

2018

Obama's Conversion on Same-Sex Marriage: The Social Foundations of Individual Rights

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Tsai, Robert L., "Obama's Conversion on Same-Sex Marriage: The Social Foundations of Individual Rights" (2018). *Connecticut Law Review*. 396.

https://opencommons.uconn.edu/law_review/396

CONNECTICUT LAW REVIEW

VOLUME 50

MARCH 2018

NUMBER 1

Article

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ROBERT L. TSAI

This article explores how presidents who wish to seize a leadership role over the development of rights must tend to the social foundations of those rights. Broad cultural changes alone do not guarantee success, nor do they dictate the substance of constitutional ideas. Rather, presidential aides must actively re-characterize the social conditions in which rights are made, disseminated, and enforced. An administration must articulate a strategically plausible theory of a particular right, ensure there is cultural and institutional support for that right, and work to minimize blowback. Executive branch officials must seek to transform and popularize legal concepts while working within a broader professional and political culture that respects the role of other branches of government, including the prerogative of the courts to interpret the laws. A useful case study concerns the Obama administration's shift in position on the federal Defense of Marriage Act (DOMA) and its subsequent articulation of a theory of equality that encompasses same-sex marriage. This episode should be understood, in part, as an act of presidential leadership over individual rights, though presidentially-instigated rights differ from judicially-derived ones. Recognizing this model of leadership doesn't require embracing executive supremacy, but it does suggest we ought to emphasize institutional dynamics over party politics or social movements in explanations of constitutional change.

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ROBERT L. TSAI *

INTRODUCTION

When it comes to the protection of individual rights, one's thoughts can be easily clouded by the great myth of judicial statesmanship. We have all been regaled with accounts of landmark rulings like *Brown v. Board of Education*¹ and *Roe v. Wade*,² which inspire an abiding hope in lawsuits as the best route to political justice. But this is an unrealistic ideal because judges rarely, if ever, step out beyond the realm of a political or cultural consensus to defend minority rights, real or imagined.³ Even if it were possible to do so, it would not be normatively desirable for judges to stray too far from what can be sustained socially and politically.

There are other reasons not to put one's faith entirely in the legal system. Judicial leadership over rights simply is not borne out in historical practice. Through a combination of training and practice, judges tend to be conservative by disposition; they are also constrained by elaborate systems of procedural review and a professional culture that values workmanlike resolution of specific cases rather than revolutionary action. Few judges enjoy being reversed by higher-ranking judges, declared mistaken in their legal methods, or branded traitors to the people when they issue rulings that call into question voters' moral choices. Judges promise finality but

* Professor of Law, American University, Washington College of Law. Parts of this paper were presented at the Constitutional Law Colloquium at Loyola University Law School in Chicago, the Constitutional Law Roundtable at the University of Maryland, and workshops at American University's Washington College of Law. My thanks to Erwin Chemerinsky, Jim Fleming, Mark Graber, Linda McClain, and Sachin Pandya. I am also grateful to the AU and University of Georgia law students who have taken my seminar on Presidential Leadership, Legal Transformation, and Individual Rights, as well as those who have taken my course on Jurisprudence. My Dean's Fellows Stephanie Leacock, Cody Meixner, Stephanie MacInnes, Haaris Pasha, James Purce, and Catherine Warren rendered valuable research assistance. Generous support came from Dean Claudio Grossman, Dean Camille Nelson, and Associate Dean for Scholarship Jenny Roberts. Michael Rondon and the excellent staff of the *Connecticut Law Review* made the editorial process a pleasure.

¹ 347 U.S. 483 (1954).

² 410 U.S. 113 (1973).

³ I join the chorus of political scientists and legal theorists who have found that constitutional law rarely departs too far from national sentiment. See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

can deliver, at best, the terms for future debate. Even when judges lay down grand constitutional principles, they are inevitably subject to narrowing and piece-meal reversal by subsequent decision makers, as well as creative forms of resistance by political actors. Litigation can be critical at various stages of transformative change, but what society obtains from the judicial process is largely rhetorical in nature: public rationales, ways of talking about rights, and a few choice phrases that can penetrate the news cycle and capture the stakes for ordinary citizens.

This is all valuable cultural material from which we can begin a national conversation or sustain legal transformations already under way, but a judicial decision alone should not be mistaken for a final resolution or the equivalent of democratic justice.⁴ A theory of rights based on the false hope of judicial salvation ends in failure before it even begins. The point is not that judicial participation in the development of rights is unimportant—of course it is—but rather that judicial craftsmanship is grossly incomplete as an account for how constitutional rights are actually made or enforced and whether they will stand the test of time.

In truth, lasting legal change ultimately can be measured by the degree to which political actors are successful in securing others' compliance with judicial rulings (either through *acquiescence*, *socialization*, or *institutionalization*)⁵ and in creating the overall perception that constitutional norms have become sufficiently settled that they are obligatory (the way actors within the legal system talk about the law also is a reminder that the "settlement" of law is a claim about social perception of the law). We learn more about what constitutional rights actually mean from how non-judicial institutions and political actors deal with ideas of law and justice in their social milieu than from a glorious ruling itself within the confines of existing jurisprudence. How elected officials choose to respond to important judicial rulings, or what they do in stepping into

⁴ See generally ROBERT L. TSAI, *ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE* (2008) (discussing the different ways in which social support for constitutional principles can be measured and cutting into finer detail prevailing jurisprudential accounts of why citizens might obey the law). Compare Leslie Greene, *Law and Obligations*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 514–47 (Jules Coleman & Scott Shapiro eds., 2001) (discussing the "obligatory" nature of law), with John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY: A SYMPOSIUM* 3–18 (Sidney Hook ed., 1964) (treating obedience to the law as a matter of fairness because citizens enjoy the benefits of citizenship).

⁵ *Acquiescence* involves bowing to another's interpretation whether in recognition of a superior power or out of convenience, even if they do not publicly endorse its rationale. *Socialization* entails self-conscious internalization of legal norms, which can occur through education, media, training, and similar processes. *Institutionalization* takes the cultural theory of law to the next step of both intentionality and permanence, where the building or remaking of organizations facilitates the perpetuation of preferred legal views. Scholars in recent years have paid greater attention to processes of socialization. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 628 (2004).

the breach when judges refuse to enter a field of action or render parsimonious readings of the Constitution, determines the actual scope of American freedoms—often, decisively so.

For all of these reasons, we must pay careful attention to what I call “the social plausibility” of rights: whether a certain interpretation of the law not only seems to be a thoughtful solution based on acceptable modes of argumentation, but also is likely to be publicly accepted by ordinary citizens, public officials, and judges. But where some scholars try to match judicial outcomes to majoritarian views in rather crude fashion,⁶ I believe it is more descriptively accurate to say that, at any given moment in time, there exists a range of socially plausible interpretations of legal text. That way, we don't assert the existence of consensus as another way of imposing hegemony by falsely suggesting, even unwittingly, that for every constitutional question there can be only one correct answer.

For every constitutional question there will be a range of socially plausible interpretations. Some readings of text will be better than others, while some interpretations will seem entirely out of bounds in the sense that they are simply not culturally sustainable.⁷ A constitutional understanding that seems outrageous is vulnerable precisely because of the ease with which one might mobilize against it as a usurpation of authority, an apparent act of will rather than a faithful reading of law.

There is yet another point that follows from these premises: because constitutional interpretation is constantly being done by a variety of jurists, agencies, institutions, and political actors, different theories of the Constitution abound and jockey for *legitimacy* and *dominance*. This aspect of the constitutional process entails an ideological conflict waged across historical time, through a variety of bureaucracies and political resources. Constitutional conflict is not the exact same thing as electoral conflict or philosophical disagreement, and practitioners may engage in it according to established customs, but it nevertheless uses the same basic apparatus to make legal achievements and punish those who violate legal norms.

To illustrate these insights, this essay explores what it means for a president to lead on questions of individual rights—that is, to depart from the Supreme Court's jurisprudence and to insist that he has the better view

⁶ Examples of the correct insight—that courts tend to follow public sentiment rather than lead it—coupled with overly brute pictures of the broader process of constitutional meaning-making include Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992) and Dahl, *supra* note 3, at 279–81.

⁷ Jack Balkin has colloquially referred to arguments that are not socially plausible at the moment of interpretation as “off the wall.” Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 309 (2007). The real question is what institutions, practices, rules, and other things constrain the field of social plausibility.

of the Constitution.⁸ When a president decides to act in this way, he is setting up certain kinds of social forces against other kinds of cultural dynamics, while trying to capitalize on favorable social trends and institutional practices. All of this is unavoidable, though the degree of conflict can be made more or less visible, and the transformation of individual rights can be accomplished either to foster societal acceptance or inflame resistance.

There have been many intriguing examples of executive-led development of constitutional rights, from Franklin D. Roosevelt's call for freedom of speech and religion "everywhere in the world" to Lyndon B. Johnson's championing of racial equality.⁹ Exploring when and how presidential actors advance their own conceptions of individual rights reveals the recurring obstacles to presidential leadership over such matters as well as the social conditions that must exist—or be fostered—before decisive action can be taken to alter status-quo theories of the Constitution.

Presidents do more than dutifully "enforce" judicially created rights; they also make rights on an everyday basis by manipulating the social foundations for individual rights. Presidents—or more accurately, executive branch officials acting in the name of a president—theorize about rights, implement what they believe to be the proper conception of legal concepts, and in so doing, effectively create rights that differ from juridically conceived ones. As Keith Whittington puts it, "The Constitution is foundational in American politics, not only in the sense that it establishes the boundaries of legal action but also in the sense that it authorizes, invites, and structures political activity."¹⁰ Political and social activity ultimately determines the true scope of rights.

Rights discourse can be shaped through presidential will because "visions of political leadership lead [a president] to push the boundaries of that tradition."¹¹ That presidents occasionally seize a leadership position with regard to individual rights and that they must respond to claims of inequity in ways that differ from that of judges does not render their

⁸ Since the goal of this project is to arrive at insights about how presidents of any political persuasion can lead on rights, the model is not committed to any baseline conception of rights. Thus, if a president seeks to "expand" or "contract" rights, it is only in relationship to the courts and not to what I consider to be a conceptual floor. Though important, whether it is a good idea to have a robust right in any particular instance is not the central concern of this essay. Thus, when I speak of what presidents are doing to rights, I am speaking only in relative terms rather than absolute ones.

⁹ For some recent scholarship on some of these episodes, see generally Joseph Landau, *Presidential Constitutionalism and Civil Rights*, 55 WM. & MARY L. REV. 1719 (2014); Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619 (2012); Robert L. Tsai, *Reconsidering Gobitis: An Exercise of Presidential Leadership*, 86 WASH. U.L. REV. 363 (2008).

¹⁰ KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 19 (2007).

¹¹ *Id.*

decisions *less* than constitutional law, but rather a *different kind* of constitutional law.

Political actors do, and often should, push beyond juridic conceptions of individual rights precisely because judges tend to be conservatizing figures rather than visionaries. Presidents, like judges, are oath-bound to defend the Constitution. But unlike judges, presidents are elected to provide charismatic, and often visionary, leadership. Many presidents lay claim to a form of popular sovereignty that is urgent and backed by victories at the ballot box. This is true whether voters feel it is time for an eloquent, multi-racial leader like Barack Obama to burnish America's reputation for freedom and equality or instead that it is time for a brash, nationalist figure like Donald Trump to disrupt the patterns of elitism and globalism.

Bringing the Constitution closer in line with the sentiments of the people might require harnessing divergent, and even alternative, interpretations of the Constitution to erode entrenched understandings within the courts. But it's not enough to want to change a legal regime. *How* the gears of constitutional change are engaged matter. To be most effective, presidents must pursue projects of legal transformation in ways that are attentive to how their interpretive resistance is perceived. Because of a widely-shared belief in both separation of powers and judicial review,¹² those who act in the name of the president must be viewed as acting mostly within their proper spheres of influence, even as they seek to alter the social conditions in which courts decide cases—all without appearing to usurp the judiciary's prerogative to "say what the law is."¹³

Presidents are elected in part based on their agendas, which encompass not only public policies but also popular perceptions of how key rights, powers, and institutions might be reshaped. Through intense media scrutiny and the major party system, candidates are pushed to be transparent about their agendas and to sharpen the ideological consistency of their positions. Elections authorize presidents to be empathic towards others and to respond to the needs of citizens, on a broader scale than judges can or should. If there is anything we have learned from the field of presidential studies, it is that every president cares enormously about his historical reputation. All of these characteristics of the institution can make the presidency an effective guardian of liberty and equality when decisive action is warranted and there exists political will to do so. The modern president can challenge the laws and practices of states and local governments when liberties are threatened, and can find ways to resist

¹² Keith Whittington's work shows how elected officials have, for their own reasons, helped to prop up the perception of judicial supremacy, even if they do not always believe in it in a deep philosophical way. See WHITTINGTON, *supra* note 10, at 26–27.

¹³ *Marbury v. Madison*, 5 U.S. 1, 177 (1803).

legislative encroachments on individual rights at the national level. To the extent new rules, institutions, and theories of law are formulated and become socially grounded, they can also restrain successive administrations.

During the Obama administration, we witnessed ingenious, and at times highly effective, instances of presidential leadership over individual rights. Take the topic of equal rights for gays and lesbians. President Obama's turnabout on gay marriage has received perhaps the most attention. But in fact, in the years leading up to this event, the administration had advanced a broad conception of equal protection of the law across an entire spectrum of issues involving sexual orientation: the federal workplace, military, tax policy, federal benefits, education, and even foreign policy. And it did so in ways that went well beyond how the U.S. Supreme Court and Congress understood the principle of egalitarianism.

In this essay, I focus on the actions by the Obama administration on gay marriage, which ultimately helped lead to the Court's rulings in *United States v. Windsor*¹⁴ and *Obergefell v. Hodges*,¹⁵ and theorize the episode as the exercise of presidential leadership. My approach does not supplant accounts that focus on the role of popular opinion,¹⁶ social movements,¹⁷ litigation strategy,¹⁸ or jurisprudence.¹⁹ Instead, I situate those elements within an institutional model through which different players seek to dictate the development of constitutional rights by turning social changes into persuasive legal arguments.

This article begins in Part I by teasing out some of the unique features of gay rights as a case study for presidential leadership. It does so by examining in detail the Obama administration's change of legal position on the federal Defense of Marriage Act (DOMA). I explain how the administration decided to repudiate DOMA, how it justified its decision,

¹⁴ 133 S. Ct. 2675, 2695 (2013).

¹⁵ 135 S. Ct. 2584, 2608 (2015).

¹⁶ See, e.g., Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 127–35 (2013) (contending that changes in popular opinion made the *Windsor* decision possible).

¹⁷ See, e.g., Zachary A. Kramer, *Before and After Obergefell*, 84 UMKC L. REV. 797, 801 (2016) (“[T]here is no question that the gay rights movement has accomplished an incredible thing.”).

¹⁸ See, e.g., Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 246 (2015) (arguing that *Obergefell* resulted from innovative litigation strategies).

