

BROWN AND LAWRENCE (AND GOODRIDGE)

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One year shy of the fiftieth anniversary of *Brown v. Board of Education*,¹ the Justices issued another equality ruling that is likely to become a historical landmark.² In *Lawrence v. Texas*,³ the Court invalidated a state law that criminalized same-sex sodomy. This article contrasts these 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.

Part I juxtaposes *Brown* and *Lawrence* to illustrate how judicial decisionmaking often involves an uneasy reconciliation of traditional legal

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I dedicate this Article to the memory of my mother, Muriel Klarman (1929–2004).

1. 347 U.S. 483 (1954).

2. See E.J. Graff, *The High Court Finally Gets It Right*, BOSTON GLOBE, June 29, 2003, at D11 (observing that “*Lawrence* is our *Brown v. Board of Education*”); Evan Thomas, *The War over Gay Marriage*, NEWSWEEK, July 7, 2003, at 38, 40 (quoting legal scholar David Garrow calling *Lawrence*, along with *Brown*, “one of the two most important opinions of the last 100 years”).

3. 539 U.S. 558 (2003).

sources with broader social and political mores and the personal values of the judges. Part II considers what these landmark decisions teach us about the relationship between Supreme Court decisions and movements for social reform. Part III examines the light these rulings shed on the *strategic* aspect of judicial decisionmaking: how courts sometimes temper their decisions in light of political constraints. Part IV considers the consequences of *Brown* and *Lawrence* (and *Goodridge v. Department of Public Health*⁴) and, especially, the political backlashes they ignited. Part V analyzes the rulings from the perspective of Supreme Court Justices attempting to predict the future. A brief conclusion speculates as to what such decisions—and history’s verdict upon them—teach us about the source of the Supreme Court’s legitimacy.

I. WHY *BROWN* AND *LAWRENCE* WERE HARD CASES

Legal scholars and political scientists have long debated how to understand judicial decisionmaking.⁵ One school, that of the “formalists,” argues that judges decide cases by interpreting legal sources, such as texts (statutes and constitutions), the original understanding of such documents, and legal precedents. According to an extreme version of this view, judges engaged in constitutional adjudication “lay the article of the Constitution which is invoked beside the statute which is challenged and . . . decide whether the latter squares with the former.”⁶ In its more moderate (and more plausible) form, formalism holds that judicial decisionmaking is significantly constrained by legal sources such as text, original understanding, and precedent, even though some room for judicial discretion remains.⁷ A competing school, that of the “realists” or the “attitudinalists,” argues that judicial interpretation mainly reflects the personal values of judges.⁸ In its crudest form, this perspective explains judicial decisionmaking as a reflection of what the judge ate for breakfast.⁹ In its subtler (and more plausible) form,

4. 798 N.E.2d 941 (Mass. 2003).

5. For an excellent summary of the current status of this debate within the political science community, see Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 *LAW & SOC. INQUIRY* 465 (2001).

6. *United States v. Butler*, 297 U.S. 1, 62 (1936).

7. For examples of law professors defending the moderate formalist position, see, for example, Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057 (1975), and Frederick Schauer, *Easy Cases*, 58 *S. CAL. L. REV.* 399 (1985). For examples of political scientists emphasizing the importance of the legal component in judicial decisionmaking, see *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* (Cornell W. Clayton & Howard Gillman eds., 1999) [hereinafter *SUPREME COURT DECISION-MAKING*] and LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 299–312 (1992).

8. For leading modern variants of the realist view, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 208–60 (1993); Jeffrey A. Segal & Alfred D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 *AM. POL. SCI. REV.* 557 (1989); and Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781 (1983).

9. See JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 *CORNELL L.Q.* 274 (1929).

this view is encapsulated in a famous statement by Justice Oliver Wendell Holmes: “The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”¹⁰ *Brown* and *Lawrence* demonstrate the extent to which judicial decisionmaking is influenced by nonlegal factors.¹¹

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*.¹²

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 December 1952 would have been “five to four in favor of the constitutionality of segregation in the public schools.”¹³ 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.¹⁴

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 that school segregation was permissible. By contrast, most of the Justices privately condemned segregation, which Justice Hugo Black called “Hitler’s creed.”¹⁵ 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,”¹⁶ not “the

10. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

11. For elaboration of this claim about the nature of judicial decisionmaking, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 4–6, 292–312, 446–54 (2004).

12. For a more complete discussion of the Justices’ internal deliberations in *Brown*, see *id.* at 292–312.

13. Memorandum from William O. Douglas, Assoc. Justice, U.S. Supreme Court, to Segregation Cases file (May 17, 1954) (on file with the Library of Congress, Manuscript Division, Douglas Papers, Box 1150).

14. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Stanley Reed, Assoc. Justice, U.S. Supreme Court (May 20, 1954) (on file with the University of Kentucky, Reed Papers).

15. *THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* 639 (Del Dickson ed., 2001) [hereinafter *THE SUPREME COURT IN CONFERENCE*] (reproducing the April 8, 1950, conference discussion in *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950)).

16. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to William O. Douglas, Assoc. Justice, U.S. Supreme Court (Nov. 19, 1942) (on file with the Library of Congress,

idiosyncrasies of a merely personal judgment.”¹⁷ In a memorandum he wrote in conjunction with the first flag-salute case in 1940,¹⁸ 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 [c]ase.”¹⁹

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 1948 he had hired the Court’s first black law clerk, William Coleman, Jr.²⁰ 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.”²¹ 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.²² To be sure, Frankfurter believed that the meaning of constitutional concepts can change over time,²³ but as he and his colleagues deliberated, public schools in twenty-one states and the District of 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,”²⁴

Douglas Papers), *quoted in* MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953*, at 130 (1997) [hereinafter UROFSKY, *DIVISION AND DISCORD*].

17. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring).

18. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

19. UROFSKY, *DIVISION AND DISCORD*, *supra* note 16, at 109 n.112 (quoting an undated memorandum in Justice Frankfurter’s handwriting found in the files on the flag salute cases).

20. UROFSKY, *DIVISION AND DISCORD*, *supra* note 16, at 260; MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 128–29 (1991) [hereinafter UROFSKY, *JUDICIAL RESTRAINT*].

21. Memorandum (first draft) from Felix Frankfurter (undated), *microformed on* Frankfurter Papers, pt. 2, reel 4, frame 378 (Univ. Publ’ns of Am. 1986)).

22. Memorandum from Alexander M. Bickel, Law Clerk, to Felix Frankfurter, Assoc. Justice, U.S. Supreme Court (Aug. 22, 1953), *microformed on* Frankfurter Papers, pt. 2, reel 4, frames 212–14 (Univ. Publ’ns of Am. 1986).

23. UROFSKY, *DIVISION AND DISCORD*, *supra* note 16, at 217–18, 222.

24. MARY FRANCES BERRY, *STABILITY, SECURITY, AND CONTINUITY: MR. JUSTICE BURTON AND DECISION MAKING IN THE SUPREME COURT 1945–1958*, at 142 (1978) (quoting Memorandum of Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Conference (Dec. 20, 1951) (on file with the Library of Congress, Manuscript Division, Burton Papers, no. 195, Box 238)).

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.²⁵ Indeed, on the basis of legislative history and precedent, Frankfurter had to concede that “*Plessy* is right.”²⁶

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.”²⁷ Yet, like Frankfurter, Jackson thought that judges were obliged to separate their personal views from the law, and he was loath to overrule precedent.²⁸

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.”²⁹ 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.³⁰

That the nine Justices who initially considered *Brown* would be uneasy about invalidating segregation is unsurprising. All of them had been appointed by Presidents Franklin D. Roosevelt and Harry S. Truman on the

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

26. Douglas Conference Notes, Nos. 2 & 4, *Briggs v. Elliott*, Dec. 12, 1953 (on file with the Library of Congress, Manuscript Division, Douglas Papers, Box 1150).

27. Letter from Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, to Charles Fairman, Professor, Stanford University 2 (Mar. 13, 1950) (on file with Library of Congress, Jackson Papers, Fairman file, Box 12).

28. *United States v. S.E. Underwriters Ass’n*, 322 U.S. 533, 589–95 (1944) (Jackson, J., dissenting); *Helvering v. Griffiths*, 318 U.S. 371, 403–04 (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 UCLA L. REV. 325, 326–30, 338–41 (1956).

29. Robert H. Jackson, Draft Memorandum, School Segregation Cases 1 (Mar. 15, 1954) (on file with Library of Congress, Manuscript Division, Jackson Papers, Segregation Cases, Box 184).

30. *Id.* at 5, 10.

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.”³¹ 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*³² 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.”³³

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.”³⁴ Jackson cautioned that “[h]owever desirable it may be to abolish educational segregation, we cannot, with a proper sense of responsibility, ignore the question whether the use of the judicial office to initiate law reforms that cannot get enough national public support to put them through Congress, is our own constitutional function.”³⁵ If the Court had to decide the question, Jackson lamented, “then representative government ha[d] failed.”³⁶

* * * * *

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*.³⁷ 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*³⁸—and a fairly recent one at that. Three of the six Justices who voted to invalidate the Texas same-sex sodomy statute—Sandra

31. Letter from Jackson to Fairman, *supra* note 27, at 2.

32. *Lochner v. New York*, 198 U.S. 45 (1905).

33. Memorandum of WHR (William H. Rehnquist), A Random Thought on the Segregation Cases (on file with Library of Congress, Manuscript Division, Jackson Papers, Box 184).

34. Harold H. Burton, Conference Notes, Segregation Cases (Dec. 13, 1952) (on file with Library of Congress, Burton Papers, Box 244).

35. Robert H. Jackson, Draft Concurrence, School Segregation Cases 7 (Dec. 7, 1953) (on file with Library of Congress, Manuscript Division, Jackson Papers, Segregation Cases, Box 184).

36. William O. Douglas, Conference Notes, *Briggs v. Elliott* and *Davis v. County School Board* (Dec. 12, 1953) (on file with Library of Congress, Manuscript Division, Douglas Papers, Segregation Cases, Box 1149).

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

38. 478 U.S. 186 (1986).

Day O'Connor, Anthony Kennedy, and David Souter—had co-authored the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁹ which stressed the importance of precedent to the rule of law: “Liberty finds no refuge in a jurisprudence of doubt.”⁴⁰ As Justice Antonin Scalia pointed out in his *Lawrence* dissent, the treatments of precedent in *Casey* and *Lawrence* are—to put it mildly—in some tension with one another.⁴¹

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.⁴²

Further, because Justices Kennedy and O'Connor generally disfavor identifying new fundamental rights or suspect classes,⁴³ both of their opinions in *Lawrence* rule the Texas statute deficient without applying a heightened standard of review.⁴⁴ Yet invalidating the law under minimum rationality review is difficult to justify, given the extreme deference the Court has traditionally shown when applying that standard.⁴⁵ Until 1961

39. 505 U.S. 833 (1992) (plurality opinion).

40. *Id.* at 844.

41. *Lawrence*, 539 U.S. at 587 (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); see Jeffrey Rosen, *Immodest Proposal: Massachusetts Gets It Wrong on Gay Marriage*, NEW REPUBLIC, Dec. 22, 2003, at 19 [hereinafter Rosen, *Immodest Proposal*] (criticizing the “cavalier treatment of precedent” in *Lawrence*).

42. 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).

43. 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 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); *United States v. Salerno*, 481 U.S. 739, 750–51 (1987) (Rehnquist, C.J., writing for the majority, in an opinion in which O'Connor, J., joined) (refusing to hold that a right against pretrial detention is “so rooted in the traditions and conscience of our people as to be ranked as fundamental” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))); *Plyler v. Doe*, 457 U.S. 202, 242–54 (1982) (Burger, C.J., dissenting, joined by O'Connor, J.) (denying that illegal aliens are a suspect class or that education is a fundamental right).

44. Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1449–50 (2004) (noting that the majority opinion in *Lawrence* fails to state what level of scrutiny it is applying to the Texas statute); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1578 (2004) (same).

45. 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 Co.*, 348 U.S. 483, 488–89 (1955) (applying an extremely deferential standard under minimum rationality review).

every state in the nation had a law forbidding same-sex sodomy.⁴⁶ It strains credulity to suggest that all those states were acting irrationally.⁴⁷

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 thought, belief, expression, and certain intimate conduct."⁴⁸ O'Connor both portrays the Texas statute as motivated by simple animus or hatred and rejects "moral disapproval" as a legitimate government purpose.⁴⁹ 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.⁵⁰ They offer no convincing bases for drawing such 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.⁵¹

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.⁵² 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."⁵³ Yet, Kennedy's and O'Connor's 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 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 aca-

46. *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986).

47. See *Lawrence*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (criticizing the majority for applying "an unheard-of form of rational-basis review"); *id.* at 604 (accusing the majority of "having laid waste the foundations of our rational-basis jurisprudence").

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

49. *Id.* at 580–81 (O'Connor, J., concurring).

50. *Id.* at 578; *id.* at 585 (O'Connor, J., concurring).

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

52. Cf. Cass Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 34 (noting that the Justices in the majority in *Lawrence* probably faced a dilemma because they thought the Texas statute had to be struck down but that any rationale for invalidation "would inevitably raise serious doubts about practices, including the ban on same-sex marriages, that the majority did not want to question").

53. *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)); see also Sunstein, *supra* note 52, at 31 (noting that *Lawrence* "was possible only because of the ludicrously poor fit between the sodomy prohibition and the society in which the Justices live").

demic experts cited invited criticism from McCarthyites.⁵⁴ Justice Jackson himself disparaged the NAACP's brief, which he said "starts and ends with sociology,"⁵⁵ 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."⁵⁶ Why Chief Justice Earl Warren chose to insert the controversial social science evidence into the footnote is unclear,⁵⁷ but the NAACP probably relied on it in the litigation partly because the conventional sources of constitutional interpretation were so unsupportive of the challenge to school segregation.⁵⁸

Similarly in *Lawrence*, the majority opinion relies partly on an unorthodox source for interpreting the U.S. Constitution: a decision by the European Court of Human Rights.⁵⁹ For the Justices to invoke a ruling from a foreign court as authority for their interpretation of the U.S. Constitution is virtually unprecedented. As Justice Scalia pointed out in his *Lawrence* dissent, it is also highly controversial.⁶⁰ 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

54. See 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).

55. Tom C. Clark, Conference Notes, *Brown v. Board of Education* (on file with University of Texas, Tarlton Law Library, Clark Papers, Box A27).

56. *S.C. Negroes Ask to Transfer to State University*, SO. SCH. NEWS (Nashville), Feb. 1958, at 7.

57. For some interesting speculation, see Mody, *supra* note 54, at 814–28, suggesting that the *Brown* Court relied on social science evidence to help legitimize a ruling that departed from conventional approaches to constitutional interpretation.

58. Cf. RICHARD KLUGER, *SIMPLE JUSTICE* 321 (1976) (noting that some NAACP lawyers ridiculed the social science evidence but that "Thurgood Marshall was taking all the help he could get").

59. *Lawrence*, 539 U.S. 558, 573 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (sec. A) (1981) as refutation of "the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization"); *id.* at 576 (noting subsequent decisions by the European Court of Human Rights adhering to *Dudgeon*).

60. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (calling the majority's invocation of foreign precedents "[d]angerous dicta"); see also Lund & McGinnis, *supra* note 44, at 1580–81 (criticizing the Court for looking to foreign legal decisions as support for an interpretation of the U.S. Constitution); Rosen, *Immodest Proposal*, *supra* note 41, at 21 (noting that the invocation of a ruling by the European court in *Lawrence* confirms the fears of social conservatives who dread the internationalization of U.S. domestic law).

In the spring of 2004, dozens of congressional representatives sponsored a resolution in the House criticizing the Supreme Court for citing foreign legal authority in recent decisions, including *Lawrence*. The Reaffirmation of American Independence Resolution declared that "inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States, the separation of powers and the President's and the Senate's treaty-making authority." H.R. Res. 568, 108th Cong. (2004). Rep. Tom Feeney, a Florida Republican who introduced the resolution, warned in an interview that judges who based their decisions on foreign precedents would risk the "ultimate remedy" of impeachment. Tom Curry, *A Flap over Foreign Matter at the Supreme Court*, MSNBC.com, Mar. 11, 2004, <http://www.msnbc.msn.com/id/4506232/>.

Justices' concern in *Lawrence* that the conventional sources of U.S. constitutional law did not adequately support the result.

II. COURT AS VANGUARD OR LAGGARD?

Scholars and judges have long disagreed about the extent to which the Supreme Court acts as a countermajoritarian force in U.S. society. Justice Black once stated the conventional wisdom in particularly ringing terms: Courts stand "as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are the non-conforming victims of prejudice and public excitement."⁶¹ In his famous concurring opinion in *Whitney v. California*,⁶² Justice Louis Brandeis similarly opined that one function of judicial review is to protect against "the occasional tyrannies of governing majorities."⁶³ Like-minded scholars have written that without judicial review "there would be little hope for rights or for equality,"⁶⁴ that courts "restrain the majority's worst excesses,"⁶⁵ and that judicial review "advances the cause of peaceful change" by preventing the "[o]ppression of individuals and minorities" that might encourage resort to the right of revolution.⁶⁶

By contrast, other scholars have denied that the Court has either the inclination or the capacity to play this role of "countermajoritarian hero."⁶⁷ In a classic article, the political scientist Robert Dahl observed that, given any reasonable set of assumptions about the nature of the political process, "it would appear to be somewhat naive to assume that the Supreme Court either would or could play the role of Galahad."⁶⁸ Law professor Barry Friedman

61. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

62. 274 U.S. 357 (1927).

63. *Id.* at 376 (Brandeis, J., concurring); see also *United States v. Eichman*, 496 U.S. 310, 318 (1990); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 902–03 (1990) (O'Connor, J., concurring in judgment); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 606 (1940) (Stone, J., dissenting).

64. JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 282 (1983).

65. Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 287 (1983).

