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

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

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

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

Justice Anthony Kennedy, Obergefell v. Hodges\(^2\)

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

Judge Richard Posner, Baskin v. Bogan\(^3\)

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1. A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 131 (Clayborne Carson & Kris Shepard, eds., 2001) (paraphrasing abolitionist THEODORE PARKER, TEN SERMONS OF RELIGION 84-85 (1853)).
3. 766 F.3d 648, 671 (7th Cir. 2014), cert. denied, 135 S. Ct. 316 (2014).
INTRODUCTION—CIVIL RIGHTS HISTORY AND STORYTELLING

A. Legal Analysis Bound to History

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

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

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

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


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

7. See, e.g., Smith v. Wade, 461 U.S. 30, 34 & n.2 (1983) (inferring nineteenth century congressional intent to permit courts to take guidance from tort principles as they have evolved, rather than as frozen at the time of enactment); see also Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954) (considering “public education in the light of its full development and its present place in American life,” rather than “turn[ing] the clock back to 1868 when the [Fourteenth] Amendment was adopted”); Heller, 554 U.S. at 582 (stating that First, Second, and Fourth Amendments apply to “modern forms of communications,” modern techniques of
so courts do overrule their own precedents in the proper circumstances. And even when the conditions dictated by stare decisis for abandoning precedent have not been met, the precise meaning and reach of retained precedent is frequently subject to reasonable debate.

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

The thesis of this Article is that past civil rights movements in the United States define broad historical patterns that form a narrative helpful to a proper understanding of new controversies. In essence, as a society, we often could benefit from a reminder that our searching, and “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding”).

9. Citizens United, 558 U.S. at 363-65 (stressing the importance of stare decisis, but nonetheless, overruling precedent).
12. E.g., Raftopol v. Ramey, 12 A.3d 783, 800-04 (Conn. 2011) (identifying legislature as the appropriate body to address public policy issues raised by surrogate mother agreements, but judicially resolving narrow issue by interpreting existing statute); City & Cty. of S.F. v. Local 38, 726 P.2d 538, 541-44 (Cal. 1986) (deferring to legislature to resolve policy issues in field of public employee strikes, and thus refraining from developing common law tort liability for strike assumed to be illegal).
13. E.g., Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (the view of the governing majority in a state that homosexual intimacy is immoral does not justify state criminal law); Strauder v. West Virginia, 100 U.S. 303, 306 (1879) (holding that Fourteenth Amendment includes the “right to exemption from unfriendly legislation” targeting African-Americans); Baskin v. Bogan, 766 F.3d 648, 671 (7th Cir.) (“Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.”), cert. denied, 135 S. Ct. 316 (2014).
actions today will form the history for future generations, who will judge us with benefit of hindsight and a broader perspective. With each new civil rights controversy, we owe it to ourselves and to the victims of discrimination to ask whether we are once again in a period of transition, where conventional mores of the present will soon sound as jarring as this passage from Justice Bradley’s concurrence in Bradwell v. Illinois\textsuperscript{14} sounds to us now:

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

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

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

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

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

\textsuperscript{15} Id. at 141 (Bradley, J., concurring).

\textsuperscript{16} See generally CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 354-56 (7th ed. 2014) (discussing the technique of embedding a theme into a brief,
B. The Civil Rights Narrative as a Tool of Persuasion

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

But stories are also embedded in the law itself and its development over time, sometimes revealing the deeply seated
to underscore the fairness or justice of a position or encourage a judge to adopt an approach or perspective); Ruth Ann Robbins, Steve Johansen & Ken Chestek, Your Client’s Story: Persuasive Legal Writing 292 (2013) (“While every case requires a sound legal theory, the client is better served by the lawyer including an appealing theme as well.”).

17. See, e.g., Robbins, Johansen & Chestek, supra note 16, at 292; Ruth Anne Robbins, Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey, 29 Seattle U. L. Rev. 767, 767-68 (2006); Jonathan Shapiro, Lawyers, Liars, and the Art of Storytelling 125 (2014) (“The client will be your story’s central character, or at least one of them.”).


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

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

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

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

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

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The text continues with further elaboration on the role of narrative in legal reasoning, including references to academic works by Christy H. DeSanctis, Anthony Amsterdam & Jerome Bruner, Linda H. Edwards, and others. The page number 1255 is noted at the bottom right.
equality. It ends by concluding that references to the arc of civil rights history can advance advocacy in contemporary civil rights movements, by revealing parallels to previously recognized civil rights and to previously rejected grounds for resistance to civil rights.

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

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


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

In Baker, the Minnesota Supreme Court rejected federal equal protection and due process challenges to a state statute that it interpreted to disallow same-sex marriages. It set the tone for its opinion with a reference to tradition of especially long standing: “The institution of marriage as a union of man and woman, uniquely
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involving the procreation and rearing of children within a family, is as old as the book of Genesis.”

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

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

29. Id. at 186 (citing Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942), and quoting its linking of marriage to procreation and “survival of the race”).
31. Baker, 191 N.W.2d at 186-87 (citing the majority opinion of Griswold, 381 U.S. at 482, 485, and Justice Goldberg’s concurring opinion, id. at 496).
32. Id. at 187.
33. Id. The court quoted a passage from Loving v. Virginia, 388 U.S. 1, 12 (1967), which referred to the equality principle of the Fourteenth Amendment and to a deprivation of liberty without due process. Baker, 191 N.W.2d at 187.
36. Id. at 345 n.14; see also Mandel v. Bradley, 432 U.S. 173, 176-77 (1977) (stating that such a dismissal binds lower courts on “the precise issues presented and necessarily decided”).
Forty-two years after the Supreme Court’s summary disposition in *Baker*, intervening Supreme Court case law—culminating in *United States v. Windsor*38—had so undermined the judgment in *Baker* that, after *Windsor*, lower courts nearly universally determined that they could entertain federal due process and equal protection challenges to state bans on same-sex marriage, free of the bonds of *Baker*.39 But, in 1986, the Court’s decision in *Bowers v. Hardwick*40 had threatened to derail that doctrinal progression.

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

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38. 133 S. Ct. 2675 (2013).
39. See, e.g., Latta v. Otter, 771 F.3d 456, 467 (9th Cir. 2014); Pareto v. Ruvin, 21 Fla. L. Weekly Supp. 899, 901 (Fla. Cir. Ct. 2014) (observing that, as of July 25, 2014, all cases that had addressed *Baker* since *Windsor*, numbering more than twenty, had viewed *Baker* to be undermined by doctrinal developments); see also Bostic v. Schaefer, 760 F.3d 352, 373 (4th Cir.) (citing to eleven federal cases reaching the same conclusion, and describing them as consistent conclusions from every federal case addressing *Baker* since *Windsor* and up to July 29, 2014), cert. denied, 135 S. Ct. 308, 308 (2014); Searcy v. Strange, 81 F. Supp. 3d 1285, 1288 (S.D. Ala. 2015). Some courts have proceeded to the merits without discussing *Baker*. See generally, e.g., Brassner v. Lade, 21 Fla. L. Weekly Supp. 920a (Fla. Cir. Ct. 2014). Between the Supreme Court’s decisions in *Windsor* and *Obergefell*, a few courts concluded that *Baker* still had some bite, apparently on the basis that it would not lose its precedential force unless clearly overruled, rather than simply undermined by intervening authority. DeBoer v. Snyder, 772 F.3d 388, 400 (6th Cir. 2014) (finding that *Baker* had not been overruled), rev’d sub nom. *Obergefell*, 135 S. Ct. 2584; Borman v. Pyles-Borman, No. 2014CV36, slip op. at 2-3 (Tenn. Cir. Ct. Aug. 5, 2014) (finding *Baker* not overruled “[f]or purposes of passing this issue to the appellate courts without discussion”), abrogated by *Obergefell*, 135 S. Ct. 2584.
41. *Id.* at 190-96 (finding no fundamental right at stake, and finding a rational basis for the statute).
42. *Id.* at 188.
43. Justice White’s opinion described the relevant precedent in the following way:

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

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

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

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

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

*Bowers*, 478 U.S. at 190.  

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

45.  *Id.* at 196.  


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

49.  *Id.* at 211-12.  

50.  *Id.* at 206.  