¹⁹ See, e.g., Thomas A. Bird, Note, *Challenging the Levels of Generality Problem: How Obergefell v. Hodges Created a New Methodology for Defining Rights*, 19 N.Y.U.J. LEGIS. & PUB. POL'Y 579, 599 (2016) (emphasizing Justice Kennedy's choice to define a right at a relatively “higher level of generality” than usual); Jack B. Harrison, *At Long Last Marriage*, 24 AM. U.J. GENDER & SOC. POL'Y & L. 1, 52 (2015) (focusing on Justice Kennedy's framing of the constitutional issue “within the context of the evolution of the understanding of marriage”).

and how the administration's theory of equality differed from judicial theories of equality. In Part II, I explore the dynamics of jurisprudential bootstrapping, an especially powerful tactic for a president, by which an administration leverages achievements on rights in one domain to make changes in another domain. More broadly, I venture into some arguments as to why executive-based theories of liberty can be superior to judicial interpretations. Finally, in Part III, I defend presidential leadership as a model of constitutional lawmaking from the objection that it requires the subordination of the judiciary. I conclude by distinguishing this model from a leading account of constitutional change offered by Professors Sanford Levinson and Jack Balkin called "partisan entrenchment" and from explanations that emphasize the role of social movements.²⁰

I. PRESIDENTIAL LEADERSHIP ON GAY MARRIAGE

My approach differs from the leading historical account of legal change: the gestalt approach. The gestalt model explains major legal changes as the byproduct of sweeping social and historical phenomena.²¹ By contrast, the leadership model stresses the role of autonomous decisions by a president and his allies to either embrace or repudiate cultural dynamics. These actions, taken with particular institutional and political considerations in mind, help drive constitutional change or cement a transformation already underway.

Professor Michael Klarman of Harvard Law School exemplifies the gestalt approach to the stunning gay marriage rulings. Klarman argues that the outcomes can be explained by "enormous changes in the surrounding social and political contexts."²² For Klarman, "the critical development has been the coming-out phenomenon, which over a period of decades has led to extraordinary changes in attitudes and practices regarding sexual orientation."²³ While it is true that broad societal changes made it conceivable that the Equal Protection Clause might be read to encompass gay relationships, such an explanatory model tells us very little about the

²⁰ Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 491 (2006).

²¹ See, e.g., Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 *WASH. U. L. REV.* 1, 43 (2013) (using a gestalt model to "organize[] our perception of cases, rules, and doctrinal theories" regarding the development of constitutional law).

²² Klarman, *supra* note 16, at 132. One area of overlap between a descriptive model of constitutional change that emphasizes broad cultural and ethical factors, such as Klarman's, and the model of presidential leadership I articulate here is a de-emphasis of the constraining capacity of legal doctrines. For Klarman, the substantive law in landmark cases seems to be shaped by "strong intuitions of fairness and right" rather than workmanlike reasoning from existing precedent and well-established rules. *Id.* at 142. Moreover, he suggests that something akin to the judgment of history is a more likely constraining factor than a raw evaluation of current public opinion. *Id.* at 160.

²³ *Id.* at 132.

timing, pace, or strategies involved. Indeed, gestalt models can feel oddly deterministic, as if changes in society alone are sufficient to ensure the transformation of constitutional law. Uncertain, too, in many such accounts is how constitutional actors ought to treat shifting social terrain as a normative matter when they interpret the Constitution.

Presidential action helps fill this gap in our picture of constitutional lawmaking by illuminating the role of a critical player in the development of individual rights on a national scale. It enriches our picture of how constitutional change happens and makes the normative case that a president's portrayal of social change ought to be accorded some degree of deference. As Obama reached the end of his first term, executive branch officials advanced the cause of sexual orientation equality on a number of fronts. Although the President himself had not yet endorsed gay marriage as a substantive right, on February 23, 2011, Attorney General Eric Holder informed Congress that the administration would no longer defend DOMA in court.²⁴

That strategic choice not only reflected changed conditions within the administration on gay marriage, but also removed a major obstacle to more aggressive executive branch efforts to articulate a broadened theory of equality before the courts. Eventually, Department of Justice (DOJ) lawyers would do just that, nudging the courts to catch up with the administration's more popular conception of equality and signaling to the judiciary that pro-gay rights rulings would be supported by the executive branch.

As this incident will demonstrate, a coherent theory of individual rights must not be held captive by a false, court-centered sense of justice or obscured by a formalistic understanding of constitutional interpretation. Rather, a plausible account of executive branch constitutional lawmaking must be attuned to the social foundations of rights in action. The most fruitful line of inquiry into how rights are developed and enforced by presidents, then, lies in the muck of party politics and confusion of everyday institutional behavior. Here, I wish to underscore a crucial methodological point: To uncover the ways in which political leaders make and unmake individual rights, we have to soften the emphasis on formal power and employ methods that favor descriptive accuracy. Once we get this picture right, we must also approach normative questions of constitutional law simultaneously from a social, strategic, and holistic perspective.²⁵

²⁴ Letter from Attorney General, U.S. Dep't of Just., Off. of Pub. Aff., to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act>.

²⁵ George Edwards, who counts himself among the skeptics of the power of presidential persuasion, nevertheless believes that astute presidents can exploit favorable circumstances to advance

A few rules of thumb seem in order. First, although one human being is elected president, in actuality, law is made by an administration comprised of many individuals, agencies, and organizations, each with their own motivations, spheres of influence, strategies, and experiences. The environment in which executive decisions are made can be so paralyzing that a leading scholar in the field once famously quipped that the president is really a glorified “clerk.”²⁶ All the same, these confining social conditions can be transcended to make dramatic progress on a matter of individual rights—whether it is to expand, reconceive, or limit them. The conditions for political action on a question of individual rights shift depending on the interaction of these relationships and organizations against a broader economic and cultural backdrop. Actions to move the needle on rights taken in one historical moment might not be socially plausible at another moment in time.

Second, when a president acts in the name of liberty or equality, his theory of rights is shaped according to significant strategic considerations. Considerations of professional reputation and public prestige influence a president’s behavior in ways that differ from similar constraints on judging or congressional law making. If favorable social conditions create opportunities for presidential action, then we must also learn more about the range of forms which executive action might take when rights are at stake. Tactically, political actors working in the name of a president decide when and where to advance an individual rights agenda.²⁷ Within the modern administrative state, these figures determine which levers of power to press, what resources to marshal for these purposes, how hard to fight for a cause, and how broadly to define a constitutional right or liberty.

Collectively, these tactical choices influence the odds that constitutional change is enduring rather than fleeting. A targeted intervention by officials might be most tempting on a highly controversial issue and yield incremental gains; while on another occasion, flooding the zone by using multiple resources at a president’s disposal over a range of related issues touching on rights might be called for. The latter approach best describes the Obama administration’s approach to the rights of sexual minorities: building social and institutional grounding for an expanded

an agenda. GEORGE C. EDWARDS III, *THE STRATEGIC PRESIDENT: PERSUASION AND OPPORTUNITY IN PRESIDENTIAL LEADERSHIP* 1–9, 188–89 (2009).

²⁶ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* ix (1991).

²⁷ Whereas Neustadt emphasized a president’s power to persuade others and to reach political bargains, other scholars have explored a broader range of presidential tactics. *See generally* JOHN P. BURKE, *PRESIDENTIAL POWER: THEORIES AND DILEMMAS* 56–58 (2016) (adding ten other sources of presidential power, including “coercive power” and “agenda power”). Those who follow Stephen Skowronek stress historical trends as constraints on what presidents can and cannot do, even if they are committed to a decisive course of action. *See generally* STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISAL AND REAPPRAISAL* (2011).

theory of equality in carefully selected areas, and then leveraging those successes to make gains in other areas.

It is true that strategic considerations affect all judicial rulings, but the ones facing presidential actors differ in crucial ways. Broader societal values and political realignments can reshape the decisions of judges, but they do so far more slowly and indirectly than they do for presidential decisions. The politics affecting judicial outcomes are more bureaucratic in nature and diffused throughout multi-member tribunals like a court of appeals or the Supreme Court. By contrast, presidents and their aides can respond more nimbly and aggressively to changes in cultural sentiment and political trends.

A president committed to popular defense of rights can wield tools that are both more efficient and effective than those available to judges. The judiciary's primary advantage on rights involves the institutional respect given to the legal system charged with interpreting the laws, as well as the procedural mechanisms that can be manipulated in defense of rights. Executive branch officials have far more tools at their disposal for creating, and sustaining, popular conceptions of rights.

Third, an individual right can look very different as its contours are shaped by the unique strategic and social realities facing a president.²⁸ The differences between politically-created and juridically-ordered rights are important to appreciate, since the true measure of any particular right lies in some uncomfortable amalgamation of the two. The complex nature of our rights regime builds inefficiencies into the legal order precisely to deter the violation of individual liberties. But this design complexity, which encourages political leaders to theorize about rights, does not render political rights incoherent or less tangible than juridical creations. To the contrary, there are good reasons to expect that in a number of situations, politically entrenched rights may be more durable than judicially articulated rights. After all, a president will be more invested in the rights he has played a role in creating.

²⁸ For now, I shall resist getting embroiled in terminological debates with other scholars over whether to call presidential enforcement of the Constitution something else. Keith Whittington, for instance, has called presidential action "construction" of the Constitution to distinguish it from "interpretation," something he believes is reserved for judges alone. See generally KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999). Other theorists have described parts of judicial review to entail "construction." For ease of understanding in this essay, I will refer to "presidential action," "initiative," or "leadership" to broadly encapsulate how presidential actors enforce their understandings of the Constitution. These actors have their own "interpretations" of the Constitution or "conceptions" of rights.

A. *Rights in Action: Party, Reelection, History*

Gay rights present an instructive area for case studies because it is difficult to call progress on this front the product of pure majoritarianism. To begin, we should dispense with the claim that such dramatic progress on gay rights was inevitable, because this perspective denies the agency of constitutional actors and tells us nothing in particular about the pace or means of legal change. Instead, constitutional transformation on gay rights occurred because some softening of cultural mores created opportunities to be exploited by legal actors within a complex political system. These figures made key strategic decisions to force a deep rethinking of legal concepts.

Despite a greater societal tolerance of sexual difference, there remain religious traditions and influential cultural institutions that look upon homosexuality as sinful and corrosive of traditional sex roles. Attitudes toward homosexuality have shifted far more rapidly within the Democratic Party—leading to greater pressure for legal changes that benefit sexual minorities when Democrats occupy the White House. But those same pressures do not exist to the same degree in the Republican Party, whose grassroots activists tend to hold more socially conservative views about marriage, sexual identity, and sexual behavior.

The fact that political power is diffused among different institutions in the American system is another reason why majoritarian sentiment can be so easily obstructed even when it exists. A president whose party does not share the majority of voters' view of human sexuality or their sense of egalitarianism can frustrate the development of the law so that it does not reflect popular attitudes. Similarly, a dissenting party's control of one house of Congress can impede the passage of anti-lynching legislation or the addition of sexual orientation to the nation's civil rights laws. What is true about public policy is even truer about constitutional law's connections to popular sentiment: whether to close that distance, and how quickly to do so, remains a matter of strategic action rather than predestination or the mystery of cultural change alone.

Presidential leadership on gay rights seemed to be driven not only by a moral imperative shared keenly by Democratic Party members and more weakly by average citizens, but also by an overriding desire on the part of President Obama to be perceived as a strong national leader. No one was ever deemed a great president by being merely a faithful "party man." Stepping forward to defend politically vulnerable minorities can produce positive reputational effects for a president if presented in the right way.²⁹

²⁹ As James MacGregor Burns observes, "Role-taking, carried to its ultimate degree, implies finally the absence of leadership (aside from the purely ceremonial), for the leader-actor assumes as many roles as society in all its component parts demands, and in doing so he mirrors society rather than

When a tantalizing opportunity to make a mark on history arises, one would expect an astute president to treat the long-term gains to his historical reputation from championing the rights of political minorities as greater than any costs that may be paid by his party (e.g., a momentary dip in public esteem, further polarization of the electorate, electoral losses by the party, even political realignment). This was precisely the calculation made by Lyndon B. Johnson when he famously quipped, “Well, what the hell’s presidency for?” in response to questions of why he was spending so much political capital on behalf of landmark civil rights legislation.³⁰

Let us return, then, to the world before *Obergefell v. Hodges*;³¹ it was really not that long ago. Polls showed that since a high point of public opposition to gay marriage around 1996, resistance to the idea had steadily declined until 2010 or 2011, when more people began to support gay marriage than oppose it.³² Younger Americans increasingly embraced the policy of gay marriage, though there was nothing that could yet be described as a sustained majority or supermajority of voters committed to permanent change as a matter of national priority. In fact, crucial pockets of objection remained: one of every three Americans was not swayed by advocates of gay marriage, and a majority of black Americans generally and white evangelicals specifically continued to oppose legalization of gay marriage.³³ Party affiliation also mattered: only 35% of registered Republicans favored a change in traditional marriage.³⁴

For a new Democratic president who was already cautious by nature, it made sense to not identify the controversial issue of gay marriage as a high priority early on.³⁵ In terms of agenda setting, other matters—such as

transforms it Far from being a slave to a role system, the great leader . . . may actually smash it and set up another system in which his roles are differently structured.” JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 486–87 (1956).

³⁰ ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON, THE PASSAGE TO POWER xv (2012).

³¹ 135 S. Ct. 2584, 2607 (2015) (holding that the Fourteenth Amendment guarantees same-sex couples a fundamental right to marry).

³² Nate Silver, *How Opinion on Same-Sex Marriage is Changing, and What It Means*, N.Y. TIMES, (Mar. 26, 2013, 10:10 AM), <http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means>.

³³ In June 2015, the overall number of Americans opposed to same-sex marriage dropped to 39%. *Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed*, PEW RES. CTR. (June 8, 2015), <http://www.people-press.org/2015/06/08/support-for-same-sex-marriage-at-record-high-but-key-segments-remain-opposed/>. Fifty-one percent of African Americans opposed gay marriage. *Id.* Broken down according to religion, seventy percent of white evangelicals opposed same-sex marriage. *Id.* Republican support of the idea stayed around thirty-five percent. *Id.* A year later, the numbers are largely the same. See *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/>.

³⁴ *Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed*, *supra* note 33.

³⁵ Any shift in policy on gay marriage would not only have dominated the early days of Obama’s presidency, it would have also been an open repudiation of the policy of the last Democratic president, who signed DOMA into law.

stimulating economic growth, reforming health care, and improving the international reputation of the United States after the Bush administration's prosecution of the war on terror—appeared more urgent to White House officials. Additionally, the Supreme Court had already acted to ensure that the principle of sexual privacy extended to homosexuals and identified anti-gay animus as an illegitimate motivation for disadvantaging sexual minorities.³⁶ For many politicians, these decisions reduced the overall sense of urgency over gay rights. Indeed, influential figures within the Obama administration thought it more important to preserve gains on this front rather than to extend rights if doing so risked undermining other priorities.

Obama's struggle with his own faith and public responsibilities also played a role in the cautious development of an equality-based understanding of the issue.³⁷ As a candidate, Obama opposed gay marriage but supported civil unions,³⁸ a compromise that did not damage his candidacy during the primaries. At that time, he paid no political price for his views because the social environment was in flux, with Democrats and gay-rights activists divided over whether to move more deliberately by supporting civil unions or instead to risk backlash by seeking recognition of same-sex marriage as a basic right of citizenship.³⁹

In 2010, Obama described himself as conflicted whenever he was asked about gay marriage, with his views on the matter “evolving.”⁴⁰ In his answers, Obama often referenced his religious upbringing along with his devotion to civic equality, but this ambiguity can be explained by a desire to position himself as a leader capable of bridging multiple constituencies: black and white, gay and straight, insider and outsider.⁴¹ Taking too many

³⁶ See *Romer v. Evans*, 517 U.S. 620, 637 (1996) (holding that an amendment to a state constitution violated the Equal Protection Clause by making homosexuals unequal to others); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that gay people have the right to engage in private, consensual, sexual activity under the Due Process Clause).

³⁷ JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* 120–21 (2014).

³⁸ When asked about a questionnaire he signed as a candidate indicating his support for gay marriage back in 1996, Obama's aides later claimed that he meant only endorsement of civil unions. *Id.* at 285.