66. Alpheus Thomas Mason, *The Warren Court and the Bill of Rights*, 56 YALE REV. 197, 210 (1967).

67. See generally Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 2 (1996) (citing examples of such scholarship).

68. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284 (1957). For additional scholarship denying that the Court is heroically countermajoritarian, see Robert G. McCloskey, *THE AMERICAN SUPREME COURT* 224 (1960) ("it is hard to find a single instance when the Court has stood firm for very long against a really clear wave of public demand"); David G. Barnum & John L. Sullivan, *The Elusive Foundations of Political Freedom in Britain and the United States*, 52 J. POL. 719, 731–32 (1990); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996); Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1973–74 (1990); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1890 (1991); and compare GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing

likewise denies the existence of any significant countermajoritarian function, contending instead that judicial review should be seen as part of a “dialogue” between the judicial and legislative branches.⁶⁹ *Brown and Lawrence* shed light on how countermajoritarian the Court’s rulings generally are.

As we have seen, 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.⁷⁰ And so they did. Although the Court had unanimously and casually endorsed public school segregation as recently as 1927,⁷¹ 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.⁷² 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 democracy, I thought that when we got back here we should enjoy a little of it.”⁷³ 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.

that courts cannot effectuate significant social change independently of broad extralegal forces and thus implicitly denying the existence of a substantial countermajoritarian problem); and Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993) (arguing that many landmark instances of judicial review, such as *Dred Scott v. Sandford*, 60 U.S. 393 (1857) and *Roe v. Wade*, 410 U.S. 113 (1973), involve not countermajoritarianism, but rather legislative delegation to courts of difficult issues that threaten to disrupt existing political coalitions).

69. Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577 (1993); accord Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 *U. CIN. L. REV.* 1257, 1259 (2004) [hereinafter Friedman, *Importance of Being Positive*] (arguing that the Supreme Court’s role in judicial review is mainly “forcing a conversation within the polity about what the Constitution should mean”); see also Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 *VA. L. REV.* 1537, 1551–52 (2004) (noting that courts only protect minority groups that the majority wishes to see protected).

70. For a similar example of this phenomenon, see *Bush v. Gore*, 531 U.S. 98 (2000). See generally Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 *CAL. L. REV.* 1721 (2001) (arguing that the result in *Bush* can only be understood as a reflection of the conservative Justices’ personal preferences).

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

72. The following discussion is based on KLARMAN, *supra* note 11, at 173–96 (citing relevant sources).

73. ROBERT J. NORRELL, *REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE* 60–61 (1998).

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."⁷⁴ After *Brown*, supporters of the decision boasted that the United States' leadership of the free world "now rests on a firmer basis" and that American democracy had been "vindicat[ed] . . . in the eyes of the world."⁷⁵

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 three percent in 1940 to twenty percent in 1952.⁷⁶ 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 recent changes. Sherman Minton detected "a different world today" with regard to race.⁷⁷ 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."⁷⁸ 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 dra-

74. Brief for the United States as Amici Curiae at 6, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 121 (Philip B. Kurland & Gerhard Casper eds., 1975).

75. *Educators Comment on Schools Decision*, CHI. DEFENDER, May 22, 1954, at 5.

76. DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965, at 7 tbl.1-1 (1978).

77. Harold H. Burton, Conference Notes, School Segregation Cases (Dec. 12, 1953) (on file with Library of Congress, Manuscript Division, Burton Papers, Box 244).

78. Memorandum from Felix Frankfurter, *supra* note 21.

matic advances in the annals of man.”⁷⁹ Blacks had thus overcome the pre-sumptions 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.”⁸⁰ The 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. By the time the Court struck down school segregation, polls revealed that a narrow majority of Americans approved of the decision.⁸¹

Lawrence, like *Brown*, came in the wake of extraordinary changes in attitudes and practices regarding homosexuality.⁸² 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.⁸³ In the seventeen years between *Bowers* and *Lawrence*, public opinion went from *opposing* the legalization of homosexual relations by fifty-five percent to thirty-three percent to *supporting* legalization by sixty percent to thirty-five percent.⁸⁴ Many states, either through legislative or judicial action, nullified laws criminalizing same-sex sodomy.⁸⁵ Several states and scores of cities added protection for sexual orientation to their antidiscrimination laws.⁸⁶ Nearly two hundred Fortune 500 companies extended job-related benefits to gay partners,⁸⁷ as did several states and scores of municipalities for their public employees.⁸⁸ The Hawaii Supreme Court invalidated

79. Jackson, *supra* note 29, at 1, 19–21.

80. Memorandum from William O. Douglas (Jan. 25, 1960), *reprinted in* THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 169 (Melvin I. Urofsky ed., 1987).

81. GEORGE H. GALLUP, 2 THE GALLUP POLL: PUBLIC OPINION 1935–1971, at 1249–50 (1972) (noting polls in the summer of 1954 showing fifty-four percent approving of *Brown* and forty-one percent disapproving); *see also* Balkin, *supra* note 69, at 1538–39 (noting that one lesson of *Brown* is that the Court acts largely in accordance with national majorities).

82. *See, e.g.*, Sunstein, *supra* note 52, at 28–29 (noting that “[i]n the area of sexual orientation, America is in the midst of a civil rights revolution”).

83. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

84. Gallup Poll, May 5–7, 2003, Public Opinion Online, The Roper Center, University of Connecticut, accession # 0429847, *available at* Westlaw, Public Opinion Online Database; *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 during the 1990s in the percentage of Americans who regard same-sex relations as wrong).

85. WILLIAM N. ESKRIDGE, JR., *GAY LAW: CHALLENGING THE APARTHEID OF THE CLOSET* 168 (1999).

86. *Id.* at 130, 139, 233, app. B2; BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* 123 (1987).

87. Thomas, *supra* note 2, at 45 (noting the number of Fortune 500 companies offering benefits to gay partners rose from 1 in 1992 to 197 in 2003).

88. John Cloud, *The Battle over Gay Marriage*, TIME, Feb. 16, 2004, at 56; Lisa Duggan, *Holy Matrimony!*, NATION, Mar. 15, 2004, at 14.

a ban on same-sex marriage,⁸⁹ and the Vermont Supreme Court ruled that same-sex couples must at least be permitted to form “civil unions.”⁹⁰ 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.⁹¹ In 2003 the Episcopal Church ordained its first openly gay bishop.⁹²

Both *Brown* and *Lawrence* reflected, at least as much as 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.⁹³ On some public policy disputes that become constitutional 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.⁹⁴

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.⁹⁵ 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 supportive of gay rights than are average Americans. For example, one poll taken in 1999 found that seventy-four percent of respondents with post-graduate education would vote for a well-qualified homosexual for president but only forty-six percent of high school dropouts would do so.⁹⁶ Yet, on

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

90. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

91. CRAIG A. RIMMERMAN, *FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES I* (2002).

92. See Laurie Goodstein, *Openly Gay Man Is Made a Bishop*, N.Y. TIMES, Nov. 3, 2003, at A1.

93. Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 189–91 (1998).

94. *Id.* at 190 n.245.

95. 2 GALLUP, *supra* note 81, at 1250.

96. Gallup Poll, Feb. 19–21, 1999, Public Opinion Online, The Roper Center, University of Connecticut, accession # 0365291, available at Westlaw, Public Opinion Online Database; see also Press Release, George Gallup, The Gallup Poll, Little Change Found in Public's Acceptance of Homosexuality (Nov. 7, 1982) [hereinafter Gallup, Little Change] (on file with author) (noting that a poll conducted in June 1982 found that among those with a college education 44% thought that homosexuality was an acceptable lifestyle and 46% thought not, while among those with only a high school education the corresponding numbers were 32% and 52%, and among those with only a grade school education the numbers were 17% and 59%); Press Release, George Gallup, Difficult Lot of Homosexual Seen in New Survey Findings (July 19, 1977) [hereinafter Gallup, Difficult Lot] (on file with the American Institute of Public Opinion) (noting a poll showing that among those with

gay-rights issues, another of the Justices' systemic biases has a partially off-setting 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 fifty-eight percent to thirty-nine percent, while those aged sixty-five and over oppose legalization by sixty-one percent to twenty-four percent.⁹⁷ 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 by the time their grievances had reached the Supreme Court. To be sure, *Brown* occurred earlier in the course of the civil rights movement than *Lawrence* did in the course of the gay-rights movement.⁹⁸ Opinion polls showed only a slender national majority supporting *Brown* in 1954, whereas by 2003 it was hard to find anyone supporting criminal prosecution for private, consensual, adult same-sex relations.⁹⁹ But neither ruling was at the vanguard of a social reform movement, as was the California Supreme Court decision in 1948 striking down a ban on interracial marriage¹⁰⁰ or the Massachusetts Supreme Court decision in 2003 striking down a ban on same-sex marriage.¹⁰¹ The U.S. Supreme Court rarely, if ever, plays such an adventurous role.¹⁰²

a college background 57% thought that homosexual relations should be legal and 35% that they should not, while among those with a high school education the corresponding numbers were 42% and 44%, and among those with only a grade school education the numbers were 21% and 57%).

97. Katharine Q. Seelye & Janet Elder, *Strong Support Is Found for Ban on Gay Marriage*, N.Y. TIMES, Dec. 21, 2003, at A1; see also NAT'L PUB. RADIO, GAY MARRIAGE AND CIVIL UNIONS (2003) (noting that people aged eighteen to twenty-nine oppose gay marriage by 45% to 39%, whereas people aged sixty-four and over oppose it by 75% to 18%); Public Opinion Online, *supra* note 96 (reporting an opinion poll finding that 65% of people under aged twenty-nine would vote for a qualified homosexual for president but only 39% of people aged seventy and older would do so); Gallup, Little Change, *supra* note 96 (noting that a poll conducted in June 1982 found that among those aged 18 to 29, 40% thought homosexuality was an acceptable lifestyle and 46% did not, while among those aged 30 to 49 the corresponding numbers were 37% and 50%, and among those aged 50 and older the numbers were 25% and 57%); Gallup, Difficult Lot, *supra* note 96 (reporting a poll taken in 1977 that showed that among those aged 30 and under, 57% thought that homosexual relations should be legal and 34% thought they should not, while among those aged 30 to 49 the corresponding numbers were 47% and 41%, and among those 50 and over the numbers were 29% and 53%).

98. Balkin, *supra* note 69, at 1542 & n.24.

99. See *infra* notes 340–345 and accompanying text.

100. *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

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

102. See Balkin, *supra* note 69, at 1546 (observing that the Supreme Court is better at "piling on" than at "tackling"); Friedman, *Importance of Being Positive*, *supra* note 69, at 1279 (concluding that "the Court operates on a leash," which prevents it from deviating far from public opinion).

III. JUDICIAL STRATEGIZING—EVADING THE MARRIAGE ISSUE

Scholars have written a good deal about the strategic element of judicial decisionmaking—that is, the extent to which judges decide cases not simply on the basis of good-faith interpretations of the relevant legal sources but also on calculations regarding the political feasibility of implementing various rulings. Political scientists especially have described many such instances of judicial strategizing.¹⁰³ Legal scholars have been more inclined to debate the normative defensibility of such politically informed decisionmaking.¹⁰⁴ Both *Brown* and *Lawrence* illustrate this strategic aspect of judicial decisionmaking.

Both opinions were consciously written narrowly to avoid resolving the whole range of issues regarding classifications based on race and sexual orientation. *Brown* was decided as an education case. The Court emphasized that “education is perhaps the most important function of state and local governments”¹⁰⁵ and held only that “[s]eparate educational facilities are inherently unequal.”¹⁰⁶ 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.¹⁰⁷

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”¹⁰⁸ and “to mongrelize the white race.”¹⁰⁹ For

103. For scholarship emphasizing the strategic aspects of judicial decisionmaking, see WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 171–75, 186–97, 204–10 (1964); Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, in *CONTEMPLATING COURTS* 315 (Lee Epstein ed., 1995); Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 *STUD. AM. POL. DEV.* 229 (1998); Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 *CONST. COMMENT.* 67 (1995); Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 *VA. L. REV.* 1111, 1157–64 (2001); Klarman, *supra* note 70, at 1757–60; Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 *L. & Soc’y REV.* 87 (1996); and Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutional-ist Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING*, *supra* note 7, at 43–63.

104. Compare ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 174 (1962) (defending strategizing in some circumstances), with PAUL M. BATOR ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 660–62 (2d ed. 1973) (criticizing such strategizing), and Gerald Gunther, *The Subtle Vices of the “Passive Virtues” A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1, 11–12 (1964) (same); see also CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

105. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added).

106. *Id.* at 495 (emphasis added).

107. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 *MICH. L. REV.* 213, 241–43 (1991).

108. *Alabama: Marengo Meeting*, *SO. SCH. NEWS* (Nashville), Jan. 6, 1955, at 2.

109. *Attacks NAACP*, *SO. SCH. NEWS* (Nashville), Nov. 1955, at 9 (quoting state senator Sam Engelhardt of Macon County, Ala.). For additional statements to similar effect, see TOM BRADY, *BLACK MONDAY* 64–67 (1954); HERMAN E. TALMADGE, *YOU AND SEGREGATION* 42–44 (1955); and Walter B. Jones, *I Speak for the White Race*, *MONTGOMERY ADVERTISER*, Mar. 4, 1957, *microformed on Papers of the NAACP*, pt. 20, reel 4, frame 436 (Univ. Publ’ns of Am.).

the Justices to strike down antimiscegenation laws so soon after *Brown* might have appeared to validate such suspicions. Moreover, opinion polls in the 1950s revealed that over ninety percent of whites—even outside of the South—opposed interracial marriage.¹¹⁰ 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.¹¹¹ 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.¹¹²

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* cases seemed to require additional explanation. Yet the Justices provided none, instead issuing cursory per curiam opinions that merely cited *Brown*.¹¹³ Those legal academics most committed to “reasoned elaboration” in judicial decisionmaking were virtually apoplectic.¹¹⁴

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. The case was *Naim v. Naim*.¹¹⁵ There, 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 when state courts had

110. 2 GALLUP, *supra* note 81, at 1572.

111. Transcript of Oral Argument at 10–11, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 413), reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES, *supra* note 74, at 405–06. Justice Frankfurter asked counsel whether striking down school segregation would necessarily lead the Court to invalidate antimiscegenation laws and then praised the answer that such legislation would be suspect but not necessarily prohibited. *Id.*

112. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 664–70 (1994).

113. *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).

114. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 164–70 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Wechsler, *supra* note 54, at 11–12, 15–17.

115. *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), *vacated*, 350 U.S. 891 (1955).

rejected federal claims that were not “insubstantial.”¹¹⁶ 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.”¹¹⁷ 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.”¹¹⁸

Both clerks underestimated the desperation and creativity of the Justices. Though several Justices wished to take jurisdiction,¹¹⁹ 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 statutory prohibition.¹²⁰ 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.¹²¹

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.”¹²² (Indeed, in 1954 the Court had denied certiorari in another southern miscegenation case.¹²³) But *Naim* was an appeal, and Frankfurter admitted that the challenge to antimiscegenation laws “cannot be rejected as frivolous.”¹²⁴ Still, the “moral considerations” for dismissing the appeal “far outweigh the technical considerations in noting jurisdiction.”¹²⁵ To thrust the miscegenation issue into “the vortex of the present disquietude” would risk “thwarting or seriously handicapping the

116. 28 U.S.C. § 1257 (1952).

117. Memorandum from WAN (William A. Norris, Law Clerk) to William O. Douglas, Assoc. Justice, U.S. Supreme Court, Certiorari in *Naim v. Naim* (Oct. 24, 1955) (on file with Library of Congress, Manuscript Division, Douglas Papers, Office Memos, nos. 350–99, Box 1164); see also Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 149–50 (1998) (noting other similar statements).

118. Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 63 (1979) (quoting Memorandum of AJM, Law Clerk, to Harold H. Burton, Assoc. Justice, U.S. Supreme Court, Certiorari in *Naim v. Naim* (Oct. 1955)).

119. Dorr, *supra* note 117, at 153–54; Hutchinson, *supra* note 118, at 64.

120. Tom C. Clark, handwritten note to Robert H. Jackson, *Naim v. Naim* (on file with the University of Texas, Tarlton Law Library, Clark Papers, Box A47).

121. Memorandum from WAN (William A. Norris, Law Clerk) to William O. Douglas, Assoc. Justice, U.S. Supreme Court, Supplemental memorandum regarding *Naim v. Naim* (undated) (on file with Library of Congress, Manuscript Division, Douglas Papers, Office Memos, nos. 350–99, Box 1164).

122. Felix Frankfurter, Memorandum, *Naim v. Naim* (*microformed on* Frankfurter Papers, pt. 2, reel 17, frames 588–90 (Univ. Publ’ns of Am. 1986)).

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

124. Felix Frankfurter, Memorandum, *supra* note 122.

125. *Id.*

enforcement of [*Brown*].”¹²⁶ 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 constitutional question.¹²⁷ 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.¹²⁸ Virginia newspapers treated the state court’s response as an instance of nullification.¹²⁹

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. The Court could summarily vacate the state judgment to “punish” Virginia for its disobedience.¹³⁰ 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.”¹³¹ 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.”¹³²

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 federal question.”¹³³ 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 decisionmaking scored the Court for taking action that was “wholly without basis in the law.”¹³⁴ Not until the 1960s

126. *Id.*

127. *Naim v. Naim*, 350 U.S. 891 (1955); Hutchinson, *supra* note 118, at 64–66.

128. *Naim v. Naim*, 90 S.E.2d 849 (Va. 1956).

129. *See Dorr*, *supra* note 117, at 156.

130. Memorandum from WAN (William A. Norris, Law Clerk) to William O. Douglas, Assoc. Justice, U.S. Supreme Court, *Certiorari in Naim v. Naim* (Mar. 1, 1956) (on file with Douglas Papers, Office Memos, nos. 350–99, Box 1164).

131. *Id.*

132. *Id.*

133. *Naim v. Naim*, 350 U.S. 985 (1956); *see also* Handwritten Note from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Tom. C. Clark, Assoc. Justice, U.S. Supreme Court (undated) (on file with Library of Congress, Manuscript Division, Clark Papers, Box A47) (noting that Frankfurter’s proposed disposition of the case, which is what the Court ultimately adopted, “fills me with hope, confident hope, that my anxiety will soon be lifted”).