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

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

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

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

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

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

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

53. Id.
54. Id. at 562.
55. See supra text accompanying notes 46-47.
56. Lawrence, 539 U.S. at 562.
58. Id. at 579-85 (O’Connor, J., concurring); see also id. at 566 (majority opinion) (distinguishing the Georgia and Texas statutes).
59. Id. at 579 (O’Connor, J., concurring).
Texas statute against liberty interests protected by substantive due process, thus directly confronting *Bowers*, and avoiding questions about whether an equal protection infirmity in the statute could be cured by extending its provisions to opposite-sex couples.\(^{60}\)

The *Lawrence* majority reviewed several pre-*Bowers* precedents that supported a broad conception of substantive due process protecting liberty interests related to privacy: three decisions relating to access to contraception\(^{61}\) and recognition in *Roe v. Wade*\(^{62}\) of a woman’s qualified right to elect an abortion.\(^{63}\) These were buttressed by two post-*Bowers* cases: *Planned Parenthood v. Casey*,\(^ {64}\) and *Romer v. Evans*.\(^ {65}\)

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

In *Romer*, the Supreme Court invalidated an amendment to the Colorado state constitution, adopted by referendum, which prohibited all state or local government action designed to prevent or redress discrimination on the basis of homosexual orientation.\(^ {67}\) The amendment placed gay and lesbian Coloradans in a “disfavored legal status” that made it more difficult for them to “seek aid from the government”\(^ {68}\) simply “to make them unequal to everyone else.”\(^ {69}\)

Although the Supreme Court applied equal protection principles,\(^ {70}\) it found a constitutional defect that applies as well to substantive due process: the absence of a legitimate state interest, and therefore no valid interest to which to link the regulation under any level of

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60. *Id.* at 574-75 (majority opinion).
63. *Lawrence*, 539 U.S. at 564-66. (citing also to *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).
68. *Id.* at 633.
69. *Id.* at 635.
70. *Id.* at 631-32, 635.
In an opinion authored by Justice Kennedy, the majority found that the Colorado amendment simply reflected animosity toward the disfavored class, which did not constitute a legitimate state interest. It gave careful consideration to the amendment and its constitutionality because it was “of an unusual character,” and “not within our constitutional tradition.”

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

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

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

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

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

71. Id. at 632-35.
72. Id. at 634-35 (citing U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
74. Id.
76. Id. at 577.
77. Id. (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).
78. Id. at 573-74 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
79. Id. at 578; see also id. at 585 (O’Connor, J., concurring) (“[O]ther reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”).
80. Id. at 605 (Scalia, J., dissenting).
States v. Windsor,\textsuperscript{81} striking down the federal Defense of Marriage Act (DOMA) as a violation of the Due Process Clause of the Fifth Amendment.\textsuperscript{82} Justice Kennedy once again authored the majority opinion,\textsuperscript{83} which dissenting Justice Scalia described as presenting “rootless and shifting” justifications\textsuperscript{84} and “scatter-shot rationales.”\textsuperscript{85}

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

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

\begin{thebibliography}{99}
\bibitem{81} 133 S. Ct. 2675 (2013).
\bibitem{82} Id. at 2693-96.
\bibitem{83} Id. at 2682.
\bibitem{84} Id. at 2705 (Scalia, J., dissenting).
\bibitem{85} Id. at 2709.
\bibitem{86} Id. at 2689-92 (majority opinion).
\bibitem{87} See, e.g., id. at 2696-97 (Roberts, C.J., dissenting) (pressing an interpretation of the majority opinion to rest on federalism principles and emphasizing that the constitutionality of a state’s banning same-sex marriage is not before the court).
\bibitem{88} Id.; see also id. at 2709 (Scalia, J., dissenting) (stating that courts should adopt Chief Justice Roberts’s interpretation of the majority opinion, see id. at 2696-97, but predicting that they will not); DeBoer v. Snyder, 772 F.3d 388, 414 (6th Cir. 2014) (concluding that Windsor was necessarily grounded on federalism principles), rev’d sub nom. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
\bibitem{89} Windsor, 133 S. Ct. at 2692.
\bibitem{90} Id. at 2693 (citing to Bolling v. Sharpe, 347 U.S. 497 (1954)).
\end{thebibliography}
status, and so a stigma” on members of a class to which the state had granted the “equal dignity of same-sex marriages.” 91

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

According to the majority, these circumstances compelled the conclusion that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.” 99 The majority also found that DOMA violated the equal protection guarantee of the Fifth Amendment, linking it to the liberty interest, 100 because it “imposes a disability on the class” of persons in same-sex marriages recognized by states to help them “enhance their own liberty.” 101 Accordingly, dissenting Justice Alito interpreted the majority’s decision to rest at least partly on both substantive due process 102 and equal protection. 103

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91. Id. at 2693 (“[A] bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.” (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973))).
92. Id. at 2693.
93. Id. (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)); see also Id. at 2692 (quoting Romer, 517 U.S. at 633) (explaining that DOMA “departs from [a] history and tradition of reliance on state law to define marriage”).
94. Id. at 2692.
95. Id. at 2693.
96. Id. at 2694.
97. Id.
98. Id. at 2695.
99. Id.
100. Id.
101. Id. at 2695-96.
102. Id. at 2714 (Alito, J., dissenting) (observing that the majority’s reference to “liberty of the person . . . suggests that substantive due process may partially underlie the Court’s decision today”).
After *Windsor*, nearly every court that addressed the continuing precedential effect of *Baker v. Nelson* concluded that *Baker* had been undermined by subsequent Supreme Court case law and no longer bound lower courts.\(^{104}\)

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

After courts from four states had rejected constitutional challenges to same-sex marriage from 1971 to 1984,\(^ {105}\) the courts of Hawaii breathed new life into the judicial front of the movement for marriage equality. In 1993, in *Baehr v. Lewin*,\(^ {106}\) a plurality of the court found that the state marriage statute, which limited marriage to opposite-sex couples, triggered strict scrutiny under an equal protection provision of the Hawaii Constitution that specifically prohibited sex discrimination.\(^ {107}\) It remanded to the trial court for further proceedings consistent with the plurality opinion.\(^ {108}\) On remand, the trial court found that the marriage statute violated the state constitution’s guarantee of equal protection, and it enjoined state officials from denying marriage licenses to same-sex couples.\(^ {109}\) The Supreme Court of Hawaii affirmed in 1997.\(^ {110}\)

The backlash came swiftly. Congress enacted DOMA\(^ {111}\) in 1996, denying federal recognition to state-sanctioned same-sex

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103. *Id.* at 2716 (stating that the majority’s holding “seems to rest” on equal protection).
104. *See supra* note 39 and accompanying text.
106. 852 P.2d 44 (Haw. 1993) (plurality opinion).
107. *Id.* at 60-67. The plurality rejected a claim that the marriage statute violated a fundamental privacy interest protected by due process. *Id.* at 55-57. Intermediate Court of Appeals Chief Judge James M. Burns, sitting by designation, concurred with the order remanding for further proceedings, but only on the ground that the constitutional issue should not be decided on an inadequate factual record. *Id.* at 68-69 (Burns, C.J., concurring).
108. *Id.* at 68 (plurality opinion); *see also* *id.* at 74 (clarifying that, on motion for reconsideration or clarification, case is remanded for proceedings consistent with the plurality opinion).
marriages, and allowing states to deny recognition to same-sex marriages lawfully performed in other states.\footnote{112} In 1997, Indiana reenacted its same-sex marriage ban and added a provision denying recognition to same-sex marriages from other states.\footnote{113} In 1998, Hawaii and Alaska adopted state constitutional amendments prohibiting recognition of same-sex marriage, seeking to place the question outside the reach of their state judiciary.\footnote{114}

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


\footnote{116} 798 N.E.2d 941 (Mass. 2003).

\footnote{117} \textit{id.} at 961-68.

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

\footnote{119} \textit{See id.} at 959-68. For an excellent exploration of the \textit{Goodridge} decision, its implications and aftermath, within the larger context of the recognition of LGBT rights in Massachusetts, from the insider’s perspective of a GLAD attorney, see Bonauto, \textit{supra} note 18.
By this time, opponents of marriage equality were highly motivated and well organized. By 2008, nearly thirty states had enacted constitutional bans on recognition of same-sex marriage.120

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

Because *Windsor* addressed the constitutionality of a federal refusal to recognize a state’s decision to authorize same-sex marriage, it did not directly address the validity of a state’s decision to exclude same-sex marriage.123 Nonetheless, after *Windsor*, nearly all of the courts that addressed the constitutionality of state bans on same-sex marriage found state or federal constitutional violations in the bans.124 The Sixth Circuit’s contrary decision in *DeBoer v.*
Snyder—rejecting a constitutional right to same-sex marriage—set the stage for Supreme Court review.\textsuperscript{125} Before examining the Supreme Court’s reversal of DeBoer in Obergefell v. Hodges,\textsuperscript{126} it will be instructive to examine the recent transition in social attitudes about same-sex marriage, and the doctrinal uncertainty that permitted judges on state and federal courts to reach different conclusions on the constitutional question, including those on a closely divided Supreme Court.