³⁹ See, e.g., WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 142–44 (2002) (arguing that civil unions were more sustainable than gay marriage at the time). Activists who favored civil unions felt it critical to secure whatever support could be mustered for same-sex relationships, to build on those achievements, and to avoid the sort of backlash against gay rights that occurred when the Supreme Court of Hawaii declared a right to gay marriage under its state constitution. Pro-marriage activists, on the other hand, worried that support for civil unions might satiate the demand for legal change and harden the situation into a segregation-like status for gay and lesbian unions.

⁴⁰ BECKER, *supra* note 37, at 268.

⁴¹ See *id.* at 294 (explaining that Obama “feared that embracing the same-sex marriage could splinter the coalition he needed to win a second term”).

positions on hot-button issues can render a person unelectable as a national candidate. He would not be the first presidential candidate to finesse his policy positions, and he certainly will not be the last to do so. On questions of race, as with sexual orientation, Obama often spoke in inclusive but vague terms.⁴² As a policymaker, he tended to act even more deliberately, building support while avoiding the most controversial matters until he saw a way forward.

President Obama would eventually announce his personal support for gay marriage on daytime television, but not until just six months before the 2012 election, and only after Vice-President Joe Biden stole his thunder by publicly endorsing the cause.⁴³ At the time, supporters of gay marriage within the administration believed the president to be sympathetic to the cause, but uncertain whether the timing was right in that sufficient numbers of Americans would support such an expanded theory of equality.⁴⁴ Valerie Jarrett, a close confidant of the president and an important liaison to the gay community, lobbied Obama to come out in support of gay marriage.⁴⁵ First Lady Michelle Obama also signaled to activists that the administration was working its way toward public support of gay marriage.⁴⁶ And others who lobbied administration officials on the matter cited opinion polls showing a more receptive electorate, and made arguments emphasizing the president's legacy and the importance of showing moral "character" in the eyes of voters.⁴⁷

In other areas, Obama had no such reservations about extending equal protection of the law to sexual minorities, showing that presidential action was, in fact, being taken on gay rights in a variety of areas, but also that the

⁴² See *id.* at 296 ("I think it's important to say that in this country we've always been about fairness, and treating everybody as equals.").

⁴³ Behind the scenes, some prominent figures, including Valerie Jarrett and Michelle Obama, urged the president to change his public stance to reconcile his public and private views, and to influence the public conversation. See BECKER, *supra* note 37, at 288–93. Biden's comments in his interview with David Gregory on *Meet the Press* were not a trial balloon but unscripted; though months earlier, Obama had already asked aides to explore how he might explain a change in position. *Id.*; Michael Barbaro, *A Scramble as Biden Backs Same-Sex Marriage*, N.Y. Times (May 6, 2012), <http://www.nytimes.com/2012/05/07/us/politics/biden-expresses-support-for-same-sex-marriages.html>. Pollsters began testing the various ways to describe gay marriage as a right. See BECKER, *supra* note 37, at 288–93. Thus, Biden's statements may have sped up the timetable, but a change in policy on gay marriage appeared already in the works.

⁴⁴ *Id.* at 293–94.

⁴⁵ *Id.* at 293.

⁴⁶ See *id.* at 284 ("Hang in there with us, and we'll be with you after the election.").

⁴⁷ See *id.* at 289. Biden, too, before his public statement in support of gay marriage, told the hosts of a private fundraiser in Los Angeles, "Things are changing so rapidly, it's going to become a political liability in the near term for an individual to say, 'I oppose gay marriage.' Mark my words." *Id.* Beyond acknowledging the changing social terrain, Biden also made a normative point, which is that he saw it the duty of the executive branch to reflect in law and policy a more expansive, popular theory of equality that encompassed same-sex marriage: "And my job—our job—is to keep this momentum rolling to the inevitable." *Id.* at 286.

administration prioritized marriage below equality in the military and workplace contexts.⁴⁸ Obama had already begun the cautious process of dismantling “Don’t Ask, Don’t Tell,” the federal ban on gay soldiers serving openly in the armed forces. Repeal would eventually be certified in July 2011, after painstaking work suggesting that social support for a policy change would be supported not only by top military brass, but also by service members.⁴⁹

Obama’s success on this matter stood in sharp relief from President Bill Clinton’s abject failure to change military policy so gay soldiers could serve openly in the early 1990s. A cautious, collaborative approach was the lesson Obama had drawn from President Clinton’s disastrous effort to lift the ban on gay military service only to swallow the bitter pill of “Don’t Ask, Don’t Tell,” a legislative codification of the anti-gay personnel policy.⁵⁰ Clinton had failed to do the hard work of tending to equality’s social foundations, and that inattention had incurred the wrath of military leaders, soldiers, and voters.⁵¹ President Clinton’s failed leadership strategy

⁴⁸ For example, in a presidential candidate questionnaire, Obama indicated that he would support a non-discrimination policy for federal contractors that included sexual orientation and gender identity. Stephanie Condon, *Employment Non-Discrimination Act (ENDA) makes progress in the Senate*, CBS NEWS (Nov. 4, 2013, 8:08 PM), <https://www.cbsnews.com/news/employment-non-discrimination-act-enda-makes-progress-in-the-senate/>.

⁴⁹ Press Release, Office of the Press Secretary, Statement by the President on Certification of Repeal of Don’t Ask, Don’t Tell (July 22, 2011). See BECKER, *supra* note 37, at 265 (“More than 70 percent [surveyed] said the effect of repealing the ban on gays and lesbians serving openly would be positive, mixed, or nonexistent, leading the study’s authors to conclude that the ban could be lifted with minimal risk to the current war efforts in Iraq and Afghanistan.”). A broadened notion of sexual equality was eventually codified in military policies:

Service members will no longer be subject to administrative separation based solely on legal homosexual acts, a statement by a Service member that he or she is a homosexual or bisexual (or words to that effect), or marriage or attempted marriage to a person known to be of the same biological sex Sexual orientation will continue to be a personal and private matter. Applicants for enlistment or appointment may not be asked, or be required to reveal, their sexual orientation Enforcement of service standards of conduct, including those related to public displays of affection, dress and appearance, and fraternization will be sexual orientation neutral Harassment or abuse based on sexual orientation is unacceptable and will be dealt with through command or inspector general channels.

Memorandum from Clifford L. Stanley, Under Sec. of Def., Dep’t of Def., on Repeal of Don’t Ask Don’t Tell and Future Impact on Policy, to Secretaries of the Military Departments (Jan. 28, 2011).

⁵⁰ By the time of Obama’s election, it became clear that “Don’t Ask, Don’t Tell” was an utter failure to the extent that one of the goals might have been to reduce the risk of witch hunts if service members kept quiet about their sexual orientation. In fact, some 13,000 troops were expelled from the military after the creation of the new policy, at a faster clip than before Clinton’s intervention. See Bryan Bender, *Continued Discharges Anger “Don’t Ask, Don’t Tell” Critics*, BOSTON GLOBE (May 20, 2009), http://archive.boston.com/news/nation/washington/articles/2009/05/20/continued_discharges_anger_dont_ask_dont_tell_critics/ (showing gay rights advocates’ disappointment in Obama’s approach to integrating homosexuals into the military).

⁵¹ See BECKER, *supra* note 37, at 9–10 (“Clinton had already taken a beating for trying to end a policy that allowed the military to discharge a service member for being gay; he would up forced to

even sparked the vocal opposition of a fellow Democrat, Senator Sam Nunn (D-GA), who vowed to make Clinton pay a political price for blindsiding him with a plan for social engineering.⁵²

Obama's success in extending the principle of equality to military service showed how a nimble blend of pragmatism and idealism could result in real legal gains. Far from satisfying social progressives within the Democratic Party, however, this crucial victory merely stoked the hope for constitutional changes in other areas of life for gays and lesbians. In fact, as we shall see, the administration eventually leveraged legal changes that improved life for sexual minorities in the military setting to create a broadened notion of equality in the domestic arena—most notably, on the issue of gay marriage.⁵³

B. *The Attorney General Repudiates DOMA*

Until Obama announced his unequivocal support for gay marriage, other incremental steps had to be taken in the name of equality while trying to hold together a governing coalition.⁵⁴ Making these changes balanced a variety of concerns, both partisan and principle. Collectively, they vindicated a position of equal dignity for gay Americans, but left the scope of any principles strategically vague. This tactical ambiguity as to the proper scope of equal protection of the law reflected not only electoral constraints, but also at least three other factors: (1) the importance of respecting appearances of the Presidency as an overtly law-enforcing body rather than an overtly law-making or law-interpreting body; (2) Obama's own mix of legal and policy priorities; and (3) a belief that time was on the side of the pro-gay rights perspective because of changes in cultural attitudes about homosexuality.

settle on a compromise policy called 'Don't Ask, Don't Tell' that allowed gays and lesbians to serve only if they kept their sexual orientation hidden.”).

⁵² See Adam Clymer, *Lawmakers Revolt on Lifting Gay Ban in Military Service*, N.Y. TIMES, (Jan. 27, 1993), <http://www.nytimes.com/1993/01/27/us/lawmakers-revolt-on-lifting-gay-ban-in-military-service.html> (“Congressional resistance to President Clinton's promise to let homosexuals serve in the military broke into open revolt today, threatening to derail Democratic plans for quick passage of family-leave and health legislation.”). Not only did Senator Nunn vow to publicly oppose Clinton's announced plan to end the ban on gays in the military, he also threatened to codify the ban in legislation when it previously represented merely military policy. The Joint Chiefs of Staff, too, including Colin Powell, vigorously and openly opposed a policy change at that time, with some military leaders using anti-gay epithets during these discussions. See Margaret Carlson et al., *Then There Was Nunn*, TIME, July 26, 1993 (describing the tensions between the Clinton administration and the Joint Chiefs of Staff), <http://content.time.com/time/magazine/article/0,9171,978951,00.html>.

⁵³ For war-dependent arguments deployed by President Obama in favor of gay marriage, as well as how such arguments can be leveraged in multiple domains, see Robert L. Tsai, *Three Arguments About War*, 30 CONST'L COMMENT. 1, 24–27 (2015).

⁵⁴ This coalition consisted of not only the party faithful who wanted decisive action on gay rights, but also moderate voters who might be open to progress on these issues.

Thus, plasticity in the president's theory of equality served multiple political functions. By contrast, doctrinal ambiguity on the part of judges ordinarily serves very different purposes: showing deference to political actors, acknowledging access to imperfect information, and maintaining the appearance of stability in the law by reducing the sheer incidence of mistakes and reversals.

Then a key turnabout occurred on gay marriage. By letter dated February 23, 2011, Attorney General Eric Holder informed Congress of the administration's intention to change its legal position on the constitutionality of DOMA.⁵⁵ For two years, consistent with the president's "evolving" view on gay marriage, DOJ had continued the prior administration's policy of defending the law as a reasonable legislative prerogative while assuring constituents that the president "opposed" DOMA on principle and would work for its legislative repeal.⁵⁶ This somewhat passive strategic position did not satisfy gay rights activists and donors, but it did reflect the president's own uncertainty over whether laws recognizing only traditional marriage should be treated as hostility towards sexual minorities, and it allowed the administration to make progress on more pressing agenda items without being embroiled in a major social values debate.

Suddenly, in a dramatic sea change in enforcement policy,⁵⁷ DOJ lawyers would no longer defend the law in court, having determined that "heightened scrutiny" should apply to DOMA and that under this more stringent standard, the law should fall. If DOMA proved to be unconstitutional after DOJ's own internal analysis, then government lawyers could not and would not defend the law in court as a matter of principle and duty.

In a striking move, the administration pled a plethora of changed circumstances to justify the government's newfound refusal to defend the

⁵⁵ Letter from Eric Holder, Atty. General, to Congress (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act>.

⁵⁶ E.g., Declan McCullagh, *Gay Rights Groups Irate After Obama Administration Lauds Defense Of Marriage Act*, CBS NEWS (Jun. 12, 2009, 6:56 PM), <https://www.cbsnews.com/news/gay-rights-groups-irate-after-obama-administration-lauds-defense-of-marriage-act/> ("As a presidential candidate, Barack Obama claimed 'we need to fully repeal the Defense of Marriage Act,' This week, the Obama administration is facing the ire of gay rights groups after it filed a brief in California federal court defending the Defense of Marriage Act").

⁵⁷ This decision was itself contentious within DOJ, with Holder overruling at least two deputies, including Neal Katyal, acting Solicitor General, and Tony West, head of the Civil Division. See Sari Horwitz, *After Overruling Top Justice Department Lawyers on DOMA, Holder Feeling Vindicated*, WASH. POST (June 27, 2013), https://www.washingtonpost.com/world/national-security/justice-department-had-debated-handling-of-law-denying-benefits-to-gay-couples/2013/06/27/06e56304-df4d-11e2-b94a-452948b95ca8_print.html (explaining that Attorney General Eric Holder viewed the Supreme Court's ruling against the 1996 Defense of Marriage Act as a victory for equal protection in the United States).

law.⁵⁸ The press release issued by the Attorney General's office the same day the letter was delivered to congressional leaders confirmed this line of argument for public consumption: "Much of the legal landscape has changed in the 15 years since Congress passed DOMA. The Supreme Court has ruled that laws criminalizing homosexual conduct are unconstitutional. Congress has repealed the military's Don't Ask, Don't Tell policy. Several lower courts have ruled DOMA itself to be unconstitutional."⁵⁹

There is a lesson here about constraints and opportunities. Shifting social conditions can create an opening to take decisive executive action on a matter of individual rights, but they also can serve as independent rationales for a course of action. Holder's letter proved to be a textbook example of these insights as the Obama administration staked out a new theory of equality. First, the collection of occurrences gave the impression that anti-gay fervor in other institutions had waned, and that the president was no longer resisting the mobilized sentiment of the people by defending the rights of sexual minorities—something that might have been the case back when Clinton signed DOMA into law. Moreover, the letter implied that the president saw it as his job to respond to changes in public sentiment and in the law. The Obama administration appeared to characterize the current Congress as no longer hostile to gay marriage, predicting that it would be unlikely to resist a broadened theory of equality.

Second, Holder noted that "new" DOMA cases were being litigated in the Second Circuit, a jurisdiction "which has no established or binding standard for how laws regarding sexual orientation" should be reviewed.⁶⁰ In other words, social activism in the courts had presented DOJ with a fresh opportunity to reconsider an inherited policy (though it might be noted that the president had the power to rethink his constitutional view at any time).

Third, a series of adverse judicial decisions softened the Obama administration's resolve to support DOMA (which was already weak given its inherited position in tension with the Democratic Party's platform),⁶¹ causing lawyers and policymakers (like many other Americans) to rethink

⁵⁸ Letter from Eric Holder, Atty. General, to Congress, *supra* note 55.

⁵⁹ Press Release, U.S. Dep't of Just., Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act>.

⁶⁰ Letter from Eric Holder, Atty. General, to Congress, *supra* note 55.

⁶¹ The Democratic Party platform calls for "the full repeal of the so-called Defense of Marriage Act," based on broadly stated principles of equal dignity: "We support the right of all families to have equal respect, responsibilities, and protections under the law. We support marriage equality and support the movement to secure equal treatment under law for same-sex couples." *Democratic Party Platform Drafting Committee Releases Language of Pro-Marriage Plank*, FREEDOM TO MARRY (Aug. 9, 2012), <http://www.freedomtomarry.org/blog/entry/democratic-party-platform-drafting-committee-releases-language-of-pro-marri>.

their views. Once they did so, a new interpretation of the Constitution emerged.

