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Marriage Equality: The Paralleled Progress between Public Approval and Supreme Court Decisionmaking

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MARRIAGE EQUALITY: THE PARALLELED PROGRESS BETWEEN PUBLIC APPROVAL AND SUPREME COURT DECISIONMAKING

RILEY ERIN FREDRICK*

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I. INTRODUCTION

The relationship between the Supreme Court and public opinion is a historically significant one. The Court’s institutional differences from the other two branches of government place it in a unique position when it comes to the importance of public support and approval. On one hand, the Justices are unelected, serve life terms, and are generally unanswerable to the public.¹ The Court also lacks the power to enforce its own decisions.² In theory, these aspects insulate it from public pressure. Thus, because the Court is not electorally accountable, societal influences and public opinion should play little role in its decisionmaking. However, the opposite seems to be the case.³ The

* J.D., Florida State University College of Law (2017). First, I would like to thank Professor Tahirih V. Lee for immediately recognizing the potential in me before I could see it in myself. I truly cannot thank you enough for your continued guidance and encouragement, as I might not be where I am today without it. I would also like to thank all of my friends, family, and classmates who supported me throughout this process. Finally, thank you *Florida State University Law Review* for making all of this possible.

1. Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013).

2. *Id.*

3. *See id.* (“[S]cholars and commentators agree that it is crucial for the Court to maintain a reputation from the public as impartial, trustworthy, and above the politics and bargaining characterizing Congress and the presidency.”).

Court's institutional differences from the other branches of government are exactly why public opinion is so important in retaining its legitimacy and more importantly, its functionality as an institution.⁴

The question that has dominated legal and political science discourse for the past decade is, to what extent can and do courts “make policy decisions by going outside established ‘legal’ criteria found in precedent, statute, and constitution[?]”⁵ This is where the Court's reliance on ‘non-legal’ principles, such as ideological preferences and public opinion, come into the analysis. The first step in establishing a relationship between the Court's decisionmaking and public influence is to understand the relationship between the Court and public opinion itself. Again, institutional capacities, or lack thereof, are the driving force behind the Court's need for public approval. It may even be said that the Court's decisions will only have their full effects when popular opinion supports them.⁶ Thus, considering the Court strictly “a legal institution is to underestimate its significance in the American political system.”⁷ It is also a political institution in that it issues decisions on controversial questions of national policy.⁸

Often times, Supreme Court constitutional interpretation “can intersect social reform movements at various points in their evolution.”⁹ Less frequently, however, the Court issues a landmark decision that would have been constitutionally inconceivable just a decade or two earlier. While “[s]ocial and political change can render previously inconceivable Court decisions conceivable. . . . such change does not necessarily make those rulings *inevitable*.”¹⁰ Multiple factors, such as legal precedent, historical background, ideological preferences, and public opinion, affect judicial decisionmaking too. This Note is not the first, nor will it be the last, to analyze the complex multitude of reasons behind Supreme Court decisionmaking, particularly for the presence of ‘non-legal’ influences.

My job today is to explore the connection between public opinion, societal progress, and Supreme Court decisionmaking. Specifically,

4. Neil Malhotra & Stephen A. Jessee, *Ideological Proximity and Support for the Supreme Court*, 36 POL. BEHAV. 817, 818 (2013).

5. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279-80 (1957).

6. Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1023 (2004).

7. Dahl, *supra* note 5, at 279.

8. *Id.*

9. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE, at ix (2013).

10. Michael J. Klarman, Windsor and Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 135 (2013).

and unlike anyone else, my focus is on the journey to legal recognition of same-sex marriage, which has undoubtedly been one of the most socially, politically, and legally contentious issues in the United States. The dramatic changes in social and political attitudes about both gay rights generally and same-sex marriage over the past three decades are truly remarkable. For that reason, same-sex marriage makes for a compelling test subject when looking at the relationship between public opinion and judicial decisionmaking. Ultimately, I find that the attitudinal model best explains the outcomes of the same-sex marriage cases, and the attitudinal change model provides a more complete explanation for *how* and *why* the Court progressed from its *Bowers*¹¹ decision in 1986 to the monumental *Obergefell*¹² decision in 2015.

Part II of this Note discusses four behavioral models that have guided scholars' approach to analyzing and empirically studying judicial decisionmaking. The legal model is based on a formalist view of the law, which calls for legal analysis through strict adherence to common law precedents or statutory texts and is devoid of any expression of judicial ideology.¹³ The attitudinal model assumed prominence in Jeffrey A. Segal and Harold J. Spaeth's *The Supreme Court and the Attitudinal Model*.¹⁴ This model is based on the simple theory that "judges make result-oriented decisions, based primarily upon their ideologies."¹⁵ The attitudinal change model suggests that external social and political forces, rather than internal forces (e.g., ideology), influence decisionmaking based on the hypothesis that judges are influenced by the same social forces that sway public opinion.¹⁶ Finally, the strategic behavior model is based on rational choice institutionalism, which emerged when Lee Epstein and Jack Knight empirically assessed Walter F. Murphy's argument in *The Elements of Judicial Strategy*.¹⁷

Part III is a historical account of the gay rights movement in the United States. It lays out a same-sex marriage timeline, tracking the gradual change in public opinion that paralleled Supreme Court progress. Finally, Part IV chooses the attitudinal model and the attitudinal change model, to create what I term the "attitudinal model 'plus'"

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

12. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

13. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 254-55 (1997).

14. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). Glendon Schubert, David Rohde, and Harold Spaeth developed the attitudinal model. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 110 (2002) [hereinafter SEGAL & SPAETH, REVISITED].

15. Cross, *supra* note 13, at 266.

16. Isaac Unah et al., *U.S. Supreme Court Justices and Public Mood*, 30 J.L. & POL. 293, 300 (2015).

17. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

as the best explanation of the Court's decisionmaking in the same-sex marriage cases. Further, it demonstrates how the same social forces that influenced the gradual public approval of same-sex marriage, similarly influenced the Court overtime.

II. THEORETICAL MODELS OF JUDICIAL DECISIONMAKING

Several theoretical models seek to explain judicial decisionmaking. There are three main models of judicial behavior generally depicted in scholarship: legal, attitudinal, and strategic.¹⁸ Each of the models stand for different hypotheses on how judges make decisions. Specifically, I will explore four models, the legal model; the attitudinal model; the attitudinal change model; and the strategic behavior model, detailing their diverse contributions to the scholarship on judicial behavior. In Part IV, I will come back to these models in light of the same-sex marriage timeline and cases described in Part III to draw a conclusion.

A. Legal Model

The legal model is a traditional, formalist theory that portrays the judge "as one who objectively and impersonally decides cases by logically deducing the correct resolution from a definite and consistent body of legal rules."¹⁹ This model demands that judicial decisionmaking be objective and impartial.²⁰ Further, it calls for pure legal reasoning, devoid of any expression of judicial individuality or ideology.²¹ It hypothesizes that judges only want to interpret the law and thus, "choose between alternative case outcomes and doctrinal positions on the basis of their legal merits."²² Thus, "judge[s] do] not make law . . . [but simply] appl[y] the law that [was] created by the legislature or [is] inherent in the common law."²³ This model reflects the traditional view that law and politics should and do remain separate.

However, since the legal realist movement, scholars no longer fully accept the legal model's explanation of judicial behavior.²⁴ The legal

18. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 5 (2006).

19. John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 87 (1995) (citing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 24-25 (1960); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 74-75 (1973)).

20. *Id.*

21. Cross, *supra* note 13, at 255.

22. BAUM, *supra* note 18, at 5.

23. Hasnas, *supra* note 19, at 87.

24. BAUM, *supra* note 18, at 8.

model has largely been abandoned and disproven in recent years.²⁵ Instead, a complex multitude of factors, including legal, ideological, and strategic elements are suggested to drive judicial decisionmaking.²⁶ Strict reliance on precedent without any ideological principles coming into play may no longer be a realistic assessment of judicial decisionmaking, and “legal scholars have implicitly accepted the use of precedent at face value.”²⁷ More cynically, adherence to the legal model “may simply be a convenient fiction for judges, lawyers, professors, and others.”²⁸ Although the legal model may no longer accurately reflect the prevailing view of scholars, judicial decisionmaking is also not exclusively result-oriented, as the reliance on precedent, statute, and constitution still pervades and restrains the vast majority of legal writing.