134. Wechsler, *supra* note 54, at 34; *see also supra* note 114 and accompanying text.

would the Court announce a presumptive ban on racial classifications,¹³⁵ and not until 1967 would it strike down antimiscegenation laws.¹³⁶

* * * * *

In *Lawrence*, the Justices likewise strained to avoid resolving the same-sex marriage issue.¹³⁷ Justice Kennedy's majority opinion emphasized that the case involved "the most private human conduct, sexual behavior, and in the most private of places, the home."¹³⁸ He also carefully noted that the case did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."¹³⁹ Justice O'Connor's concurring opinion similarly stressed 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."¹⁴⁰ Further, she noted that in its effort to defend its ban on same-sex sodomy, Texas had failed to assert a legitimate interest, "such as national security or preserving the traditional institution of marriage."¹⁴¹ O'Connor even went 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."¹⁴² 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. Just 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.¹⁴³

Justice O'Connor's constitutional jurisprudence—and, perhaps to a somewhat lesser extent, Justice Kennedy's—reveals a strong sensitivity to public opinion.¹⁴⁴ On the question of whether it was constitutional to execute

135. *McLaughlin v. Florida*, 379 U.S. 184, 192–93, 196 (1964); *id.* at 197 (Harlan, J., concurring).

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

137. See Karlan, *supra* note 44, at 1459–60 (noting that the majority in *Lawrence* may have feared that invalidating the Texas law under the Equal Protection Clause would have required it to strike down all laws treating gays and straights differently, including marriage laws).

138. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

139. *Id.* at 578.

140. *Id.* at 585 (O'Connor, J., concurring).

141. *Id.*

142. *Id.*

143. See *infra* notes 340–345 and accompanying text.

144. See, e.g., Friedman, *Importance of Being Positive*, *supra* note 69, at 1302.

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.¹⁴⁵ 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.¹⁴⁶ No Court on which O'Connor is the median Justice will invalidate bans on same-sex marriage any time soon.

Yet just as *Brown* led inexorably, albeit gradually, to a presumptive judicial ban on all racial classifications, so is *Lawrence* likely to lead eventually to a presumptive judicial ban on all classifications based on sexual orientation.¹⁴⁷ 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.¹⁴⁸ *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.¹⁴⁹ The subsequent 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.¹⁵⁰

145. Compare *Atkins v. Virginia*, 536 U.S. 304, 310, 314–15 (2002) (majority opinion joined by O'Connor, J. and Kennedy, J.) (holding unconstitutional the execution of the mentally retarded, partly on the basis of “the dramatic shift in the state legislative landscape that has occurred in the . . . 13 years [since *Penry*]”) with *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (O'Connor, J., joined by Kennedy, J.) (rejecting a constitutional challenge to the execution of the mentally retarded partly because “there is insufficient evidence of . . . a consensus today” against the practice).

146. 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. 306 (2003), which apparently upheld affirmative action in law school admissions partly because the practice was endorsed by leading societal institutions such as the military and Fortune 500 companies, with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion); *United States v. Paradise*, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting); and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), all of which invalidated affirmative plans or at least subjected them to rigorous scrutiny.

147. Robert P. George & David L. Tubbs, *Why We Need a Marriage Amendment*, CITY J., Autumn 2004, at 48 (noting that the Court may be reluctant to impose same-sex marriage now but that eventually it “is almost certain to nationalize the issue and make same-sex-marriage legal from coast to coast”).

148. *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting); see also *id.* at 601 (noting that Justice O'Connor's Equal Protection rationale “leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples”).

149. See Sunstein, *supra* note 52, at 72.

150. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The court in *Goodridge* rejected three interests proffered by the state to justify denying marriage to same-sex couples: (1) creating a favorable setting for procreation; (2) ensuring that childrearing take place in “optimal” settings; (3) saving state resources by limiting the scope of the marriage “subsidy.”

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.¹⁵¹ Figuring out how the Court in such a case would distinguish *Lawrence* is an interesting question.¹⁵² Perhaps the Court would simply refuse to take such a case, much as the Justices after *Brown* managed to evade the antimiscegenation issue in *Naim*.¹⁵³ Alternatively, the Justices might adopt the unorthodox strategy pursued by Justice Kennedy in *Romer v. Evans*¹⁵⁴ 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 of same-sex marriage. If public opinion on that issue becomes more tolerant—as I suggest below is almost certain to happen¹⁵⁵—then the Court is likely to extend *Lawrence*'s condemnation of “moral disapproval” of homosexuality and invalidate bans on same-sex marriage.¹⁵⁶ The critical development in both arenas will have been changes in public opinion, not the inexorable doctrinal logic of the earlier decision.

IV. CONSEQUENCES

Scholars have long disagreed about how consequential Supreme Court rulings tend to be.¹⁵⁷ Some have argued that such decisions make little if any

151. See, e.g., Jonathan Rauch, *The Supreme Court Ruled for Privacy—Not for Gay Marriage*, 35 NAT'L J. 2402, 2402–03 (JULY 26, 2003) (noting that this conservative Supreme Court is not going to “ram same-sex marriage down the throat of an unwilling public”).

152. See Sunstein, *supra* note 52, at 72 (speculating that the Court would distinguish same-sex marriage from *Lawrence* on the ground that public opinion still strongly supports the traditional definition of marriage).

153. Cf. *Lofton v. Sec'y of Fla. Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005); Charles Lane, *Gay-Adoption Ban in Florida to Stand*, WASH. POST, Jan. 11, 2005, at A4 (noting the Court's refusal to hear a challenge to Florida's unique statute banning adoptions by gays and suggesting that this action “may signal the Court's reluctance to move into a potentially charged area”).

154. 517 U.S. 620 (1996).

155. See *infra* notes 381–392 and accompanying text.

156. Cf. Sunstein, *supra* note 52, at 31 (“The Supreme Court may or may not read *Lawrence* to require states to recognize gay and lesbian marriages. But if and when it does so, it will be following public opinion, not leading it.”).

157. For scholarship, much of it by political scientists, examining the impact of Supreme Court decisions, see, for example, KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, *THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE* 133–53 (1971); JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE*

difference, while others have claimed that they can be of enormous importance. In the race context, for example, we hear at one end of the spectrum that *Brown v. Board of Education* created the civil rights movement and, at the other, that it had no impact whatsoever.¹⁵⁸ Examining the consequences of *Brown* and *Lawrence* illustrates the unpredictable, and occasionally perverse, consequences of Supreme Court rulings.¹⁵⁹

A. Brown's Backlash

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.¹⁶⁰ 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.¹⁶¹ *Brown* was also enormously symbolic to African Americans, many of whom regarded it as the greatest victory for their race since the Emancipation Proclamation.¹⁶² In addition, *Brown* inspired southern blacks to file petitions and lawsuits challenging school segregation, including in dozens of localities in the Deep

192–209 (1978); LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., 1998); ROSENBERG, *supra* note 68; SEGAL & SPAETH, *supra* note 8, at 333–55; STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970); Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715 (1992); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (1993).

158. On the importance of *Brown* specifically, compare ROSENBERG, *supra* note 68, at 71, 169, 338, and Gerald N. Rosenberg, *Brown is Dead! Long Live Brown!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161, 171 (1994), which deny that *Brown* had any significant positive impact on the movement for racial equality, with JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 12, 116 (1994), and Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991), which argue that *Brown* was instrumental to the modern civil rights movement. For other extravagant assessments of *Brown*'s importance, see DAVISON M. DOUGLAS, READING, WRITING & RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS 25 (1995); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 15 (1998); J. HARVIE WILKINSON, FROM *Brown* TO *Bakke*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 6 (1979); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988); and Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 973–74, 976, 1006–07, 1017, 1029 (2005). For a more measured assessment, see Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1708–12 (2004), which agrees with Rosenberg that the contribution of *Brown* to the transformation of U.S. race relations “is easily exaggerated” but nonetheless concludes that the Supreme Court might have played an important role in articulating the principles of New Deal liberalism. For my own views on this subject, see KLARMAN, *supra* note 11, ch. 7.

159. On the idea of backlash generally, see Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989); Friedman, *Importance of Being Positive*, *supra* note 69, at 1291–93; and Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, J. AM. HIST., June 1994, at 81.

160. On massive resistance, see generally NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969), and NEIL R. McMILLEN, THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954–62 (1971). On the lack of desegregation in the first decade, see KLARMAN, *supra* note 11, at 344–63.

161. KLARMAN, *supra* note 11, at 364–65.

162. *Id.* at 369.

South, where such challenges would otherwise have been inconceivable in the mid-1950s.¹⁶³

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.¹⁶⁴

In the short term, *Brown* retarded progressive racial reform in the South. With school 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.¹⁶⁵ *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*.¹⁶⁶ The post-*Brown* backlash in the South also reversed progress in desegregating sporting competitions, including minor league baseball and intercollegiate football and basketball.¹⁶⁷ 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.¹⁶⁸ 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*.¹⁶⁹

Most importantly, in the wake of *Brown*, political contests in southern states assumed a 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."¹⁷⁰ Most moderates either joined the segregationist bandwagon, or they were retired from service. A Virginia politician observed that it "would be

163. *Id.* at 368–69.

164. For a more detailed exegesis of this backlash argument, see *id.* at 385–442.

165. *Id.* at 392–93.

166. 339 U.S. 629 (1950); see KLARMAN, *supra* note 11, at 393.

167. KLARMAN, *supra* note 11, at 393–94.

168. *Patterson Inaugurated with Pledge to Continue Separation of State Schools*, So. SCH. NEWS (Nashville), Feb. 1959, at 16.

169. Margaret Price, Draft of Joint Interagency Fact Finding Project on Violence and Intimidation 51–52, *microformed on Papers of the NAACP*, pt. 20, reel 11, frames 388–89 (Univ. Publ'ns of Am.).

170. KLARMAN, *supra* note 11, at 391 (citations omitted).

suicide to run on any other platform [than segregation].”¹⁷¹ A liberal southern editor explained that “it takes guts NOT to come out for segregation every day.”¹⁷²

Although most southern politicians avoided explicit exhortations to violence, the extremist rhetoric they used probably encouraged it. Marvin Griffin, the Democratic nominee for governor of Georgia, condemned violence but also insisted that “no true Southerner feels morally obliged to recognize the legality of this act of tyranny [*Brown*].”¹⁷³ Senator James Eastland of Mississippi cautioned that “[a]cts of violence and lawlessness 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 integrate against their will.”¹⁷⁴ Congressman James Davis of Georgia insisted that “[t]here is no place for violence or lawless acts,”¹⁷⁵ 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.”¹⁷⁶ 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 benefited 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.¹⁷⁷

After *Brown*, Birmingham’s racial progress ground to a halt, and Connor resurrected his political career. In 1957 he regained his city commission seat, defeating an incumbent he attacked as weak on segregation. In the late

171. *Virginia’s Pupil Placement Act Is Under Challenge in Two Courts*, SO. SCH. NEWS (Nashville), July 1957, at 3.

172. Stan Opatowsky, *Dixie Dynamite: The Inside Story of the White Citizens’ Councils* 18 (Jan. 1957), *microformed on Papers of the NAACP*, pt. 20, reel 13, frames 670, 685 (Univ. Publ’ns of Am.).

173. *Georgia*, SO. SCH. NEWS (Nashville), Nov. 4, 1954, at 10.

174. Sen. James Eastland, *The South Will Fight!*, ARK. FAITH, Dec. 1955, at 8–9, *microformed on Papers of the NAACP*, pt. 20, reel 13, frames 303–04 (Univ. Publ’ns of Am.).

175. Speech of Hon. James C. Davis of Georgia, in *Defense of Constitutional Government, and State Sovereignty*, Delivered at West Memphis, Ark. (Mar. 31, 1956), *reprinted in* 102 CONG. REC. 5, 6825 (1956).

176. *Id.* at 6822.

177. For this paragraph, see KLARMAN, *supra* note 11, at 429–30 (citing relevant sources).

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.¹⁷⁸

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 ten weeks, spin-off demonstrations had spread to over 100 cities.¹⁷⁹

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 four percent before Birmingham to fifty-two percent after.¹⁸⁰ 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"¹⁸¹ and propose landmark civil rights legislation that would end Jim Crow.¹⁸²

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."¹⁸³

Wallace made good on that promise in 1962, winning on a campaign promise of defying federal integration orders, "even to the point of standing

178. For this paragraph, see *id.* at 430–31 (citing relevant sources).

179. For this paragraph, see *id.* at 433–36 (citing relevant sources).

180. 3 GALLUP, *supra* note 81, at 1812, 1842.

181. CARL M. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION 260 (1977) (quoting Kennedy).

182. For this paragraph, see KLARMAN, *supra* note 11, at 435–36 (citing relevant sources).

183. DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 96 (1995) (footnote omitted). For this paragraph generally, see KLARMAN, *supra* note 11, at 399, 436–37 (citing relevant sources).

at the school house door in person."¹⁸⁴ 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."¹⁸⁵

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 the 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.¹⁸⁶

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,"¹⁸⁷ 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 rights era, and Wallace received much of the blame.¹⁸⁸

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."¹⁸⁹ A white teenager 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."¹⁹⁰ The NAACP urged its members to "flood Congress with letters in support of necessary civil rights legislation to curb such outrages."¹⁹¹

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

184. *Ribicoff Proposal on Impact Aid Alarms Alabama Educators*, SO. SCH. NEWS (Nashville), Apr. 1962, at 3.

185. *Gov. Wallace Reaffirms Intent to Keep Segregation*, SO. SCH. NEWS (Nashville), Feb. 1963, at 10.

186. For this paragraph, see KLARMAN, *supra* note 11, at 437 (citing relevant sources).

187. CARTER, *supra* note 183, at 173 (quoting George Wallace).

188. For this paragraph, see KLARMAN, *supra* note 11, at 437–38 (citing relevant sources).

189. Letter from Donald B. Brown to Roy Wilkins, National Secretary, NAACP (Sept. 18, 1963), *microformed on Papers of the NAACP*, pt. 20, reel 3, frame 941 (Univ. Publ'ns of Am.).

190. Letter from Robert E. Feir to Roy Wilkins, National Secretary, NAACP (Sept. 23, 1963), *microformed on Papers of the NAACP*, pt. 20, reel 3, frame 959 (Univ. Publ'ns of Am.).

191. Press Release, NAACP, NAACP Units Hold Services for Birmingham Bomb Victims (Sept. 21, 1963), *microformed on Papers of the NAACP*, pt. 20, reel 3, frame 986 (Univ. Publ'ns of Am.).

enforcement officer of Bull Connor-like proclivities. Dallas County Sheriff Jim Clark had a vicious temper, especially when it came to black people asserting their civil rights.¹⁹²

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.”¹⁹³ 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.¹⁹⁴

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.”¹⁹⁵ 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. U.S. citizens demanded remedial action from their congressmen, scores of whom condemned the “deplorable” violence and the “shameful display” of Selma and endorsed voting rights legislation.¹⁹⁶ 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.”¹⁹⁷

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.¹⁹⁸

192. For this paragraph, see KLARMAN, *supra* note 11, at 440 (citing relevant sources).

193. STEPHEN L. LONGNECKER, *SELMA'S PEACEMAKER: RALPH SMELTZER AND CIVIL RIGHTS MEDIATION* 176 (1987) (quoting George Wallace); *see also* CARTER, *supra* note 183, at 249 (noting that Wallace's chief law enforcement lieutenant insisted that the governor himself had ordered the use of force).

194. For this paragraph, see KLARMAN, *supra* note 11, at 440–41 (citing relevant sources).

195. *The Nation: Civil Rights*, *TIME*, Mar. 19, 1965, at 23, 24.

196. 111 CONG. REC. 4984–89, 5014–15 (1965).

197. Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 281, 284 (1966). For this paragraph generally, see KLARMAN, *supra* note 11, at 440–41 (citing relevant sources).

198. *See generally* KLARMAN, *supra* note 11, at 385–442 (describing *Brown*'s backlash, the violence it fostered, and the counterbacklash that the violence incited).

B. *The Backlash Against Same-Sex Marriage*

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, given that such statutes were almost never enforced anyway.¹⁹⁹ Yet the response to *Lawrence* quickly became acrimonious.²⁰⁰ Both sides of the gay-rights debate apparently appreciated that the decision would have little practical significance when considered narrowly, and thus they shifted their attention to far more controversial issues like same-sex marriage.²⁰¹ Justice Scalia's dissent in *Lawrence*, which insisted that the majority's rationale for invalidating Texas's ban on same-sex sodomy would logically entail a constitutional right for gays to marry, was widely circulated in conservative Christian circles.²⁰² At the same time, well-publicized developments in Canada—including both legislative and judicial recognition of same-sex marital rights²⁰³—made the issue of same-sex marriage concrete and “sent shock waves through the religious right,” according to one prominent social conservative.²⁰⁴ Critics of same-sex marriage in the United States viewed developments in Canada as a wakeup call. Ken Connor, president of the

199. See Lund & McGinnis, *supra* note 44, at 1556 (noting, with regard to *Lawrence*, that one is not likely “to see anything like the intense political opposition generated by this decision’s most important doctrinal ancestor, *Roe v. Wade*”); *id.* (“most of the public can be counted on to respond to the immediate consequences of *Lawrence* with a yawn”).

200. See, e.g., Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, (Magazine), at 48 (describing how social conservatives swiftly mobilized opposition to *Lawrence*); Sheryl Gay Stolberg, *White House Avoids Stand on Gay Marriage Measure*, N.Y. TIMES, July 2, 2003, at A22 (noting that conservatives were “outraged” over *Lawrence*); Thomas, *supra* note 2 (describing conservative groups as “apoplectic” over *Lawrence*).