Note, too, that progress on gay rights in other domains then became an independent reason for making progress on the marriage question, suggesting an irresistible force to the logic of those earlier actions. I have, in another context, called attention to this form of *jurisprudential bootstrapping*, whereby constitutional actors leverage gains on one issue to make progress on another issue.⁶² But here it makes sense to see it as a broader approach to advancing rights by creating the impression of irreversible cultural and legal change, whatever the truth might be.

Repeal of the ban on gay military service is the most dramatic change invoked as part of this bootstrapping strategy, one initiated by the Obama administration itself, though it is carefully portrayed here in more popular and deferential terms—as a reflection of Congress's considered judgment and as evidence of legislative support for gay rights.

What is going on here is complicated, and we have to make educated guesses based on what political actors say publicly and what we know to be the social constraints acting on this kind of high-profile decision.⁶³ At the outset, we should lay on the table the foundational principle that the power to enforce the law is committed explicitly by the Constitution to the president. Most authorities on this subject agree that this enforcement power includes the discretion not to enforce a law deemed unconstitutional, though they differ on the exact scope of this power.⁶⁴ For

⁶² See Robert L. Tsai, *Three Arguments About War*, 30 CONST. COMMENT. 1, 26 (2015) (showing how President Obama “bootstrapped the military service question into the one about marriage, implying that action on one front ineluctably leads to progress on the other”).

⁶³ At some point, when internal legal memoranda and notes are available and biographies are written, we may gain a richer view of what happened.

⁶⁴ See David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 J.L. & CONTEMP. PROBS. 61, 63–64 (2000) (“This article challenges the court-centered approach to the scope of the President’s non-enforcement power.”); see also Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 508–510 (2012) (“The belief that the President must enforce and defend laws that he thinks unconstitutional is widely held, although there is substantial disagreement over the obligation’s scope.”); Dawn Johnsen, *The Obama Administration’s Decision to Defend Constitutional Equality Rather than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599, 602–03 (2012) (addressing the issue of “the proper scope of presidential interpretive authority pervad[ing] government”); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 J.L. & CONTEMP. PROBS. 7, 8, 10 (2000) (“Constitutional commentators, as well as the political branches of our federal government, continue to debate the existence and parameters of the President’s authority to refuse to enforce constitutionally objectionable statutes. . . . In this article, I consider the legitimacy of what I will term ‘presidential non-enforcement.’”); Walter Dellinger, *Presidential Authority to Decline to Execute Unconstitutional Statutes* (Nov. 2, 1994), <https://fas.org/irp/agency/doj/olc110294.html> (“We do not believe that a President is limited to choosing between vetoing, for example, the Defense Appropriations Act and executing an unconstitutional provision in it. In our view, the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision.”).

his part, Holder acknowledged the reality of “vast discretion” enjoyed by a president in enforcing the laws.⁶⁵ Why, then, were his explanations for the administration’s rejection of DOMA far more complicated than they needed to be? The answer is that, on such a controversial matter, President Obama wanted to present a principled solution, one that did not seem mere capitulation to partisan interests, the usurpation of another branch’s powers, or the abdication of the Chief Executive’s duty to enforce federal law.

C. *Appearances Matter: Collaboration or Unilateralism?*

It is against this backdrop of popular expectations that Holder’s explanation makes the most sense. What we are interested in, for the moment, is the role constitutional analysis played in Holder’s explanation to Congress and the American public. Overall, the approach could be understood as equal parts *predictive*, *justificatory*, and *popular*. President Obama allowed the Attorney General to make this announcement, framing gay marriage as a matter of what the rule of law required rather than what some constituents desired. The announcement itself was *predictive* in the sense that it tried to anticipate what the U.S. Supreme Court might do once it squarely addressed the constitutionality of DOMA (though as we have learned, the Court itself frequently reaches decisions without agreeing on general methods). This orientation appealed to citizens and elites accustomed to ideas of judicial supremacy, without actually taking this position openly and committing to it. No president would surrender his power to another branch unequivocally, but the appearance of institutional acquiescence can pay political and social dividends.

Not all presidential efforts take a predictive orientation toward rights development (sometimes it’s intended to be corrosive of prevailing judicial interpretations), and so DOJ’s orientation was notably predictive rather than combative.⁶⁶ But unilateral or anti-judicial actions (and even those

⁶⁵ Called before the House Committee on Judiciary to explain his turnabout on the enforcement of DOMA, Attorney General Holder stated: “There is a vast amount of discretion I think that a President has, and, more specifically, that an attorney general has, but that discretion has to be used in appropriate way so that you are acting consistent with the aims of the statute, but at the same time, making sure that you are acting in a way that is consistent with our values, consistent with the Constitution, and protecting the American people.” *Hearing Before the Committee on the Judiciary*, 113th Cong. 2d Sess. (2014) (statement of Eric Holder, Att’y Gen. of the United States). Holder’s further explanation of the president’s enforcement power reveals that it entails a combination of legal and value judgments.

⁶⁶ The Obama administration took a more combative posture with respect to the U.S. Supreme Court’s jurisprudence on voting rights, especially a president’s own power under Section Five of the Voting Rights Act. After the High Court’s ruling in *Shelby County v. Holder*, President Obama stated, “Today’s decision invalidating one of its core provisions upsets decades of well-established practices that help make sure voting is fair, especially in places where voting discrimination has been historically prevalent.” Press Release, White House Off. of the Press Sec’y, Statement on the Supreme Court Ruling on *Shelby County v. Holder* (June 25, 2013), <https://obamawhitehouse.archives.gov/the-press->

that merely appear to be unilateral or anti-judicial) can be more costly to sustain than those that appear to be, or are in fact, collaborative projects. For better or for worse, the courts themselves have often taken the view that presidential actions supported by another branch of government are more likely to be constitutional, and that unilateral presidential acts are more vulnerable to challenge.⁶⁷ If nothing else, such rulings confirm a traditional preference for socially grounded assertions of law.

DOJ lawyers sought to supplement and render the existing law of equality more coherent, rather than undoing what the Justices had wrought. But make no mistake: despite its self-presentation, the Obama administration was still making individual rights law and interpreting the Constitution more broadly than its counterparts. Holder's letter was *justificatory* in that it offered a host of reasons for the shift in enforcement policy. It acknowledged Congress's prerogative to make the laws, and sought only to explain the administration's considered judgment in refusing to defend the law. This respectful posture also tried to preempt criticism that the non-enforcement decision was a partisan one or based on Obama's personal preferences. What the Constitution requires instead, and what Holder took pains to emphasize had occurred, was a presidential decision based on "careful consideration, after review of [the Attorney General's] recommendation."⁶⁸

The legal analysis was *defensive* in the general posture struck as the executive branch tended to the social plausibility for expanded rights. Holder characterized DOJ's own equality-making activity as mere gap filling: where there are gaps in the law, it can hardly be said to be usurping judicial review for political actors to reach their own good-faith conclusion about what the Constitution requires.⁶⁹ Although experts might accept that the power to enforce encompasses the power of non-enforcement, ordinary

office/2013/06/25/statement-president-supreme-court-ruling-shelby-county-v-holder. Holder went even further, calling the Court's ruling "a serious and unnecessary setback," with "the potential to negatively affect millions of Americans across the country." Att'y Gen. Eric Holder, *Remarks on the Supreme Court's Decision in Shelby County v. Holder*, DEPT. OF JUST. (June 25, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-supreme-court-decision-shelby-county-v>.

⁶⁷ Justice Robert Jackson's Steel Seizure Case concurrence stands for this view. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.").

⁶⁸ Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, *supra* note 59.

⁶⁹ See, e.g., Memorandum from Walter Dellinger, Assistant Att'y Gen., U.S. Dep't of Justice, on Presidential Authority to Decline to Execute Unconstitutional Statutes, to the Honorable Abner J. Mikva, Counsel to the President (Nov. 2, 1994), <https://fas.org/irp/agency/doj/olc110294.html> (displaying the consensus approach of the Office of Legal Counsel, which usually permits greater presidential creativity on a constitutional question when the U.S. Supreme Court has remained silent).

people (and by extension, their elected representatives) might not hold such a sophisticated view. Refusing to enforce a law sounds lawless and tyrannical, especially if a president can pick and choose which laws to enforce.

The expectation of the Obama administration must have been that the president's discretionary action was more palatable, and more likely to be treated as legitimate, when cast in constitutional principles. Importantly, this general orientation is consistent with the long-standing view of the professional class—most of the lawyers that, at one time or another, offer legal opinions on behalf of the executive branch.⁷⁰ The message conveyed through the Attorney General's resort to judicial decisions, then, was that President Obama cared deeply about the rule of law as well as the protection of political minorities. He believed himself duty-bound to rise to the occasion based on his independent determination as to what the law demanded, especially when other institutions proved indecisive.

Maintaining the appearance of executive-judicial cooperation was especially important because Congress had already spoken explicitly on this issue by denying that equality was seriously implicated by heterosexual marriage (this was the central message of DOMA, after all). The makeup of Congress had most certainly changed, and the prospect of passing a similar law in 2011 had waned—these were all factors to consider in deciding just how aggressive a president should be in disowning a duly enacted law. But even if the Obama administration expected Congress to acquiesce to the president's view on this issue, the impression of inter-branch coordination could go some way in reducing excessive heat around a controversial matter and smoothing the path toward a different socio-political consensus.

D. *The Scope of the Right*

The Attorney General hedged his bets by saying that he would merely refuse to defend DOMA in the courts.⁷¹ In all other respects beyond

⁷⁰ See, e.g., Memorandum from David J. Barron, Acting Assistant Attorney General, U.S. Dep't of Justice, on Best Practices for OLC Legal Advice and Written Opinions, to Attorneys of the Office, (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> (outlining how the Office of Legal Counsel provides controlling advice to the executive branch on questions of law).

⁷¹ As a number of experts pointed out, this transitional approach to DOMA was fraught with practical complications. See, e.g., Joanna L. Grossman, *Defense of Marriage Act, Will You Please Go Now!*, CARDOZO L. REV. DE NOVO 155, 165 (2012) ("The complications of DOMA have begun to reveal themselves in earnest as the same-sex marriage and its equivalents have spread across the country."). Some have gone further, claiming that the position was incoherent and should have gone further. See, e.g., Robert J. Delahunty, *The Obama Administration's Decisions to Enforce, But Not Defend, DOMA § 3*, 106 NW. U.L. REV. COLLOQUY 69, 75 (2011) (contending that the Administration's decisions were "incoherent and unprincipled").

litigation, he would enforce the law deemed by the president to be unconstitutional until such time as the courts ruled conclusively on the matter. This compromise in February 2011—indicating only a partial willingness by DOJ to follow through on the president's legal judgment that sexual orientation triggers heightened review—signaled a desire to deny the imprimatur of the rule of law to DOMA, while allowing public sentiment to sort itself out regarding other gay rights issues and giving the courts a role to play.⁷² It represented an effort to announce a new constitutional principle of equality and the methodology to be utilized by presidential actors, but to sever those features of constitutional lawmaking from the question of enforcement.

To be sure, the bolder move by far would have been to carry out the administration's new interpretation of the Equal Protection Clause and to present it to the world as a *fait accompli*. Doing so would have been a powerful implementation of the executive branch's revised theory of equality. But such a strategy would also have been a boon for opponents of gay marriage, incensing the institutionally cautious along with social conservatives, and possibly provoking a more negative reaction from the courts than necessary. It was apparent, too, that the president did not wish to say anything that might help anti-gay marriage forces in states considering the question legislatively or via referendum. Executive branch creativity at the state and local levels had prompted an outcry, as some mayors and county clerks, interpreting their own obligations under state and federal law, began unilaterally handing out marriage licenses to same-sex couples.⁷³ Many observers condemned those actions as illegal acts of defiance, and the consequences of such a reaction at the national level would be even greater, where an outcry obscuring the constitutional stakes might be crippling for a nascent right.⁷⁴

⁷² When President Obama ultimately decided to support gay marriage, he publicly cast the move in terms of the Golden Rule, a time-honored way of popularly describing the concept of equality. *Transcript: Robin Roberts ABC News Interview With President Obama*, ABC NEWS (May 9, 2012), <http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043>. The rhetorical approach put the burden squarely on those who oppose a right to justify an exception to this basic notion of fairness. It also draws on an idea that exists in a cross-section of religious traditions, implying that a believer, too, can support marriage equality.

⁷³ Importantly, these actions suggested that any socio-legal consensus over the right of marriage as purely a heterosexual institution might no longer hold.

⁷⁴ After *Obergefell*, resistance by county clerks and other state and local officials occurred sporadically. See Elliott C. McLaughlin, *Despite Same-Sex Marriage Ruling, Resistance Persists*, CNN (June 30, 2015, 10:06 PM), <http://www.cnn.com/2015/06/30/us/same-sex-marriage-supreme-court-ruling-holdouts/index.html> (detailing the various public officials who refused to issue marriage licenses to same-sex couples or who voiced their opposition to doing so). For the most part, courts treated the refusal to issue a marriage license to same-sex couples as improper defiance of the law rather than evidence of a wholesale rejection of the constitutional principle. See *Miller v. Davis*, 123 F. Supp. 3d 924, 944 (E.D. Ky. 2015) (explaining that a county clerk in this situation is refusing to fulfill her lawful duties, but failing to state that she rejects the constitutional principle).

Plentiful other evidence suggested that the president wished to signal a cautious executive approach, even after this turnabout on DOMA. Although DOJ announced that “heightened” review would be applied in the future by the administration to matters involving sexual orientation, nowhere did Holder try to specify whether intermediate or strict scrutiny was most appropriate.⁷⁵ The administration may only have been parroting the Supreme Court’s own strategic ambiguity on this matter, for even in pro-gay rights decisions like *Romer* and *Lawrence*, the Court avoided specifying which tier of scrutiny was required for laws that implicate sexual orientation.

But I wish to tease out a very different set of legal and political benefits when executive branch actors rely on conceptual vagueness in evaluating rights. First, so long as DOMA was eventually struck down, the administration could claim credit for predicting the outcome and vindicating constitutional rights. Thus, we can imagine the possibility of a political dividend if a president was later proven to be farsighted, as well as stalwart, in defending the ideal of equality. That a president might be later proven correct—and even heroic—through historical judgment should not be underestimated.

This long view is a powerful reputational consideration that can be harnessed on behalf of individual liberties. But even a decisive loss in the Supreme Court, if it came, might not undermine the political gains from seizing a leadership role on a matter of national importance. A certain ambiguity about the full scope of gay rights can therefore facilitate a steadier commitment to rights and incremental gains by an administration, even more so than confident proclamations of principle followed by embarrassing retreats.

Second, Holder’s position rendered it harder to accuse the president of interfering with the judicial function because he did not behave in a way that undermined the High Court’s prerogative or undercut any of its rulings. Thus, the president appeared to be gently nudging the courts in the direction jurists apparently had already charted, and filling gaps along the way, rather than usurping a coordinate branch’s powers.

Third, such ambiguity about what a commitment to equality requires preserved a great deal of policy discretion within the executive branch. Even after announcing that *some* sort of heightened review should apply to laws based on sexual orientation, lawyers and policymakers could still theoretically take the view that on some policy matters—say, in certain security situations—being cognizant of sexual orientation may be permissible. If a president did later decide to make exceptions to the

⁷⁵ The answer could be intermediate review for all laws implicating sexual orientation, strict scrutiny for all laws implicating sexual orientation, or middle tier review for some kinds of laws and strict scrutiny for others.

administration's new concept of equality, he could make refinements without disavowing the principle as a whole.