B. Attitudinal Model

“The attitudinal model is [perhaps] the bedrock theoretical principle of legal realists” and one of the leading theories when it comes to explaining judicial decisionmaking.²⁹ This theory, advanced by Jeffrey A. Segal and Harold J. Spaeth, materialized in the legal realist movement of the 1920’s, which was led by Karl Llewellyn and Jerome Frank, among others.³⁰ The legal realist movement challenged the classical view of legal formalism. As described above, the premise of the legal model was inspired by legal formalism and posited that a “judge’s techniques were socially neutral, his private views irrelevant . . . [and that] judging was more like finding than making, a matter of necessity rather than choice.”³¹ Legal realists rejected the theory that judges do not make law because judging inherently creates law.³² According to Jerome Frank:

Even in a relatively static society, men have never been able to construct a comprehensive, externalized set of rules anticipating all possible legal disputes and settling them in advance. Even in such a social order no one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated

25. Cross, *supra* note 13, at 255 (“The formalist [legal] model held sway for a long time, but most contemporary scholars no longer adhere to the strict determinate formalist [legal] model.”).

26. Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics into Mayonnaise*, 12 GEO. J.L. & PUB. POL’Y 57, 72 (2014).

27. Cross, *supra* note 13, at 260.

28. *Id.* at 263.

29. Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 L. & POL’Y 295, 296 (2006).

30. SEGAL & SPAETH, REVISITED, *supra* note 14, at 86-87.

31. *Id.* (citing Yosol Rogat, *Legal Realism*, in THE ENCYCLOPEDIA OF PHILOSOPHY 420 (Paul Edwards, ed., 1972)).

32. *Id.* at 87.

when the original rules were made. How much less is such a frozen legal system possible in modern times. . . . Our society would be straight-jacketed were not the courts, with the able assistance of lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions.³³

Thus, legal realism is where “[t]he attitudinal model ha[d] its genesis,” but the model also incorporates key concepts from psychology, political science, and economics.³⁴

The simple hypothesis of the attitudinal model is that judges come to the court “with their ideological preferences fully formed and, in light of contextual case facts, these preferences cast overwhelming influence on their decision making.”³⁵ Accordingly, judicial decisionmaking is result-oriented here because it is based primarily on the judge’s ideologies.³⁶ More specifically, the attitudinal model suggests Supreme Court Justices have more power to freely implement their personal policy preferences than other judges.³⁷ The Justices have life-tenured positions, no electoral accountability, and comprise a court of last resort that controls its own docket, giving them enormous power to let their own ideologies influence decisionmaking.³⁸

However, there are “[t]wo fundamental assumptions [that] underlie the . . . attitudinal model”: (1) “individual attitudes are assumed to be the primary determinants of behavior (i.e., decisions)” and (2) “individual attitudes are considered fundamental and enduring.”³⁹ Thus, “Justices vote the way they do . . . because this is who they are and who they are likely to remain.”⁴⁰ Based on this model, each Justice’s vote is determined solely by his or her ideology. For example, “Rehnquist vote[d] the way he [did] because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.”⁴¹ Moreover, the attitudinal model assumes the Justices have fixed ideological preferences that are enduring throughout their time on the bench.⁴² While

33. *Id.* at 88 (citing JEROME FRANK, *LAW AND THE MODERN MIND* 5-7 (1949)).

34. *Id.* at 87.

35. Unah & Hancock, *supra* note 29, at 296 (citing SEGAL & SPAETH, *supra* note 14).

36. Cross, *supra* note 13, at 266.

37. SEGAL & SPAETH, *REVISITED*, *supra* note 14, at 110.

38. SEGAL & SPAETH, *REVISITED*, *supra* note 14, at 92.

39. William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 171 (1996).

40. *Id.*

41. Lee Epstein et al., Review Essays, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 587-88 (2001).

42. Mishler & Sheehan, *supra* note 39, at 171.

this might be a slight oversimplification for explaining judicial behavior, the attitudinal model has been widely tested under various conditions, with strong evidence supporting it.⁴³

C. Attitudinal Change Model

Although they share a common name, the attitudinal model and the attitudinal change model do have significant differences. While the attitudinal model suggests internal forces (such as a judge's ideological preferences and values) influence vote choice, the attitudinal change model suggests external social and political forces influence decisionmaking.⁴⁴ More specifically, the attitudinal change model rests on the idea that judges are "influenced by the same social forces that sway public opinion" rather than being influenced directly by public opinion.⁴⁵ Because judges are still members of society, social forces influence their beliefs in the same way they influence the rest of the American public.⁴⁶

The sentiment of the attitudinal change model has not only been advanced by scholars, but by Supreme Court Justices themselves. Addressing the question of whether "judges [are] influenced by public opinion," former Chief Justice Rehnquist stated, "I think it would be very wrong to say that judges are not influenced by public opinion. Indeed, I think it is all but impossible to conceive of judges who are in any respect normal human beings who are not affected by public opinion in this way."⁴⁷ He further explained the effect of public opinion, specifically in regards to the salient constitutional questions:

"Great" constitutional cases often derive their "greatness" from the very fact that they involve broad jurisprudential themes, rather than simply the nuts and bolts of the law, and are therefore more likely to be affected by tides of public opinion already running in the country. Secondly, important constitutional litigation can generate its own tides of public opinion, just as a large ship causes a considerable wake, and these more immediate tides may also affect the decision of the case.⁴⁸

Chief Justice Rehnquist championed the attitudinal change model's theory that the nexus between public opinion and judicial decisionmaking "arises from the force of mutually experienced events

43. Unah & Hancock, *supra* note 29, at 296-97.

44. Unah et al., *supra* note 16, at 300 n.28.

45. *Id.* at 300.

46. *Id.*

47. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 752 (1986).

48. *Id.* at 768.

and ideas in shaping and reshaping the preferences of both the public and the [J]ustices.”⁴⁹

D. *Strategic Behavior Model*

The strategic behavior model is another popular theory advanced in judicial decisionmaking scholarship. The theory postulates that the Supreme Court “directly and deliberately follows public opinion for fear of losing its legitimacy as an institution.”⁵⁰ This model is rooted in the belief that the Justices modify their behavior to strategically align with public opinion to protect the Court’s legitimacy and promote policy effectiveness.⁵¹ Public opinion serves as an active constraint on the Justices’ preferences here.⁵² Because the Court does not have the power to enforce its own decisions, “it cannot stray too far from public opinion.”⁵³ Thus, the Court would risk losing both the public’s confidence and its institutional legitimacy if it consistently voted contrary to public opinion.⁵⁴

Much like the attitudinal change model, the sentiment of the strategic behavior model has also been echoed among Supreme Court Justices. Most notably, Justice Frankfurter spoke out in regard to the Court maintaining societal acceptance. He stated, “[t]o a large extent, . . . the Supreme Court, under the guise of constitutional interpretation of words whose contents are derived from the disposition of the Justices, is the reflector of that impalpable but controlling thing, the general drift of public opinion.”⁵⁵ He reiterated this notion in his dissent in *Baker v. Carr*, stating, “[t]he Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”⁵⁶ In another landmark case, *Planned Parenthood v. Casey*, Justice O’Connor similarly reasoned,

49. Michael W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293, 295 (2008); see also Rehnquist, *supra* note 47, at 768-69 (“This is not a case of judges ‘knuckling under’ to public opinion, and cravenly abandoning their oaths of office. Judges . . . can no more escape being influenced by public opinion in the long run than can people working at other jobs. In addition, if a judge on coming to the bench were to decide to seal himself off hermetically from all manifestations of public opinion, he would accomplish very little; he would not be influenced by current public opinion, but instead would be influenced by the state of public opinion at the time he came to the bench.”).

50. Unah et al., *supra* note 16, at 299.

51. Giles et al., *supra* note 49, at 295.

52. *Id.*

53. Malhotra & Jessee, *supra* note 4, at 820.

54. Unah et al., *supra* note 16, at 299.

55. McGuire & Stimson, *supra* note 6, at 1022 (quoting FELIX FRANKFURTER, LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913-1939, 197 (eds. Archibald MacLeish and E. F. Prichard, Jr., 1939)).

56. 369 U.S. 186, 267 (1962).

“[t]he Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”⁵⁷ While the Court is not electorally accountable, it is nonetheless important for the Court to stay somewhat in line with public opinion in order to retain its legitimacy. All four of these models will provide solid frameworks for analyzing the relationship between public opinion and Supreme Court decisionmaking regarding gay rights and same-sex marriage, as described in Part III.

III. SAME-SEX MARRIAGE TIMELINE: PUBLIC OPINION AND COINCIDING CASES

Same-sex marriage makes for such a compelling test subject when studying the relationship between public opinion and judicial decisionmaking because of the dramatic change in social and political attitudes in the past three decades. Striking down a federal statute that defined marriage as the union between one man and one woman was not constitutionally plausible just twenty years ago.⁵⁸ Even by the mid-1990s, not a single country in the world legally recognized same-sex marriage.⁵⁹ The timeline of the gradual public approval of same-sex marriage, as analyzed with the coinciding Supreme Court cases on the issue, provide a telling story of the relationship between public opinion and judicial decisionmaking in this context.