201. Gerard V. Bradley, *Stand and Fight: Don't Take Gay Marriage Lying Down*, NAT'L REV., July 28, 2003, at 26–28 (warning after *Lawrence* that “next season may be the last, at least for marriage”); Sarah Kershaw, *Adversaries on Gay Rights Vow State-By-State Fight*, N.Y. TIMES, July 6, 2003, at A8 (noting that in the wake of *Lawrence*, both sides in the gay-rights debate were “vowing an intense state-by-state fight over deeply polarizing questions, foremost among them whether gays should be allowed to marry”); Rosen, *supra* note 200 (noting that liberal activists and social conservatives both thought that *Lawrence* “made it more likely that lower courts will come to recognize a constitutional right to gay marriage”); William Safire, Op-Ed, *The Bedroom Door*, N.Y. TIMES, June 30, 2003, at A21 (predicting immediately after *Lawrence* that gay-rights activists would turn same-sex marriage into a dominant political issue).

202. Esther Kaplan, *The Religious Right's Sense of Siege is Fueling a Resurgence*, NATION, July 5, 2004, at 33; Mary Leonard, *Gay Marriage Stirs Conservatives Again*, BOSTON GLOBE, Sept. 28, 2003, at A1.

203. See *Halpern v. Canada* (Att'y Gen.), 65 O.R.3d 161 (Ont. C.A. 2003); Tom Cohen, *Dozens in Canada Follow Gay Couple's Lead*, WASH. POST, June 12, 2003, at A25; Clifford Krauss, *Canadian Leaders Agree to Propose Gay Marriage Law*, N.Y. TIMES, June 18, 2003, at A1; see also Clifford Krauss, *Canada's Supreme Court Clears Way for Same-Sex Marriage Law*, N.Y. TIMES, Dec. 10, 2004, at A7 (noting that in Canada the high courts of six provinces and one territory, which together comprise eighty-five percent of the country's population, have ruled unconstitutional the traditional definition of marriage).

204. Kaplan, *supra* note 202 (quoting Phil Burress, president of Citizens for Community Values in Ohio); see also Clifford Krauss, *A Few Gay Americans Tie the Knot in Canada*, N.Y. TIMES, June 28, 2003, at A2 (noting that the Canadian court decisions, together with *Lawrence*, encouraged the belief among gay-rights groups that barriers to same-sex marriage in the United States were vulnerable).

Family Research Council, declared, “[u]nless the American people rise up to defend this indispensable institution, we could lose marriage in a very short time.”²⁰⁵ James Dobson, founder of Focus on the Family, warned in a newsletter in September 2003, “the homosexual activist movement . . . is poised to administer a devastating and potentially fatal blow to the traditional family.”²⁰⁶ Reverend Jerry Falwell, leader of the now-defunct Moral Majority, and Tony Perkins, incoming president of the Family Research Council, both announced that they were shifting their attention to the marriage issue and committing their full support to the federal marriage amendment.²⁰⁷ The Southern Baptist Convention passed a resolution condemning same-sex unions, and the leadership of the U.S. Conference of Catholic Bishops endorsed a federal constitutional amendment to ban them.²⁰⁸ The chairman of the Republican National Committee, Ed Gillespie, stated for the first time that the Republican party platform in 2004 might support a federal marriage amendment.²⁰⁹

Then, in November 2003, the Massachusetts Supreme Court ruled in *Goodridge v. Department of Public Health*²¹⁰ that a state law limiting marriage to a union of a man and a woman violated the equality provision of the state constitution. A similar ruling in 1993 by the Hawaii Supreme Court²¹¹ had provoked a dramatic political backlash. Within a few years, more than thirty states (including Hawaii) and Congress had responded by passing Defense of Marriage Acts.²¹²

Almost immediately after *Goodridge*, President George W. Bush stated that he would “do what is legally necessary to defend the sanctity of marriage.”²¹³ Many Republican congressional representatives and conservative activists went further, demanding a federal constitutional amendment to explicitly bar same-sex marriage.²¹⁴ Referring to the Massachusetts ruling, a Wisconsin woman warned in the newsletter of Focus on the Family, “Soon all of the U.S. will become Sodom and Gomorrah.”²¹⁵ James Dobson wrote that the fight against gay marriage would be “our D-day, or Gettysburg or

205. Christopher Marquis, *U.S. Gays Who Marry in Canada Face Hurdles*, N.Y. TIMES, June 19, 2003, at A8.

206. Leonard, *supra* note 202.

207. *Id.*

208. *Id.*

209. *Id.*

210. 798 N.E.2d 941 (Mass. 2003).

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

212. These laws are listed in ESKRIDGE, *supra* note 85, app. B3; see also RIMMERMAN, *supra* note 91, at 75 (describing an “enormous conservative backlash” against *Baehr*).

213. Howard Fineman & T. Trent Gegax, ‘My Mommies Can Marry,’ NEWSWEEK, Dec. 1, 2003, at 34; Katharine Q. Seelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. TIMES, Nov. 20, 2003, at A29.

214. Maggie Gallagher, *Massachusetts v. Marriage*, WKLY. STANDARD, Dec. 1, 2003, at 21, 21.

215. Kaplan, *supra* note 202.

Stalingrad.”²¹⁶ Within a week, representatives of several conservative groups met in Washington, D.C., to plan a national strategy to counter the ruling, including demands for a federal marriage amendment.²¹⁷ The president of Concerned Women of America, Sandy Rios, declared that her group would use the amendment “as a litmus test for offices from president to street sweeper,” and she warned that if President Bush did not support such an amendment, some evangelicals and Roman Catholics would withhold their votes in the 2004 presidential election.²¹⁸ The Traditional Values Coalition began sending 1.5 million mailings a month to prospective voters to rally support for the marriage amendment.²¹⁹ Many commentators noted that the same-sex marriage issue had quickly supplanted abortion as the principal concern of social and religious conservatives.²²⁰

Political analysts now predicted that the same-sex marriage issue would “resonate for months and months during the election season”²²¹ and that it would be “front and center of the 2004 debate.”²²² Most recognized that the issue was “a real gift” for social conservatives, because “it’s revitalized their base and revitalized their fund-raising.”²²³ One top advisor to a Democratic presidential candidate said, “I got a bad case of acid reflux as soon as I heard about it,” and a pair of political reporters observed that the decision “complicates life for the leading Democratic candidates.”²²⁴

Goodridge mandated that same-sex couples be allowed to marry—a position that had not carried the day in the popularly elected branches of a single state government and that opinion polls showed was rejected by

216. *Id.*

217. Seelye, *supra* note 213.

218. *Id.*; see also Fineman & Gegax, *supra* note 213 (quoting Gary Bauer of the organization American Values, “People would stay home if they thought the party they were investing in wasn’t willing to go to the mat on this”).

219. Kaplan, *supra* note 202.

220. Leonard, *supra* note 202; Seelye, *supra* note 213.

221. James Dao, *State Action is Pursued on Same-Sex Marriage*, N.Y. TIMES, Feb. 27, 2004, at 24.

222. *Morning Edition* (Nat’l Pub. Radio broadcast Dec. 26, 2003) (quoting Republican pollster Bill McInturff); see also *id.* (noting that same-sex marriage “will likely be one of the most contentious social issues in the 2004 races”).

223. Kaplan, *supra* note 202 (quoting Jean Hardisty, founder of Political Research Associates, a group that researches the far right); see Andrew Jacobs, *Black Legislators Stall Marriage Amendment in Georgia*, N.Y. TIMES, Mar. 3, 2004, at 11 (reporting leaders of the Georgia Legislative Black Caucus predicting that if a state constitutional amendment barring same-sex marriage got on the ballot that fall, Republicans might take over the lower house of the state legislature); Rosen, *supra* note 200 (“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.”); Robin Toner, *Same-Sex Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1 (quoting conservative leader Gary Bauer stating that on the issue of same-sex marriage, “[t]he public overwhelmingly embraces . . . the conservative side”); *Morning Edition*, *supra* note 222, (quoting Democratic pollster Stan Greenberg observing that same-sex marriage “has the potential to be a wedge issue [with] . . . greater risk for the Democrats”).

224. Fineman & Gegax, *supra* note 213; see also Rosen, *Immodest Proposal*, *supra* note 41, at 19 (calling *Goodridge* “politically naive” and predicting that it will produce a powerful backlash).

national majorities of roughly two to one.²²⁵ Although many liberal Democrats support same-sex marriage, other traditionally Democratic constituencies—African Americans, the elderly, the working class—generally do not.²²⁶ Many Democratic politicians—in the Massachusetts legislature, on the presidential campaign trail, and elsewhere—tried to finesse the issue by emphasizing their support for civil unions, while opposing same-sex marriage.²²⁷ But opinion polls conducted soon after the Massachusetts ruling showed that respondents were much more likely to vote for President Bush than the as-yet undetermined nominee of the Democratic party after being told of their respective positions on same-sex marriage and civil unions.²²⁸ Polls also revealed that when people were read a Democratic statement of support for civil unions and a Republican statement of opposition to same-sex marriage, they overwhelmingly favored the latter position, suggesting that the Democrats' preferred strategy of diverting attention from marriage to civil unions might not succeed.²²⁹

In February and March of 2004, roughly 4,000 same-sex couples applied for and received marriage licenses in San Francisco, where Mayor Gavin Newsom announced that the state law restricting marriage to unions between men and women was, in his opinion, unconstitutional.²³⁰ Same-sex couples quickly followed suit in Multnomah County, Oregon (which includes Portland), where more than 3,000 were married before a state court stopped the process. Smaller numbers of same-sex couples received mar-

225. Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1 (noting an opinion poll taken on February 16–17, 2004 revealing sixty-four percent opposing same-sex marriage); Seelye & Elder, *supra* note 97 (noting another poll showing that respondents opposed same-sex marriage by sixty-one percent to thirty-four percent).

226. See, e.g., David Mattson, *The Struggle to Redefine Marriage*, NATION, Aug. 18, 2003, at 30 (noting that sixty-three percent of blacks and Hispanics, ordinarily Democratic constituencies, supported a federal marriage amendment); *State of the Union*, THE ECONOMIST, Nov. 22, 2003, at 30 (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”).

227. Pam Belluck, *Gays' Victory Leaves Massachusetts Lawmakers Hesitant*, N.Y. TIMES, Nov. 20, 2003, at A29 (noting that the Massachusetts legislature was dominated by Democrats but that many of them, especially those who were Catholic, supported civil unions but not same-sex marriage); Duggan, *supra* note 88, at 14 (noting that most of the candidates for the Democratic presidential nomination opposed same-sex marriage but supported civil unions).

228. See NAT'L PUB. RADIO, *supra* note 97, figs. 6, 23 (noting that respondents favored President Bush over an unnamed Democratic nominee by forty-six percent to forty-two percent before being informed of their respective positions on same-sex marriage and civil unions and by fifty-one percent to thirty-five percent after).

229. *Id.* fig. 30 (noting that by fifty-five percent to thirty-three percent respondents identified more closely with the Republicans' statement in opposition to same-sex marriage than with the Democrats' statement in support of civil unions).

230. Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs From 46 States*, N.Y. TIMES, Mar. 18, 2004, at A26. On August 12, 2004, the California Supreme Court ruled that the marriage licenses issued by Mayor Newsom were “void and of no legal effect.” *Lockyer v. City and County of S.F.*, 95 P.3d 459, 464 (Cal. 2004).

riage licenses around the same time in Asbury Park, New Jersey,²³¹ Sandoval County, New Mexico,²³² and New Paltz, New York.²³³

As photographs on the front pages of newspapers and film footage on nightly television news programs showed scenes of gay and lesbian couples celebrating their marriages outside of city halls across the country, social conservatives began mobilizing support for state constitutional amendments barring same-sex marriage.²³⁴ It was also at this time that President Bush finally came out unequivocally in support of a federal marriage amendment.²³⁵ According to the executive director of the Campaign for California Families, “There are millions of Americans angry and disgusted by what they see on the TV”; he called the issue, “the new civil war in America.”²³⁶ A leader of the Southern Baptist Convention observed, “I have never seen anything that has energized and provoked our grass roots like this issue [same-sex marriage], including *Roe v. Wade*.”²³⁷

In Cincinnati, Ohio, a group called Citizens for Community Values began meeting the day after same-sex couples began marrying in Massachusetts; its goal was to ensure that nothing similar would ever happen in Ohio. The group collected over 500,000 signatures supporting a state marriage amendment and registered over 54,000 new voters in the process. The group’s leader, Phil Burress, later reported, “[w]e would not have had this on the ballot if they had not started marrying people on May 17.”²³⁸

231. Thomas Crampton, *Issuing Licenses, Quietly, to Couples in Asbury Park*, N.Y. TIMES, Mar. 10, 2004, at B5.

232. Steve Barnes, *New Mexico Gay-Marriage Injunction Stands*, N.Y. TIMES, Aug. 27, 2004, at A15 (noting that the clerk in Sandoval County, New Mexico issued sixty-six marriage licenses to same-sex couples before being enjoined by a court).

233. Thomas Crampton, *Spitzer and New Paltz Mayor Meet About Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at B4 (noting that Mayor Jason West of New Paltz conducted marriages for twenty-five gay couples before being enjoined by a court).

234. See, e.g., Cloud, *supra* note 88 (reporting that the proposed federal marriage amendment received a big boost last week when pictures of lesbians kissing their brides were broadcast around the world); Dao, *supra* note 221 (noting that nearly two-dozen state legislatures were considering constitutional amendments forbidding same-sex marriage and that the granting of marriage licenses to same-sex couples in San Francisco was 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”); Barbara Kantrowitz, *The New Face of Marriage*, NEWSWEEK, Mar. 1, 2004, at 42 (noting that the scenes of gays and lesbians marrying in San Francisco had been a provocative call to arms for conservatives). *But cf.* Balkin, *supra* note 69, at 1557 (predicting that the images of same-sex couples getting married in San Francisco would play the same role for the gay-rights movement that the televised images of Bull Connor attacking the black schoolchildren of Birmingham with fire hoses and police dogs had for the civil rights movement).

235. See, e.g., Bumiller, *supra* note 225; Duggan, *supra* note 88, at 14 (noting the political storm over same-sex marriage intensifying as gay couples wed in San Francisco and President Bush vowed to stop such marriages with a federal constitutional amendment).

236. Kantrowitz, *supra* note 234.

237. David D. Kirkpatrick, *Conservatives Using Issue of Gay Unions as a Rallying Tool*, N.Y. TIMES, Feb. 8, 2004, at 1; see also *id.* (noting that the same-sex marriage issue was mobilizing social conservatives in a way that no other issue had done in the last several years).

238. Scott S. Greenberger, *Gay-Marriage Ruling Pushed Voters, Mobilized Bush, Left Kerry Wary*, BOSTON GLOBE, Nov. 7, 2004, at B1.

Burress also observed that in his twenty-one years of organizing, “I’ve never seen anything like this. . . . It’s a forest fire with a 100 mile-per-hour wind behind it.”²³⁹ The spokesman for the Defense of Marriage Coalition declared, “[p]eople are three times more passionate on this issue than they were even about abortion.”²⁴⁰ A leading gay-rights activist expressed concern that the Massachusetts ruling was creating “a backlash so much more powerful than our community is prepared to handle.”²⁴¹ Also in May 2004, Republican pollster Richard Wirthlin called same-sex marriage “an ideal wedge issue,” which would enable Republicans to peel away from the Democratic party such socially conservative groups as Catholics and African Americans (whose support for same-sex marriage—at twenty-eight percent—was lower than among any other racial group).²⁴²

The eventual presidential nominee of the Democratic party, Senator John Kerry, was wary of the issue. He stated repeatedly—to the point of obvious exasperation—that he supported civil unions, opposed same-sex marriage, but also opposed the federal marriage amendment on the ground that states should decide this issue for themselves.²⁴³ By contrast, President Bush was now regularly calling for a federal amendment,²⁴⁴ and he was frequently referring to Kerry as the senator from Massachusetts—an obvious effort to associate his opponent in voters’ minds with that state’s court decision protecting same-sex marriage.²⁴⁵

By the summer of 2004, political analysts were reporting that the president’s reelection campaign had “finally hit on the issue they think may save them in the 2 November election: same-sex marriage.”²⁴⁶ Focus groups and private polls suggested that Republicans could gain significant traction on this issue with undecided voters as well as mobilize the party’s conservative Christian base.²⁴⁷ Political analysts predicted that the issue of same-sex marriage could especially help Republicans in critical swing states such as Michigan, Pennsylvania, and Ohio by turning out unusually large numbers

239. James Dao, *Flush with Victory, Grass-Roots Crusader Against Same-Sex Marriage Thinks Big*, N.Y. TIMES, Nov. 26, 2004, at A28.

240. Karen Breslau, *A Rising Tide, Rocking Boats, The Politics of Gay Marriage Roil Oregon’s Electoral Terrain*, NEWSWEEK, May 17, 2004, at 43, 43 (quoting Tim Nashif).

241. Cloud, *supra* note 88 (quoting Matt Foreman of the National Gay and Lesbian Task Force).

242. Kaplan, *supra* note 202; accord Debra Rosenberg, *Politics: A Gay-Marriage Wedge*, NEWSWEEK, June 28, 2004, at 8, 8.

243. Andrew Stephen, *Bush and Cheney Have Hit on the Issue They Believe Will Save Them in the 2 November Election—Same-Sex Marriages—and They Are Determined to Use this Weapon*, NEW STATESMAN, July 26, 2004, at 13, 13.

244. See, e.g., Elisabeth Bumiller, *Bush Talks to an Appreciative Catholic Crowd*, N.Y. TIMES, Aug. 4, 2004, at A14; Rosenberg, *supra* note 242, at 8.

245. Greenberger, *supra* note 238.

246. Stephen, *supra* note 243; see also Andrew Sullivan, *If at First You Don’t Succeed . . .*, TIME, July 26, 2004, at 78, 78 (noting that the same-sex marriage issue “is an integral part of the Bush re-election campaign”).