For our purposes, this shift in legal terminology and mechanism should be seen for what it was, namely, the announcement of a major change in enforcement policy and the development of a theory of equality with wider implications. The fact that an executive-made right looks different from a juridically-constructed right affects its *scope* and *effectiveness*, but should never be mistaken for a lack of coherence or commitment. It is simply evidence that a constitutional right in action looks different in the political sphere than it does in the judicial sphere.

To see this potentially far-reaching effect on the scope of the right, keep in mind that DOJ could have simply argued that DOMA reflected anti-gay animus, without taking the additional position that sexual orientation triggered heightened scrutiny. That position would have put it squarely within *Romer*. But the administration wanted to put gay rights on even sounder footing—to endorse that shining language in *Lawrence* that gestured toward (but did not fully explicate) a more robust notion of civic equality for sexual minorities. By adopting heightened scrutiny, the administration signaled that the scope of equality should extend well beyond a do-no-harm approach and should approximate something closer to full participation in civic life. Citing the landmark sex equality ruling *Frontiero*, the Attorney General argued that “there is a growing acknowledgment that sexual orientation ‘bears no relation to ability to perform or contribute to society.’”⁷⁶

The president's theory of equality did *Lawrence* one better in another respect—institutionally—by inviting the Court to join hands with the White House to promote equality, in the spirit of cooperation. This was both opportunistic and likely to be effective, because the president: (1) acted preemptively by removing the specter of executive-branch repudiation of judge-created rights; (2) offered the Court political cover for pro-gay decisions by taking the leadership position on these matters (and thereby drawing some political reaction to Obama and his party); and (3) presented jurists with more raw material with which to say that social consensus had changed sufficiently that a jurisprudence of equality for sexual minorities now made sense.

Where doctrinal space remains for the Court to act without altering doctrine dramatically, and the executive branch has reason to believe the Court might adopt its preferred view on rights, a facilitative orientation can be more productive in creating a durable consensus over rights.⁷⁷

⁷⁶ Letter from Eric Holder, Atty. General, to Congress, *supra* note 55 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

⁷⁷ A president can always claim later that the Supreme Court went off the rails, or did the right thing but did not go far enough.

Indeed, Holder's letter reminded his audience that President Obama had already taken a number of noteworthy actions to advance civic equality for sexual minorities with the support of the American people. The administration had secured the repeal of "Don't Ask, Don't Tell," on the principle that "sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed."⁷⁸ If the Supreme Court desired to fashion a socially responsive jurisprudence,⁷⁹ then the administration offered material support for such a project.

In the meantime, much could be done within the president's spheres of influence on gay rights, while cases churned slowly through the legal system. Given DOJ's new imperative, regulations and policies that denied rights or benefits on the basis of sexual orientation should be revisited under the Attorney General's directive, and if found wanting, revised or reinterpreted. State laws that negatively impacted the rights of sexual minorities now could be said to affect a national interest, namely the federal constitutional principle of equal protection of the law, allowing more frequent monitoring and intervention by the federal government in state and local conflicts. DOJ's theory of equality also empowered actors within the administration—lawyers, appointees, or even just lower level aides across a variety of departments—to fight to expand rights on behalf of sexual minorities by enforcing agency rules or filing lawsuits.

Another reason for resorting to the intricacies of legal analysis to justify the exercise of political discretion is to gain an *offensive advantage*: gaps in judicial case law provide opportunity, political cover, and the raw materials for decisive, and sometimes highly creative, political action. In this instance, Holder argued that judicial inaction at the level of the Supreme Court and at least one circuit court justified reconsideration of enforcement policy and more robust presidential action. Along the way, he recycled judicial language and past judicial rulings, adapting them toward new goals, and indeed, on behalf of a more aggressive agenda on gay rights.

Note, too, that Holder's letter explicitly rejected appellate court decisions that used rational basis scrutiny for sexual orientation. The administration's view was that any judicial ruling was outdated (or lacked sufficient social foundation) to the extent it rested on assumptions

⁷⁸ Letter from Eric Holder, Atty. General, to Congress, *supra* note 55.

⁷⁹ There is some evidence that Justice Kennedy, for instance, is particularly sensitive to arguments about having a socially responsive jurisprudence—i.e., interpretations of law that do not fall too far outside of existing political and social sentiment, or hinder the development of such attitudes. See, e.g., Saiju George, On Liberty: The Moral Concepts of Justice Kennedy's Jurisprudence (2014) (unpublished Law School Student Scholarship Paper, on file with Seaton Hall Law School) (discussing *Roper v. Simmons*, 543 U.S. 551 (2005)) ("Kennedy cites to the 'evolving standards of decency that mark the progress of a maturing society,' social science research, and international law to provide 'objective referents' for the moral content of liberty.").

articulated in *Bowers v. Hardwick* and later overturned by *Lawrence*.⁸⁰ Though the Supreme Court had not yet determined the full scope of either *Lawrence* or its repudiation of *Bowers*, the Obama administration confidently did so: rulings adverse to gay rights that invoked *Bowers* were tainted, Holder stated, and DOJ now read *Lawrence* as having announced general principles of liberty and equality that must be implemented as a matter of law. DOJ lawyers would no longer cite *Bowers* as precedent nor adopt its claim that rational basis review was the appropriate baseline for sexual orientation-dependent laws.

Moreover, as a matter of presidential policy, lawyers rejected the “procreational responsibility” justification for DOMA as “unreasonable,” instead embracing the immutability of sexual orientation as most compatible with “recent social science understandings.”⁸¹ The letter went on to apply these principles to DOMA, finding the law wanting. Notably, Holder cited statements in the legislative record “expressing moral disapproval of gays and lesbians and their intimate and family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.”⁸²

This last bit served as the strongest evidence that a sex/sexual orientation analogy drove at least some of the president’s theory of equality. To the extent laws expressed hostility towards sexual minorities or were based on unfounded generalizations about sexuality, they were unconstitutional. In a footnote, Holder made clear that laws intended to “correct” homosexual behavior as anti-social defied the state of modern science: “some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation.”⁸³

⁸⁰ Recall that the *Lawrence* Court explicitly overruled *Bowers* precisely because it lacked social grounding. First, The *Bowers* ruling’s claim that anti-sodomy laws had “ancient roots” was erroneous. *Lawrence v. Texas*, 539 U.S. 558, 570 (2003). Rather, the decision’s “historical premises are not without doubt and, at the very least, are overstated.” *Id.* at 571. Second, the number of anti-sodomy laws in the United States had in fact dwindled. *Id.* at 572. That fact, coupled with a strong pattern of non-enforcement of those laws, suggested a weakening even of contemporary norms. *Id.* Third, *Bowers* had been eroded by not only subsequent decisions of the U.S. Supreme Court, but also that of the European Court of Human Rights. *See id.* at 573 (detailing the case of an adult male resident of Northern Ireland who was denied his right to engage in consensual homosexual conduct. The European Court of Human Rights held that the laws proscribing the conduct were invalid under the European Convention on Human Rights).

⁸¹ Letter from Eric Holder, Atty. General, to Congress, *supra* note 55.

⁸² *Id.*

⁸³ *Id.*

E. *The Vice-President and President Offer a Popular Defense of Equality*

On May 4, 2012, *Meet the Press* host Mark Gregory asked Vice-President Joe Biden for his view on same-sex marriage. “What this is all about is a simple proposition,” he answered. “Who do you love, and will you be loyal to the person you love?”⁸⁴ Pressed further, Biden clarified that “[t]he president sets the policy” but that he personally was “absolutely comfortable with the fact that men marrying men, women marrying women, and heterosexual men and women marrying one another are entitled to the same exact rights, all the civil rights, all the civil liberties.”⁸⁵

Biden’s comments, though couched as unofficial, amounted to a powerful statement about equality, one that rendered the stakes in the simple terms of affection, devotion, and equal regard. His conception of equality also seemed unequivocal in that “the same exact rights” must be extended to same-sex couples for their commitments to satisfy constitutional demands.

Although Biden’s endorsement of gay marriage was unscripted, President Obama’s public announcement five days later was both poll-tested and carefully orchestrated. The President sat down with Robin Roberts in an exclusive interview for *Good Morning America*. In announcing his support for same-sex marriage for the first time, Obama made three noteworthy moves. First, like Biden, he characterized the principle as one of basic “fairness, and treating everybody as equals.” He further elaborated the point that equality must be forward-looking and practical by referencing his own children, saying a ban on same-sex marriage “doesn’t make sense” to them because it treated gay parents of their friends differently from their own parents.⁸⁶

Second, Obama defended the principle in explicitly religious terms, required by the example of “Christ sacrificing himself on our behalf,” as well as “the Golden Rule,”⁸⁷ that is, the injunction to treat others as one would like to be treated. This offered a moral content to the principle of equality beyond that of secular requirements to treat people fairly, and it

⁸⁴ BECKER, *supra* note 37, at 288–89. As Becker tells it, the president’s aides were hoping for greater control over the timing of the president’s statements and felt rushed to hurry his own views into public so as not to give the impression of “leading from behind.” To some extent, this will always be true, but any political and legal gains to be had from conveying firm leadership on an issue can be dissipated by the impression that one feels forced to act by circumstance rather than out of principle.

⁸⁵ Felicia Sonmez, *Biden ‘Comfortable’ with Same-Sex Marriage*, WASH. POST (May 7, 2012), https://www.washingtonpost.com/politics/biden-comfortable-with-same-sex-marriage/2012/05/06/gIQASQDf7T_story.html?utm_term=.84164dee6b7a.

⁸⁶ BECKER, *supra* note 37, at 296.

⁸⁷ *Id.* The Golden Rule, a Christian formulation of equality, is attributed to a saying of Jesus: “So always treat others as you would like them to treat you; that is the Law and the Prophets.” *Matthew* 7:12.

also presented an opposing moral discourse to counter the religious-traditionalist view of heterosexual marriage as sacrosanct. In fact, refusing to cede the moral terrain, the president claimed that support for same-sex marriage is “consistent with our best and in some cases our most conservative values, sort of the foundation of what made this country great.”⁸⁸

Together, Obama’s appeal to religious and ethical sources of law obviously went beyond what judges would generally do today in their positivist formulations of the Equal Protection Clause. But his rhetoric also simplified the stakes, rendering them more easily understood by non-lawyers and grounding them in older traditions. Even if judges declined to treat the principle of egalitarianism in such moral terms, the president’s own language helped pave the way for broader social support for an outcome that benefited sexual minorities.

Third, Obama engaged in jurisprudential bootstrapping, leveraging gains in other social domains on gay rights to help advance a theory of equality that encompassed same-sex marriage. He said:

When I think about—those soldiers or airmen or marines or—sailors who are out there fighting on my behalf—and yet, feel constrained, even now that ‘Don’t Ask, Don’t Tell’ is gone, because—they’re not able to—commit themselves in a marriage. At a certain point I’ve just concluded that—for me personally, it is important to go ahead and affirm that—I think same-sex couples should be able to get married.⁸⁹

There are several smaller moves that make up the bootstrapping argument. First, changes in military policy should be treated as evidence of social progress. Second, that progress was incomplete in other domains. Third, social progress in the military domain justified further legal gains in non-military domains, including in those not directly controlled by the president (*i.e.*, state laws governing marriage).⁹⁰

Still, all three facets of Obama’s primetime articulation of popular egalitarianism struck a principled stance while accounting for strategic concerns. The most immediate concern was the president’s reelection efforts, for he and others worried that supporting same-sex marriage might depress turnout among socially conservative voters in the African-American and Hispanic communities, as well as among white working

⁸⁸ *Id.*

⁸⁹ *Transcript: Robin Roberts ABC News Interview With President Obama, supra* note 72.

⁹⁰ As a matter of pure logic, it needn’t follow that legal changes in one policy mandate change in another policy. The contexts may be so dramatically different that legal changes are unsuitable in some contexts given different policy goals; or perhaps it is a question of who gets to decide. Here, the bootstrapping argument is therefore a way of blurring differences, and overcoming these objections by stressing the same social condition that ought to be given primary importance in decision making.

class Catholics.⁹¹ By couching his support for same-sex marriage in explicitly ethical and religious terms, by appealing to family and traditionalism, and by referring to the importance of fairness for military families, Obama hoped to minimize any political costs associated with supporting a broader notion of equality.

His overall presentation appeared to follow the advice of advisors who believed that Obama had been out-of-step with his own base on same-sex marriage, that many Republicans themselves were becoming increasingly ambivalent about the issue, and that more political and legal gains could be made by staying slightly ahead of the curve because same-sex marriage would someday become the law of the land.⁹² In other words, decisive leadership by the president could help establish the right to same-sex marriage on stable footing in the law and society as a whole, while persuadable voters would likely acquiesce to that outcome at some point.

With internal DOJ obstacles removed to full-throated development of a new conception of equality, and with the President's and Vice-President's powerful endorsements of same-sex marriage as a matter of national legal concern, the table was now set for a vigorous display before the courts.

II. FROM *WINDSOR* TO *OBERGEFELL*: AN OPPORTUNITY REALIZED

Well before the same-sex marriage rulings, other decisions by the Supreme Court had hastened, rather than arrested, this trend in rights development. From *Romer* onward, the justices had repeatedly rejected anti-gay laws, often on incompletely theorized accounts of equality, substantive rights, and without agreeing to the proper doctrinal framework. Critically, *Lawrence* not only struck down laws that criminalized consensual sex between partners of the same sex, but also swept away *Bowers*, along with its associated arguments that moral opprobrium alone was sufficient to treat gay people unfairly. The cumulative effect of this jurisprudence had been to invite political actors—not just grassroots activists and lawyers but also presidential actors—into the fray to do more to protect the rights of sexual minorities. With the previous administration's theory of equality repudiated as it related to same-sex marriage, the Obama administration obliged by joining forces with pro-marriage advocates before the courts. That involvement had a profound impact on how jurists perceived the national stakes of their interpretation of the Equal Protection Clause.

⁹¹ BECKER, *supra* note 37, at 294.

⁹² One of those advisors was Ken Mehlman, an openly gay Republican who founded Project Right Side, an organization that strove to convince Republicans that gay marriage was consistent with conservatism and made for good politics. His advice to Obama about how to talk about same-sex marriage was based in part on polling. *See id.* at 289–96.

The gay marriage decisions by the Supreme Court—first *Windsor*, then *Obergefell*—appeared to vindicate the administration's legal position. Those judicial rulings, coming on the heels of a major shift by the executive branch, signaled to the public that, just as the president had claimed, fundamental constitutional rights were at stake in the battle over gay marriage. Importantly, popular support for the pro-marriage position did not noticeably erode after the *Windsor* ruling or after the increase in public scrutiny of the Obama administration's siding with pro-marriage forces. If that had occurred, it might have caused aides to wonder whether a jurisprudence that encompassed same-sex marriage was socially untenable. To the contrary, lower courts and many ordinary people treated that ruling as consistent with the view that DOMA amounted to unjustifiable discrimination.⁹³

A. *The Windsor Brief: DOJ Makes Its Case*

On February 22, 2013, Solicitor General Donald Verrilli, Jr., filed the government's brief in the *Windsor* case. For the first time, the Obama administration advanced its theory of Equal Protection of the Laws to require marriage for gay and lesbian couples.⁹⁴ That brief largely tracked Holder's letter, and in recounting the procedural history of the case, devoted two full paragraphs to the president's changed legal position. This recitation emphasized several themes discussed earlier: a principled, good-faith reevaluation of the constitutionality of DOMA in light of changed social conditions; certitude on the part of administration lawyers that DOMA now violated the ideal of equality; and respect for both Congress and the judiciary through the president's decision to stop defending DOMA in the courts while pressing for the Supreme Court to render "a definitive verdict against the law's constitutionality."⁹⁵

Notably, the brief argued that social conditions now favored the recognition of gay marriage as a constitutional right.⁹⁶ First, sufficiently

⁹³ Polls showed waning support for DOMA-type laws even before the Court's *Windsor* decision. E.g., Jonathan Capehart, *Americans are Done With DOMA*, WASH. POST (Feb. 19, 2013), <http://www.washingtonpost.com/blogs/post-partisan/wp/2013/02/19/americans-are-done-with-doma/>. Polls afterward have not shown a backlash to the Court's involvement on this issue. E.g., Susan Page, *Poll: Support for Gay Marriage Hits High After Ruling*, USA TODAY (July 1, 2013), <https://www.usatoday.com/story/news/politics/2013/07/01/poll-supreme-court-gay-marriage-affirmative-action-voting-rights/2479541/>; William Saletan, *Anti-Gay is Yesterday*, SLATE (June 26, 2013), http://www.slate.com/articles/news_and_politics/frame_game/2013/06/gay_marriage_polls_and_public_opinion_the_supreme_court_s_rulings_upheld.html.