C. Transition in Social Attitudes

Although Congress has not succeeded in amending Title VII of the Civil Rights Act of 1964 to bar employment discrimination on the basis of sexual orientation,\textsuperscript{127} the American population has for many years tended to accept equal rights in employment in much greater percentages than its acceptance of equal marriage rights for same-sex couples.\textsuperscript{128} To some extent, the greater controversy surrounding same-sex marriage may reflect a tendency by a significant percentage of the population to view state-sanctioned marriages partly through the lens of deeply held religious beliefs and legislature and on rational basis to encourage union that is viewed as best arrangement for procreation and child-rearing), \textit{abrogated by Obergefell}, 135 S. Ct. 2584.

\textsuperscript{125} 772 F.3d at 421.

\textsuperscript{126} 135 S. Ct. at 2608.


\textsuperscript{128} \textit{Compare} GALLUP, \textit{Gay and Lesbian Rights}, http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx (last visited Nov. 1, 2015) (approval for same-sex marriage varying between approximately 36\% and 46\% in the years 2001-2009), and \textit{id.} (finding approval for constitutional amendment banning same-sex marriage varying between 47\% and 57\% in the years 2003-2008), \textit{with id.} (finding support for equal employment rights without regard to sexual orientation varying between 85\% and 89\% in the years 2001-2008); \textit{see} Goodridge v. Dep’t. of Pub. Health, 798 N.E.2d 941, 967 (Mass. 2003) (observing that Massachusetts law excluded same-sex marriage even after adopting laws prohibiting discrimination on the basis of sexual orientation in a variety of contexts, such as employment, housing, and public accommodation).
surrounding marriages sanctioned by their church.\textsuperscript{129} Accordingly, many courts have taken pains to explain that their analyses are limited to state-sanctioned civil marriage and have no effect on religious marriage ceremonies sanctioned by a church and restricted by religious tenets.\textsuperscript{130}

Notwithstanding possible religious objections to same-sex marriage, the support for legal rights to same-sex marriage have increased in recent years, rising to 55% of those polled in 2014.\textsuperscript{131} Some evidence suggests that attitudes about same-sex marriage and other LGBT rights are generational,\textsuperscript{132} so that in a few decades, we

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

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

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

\textsuperscript{132} See, e.g., Growing Support for Gay Marriage: Changed Minds and Changing Demographics, P E W R ES. CTR. (Mar. 20, 2013), http://www.peoplepress.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-
likely will look back on the same-sex marriage debate the way that we now look back on controversies about racial integration and interracial marriage.

II. CLASHING LEGAL PERSPECTIVES

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

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

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

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

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

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

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

A. Baker v. Nelson as Precedent with Continuing Force

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

Although nearly all courts since Windsor found Baker to be undermined by intervening case law,139 the majority and dissenting opinions in the Tenth Circuit’s 2014 decision in Kitchen v. Herbert140 illustrate points of good-faith debate.

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

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137. See supra notes 28-29. The Full Faith and Credit Clause, not addressed in Baker, would remain available as a potential means of challenging a state’s denial of recognition of same-sex marriages legally performed in other states. See, e.g., DeBoer v. Snyder, 772 F.3d 388, 418-19 (6th Cir. 2014) (but finding that full faith and credit did not require a state to recognize same-sex marriages in violation of its own public policy), rev’d sub nom. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).
138. See supra note 34.
139. See supra notes 38-39.
140. 755 F.3d 1193, 1228, 1240 (10th Cir.), cert. denied, 135 S. Ct. 265 (2014).
141. Id. at 1206, 1217.
142. See id. at 1206-07. In section III of its opinion, the majority referred briefly to Lawrence’s affirmation of personal autonomy in intimate relations, but it discussed Windsor in approximately six paragraphs. See id. at 1205-07, 1213.
143. Id. at 1206 (“We acknowledge that the question presented in Windsor is not identical to the question before us.”).
144. See id. at 1207-08.
Circuit Judge Kelly concurred with the majority that the plaintiffs had standing, but he dissented on the merits.\footnote{See \textit{id.} at 1230 (Kelly, J., concurring in part and dissenting in part).} He disagreed that the court could disregard the summary disposition of \textit{Baker}, even if intervening case law had undermined \textit{Baker}. Judge Kelly opined that lower courts must still wait for the Supreme Court to overrule its own precedent.\footnote{See \textit{id.} at 1232 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).} He argued that the weaker application of stare decisis to a summary disposition of the Supreme Court applies only to the Supreme Court’s own reconsideration of the precedent and not to a lower court’s duty to adhere to the holding of the summary disposition: “Though the Supreme Court may not accord \textit{Baker} the same deference as an opinion after briefing and argument, it is nonetheless precedential for this court.”\footnote{Id. at 1232 (citing Caban v. Mohammed, 441 U.S. 380, 390 n.9 (1979)); see also DeBoer v. Snyder, 772 F.3d 388, 401 (6th Cir. 2014) (requiring overruling rather than simply undermining of \textit{Baker}), rev’d sub nom. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).}

Applying the majority’s standards for sake of argument, Judge Kelly disagreed that \textit{Baker} had been undermined by intervening case law.\footnote{Id. at 1232 (citing Caban v. Mohammed, 441 U.S. 380, 390 n.9 (1979)); see also DeBoer v. Snyder, 772 F.3d 388, 401 (6th Cir. 2014) (requiring overruling rather than simply undermining of \textit{Baker}), rev’d sub nom. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).} He characterized intervening case law, including \textit{Lawrence} and \textit{Windsor}, as “[a]t best . . . ambiguous” and as “certainly [not compelling] the conclusion that the Supreme Court will interpret the Fourteenth Amendment to require every state to extend marriage to same-gender couples, regardless of contrary state law.”\footnote{Id. at 1232-33.} Judge Kelly cited to a pre-\textit{Windsor} decision of the First Circuit, holding that \textit{Romer} and \textit{Lawrence} did not undermine the binding effect of \textit{Baker}.\footnote{See \textit{id.} at 1233 (citing Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1, 8 (1st Cir. 2012)).}

Although the dissent in \textit{Kitchen} represented a minority view on the continuing force of \textit{Baker} after \textit{Windsor},\footnote{See supra note 147; see also DeBoer, 772 F.3d at 430 (Daughtrey, J., dissenting) (“If ever there was a legal ‘dead letter’ . . . \textit{Baker} is a prime candidate. It lacks only a stake through its heart.”).} it did reveal a good-faith controversy and uncertainty on that issue. It also suggests that
disregarding *Baker* would have been a more challenging position to defend prior to *Windsor*.152

**B. Level of Scrutiny**

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

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


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


157. *E.g.*, *Clark*, 486 U.S. at 461; *see also* *Griego v. Oliver*, 316 P.3d 865, 879 (N.M. 2013) (stating that sensitive classifications, such as “persons with a mental disability,” trigger intermediate scrutiny under state law); *id*. at 880-85 (noting that sex is viewed as a suspect classification under the state constitution, and finding that a classification based on sexual orientation triggers intermediate scrutiny under state law).
upheld if it is substantially related to an important government interest.\textsuperscript{158}

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

1. \textit{Fundamental Right Triggering Strict Scrutiny: Competing Analytic Frameworks}

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

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

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

\textsuperscript{159.} 521 U.S. 702 (1997).

\textsuperscript{160.} \textit{See id.} at 720-21 (quoting \textit{Moore v. East Cleveland}, 431 U.S. 494, 503 (1977)).

\textsuperscript{161.} \textit{Glucksberg}, 521 U.S. at 720 (citing \textit{Loving v. Virginia}, 388 U.S. 1, 12 (1967)).