A. *Burger Court (1969 – 1986): Bowers*

The recognition of any gay rights, much less the legalization of same-sex marriage, was not a topic of serious discussion in the United States during the 1960s.⁶⁰ There was no right to privacy, as every state criminalized private, consensual sex between same-sex partners.⁶¹ Federal, state, and local governments treated alleged homosexuality as sufficient grounds for dismissal.⁶² Further, “[h]omosexual acts were deemed unprofessional conduct sufficient to deny or revoke a license to practice medicine, law, or nursing.”⁶³ In the early 1960s, there were

57. 505 U.S. 833, 865 (1992).

58. Klarman, *supra* note 10, at 155.

59. *Id.* at 130.

60. See KLARMAN, *supra* note 9, at 3-6; Richard Wolf, *Timeline: Same-sex Marriage Through the Years*, USA TODAY (June 26, 2015, 12:53 PM), <http://www.usatoday.com/story/news/politics/2015/06/24/same-sex-marriage-timeline/29173703/> [<https://perma.cc/2GGN-W8SU>].

61. KLARMAN, *supra* note 9, at 3.

62. *Id.* at 5.

63. *Id.*

approximately 3,000 military discharges a year based on alleged homosexuality.⁶⁴ Because there were serious implications associated with being publicly identified as gay, gay rights organizations had to be extremely secretive, thus, limiting the influence they could exercise in society.⁶⁵ Further, a 1969 opinion poll reported that sixty-three percent of respondents considered homosexuals "harmful to American life."⁶⁶

Despite the stagnant progress made during the 1960s, the 1970s experienced a dramatic increase in the number of gay activists and gay rights organizations.⁶⁷ From a mere fifty gay rights organizations in 1969 to eight hundred organizations in 1973, the gay rights movement was finally getting a public voice.⁶⁸ As such, same-sex couples started applying for marriage licenses for the first time in 1971 and subsequently filing suit when their state refused to recognize their marriages as valid.⁶⁹ State courts decisively rejected any and all legal arguments made for the recognition of same-sex marriage.⁷⁰ These casual dismissals were not shocking because "[c]ourts almost never vindicate constitutional claims that strongly contravene public opinion."⁷¹ In the 1970s, same-sex marriage had so little support that there were no polls that surveyed public opinion on the issue.⁷²

By 1985, only twenty-five percent of Americans reported having a gay friend, coworker, or relative.⁷³ Further, it was not until 1986 that the American Civil Liberties Union formally endorsed same-sex marriage.⁷⁴ Similarly, in 1986, when the Supreme Court was deciding a same-sex sodomy issue in *Bowers v. Hardwick*,⁷⁵ Justice Powell discussed the case with his (gay) law clerk and remarked that he had never known a gay person.⁷⁶ The issue in *Bowers* was whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy."⁷⁷ The Court of Appeals for the Eleventh Circuit found the Georgia statute which criminalized consensual sodomy violated Hardwick's right to privacy protected by the Ninth Amendment and

64. *Id.*

65. *Id.* at 6.

66. *Id.* at 13.

67. *Id.* at 17.

68. *Id.* at 18.

69. *Id.*

70. *Id.* at 20.

71. *Id.*

72. *Id.*

73. Klarman, *supra* note 10, at 132.

74. *Id.*

75. 478 U.S. 186 (1986).

76. KLARMAN, *supra* note 9, at 37.

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

under the “notion of fundamental fairness embodied in the [D]ue [P]rocess [C]lause of the Fourteenth Amendment.”⁷⁸

The Supreme Court disagreed. The Court held that there was no fundamental right to engage in homosexual sodomy, despite the fact that the Georgia statute made no distinction between heterosexual and homosexual sodomy.⁷⁹ The majority stated it was unwilling to take an expansive view of its authority and “discover new fundamental rights imbedded in the Due Process Clause.”⁸⁰ It reasoned that “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”⁸¹ Finally, the majority stated that sodomy laws are grounded in notions of morality “and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”⁸²

In his dissent, Justice Blackmun criticized the majority’s “obsessive focus on homosexual activity . . . in light of the broad language Georgia has used.”⁸³ He reasoned that the issue here involved an unconstitutional invasion of privacy, which had no bearing on *Hardwick*’s sexual orientation.⁸⁴ He went even further to say that, “[u]nlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens.”⁸⁵

This decision even came under criticism from some of the mainstream press. In an article for the *Los Angeles Times*, John Rechy opined that “[n]ot since the Supreme Court declared in the *Dred Scott* case that slavery was legal and blacks were not citizens has there been a high court ruling as seeped in prejudice as this one.”⁸⁶ However, the criticism was not unanimous among the nation, as only thirty-three percent of Americans supported legalizing sodomy.⁸⁷ In addition, *Bow-*

78. *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985) (citing *Roe v. Wade*, 410 U.S. 113, 152-53 (1973)).

79. *Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

80. *Id.* at 194.

81. *Id.*

82. *Id.* at 196.

83. *Id.* at 200 (Blackmun, J., dissenting).

84. *Id.*

85. *Id.*

86. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 338-39 (2009).

87. *Id.* at 359.

ers “was decided at the height of public hysteria about the AIDS epidemic. . . . [as] almost a majority [of Americans] supported quarantining AIDS victims.”⁸⁸

B. Rehnquist Court (1986 – 2005): Romer & Lawrence

By the time the next gay rights case came to the Supreme Court, there were major compositional changes. Only Chief Justice Rehnquist, Justice O’Connor, and Justice Stevens, who decided *Bowers*, remained on the Court. New to the Court were Justices Breyer, Ginsburg, Souter, Kennedy, Scalia, and Thomas. The Court’s composition is of the utmost importance because a single vote switch can drastically change the direction of national policy. At this time, there was still not a single country in the world that legalized same-sex marriage.⁸⁹ However, most economically developed countries started seeing a change in the meaning of marriage, specifically that marriage “became less about childbearing . . . [and] more about mutual commitment and nurturing happiness.”⁹⁰ Same-sex couples could just as easily pursue these objectives of marriage as opposite-sex couples, facilitating some support to expand the definition of marriage to include same-sex couples.⁹¹

Significantly, 1996 was a defining year for same-sex marriage progress. The Supreme Court issued what was the first major win for gay right supporters in *Romer v. Evans*.⁹² In the early 1990s, several Colorado cities “enacted ordinances forbidding discrimination based on sexual orientation.”⁹³ In response, Colorado amended their state constitution (“Amendment 2”) both to repeal these ordinances and to “prohibit all legislative, executive or judicial action at any level of state or local government designed to protect” the civil rights of gay people.⁹⁴ The Supreme Court invalidated Amendment 2, holding it violated the Fourteenth Amendment’s Equal Protection Clause.⁹⁵

Writing for the majority, Justice Kennedy reasoned that Amendment 2 “identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of

88. *Id.*

89. See David Masci et al., *Gay Marriage Around the World*, PEW RES. CTR. (June 26, 2015), <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013> (illustrating that no nations had legalized same-sex marriage by 1986).

90. KLARMAN, *supra* note 9, at 52.

91. *Id.* at 51.

92. 517 U.S. 620 (1996).

93. KLARMAN, *supra* note 9, at 68.

94. *Romer*, 517 U.S. at 624.

95. *Id.* at 635-36.

persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”⁹⁶ Further, he noted that a law, which makes it more difficult for a single group of citizens than for all others to seek assistance from the government, is a denial of equal protection “in the most literal sense.”⁹⁷ Additionally, the Court found no legitimate governmental purpose in enacting Amendment 2.⁹⁸

The three dissenters in *Romer*, Justices Scalia, Rehnquist, and Thomas, criticized the majority’s “heavy reliance upon principles of righteousness rather than judicial holdings”⁹⁹ as having “no foundation in American constitutional law, and barely pretend[ing] to.”¹⁰⁰ Justice Scalia also stated the judiciary, as opposed to the political branches, had no business taking a side in “this culture war.”¹⁰¹ This would hardly be the last word, or dissent, that Justice Scalia would author on the topic. Thus, while *Romer* “was a narrow decision with limited implications,” it was nonetheless a significant victory for the gay rights movement.¹⁰²

Just when *Romer* reflected a win, the Defense of Marriage Act (“DOMA”)¹⁰³ stood in resistance to that progress. The two main purposes of DOMA were “to defend the institution of traditional heterosexual marriage. . . . [and] to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions.”¹⁰⁴ Governing state choice-of-law cases, DOMA stated:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.¹⁰⁵

Thus, states were not “required to give full faith and credit to any law or judicial decision of another state recognizing same-sex marriage.”¹⁰⁶

96. *Id.* at 633.

97. *Id.*

98. *Id.* at 635.