⁹⁴ Brief for the United States on the Merits Question at *12, *United States v. Windsor*, 133 S. Ct. 2675 (Feb. 22, 2013) (No. 12-307), 2013 WL 683048.

⁹⁵ *Id.* at *5.

⁹⁶ See *id.* at *12–16 ("There is broad scientific and medical consensus that sexual orientation is typically not a voluntary choice, and that efforts to change an individual's sexual orientation are generally futile and potentially harmful. In any event, as long as it distinguishes a group, a

oppressive conditions against sexual minorities persisted, justifying not only enhanced doctrinal tools such as “heightened scrutiny” by the courts but also a more robust jurisprudence of equality and liberty.⁹⁷ Going well beyond Holder’s letter to Congress, the Solicitor General’s brief recounted all of the historical forms of anti-gay discrimination, with an emphasis on governmental actions to intimidate and subordinate sexual minorities: anti-sodomy laws, anti-gay employment and immigration laws, widespread incidence of hate crimes, unequal child custody laws, unfair police enforcement of criminal laws, and ballot initiatives repealing legal protections for gays and lesbians.⁹⁸ While defenders of DOMA minimized the duration and significance of this history of discrimination, the Solicitor General urged the High Court to see that “given its breadth and depth, the undisputed twentieth-century discrimination has lasted long enough” to merit enhanced protections for sexual minorities.⁹⁹

Second, insisting that sexual orientation “bears no relation to ability to perform or contribute to society,” Verilli’s brief pointed to two sources of new information: (1) more recent, considered scientific views of homosexuality; and (2) the President’s own actions to end the military’s ban on service by gay Americans. The brief quoted the American Psychiatric Association’s position statement that “homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.”¹⁰⁰ Given this social-scientific fact, the government argued, sexual orientation should be legally treated like other suspect classifications (i.e., gender, race, religion), in that one’s sexual preference “bears no inherent relation to a person’s ability to participate in or contribute to society.”¹⁰¹

In the same vein, “the broad consensus in the scientific community was that, for the vast majority of people (gay and straight alike), sexual orientation is not a voluntary choice” and that “efforts to change an individual’s sexual orientation are generally futile and potentially dangerous to an individual’s well-being.”¹⁰² For these reasons, the administration argued that sexual orientation is an “obvious, immutable, or distinguishing characteristic” meriting strict scrutiny.¹⁰³

characteristic may support application of heightened scrutiny even if - as with illegitimacy or alienage - it is subject to change or not readily visible.”).

⁹⁷ *Id.* at *5.

⁹⁸ *Id.* *22–27.

⁹⁹ *Id.* at *27.

¹⁰⁰ *Id.* at *28 (quoting American Psychiatric Ass’n, *Position Statement on Homosexuality and Civil Rights* (1973), reprinted in 131 AM. J. PSYCHIATRY 497 (1974)).

¹⁰¹ *Id.* at *28.

¹⁰² *Id.* at *31.

¹⁰³ *Id.* at *31–32.

Additionally, government lawyers made the identical jurisprudential bootstrapping argument that President Obama himself used in his public words on gay marriage and Holder previewed in his letter to Congress, namely, that the end of “Don’t Ask, Don’t Tell” provided a reason to vindicate the pro-gay marriage view. That Congress and the Obama administration ended the discriminatory practice should be taken as proof that scientific judgments about homosexuality have also been embraced by society at large, even among some of its more conservative institutions. Verilli’s brief quoted the President’s remarks during the signing of the repeal: “[V]alor and sacrifice are no more limited by sexual orientation than they are by race or by gender or by religion or by creed.”¹⁰⁴ This amounted to a political judgment as much as an institutional and cultural one, but as far as the administration was concerned, it was a judgment that should now be generalized as a *legal* one.

Third, the United States rebutted the argument of DOMA’s defenders that social conditions did not yet support “experimentation” with marriage as a matter of judicial intervention.¹⁰⁵ In other words, they insisted that the courts should defer to Congress’s judgment that such rights should be developed on a state-by-state basis. But as the Solicitor General argued, this kind of prudential argument has been raised before in other contexts such as school desegregation—and usually rejected when the rights of national citizenship are at stake.¹⁰⁶ The brief also made an interesting fairness argument: DOMA was not crafted as a “temporary” or “provisional” law,¹⁰⁷ and it contained no sunset provision. Given DOMA’s harshness, the argument to “proceed with caution” appeared to be an effort to indefinitely deny the rights of a political minority.

¹⁰⁴ *Id.* at *28. In President Obama’s original remarks, he went on to say that gay soldiers have always served with honor and distinction; the only thing that changed was they could now do so openly: “There can be little doubt there were gay soldiers who fought for American independence, who consecrated the ground at Gettysburg, who manned the trenches along the Western Front, who stormed the beaches of Iwo Jima. Their names are etched into the walls of our memorials. Their headstones dot the grounds at Arlington.” Barack Obama, Remarks by the President and Vice President at Signing of the Don’t Ask, Don’t Tell Repeal Act of 2010 (Dec. 22, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a>. In this way, Obama orally rewrote sexual minorities back into the constitutional history of this country. He would go further, situating his theory of equality within an older view of pluralism: “For we are not a nation that says, ‘don’t ask, don’t tell.’ We are a nation that says, ‘Out of many, we are one.’ (Applause.) We are a nation that welcomes the service of every patriot. We are a nation that believes that all men and women are created equal. (Applause.) Those are the ideals that generations have fought for. Those are the ideals that we uphold today.” *Id.*

¹⁰⁵ Brief for the United States on the Merits Question, *supra* note 94, at *50–51.

¹⁰⁶ *Id.* at *50.

¹⁰⁷ *Id.* at *50–51.

B. Windsor *Vindicates the Government's Position*

On March 27, 2013, the Supreme Court ruled for Edith Windsor, who had been married to a woman under New York law and was subsequently denied a spousal deduction on her federal taxes due to DOMA.¹⁰⁸ Justice Kennedy's opinion declaring DOMA to be a violation of the Fourteenth Amendment's Equal Protection Clause characterized New York's same-sex marriage law as an effort "to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."¹⁰⁹ By creating the institution of same-sex marriage, New York "conferred upon [these couples] a dignity and status of immense import."¹¹⁰ DOMA interfered with a state's traditional power over marriage and denied these couples the status and dignity conferred by law. Notably, Justice Kennedy's opinion treated marriage not as a static institution, but rather as a complex, cultural institution that has evolved with time.¹¹¹

Although the Supreme Court declined advocates' invitation to call sexual orientation a suspect classification, it did find several points of concord with the administration. First, the Solicitor General had argued that DOMA denied the effects of "state-recognized marital relationships across the entire spectrum of federal law."¹¹² The Court agreed, noting in *Windsor* that DOMA "enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect."¹¹³

Second, the Court emphasized the dignitary and tangible harms of DOMA to families, and especially the children of same-sex parents. Justice Kennedy wrote that the federal law "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."¹¹⁴ He also stressed the "financial harm to the children of same-sex couples."¹¹⁵ As the Solicitor General's brief had emphasized, the denial of benefits "undermines the efforts of same-sex couples to raise their children, hindering rather than advancing any interest in promoting child welfare."¹¹⁶ To be sure, the administration's brief was not the only

¹⁰⁸ *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

¹⁰⁹ *Id.* at 2689.

¹¹⁰ *Id.* at 2692.

¹¹¹ *See id.* at 2689 (describing the evolving societal norms and changes in the laws regarding marriage in New York).

¹¹² Brief for the United States on the Merits Question, *supra* note 94, at *53.

¹¹³ *Windsor*, 133 S. Ct. at 2690.

¹¹⁴ *Id.* at 2694.

¹¹⁵ *Id.* at 2695.

¹¹⁶ Brief for the United States on the Merits Question, *supra* note 94, at *43.

one that made these points, but DOJ's stature as a respected repeat player in the High Court gave its characterization of the law's effects great credibility.

Beyond grounding its decision in the social conditions in which marriage actually operates for thousands of families, the Court's actions helped to present a unified front that marriage equality was a matter of national significance and constitutional dimension. The administration's repudiation of DOMA appeared to be vindicated by the Supreme Court's ruling in *Windsor*, which seemed jurisprudentially cautious at the time, for it did not give a ringing endorsement of same-sex marriage as a substantive right.¹¹⁷ Instead, the Justices simply asked whether federal law could treat lawfully married same-sex couples differently from opposite-sex couples.

The decision did give the Obama administration considerable useful material for the promotion of sexual orientation-based equality if it chose to do so. If anything, the Court's decision signaled to the president that (a) the Court would not object to the president's far-reaching theory of equality and (b) the Justices would give the administration both time and resources to advance a pro-rights agenda. Rather than create obstacles to the President's theory of equality, *Windsor's* selective judicial ratification of the administration's position hastened executive-based lawmaking in this area.

C. *Post-Windsor Actions by the Executive Branch*

During the period between the two gay marriage decisions, executive branch officials took aggressive steps to lay down a firmer foundation for same-sex marriage. Collectively, these actions responded to party pressures and movement goals, but did so in a way that indicated the broader objective of constitutional transformation rather than the mere satisfaction of constituent interests. After *Windsor*, presidential actors repeatedly and expressly relied on the Supreme Court's language and reasoning for their own ends, seeking to entrench a gay marriage-friendly conception of equality.

1. *Holder's Speech to HRC*

On February 8, 2014, Attorney General Holder gave a speech to the Human Rights Campaign (HRC), the nation's largest gay rights organization, as a way of signaling continued support by the President for a

¹¹⁷ The closest the Court came to doing so was one line that cited *Lawrence v. Texas* and this characterization of same-sex marriage: "[t]he differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, 123 S. Ct. 2472, and whose relationship the State has sought to dignify." *Windsor*, 133 S. Ct. at 2694.

broadened theory of equality.¹¹⁸ By giving this speech before such a prominent group, Holder acted as a kind of political patron for HRC's legal ideas and the social movement associated with its work. Holder's actions both authorized and mainstreamed their grassroots labors, nurturing intellectual and political relationships that valued a theory of equality that encompassed gay rights.¹¹⁹

During Holder's widely-publicized speech,¹²⁰ he first noted the role of HRC and the gay rights movement in promoting "opportunity and equal justice under law."¹²¹ He said that "[f]or President Obama, for me, and for our colleagues at every level of the Administration," LGBT rights remained "a top priority."¹²² Holder vowed that any legal changes on this front would be "historic, meaningful, lasting change."¹²³

Importantly, Holder also took credit for progress on gay marriage and offered a defense of presidential leadership. He reminded the audience that executive action, backed by social activism,¹²⁴ had led to the disavowal of DOMA, and eventually, the *Windsor* ruling. A belief in "our common humanity" animated the work of the DOJ across a variety of issues, including the enforcement of the Violence Against Women Act and the Matthew Shepard and James Byrd, Jr. Hate Crimes Act.¹²⁵ The administration's theory of equality, which now encompassed marriage rights for gay couples, should be seen as opening "a new frontier in the fight for civil rights."¹²⁶

¹¹⁸ *Eric Holder to Extend Benefits to Same-Sex Couples*, N.Y. DAILY NEWS (Feb. 8, 2014), <http://www.nydailynews.com/news/national/eric-holder-extend-benefits-same-sex-couples-article-1.1606971>.

¹¹⁹ Laudatory appearances of this sort by high-ranking political and legal officers bring attention to a cause, prime the pump for talented lawyers and activists, and raise the profile of a social group or movement. Then-Attorney General Ed Meese's speech before a young Federalist Society paid similar dividends for the conservative legal movement. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2009); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 134–36 (2008). President Trump's Attorney General Jeff Sessions performed a similar function recently when he spoke at a meeting of the Alliance Defending Freedom, a Christian legal advocacy group that has been pushing exemptions to LGBT anti-discrimination laws and a right of conscience not to participate in gay marriages. See Laura Jarrett, *AG Sessions under fire for closed-door speech to Alliance Defending Freedom*, CNN (July 13, 2017, 10:58 AM), <http://www.cnn.com/2017/07/12/politics/jeff-sessions-alliance-defending-freedom-summit/index.html>.

¹²⁰ Press Release, Dep't of Just., Att'y Gen. Eric Holder Delivers Remarks at the Human Rights Campaign Greater New York Gala (Feb. 10, 2014), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-human-rights-campaign-greater-new-york-gala>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ In his speech, Holder linked "suffragettes to the Freedom Riders," and galvanizing events such as the Stonewall Riots to the protests of Birmingham. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

Then, the Attorney General announced it would be taking specific steps to “advance” the “fundamental truth” of equality “and to give real meaning to the *Windsor* decision.” DOJ would issue “a new policy memorandum that will—for the first time in history—formally instruct all Justice Department employees to give lawful same-sex marriages full and equal recognition, to the greatest extent possible under the law.”¹²⁷

At a crucial moment in his performance, Holder went out of his way to acknowledge the gay rights movement as a natural successor to the black civil rights movement of the 1960s, and stated that the stakes over the struggle for same-sex marriage “could not be higher.”¹²⁸ No more extravagant call could be made to draw together members of the Democratic Party’s traditional base to forge a broad coalition to do the hard work of egalitarianism:

[G]ay and straight, bisexual and transgender. Black and white. Young and old—whether they live in Washington or Wyoming; Massachusetts or Missouri. Whether they work in schools or restaurants—on Wall Street or Main Street. And whether they contribute to our nation as doctors or service members; as businesspeople or public servants; as scientists or as Olympic athletes.¹²⁹

This statement captured the administration’s intention to harness the power of popular sovereignty to promote a vigorous, presidentially-directed conception of equality—through interest group politics, bureaucratic resources, and the rule of law.

The purpose of this historical comparison would soon become apparent: to help justify DOJ’s function as an engine for transformative legal change. “[T]he Justice Department’s role in confronting discrimination must be as aggressive today as it was in Robert Kennedy’s time,” Holder stated.¹³⁰ Most Americans, especially those committed to social justice, remembered the 1960s as an exemplar of executive branch leadership and legal wisdom on matters of equality. That institutional history and example had to be repeated. Holder closed by committing the

¹²⁷ *Id.*

¹²⁸ *Id.* A black Attorney General making this historical claim helped to foster social support for gay rights among the black civil rights community. Some black ministers opposed same-sex marriage and rejected the analogy to the social movement of the 60s. *See, e.g.,* Niraj Warikoo, *Decrying Gay Marriage, Black Pastors Join Legal Fight*, USA TODAY (May 14, 2014, 6:30 PM), <https://www.usatoday.com/story/news/nation/2014/05/14/michigan-same-sex-marriage-black-ministers/9094721/> (reporting on a group of black ministers who filed amicus briefs disapproving of gay marriage, with one minister saying that “[c]omparing the gay rights movement to black civil rights is ‘ignorant and myopic’”).

