douglas conference notes, *Brown v. Board of Education*, 13 Dec. 1952, case file: segregation cases, Box 1150, Douglas Papers.

[199] Id.

[200] See Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 16-17 (1996).

segregation. A subsequent generation of justices, finding segregation even more abhorrent than their predecessors had, would have been sorely tempted to apply an ascendant national norm against segregation to shrinking numbers of holdout states. This is probably what Justice Jackson had in mind when he declared in his draft concurring opinion in *Brown* that "[w]hatever we might say today, within a generation [racial segregation] will be outlawed by decision of this Court."[201]

The future may be even easier to predict with regard to gay rights. The demographics of public opinion on issues of sexual orientation virtually ensures that one day in the not-too-distant future a substantial majority of Americans will support gay marriage.[202] Young people are dramatically more likely to support gay rights than are their elders. One recent poll shows that respondents aged 18 to 29 *favor* legalization of same-sex marriage by 56 percent to 40 percent, while those aged 65 and over *oppose* legalization by 79 percent to 14 percent. Nor is there reason to believe that as people get older, their attitudes on such issues become more

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[201] Jackson draft concurrence, supra note __, at 1.

[202] Rosen, supra note __ (noting that "two-thirds of Americans now say they believe that same-sex marriage will be legal within the next hundred years"); Frank Rich, *And Now, the Queer Eye for the Straight Marriage*, **New York Times**, Aug. 10, 2003, p.B1 (noting University of Chicago historian George Chauncy confidently predicting "the steady decline in opposition to same-sex marriage"); Editorial, *Canada's Celebration of Marriage*, **New York Times**, June 19, 2003, p.A24 (noting that movements toward accepting same-sex marriage in the United States "will be unstoppable in time, whatever the pace proves to be").

conservative (unlike attitudes toward wealth redistribution, which do become more conservative as people age and acquire more property). As an older generation holding more traditional views about sexual orientation fades from the scene and today's youth become tomorrow's policymakers, gay marriage will be increasingly accepted.[203] At some point, the Court is likely to constitutionalize that new consensus and invalidate statutory bans on same-sex marriage, much as the justices struck down restrictions on interracial marriage in *Loving v. Virginia* (1967), after the civil rights movement had made that last formal vestige of Jim Crow seem anachronistic.

To be sure, predicting the future can be fraught with peril. When the Supreme Court invalidated abortion restrictions in *Roe v. Wade*[204] and cast doubt upon the constitutionality of the death penalty in *Furman v. Georgia*,[205] the justices were probably imagining a future in which public opinion would have continued to move in the same direction that the Court was pushing.[206] Suffice it to say that on both occasions the justices' prediction proved mistaken.

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[203] See Robin Toner, *The Nation: To the Barricades*, **New York Times**, Feb. 29, 2004, § 4, p.1 (quoting Democratic pollster Anna Greenberg observing, "[I]t's really likely in 10 or 20 years that people won't understand what all the fuss was about. There's a whole generation of people growing up who just don't think about these issues in the same way.").

[204] 410 U.S. 113 (1973).

[205] 408 U.S. 238 (1972).

[206] See Dickson, supra note __, at 617 (reproducing the conference notes in *Furman v.*

Over the next three decades, public opinion on abortion changed very little from what it had been in 1973.[207] Public opinion on the death penalty shifted quickly and powerfully against the Court.[208]

Still, some predictions seem safer than others. The age disparities revealed by public opinion polls on issues of sexual orientation are so dramatic that only an unforeseeable event of enormous magnitude could disrupt the movement toward greater tolerance.

Georgia, in which Justice Stewart predicted, "Someday the Court will hold that the death sentence is unconstitutional"); Furman, 408 U.S. at 313 (White, J., concurring) (observing that the death penalty "has for all practical purposes run its course"); John C., Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 413-14 (1994).

[207] Compare Public Opinion Online, accession # 0380244 (on file with author) (reporting a Roper opinion poll from April 2001 revealing that 47 percent of Americans consider themselves pro-choice, as opposed to 41 percent who consider themselves pro-life), with id., accession # 0045804 (reporting a March 1974 Gallup poll showing that 47 percent of Americans supported *Roe v. Wade* and 44 percent opposed it).

[208] Jeffries, supra note __, at 414 (reporting Gallup polls and concluding that the increase in public support for the death penalty after *Furman* was "so sharp that it seems almost certain to have been a negative reaction to the Court's decision"); Carole S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 411-12 (1995) ("[I]t seems fair to say that *Furman* galvanized political opposition to abolition").

VII. *Conclusion*

Supreme Court justices sometimes claim that the Court's legitimacy derives from its ability to demonstrate that its rulings are based on sound legal principles rather than political calculations or personal preferences. In reaffirming the Court's landmark abortion-rights decision, *Roe v. Wade*, the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* declared that "the underlying substance of [the Court's] legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws."[209] Further, the plurality stated, "[A] decision without principled justification would be no judicial act at all,"[210] and "[t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures. . . ."[211]

In the 1950s, critics assailed *Brown v. Board of Education* as unprincipled judicial activism. Southern whites charged the Court with ignoring precedent, transgressing original intent, indulging in sociology, infringing on the reserved rights of states, and usurping legislative

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[209] *Casey*, 505 U.S. 833, 865 (1992) (plurality opinion).