99. *Id.* at 636 (Scalia, J., dissenting).

100. *Id.* at 653.

101. *Id.* at 652.

102. KLARMAN, *supra* note 9, at 69.

103. 28 U.S.C. § 1738C (2012).

104. H.R. REP. NO. 104-664, at 2 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

105. § 1738C.

106. KLARMAN, *supra* note 9, at 61 (emphasis removed).

For the purposes of federal law, DOMA defined marriage solely as the union between a man and a woman.¹⁰⁷

After the *Romer* decision and President Clinton announced his intentions to sign DOMA, the *Washington Post* declared, “[s]ame-sex marriage has suddenly become the most visible issue in the gay rights debate.”¹⁰⁸ In 1996, DOMA passed by huge margins in both houses of Congress.¹⁰⁹ The House passed DOMA by a vote of 342 to 67 and the Senate passed it by 85 to 14.¹¹⁰ President Clinton kept a low profile, signing DOMA after midnight and without public ceremony.¹¹¹ Mike McCurry, President Clinton’s press secretary, later recalled “[h]is posture was quite frankly driven by the political realities of an election year in 1996.”¹¹²

By 2000, there was still not a single country in the world that had legalized same-sex marriage.¹¹³ Although same-sex marriage was still an enormously controversial topic, consensual same-sex sodomy no longer was.¹¹⁴ Gay rights organizations worked towards the repeal of sodomy laws by litigation in state courts and lobbying state legislatures.¹¹⁵ Their efforts paid off: by 2003, only four states still criminalized consensual sodomy and specifically targeted same-sex couples, compared to half of the states criminalizing same-sex sodomy at the time *Bowers* was decided in 1986.¹¹⁶ Further, states that did still have sodomy laws commonly did not enforce them against consenting adults acting in private.¹¹⁷

107. David Masci, *An Overview of the Same-Sex Marriage Debate*, PEW RES. CTR. (Apr. 1, 2008), <http://www.pewresearch.org/2008/04/01/an-overview-of-the-samesex-marriage-debate/> [<https://perma.cc/55QX-3S8B>].

108. Barbara Vobejda, *Same-Sex Marriage Becomes Political Issue*, WASH. POST (May 23, 1996), <https://www.washingtonpost.com/archive/politics/1996/05/23/same-sex-marriage-becomes-political-issue/7c4c8c57-c2dc-47fa-b0f1-9ef82ab7c69b/> [<http://perma.cc/2VDL-9YFQ>].

109. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 970 (1998).

110. KLARMAN, *supra* note 9, at 63.

111. *Id.*

112. Peter Baker, *Now in Defense of Gay Marriage, Bill Clinton*, N.Y. TIMES (Mar. 25, 2013), http://www.nytimes.com/2013/03/26/us/politics/bill-clintons-decision-and-regret-on-defense-of-marriage-act.html?_r=0 [<http://perma.cc/EV5B-22RJ>].

113. KLARMAN, *supra* note 9, at 83.

114. *Id.* at 85.

115. *Id.*

116. *Id.*; see also *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (“In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”).

117. *Lawrence*, 539 U.S. at 573.

In March of 2003, the constitutionality of same-sex sodomy laws came directly before the Supreme Court in *Lawrence v. Texas*.¹¹⁸ Writing for the majority once again, Justice Kennedy emphasized that *Bowers*' holding that there was no fundamental right to engage in homosexual sodomy¹¹⁹ needed to be reexamined.¹²⁰ He stated, "*Bowers* was not correct when it was decided, and it is not correct today."¹²¹ Further, its "continuance as precedent demeans the lives of homosexual persons."¹²² The Court found that the decisions consenting adults make in the privacy of their homes "are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment" and a State's view that same-sex sodomy is immoral is not sufficient grounds to uphold a law prohibiting it.¹²³ Nor did the Court find any legitimate state interest to justify this invasion of privacy.¹²⁴

As Justice Kennedy noted in his opinion, the foundations of *Bowers* seriously eroded in the seventeen years between when it was decided and when *Lawrence* overruled it.¹²⁵ In 1986, fifty-seven percent of Americans believed same-sex relations between consenting adults should not be legal and only thirty-two percent believed it should be legal.¹²⁶ By 2003, only thirty-five percent of Americans believed same-sex relations between consenting adults should not be legal and sixty percent believed it should be legal.¹²⁷ Thus, overruling *Bowers* in *Lawrence* was a somewhat easy decision for the Court "in the sense that it simply involved translating into constitutional law a social norm that already commanded overwhelming popular support."¹²⁸

Despite the seemingly uncontroversial holding of *Lawrence*, its undeniable connection with same-sex marriage made it a salient issue.¹²⁹

118. *Id.* at 558.

119. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

120. *Lawrence*, 539 U.S. at 575.

121. *Id.* at 578.

122. *Id.* at 575.

123. *Id.* at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)). Justice O'Connor concurred in *Lawrence* but did not join the Court in overruling *Bowers*. *Id.* at 579 (O'Connor, J., concurring). Further, she found the Texas statute unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, not the Due Process Clause. *Id.*

124. *Id.* at 578.

125. *Id.* at 576.

126. Lydia Saad, *Americans Evenly Divided on the Morality of Homosexuality*, GALLUP (June 18, 2008), <http://www.gallup.com/poll/108115/americans-evenly-divided-morality-homosexuality.aspx> [<https://perma.cc/PKS7-YA25>].

127. *Id.*

128. KLARMAN, *supra* note 9, at 86.

129. *Id.*

The day after the Court issued its decision, there were nearly fifty stories on gay marriage in major U.S. newspapers.¹³⁰ Justice Scalia noted this connection in his *Lawrence* dissent, stating “[t]his case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.”¹³¹ Gay rights activists immediately echoed Scalia’s view of *Lawrence*’s implications, believing that same-sex marriage would be next.¹³² However, support for the legalization of same-sex relations fell from sixty percent to fifty percent in the month following the *Lawrence* decision, perhaps because of its connection with same-sex marriage.¹³³

Nonetheless, just a few months later in November of 2003, the Massachusetts Supreme Court ruled that barring same-sex couples “from the protections, benefits, and obligations of civil marriage” was a violation of the Massachusetts Constitution.¹³⁴ The court reasoned that “[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family . . . are among the most basic of every individual’s liberty and due process rights.”¹³⁵ Thus, Massachusetts “became only the fifth jurisdiction in the world to allow gay marriage. [And] [t]he others—Ontario, British Columbia, Belgium, and the Netherlands—had all enacted gay marriage only within the [previous] two years.”¹³⁶

Immediately following this decision, several cities began issuing marriage licenses to same-sex couples, while thirteen states amended their constitutions to prohibit same-sex marriage.¹³⁷ By 2004, the number of newspaper articles reporting on gay marriage was ten times higher than what it had been in 2000.¹³⁸ Further, during the 2004 election, forty-one percent of voters viewed same-sex marriage as an important issue and twenty-four percent reported they would vote only for candidates that shared their views on the subject.¹³⁹ At this time,

130. Nathaniel Persily, *Gay Marriage, Public Opinion and the Courts* 19 (April 29, 2006) (unpublished manuscript, University of Pennsylvania Law School), faculty scholarship paper 91, http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1090&context=faculty_scholarship [<https://perma.cc/QB54-SFCM>].

131. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

132. KLARMAN, *supra* note 9, at 87.

133. Saad, *supra* note 126.

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

135. *Id.* at 959.

136. KLARMAN, *supra* note 9, at 90-91.

137. Masci, *supra* note 107.

138. KLARMAN, *supra* note 9, at 97.

139. *Id.* at 103-04.

forty-two percent of Americans supported same-sex marriage legalization and fifty-five percent opposed it.¹⁴⁰ During the Rehnquist Court era, same-sex marriage became solidified as a pressing social issue throughout the United States.

C. Roberts Court (2005-Present): Windsor, Hollingsworth, & Obergefell

Just like the Rehnquist Court, the Roberts Court era experienced several compositional changes. In 2005 and 2006, President Bush appointed John Roberts to replace the former Chief Justice Rehnquist and Samuel Alito to replace Justice O'Connor.¹⁴¹ Adding Alito to the bench was “expected to tilt the balance of the court to the right on matters like abortion, affirmative action, and the death penalty . . . [which] partisans on each side said the outcome would echo through American politics for decades.”¹⁴² By 2008, the United States proved to be getting more progressive in terms of gay rights. Fifteen states provided health care benefits to same-sex partners of public employees, as compared to zero states in 1993.¹⁴³ Twenty states had anti-discrimination laws that covered sexual orientation.¹⁴⁴ And finally, thirty-two states authorized additional punishments for hate crimes motivated by anti-gay sentiments.¹⁴⁵ Working towards marriage, several states enacted domestic partnership or civil union laws.