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

\textsuperscript{163.} \textit{See, e.g., Andersen}, 138 P.3d at 979 (“[A]lthough marriage has evolved, it has not included a history and tradition of same-sex marriage in this nation or in Washington State.”); \textit{Robicheaux v. Caldwell}, 2 F. Supp. 3d 910, 923 (E.D. La. 2014) (“Public attitude might be becoming more diverse, but any right to same-sex
cannot claim a fundamental right to same-sex marriage, and a ban on same-sex marriage is subject to rational basis review. Plaintiffs and sympathetic judges have responded that defenders of the bans have misstated the issue: rather than ask whether plaintiffs have a right to “same-sex marriage,” courts should recognize the fundamental right to marriage and then apply strict scrutiny to laws that exclude same-sex couples from that right. They have observed that Loving v. Virginia did not ask whether the right to interracial marriage was deeply rooted in our nation’s history; it instead recognized the “the freedom of choice to marry,” and then asked whether a state could deny this “fundamental freedom” on the basis of racial classifications. Similarly, in

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

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

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


168. Loving, 388 U.S. at 12; De Leon v. Perry, 975 F. Supp. 2d 632, 659 (W.D. Tex. 2014) (noting that Loving found that the right to marry included interracial marriage, rather than finding a new right to interracial marriage); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 958 (Mass. 2003) (stating that Loving makes clear that “the right to marry means little if it does not include the right to marry the person of one’s choice”); Hamby v. Parnell, 56 F. Supp. 3d 1056, 1065 (D. Alaska 2014) (noting that Loving “hinged on” recognition of “the freedom to marry, without an additional descriptor”); Pareto v. Ruvin, 21 Fla. L. Weekly
Lawrence, the Supreme Court rejected the framing of the issue stated in Bowers as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,” stating that this framing in Bowers failed “to appreciate the extent of liberty at stake.” According to this line of argument, fundamental rights should not be defined in terms of those who have been excluded from them and are challenging the exclusion.

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

2. Heightened Scrutiny for Quasi-Suspect Class

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

a. Sexual Orientation as a Quasi-Suspect Class

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

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

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

172. *See supra* notes 155-56.

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

In light of uncertainty surrounding this issue, some courts have exercised caution by applying the rational basis level of review, requiring substantial deference to the legislature.\textsuperscript{178} Others have found a basis for intermediate scrutiny\textsuperscript{179} after applying the lodestar

\begin{itemize}
\item \textsuperscript{174} United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (emphasis omitted).
\item \textsuperscript{175} Whitewood v. Wolf, 992 F. Supp. 2d 410, 425 (M.D. Pa. 2014).
\item \textsuperscript{176} Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480-83 (9th Cir. 2014).
\item \textsuperscript{177} \textit{Id.} at 483 (quoting Witt v. Dep’t of the Air Force, 527 F.3d 806, 813 (2008)).
\item \textsuperscript{178} \textit{E.g.}, Baskin v. Bogan, 766 F.3d 648, 656 (7th Cir.) (holding that, even if heightened scrutiny does not apply, discrimination against same-sex couples is irrational, “which is why we can largely elide the more complex analysis found in more closely balanced equal-protection cases”), \textit{cert. denied}, 135 S. Ct. 316 (2014); Bourke v. Beshar, 996 F. Supp. 2d 542, 548-50 (W.D. Ky.) (applying rational basis test in light of uncertainty in \textit{Windsor}, but finding that state law failed this deferential test), \textit{rev’d sub nom.} DeBoer v. Snyder, 772 F.3d 388, 406 (6th Cir. 2014) (finding no constitutional violation after applying an extremely deferential rational basis review, which was satisfied despite “foolish, sometimes offensive, inconsistencies that have haunted marital legislation from time to time”), \textit{rev’d sub nom.} Obergefell v. Hodges, 135 S. Ct. 2584 (2015); \textit{see also} Andersen v. King Cty., 138 P.3d 963, 980 (2006) (applying rational basis test in pre-\textit{Windsor} case), \textit{abrogated by} Obergefell, 135 S. Ct. 2584; \textit{see generally} Baskin, 766 F.3d 648 (finding no need to apply heightened scrutiny, because states’ bans on same-sex marriage fail the rational basis test); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (determining, in pre-\textit{Windsor} case, that the court could apply heightened scrutiny to same-sex marriage ban as sex discrimination, but finding such scrutiny to be unnecessary because ban fails rational relationship test), \textit{aff’d sub nom.} Perry v. Brown, 671 F.3d 1052 (9th Cir. 2011), \textit{vacated sub nom.} Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
\item \textsuperscript{179} \textit{E.g.}, \textit{Whitewood}, 992 F. Supp. 2d at 427-30 (applying the factors to sexual orientation and finding a quasi-suspect class warranting intermediate scrutiny); Obergefell v. W symlo, 962 F. Supp. 2d 968, 987-91 (S.D. Ohio 2013) (applying the factors and adopting “a heightened scrutiny” to sexual orientation), \textit{rev’d sub nom.} DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), \textit{rev’d sub nom.} Obergefell, 135 S. Ct. 2584; \textit{see also id.} at 978-79 (applying intermediate scrutiny to equal protection claim against law that does not recognize lawful same-sex marriage
factors relevant to determining suspect status: whether a group is politically powerless and has been subjected to a history of discrimination, and is defined by traits that are immutable or distinguishing and that bear no relation to ability to contribute to society.\(^{180}\)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

189. Id. at 9.

190. E.g., Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 957 n.15 (Mass. 2003); see also id. at 971 (Greaney, J., concurring) (“[C]onstitutional protections extend to individuals and not to categories of people.”).
he (Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law.191

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

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

191. Id. at 971 (Greaney, J., concurring); see also Andersen, 138 P.3d at 1037 (Bridge, J., concurring in dissent) (“A woman cannot marry the woman of her choice but a man can marry the woman of his choice . . . . [T]he only thing preventing plaintiff Heather Andersen from marrying her partner, Leslie Christian, is the fact that Andersen is a woman.”); Baker v. State, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (“A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians.”); Latta v. Otter, 771 F.3d 456, 485-90 (9th Cir. 2014) (Berzon, J., concurring) (discussing at length why bans on same-sex marriage represent discrimination on the basis of sex and sex stereotyping); Lawson v. Kelly, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014) (“The State’s permission to marry depends on the genders of the participants, so the restriction is a gender-based classification.”).

As recognized by some judges, a same-sex marriage ban can discriminate on the basis of both sex and sexual orientation. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (noting that the two forms of discrimination were interrelated and equivalent), aff’d sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2011), vacated sub nom. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); see also Latta, 771 F.3d at 484-85 (Berzon, J., concurring) (explaining that a ban on same-sex marriage operates most clearly as discrimination on the basis of sex, although it was intertwined with discrimination on the basis of sexual orientation).

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

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

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

Dissenting in Lawrence, Justice Scalia invoked this concern in 2003 to argue that the majority—in overruling Bowers v. Hardwick—was taking a position in a culture war, a matter that should be left to democratic majority will. Three years later, the...
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question of judicial deference to the legislatures surfaced in several opinions in the en banc decision of the Washington Supreme Court, upholding a state ban on same-sex marriage, in *Andersen v. King County*. The strongest reference to judicial deference was penned by Justice Johnson, concurring with the plurality’s decision upholding the state’s DOMA: “[W]here courts attempt to mandate novel changes in public policy through judicial decree, they erode the protections of our constitutions and frustrate the constitutional balance, which expressly includes the will of the people who must ratify constitutional amendments.” Similar sentiments appear in the plurality opinion and that of concurring Justice Alexander, both of which add some gentle encouragement for further democratic deliberation, and perhaps reconsideration, in the populace and legislature.

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

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198. *Id.* at 998 (Johnson, J., concurring) (discussing the need to consult history and tradition to define fundamental interests); *see also id.* at 1003-04 (noting that DOMA reflects legislative effort to prevent judicial decisions from other states to dictate marriage policy in Washington); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 1050 (Mass. 2003) (Cordy, J., dissenting) (“[T]he issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.”).
199. *See Andersen*, 138 P.2d at 968 (“[W]e have engaged in an exhaustive constitutional inquiry and have deferred to the legislative branch as required by our tri-partite form of government.”); *see also id.* at 969 (“[W]hile same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it.”).
200. *Id.* at 991 (Alexander, C.J., concurring) (explaining that, by overturning the state DOMA, “we would be usurping the function of the legislature or the people as defined in article II of the constitution of the state of Washington”).
201. *Id.* at 968 (plurality opinion) (“We see no reason, however, why the legislature or the people acting through the initiative process would be foreclosed from extending the right to marry to gay and lesbian couples in Washington.”); *id.* at 991 (Alexander, C.J., concurring) (“[N]othing in the opinion that I have signed . . . should be read as casting doubt on the right of the legislature or the people to broaden the marriage act or provide other forms of civil union if that is their will.”).
As this court noted in considering whether to recognize a right of terminally ill patients to refuse life-prolonging treatment, “the law always lags behind the most advanced thinking in every area,” and must await “some common ground, some consensus.”

. . . .