[210] Id.

[211] Id.

authority.[212] One prominent newspaper editor in the South, James J. Kilpatrick, stated a typical view: "[I]n May of 1954, that inept fraternity of politicians and professors known as the United States Supreme Court chose to throw away the established law. These nine men repudiated the Constitution, sp[a]t upon the tenth amendment, and rewrote the fundamental law of this land to suit their own gauzy concepts of sociology."[213]

White southerners who sympathized with racial segregation were not the only critics of *Brown*. Some eminent jurists and law professors who condemned white supremacy also attacked the Court's reasoning. In 1958 Judge Learned Hand stated, "I have never been able to understand on what basis it [*Brown*] does or can rest than as a *coup de main*,"[214] and the following year Professor Herbert Wechsler castigated the Court for failing to justify its result in *Brown* on the basis of any "neutral principle."[215] Indeed, several of the justices themselves seemed unconvinced that *Brown* rested on a sound legal basis. Justice Jackson, for example, conceded that he could not "justify the abolition of segregation as a judicial act," but he agreed to "go along with it" as "a political decision."[216]

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[212] Klarman, supra note __, at 367-68 (citing relevant sources).

[213] *Southern School News*, June 1955, p.9.

[214] Learned Hand, **The Bill of Rights** 55 (1958).

[215] Wechsler, supra note __, at 32-34.

[216] Burton conference notes, School Segregation Cases, 12 Dec. 1953, Box 244, Burton Papers, Library of Congress.

In the fifty years since it was decided, *Brown* has become an American icon. Almost everyone regards the decision as right.[217] No constitutional theory is taken seriously unless it can accommodate the result in *Brown*.[218] Aspiring jurists who dared to question the soundness of *Brown* could not possibly survive Senate confirmation hearings.[219] In 1987 Judge Robert Bork

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[217] See, e.g., Jeffries, supra note __, at 330 (stating that *Brown* "is universally approved as both right and necessary[;] [m]ore powerful than any academic theory of constitutional interpretation is the legend of *Brown*").

[218] See, e.g., Robert Bork, The Tempting of America: The Political Seduction of the Law 77 (1990) (stating that "any theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*"); Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Re. 947, 952 (1995) (noting that any theory unable to accommodate Brown "is seriously discredited").

[219] See, e.g., Senate Comm. on the Judiciary, Nomination of William H. Rehnquist to be Chief Justice of the United States, S. Exec. Rep. No. 118, 99th Cong., 2d Sess. 25-26 (1986) (reproducing 1971 letter from William Rehnquist to Senator James Eastland denying that views hostile to the result in *Brown* expressed in a memorandum he authored as law clerk to Justice Jackson during the 1952 term were his own, and stating, "I . . . unequivocally . . . support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision").

criticized the Court's sexual-privacy decision, *Griswold v. Connecticut*,[220] and its landmark reapportionment ruling, *Reynolds v. Sims*,[221] but he emphasized his support for *Brown*.[222] This seismic shift in *Brown*'s status–from a much-criticized ruling that divided public opinion to a sacrosanct decision that is well-nigh universally applauded–may suggest that the Court's legitimacy flows less from the soundness of its legal reasoning than from its ability to predict future trends in public opinion.

Lawrence v. Texas may one day have a similar history. Contemporary critics of that decision have accused the justices of engaging in unprincipled activism, ignoring federalism and history, and inventing constitutional rights that have no foundation in the traditional sources of constitutional law.[223] *Lawrence*'s critics sound many of the same notes that *Brown*'s critics did

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[220] *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 116 (1987) ("[T]he right of privacy, as defined or undefined by Justice Douglas, was a free-floating right that was not derived in a principled fashion from constitutional materials.")

[221] Id. at 157 ("There is nothing in our constitutional history that suggests one man, one vote is the only proper way of apportioning. . . . [I]t does not come out of anything in the Constitution.")

[222] Id. at 104 ("*Brown*, delivered with the authority of a unanimous Court, was clearly correct and represents perhaps the greatest moral achievement of our constitutional law.")

[223] See, e.g., *Lawrence*, 123 S. Ct. at 2497 (criticizing the majority for the "invention of a

fifty years earlier. Yet, as we have seen, the demographics of public opinion on sexual-orientation issues suggest dramatic changes in the near future. Those changes have already been sufficient to lead a majority of justices to discard *Bowers v. Hardwick*. It may not be too much longer before *Bowers*comes to resemble *Plessy v. Ferguson*,[224] and *Lawrence* evolves into the *Brown* of the twenty-first century. Then, the Court's legitimacy will have been even further enhanced by virtue of the justices having rightly predicted the future on another great issue of social reform.

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brand-new 'constitutional right'" and subverting the democratic process); Dean E. Murphy, *Gays Celebrate, and Plan Campaign for Broader Rights*, **New York Times**, June 27, 2003, p.A20 (quoting Virginia Attorney General Jerry W. Kilgore criticizing *Lawrence* for undermining the states' "right to pass legislation that reflects the views and values of our citizens").

[224] 163 U.S. 537 (1896).