In 2009, support for same-sex marriage among Americans was up to forty percent.¹⁴⁶ In the same year, President Obama made his first Supreme Court appointment, nominating Sonia Sotomayor to replace Justice Souter.¹⁴⁷ Some conservatives criticized her as being “a liberal judicial activist of the first order who thinks her own personal political agenda is more important [than] the law as written.”¹⁴⁸ Her critics also pointed to “a panel discussion at Duke University in 2005, where she told students that the federal Court of Appeals is where ‘policy is

140. Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP (May 27, 2009), <http://www.gallup.com/poll/118378/majority-americans-continue-oppose-gay-marriage.aspx> [https://perma.cc/C8P3-NGSC].

141. FRIEDMAN, *supra* note 86, at 368-69.

142. *Id.* (quoting David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES (Feb. 1, 2006), <http://www.nytimes.com/2006/02/01/politics/politicsspecial1/01confirm.html> [https://perma.cc/RV6W-P3VR]).

143. KLARMAN, *supra* note 9, at 119.

144. *Id.*

145. *Id.*

146. Jones, *supra* note 140.

147. Peter Hambly et al., *Obama Nominates Sonia Sotomayor to Supreme Court*, CNN (May 26, 2009, 8:27 PM), <http://www.cnn.com/2009/POLITICS/05/26/supreme.court/> [https://perma.cc/PZ2A-8YFT].

148. *Id.*

made.’”¹⁴⁹ Approximately one year later, President Obama made a second appointment, nominating Elena Kagan to replace Justice Stevens.¹⁵⁰ Yet again, concerns over judicial activism echoed among conservative critics.¹⁵¹ Both of President Obama’s nominations were monumental, as democrats had gone fifteen years without a Supreme Court appointment.¹⁵² Moreover, compositional changes generally reflect the appointing President’s policy preferences, which “shift the ideological composition of the bench to bring it into line with what they feel is popular sentiment.”¹⁵³

By 2011, the majority of Americans, fifty-three percent, “believe[d] same-sex marriage should be recognized by the law” and given all “the same rights as traditional marriage.”¹⁵⁴ Another poll showed that Americans “opposed DOMA by [fifty-one] percent to [thirty-four] percent.”¹⁵⁵ Thus, in less than two decades, support for same-sex marriage nearly doubled from twenty-seven percent approval in 1996 to fifty-three percent approval in 2011.¹⁵⁶ In May of 2013, a national survey reported seventy-two percent of Americans thought the legalization of same-sex marriage was “inevitable.”¹⁵⁷ Interestingly enough, Republicans (seventy-three percent) were just as likely as Democrats (seventy-two percent) and independents (seventy-four percent) to view the legalization of same-sex marriage as inevitable.¹⁵⁸

Just one month later, the Supreme Court decided two landmark cases for same-sex marriage. The first case, *United States v. Windsor*, involved a challenge to Section 3 of DOMA that provided a federal definition of “marriage” and “spouse.”¹⁵⁹ Section 3 stated that:

149. *Id.*

150. Bill Mears et al., *Obama Chooses Elena Kagan for Supreme Court*, CNN (May 12, 2010, 10:31 AM), <http://www.cnn.com/2010/POLITICS/05/10/scotus.kagan/> [<https://perma.cc/KCV3-PUST>].

151. Nina Totenberg & Scott Neuman, *Kagan Likely to Be Pressed on Writings, Experience*, NPR (May 10, 2010, 2:19 PM), <http://www.npr.org/templates/story/story.php?storyId=126657976> [<https://perma.cc/P7GP-6KFT>].

152. *Id.*

153. Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 468 (1997).

154. Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx> [<https://perma.cc/ZZ9V-5T4K>].

155. KLARMAN, *supra* note 9, at 161.

156. Newport, *supra* note 154.

157. *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as Inevitable*, PEW RES. CTR. (June 6, 2013), <http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/> [<https://perma.cc/R5VQ-SWJG>].

158. *Id.*

159. 133 S. Ct. 2675, 2683 (2013).

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.¹⁶⁰

This section controlled over 1,000 federal laws that addressed marital or spousal status as a matter of federal law.¹⁶¹ Notably, the Executive Branch refused to defend DOMA in this case and had stopped defending its constitutionality in 2011.¹⁶² Ultimately, the Court held, in a 5-4 decision, that DOMA “imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper” and thus, was unconstitutional as a deprivation of liberty protected under the Due Process Clause of the Fifth Amendment.¹⁶³

Writing for the majority, Justice Kennedy reasoned that “DOMA’s unusual deviation from the *usual tradition of recognizing and accepting state definitions of marriage* here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.”¹⁶⁴ He went on to list the inequalities DOMA imposes on same-sex couples, such as healthcare benefits, bankruptcy protections, and federal financial aid eligibility, by living as married according to state law but unmarried according to federal law.¹⁶⁵ Further, Justice Kennedy stated, “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal[,] [and] [t]he principal purpose is to impose inequality.”¹⁶⁶ Interestingly enough, Justice Kennedy avoided the question of whether there is a fundamental right to same-sex marriage in his opinion. *Windsor* set the stage for lower courts to decide that question independently, leaving the door open for the questions that were ultimately presented in *Obergefell*.

It should come as no surprise that the four dissenters were Chief Justice Roberts and Justices Scalia, Alito, and Thomas. In his dissent, Justice Scalia criticized the majority for making law in a case “[w]e have no power to decide” by stating, “[t]he Court’s errors on both points spring forth from the same diseased root: an exalted conception of the

160. *Id.* (quoting 1 U.S.C. § 7 (2012)).

161. *Id.*

162. Swathi Nallapa, *DOMA: Obama Administration’s Refusal to Defend Law Is Entirely Justified*, MIC (Mar. 29, 2013), <https://mic.com/articles/31429/doma-obama-administration-s-refusal-to-defend-law-is-entirely-justified#.LUP3lVkf2> [<https://perma.cc/Z2A2-GJVE>].

163. *Windsor*, 133 S. Ct. at 2695-96.

164. *Id.* at 2693 (emphasis added).

165. *Id.* at 2694-95.

166. *Id.* at 2694.

role of this institution in America.”¹⁶⁷ He also “accused Justice Kennedy of writing an opinion ‘deliberately transposable,’ in the near future, into a federal constitutional right to same-sex marriage.”¹⁶⁸ Justice Alito echoed a similar but less verbose public policy concern, stating, “the Constitution simply does not speak to the issue of same-sex marriage. . . . [a]ny change on a question so fundamental should be made by the people through their elected officials.”¹⁶⁹

The same day, the Court issued its decision in *Hollingsworth v. Perry*.¹⁷⁰ *Hollingsworth* involved an amendment to the California Constitution, known as Proposition 8, which provided “[o]nly marriage between a man and a woman is valid or recognized in California.”¹⁷¹ California law allowed same-sex couples to enter into “domestic partnerships,” which carried “the same rights, protections, and benefits, and . . . [were] subject to the same responsibilities, obligations, and duties under law” as marriage.¹⁷² Proposition 8 did not take those rights away, but “reserve[d] only ‘the official *designation* of the term “marriage” for the union of opposite-sex couples as a matter of state constitutional law.’”¹⁷³

The Court declined to address the constitutionality of Proposition 8 because it found the petitioners lacked Article III standing to invoke the power of a federal court.¹⁷⁴ Chief Justice Roberts explained there was no injury to redress here: “[T]he District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it . . . and the state officials chose not to appeal.”¹⁷⁵ Nor can a private party seek relief for a generalized grievance on behalf of the State.¹⁷⁶ The Court stated, “[w]e have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.”¹⁷⁷

167. *Id.* at 2697-98 (Scalia, J., dissenting).

168. Klarman, *supra* note 10, at 158 (quoting *Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting)).

169. *Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting).

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

171. *Id.* at 2659 (quoting CAL. CONST., art. I, § 7.5).

172. *Id.* (quoting CAL. FAM. CODE § 297.5(a) (West 2004)).

173. *Id.* at 2659-60 (quoting *Strauss v. Horton*, 207 P.3d 48, 61 (Cal. 2009)).

174. *Id.* at 2668.

175. *Id.* at 2662.

176. *See id.* at 2667.

177. *Id.* at 2668.