247. See Stephen, *supra* note 243.

of socially conservative voters.²⁴⁸ President Bush declared, “activist judges and local officials in some parts of the country are not letting up in their efforts to redefine marriage for the rest of America.”²⁴⁹ Senator Rick Santorum of Pennsylvania, one of the leading advocates of the federal marriage amendment, referred to the recent rash of same-sex marriages and declared, “the future of our country hangs in the balance because the future of marriage hangs in the balance.”²⁵⁰

In July, Republicans in the Senate forced a vote on the federal marriage amendment. Senator Wayne Allard of Colorado, the main sponsor of the amendment, declared, “There is a master plan out there from those who want to destroy the institution of marriage.”²⁵¹ Senator Hatch of Utah said, “We have had traditional marriage in this world for over 5,000 years This is one of the most important debates in history.”²⁵² Senator Santorum asked, “Isn’t that the ultimate homeland security, standing up and defending marriage?”²⁵³ James Dobson wrote to his followers, “Barring a miracle, the family as it has been known for more than five millennia will crumble, presaging the fall of Western civilization itself.”²⁵⁴ Though the amendment was defeated on a procedural vote by fifty to forty-eight (suggesting it was some nineteen votes shy of the two-thirds majority required to pass),²⁵⁵ it did force Democratic senators to go on record in opposition. This almost certainly harmed those, such as Minority Leader Tom Daschle of South Dakota, who were competing for reelection in states where polls showed overwhelming public support for ballot initiatives defining marriage in traditional terms.²⁵⁶

In early August, voters in Missouri provided a glimpse of what might lie ahead when they overwhelmingly endorsed a ballot initiative amending the state constitution to define marriage as a union between a man and a

248. See *Fear the Counter-Attack*, *ECONOMIST*, Aug. 21, 2004, at 26, 26 (predicting that evangelical Christians, who in Ohio account for a quarter of the electorate, might vote in unusually large numbers to defeat same-sex marriage and, in the process, help to reelect Bush); Sarah Kershaw & James Dao, *Voters in 10 of 11 States Are Seen as Likely to Pass Bans of Same-Sex Marriages*, *N.Y. TIMES*, Sept. 28, 2004, at A14 (noting supporters of the state amendments predicting that the ballot initiatives would draw more conservatives to the polls and thus might prove critical to Bush in swing states); David D. Kirkpatrick, *Gay Marriage Becomes a Swing Issue with Pull*, *N.Y. TIMES*, Aug. 14, 2004, at A7 (noting Celinda Lake, a Democratic pollster who had worked for Human Rights Campaign, conceding that the same-sex marriage issue might help Bush win Ohio); Stephen, *supra* note 243, at 14.

249. Stephen, *supra* note 243.

250. *Id.*

251. Sullivan, *supra* note 246.

252. 150 CONG. REC. S7912 (daily ed. July 12, 2004) (statement of Sen. Santorum).

253. Sullivan, *supra* note 246.

254. *Id.*

255. See *Marriage Amendment May Rise Again*, *CHRISTIAN CENTURY*, Aug. 10, 2004, at 10.

256. See Rosenberg, *supra* note 242; see also 150 CONG. REC. S8077 (July 14, 2004) (statement of Sen. Leahy of Vermont) (“[T]he Senate leadership has decided that forcing a vote in relation to the [Federal Marriage Amendment] will benefit the Republican party politically, from the race for the White House to the Senate races.”).

woman.²⁵⁷ Voter turnout far exceeded that of any primary election in Missouri over the last quarter-century, and the amendment passed with a whopping seventy percent majority, far greater than even its proponents had anticipated.²⁵⁸ The Coalition to Protect Marriage in Missouri attributed the impressive voter turnout to grassroots mobilizing efforts, including notes posted on church bulletin boards and sermons given by preachers to their congregations.²⁵⁹ Reacting to the result in Missouri, the leader of Citizens for Community Values in Ohio said the same-sex marriage issue has “brought the people of faith to the table like I have never seen before.”²⁶⁰ In September, the Republican party platform “strongly support[ed]” President Bush’s call for a constitutional amendment to protect marriage.²⁶¹

In the end, the political backlash ignited by *Lawrence*—and, even more so, by *Goodridge*—had several direct consequences. First, thirteen states added to their constitutions language defining marriage as a union between a man and a woman;²⁶² before 2004, only four states had such provisions in their constitutions.²⁶³ In none of these thirteen states was the vote close, and many gay-rights activists were stunned by the margins of defeat.²⁶⁴ In only two states—Michigan and Oregon—did the initiatives win less than sixty percent of the vote, and in many states they won approximately seventy-five percent.²⁶⁵ In Mississippi, the amendment passed with eighty-six percent of the vote.²⁶⁶ Had *Lawrence* and *Goodridge* not focused public attention on the issue of same-sex marriage, none of these measures would likely have appeared on the ballot. Marriage rights will now be harder to secure for gays and lesbians because state legislatures cannot provide them, and state courts cannot interpret state constitutions to protect them.

257. Monica Davey, *Missourians Back Amendment Barring Gay Marriage*, N.Y. TIMES, Aug. 4, 2004, at A13 [hereinafter Davey, *Missourians Back Amendment*]; Monica Davey, *Sharp Reactions to Missouri’s Decisive Vote Against Gay Marriage*, N.Y. TIMES, Aug. 5, 2004, at A17 [hereinafter Davey, *Sharp Reactions*].

258. Davey, *Sharp Reactions*, *supra* note 257.

259. *Id.*; Davey, *Missourians Back Amendment*, *supra* note 257.

260. Davey, *Sharp Reactions*, *supra* note 257.

261. 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 83, <http://www.gop.com/media/2004platform.pdf> (“We strongly support President Bush’s call for a Constitutional amendment that fully protects marriage, and we believe that neither federal nor state judges nor bureaucrats should force states to recognize other living arrangements as equivalent to marriage.”).

262. See, e.g., Linda Feldmann, *How Lines of the Culture War Have Been Redrawn*, CHRISTIAN SCI. MONITOR, Nov. 15, 2004, at 1.

263. See, e.g., Cheryl Wetzstein, *States Lining Up to Outlaw Same-Sex ‘Marriage,’* WASH. TIMES, Nov. 9, 2004, at A3.

264. Kate Zemike, *Groups Vow Not to Let Losses Dash Gay Rights*, N.Y. TIMES, Nov. 14, 2004, at A30; see also Kershaw & Dao, *supra* note 248 (noting five weeks before the election that the marriage initiative in Oregon was too close to call and that the national field director for the Human Rights Campaign stated, “we’re feeling good about Oregon”).

265. See, e.g., Gina Piccalo, *Union and Division*, L.A. TIMES, Nov. 6, 2004, at E21.

266. *Id.*

Second, opposition to same-sex marriage mobilized conservative Christians to turn out at the polls in 2004 in unprecedented numbers,²⁶⁷ leading one social conservative to joke the day after the election that “President Bush should send a bouquet of flowers” to the members of the Massachusetts Supreme Court.²⁶⁸ In the words of one political analyst, the ballot measures “appear to have acted as magnets for thousands of socially conservative voters in rural and suburban communities who might not otherwise have voted.”²⁶⁹ The issue of same-sex marriage not only mobilized the Republican party’s base, but it also acted as a “wedge” to dislodge traditionally Democratic constituencies such as African Americans, the elderly, and working-class Catholics—all of whom voted for President Bush in somewhat larger percentages than they had for other Republican presidential candidates in recent elections.²⁷⁰ In exit polls, twenty-two percent of voters identified “moral values” as their principal voting issue, and of that group, nearly eighty percent supported President Bush.²⁷¹ Same-sex marriage—along with abortion and stem-cell research—was widely deemed to be one of the dominant moral issues in the campaign.²⁷²

In closely divided states such as Ohio, the issue of same-sex marriage may well have determined the outcome of the presidential election.²⁷³ A Democratic strategist in that state bluntly declared that if the marriage amendment “had not been on the ballot, John Kerry would have won

267. See, e.g., James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4; Piccalo, *supra* note 265.

268. Elizabeth Mehren, *State Bans on Gay Marriage Galvanize Sides*, L.A. TIMES, Nov. 4, 2004, at 11 (quoting Robert Knight, director of the Culture and Family Institute of Concerned Women for America); see also Donna Britt, *Gay Unions Put Kerry Campaign Asunder*, WASH. POST, Nov. 5, 2004, at B1 (observing that the issue of same-sex marriage sparked a firestorm that helped consume Kerry’s presidential hopes); Dana Hull, *Gay-Marriage Opposition Seen as Factor Aiding Bush*, SAN JOSE MERCURY NEWS, Nov. 4, 2004, at 13A (quoting Richard Cizik, vice president for governmental affairs at the National Association of Evangelicals, “Five judges in Massachusetts and the mayor of San Francisco may have done more to help George W. Bush’s campaign than [sic] anything else”); Walter Shapiro, *Presidential Election May Have Hinged on One Issue: Issue 1*, USA TODAY, Nov. 5–7, 2004, at 6A (noting that Goodridge “may have been the decisive factor in granting Bush a second term”).

269. Dao, *supra* note 267.

270. See Katharine Q. Seelye, *Moral Values Cited as a Defining Issue of the Election*, N.Y. TIMES, Nov. 4, 2004, at P4.

271. *Id.*

272. See, e.g., Anthony B. Robinson, *Making Sense of Moral Surprise During the 2004 Election*, SEATTLE POST-INTELLIGENCER, Nov. 14, 2004, at F1.

273. See, e.g., Editorial, *Bigotry and Ballots: Gay Marriage Is Repudiated; So Is Fairness*, PITTSBURGH POST GAZETTE, Nov. 6, 2004, at A16 [hereinafter *Bigotry and Ballots*] (noting that gay marriage was high among the moral issues that concerned conservative voters, perhaps decisively in states such as Ohio); Greenberger, *supra* note 238 (quoting Al Cross of the Institute for Rural Journalism and Community Issues at the University of Kentucky, concluding that “there is plenty of analytical and anecdotal evidence out there over the last couple of days that the Republicans hit the jackpot with the rural folks in Ohio”); Andrew Sullivan, *Uncivil Union*, NEW REPUBLIC, Nov. 22, 2004, at 11 (observing that the same-sex marriage issue may have proved critical to Bush’s victory in Ohio). *But see* Charles Krauthammer, *‘Moral Values’ Myth*, WASH. POST, Nov. 12, 2004, at A25 (strongly rejecting the view that the issue of same-sex marriage was responsible for Bush’s victory).

Ohio.²⁷⁴ Many political analysts credited the ballot measure with spurring Republican voter turnout in the socially conservative western and southern portions of the state, thus offsetting the unusually high Democratic turnout in cities such as Cleveland and Columbus.²⁷⁵ Without the electoral votes of Ohio, President Bush would not have been reelected. In his second term, the president is widely expected to appoint the sort of conservative judges and Justices who will be least likely to extend *Lawrence* to protect other rights of gays and lesbians. Indeed, within weeks of the election, the administration—as an evident reward to social and religious conservatives for their election-day accomplishments—announced that it was renominating ten of the most controversial judicial selections from President Bush’s first term, whose confirmation Democratic senators had blocked through filibuster.²⁷⁶ Thus, the backlash ignited by *Goodridge* possibly ensured the reelection of a president whose judicial appointments will almost certainly delay the legal recognition of same-sex marriage.²⁷⁷

Third, the issue of same-sex marriage clearly provided the margin of victory for Republican senators in closely fought contests in states such as Kentucky and South Dakota. In Kentucky, Senator Jim Bunning was narrowly reelected despite running an almost comically inept campaign against an underfunded, relatively unknown opponent, Dr. Daniel Mongiardo.²⁷⁸ In the state legislature, Mongiardo had cosponsored the amendment barring same-sex marriage that appeared on the November ballot. But, with the con-

274. Shapiro, *supra* note 268.

275. Dao, *supra* note 267; Frank Langfitt, *For Most Voters, Values Trumped Terror and Taxes*, BALT. SUN, Nov. 4, 2004, at 1A; Joan Vennoch, *Was Gay Marriage Kerry's Undoing?*, BOSTON GLOBE, Nov. 4, 2004, at A15; *see also* Dao, *supra* (noting a political analyst in Michigan reporting that his polls showed that five percent of voters said the ballot initiative on marriage was their main motivation for voting).

276. Eric Gorski, *Dobson Shifts Power to Focus on the Politics*, DENVER POST, Nov. 14, 2004, at A1 (noting James Dobson explaining that he took a higher profile in the 2004 election than previously because he “had to do everything [he] could to keep the loony left from capturing the United States Supreme Court” and declaring that “[f]or many social conservatives, judges are more to blame than lawmakers for societal changes over the past 30 years”); Neil A. Lewis, *Bush Tries Again on Court Choices Stalled in Senate*, N.Y. TIMES, Dec. 24, 2004, at A1.

277. *See, e.g.*, Mickey Wheatley, Op-Ed, *For the Moment, Concentrate on Being Civil*, L.A. TIMES, Nov. 10, 2004, at B11 (noting that the same-sex marriage issue helped elect Bush and conservative senators, whose victory will ensure the appointment of new Supreme Court Justices “likely to adjudicate us right out of the constitution”).

278. John Cheves, *Senate Race Should Please Republicans*, LEXINGTON HERALD-LEADER, May 9, 2004, at A1 (“In recent months, Bunning has exhibited a pattern of putting his foot in his mouth.”).

Among other things, in February 2004, Bunning startled civic leaders in Louisville by stating that a second new bridge that had been promised to the city would be delayed indefinitely because northern Kentucky, where Bunning lives, needed a new bridge to Cincinnati. After the U.S. congressional representative from Louisville corrected Bunning, explaining that he was “confused,” Bunning denied having made the remarks, despite a television news crew having them on tape. In March, Bunning told an audience that his opponent, the olive-skinned son of Italian immigrants, looked like the dead sons of former Iraqi dictator Saddam Hussein. Mongiardo demanded an apology, but Bunning’s campaign denied that he had made the remarks. After eyewitnesses publicly confirmed the comments, campaign officials insisted that Bunning had been joking. As some critics began raising questions about Bunning’s judgment and mental soundness (he was 72 years old), his campaign aides began steering him away from public speeches. *Id.*

test unexpectedly tight in the final weeks, state Republican leaders campaigning with Bunning called Mongiardo, a 44-year-old bachelor, “‘limp-wristed’ and a ‘switch hitter.’”²⁷⁹ Republican state senator Elizabeth Tori said that Mongiardo “is not a gentleman, . . . I’m not even sure the word ‘man’ applies to him.”²⁸⁰ Reporters began asking Mongiardo if he was gay (he firmly denied that he was).²⁸¹ Late in the campaign, Republicans ran commercials that featured the sound of wedding bells, again hinting that Mongiardo was weak on the issue of same-sex marriage.²⁸² Analysts attributed Bunning’s victory to a large turnout of conservative rural voters who had been mobilized by the state ballot initiative.²⁸³ Because President Bush enjoyed commanding leads in Kentucky opinion polls, many conservatives might have stayed home were it not for this ballot initiative. A small reduction in the turnout of such voters would have cost Bunning reelection.

In South Dakota, John Thune, an evangelical Christian who was challenging Senate Minority Leader Tom Daschle for his seat, made the same-sex marriage issue “the centerpiece of his campaign,” according to one Democratic spokesman.²⁸⁴ With a marriage amendment on the ballot, Thune crisscrossed the state warning that the “institution of marriage is under attack from extremist groups They have done it in Massachusetts and they can do it here.”²⁸⁵ Like most Democratic candidates for national office in the 2004 election, Daschle opposed same-sex marriage but also criticized the federal marriage amendment as too drastic a step.²⁸⁶ Thune and Republican Governor Mike Rounds pressed Daschle to explain why he opposed a constitutional amendment banning gay marriage that most South Dakotans supported.²⁸⁷ The director of Concerned Women for America of South Dakota warned that Daschle “has promised the homosexual lobby that he would ensure the defeat of the Federal Marriage Amendment.”²⁸⁸ James

279. Sarah Vos, *Mongiardo Has Come Far, Fast*, LEXINGTON HERALD-LEADER, Oct. 30, 2004, at A1; Amanda York, *Pols Look for Limp Wrists*, KY. POST, Oct. 30, 2004, at A12.

280. Bruce Schreiner, *GOP’s Comments ‘Pure Lies,’ Mongiardo Says*, LEXINGTON HERALD-LEADER, Oct. 30, 2004, at B4.

281. *Id.*; Vos, *supra* note 279.

282. *See* Dao, *supra* note 267; *see also* Kershaw & Dao, *supra* note 248 (noting that the proposed state constitutional amendment banning same-sex marriage was so popular in Kentucky that legislative candidates fought over who supported it first).

283. Dao, *supra* note 267; Greenberger, *supra* note 238.

284. Dirk Johnson & Debra Rosenberg, *The Gay War Rolls On*, NEWSWEEK, July 26, 2004, at 34, 34 (quoting Dan Pfeiffer).

285. *Id.* (quoting John Thune); *see also* Denise Ross, *Thune Calls for Ban on Gay Marriage*, RAPID CITY J., July 9, 2004, available at <http://rapidcityjournal.com/articles/2004/07/09/news/local/news04.prt> (quoting Thune stating that “[r]unaway courts are trampling the will of the majority in this country and the laws in 42 states”).

286. Ross, *supra* note 285.

287. Scott Waltman, *Daschle Against Gay Marriage Amendment*, ABERDEEN AM. NEWS, Jul. 14, 2004, at 10, available at 2004 WL 80866264.

288. *Id.* (quoting Linda Schauer); *see also* Gorski, *supra* note 276 (noting that Focus on the Family Action ran a full page advertisement in South Dakota newspapers after Senator Daschle blocked the federal amendment, which declared, “Shame on You, Senator Daschle”).