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

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

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

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


203. Baskin v. Bogan, 766 F.3d 648, 671 (7th Cir.) (referring to the operation of a state democratic process in which homosexuals made up only a tiny fraction of the population), cert. denied, 135 S. Ct. 316 (2014). The popular vote in favor of same-sex marriage in Ireland, in May 2015, stands as the only instance in which a majority of the electorate of a nation has approved marriage equality by popular vote, thus protecting the rights of a small minority of the electorate. Danny Hakim & Douglas Dalby, Irish Legalize Gay Marriage by Big Margin, N.Y. TIMES, May 24, 2015, at A1.
central to personal autonomy. The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box. 204

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

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

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

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

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204. Kitchen v. Herbert, 755 F.2d 1193, 1228 (10th Cir.), cert. denied, 135 S. Ct. 265 (2014); see also Andersen, 138 P.3d at 1025 (Fairhurst, J., dissenting) (“[P]opular opinion cannot dictate our interpretation of the constitution.”), abrogated by Obergefell, 135 S. Ct. 2584.
206. 198 P.2d 17, 27 (Cal. 1948).
207. Goodridge, 798 N.E.2d at 958 n.16.
Similarly, in finding federal due process and equal protection violations in a citizen-led ballot initiative that amended the state constitution to deny recognition to same-sex marriage, a Florida trial court rejected an argument that it defer to the “will of the voters”:

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

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

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

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

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

This court is aware that the majority of voters oppose same-sex marriage, but it is our country’s proud heritage to protect the rights of the individual, the rights of the unpopular, and the rights of the powerless, even at the cost of offending the majority. . . . All laws, passed whether by the legislature or by popular support must pass [constitutional scrutiny], to do otherwise diminishes the Constitution to just a historical piece of paper. Huntsman v. Heavilin, 21 Fla. L. Weekly Supp. 916, 919 (Fla. Cir. Ct. 2014); see also Varnum, 763 N.W.2d at 876 (declaring that state constitutional rights must be enforced “even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time”); DeBoer v. Snyder, 772 F.3d 388, 436 (6th Cir. 2014) (Daughtrey, J., dissenting) (stating that courts have the responsibility to ensure that rights are not “held hostage by popular whims”), rev’d sub nom. Obergefell, 135 S. Ct. 2584.

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

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

211. See supra Section I.A.
212. Obergefell, 135 S. Ct. at 2604. In three paragraphs near the end of the majority opinion, in Section V, Justice Kennedy explained that the same constitutional principles invalidated state laws that refused recognition of same-sex marriages validly concluded in other states. Id. at 2607-08.
213. Id. at 2605 (overruling Baker v. Nelson, 409 U.S. 810 (1972)). For a discussion of Baker, see supra notes 25-37 and accompanying text.
214. Obergefell, 135 S. Ct. at 2604.
215. Id. at 2597-604.
216. Id. at 2597.
217. Id. at 2599.
218. Id.
219. Id. at 2599-600.
220. Id. at 2600.
221. Id. at 2600-01 (rejecting any conclusion, however, that “the right to marry is less meaningful for those who do not or cannot have children”).
222. Id. at 2601.
223. Id. at 2598.
concludes that these reasons “apply with equal force to same-sex couples.”

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

1. The Fundamental Right to Marry

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

224. Id. at 2599.
225. Id. at 2615-19 (Roberts, C.J., dissenting) (referring to the Court’s invoking due process to strike down the Missouri Compromise in *Dred Scott v. Sandford*, 60 U.S. 393, 451-52 (1856) and a state law regulating maximum hours for bakery employees in *Lochner v. New York*, 198 U.S. 45, 58 (1905)).
226. Because of the majority’s minimalist treatment of equal protection, the Justices did not address the issue of whether a ban on same-sex marriage constitutes a form of sex discrimination, triggering intermediate scrutiny, nor did it articulate the level of scrutiny generally appropriate for classifications based on sexual orientation. See supra notes 171-90 and accompanying text. The majority opinion characterizes the state laws as denying benefits to same-sex couples that are accorded to opposite-sex couples, and it refers to subordination of gays and lesbians. See *Obergefell*, 135 S. Ct. at 2604; thus, it appears to find an equal protection violation in a classification based on sexual orientation. To support any heightened scrutiny, however, it appears to rely on a state’s heavy burden to justify its exclusion of gays and lesbians from the fundamental right to marry, “[e]specially against a long history of disapproval of their relationships.” See id.
227. See supra notes 159-68 and accompanying text.
228. See supra notes 194-209 and accompanying text.
229. *Obergefell*, 135 S. Ct. at 2602 (quoting Brief for Respondent at 8).
230. Id. at 2611, 2614 (Roberts, C.J., dissenting); see also id. at 2640 (Alito, J., dissenting) (“[I]t is beyond dispute that the right to same-sex marriage is not
The majority opinion rejects the petitioner’s framing of the issue, noting that the Court’s precedent establishing the right to marry in various contexts has consistently recognized a general right to marry and then scrutinized exclusions from that right. 231 Although marriage has been historically viewed as the “union of a man and a woman,” the majority opinion adopts the petitioners’ contention that the “cases cannot end there”. 232 “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.” 233

2. Deference to Democratic Deliberation

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

In reto, Chief Justice Roberts’s dissent proclaims, “this Court is not a legislature,” and argues that “debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will.” 236 Opinions authored by each of the remaining dissenting Justices characterize the majority opinion as a “threat to American democracy,” 237 a “usurp[ation of] the constitutional right among” the rights “deeply rooted in this Nation’s history and tradition.” (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

231. Id. at 2598 (majority opinion) (citing to cases recognizing the right of interracial couples, inmates, and fathers owing child support to marry, without characterizing the asserted rights in terms of the excluded class).
232. Id. at 2594, 2599.
233. Id. at 2602.
234. Id. at 2605.
235. Id.
236. Id. at 2611, 2624 (Roberts, C.J., dissenting).
237. Id. at 2626 (Scalia, J., dissenting).
of the people to decide,” and a means of “undermining the political processes that protect our liberty.”

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

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

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

Of course, _Windsor_ did not compel that conclusion in the Supreme Court. Moreover, prior to _Windsor_, in the decade after _Lawrence_, or in the two decades following _Casey_ and _Romer_, courts adjudicating federal constitutional challenges to same-sex marriage bans were faced with evolving Supreme Court precedent that sent mixed signals. In the meantime, forty-five years had passed since the plaintiffs challenged the denial of a marriage license in _Baker v. Nelson_, and advances in the two decades after the successful

238. _Id._ at 2642 (Alito, J., dissenting).
239. _Id._ at 2638 (Thomas, J. dissenting).
240. _See supra_ notes 121-22 and accompanying text.
241. _See supra_ notes 121-24 and accompanying text.
242. _See supra_ notes 129-32 and accompanying text (showing majority popular support for same-sex marriage, and strong support among youth). Global momentum for same-sex marriage seemed to peak one month before the Supreme Court’s June 2015 decision in _Obergefell_, when the solidly Catholic country of Ireland approved same-sex marriage rights by popular vote. Hakim & Dalby, _supra_ note 203.
243. _See supra_ note 123 and accompanying text.
244. _See supra_ notes 62-65 and accompanying text.
245. _See supra_ notes 25-29, 34-37 and accompanying text.
challenge in *Baehr v. Lewin* frequently drew a backlash that blocked or matched the advances.

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

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

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

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

A. A Progression of Struggles for Civil Rights

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

246. See supra notes 106-09 and accompanying text.
tradition, morality, religion, and what is deemed to be consistent with the laws of nature.

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

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

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

250. E.g., Pirate, 1 Dall. at 168 (“By the sacred books of Leviticus and Deuteronomy, [slavery] appears to have existed in the first ages of the world.”), abrogated by U.S. Const. amend. XIII; John Patrick Daly, When Slavery Was Called Freedom: Evangelicalism, Proslavery, and the Causes of the Civil War 32, 35-37, 60-67, 85, 92-93, 100 (2002). One popular religious defense of slavery was simply that an all-powerful God had permitted it to persist: “God had clearly not destroyed the system, so if it was a violation of His Kingdom on earth, abolitionists were accusing God of incompetence or of complicity in sin.” Id. at 92; see also id. at 35 (referring to the belief that “God was frustrating the anti-slavery movement at every turn while blessing the kingdom of cotton and evangelicalism, which was spreading across the land with an ease that had to be divinely inspired”).