¹²⁹ Press Release, Dep’t of Just., Att’y Gen. Eric Holder Delivers Remarks at the Human Rights Campaign Greater New York Gala, *supra* note 120.

¹³⁰ *Id.*

administration's vast resources to promoting gay marriage: "[I]n every courthouse, in every proceeding and in every place where a member of the Department of Justice stands on behalf of the United States—they will strive to ensure that same-sex marriages receive the same privileges, protections, and rights as opposite-sex marriages under federal law."¹³¹

2. *The Feb. 10, 2014 Legal Memo*

Two days later, by memo dated February 10, 2014, Attorney General Holder celebrated the *Windsor* decision as "an enormous triumph for equal protection under the law for all Americans," and he issued further guidelines to all department employees announcing how the ruling should be implemented within the president's sphere of influence.¹³² Consistent with President Obama's robust theory of equality, Holder announced DOJ's policy "to the extent federal law permits, to recognize lawful same-sex marriages as broadly as possible."¹³³ Despite the fact that some states still resisted the concept of gay marriage as a matter of morality and local prerogative, the administration would enforce the general policy that "all marriages [were] valid in the jurisdiction where the marriage was celebrated."¹³⁴

The DOJ took these steps to enforce the Supreme Court's ruling as broadly as possible, in as many contexts as possible. In this way, the president's agents sought to disseminate and bureaucratize his theory of equality. Although none of these programs were contested during the *Windsor* litigation,¹³⁵ federal benefit programs, victim compensation funds, bankruptcy laws, Bureau of Prison policies, and ATF policies that turned on marriage status would henceforth be interpreted to be available to same-sex spouses on the same terms as to straight couples.¹³⁶

Moreover, unless it was "infeasible," the Attorney General directed lawyers to take litigation positions such that any references to marriage in federal laws be read to include valid same-sex marriages.¹³⁷ Marital privileges recognized during any judicial process would be treated the

¹³¹ *Id.*

¹³² Memorandum from Att'y Gen. Eric Holder, Dep't of Just., to All Department Employees, Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples 1–4 (Feb. 10, 2014), <https://www.justice.gov/iso/opa/resources/ss-married-couples-ag-memo.pdf>.

¹³³ *Id.* at 1.

¹³⁴ *Id.*

¹³⁵ The point here is not that the Obama administration's theory of equality was somehow implausible or unjustified. It is simply that a different administration might have taken the view that equality required that benefits of the sort at issue in *Windsor* were subject to maximal protection, but not other kinds of benefits or rules. Such a principled position on what equality demands would have justified a wait-to-be-sued attitude.

¹³⁶ Memorandum from Att'y Gen. Eric Holder, *supra* note 130, at 2.

¹³⁷ *Id.* at 2–3.

same.¹³⁸ In these ways, presidential action sought to alter the social conditions in which the right to same-sex marriage would be ultimately determined.

Soon enough, two cases, *Obergefell v. Hodges* and *Hollingsworth v. Perry*, would give the administration a fresh opportunity to extend its new approach to equality.¹³⁹

3. DOJ's Amicus Brief in *Obergefell*

The United States was not a party to either case, but decided to file an amicus brief on behalf of the same-sex couples both times. In the *Hollingsworth* case, the same-sex couples won in the Ninth Circuit on a narrow ground. Instead of treating same-sex marriage as a fundamental right or concluding that strict scrutiny was required any time the state used sexual orientation as a classification, Judge Reinhardt's ruling simply held that Proposition 8, which had overturned the California Supreme Court's pro-same-sex marriage ruling, stripped a minority group of its rights without a rational justification.¹⁴⁰

If possible, DOJ's amicus brief in *Hollingsworth* sounded even more forceful than the one filed in *Windsor*, especially in its insistence that equality represented a paramount national concern and priority for the Obama administration. The brief announced at the outset, "The United States has a strong interest in the eradication of discrimination on the basis of sexual orientation."¹⁴¹ First, by making same-sex marriage a national priority, the administration gave the Court political cover for a more generous reading of the Constitution. Second, by repeatedly quoting the Court's own words in *Windsor* back to the Justices, the Solicitor expressed substantive agreement with the Court's broader language and rationales of equality and liberty. DOJ lawyers drastically minimized the tepid rational basis approach exemplified by the holding in *Romer v. Evans*, leading instead with plentiful references to *Windsor*'s concern for the dignity and status of civil marriage, language about the connections between "personal decisions" and "liberty" from *Lawrence*, and *Loving v. Virginia*'s declaration that "the freedom to marry has long been recognized as . . . essential to the orderly pursuit of happiness."¹⁴² Third, the brief reassured

¹³⁸ *Id.* at 2–4.

¹³⁹ *Perry v. Brown*, the case that preceded *Hollingsworth*, was advanced by lawyers David Boies and Ted Olson. 671 F.3d 1052, 1058 (9th Cir. 2013). Ultimately, the U.S. Supreme Court left the ruling in *Perry* intact by holding that the interveners in the case did not have standing to continue litigating after the California Attorney General declined to defend the law at issue. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2656 (2013).

¹⁴⁰ *Hollingsworth*, 133 S. Ct. at 2660–61.

¹⁴¹ Brief for the United States as Amicus Curiae Supporting Petitioners, at *2, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1004710.

¹⁴² *Id.* at *3, *22, *33–34.

the Justices that the Obama administration would vigorously enforce a strong opinion in favor of same-sex couples.

While the government's brief repeated many of the doctrinal arguments from its brief in *Windsor*, it also bolstered those arguments with the work of historians and other scholars who work on human rights and sexuality. For instance, lawyers drew from the work of Dale Carpenter documenting official policies of hostility towards lesbian and gay people, such as civil institutionalization, sterilization, and castration.¹⁴³ They also cited Michael Klarman and Robert Wintemute for the proposition that "efforts to combat discrimination against lesbian and gay people have engendered significant political backlash," which demonstrated their relative political powerlessness and warranted judicial intervention to secure their rights.¹⁴⁴ In this way, the government offered resources to the Justices for the finding of accurate social facts about the status of sexual minorities in America, as well as context for understanding the social meaning and effects of bans on same-sex marriage.

A culturally adaptive reading of the Constitution made the most sense, the government argued, because "earlier generations may have failed" to even consider the possibility of these kinds of unions. One line in the brief exemplified the government's plea to take the social context into account: "[I]t is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian."¹⁴⁵

A. *Obergefell as Institutional Consensus*

On June 26, 2015, the Supreme Court handed down its decision in *Obergefell*. That ruling, authored by Justice Kennedy, articulated a concept of marriage that implicated both principles of liberty and equality. Notably, in describing marriage as an institution of constitutional dimension, the opinion cited the administration's recounting of all of the ways that the states "have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities."¹⁴⁶ In fact, Justice Kennedy wrote, "[t]he States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order."¹⁴⁷ That is, constitutional adjudication had to grapple with marriage as a contemporary institution rather than as a social good that was frozen in time.

¹⁴³ *Id.* at *4 (quoting Dale Carpenter, *Windsor Products*, 2013 SUP. CT. REV. 183, 253 (2013)).

¹⁴⁴ *Id.* at *20 (citing MICHAEL KLARMAN, *FROM THE CLOSET TO THE ALTAR* 26–29 (2012); ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 56 (1995)).

¹⁴⁵ *Id.* at *23 (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir. 2014) (citation omitted)).

¹⁴⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

¹⁴⁷ *Id.*

While the Justices did not go as far in *Obergefell* as President Obama's preferred theory of equality,¹⁴⁸ neither did they decisively reject it. The Supreme Court found a fundamental right to same-sex marriage, offering clarity as to its nature in a way that will aid proponents of the new right while antagonizing opponents. And critically for our purposes, leaving the scope of equality partly unresolved gave committed political actors room to push further.

Decisive presidential action on this front nevertheless encouraged the Justices to take that final step toward a new social convergence over rights. After all, having ruled in *Windsor* that the federal government's treatment of same-sex marriages implicated both tangible and symbolic constitutional interests, it would have been a tall order to say in *Obergefell* that states suddenly had a legitimate reason to violate those exact interests. While a technical possibility as a matter of cool logic, a secondary-right approach to gay marriage (equality is required only if a state chooses to offer gay marriage) would have undermined the general, autonomy-based terms of *Windsor*.

To be sure, there are few guarantees in life. It was theoretically possible for the Court to conclude in *Obergefell* that no substantive right to gay marriage existed as such or that states enjoy a power to regulate the moral welfare of the people in a way that is not entrusted to the federal government. But doing so would have risked inflaming both sides in the dispute rather than ratifying what appeared to be a broadening political settlement of the issue, one in which a president had made a decisive intervention. The Obama administration's public repudiation of DOMA confirmed to the High Court that public opinion had shifted significantly on gay marriage, clarified the constitutional stakes raised by the question, and gave the Justices a measure of political cover to strike down federal and state DOMA's. DOJ lawyers cited earlier judicial rulings to justify a broadened view of equality, and their actions, in turn, gave the Justices the social support to expand their own jurisprudence.

Presidential leadership on gay marriage did not guarantee the outcome in *Obergefell*, but it did help alter the social conditions in which jurists wrestled with the issue, making a pro-gay rights outcome far more likely. Not only would there be no risk of presidential defiance of such a ruling, President Obama offered to serve as an active partner to enforce egalitarianism as a national principle—including by defending that right against recalcitrant states. Additionally, the administration's aggressive posture within its own domain took maximum advantage of the role of

¹⁴⁸ For instance, Justice Kennedy's opinion did not state that heightened review was required for all laws implicating sexual orientation. Nor did he spell out any substantive constitutional right to marriage, finding only that the federal government could not treat same-sex marriages differently once states decided to sanction such unions.

time to ground its theory of equality in areas that might not have been the subject of immediate litigation. The more areas in which the administration could codify policies and practices that extended benefits and protections on the basis of gay marriage, the more the social terrain would necessarily be changed each time a future court faced a question involving questions of sexual orientation.

Instead of operating in a social environment devoid of law, the Supreme Court in *Obergefell* had to contend with the prospect that a negative ruling, one that read the Constitution in a parsimonious fashion, would make the judiciary appear out of step with popular sentiment. This was not merely a matter of following what is fashionable, but actually goes to the legitimacy of the court, for rulings that are too far out of the consensus—that begin to appear socially implausible, taking both the present and future into account—risk making the courts appear culturally irrelevant. After all, the lesson drawn from *Bowers* was that a decision whose historical foundations were suspect to begin with, and whose logic and social support later “sustained serious erosion,” would start to cast doubt on the Court’s own wisdom and authority.¹⁴⁹

In this case, a decision the other way could certainly have been defended in the abstract or based on older, but perhaps outdated, social views of marriage, but how long would such a ruling last before pressure to revisit its reasoning reemerged? Moreover, if the Supreme Court refused the president’s invitation to lay down a cooperative vision of sexual equality on this issue, the Court would have ceded the ground of principle to the presidency, rather than claiming some credit for keeping the principle of egalitarianism both salient and effective.

When the *Obergefell* ruling came down in a way that established a fundamental right to same-sex marriage, it then recognized that a social consensus had been reached among national institutions on this matter. Only then could it be fairly said that a majority’s political preferences became established initially as social, and ultimately, *constitutional* norms. Still, it should be said that a claim of convergence will eventually be tested by dissenters, something all such claims to cultural governance must face.

How should we think about social convergence on constitutional norms? Though influential, Robert Dahl’s work offers far too crude a formula for why rulings by the Supreme Court might be considered “majoritarian,” but he was absolutely right to treat the other branches of the national government as essential parts of the social context in which judicial decisions are made.¹⁵⁰

¹⁴⁹ *Lawrence v. Texas*, 539 U.S. 558, 571–76 (2003).

¹⁵⁰ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 281 (1957).

The president seized a leadership role on gay marriage by endorsing the work of activists;¹⁵¹ the Supreme Court approved that course of action by authoring equality-based opinions, and Congress offered mostly institutional acquiescence, especially after DOMA's demise. Importantly, the judicial outcome allowed both the Presidency and the judiciary to rise to the occasion and join forces to establish new constitutional norms while pursuing their own, separate institutional prerogatives. It gave President Obama an opportunity to declare political victory, which he did by wrapping his arm around the *Obergefell* ruling and treating it as a vindication of his own leadership to transform individual rights,¹⁵² and offered additional material—arguments, rationales, and momentum—for whatever equality initiatives remained on his agenda.

One of those matters later turned out to be North Carolina's HB2 law, which required individuals to use bathrooms that corresponded to their sex as identified on their birth certificate.¹⁵³ Lawyers in the administration subsequently drew on this approach to equality to find that such bathroom laws constituted impermissible sex-based discrimination. By opening up such new fronts in the battle over human sexuality and sex roles in society, however, opponents of social progress-based theories of equality will have new opportunities to challenge claims of social convergence over legal norms.

III. THEORETICAL IMPLICATIONS FOR PRESIDENTIAL LEADERSHIP OVER RIGHTS

A. *Neither Simple Obedience Nor Pure Politics*

As the Obama administration's experience with same-sex marriage confirms, the dynamics surrounding the presidential creation of individual rights are more complicated and far-reaching than most models of rights

¹⁵¹ In making this point, I do not mean to denigrate the work of activists, lawyers, and ordinary citizens who toil on issues of rights. Quite the contrary: their activity is crucial to the formation of new legal vocabulary, the pressuring of governmental institutions, and generation of momentum for legal change. My point is simply that such efforts, if they are to produce lasting change, must be directed to the gears of government as efficiently as possible, and that among the most influential factors in judicial decision making are the views of the President and Congress.

¹⁵² President Obama called Jim Obergefell personally to congratulate him on the legal victory, and in his speech publicly endorsed the ruling as a crucial step that "made our union a little more perfect." *Clip of President Obama on Same-Sex Marriage Ruling*, C-SPAN (June 26, 2015), <http://www.c-span.org/video/?326809-1/president-obama-reaction-supreme-court-samesex-marriage-ruling>. He called it a vindication of the principle of equal treatment of all people, "regardless of who they are or who they love." *Id.* More important, he took credit for defending that principle vigorously, before and after the Supreme Court's own episodic interventions. "My administration has been guided by that idea," Obama said, reminding the American people that his leadership has led to "real progress for LGBT Americans in ways that were unimaginable not too long ago." *Id.*

¹⁵³ H.R. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016).

currently allow. A conventional story about judicial supremacy affirms that judges alone create rights, which political actors are then required to take on as their own—but this explanation goes only so far. Such theories tend to treat political actors as passive receptors for juridic theories of rights, rather than active proponents of their own theories of rights. They are also defective in a normative sense, by departing from the tradition of popular sovereignty and the ideal of co-equal branches of government.

The executive branch has, in fact, internalized many methods of interpreting the laws, by establishing the Department of Justice and the White House Counsel's Office, but also by creating legal departments within most agencies to foster responsive and specialized legal advice. A professional rule of law culture has been fostered by attorney-advisors, past and present, who valorize service to the Office of the Presidency rather than to individual presidents.¹⁵⁴

Still, the simple account of constitutional law making does not fully grasp the full range of choices facing political actors who might, but need not always, resort to juridic language or methods to enforce individual rights. There are times when progress on matters of rights can be made more effectively when not cast explicitly in liberty or equality terms at all.¹⁵⁵ Presidents might tell the world they are not making rights but are merely defending an “original” Constitution. This can be more of a strategic ploy rather than an accurate description of their legal ambitions. As already illustrated, the benefits from selective reliance on juridic methods and from paying homage to the myth of judicial supremacy can be partly political, and partly legal. Departures from legal methodology do not always damage rights. Quite the contrary: being cognizant of political and social conditions can more effectively secure rights for the long term.