Dobson, Tony Perkins, and Gary Bauer, head of American Values, came to Sioux Falls and told a crowd of five thousand that if the institution of marriage was not defended from homosexual attack, “it’s going to be gone.”²⁸⁹ They criticized Daschle for blocking the federal marriage amendment in the Senate and the appointment of federal judges who would uphold school prayer.²⁹⁰ In the end, Thune defeated Daschle by fifty-one percent to forty-nine percent, making Daschle the first party leader in the Senate to be defeated in more than fifty years. The state marriage amendment passed by roughly seventy-five percent to twenty-five percent. Its presence on the ballot probably rallied enough social conservatives and shifted the stance of enough marginal voters to cost Daschle reelection.²⁹¹

Thus, the backlash ignited by the issue of same-sex marriage probably helped Republicans increase their majority in the Senate from fifty-one to fifty-five, which will make it harder for Democrats to block the confirmation of socially conservative judges. Moreover, socially conservative leaders have already begun threatening to “put in the bull’s-eye” several Democratic senators from states whose electoral votes went to President Bush if they continue to block the administration’s conservative judicial nominees.²⁹²

Fourth and finally, the public’s rejection of same-sex marriage in the thirteen state ballot initiatives was so unequivocal—two-thirds of all voters on these initiatives rejected same-sex marriage—that social conservatives and Republicans are certain not to allow the issue to die.²⁹³ Many social conservatives have claimed credit for reelecting the president, insisting that their efforts to defend the traditional definition of marriage drew millions of evangelical Christians to the polls and provided Bush’s margin of victory.²⁹⁴ These groups have already begun flexing their political muscles, promising “a battle of enormous proportions from sea to shining sea” if the administra-

289. Ben Shouse, *Advocate Promotes Religious Stance*, ARGUS LEADER (Sioux Falls, S.D.), Oct. 5, 2004, at 1B, available at 2004 WLNR 16352528 (quoting James Dobson).

290. *Id.*

291. See also David D. Kirkpatrick, *Evangelical Leader Threatens to Use His Political Muscle Against Some Democrats*, N.Y. TIMES, Jan. 1, 2005, at A10 (crediting social conservatives with defeating Daschle in South Dakota).

292. *Id.* (quoting James Dobson).

293. Kelly Brewington, *70 Pastors Ready Fight Against Gay Marriage*, BALT. SUN, Nov. 17, 2004, at 1B (noting that opponents of same-sex marriage in Maryland twice failed in the last session of the General Assembly to strengthen the statutory limitation on marriage to unions between a man and a woman, but that the results of the recent election have inspired them to try again); Nina J. Easton, *Va. Focus of Battle Over Gay Marriage*, BOSTON GLOBE, Jan. 16, 2005, at A1 (quoting Robert H. Knight, director of the Culture & Family Institute, an arm of Concerned Women for America, stating that “[t]he smashing election results on Nov. 2 have energized conservatives”).

294. Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39; Gorski, *supra* note 276 (quoting Dobson, “I’m confident President Bush knows who was responsible for this election victory”); see also Chris L. Jenkins, *Va. GOP Lawmakers Want Amendment to Define Marriage*, WASH. POST, Jan. 11, 2005, at B6 (noting that the victories on the state ballot initiatives “have energized social conservatives across the country and are credited by some with helping President Bush win reelection in November”).

tion does not nominate socially conservative judges.²⁹⁵ Moreover, the issue of same-sex marriage is very appealing to conservative politicians because in virtually every state a clear majority opposes it; by contrast, on other social issues, such as abortion and stem-cell research, religious conservatives occupy minority positions.²⁹⁶ Conversely, the gay-marriage issue makes most Democrats very uncomfortable, because they wish neither to support same-sex marriage in defiance of the wishes of a clear majority nor to alienate a gay-rights constituency that leans strongly Democratic (and, one might surmise, many Democratic politicians privately sympathize with supporters of same-sex marriage).²⁹⁷

Pundits are already predicting that marriage initiatives will be on the ballot in ten or twenty more states over the next few years.²⁹⁸ In Tennessee in 2004, for example, the two houses of the legislature passed such a measure by lopsided votes of eighty-six to five and twenty-eight to one, and they are virtually certain to pass it again in 2005, which will put it on the ballot at the next election.²⁹⁹ Similarly, Republicans in Congress are certain to push for another vote on the federal marriage amendment.³⁰⁰ The day after the

295. Kirkpatrick, *supra* note 237; see also Gorski, *supra* note 276 (noting Dobson warning Republicans that they would “pay a severe price” in four years if they refused to consult with conservative Christians who had returned them to power and concluding that “Dobson stands to be a force during President Bush’s second term”); Evelyn Nieves, *Gay Rights Groups Map Common Agenda*, WASH. POST, Jan. 17, 2005, at A3 (noting that conservative religious groups are lobbying hard for federal judges who will oppose same-sex marriage).

296. Linda Feldmann, *How Lines of the Culture War Have Been Redrawn*, CHRISTIAN SCI. MONITOR, Nov. 15, 2004, at 1; Kaplan, *supra* note 202.

297. See Easton, *supra* note 293 (noting the awkward position that proposed state marriage amendments create for one Democratic presidential prospect, Mark Warner, the governor of Virginia, and quoting a Republican state legislator who has been a leading proponent of such an amendment, “Politicians love halfway houses But on this, there ain’t no halfway house. Warner’s doing the John Kerry dance.”).

298. Brad Knickerbocker, *Political Battles over Gay Marriage Still Spreading*, CHRISTIAN SCI. MONITOR, Nov. 29, 2004, at 1 (noting that amendments to ban gay marriage are likely to be on the ballot in at least a dozen more states in 2006); Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at A16 (reporting the views of Mathew Staver, president and general counsel of Liberty Council, a public interest law firm representing religious causes); Nieves, *supra* note 295 (noting that conservative groups are seeking marriage amendments in fifteen more states); Wetzstein, *supra* note 263.

299. Wetzstein, *supra* note 263; see also Easton, *supra* note 293 (noting that conservatives in the Virginia legislature have proposed several versions of a marriage amendment and that one of them is virtually certain to pass in 2005 and to appear on the ballot in 2006).

300. *Rove Says Marriage Amendment on Bush’s Agenda*, FRONTRUNNER, Nov. 8, 2004, available at LEXIS, News Library, Curnews File (noting that Karl Rove stated that President Bush would definitely use his second term to push for a constitutional amendment banning gay marriage); see also Nieves, *supra* note 295 (noting that since the election, conservatives in Congress have been emboldened in their support of the federal marriage amendment).

Some doubt has arisen since the election over the White House’s commitment to pushing such an amendment in the near term. See Jim VandeHei & Michael A. Fletcher, *Bush Upsets Some Supporters*, WASH. POST, Jan. 19, 2005, at A11 (noting that President Bush came under fire from some social conservatives for saying in a recent interview that he would not aggressively lobby the Senate to pass a constitutional amendment banning same-sex marriage, though the White House later sought to clarify that the president remained as committed as ever to barring same-sex marriage); see also Richard W. Stevenson, *White House Again Backs Amendment on Marriage*, N.Y. TIMES, Jan. 17, 2005, at A15 (same).

election, James Dobson, who had weekly strategy sessions with the president's top political advisor Karl Rove during the election, called for a renewed push for the amendment.³⁰¹ The amendment will pick up support among newly elected senators and representatives, as some lawmakers feel pressure from constituents as a result of the successful ballot initiatives.³⁰² Finally, in this changed political environment, it seems unlikely that many state court judges will stick out their necks by duplicating the adventurous holding of the Massachusetts high court in *Goodridge*.³⁰³

Indeed, some gay-rights activists have concluded since the election that their aggressive push for same-sex marriage played into the hands of social conservatives and Republicans and that such litigation should cease until public opinion has become more receptive; the gay-rights agenda should focus instead on securing reforms such as civil unions and partnership benefits.³⁰⁴ An openly gay officeholder in California questioned "the strategic wisdom of pushing forward an issue that draws vehement opposition from nearly two-thirds of voters."³⁰⁵ One gay-rights activist observed that "[o]ur legal strategy is at least 10 years ahead of our political and legislative strategy," and another warned that if same-sex marriage advocates won in court, it would be "like pouring gasoline onto the fire for purposes of the federal

301. Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39; see also Easton, *supra* note 293 (noting that social conservatives view the successful ballot initiatives in 2004 "as a national mandate to move forward with more constitutional change, including another attempt at passing an amendment in Congress"); VandeHei & Fletcher, *supra* note 300 (quoting Tony Perkins of the Family Research Council, "I believe there is no more important issue for the president's second term than the preservation of marriage").

302. Knickerbocker, *supra* note 298.

303. Such challenges are already under way in the courts of several states. See, e.g., Kristen A. Grahman, *New Jersey Appeals Court Hears Same-Sex Marriage Case*, PHILA. INQUIRER, Dec. 8, 2004, at A20 (noting that an intermediate New Jersey appeals court heard argument in a recent case seeking a right for gays and lesbians to marry); Thomas J. Lueck, *State Justice Rules Against 13 Couples Seeking Same-Sex Marriage*, N.Y. TIMES, Dec. 8, 2004, at B4 (noting that in the last two months two state trial judges in New York have rejected a right to same-sex marriage under the state constitution).

This is not to say that courts will desist from expanding the rights of gays and lesbians in other contexts where public opinion is more supportive. See *infra* notes 384–385 and accompanying text.

304. John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1 (noting that leaders of the gay rights movement are embroiled in a bitter debate over whether they should moderate their goals after the election losses, with some groups, such as the Human Rights Campaign, the nation's largest gay and lesbian advocacy group, favoring less emphasis on legalizing same-sex marriage); Knickerbocker, *supra* note 298 (noting Matt Foreman of the National Gay and Lesbian Task Force stating that gay rights advocates had made a mistake by lobbying lawmakers and filing lawsuits before building sufficient grassroots support); Liptak, *supra* note 298 (noting Matthew Coles, Director of the Lesbian and Gay Rights Project of the American Civil Liberties Union, stating that winning too soon in court would mean losing in the court of public opinion and concluding that "we are unprepared for the consequences of winning"); Michelle Mittelstadt, *Election Day Defeat on Same-Sex Marriage Issue Sparks Debate*, DALLAS MORNING NEWS, Nov. 16, 2004, at 11A (noting that many gay and lesbian leaders concluded after the election that they had pushed too hard, too fast for same-sex marriage).

305. Susan P. Kennedy, *Blinded by the Cause of Same-Sex Marriage*, S.F. CHRON., Nov. 21, 2004, at B5.

marriage amendment.”³⁰⁶ Democratic strategists are struggling to figure out a way to neutralize an issue that seems sure to benefit Republicans in the short term.³⁰⁷

C. Why Backlash?

Court rulings such as *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 alter 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.³⁰⁸ 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.³⁰⁹ A northern white visitor found after *Brown* that segregation “is the foremost preoccupation of the Southern mind. . . . [It] intrudes into almost every conversation. It nags, it bothers and

306. Liptak, *supra* note 298 (reporting views of Matt Foreman of the National Gay and Lesbian Task Force and quoting Mathew Staver, president and general counsel of Liberty Council); see also Tim Evans, *Same-Sex Marriage Ruling Due*, INDIANAPOLIS STAR, Jan. 16, 2005, at B1 (noting that one of the couples serving as plaintiffs in a case challenging Indiana’s ban on same-sex marriage is no longer certain that a victory is desirable, given that it might inspire a state constitutional amendment overturning the result).

Other gay-rights activists strenuously disagree with the idea of temporarily relegating demands for same-sex marriage to the backburner. See, e.g., Yvonne Abraham, *Gay Rights Advocates Split Over Taking Softer Course*, BOSTON GLOBE, Dec. 13, 2004, at A1 (noting that supporters of Cheryl Jacques, former head of the Human Rights Campaign, report that she was forced out of office because she wanted to continue pushing for full marriage rights for gays and lesbians in spite of the election results and that the organization’s board of directors believed, to the contrary, that the lesson of the election was that same-sex marriage was a losing issue at this time); Broder, *supra* note 304 (noting that Jonathan Katz, executive coordinator of the Larry Kramer Initiative for Lesbian and Gay Studies at Yale University, rejected this sort of retrenchment as completely wrong and stated that achieving marriage rights was fundamental to winning equality for gays and lesbians); Evelyn Nieves, *Gay Activists Refuse to Bargain Away Rights*, WASH. POST, Dec. 10, 2004, at A2 (noting that dozens of prominent advocates for gay rights sent a letter to every member of Congress criticizing a report that the Human Rights Campaign was planning to moderate its position on same-sex marriage).

307. David D. Kirkpatrick & Katie Zezima, *Supreme Court Turns Down a Same-Sex Marriage Case*, N.Y. TIMES, Nov. 30, 2004, at A20; see also Easton, *supra* note 293 (noting the uncomfortable position that proposed constitutional bans on same-sex marriage create for Democratic presidential prospects such as Mark Warner, the governor of Virginia, who would like to neutralize cultural issues that have harmed Democrats in the South).

308. For examples, see ADAM FAIRCLOUGH, *RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915–1972*, at 153 (1995), and *Miscellaneous*, SO. SCH. NEWS (Nashville), May 1958, at 5.

309. Thomas F. Pettigrew, *Desegregation and Its Chances for Success: Northern and Southern Views*, 35 SOC. FORCES 339, 341 tbl.3 (1957).

it will not be ignored.”³¹⁰ One white-supremacist leader credited the Court with “awaken[ing] us from a slumber of about 30 years,”³¹¹ 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.”³¹²

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—such as 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.³¹³ Since *Goodridge*, though, same-sex marriage has constantly captured front-page newspaper headlines, and the issue received enormous attention during the 2004 presidential election campaign.³¹⁴ Court rulings such as *Lawrence* and *Goodridge* forced people who previously had not paid much attention to gay-rights issues to notice what has been happening and to form an opinion on it. As one social conservative observed not long after the Massachusetts decision, “the more people focus on [gay marriage], the less they support it.”³¹⁵ Another critic of same-sex marriage noted that *Goodridge* “slapped American Christians in their face and woke them up.”³¹⁶ In the spring of 2004 in Oregon, the Christian Coalition sent out 75,000 voter guides opposing the reelection of Justice Rives Kistler of the state supreme court, denouncing him as “the only open homosexual supreme court judge in the nation”; it was the same-sex marriage issue that had given salience to the jurist’s sexual orientation.³¹⁷

310. Hamilton Basso, Letter to the Editor, *To Understand the South*, N.Y. TIMES, Apr. 10, 1955, at E10.

311. *Councils’ Plan Told*, SO. SCH. NEWS (Nashville), Apr. 1955, at 3 (quoting a southern banker).

312. *What They Say*, SO. SCH. NEWS (Nashville), Nov. 1959, at 16 (quoting Alabama Attorney General MacDonald Gallion).

313. See, e.g., Cloud, *supra* note 88 (noting a dramatic expansion in partnership benefits over the last ten years).

314. See, e.g., Dan Gilgoff, *The Morals and Values Crowd*, U.S. NEWS & WORLD REP., Nov. 15, 2004, at 42 (“Gay marriage wasn’t a national issue until the Massachusetts Supreme Judicial Court effectively legalized it last November.”).

315. Seelye & Elder, *supra* note 97 (quoting Rev. Lou Sheldon, chairman of the Traditional Values Coalition); see also Lynn Vincent, *Court’s Eye for the Married Guy*, WORLD MAG., Dec. 6, 2003, available at <http://www.worldmag.com/displayarticle.cfm?id=8333> (quoting a congressional representative who supports a federal constitutional amendment banning same-sex marriage, who stated that 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.”).

316. Vincent, *supra* note 315; see also Kaplan, *supra* note 202, at 33 (quoting Phil Burress, president of Citizens for Community Values in Ohio, stating that “I’m beginning to think this was a good thing for America, because it woke people up.”).

317. Breslau, *supra* note 240.

The Oregon Christian Coalition promised to challenge Kistler’s fitness to serve on moral grounds: “We’ll give the people of Oregon information on who they want as a judge, a man who believes family is as important as it has been for thousands of years or a man doing what in the past has been against law and is against moral law.” Charles E. Beggs, *Gay Issue Will Arise in Court Race*, AP Newswires, Mar. 21, 2004, available at http://www.kgw.com/news-local/stories/kgw_032104_news_election_gay_judge_aa280c6d.html. Kistler survived the challenge, but with

The second reason that rulings such as *Brown* and *Goodridge* produce political backlashes is that judicially mandated social reform may mobilize greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions. *Brown* represented *federal* interference in southern race relations—something that white southerners, harboring deep historical resentments over military rule and “carpetbag” government during Reconstruction—could not easily tolerate.³¹⁸ Some earlier changes in racial practices—such as the hiring of black police 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 growth of black voter registration—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.”³¹⁹

Goodridge, decided by the Massachusetts Supreme Court, cannot be seen as outside interference—at least with regard to ramifications for Massachusetts—in the same way that white southerners tended to regard the U.S. Supreme Court ruling in *Brown*. However, because it was a court decision, rather than a reform adopted by voters or popularly elected legislators, critics were able to deride it as the handiwork of arrogant “activist judges” defying the will of the people.³²⁰ Ken Starr, a former federal appeals court judge, solicitor general, and independent counsel, called *Goodridge* “a terrible judicial usurpation of the power of the people through their elected representatives to fashion social policy.”³²¹ Karl Rove declared that President Bush believed that “5,000 years of human history should not be overthrown by the acts of a few liberal judges.”³²² The president himself stated during one of the presidential debates, “I’m deeply concerned that judges are

just sixty percent of the vote—in a state where appellate judges rarely face serious challenges for reelection. *2004 Primary Election Results*, STATESMAN J. (Salem, Or.), May 20, 2004, at 2A.

318. Robert H. Jackson, Draft Memorandum, *supra* note 29, 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 interference).

319. DAYBREAK OF FREEDOM: THE MONTGOMERY BUS BOYCOTT 208 (Stewart Burns ed., 1997) (quoting Bayard Rustin’s report on his visit to Montgomery during the bus boycott, March 21, 1956).

320. See, e.g., Bumiller, *supra* note 225 (quoting President Bush defending a federal marriage amendment as necessary because of “activist judges” redefining marriage); Lisa Schiffren, Op-Ed, *How the Judges Forced the President’s Hand*, N.Y. TIMES, Feb. 29, 2004, § 4, at 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”); Seelye & Elder, *supra* note 97 (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”).