251. State v. Belmont, 35 S.C.L. (4 Strob.) 445, 451-52 (S.C. Ct. App. 1847) (quoting Matthew Estes, A Defense of Negro Slavery, As It Exists in the United States (1846), and recommending it as “a book destined to enlighten the public mind”), abrogated by U.S. Const. amend. XIII; see also Pirate, 1 Dall. at 168-69 (determining that the slave status of the illegitimate son of a slave mother and a free man is “strongly authorized by the civil law, from which this sort of domestic slavery is derived, and is in itself . . . consistent with the precepts of nature”); Mitchell v. Wells, 37 Miss. 235, 258-59 (1859) (stating that African slavery “is in no wise opposed to the law of nature as it exists here,” and citing to an author whose work was “distinguished alike for ability, research, and a clear and lucid perception”), abrogated by U.S. Const. amend. XIII; see also Scott v. Sanford (Dread Scott Case), 60 U.S. (1 How.) 393, 407-23 (1856) (noting that the American
was acknowledged in the Constitution\textsuperscript{252} and constituted an “excepted case” from the “great principles of natural right asserted in the Declaration of Independence.”\textsuperscript{253}

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

\[ \text{All persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts . . . .} \textsuperscript{255} \]

Colonies viewed Africans as inferior beings doomed to slavery and reduced to merchandise, abrogated by U.S. Const. amend. XIV; John Stuart Mill, The Subjection of Women 12-13 (Susan Moller Okin ed., Hackett Publ’g Co., Inc. 1988) (1869) (referring to the view both in antiquity and in American slavery, that the dominion of a class of masters over a class of slaves was “natural”).

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

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

\textsuperscript{254.} The Thirteenth Amendment to the U.S. Constitution provides:

\begin{itemize}
  \item Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
  \item Section 2. Congress shall have power to enforce this article by appropriate legislation.
\end{itemize}

U.S. Const. amend. XIII.

\textsuperscript{255.} Civil Rights Act of 1866, ch. 31, 14 Stat. 27. The first clause of the quoted text recognized the citizenship of all those born in the U.S., thus overruling the Dred Scott decision. Dred Scott Case, 60 U.S. at 403-04 (1856); see also supra notes 251-52 and accompanying text. Two years later, that important provision was echoed in the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. The language guaranteeing equal rights in contracting was reenacted in § 16 of the Civil Rights Act of 1870, 16 Stat. 144, to permit the newly adopted Fourteenth Amendment to act as constitutional support for the legislation, in tandem with the Thirteenth
In 1870, adoption of the Fifteenth Amendment and implementing legislation, guaranteed the right to vote without discrimination on the basis of “race, color, or previous condition of servitude.”\textsuperscript{256} Although the struggle to perfect and implement these civil rights has continued well more than a century after Reconstruction,\textsuperscript{257} the Thirteenth Amendment represented an end to the legally sanctioned evil of slavery.\textsuperscript{258}

Amendment. See Gen. Bldg. Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 389 & n.17 (1982). After the 1874 recodification, the provision of equal rights to make and enforce contracts appeared in § 181 of Title 42 of the United States Code:

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

42 U.S.C. § 181 (1874). After falling into disuse, § 181 was revived when the U.S. Supreme Court confirmed that it reached private discrimination in contracting. Runyon v. McCrary, 427 U.S. 160, 168-74 (1976) (relying on Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420-21 (1968), which had held similarly for a companion statute). In the Civil Rights Act of 1991, 105 Stat. 1071, Congress divided § 181 into three subsections, adding (1) a provision that codified the Supreme Court’s holding that § 181 reaches private discrimination as well as discrimination under the color of state law, 42 U.S.C. § 181(c), and (2) a provision that overruled another Supreme Court decision by defining the existing statutory language “make and enforce contracts” to include all benefits of the contractual relationship, including the “performance, modification, and termination of contracts.” 42 U.S.C. § 181(b) (superseding Patterson v. McClean, 491 U.S. 164, 175-85 (1989), which had held that “make and enforce” contracts did not reach discrimination in the performance of a contract).

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

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

True, women had always been accorded citizenship,\textsuperscript{263} which had been denied to the descendants of slaves prior to the 1866 Civil Rights Act and the Fourteenth Amendment.\textsuperscript{264} Their brand of citizenship, however, was decidedly second-class in the nineteenth century. Aside from the denial of voting rights, the laws of many states formally denied to women the economic opportunities that the post-Civil War amendments and legislation sought to accord to male former slaves.\textsuperscript{265} Justice Bradley’s now jarring explanation of “the discriminatory intent and disparate impact in policing practices affecting the African-American community). “

\textsuperscript{258} See supra note 254.
\textsuperscript{259} U.S. CONST. amend. XIX.
\textsuperscript{260} Minor v. Happersett, 88 U.S. (18 Wall.) 162, 178 (1874).
\textsuperscript{261} Id. at 176.
\textsuperscript{262} Id. at 177.
\textsuperscript{263} Id. at 165-70.
\textsuperscript{264} See supra notes 259-62 and accompanying text.
\textsuperscript{265} See, e.g., Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 967 (Mass. 2003) (“The common law was exceptionally harsh toward women who became wives: a woman’s legal identity all but evaporated into that of her husband,” and the relationship of a wife to husband was viewed as similar to that of slave to master.); Latta v. Otter 771 F.3d 456, 475 (9th Cir. 2014) (reviewing legal disabilities imposed on married women in the nineteenth century, and later abandonment of them, to reject argument that same-sex marriage bans should be upheld to protect the tradition of opposite-sex marriage); id. at 487-89 (Berzon, J., concurring) (tracing these legal disabilities, as well as their repeal and replacement in the twentieth century); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 958-59, 992-93 (N.D. Cal. 2010) (discussing principles of coverture and sharply defined gender roles in marriage, but noting “[t]hat time has passed”) aff’d sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated sub nom. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (no standing to appeal); Standhardt v. Superior Court ex rel. Cty. of Maricopa, 77 P.3d 410, 458 n.10 (Ariz. Ct. App. 2003) (citing to nineteenth century case law), abrogated by Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
civil law, as well as nature herself,"²⁶⁶ appeared in his concurrence to a Supreme Court decision in 1872 upholding a state law barring women from the practice of law.²⁶⁷ As Justice Bradley explained, this restriction was related to a married woman’s more general surrender of legal status and agency:

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

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

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

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

²⁶⁶. Supra note 15 and accompanying text.
²⁶⁷. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring), abrogated by Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (finding that municipal regulations that categorically required female teachers to take maternity leave several months prior to expected birth, without individualized assessment of ability to work, were not rationally related to legitimate state interest and thus violated the Due Process Clause of the Fourteenth Amendment).
²⁶⁸. Id. at 141 (1872) (Bradley, J., concurring).
Nineteenth century racial and sexual stereotypes likely provided similar justifications for subordination on the basis of both race and sex. Prominent advocates for women’s civil rights in decades after the Civil War, while noting some progress during that time, characterized the condition of women as a form of slavery. In short, in the Reconstruction Era, federal law protected newly freed slaves from racial discrimination, but it did nothing to protect women—whether former slaves or members of high society—from sex discrimination.

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

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

Daly, supra note 250, at 88.

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

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

273. See Eisenberg, supra note 257, at 70.

274. Justice Bradley, for example, sought to justify the legal restrictions on a woman’s economic autonomy by referring to her assigned role of wife and mother
But one might still strive to explain the juxtaposition of the flurry of congressional activity to protect the economic and voting rights of newly freed slaves while state law still denied women the right to vote and denied economic agency to married women.

To support a point about a fallacy in civil rights opposition that likely is repeated through history, this author suggests a simple answer: sex is “different.” Sex and sexual roles implicated issues relating to procreation, child-rearing, and a learned or instinctual need of men to view themselves as the smarter, stronger sex, as “noble and benign,” and by recognizing a man’s obligation to serve as “woman’s protector and defender” in light of her “natural and proper timidity and delicacy" Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring); SUFFRAGE, supra note 269, at 13 (“Another writer asserts that the tyranny of man over woman has its roots, after all, in his nobler feelings; his love, his chivalry, and his desire to protect woman . . . . But wherever the roots may be traced, the results at this hour are equally disastrous to woman.”); see also Muller v. Oregon, 208 U.S. 412, 421-22 (1908) (upholding restriction on women’s occupations partly to protect them in the name of true equality), abrogated by Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (finding that municipal regulations that categorically required female teachers to take maternity leave several months prior to expected birth, without individualized assessment of ability to work, was not rationally related to legitimate state interest and thus violated the Due Process clause of the Fourteenth Amendment); DECLARATION, supra note 269, at 72 (noting that man “does accord to woman moral superiority” while he claims intellectual superiority).