By May of 2015, a record high of sixty percent of Americans supported the legalization of same-sex marriage.¹⁷⁸ Roughly one month later, the issue of same-sex marriage came before the Court once again in *Obergefell v. Hodges*.¹⁷⁹ Thus, in just two years, the Supreme Court decided a total of three same-sex marriages cases, as opposed to the seventeen years it took to decide *Bowers*, *Romer*, and *Lawrence*, all of which involved gay rights issues but not same-sex marriage directly.¹⁸⁰

Obergefell involved challenges to Michigan, Kentucky, Ohio, and Tennessee law, all of which defined marriage as a union between one man and one woman.¹⁸¹ The question before the Court was whether these states violated the Fourteenth Amendment by denying same-sex couples “the right to marry or to have their marriages, lawfully performed in another State, given full recognition.”¹⁸² Soon to be known as “the Court’s great gay rights champion,” Justice Kennedy once again wrote for the five-member majority.¹⁸³ In a landmark decision, the Court held that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”¹⁸⁴ Thus, just the same as opposite-sex couples, same-sex couples have the fundamental right to marry in all states.¹⁸⁵

178. Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), <http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx> [https://perma.cc/X9N4-BB8F].

179. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

180. *Bowers v. Hardwick*, 478 U.S. 186, 189-91 (1986) (upholding a Georgia sodomy statute by finding no fundamental right to engage in homosexual sodomy in the Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 624, 633 (1996) (holding Colorado’s Amendment 2, which prohibited all state legislative, executive, or judicial action designed to protect “homosexual, lesbian or bisexual orientation, conduct, practices or relationships” unconstitutional under the Equal Protection Clause); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers*, finding homosexual adults’ “right to liberty under the Due Process Clause gives them the full right to engage in their [sexual] conduct without intervention of the government”).

181. *Obergefell*, 135 S. Ct. 2584 at 2593.

182. *Id.*

183. Nathan Goetting, *Gay Marriage Is a Fundamental Right*, 70 NAT’L LAW. GUILD REV. 137, 141 (2013).

184. *Obergefell*, 135 S. Ct. at 2604. Justice Kennedy’s use of the Equal Protection Clause is interesting here because he arguably could have reached the same result by simply relying on the fact that there is a substantive due process right for same-sex couples to marry. Once the Court determines there is a substantive due process right, the right is removed from the legislative process. *Obergefell*’s seemingly unnecessary equal protection discussion is significant because it begs the question of whether same-sex couples are now considered a suspect class under the Equal Protection Clause, which this Author plans to address in a separate piece.

185. *Id.* at 2607.

The Court reasoned that it has long held the right to marry is fundamental under the Due Process Clause.¹⁸⁶ Marital status provides an expansive list of government rights, responsibilities, and benefits, so denying same-sex couples of the same legal recognition afforded to opposite-sex couples “would disparage their choices and diminish their personhood.”¹⁸⁷ Justice Kennedy reasoned the fundamental right to marry is both a matter of history and ancient tradition but also rises “from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”¹⁸⁸ He went on to say that new societal understandings about our most fundamental institutions (e.g., marriage) could reveal inequality that was once unnoticed and unchallenged.¹⁸⁹ The history and tradition, namely discussing marriage in personal terms, is much different than the history and tradition Justice Kennedy relied on in *Windsor*. Justice Kennedy discusses what marriage means to *individuals*, whereas his discussion of history and tradition in *Windsor* revolved around federalism and the rights of states to define marriage themselves.

This decision did not come without fierce dissents from the same four Justices that dissented in *Windsor*.¹⁹⁰ Chief Justice Roberts and Justices Scalia, Alito, and Thomas. Further, both Justice Scalia and Justice Thomas dissented in *Lawrence* in 2003 and *Romer* in 1996.¹⁹¹ The dissents mainly criticized the majority’s decision for being “an act of will” based on “arguments rooted in social policy and considerations of fairness” rather than legal arguments or judgment.¹⁹² Justice Scalia reasoned that “[j]udges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant.”¹⁹³ He referred to the Court as “a select, patrician, highly unrepresentative panel of nine” and criticized the Court for “violat[ing] a principle even more fundamental than no taxation without representation: no social transformation without representation.”¹⁹⁴

Chief Justice Roberts made similar arguments, criticizing the majority’s envisioned role of the Court as “anything but humble or restrained” because “[o]ver and over, the majority exalts the role of the judiciary in delivering social change.”¹⁹⁵ He reasoned the Court had no

186. *Id.* at 2598.

187. *Id.* at 2601-02.

188. *Id.* at 2602.

189. *Id.* at 2603.

190. *United States v. Windsor*, 133 S. Ct. 2675, 2696-2720 (2013).

191. *Lawrence v. Texas*, 539 U.S. 558, 586 (2003); *Romer v. Evans*, 517 U.S. 620, 636 (1996).

192. *Obergefell*, 135 S. Ct. at 2611-12 (Roberts, C.J., dissenting).

193. *Id.* at 2629 (Scalia, J., dissenting).

194. *Id.*

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

business deciding whether the institution of marriage should include same-sex couples because the “Constitution does not enact any one theory of marriage[.] [t]he people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.”¹⁹⁶ His dissent ended with “[i]f you are among the many Americans . . . who favor expanding same-sex marriage, by all means celebrate today’s decision. . . . But do not celebrate the Constitution. It had nothing to do with it.”¹⁹⁷

Thus, in less than three decades, the United States saw substantial changes in public opinion towards gay rights and same-sex marriage, with Supreme Court case outcomes paralleling that progress. This timeline is crucial in establishing the nexus between public opinion and judicial decisionmaking in this context. Part IV utilizes the attitudinal model to establish this relationship and the attitudinal change model to provide an explanation for it.

IV. APPLYING A MODEL OF JUDICIAL DECISIONMAKING TO THE SAME-SEX MARRIAGE CASES

The gay rights and later same-sex marriage cases decided in the past three decades truly reflect monumental changes in societal opinion about the issues. The timeline laid out in Part III demonstrates the coinciding progress made both by the American public and by the Supreme Court. Deciphering the relationship between public opinion and Supreme Court decisionmaking in this context is the next task ahead. While there is no single theory that provides an all-encompassing explanation for judicial behavior, the attitudinal model, with contextual support by the attitudinal change model, is the best theory to do so.

It is worth noting that the same-sex marriage cases are unique and distinguishable from other cases when it comes to analyzing the relationship between the Court and public opinion. Controversies over gay rights and the legalization of same-sex marriage were and continue to be highly salient issues both in the eyes of the American public and before the Court. As of July 2015, two weeks after the *Obergefell* decision, fifty-eight percent of Americans supported the legalization of same-sex marriage but forty percent still opposed it; party lines and age clearly dividing the issue.¹⁹⁸ Additionally, a fractured Supreme Court decided each of the cases analyzed in Part III, all being either a

196. *Id.* at 2611.

197. *Id.* at 2626.

198. Justin McCarthy, *U.S. Support for Gay Marriage Stable After High Court Ruling*, GALLUP (July 17, 2015), http://www.gallup.com/poll/184217/support-gay-marriage-stable-high-court-ruling.aspx?g_source=same%20sex%20marriage&g_medium=search&g_campaign=tiles [<https://perma.cc/HWF3-QXWK>].

6-3 or 5-4 decision. The three cases, *Windsor*, *Hollingsworth*, and *Obergefell*, that specifically addressed same-sex marriage were all decided by a 5-4 margin.¹⁹⁹

Another notable feature is that these cases were decided start-to-finish in less than three decades, a relatively short period of time to witness a total transformation in the Court's decisions. It only took the Court seventeen years to overturn its own decision in *Bowers*, finding that state laws banning same-sex sodomy were unconstitutional under the Due Process Clause.²⁰⁰ Further, the three, and only, Supreme Court cases that directly analyzed same-sex marriage were decided in just two years. Therefore, my Part IV analysis is limited to the gay rights context, and perhaps it is applicable to other civil liberties cases that come before the Court. But it is not meant to apply to routine and non-salient Supreme Court decisions.

A. *The Attitudinal Model "Plus"*

Overall, the best model to fully explain the Court's decisionmaking in the gay rights and same-sex marriage cases is the attitudinal model, with contextual support by the attitudinal change model. I term this combination the "attitudinal model 'plus.'" The attitudinal model's simple hypothesis that "[J]ustices come to the Supreme Court with their ideological preferences fully formed and, in light of contextual case facts these preferences cast overwhelming influence on their decision making"²⁰¹ proves true in the context of the same-sex marriage cases. Moreover, "as the Court moves in one ideological direction, it increases the likelihood that those who share the Court's policy preferences will be more likely to seek certiorari."²⁰² It necessarily follows that as the Court becomes more liberal, liberal litigants are more prone to pursue review.²⁰³ Thus, looking at the Court's composition and voting alignment is the first step to determining whether the Justices voted ideologically.