321. Seelye, *supra* note 213.

322. *Rove Says Marriage Amendment on Bush’s Agenda*, *supra* note 300.

making those decisions, and not the citizenry of the United States.”³²³ Even a prominent gay-rights activist such as Andrew Sullivan, former editor of the *New Republic*, conceded that “[c]ourt-imposed mandates rub people the wrong way, even those who support including gay couples within the family structure.”³²⁴ The *Goodridge* ruling on same-sex marriage contrasts 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 & Credit Clause of the federal constitution conceivably—though doubtfully—would place other states under some obligation to respect Massachusetts marriages, critics of *Goodridge* were able to rally support for a federal constitutional amendment, which was said to be necessary to protect the rest of the nation from the “activist judges” of Massachusetts.³²⁵ To be sure, in light of the well-recognized public policy exception to the Full Faith & Credit Clause and in light of the Defense of Marriage Act passed by Congress in 1996, *Goodridge* probably would have no binding effect outside of Massachusetts even without such an amendment.³²⁶ But the ability of critics of same-sex marriage to rally support for a constitutional amendment depended less on the reality of the extraterritorial impact of *Goodridge* than on its *perceived* consequences; moreover, these critics were able to sow doubts as to what “activist judges” might do with the Defense of Marriage Act.³²⁷ Thus, two prominent conservative scholars insisted that a federal marriage amendment was necessary to prevent “liberal state judges, abetted by sympathetic Justices on the Supreme Court of the United States [from] foist[ing] same-sex marriage upon the whole nation.”³²⁸ Senator Trent Lott of Mississippi warned, “sadly, it is only a matter of time before the Defense of Marriage Act is overturned by un-

323. David von Drehle, *Take the Issues to the People, Not to the Courts*, WASH. POST, Nov. 14, 2004, at B4.

324. *Id.*; see also Cloud, *supra* note 88 (quoting Glenn Stanton, spokesman for Focus on the Family, stating that critics of *Goodridge* “don’t know which to be more outraged at—the death of marriage or the death of democracy”).

325. See, e.g., 150 CONG. REC. S7911 (daily ed. July 12, 2004) (statement of Sen. Hatch) (“an obscure supreme court in Massachusetts . . . is deciding this issue for all of America”); Dao, *supra* note 221 (noting a Georgia legislator emphasizing the need for a state constitutional amendment forbidding same-sex marriage because of “activist judges”).

326. See, e.g., Rauch, *supra* note 151 (quoting some lawyers stating that the Full Faith & Credit Clause has never been interpreted to require states to recognize marriages that contravene their public policy and noting that this conservative Supreme Court is not about to overturn the Defense of Marriage Act).

327. E.g., Pam Belluck, *Massachusetts Gives New Push to Gay Marriage*, N.Y. TIMES, Feb. 5, 2004, at A6 (noting Tony Perkins, president of the Family Research Council, warning, “If same-sex couples ‘marry’ in 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”); Bumiller, *supra* note 225 (quoting President Bush warning that the Defense of Marriage Act might itself be struck down by “activist courts”); see also Schiffren, *supra* note 320 (warning that “[u]ndoubtedly, there are more judges across the country waiting for their chance to be creative, too”).

328. George & Tubbs, *supra* note 147.

elected Federal judges who ‘find’ rights in the U.S. Constitution which simply are not there.”³²⁹ The Republican party’s platform in 2004 proclaimed that “anything less than a Constitutional amendment, passed by the Congress and ratified by the states, is vulnerable to being overturned by activist judges.”³³⁰ Another conservative activist warned, “[w]e are in a race between the federal courts and the marriage amendment.”³³¹

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. 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.³³² 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.³³³ Heterosexuals are least determined to retain criminal prohibitions on private, consensual, adult same-sex sodomy.³³⁴

By the early 1950s, many southern cities had relaxed Jim Crow in public transportation, police-department employment, athletic competitions, and voter registration.³³⁵ Yet white southerners were more adamant about preserving grade-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). Before *Brown*, many politicians in the South had built successful careers by supporting populist economic policies while quietly backing gradual racial reform.³³⁶ *Brown* made that

329. 150 CONG. REC. S7923 (daily ed. July 12, 2004) (statement of Sen. Lott); *see also id.* at S7925 (statement of Sen. Brownback of Kansas) (“The choice is clear: Either we amend the Constitution and protect the rights of the people to self-determination in this process or the Constitution will be amended, in effect, by the edict of judges.”).

330. 2004 REPUBLICAN PARTY PLATFORM, *supra* note 261; *see also* 150 CONG. REC. S7908 (daily ed. July 12, 2004) (statement of Sen. Santorum) (warning that without a federal constitutional amendment, “the States will be powerless to defend themselves against these runaway judges”).

Republicans in the House passed a measure to strip federal courts of jurisdiction in cases dealing with the Defense of Marriage Act. H.R. 3313, 108th Cong. (2004).

331. Kirkpatrick & Zezima, *supra* note 307.

332. 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 60–61, 587–88 (1944).

333. *See infra* note 390 and accompanying text.

334. *See infra* notes 340–345 and accompanying text.

335. *See* KLARMAN, *supra* note 11, at 188–90.

336. NUMAN V. BARTLEY & HUGH D. GRAHAM, SOUTHERN POLITICS AND THE SECOND RECONSTRUCTION 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).

approach untenable by forcing to the forefront an issue—racial segregation of public schools—on which most white southerners were unwilling to compromise. *Brown* thus virtually ensured a backlash among southern whites.³³⁷ Had the Court first decided a case such as *Gayle v. Browder*,³³⁸ which required the desegregation of 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 professional education.³³⁹

By contrast, *Lawrence* dealt with an issue on which heterosexuals are most tolerant of change. Whatever most Americans today think of same-sex marriage or gays openly serving in the military, few favor punishing the private sexual conduct of gays and lesbians.³⁴⁰ As one leading 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.”³⁴¹ 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* (and only four of these had statutes that were explicitly addressed to *same-sex* sodomy).³⁴² Even in those holdout states, virtually no prosecutions actually occurred.³⁴³ 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.³⁴⁴ Thus, they probably anticipated a relatively placid response to their ruling, unlike in *Brown*, where some of the Justices expected white southerners to respond with violence and school closures.³⁴⁵

Goodridge produced a political backlash for the same reason that *Brown* did. By the early twenty-first century, most Americans were willing to accept decriminalization of same-sex sodomy, statutory bans on employment

337. See KLARMAN, *supra* note 11, at 391–92 (citing relevant sources).

338. 352 U.S. 903 (1956) (per curiam), *aff’g* 142 F. Supp. 707 (M.D. Ala. 1956).

339. KLARMAN, *supra* note 11, at 238–39, 254–55, 393.

340. See, e.g., 150 CONG. REC. S7912 (daily ed. July 12, 2004) (statement of Sen. Hatch) (“I believe gay people ought to be able to do whatever they believe they should in the privacy of their own homes, but I don’t think they should have the right to redefine traditional marriage.”).

341. Rosen, *supra* note 200, at 50 (quoting Paul M. Weyrich).

342. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

343. *Id.*; see also Dean E. Murphy, *Gays Celebrate, and Plan Campaign for Broader Rights*, N.Y. TIMES, June 27, 2003, at A20 (noting that in Harris County, Texas, *Lawrence* was the only person prosecuted for same-sex sodomy in at least twenty-two years).

344. Robin Finn, *After Battling for Gay Rights, Time to Shift Energies*, N.Y. TIMES, July 8, 2003, at B2 (quoting Ruth E. Harlow, former legal director of the Lambda Legal Defense and Education Fund, observing that in *Lawrence* “the majority of the court caught up with the vast majority of Americans”); Lund & McGinnis, *supra* note 44, at 1556 (observing that “[i]f the Court was looking for a case in which to flex its political muscles with impunity, it could hardly have found a better candidate”); Sunstein, *supra* note 52, at 27 (describing *Lawrence* as “judicial invalidation of a law that had become hopelessly out of touch with existing social convictions”); Thomas, *supra* note 2, at 40 (noting that the Court in *Lawrence* was “just catching up to public opinion”).

345. KLARMAN, *supra* note 11, at 294.

discrimination based on sexual orientation, and perhaps even civil unions for same-sex couples.³⁴⁶ Before *Lawrence* and, even more so, *Goodridge* gave same-sex marriage special prominence, 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.³⁴⁷ This compromise position was an effort to appeal to homosexual voters, who 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.³⁴⁸

After *Goodridge*, that compromise position became untenable. With gay and lesbian couples demanding marriage licenses across the country, it became harder to divert public attention from same-sex marriage to civil unions. Democratic politicians such as Senator Kerry continued to emphasize their opposition to same-sex marriage, but voters found their nuanced position—opposing same-sex marriage but also opposing a federal constitutional amendment to ban it—less palatable than the straightforward condemnation of same-sex marriage provided by most Republicans.³⁴⁹ Compounding his problems, Kerry's vote against the federal Defense of Marriage Act in 1996 made his professed opposition to same-sex marriage less credible than President Bush's.³⁵⁰

One reason Democrats had difficulty finessing the issue is that those voters opposed to same-sex marriage tend to be more passionate than those who support it or those who profess neutrality. (This was also true with regard to attitudes toward public school desegregation in the 1950s; southern whites were far more adamantly opposed to the change than northern whites were to supporting it.³⁵¹) For example, in Ohio, the drop-off in voting between the presidential race and the ballot initiative on marriage was six percent in heavily Democratic areas but only 1.5 percent in socially

346. NAT'L PUB. RADIO, *supra* note 97, fig.14 (noting that at the end of 2003, Americans opposed civil unions by only forty-nine percent to forty-two percent); Gallup Poll, May 5–7, 2003, Public Opinion Online, The Roper Center, University of Connecticut, accession # 0429847, available at Westlaw, Public Opinion Online Database (noting that Americans by sixty-two percent to thirty-five percent favor the same legal rights to health care benefits and Social Security survivor benefits for same-sex couples as for married couples).

347. See, e.g., NAT'L PUB. RADIO, *supra* note 97 (noting in December 2003 that Democratic voters favored civil unions by fifty-five percent to forty percent while Republicans opposed them by sixty-three percent to twenty-seven percent); Belluck, *supra* note 327 (noting that many 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”); *Morning Edition*, *supra* note 222 (noting that major Democratic candidates for president opposed gay marriage but supported civil unions).

348. See Vincent, *supra* note 315 (noting that “Democratic presidential hopefuls . . . are trying to preserve their political liberal base by expressing support for *Goodrich* [sic] while straining not to alienate centrists in the general electorate with a wholesale endorsement of what remains a radical notion”).

349. *Bigotry and Ballots*, *supra* note 273; Greenberger, *supra* note 238.

350. 150 CONG. REC. S7911 (daily ed. July 12, 2004) (statement of Sen. Santorum) (quoting Senator Kerry in September 1996 stating that the Defense of Marriage Act “does violence to the spirit and letter of the Constitution”).

351. KLARMAN, *supra* note 11, at 365–66.

conservative Shelby County, which voted more heavily for Bush than any other county in the state.³⁵² A report by the Pew Research Center in February 2004 found that among the third of Americans supporting same-sex marriage, only six percent would refuse to vote for a candidate who opposed that reform. But among the two-thirds of Americans who oppose same-sex marriage, thirty-four percent would refuse to support a political candidate who did not share their view; that number increased to fifty-five percent among evangelical Christians.³⁵³ Further, it is striking that eight of the eleven state ballot initiatives that passed on November 2, 2004 rejected civil unions as well as same-sex marriage, despite election-day exit polls revealing that sixty-two percent of Americans support either marriage or civil unions for same-sex couples. This result suggests that voters were much more intensely opposed to same-sex marriage than they were supportive of civil unions.³⁵⁴

Decisions such as *Brown* and *Goodridge* not only mandate changes in the abstract, but they inspire activists to take concrete steps to implement them, thus further inciting political backlash. After the decisions in both *Brown I* and *Brown II*, the NAACP urged southern blacks to petition school boards for immediate desegregation on threat of litigation.³⁵⁵ 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.³⁵⁶ 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 the 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.³⁵⁷ 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

352. Dao, *supra* note 267.

353. Kaplan, *supra* note 202; see also Breslau, *supra* note 240, at 43 (quoting the spokesman for the Defense of Marriage Coalition, Tim Nashif, “[p]eople are three times more passionate on this issue than they were even about abortion,” and noting that the National Gay and Lesbian Task Force admits that voters opposed to same-sex marriage are four times more likely to vote according to a candidate's position on the issue than are those who favor it or who profess neutrality).

354. Cf. Thomas Oliphant, Op-Ed, *The Gay Marriage Deception*, BOSTON GLOBE, Nov. 7, 2004, at D11 (noting the paradox that even though exit polls showed that sixty percent of the public supports either same-sex marriage or civil unions, eight of the state marriage initiatives that passed barred legal recognition of either relationship and attributing this disconnect to deception in the way that advocates presented the amendments).

355. KLARMAN, *supra* note 11, at 368.

356. *Id.*

357. *Id.* at 368–69.

decision itself.³⁵⁸ As the *Daily News* of Jackson, Mississippi, editorialized, “there is only one way to meet the attack of the NAACP. Organized aggression must be met by organized resistance.”³⁵⁹

Goodridge had a similar effect. Inspired by the ruling of the Massachusetts court, thousands of same-sex couples applied for and received marriage licenses in San Francisco and in Multnomah County, Oregon, and smaller numbers did so in several other cities across the nation.³⁶⁰ Office-holders in local communities where public opinion supported same-sex marriage had obvious incentives to grant such licenses; their defiance of higher authority converted them into local heroes³⁶¹ (much as southern governors such as Orval Faubus and George Wallace became virtually unbeatable politically by defying federal-court integration orders after *Brown*³⁶²). For example, Mayor Newsom, who had won a narrow victory in the San Francisco mayoral election in December 2003, saw his approval ratings rise to a staggering eighty-five percent after he ordered local officials to begin issuing marriage licenses in February 2004.³⁶³ As the threat that same-sex marriage would expand beyond the boundaries of Massachusetts became real, opponents mobilized behind state and federal constitutional amendments to limit marriage to unions between men and women.³⁶⁴

358. *Id.*

359. Report of the Secretary for the Months of July and August 1955, at 5 (Sept. 12, 1955), *microformed on Papers of the NAACP*, supp. to pt. 1, reel 2, frame 786 (Univ. Publ'ns of Am.).

360. *See supra* notes 230–233 and accompanying text.

361. *See, e.g.,* Crampton, *supra* note 231 (reporting that Mayor West of New Paltz, who began issuing marriage licenses to same-sex couples, addressed rallies, gave speeches reminiscent of the civil rights movement of the 1960s, and declared himself willing to go to jail for the cause); *cf.* Dean Murphy, *California Court Rules Gay Unions Have No Standing*, N.Y. TIMES, Aug. 13, 2004, at A1 (noting the mayor of San Francisco, Gavin Newsom, defending his decision to grant marriage licenses to same-sex couples as “right and appropriate” even after the California Supreme Court had slapped him down and declared the licenses to be “void and of no legal effect”).

362. KLARMAN, *supra* note 11, at 398, 405–06.

363. Rachel Gordon, *Newsom Sheds Wonk Image—Takes it to the Streets*, S.F. CHRON., Feb. 22, 2004, at A1.

Newsom won the election with just fifty-three percent of the vote against a candidate of the Green Party, Matt Gonzales, who outflanked Newsom on the left. *Id.* In his concession speech, Gonzales warned, “When Mayor Newsom is wrong, we’ll be there to oppose him.” John Wildermuth, *S.F. Leftists Warily Ask if Newsom Is for Real*, S.F. CHRON., Apr. 5, 2004, at A1. After Newsom issued his marriage order, a spokesman of the Green Party declared, “Gavin Newsom’s stand on gay marriage made us all proud,” and a local Democratic pollster said, “Newsom has earned the respect of many progressives and liberals.” *Id.* Newsom also quickly became one of America’s best-known mayors, appearing on national television programs such as *Good Morning America*, *Larry King Live*, and *Nightline*, and *Newsweek* magazine named him one of America’s top ten Democrats. Ilene Lelchuk, *Newsom, Unbowed by Decision, Says He is ‘More Resolved’*, S.F. CHRON., Aug. 13, 2004, at A15. By the summer of 2004, his local approval ratings had shot up to eighty-five percent. *Id.*

364. Bob Egelko, *S.F. Gay Marriages Head to Court*, S.F. CHRON., Dec. 21, 2004, at A1 (noting that the “highly visible City Hall weddings, and San Francisco’s libertine reputation, helped to fuel the successful campaigns for anti-gay-marriage amendments in 11 states last month, including Ohio, where turnout for the ballot measure may have tipped the crucial state to Bush”); Greenberger, *supra* note 238 (noting that conservative activists and some Democrats are pointing to the Massachusetts supreme court decision, together with the images of gay weddings in San Francisco, as a key reason for Kerry’s loss).

After the 2004 election, many prominent Democrats blamed Mayor Newsom of San Francisco for providing conservatives with an issue to rally around.³⁶⁵ Senator Dianne Feinstein of California observed that the thousands of same-sex weddings in San Francisco “energize[d] a very conservative vote” and that the “whole issue has been too much, too fast, too soon. And people aren’t ready for it.”³⁶⁶ Representative Barney Frank of Massachusetts, one of the few openly gay representatives in the U.S. Congress, said that Newsom had “helped to galvanize Mr. Bush’s conservative supporters in those states by playing into people’s fears of same-sex weddings.”³⁶⁷ A lawyer for the Alliance Defense Fund, a Christian group that sued to block the same-sex marriages in California, concurred with these assessments, calling the court decisions the “triggers” but noting that Mayor Newsom had “definitely accelerated the reaction” by providing images of gay and lesbian couples embracing and celebrating their marriages.³⁶⁸ Karl Rove had to stifle a grin when asked after the election whether he was indebted to Mayor Newsom for opening City Hall to same-sex marriages.³⁶⁹

Thus, the most significant short-term consequence of *Goodridge*, as with *Brown*, may have been the political backlash that it inspired.³⁷⁰ 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 counterbacklash in northern opinion, in the wake of *Goodridge* gays and lesbians have not faced the sort of pervasive public violence that outrages moderates and turns the tide of public opinion once and for all.³⁷¹

365. See, e.g., Pam Belluck, *Maybe Same-Sex Marriage Didn’t Make the Difference*, N.Y. TIMES, Nov. 7, 2004, at D5; Mehren, *supra* note 268; Mittelstadt, *supra* note 304; see also *Blame it on San Francisco?*, S.F. CHRON., Nov. 8, 2004, at B6 (reluctantly conceding some validity to the theory that the seeds of President Bush’s victory were planted in San Francisco in February, as the scenes of thousands of gay couples marrying “caused more of a jolt to heartland sensibilities than many folks here realized at the time”).