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

All history assures us that the negro race thrive in health, multiply greatly, become civilized and religious, feel no degradation, and are happy, when in subjection to the white race. Estes says, “they feel and acknowledge their inferiority; and in consequence slavery is not in the least regarded as a degradation, but as their proper and natural position.” . . . “I do not believe,” he continues, “conscientiously, that one slave in ten could be induced to accept the offer of freedom if accompanied with the condition that they were to leave the United States. This has been attested again and again.” State v. Belmont, 35 S.C.L. (1 Strob.) 445, 451-52 (S.C. Ct. App. 1847) (quoting Matthew Estes, A DEFENSE OF NEGRO SLAVERY, AS IT EXISTS IN THE UNITED STATES (1846), in attempting to explain laws that distinguished between Native Americans and Africans in slaveholding). Some proslavery evangelical writers argued curiously that slavery saved slaves from homelessness, provided “providential guardians” in slaveholders, who saved slaves from extinction through their own improvidence, and elevated slaves’ character, primarily through church attendance. DALY, supra note 250, at 80, 85-87. But cf. id. at 35-36, 40, 52, 85 (explaining that relatively few southerners sought to justify slavery in such positive terms and were content to argue in the negative that slavery was evil primarily in individual cases of abusive slaveholders).
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uniquely capable of democratic self-governance and performance of the role of family breadwinner. And, even as one civil rights movement succeeded, our society had a great capacity to see the next cause as different, as distinguishable, as justifying renewed resistance.\(^{276}\)

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

As noted by Richard Delgado:

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

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

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

\(^{277}\) 347 U.S. 483 (1954).


\(^{280}\) 388 U.S. 1 (1967).

\(^{281}\) When asked in a 1958 Gallup poll whether those polled approved of marriage “[b]etween white and colored people,” only 4% expressed approval. \textit{Gallup News Serv., Gallup Poll Social Series: Minority Rights & Relations} 3-4, http://www.gallup.com/file/poll/163703/Interracial_marriage_130725.pdf. Even after the Supreme Court’s 1967 decision in \textit{Loving}, a 1968 Gallup poll asking about personal approval or disapproval of marriage “[b]etween whites and non-whites” revealed only 20% approval and 73% disapproval. \textit{Id.}


new fears and sensitivities about race coupled with sexual relations, procreation, and child-rearing. Echoing previous forms of discrimination, some viewed interracial marriage as unnatural and inconsistent with religious doctrine and with longstanding tradition.

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

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

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

287. See, e.g., Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993) (“[T]he Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural[,]”); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 967 (Mass. 2003) (“Alarms about the imminent erosion of the ‘natural’ order of marriage were sounded over the demise of anti-miscegenation
Those objections to interracial marriage have so faded that the approval rate for interracial marriage rose from 4% in 1958 to 87% in 2013,\(^\text{289}\) and stood in 2013 at 96% for those 18 to 29 years of age.\(^\text{290}\) Today, objections to interracial marriage on the basis of nature, scripture, or tradition would sound as jarring to most ears as do Justice Bradley’s appeals to God and nature to justify a state law banning women from the practice of law or similar rationales for slavery.\(^\text{291}\)

And—while writing this passage one week after our oldest son joyfully entered into a same-sex marriage with his partner of seven years—I predict that similar objections to same-sex marriage will sound equally jarring a few decades from now. Yet, insufficient or improper motivations such as religious objections or simple animus sometimes surfaced as explicit justifications for same-sex marriage bans,\(^\text{292}\) or can be inferred from the unusual nature of a regulation\(^\text{293}\) or the implausibility of the justifications advanced for it.\(^\text{294}\)

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\(^{\text{288.}}\) As explained by Judge Posner: “The limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it [in Loving in 1967]. Laws forbidding black-white marriage dated back to colonial times and were found in northern as well as southern colonies and states. Baskin v. Bogan, 766 F. 3d 648, 666 (7th Cir.) (citing Peggy Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 20 (2009)), cert. denied, 135 S. Ct. 316 (2014).

\(^{\text{289.}}\) Gallup, supra note 281 and accompanying text (2013 poll asked about approval or disapproval of “marriage between Blacks and Whites”).

\(^{\text{290.}}\) Id. (third chart, listing approval “by Subgroup”).

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

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

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

294. See, e.g., Baskin v. Bogan, 766 F.3d 648, 666 (7th Cir.) (finding that Indiana’s recognition of out-of-state marriages between fertile cousins, though banned in Indiana, coupled with its failure to recognize out-of-state same-sex marriages, and its “inability to make a plausible argument” for the latter ban, “suggests animus against same-sex marriage[s]”), cert. denied, 135 S. Ct. 316 (2014); Perry, 704 F. Supp. 2d. at 1002-03 (finding that post-hoc justifications for Proposition 8 are such poor fits as to be irrational, supporting inference that this referendum banning same-sex marriage was motivated by the view that opposite-sex couples are superior to same-sex couples); Latta v. Otter 771 F.3d 456, 495-96 (9th Cir. 2014) (Berzon, J., concurring) (observing that sexual orientation discrimination in employment, housing, and participation on juries is primarily motivated by stereotypes, animus, and distaste); cf. Johnson, supra note 285, at 284 (“[T]he debate about same-sex marriage is more about sexual orientation than it is about marriage. The debate is, in short, a referendum on homosexuality and gay rights.”).
marriage, those who disagreed did so on familiar grounds: on religious convictions,\textsuperscript{295} on the basis of what seemed “natural” to them,\textsuperscript{296} and on the belief that the issue of same-sex marriage is “different” from earlier issues such as interracial marriage.\textsuperscript{297}

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

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

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

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

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

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

\textsuperscript{298} Id. at 287.

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

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

B. Judicial Incrementalism

Civil rights’ rapid progress in the courts is moderated by at least two forces, often interrelated: (1) the role of courts to narrowly
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decide only the cases before them, rather than broadly legislate, and (2) judicial hesitance to wade in too quickly when a contentious issue is the subject of democratic deliberation in other forums.

1. Resolving Only the Dispute before the Court

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

304. See, e.g., Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 4 (1999) (stating that judicial minimalism means, in part, “that courts should not decide issues unnecessary to the resolution of a case”); id. at 10 (explaining that judicial minimalists “decide the case at hand; they do not decide other cases too, except to the extent that one decision necessarily bears on other cases, and unless they are pretty much forced to do so”).

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

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

307. See supra note 304.

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

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

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

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

309. See, e.g., SUNSTEIN, supra note 304, at 20-21 (describing “the ordinary picture of Anglo-American common law”); id. at 36-39 (discussing Dred Scott and Roe v. Wade as maximalist decisions, and Brown v. Board of Education as less maximalist than it might appear); id. at 48 (“[M]inimalism might make special sense in view of the pervasive possibility of changed circumstances.”); Delgado, supra note 283, at 526 (stating the view of judicial incrementalists that Roe v. Wade was a “sweeping decision” that intervened when “public discussion of abortion was not complete”); Meredith Heagney, Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit, UNIV. CHI. L. SCH. (May 15, 2013), http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roev-wade-during-law-school-visit (observing that Justice Ruth Bader Ginsburg, a strong champion of women’s rights, critiqued Roe v. Wade as too far-reaching and sweeping, providing an easy target for opponents).

310. SUNSTEIN, supra note 304, at 4.

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

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

313. See, e.g., SUNSTEIN, supra note 304, at 150-52 (explaining that, although Romer intervened during democratic deliberation, it was sufficiently “subminimalist” that it failed to even mention Bowers v. Hardwick, which seemed to be inconsistent with Romer’s premises); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”); Latta v. Otter, 771 F.3d 456, 466 n.6 (9th Cir. 2014) (quoting Lawrence and Windsor as leaving this question open); supra note 123 (noting that Windsor expressly reserved the question of the constitutionality of state bans on same-sex marriage, although dissent feared that the majority’s reasoning would extend to same-sex marriage rights).
reviewing the successful challenge to California’s ban on same-sex marriage through Proposition 8, the Supreme Court avoided the merits altogether by finding that the Court of Appeals should have dismissed for lack of standing to appeal. This brand of incrementalism appears to have allowed the law to develop with appropriate care and deliberation, culminating in marriage equality, a civil rights milestone in the United States.