In all six of the cases analyzed in Part III, a fractured Court issued the decisions either 6-3 or, more often, 5-4. A fractured Court is not always common and does not inevitably mean the Court was split ideologically. In fact, over the past decade, 5-4 decisions made up an average of just twenty-two percent of the Court's total opinions with an

199. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

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

201. Unah & Hancock, *supra* note 29, at 296 (citing SEGAL & SPAETH, *supra* note 14).

202. McGuire & Stimson, *supra* note 6, at 1024.

203. *Id.*

average of sixty-seven percent of those 5-4 decisions split ideologically.²⁰⁴ However, when the Justices are ideologically liberal, as were the five majority members in *Windsor* and *Obergefell*, “[t]he odds are four times higher that the Court will issue a liberal decision.”²⁰⁵ Further, when the case is politically salient, the odds that the Court issues a liberal decision are approximately twenty percent higher.²⁰⁶

Out of the three same-sex marriage cases decided by the Roberts Court, both *Windsor* and *Obergefell* had the same alignment of Justices. The five liberal Justices were as follows: Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan in the majority and the four conservative Justices: Roberts, Scalia, Alito, and Thomas dissenting. Out of the eighty-three 5-4 decisions made by the Roberts Court from the past five terms (October 2010 to June 2015), twenty-five of those decisions, including *Obergefell* and *Windsor*, were decided by that majority alignment.²⁰⁷ Thus, Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan made up the majority in approximately thirty percent of 5-4 decisions in the past five terms.

A more common alignment is Justice Kennedy with the conservative bloc—Chief Justice Roberts and Justices Scalia, Alito, and Thomas—the majority in approximately forty-one percent of 5-4 decisions in the past five terms. As the swing vote, “virtually every constitutional question today turns on the vote of Justice Anthony Kennedy, who is undoubtedly the most powerful [J]ustice in the history of the U.S. Supreme Court.”²⁰⁸ Thus, with almost any controversial issue before the Roberts Court, Justice Kennedy’s vote is usually the deciding factor, proving that his preferences are of the utmost importance. The liberal majority alignment in *Windsor* and *Obergefell* is telling because those Justices, more often than not, are not the majority in split decisions, suggesting they voted ideologically here.

The decision in *Hollingsworth* is an anomaly. In that case, the Court decided petitioners did not have Article III standing to challenge California’s Proposition 8 and declined to decide whether the Equal Protection Clause prohibited California from defining marriage as the union between one man and one woman.²⁰⁹ Justices Roberts, Scalia, Ginsburg, Breyer, and Kagan voted in the majority; a 5-4 alignment

204. Kedar S. Bhatia, *Stat Pack for October Term 2014*, SCOTUSBLOG (June 30, 2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf [<https://perma.cc/7376-D2XR>].

205. Unah et al., *supra* note 16, at 313.

206. *Id.*

207. Data compiled from the OT14, OT13, OT12, OT11, and OT10 final stat packs on *Stat Pack Archive*, SCOTUSBLOG, <http://www.scotusblog.com/reference/stat-pack/> [<https://perma.cc/HY4Q-UZXH>].

208. KLARMAN, *supra* note 9, at 204.

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

that has only happened once (in *Hollingsworth*) over the Court's past five terms. Whether the individual Justices' ideologies influenced their vote in *Hollingsworth* is unclear, but the Court as a whole did not split ideologically, making it the exception of the same-sex marriage cases.

Another factor that makes the attitudinal model convincing in this context is that Justice Kennedy authored four of the six cases discussed in Part III. The only two decisions he did not write were *Bowers*, as he was not yet on the Court, and *Hollingsworth*, because he dissented. As previously mentioned, Justice Kennedy's swing vote is very significant in controversial cases, generally making his preferences the ones that matter. His ideologies on gay rights are pretty clear. He authored all the Supreme Court's decisions supporting gay rights, authored "an opinion that was remarkably gay-friendly for its time . . . [a]s a judge on the Ninth Circuit in 1980," and comes from northern California, which is "overwhelmingly supportive of gay rights in general and gay marriage in particular."²¹⁰ Justice Kennedy is not only the swing vote on the Roberts Court but also holds a powerful position as one of the most senior Associate Justices.

One of the most important Supreme Court procedures is the process of majority opinion assignment. After hearing oral arguments on a case, the Court "holds a secret conference to discuss the case and cast tentative votes based upon any number of factors including their ideological predilection, argument advanced by direct and indirect parties, and logic underlying the solicitor general's position on the case."²¹¹ After the vote, if the Chief Justice voted with the majority, he or she assigns the opinion.²¹² If not, the most senior Associate Justice in the majority assigns the opinion.²¹³ "[R]esearch suggests that [C]hief [J]ustices and other majority opinion assigners typically reserve cases high in salience for themselves."²¹⁴

In both *Windsor* and *Obergefell*, Justice Kennedy was the most senior Associate Justice that voted in the majority and accordingly, assigned both opinions to himself.²¹⁵ This position gave him "substantial

210. KLARMAN, *supra* note 9, at 205.

211. Unah & Hancock, *supra* note 29, at 298.

212. *Id.*

213. *Id.*

214. *Id.* at 298-99 (citing Saul Brenner, *The Chief Justice's Self Assignment of Majority Opinion in Salient Cases*, 30 SOC. SCI. J. 143-50 (1993); David J. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, in AMERICAN COURT SYSTEMS—READINGS IN JUDICIAL PROCESS AND BEHAVIOR 496 (Sheldon Goldman & Austin Sarat eds., 1978); Harold J. Spaeth, *Distributive Justice: Majority Opinion Assignments in the Burger Court*, 67 JUDICATURE 299, 299-304 (1984)).

215. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

agenda control over the content of the opinion” and did in fact “determine[] the future direction of law and policy” in regard to same-sex marriage.²¹⁶ Consistent with the attitudinal model, self-assignment allowed Justice Kennedy to write opinions that both directly reflected his own ideological preferences in light of the case facts while also keeping the majority coalition together.

The first inevitable limitation of the attitudinal model is that it assumes ideological preferences are the primary determinant of the Justices’ behavior.²¹⁷ This is an oversimplification of judicial decisionmaking. The Justices’ ideological preferences and values may play a large role in some cases, like the same-sex marriage cases, but they certainly do not explain every case the Court decides. If that were true, every case would come out 5-4 or however the Court was ideologically split at the time. In reality, 5-4 decisions are not the norm and not always ideologically split. While the attitudinal model is not an accurate predictor of every Supreme Court case, the Justices were ideologically split in every gay rights case dating back to *Bowers*, with the exception of *Hollingsworth*, strongly suggesting their political attitudes influenced their votes. Thus, this limitation does not invalidate my analysis.

The second limitation of the attitudinal model is that it assumes Justices have fixed preferences when they are appointed and these preferences are enduring throughout their time on the bench.²¹⁸ However, Justices are not immune from attitudinal changes, as former Supreme Court Justice Cardozo emphasized, “[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by.”²¹⁹ Further, this assumption fails to “address the link between constitutional design and social or political change” and does not explain short or long-term change in constitutional law.²²⁰ This is where the attitudinal change model comes in to provide an explanation.

The attitudinal change model suggests, “the observed direct linkage between public opinion and the behavior of [J]ustices arises from the force of mutually experienced events and ideas in shaping and reshaping the preferences of both the public and the [J]ustices.”²²¹ The link between public opinion and judicial decisionmaking is more indirect here because the changes in the Justices’ preferences parallel the

216. Unah & Hancock, *supra* note 29, at 299.

217. Mishler & Sheehan, *supra* note 39, at 171.

218. *Id.*

219. Giles et al., *supra* note 49, at 295 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 167-78 (1921)).

220. Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1755 (2003) (reviewing SEGAL & SPAETH, *REVISITED*, *supra* note 14).

221. Giles et al., *supra* note 49, at 295.

changing preferences of the public.²²² The attitudinal model did accurately predict the outcomes of the same-sex marriage cases, but the attitudinal change model provides an explanation for *how* and *why* the Court progressed from *Bowers* to *Obergefell* in just three decades.

Changes in public preferences for same-sex marriage happened fairly drastically during this time. In 1996, only twenty-seven percent of Americans supported legalization of same-sex marriage, whereas sixty percent of Americans supported it in 2015.²²³ What could account for the changes in public attitudes regarding same-sex marriage? First, there have been large changes over the past decade in terms of favorable opinions of gay men and lesbians overall.²²⁴ In 2003, thirty-seven percent of Americans reported viewing gay men favorably, while fifty-one percent viewed them unfavorably.²²⁵ Similarly, thirty-nine percent of Americans reported viewing lesbians favorably, while forty-eight percent viewed them unfavorably.²²⁶ However, by 2013, by a fifty-four percent to sixteen percent margin, more Americans had a favorable than unfavorable opinion of gay men, and by a fifty-eight percent to nineteen percent margin, about twice as many Americans viewed lesbian women favorably than unfavorably.²²⁷

Additionally, the largest factor in the approval or disapproval of same-sex marriage is whether the individual knows someone who is gay or lesbian.²²⁸ When the Court decided *Bowers* in 1986, Justice Powell discussed the case with his gay law clerk and remarked that he had never known a gay person.²²⁹ At that time, only twenty-five percent of Americans reported having a gay friend, coworker, or relative.²³⁰ By 1993, three years before the Court decided *Romer*, sixty-one percent of Americans polled as personally knowing someone that identified as gay or lesbian.²³¹ Further, in 2013 when the Court decided *Windsor* and *Hollingsworth*, nearly nine out of ten Americans (eighty-seven percent) personally knew someone who was gay or lesbian.²³²

222. *Id.*

223. McCarthy, *supra* note 178.

224. *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as Inevitable*, *supra* note 153.