366. Belluck, *supra* note 365.

367. Dean E. Murphy, *Some Democrats Blame One of Their Own*, N.Y. TIMES, Nov. 5, 2004, at A12; see also Wheatley, *supra* note 277 (noting that those, like the author, who had succumbed earlier in the year “to a giddy and gleeful inflation of pride” when gay couples lined up in San Francisco to get married, must now face the “harsh reality” that they had “grossly miscalculated” and that their “gambit for marriage was a resounding failure”).

368. Murphy, *supra* note 367; see also Anthony B. Robinson, *Making Sense of Moral Surprise During the 2004 Election*, SEATTLE POST-INTELLIGENCER, Nov. 14, 2004, at F1 (calling Mayor Newsom “the Republicans’ secret weapon in 2004”).

369. Adam Nagourney, *Moral Values Carried Bush, Rove Says*, N.Y. TIMES, Nov. 10, 2004, at A20.

370. See Rosen, *Immodest Proposal*, *supra* note 41, at 19 (“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*, NAT’L J., Nov. 22, 2003, at 3557 (“The backlash [*Goodridge*] has provoked could conceivably prove powerful enough to set back the gay-rights movement for decades.”).

371. *But cf. Meet the Press: Arnold Schwarzenegger* (NBC television broadcast Feb. 22, 2004) (Governor Arnold Schwarzenegger reporting on “riots” in San Francisco over same-sex marriage and predicting, “The next thing we know . . . there are injured or there are dead people”).

V. THE FUTURE

Alexander Bickel, the preeminent constitutional law scholar of the 1960s, once described the Warren Court's landmark rulings as predictions of the future.³⁷² Other scholars have likewise depicted path-breaking Court decisions such as *Roe v. Wade*³⁷³ and *Furman v. Georgia*³⁷⁴ as efforts by the Justices to put the Court on the right side of history.³⁷⁵ Other commentators have objected that even if such descriptions are accurate, to defend such a soothsaying role for the Court is normatively problematic.³⁷⁶

Brown and *Lawrence* share a characteristic pertaining to this debate: On both the issues of racial equality and gay rights, public opinion was intensely divided at the time of the Court's ruling, but future trends were not difficult to predict. In the Justices' conference deliberations on *Brown*, Stanley Reed predicted that racial segregation would disappear in the border states within fifteen or twenty years, even without judicial intervention.³⁷⁷ Justice Jackson similarly observed that "segregation is nearing an end."³⁷⁸ Given the propensity of constitutional law to suppress outliers,³⁷⁹ such a shift in social practices might have guaranteed an eventual judicial ruling against 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

372. ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 12–13 (1970) (noting that the Warren Court "bet on the future" and "relied on events for vindication"); *see also id.* at 99 ("the Justices of the Warren Court placed their own bet on the future"); *id.* at 173–74 (noting the Warren Court's "confident reliance on the intuitive judicial capacity to identify the course of progress").

373. 410 U.S. 113 (1973).

374. 408 U.S. 238 (1972).

375. *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) (noting that the Justices in *Furman* thought that capital punishment was on the way out and that they were offering a "nudge" toward extinction); *see also id.* at 352 (portraying *Roe v. Wade* as an effort by Supreme Court Justices "to anticipate popular sentiment" and as a product of their "vision of the future and . . . [their] confidence in their own foresight"); *THE SUPREME COURT IN CONFERENCE*, *supra* note 15, at 617 (reproducing the conference notes in *Furman v. Georgia*, with Justice Brennan noting that support for abolition of the death penalty has increased throughout the twentieth century and Justice Stewart predicting that "[s]omeday the Court will hold that the death sentence is unconstitutional").

376. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 69–70 (1980) (noting that "there is no reason to suppose that judges are well qualified to foresee the future development of popular opinion;" that the enterprise of predicting the future "is antidemocratic on its face," and that "by predicting the future the Justices will unavoidably help shape it").

377. William O. Douglas, Conference Notes, *Brown v. Bd. of Educ.*, (Dec. 13, 1952) (on file with Library of Congress, Manuscript Division, Douglas Papers, Box 1150).

378. *Id.*

379. *See, e.g.*, THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 84–85, 188 (1989); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 489–94 (2000); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16–17 (1996).

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.”³⁸⁰

The future may be even easier to predict with regard to gay rights. Although the election results in 2004 confirm that most Americans are not yet ready for same-sex marriage, on other gay-rights issues the trend is plainly in the direction of expanded rights. In 2004, voters in Cincinnati overturned a city ordinance adopted ten years earlier that had barred the city council from passing any laws giving “minority or protected status” to gays and lesbians.³⁸¹ In both North Carolina and Idaho, states not normally considered strong bastions of gay rights, voters elected their first openly gay state legislators, and voters in Dallas County, Texas elected as sheriff an openly lesbian Democrat—the first woman ever to hold the post and the first Democrat to do so in nearly three decades.³⁸² On January 1, 2005, the nation’s most far-reaching domestic partnership law went into effect in California, granting nearly all the rights of married couples to thousands of same-sex partners.³⁸³ Moreover, despite election results revealing powerful public opposition to same-sex marriage, lower courts—even in socially conservative states—have continued to expand gay rights in other contexts. In December 2004, a state court in Arkansas invalidated a regulation banning gays and lesbians from serving as foster parents,³⁸⁴ and the Montana Supreme Court ruled that public universities in the state were constitutionally obliged to provide gay employees with insurance coverage for domestic partners.³⁸⁵

The demographics of public opinion on issues of sexual orientation virtually ensure that one day in the not-too-distant future a substantial majority of Americans will support same-sex marriage³⁸⁶: young people are much

380. Robert H. Jackson, Draft Memorandum, *supra* note 29, at 1.

381. Christopher Lisotta, *Six Reasons Why November 2 Wasn't a Total Gay Political Nightmare*, L.A. WKLY., Dec. 24, 2004, at A20.

382. Lisotta, *supra* note 381.

383. Egelko, *supra* note 364.

384. Judgment at 1, Memorandum Opinion at 18, *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881 (Ark. Cir. Ct. Dec. 29, 2004). The court invalidated the regulation under the Equal Protection Clause, while denying that gays constituted a suspect class.

385. *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004). The basis of the decision was that Montana discriminated against same-sex couples by allowing only opposite-sex couples to qualify through common-law marriage for partnership benefits. *Id.* at 452. The court went out of its way to deny that it was calling into question the state’s limitation of marriage to unions between a man and a woman. *Id.* at 452–53.

386. *Canada’s Celebration of Marriage*, N.Y. TIMES, June 19, 2003, at A24 (noting that the movement toward accepting same-sex marriage in the United States “will be unstoppable in time, whatever the pace proves to be”); Frank Rich, *And Now, the Queer Eye for the Straight Marriage*, N.Y. TIMES, Aug. 10, 2003, at B1 (noting the University of Chicago historian George Chauncy confidently predicting “the steady decline in opposition to same-sex marriage”); *Right-to-Marry Battle Continues*, S.F. CHRON., Dec. 21, 2004, at B8 (“There is no question that the concept of same-sex marriage is gaining acceptance, despite the success of resolutions against it in 11 states last November.”); Rosen, *supra* note 200, at 50 (noting that “two-thirds of Americans now say they believe that same-sex marriage will be legal within the next hundred years”).

more likely to support gay rights than are their elders.³⁸⁷ Indeed, a poll taken in June 2003 showed that sixty-one percent of respondents aged eighteen to twenty-nine already supported the legalization of same-sex marriage, while among those aged 65 and over just twenty-two percent did so.³⁸⁸ There is little reason to believe that as people get older, their attitudes on such issues become more 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, same-sex marriage will become increasingly accepted.³⁸⁹

Indeed, exit polls conducted in the 2004 election revealed that about sixty percent of Americans *already* support either marriage or civil unions for same-sex couples, and President Bush clarified just before the election that he did not oppose states recognizing civil unions.³⁹⁰ The shift in public opinion on this issue within just a few years has been truly astonishing,³⁹¹ and it may suggest that the growing power and pervasiveness of popular culture is likely to cause public attitudes on sexual orientation to shift faster than racial and gender attitudes changed in preceding generations.³⁹² At some point, the Court is likely to constitutionalize a newly emerging consensus and invalidate bans on same-sex marriage, much as the Justices

387. Sullivan, *supra* note 273, at 11.

388. Linda Lyons, *U.S. Next Down the Aisle Toward Gay Marriage?*, GALLUP POLL TUESDAY BRIEFING, July 22, 2003.

389. Evans, *supra* note 306 (quoting Evan Wolfson, executive director of the Freedom to Marry Project: "No civil rights movement advances without ups and downs and some difficult patches. What is most important is that young people, regardless of their political affiliation, overwhelmingly support ending this discrimination."); Robin Toner, *The Culture Wars, Part II*, N.Y. TIMES, Feb. 29, 2004, § 4, at 1 (quoting Democratic pollster Anna Greenberg observing, "it's really likely in 10 or 20 years that people won't understand what all the fuss was about" and "[t]here's a whole generation of people growing up who just don't think about these issues in the same way").

390. Gary Langer, *A Question of Values*, N.Y. TIMES, Nov. 6, 2004, at 19; Sullivan, *supra* note 273; Zernike, *supra* note 264; *see also* Steve Chapman, *Our No. 1 Moral Value Is Still 'Live and Let Live'*, BALT. SUN, Nov. 9, 2004, at 15A (noting a Washington Post-ABC poll in 2004 finding that fifty-four percent of respondents supported civil unions while only forty-two percent opposed them).

391. Chapman, *supra* note 390 (noting that today a majority support civil unions, which a couple of years ago were "a radical concept"); Michael Kinsley, *A Gay Marriage Success Story*, L.A. TIMES, Dec. 12, 2004, at M5 (noting the extraordinary rapidity with which same-sex marriage has gone from being a novel idea to being seriously debated); Kirkpatrick & Zezima, *supra* note 307 (reporting a statement by Cheryl Jacques of the Human Rights Campaign noting that a few years ago people were scared to death of civil unions, whereas now that policy represents the political safe ground); Peter Steinfels, *Beliefs*, N.Y. TIMES, Nov. 6, 2004, at A15 (noting that "civil unions, which stirred shock and fury in Vermont only a few years ago, have almost reached the stage of being mainstream"); Sullivan, *supra* note 273; *see also* Lyons, *supra* note 388 (noting that when Gallup first asked the question whether Americans supported same-sex marriage in 1996, only twenty-seven percent answered yes, but by 2003 that number had increased to thirty-nine percent); Elizabeth Mehren, *Voters Oust 5 Who Backed Civil Union Law*, L.A. TIMES, Sept. 14, 2000, at A23 (noting a clear backlash against civil unions in Vermont in the 2000 elections, with five incumbent Republicans who had supported civil-union legislation being defeated in primary elections by social conservatives).

392. Kinsley, *supra* note 391; *see also* Sunstein, *supra* note 52, at 29 (noting that dramatic shifts in attitudes regarding sexual orientation have been taking place "in an extraordinarily short time").

struck down restrictions on interracial marriage in *Loving v. Virginia* (1967)³⁹³ after the civil rights movement had rendered anachronistic that last formal vestige of Jim Crow.³⁹⁴

To be sure, predicting the future can be fraught with peril. When the Supreme Court invalidated abortion restrictions in *Roe v. Wade* and cast doubt upon the constitutionality of the death penalty in *Furman v. Georgia*, 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.³⁹⁵ Suffice it to say that on both occasions the Justices' prediction proved mistaken. Over the next three decades, public opinion on abortion changed very little from what it had been in 1973.³⁹⁶ Public opinion on the death penalty shifted quickly and powerfully against the Court.³⁹⁷

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. Even some conservatives who oppose same-sex marriage admit, when pressed, that they regard it as probably inevitable.³⁹⁸ As Cheryl Jacques, then head of the Human Rights Campaign, noted after the 2004 elections, “[w]e lost a battle, but we are winning the war.”³⁹⁹

393. 388 U.S. 1 (1967).

394. Cf. *Bigotry and Ballots*, *supra* note 273 (noting that the same-sex marriage issue helped reelect President Bush but taking solace in the fact that bans on interracial marriage were supported until recently); see also Lelchuk, *supra* note 363 (noting Mayor Newsom of San Francisco predicting, immediately after the California supreme court voided the same-sex marriages he had earlier authorized, that eventually San Francisco's stand would prevail, much as civil rights activists ultimately succeeded at ending bans on interracial marriage).

395. See *supra* note 375.

396. Gallup Poll, Mar. 8–18, 1974, Public Opinion Online, The Roper Center, University of Connecticut, accession # 0045804, available at Westlaw, Public Opinion Online Database (reporting that forty-seven percent of Americans supported *Roe v. Wade* and forty-four percent opposed it); Gallup Poll, Mar. 26–28, 2001, The Roper Center, University of Connecticut, Public Opinion Online, accession # 0380244, available at Westlaw, Public Opinion Online Database (reporting that forty-seven percent of Americans consider themselves pro-choice, as opposed to forty-one percent who consider themselves pro-life).

397. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 267 (2002) (noting that the “decision of *Furman* . . . touched off the biggest flurry of capital punishment legislation the nation had ever seen”); JEFFRIES, *supra* note 375, 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 . . .”).

398. E.g., Lyons, *supra* note 388 (quoting Michael J. McManus, founder of Marriage Savers, who said, when asked if same-sex marriage was inevitable, “My answer, alas, is probably.”).

399. Greenberger, *supra* note 238; see also *Blame it on San Francisco?*, *supra* note 365 (contending that even though the same-sex marriage issue may have helped President Bush win reelection, “[t]ime is on the side of the bold leaders who are willing to confront discrimination [against gays] in clear and compelling terms”).

VI. CONCLUSION: THE COURT'S LEGITIMACY

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*⁴⁰⁰ declared that "[t]he 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."⁴⁰¹ Further, the plurality stated, "[A] decision without principled justification would be no judicial act at all,"⁴⁰² 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. . . ."⁴⁰³

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 authority.⁴⁰⁴ One prominent newspaper editor in the South, James J. Kilpatrick, stated a typical view: "In May of 1954, that inept fraternity of politicians and professors known as the United States Supreme Court chose to throw away the established law. These nine men repudiated the Constitution, sp[a]t upon the tenth amendment, and rewrote the fundamental law of this land to suit their own gauzy concepts of sociology."⁴⁰⁵

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 [*Brown*] does or can rest except as a *coup de main*,"⁴⁰⁶ and the following year Professor Herbert Wechsler castigated the Court for failing to justify its decision in *Brown* on the basis of any "neutral principle."⁴⁰⁷ 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

400. 505 U.S. 833 (1992) (plurality opinion).

401. *Id.* at 865.

402. *Id.*

403. *Id.*

404. KLARMAN, *supra* note 11, at 367–68 (citing relevant sources).

405. *Court Order Gets Varied Reaction from Region's Newspapers*, SO. SCH. NEWS (Nashville), June 8, 1955, at 8, 9.

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

407. WECHSLER, *supra* note 54, at 32–34.

“justify the abolition of segregation as a judicial act,” but he agreed to “go along with it” as “a political decision.”⁴⁰⁸

In the fifty years since it was decided, *Brown* has become an American icon. Almost everyone regards the decision as right.⁴⁰⁹ No constitutional theory is taken seriously unless it can accommodate the result in *Brown*.⁴¹⁰ Aspiring jurists who dared to question the soundness of *Brown* could not possibly survive Senate confirmation hearings.⁴¹¹ In 1987, Judge Robert Bork criticized the Court’s sexual-privacy decision, *Griswold v. Connecticut*,⁴¹² and its landmark reapportionment ruling, *Reynolds v. Sims*,⁴¹³ but he emphasized his support for *Brown*.⁴¹⁴ 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.⁴¹⁵

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.⁴¹⁶

408. Harold H. Burton, Conference Notes, Segregation Cases (Dec. 13, 1952) (on file with Library of Congress, Manuscript Division, Burton Papers, Box 244).

409. See, e.g., JEFFRIES, *supra* note 375, 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*”).

410. 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. REV. 947, 952 (1995) (noting that any theory unable to accommodate *Brown* “is seriously discredited”).

411. 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., at 25–26 (1986) (reproducing a 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”).

412. *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.”).

413. *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”)

414. *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.”).

415. Cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976) (observing that “the power of judicial action to generate assent over the long haul [is] the ultimate touchstone[] of legitimacy”).

416. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting) (criticizing the majority for the “invention of a brand-new ‘constitutional right’” and for subverting the democratic process); Lund & McGinnis, *supra* note 44, at 1557, 1575 (condemning *Lawrence* as “a paragon of the most anticonstitutional branch of constitutional law: substantive due process,” which “displays a dismissive contempt for both the Constitution and the work of prior Courts” and “simply

Lawrence's critics sound many of the same notes that *Brown*'s critics did 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*.⁴¹⁷ It may not be too much longer before *Bowers* comes to resemble *Plessy v. Ferguson*⁴¹⁸—one of the most vilified decisions in the Court's history—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.

abandons legal analysis"); Dean E. Murphy, *Gays Celebrate, and Plan Campaign for Broader Rights*, N.Y. TIMES, June 27, 2003, at A20 (quoting Virginia Attorney General Jerry W. Kilgore criticizing *Lawrence* for undermining the state's "right to pass legislation that reflects the views and values of our citizens").

417. 478 U.S. 186 (1986).

418. 163 U.S. 537 (1896).