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

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

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

315. See supra notes 58, 59 and accompanying text.
316. See supra notes 86-91 and accompanying text.
317. See supra note 124 and accompanying text.
318. See supra notes 84, 85 and accompanying text. Justice Scalia had earlier opined that the majority opinion in Lawrence logically led to recognition of a right to same-sex marriage. Supra note 80.
319. See, e.g., Shirley M. Hufstedler, New Blocks for Old Pyramids: Reshaping the Judicial System, 44 S. CAL. L. REV. 901, 910 (1971); Charles Alan
as the new disputes make their way through the courts. True, courts frequently prefer to avoid a constitutional issue if they can resolve a dispute on a statutory basis, and they frequently avoid ruling on a novel constitutional question if they can resolve the dispute through application of a more settled constitutional standard. However, stare decisis and judicial moderation do not require such restrained reasoning that the law remains mired in a sea of mud that barely creeps forward.

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

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

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


323. *Id.* at 200-01.


325. *Id.* at 236.

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

2. Deferring to Democratic Deliberation

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

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

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

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

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

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


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

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

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

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

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

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

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

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

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

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

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

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

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

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

340. Sanders, supra note 114, at 14; see also id. at 15 (in early 2014, thirty-one states banned same-sex marriage, twenty-eight by constitutional amendment,
Sanders argues that the state constitutional amendments, adopted “in an atmosphere that was often polluted by evident animus and ill will,”341 hampered “the process of democratic dialogue as translated through the normal legislative process,” undermining the argument for judicial restraint.342

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

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

I am hopeful that our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgment of the court’s authority to adjudicate the matter. My hope is more liberating. The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher,
therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do.  

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

1. Legal Uncertainty, Leaving Room for Persuasion

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

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

346. See supra Section III.A.
347. See supra Section III.A; see also supra notes 14-15, 264-66 and accompanying text (presenting and commenting on now embarrassingly outdated nineteenth century judicial statement about the natural place of women).
348. The topic of this Article is same-sex marriage, but one could identify a number of other issues that could cause future generations to wonder at this one, such as wondering why we still cannot achieve equal pay for equal work, why we do not have the political will to tackle immigration reform, why many elected officials are apparently intent on voter suppression, and why members of various racial groups experience the criminal justice system in such a disparate manner.
349. See supra notes 81-103 and accompanying text.
350. See supra Part II.
351. See supra Section II.C.
good example of the value of placing a civil rights issue in its historical context, to encourage judges to adopt the more favorable of competing analytic frameworks.352

2. The Appeal of the Civil Rights Story

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

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

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

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

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

352. See supra Part III.

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

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

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

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

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

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

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

356. Id. at 1040. In this spirit, and in support of its decision striking down a
ban on same-sex marriage, a Florida trial court opined that this form of
discrimination would someday be viewed as such anachronism that the
classification itself would fall into disuse: “The Court . . . foresees a day when the
term ‘same-sex marriage’ is viewed in the same absurd vein as ‘separate but equal’
and is thus forsaken and supplanted by ordinary ‘marriage.’” Pareto v. Ruvin,
21 Fla. L. Weekly Supp. 899, 907 (Fla. Cir. Ct. 2014) (citing to and quoting from
Whitewood v. Wolf, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014)).
357. See, e.g., Delgado, supra note 283, at 526 (discussing the incrementalist
view).
358. Andersen, 138 P.3d at 969.
359. See supra Section I.A.
finding a state constitutional right at a relatively early stage, 2003, rather than waiting for consensus in the general population.

3. Techniques of Advocacy—Telling the Civil Rights Story

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

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

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

361. See supra Subsection II.D.1.

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

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

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

365. 133 S. Ct. 2652, 2659 (2013) (vacating decision below because proponents lacked standing to appeal, thus leaving in effect the trial court’s decision striking down California’s initiative banning same-sex marriage, Proposition 8).
If a history of discrimination were sufficient to justify its perpetual existence, as Proponents argue, our public schools, drinking fountains, and swimming pools would still be segregated by race, our government workplaces and military institutions would still be largely off-limits to one sex—and to gays and lesbians, and marriage would still be unattainable for interracial couples.366

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

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

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

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369. Cf. id. at 89 (discussing the “client as hero”). Federal judges in the Sixth Circuit have debated about the degree to which courts should play the role of hero.
conflict confronting this hero\textsuperscript{371} is the challenge of recognizing the place of the current dispute in historical context and reaching a just result, one that will withstand the test of time and the judgment of future generations, typically in the face of contrary popular opinion, and while working within the bounds of precedent and with appropriate regard for democratic deliberation in other forums.

\textbf{CONCLUSION}

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

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

\textsuperscript{370} \textit{See} Robbins, \textit{et al.}, \textit{supra} note 16, at 91-92 (discussing the client's backstory, the inevitable unfavorable facts in a story, and flaws in the hero of the story).

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


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

I. Introduction—Lessons from Loving

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

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

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

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

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

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

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

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

Much more recently, “sex” as a protected classification was introduced into Title VII of the Civil Rights Act of 1964 at the last minute by a Southern congressman who opposed the bill; he apparently gambled that a majority of his colleagues would be so repulsed by the notion of equal rights in the workplace for women that they would withdraw their support from the entire bill. See Charles Whalen & Barbara Whalen, *The Longest Debate* 84, 115-16 (1985). Although his strategy backfired, his confidence in the strategy—just forty years ago—reflected the fragility of popular and legislative support for equal rights that we take for granted today. Today, some religions may still preach the benefits of recognizing starkly different roles for men and women, but few would seriously dispute the wisdom of equal rights for women in the employment arena.
Of the profiles in judicial courage, perhaps the most celebrated is *Brown v. Board of Education*, 347 U.S. 483 (1954), striking down racial segregation in public educational facilities. The principle of *Brown* is beyond any serious debate today, but it cut hard against the grain of segregationist state legislative and executive policies that persisted for many years after the decision. In 1962, for example, Mississippi Governor Ross Barnett, cheered by state legislators, gave action and voice to popular sentiment against admitting an African-American student to the University of Mississippi, relenting only to overwhelming pressure from the federal judicial and executive branches. Taylor Branch, *Parting of the Waters* 597-98, 647-72 (1988). Similarly, the United States Supreme Court’s recognition of a constitutional right to privacy that encompasses family planning and contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), cut against the grain of popular moral sensibilities that were reflected at the time in state legislation and that are still reflected in opposition to contraception in some religions.

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

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

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

*State v. Gibson*, 36 Ind. 389, 402-03 (1871) (as quoted with approval in *Naim v. Naim*, 197 Va. 80, 84 (1955)). The court in *Gibson* further
used religion and tradition to shield itself from being portrayed as discriminatory:

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

*Id.* at 405.

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

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

*Naim*, 197 Va. at 89.

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

Fortunately, in *Perez*, the California Supreme Court declared that state’s anti-miscegenation law unconstitutional, despite the State’s warnings that the multi-racial offspring of interracial marriages would not fare well in our society. *Id.* at 18. Yet one wishes for the opportunity to visit the segregationists of decades past, or those who opposed equal employment opportunities for women, and ask them to consider the natural evolution of society and to predict how their actions would appear to the next generation and beyond. If only they could have recognized their eras as ones of historic transition in our society, transition for positive change that was long overdue.
Loving, Brown, Perez, and Oyama demonstrate that courts often make decisions that cut against deeply and religiously held societal ideals and values. Similar to the opponents of gender equality, family planning, and interracial marriages, those opposed to same-sex marriage invoke the Bible, natural law, and the welfare of children. Fortunately, our nations’ social values have evolved and our judiciary has helped society accept basic constitutional rights that stand separate from private religious convictions. Otherwise, contraception and interracial marriage would still be barred, and women would be the property of their husbands. See Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (describing the highly restricted legal status of married women in the nineteenth century, which helped to justify barring women from the practice of law).

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

Even the religious hostility toward same-sex marriage likely will fade in most churches with the passage of time and the evolution of society, so that current hostility will strike the same sour note that Justice Bradley’s once timely concurrence in Bradwell strikes today. More tellingly, although some religions may continue to promote the biblical condemnation of homosexuality and concept of “sanctity of marriage” that excludes same-sex marriage, our society soon will leave such religious matters to religion and make governmental discrimination obsolete.
In light of the prospect of societal evolution, some might argue that same-sex couples should wait for democratic institutions to reflect majority support for same-sex marriage. True, in periods of transition, courts often proceed cautiously, allowing democratic deliberation to help define solutions in a variety of political arenas, rather than leading the way with bold judicial strokes. See Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999). A few times in a generation, however, in a time of great social transition, a case implicates the plight of a minority group that cannot count on majority-controlled political processes for progress and should not be compelled to wait to exercise their constitutional rights. It is in cases such as these that a courageous and forward-looking court has the opportunity, if not the duty, to help lead the way, securing equal rights with decisions such as that of Arizona Superior Court in *Oyama v. O’Neil*.

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

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

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

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

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