225. *Id.*

226. *Id.*

227. *Id.*

228. Laura Dean, *The Struggle for Legitimacy of Same-Sex Marriage and Public Opinion of Same-Sex Marriage* (Jan. 31, 2012) (unpublished M.A. thesis, George Washington University), <http://pqdtopen.proquest.com/doc/897918260.html?FMT=ABS>.

229. KLARMAN, *supra* note 9, at 37.

230. Klarman, *supra* note 10, at 132.

231. *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as Inevitable*, *supra* note 157.

232. *Id.*

The link between these relationships and attitudes about homosexuality is strong. That same poll also revealed that roughly two-thirds (sixty-eight percent) of Americans who know a lot of people who are gay or lesbian favor gay marriage, compared to thirty-two percent of those who do not know anyone.²³³

Like the American public, Supreme Court Justices are also “social beings confronted with the plethora of stimuli emanating from American culture, media, and politics.”²³⁴ Over the past three decades, the Justices were simply not immune from these same social forces that lead the public to become more accepting of same-sex marriage. Before the *Obergefell* decision, Justice Ginsburg spoke at the University of Minnesota Law School and “marveled at the ‘remarkable’ shift in public perception of same-sex marriage that she attribute[d] to gays and lesbians being more open about their relationships.”²³⁵ A few months later, she stated in an interview “I think that as more and more people came out and said that ‘this is who I am,’ the rest of us recognized that they are one of us.”²³⁶ Further, in 2014, Justice Kagan officiated a same-sex wedding for her former law clerk and his husband.²³⁷ Thus, from Justice Powell not even knowing a gay person (or knowing his law clerk was gay) in 1986, to Justice Ginsburg speaking out and Justice Kagan acting in support of same-sex marriage in 2014, the Court’s progress from *Bowers* to *Obergefell* goes beyond just the Justices’ ideologies. Over time, the same social forces that swayed public opinion in favor of gay rights in general and eventually same-sex marriage equally influenced the Court as a whole.

B. Revisiting the Legal Model and Strategic Behavior Model

Although scholars have largely abandoned the legal model, which calls for impartial decisionmaking based on the merits, devoid of any expression of judicial individuality or ideology, it nonetheless finds little support in the context of the same-sex marriage cases. Justice Kennedy’s opinions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell* exemplify the type of legal analysis that is filled with both judicial individuality

233. *Id.*

234. Flemming & Wood, *supra* note 153, at 471.

235. Associated Press, *Ginsburg Talks Gay Marriage*, POLITICO (Sept. 16, 2014, 9:04 PM), <http://www.politico.com/story/2014/09/supreme-court-gay-marriage-ruth-bader-ginsburg-111032> [https://perma.cc/6SBJ-UJ9P].

236. Paige Lavender, *Ruth Bader Ginsburg: Americans Wouldn’t Need ‘a Large Adjustment’ to Welcome Legal Gay Marriage*, HUFFINGTON POST (Feb. 12, 2015, 8:57 AM), http://www.huffingtonpost.com/2015/02/12/ruth-bader-ginsburg-gay-marriage_n_6669000.html.

237. Sam Frizell, *Here’s What 5 Supreme Court Justices Have Said About Gay Marriage*, TIME (Jan. 16, 2015), <http://time.com/3672426/supreme-court-gay-marriage-justices/> [https://perma.cc/Y6A5-VBKS].

and ideology. His reasoning in those cases emphasized social policy, notions of fairness, and dignity, as compared to strictly relying on the plain language of the Constitution. More significantly, Justice Kennedy used the Due Process Clause and the Equal Protection Clause to broaden the scope of fundamental rights by embracing a vision of a living Constitution, which sharply conflicts with the legal model.

Specifically, in *Lawrence*, Justice Kennedy “embraced an interpretive methodology of living constitutionalism, which construes the open-ended language of the Constitution according to evolving social mores rather than the original understandings of its authors.”²³⁸ He echoed this sentiment in his two following opinions. In *Windsor*, he stated that recognizing the validity of same-sex marriages performed in the United States “reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”²³⁹ Two years later in *Obergefell*, he reasoned that the fundamental right to marry was an ancient tradition and arose in this context “from a better informed understanding of how constitutional imperatives define a liberty.”²⁴⁰ He went further to say that new societal understandings about our most fundamental institutions, specifically marriage, could reveal inequality that was once unnoticed and unchallenged.²⁴¹

Praised by some and sharply condemned by others, Justice Kennedy’s reasoning in these cases simply does not lead to case outcomes based purely on the legal merits and neutral principles that the legal model demands, nor should it. The most difficult and controversial cases come before the Supreme Court for a reason; they require that a complex multitude of factors be considered. Despite this, the legal model still portrays judges as scientifically applying the applicable rule of law, which leaves little room for discretionary authority and no room for judicial individuality. While the Court, and specifically Justice Kennedy, cited to precedent and constitutional provisions in the same-sex marriage cases, those explanations are not necessarily the reasons underlying the decision. Rather, judicial ideology and individuality flourished in those cases, providing little to no support for the legal model in this context.

While slightly more persuasive than the legal model, the strategic behavior model also fails to find support in the same-sex marriage cases. This theory suggests “the Court directly and deliberately follows

238. KLARMAN, *supra* note 9, at 206.

239. *United States v. Windsor*, 133 S. Ct. 2675, 2692-93 (2013).

240. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

241. *Id.* at 2603.

public opinion for fear of losing its legitimacy as an institution.”²⁴² Public opinion serves as an active constraint on the Justices’ preferences here.²⁴³ The Justices do not underestimate the importance of public opinion in retaining the Court’s legitimacy and functionality as an institution. However, the strategic behavior model overemphasizes the effect this plays on judicial decisionmaking by suggesting the Court directly and deliberately follows public opinion for this reason.

In the gay rights and same-sex marriage cases, the progressiveness of public opinion and the Court’s decisions were never far off from each other. The timelines arguably coincided because of mutually shared experiences and ideas that shaped and reshaped the public and the Court’s opinions. However, there was no direct causal relationship either way. When the Court decided *Lawrence* in 2003, it was inevitably moving towards the question of legalizing same-sex marriage, yet only thirty-two percent of the public favored legalizing same-sex marriage with fifty-nine percent opposing it.²⁴⁴ Even when the Court decided *Windsor* and *Hollingsworth* in 2013, public approval of legalizing same-sex marriage was hovering right above fifty percent.²⁴⁵ Further, all of the Court’s gay rights decisions leading up to *Obergefell* suggested same-sex marriage legalization would be the outcome. The Court decided *Obergefell* based on its own principles set forth in *Windsor* and the strong influence of ideological preferences, not because it feared losing its institutional legitimacy.

V. CONCLUSION

As one of the most socially, politically, and legally contentious issues in the United States, the progressive changes in public opinion and Supreme Court decisionmaking regarding same-sex marriage in recent years is truly remarkable. It reflects broader concepts about democracy, the judiciary, and the Constitution. As explained by Justice Frankfurter, “[i]n our scheme of government, readjustment to great social changes means juristic readjustment. . . . [a]nd so American constitutional law is not a fixed body of truth but a mode of social adjustment.”²⁴⁶ Consistent with the attitudinal model, the Justices’ ideological preferences cast an overwhelming influence on their decisionmaking in the same-sex marriage cases. Further, over the last three decades, the same social forces that swayed public opinion to gradually

242. Unah et al., *supra* note 16, at 299.

243. Giles et al., *supra* note 49, at 295.

244. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (May 12, 2016), <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/> [<https://perma.cc/X8GV-PHHB>].

245. McCarthy, *supra* note 178.

246. FELIX FRANKFURTER, FELIX FRANKFURTER ON THE SUPREME: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 287-88 (Philip B. Kurland ed., 1970).

accept and support the legal recognition of same-sex marriage equally swayed the Supreme Court (or at least the majority). The attitudinal change model completes the explanation for how and why the Court progressed from its *Bowers* decision to the monumental *Obergefell* decision. Thus, I can conclude in this context that the main influence on the Justices' vote choice was ideological preferences, but over time and in the aggregate, the Court indirectly responded to the shifting tides of public opinion.