¹⁵⁴ See, e.g., Memorandum from David J. Barron, Acting Assistant Att’y Gen., U.S. Dep’t of Justice on Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> (“OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office.”); Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 516 (1993) (“On this point, the Office has tended to believe that its client is the institutional presidency, not any particular President.”). To be sure, how a president makes use of such legal advice is a different matter, and depends on his or her agenda and views about the relative competencies of various legal advisors.

¹⁵⁵ The rights of inmates and undocumented aliens come to mind. Rights discourse can galvanize already sympathetic communities, but also trigger vehement reactions from citizens who will deny that such groups should enjoy full or partial rights. This helps to explain why procedural approaches, with their generalist structure and application, are frequently favored over substantive approaches, which can highlight social group differences. See, e.g., Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. 149, 152 (2011) (“Our system has striven rather unsuccessfully to minimize the potential for abuse primarily by erecting safeguards that review prosecutorial and law enforcement decisions for adherence to procedural values.”).

At the same time, it would be a mistake to see presidential leadership on rights as merely an unprincipled recapitulation of ordinary politics. It involves sophisticated, popular law making—every bit as high-minded and binding as juridical processes when it is successful. An executive-based conception of rights will be powerfully shaped by political interests, but it will also tend to have more integrity than one might expect of a mere policy change. Such a right will be especially effective in areas within the executive branch's spheres of authority, since not every action or policy will face judicial review.

An executive-based conception of a right often bears the hallmarks of lasting decisions, usually through powerful articulations of legal principles combined with strategies to entrench a presidential theory of rights across multiple institutions and social domains. That way, a legal right can be preserved by different kinds of departmental rules and organizational practices (though it may be vulnerable to those separate dynamics as well). Once an institutional convergence over rights has been reached, it can be difficult to dislodge without expending significant political capital. A robust executive defense of rights is never presented as merely the one-time satisfaction of narrow constituent interests, but rather as a position informed by foundational values.

It is always theoretically possible for a new administration to alter its views on the scope of any particular right,¹⁵⁶ and this is an inherent weakness in the model of presidential leadership. Nevertheless, there are reasons to expect more continuity between administrations on rights than one might think. The key is the degree to which a particular right can be said to be well grounded as a social practice. Consider the following factors that militate against full-bore reversal of executive-based rights with each presidential succession:

1. *Practical governance constrains the transformation of rights.* If a new party gains control of the Oval Office, its political prospects now turn on the ability to govern rather than a capacity to undermine a political regime. Thus, a successful leader will avoid taking unnecessary, ideologically polarizing positions, especially those that strengthen the hand of the party in the minority in terms of counter-mobilization and distracting from a president's priorities.
2. *Rights in action are associated with constituencies.* In the eight years during which a party typically controls the presidency, the people may become reliant on the right in question. Every right creates

¹⁵⁶ For instance, the Trump administration has staked out different views about the proper scope of voting rights, abortion rights, the rights of sexual minorities, religious exemptions to civil rights laws, and perhaps others too.

constituencies, and those constituencies may try to punish a president and his party if they publicly oppose a cherished right. Parties, social groups, and their allies use rights to increase electoral gains, either by defending rights or challenging them.¹⁵⁷

3. *Rights are enmeshed in social reality through institutional practice.* In the meantime, a president has enjoyed some success entrenching his view of the right in question by appointing ideologically friendly judges, authoring executive orders, enacting regulations, authoring policies and memos, creating new bureaucracies, or taking other actions within his sphere of influence to disseminate and codify the right.
4. *Judicial endorsement of presidential action is the gold standard, though legislative assent comes a close second.* In the meantime, courts may have explicitly embraced the legal views of the past president during litigation, thereby adopting it as legal doctrine. Once such socio-legal consensus is achieved, it becomes more difficult and costly to disturb (in terms of bureaucratic and cultural resistance, as well as political resources that could be spent elsewhere). In lieu of judicial endorsement of a theory of rights, congressional approval can help raise the costs of reversal by a president's successor.¹⁵⁸

¹⁵⁷ Social Security offers the best historical example. As Franklin Roosevelt famously observed, the goal of using the payroll tax mechanism was “to give the contributors a legal, moral, and political right to collect their unemployment benefits.” ARTHUR M. SCHLESINGER, *THE COMING OF THE NEW DEAL, 1933–1935*, at 308–09 (1958). He bet that “[w]ith those taxes in there, no damn politician can ever scrap my social security program.” *Id.* The Republican White House and Republican-controlled Congress are currently in the midst of testing this socio-legal insight as it relates to national healthcare: whether the American people truly think of healthcare as a socially grounded right (something that has obtained legal or, perhaps in the hopes of Obamacare’s most ardent defenders, a quasi-constitutional status) or whether it is merely a socio-legal entitlement that can be curtailed or repealed whenever any party wins one election cycle. See, e.g., Steve Benen, *GOP senator: Health care coverage is ‘a privilege,’ not a right*, MSNBC (Oct. 2, 2017, 9:20 AM) (quoting one Republican Senator as saying, “I think [healthcare is] probably more of a privilege [than a right].”). The Republican Party’s facility with mobilizing gun rights constituencies is another, more recent illustration.

¹⁵⁸ The Obama administration’s end to “Don’t Ask, Don’t Tell,” certified by the military and approved by Congress, embraced a theory of equality as it relates to sexual orientation in the military, a domain in which courts have struggled to create enforceable rights. Later presidents might disagree, but the costs of trying to reverse such a ban, given congressional and agency approval, is almost certainly too high to pay. The issue of torture might be another area, where judicial norms against cruelty have now been approved by Congress, which then allows advocates and elected officials to argue that the issue has become “settled law.” See 42 U.S.C. § 2000dd (2012) (banning “cruel, inhuman, or degrading treatment or punishment” of any prisoner of the U.S. government); Alexander Bolton, *Top Senate Republicans: Torture Ban is Settled Law*, THE HILL (Jan. 25, 2017, 1:42 PM), <http://thehill.com/homenews/senate/316113-top-senate-republican-torture-ban-is-settled-law> (“Those issues are settled law. Congress has spoken.” (quoting Senator John Thune)).

5. *Not all presidential tactics are equal.* Certain kinds of executive actions are more easily reversed than others. An executive order can be rescinded by a successor president and a legal opinion by the Office of Legal Counsel can be recalled by the Attorney General, but that assumes no significant constituencies have arisen that are dependent on that right. It also assumes Congress has not codified the course of action into law (and courts have not required that course of action as a matter of law).
6. *Rights transformations are usually asymmetrical.* In the politics of leadership, it looks worse to be a president who takes rights away as opposed to one who gives new rights to the people, so we should assume, absent an emergency, an asymmetrical quality to rights discourse that favors the preservation or expansion of existing rights.¹⁵⁹ Actions perceived as depriving a constituency of rights are expected to be more costly,¹⁶⁰ and if curtailment is successful, more susceptible to reversal by successors or other institutions.
7. *The degree of social grounding of rights is the ultimate test of longevity.* The more that an individual right can be entrenched across governmental agencies, a variety of political and legal texts, and bureaucratic practices, the more stable that right is. This is what it means to put rights into action.

Keep in mind, too, the various ways that judicial interpretations of rights are less stable and complete than commonly believed. Any judicial declaration of rights must be enforced by others and is therefore subject to fear of defiance in its very formulation. Furthermore, the fractured nature

¹⁵⁹ For instance, Executive Order 9066, which created the mechanism for the wartime internment of Japanese Americans, has damaged FDR's historical reputation. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). Likewise, many will say that the authorization of torture permanently stains George W. Bush's presidency.

¹⁶⁰ The Trump administration announced that it would retain the government workplace non-discrimination rules that include sexual orientation established by President Obama. Jeremy W. Peters, *Obama's Protections for L.G.B.T. Workers Will Remain Under Trump*, N.Y. TIMES (Jan. 30, 2017), <https://mobile.nytimes.com/2017/01/30/us/politics/obama-trump-protections-lgbt-workers.html>. In explaining its adherence to sexual orientation equality in this sphere, the White House statement cited the fact that Trump "continues to be respectful and supportive of L.G.B.T.Q. rights, just as he was throughout the election The president is proud to have been the first ever G.O.P. nominee to mention the L.G.B.T.Q. community in his nomination acceptance speech, pledging then to protect the community from violence and oppression." *Id.* This and other episodes suggest there are several kinds of constraints that can favor continuity of executive-based legal and constitutional norms: philosophical agreement with a predecessor, reputation-enhancing benefits from appearing to be a strong leader not beholden to party, broader cultural attitudes, party preferences, likelihood of backlash of reversal, the desire to minimize distractions from other priorities.

of litigation ensures that the content of individual rights will vary from jurisdiction to jurisdiction—with more variation in controversial cases. Injunctive relief must be closely tailored to the particularized injuries of complainants after byzantine rules of standing are met (no such jurisdictional or remedial rules govern changes in executive policy or practice), and despite a recent willingness on the part of judges to grant such relief, nationwide injunctions remain a controversial remedy, given concerns about undue interference with national policies and the ease of forum shopping.¹⁶¹

Violations of injunctions, too, are subject to rules requiring gradually escalating pressure on recalcitrant government actors. By contrast, changes in an administration's executive orders, agency interpretations of the law and Constitution, policies, guidelines, and enforcement practices have broader reach than most judicial orders and are easier to accomplish. A president also possesses more tools at his disposal to streamline a theory of rights, especially within his spheres of influence.

One important clarification: My point here is not to suggest that a president's articulation of individual rights is always superior to judicial interpretations or somehow immune to politics. To the contrary, my argument concedes that politics infuse the making of rights from beginning to end, and claims that presidential politics are sufficiently complex that one should expect to find surprising areas of stability across time.

Even when a candidate from a different party wins the presidency based on promises to undo his predecessor's achievements, a successor might find a more confined environment upon taking office. Efforts to repeal, narrow, or undermine an inherited policy on rights may prove to be more costly than originally anticipated or distracting to other priorities. Loyalists of a prior regime may resist changes on ideological grounds. Thus, outright repudiation of a legal right by a successor may be untenable, and legal transformation, if it is to be undertaken by high officials, must be done surreptitiously.

The Trump administration's efforts to repeal Obamacare in 2017, capped by the Senate's failure to gain a majority vote to do so, offered a stunning example of these lessons in action. For years, a number of politicians had called for healthcare as a national right. After litigation intended to upend the law mostly failed, President Obama declared victory by saying, "In the United States, health care is not a privilege for the

¹⁶¹ For skeptical accounts of nationwide injunctions, see Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U.L. REV. (forthcoming 2017) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931267; Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 130 HARV. L. REV. (forthcoming 2017) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2864175.

fortunate few, it is a right.”¹⁶² Republicans regularly assailed the Affordable Care Act on the campaign trail, but given the opportunity and power to erase it legislatively, came face to face with the reality of healthcare as a right: mobilized constituents angry over the loss of coverage and rising costs, healthcare insurers concerned about the economic uncertainties entailed in repeal, and medical providers worried that the quality of care might worsen.

Efforts to erode healthcare as an individual right continue, but until conservatives and libertarians can find a solution they can rally around, erosion will have to be done through executive action alone. For instance, President Trump suggested he might just let the system “collapse” from neglect, perhaps by refusing to pay insurers on time, by not enforcing the tax penalty for being uninsured, or even by spending less money on things that affect how many people learn about available plans and sign up for one of them.

The Trump administration’s initial approach to the Deferred Action for Childhood Arrivals (“DACA”) is another useful example. As a candidate, Trump had vowed to immediately undo President Obama’s executive order granting a stay of removal to this class of undocumented immigrants who came as children.¹⁶³ Because DACA created 800,000 beneficiaries, or “Dreamers,” and those individuals enjoyed significant support among Americans,¹⁶⁴ Trump initially did not end DACA but instead made Dreamers a priority for removal only if they committed a crime or engaged in fraud.¹⁶⁵ For nine months, any effort to undermine the status of Dreamers could only be done covertly.

¹⁶² Scott Wilson & Ovetta Wiggins, *Obama Defends Health-Care Law, Calling Health Insurance ‘A Right,’* WASH. POST. (Sept. 26, 2013), https://www.washingtonpost.com/politics/obama-defends-health-care-law-calling-health-insurance-a-right/2013/09/26/9e1d946e-26b8-11e3-b75d-5b7f66349852_story.html?utm_term=.c32322178906.

¹⁶³ See Serena Marshall, *What Could Happen to DACA Recipients Under Donald Trump*, ABC NEWS (Nov. 16, 2016, 2:28 PM), <http://abcnews.go.com/Politics/happen-daca-recipients-donald-trump/story?id=43546706> (discussing Donald Trump’s campaign promises to end Obama’s executive orders).

¹⁶⁴ Fifty-eight percent of those polled think Dreamers should be allowed to stay and given a shot at earning citizenship, while another eighteen percent support allowing them to stay but oppose citizenship. Only fifteen percent believe they should be deported. Steven Shepard, *Poll: Majority Opposes Deporting Dreamers*, POLITICO (Sept. 5, 2017), <https://www.politico.com/story/2017/09/05/poll-trump-deporting-daca-dreamers-242343>.

¹⁶⁵ Dreamers were made subject to the new rules that expand the list of grounds for removal, including conviction “of any criminal offense,” commission of any act that could be “a chargeable criminal offense,” “fraud in connection with any government matter,” or abuse of “any program related to receipt of public benefits.” See Memorandum from John Kelly, Sec’y, U.S. Homeland Sec., Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf (urging Homeland Security personnel to “prioritize” the removal of certain illegal aliens).

After much internal debate, the White House announced it would be phasing out the program over a six-month period to give Congress a chance to fashion a legislative solution.¹⁶⁶ Attorney General Jeff Sessions argued that President Obama's prior executive order was unconstitutional and indefensible in court, and denied that an indispensable social good was created by the program.¹⁶⁷

Because President Trump's decision suddenly altered the expectations of Dreamers, he tried to shift the responsibility of maintaining the status quo to Congress. This was always the part of his immigration policy most likely to earn a legislative reversal, with some members of his own party joining Democrats rebuking the President, advocacy groups promising to tie up the change in litigation, and legislators promising bipartisan efforts to pass a Dream Act. In fact, just days after Sessions announced the shift in policy, President Trump undercut his own Attorney General's position, saying that he agreed with Democratic leaders that something needed to be done to protect Dreamers.¹⁶⁸

Thus, DACA poignantly illustrates precepts 2 and 5, that rights can develop powerful constituencies and not all presidential actions are equal, for Obama's decision to take a controversial act based solely on the theory of prosecutorial discretion rendered it more vulnerable to repudiation. At the same time, DACA tests maxim 6, which posits that rights developments are usually asymmetrical, as proponents of DACA now try their best to ground Dreamers' rights and benefits through more durable processes of bicameralism and presentment.

To say that presidential views on certain rights can remain stable across administrations does not mean that a president will always adopt the more expansive rights interpretation every time. That would be an overly deterministic account of how executive-created rights work. It simply means that the social conditions favor respect for a right such that deviations from that position would have to be justified *and that the costs of deviating from such a principle will have increased in important ways*

¹⁶⁶ Eliana Johnson, *Trump Has Decided to End DACA, with 6-Month Delay*, POLITICO (Sept. 4, 2017, 12:40 AM), <https://www.politico.com/story/2017/09/03/trump-dreamers-immigration-daca-immigrants-242301>.

¹⁶⁷ Letter from Jefferson B. Sessions, Att'y Gen., to Elaine Duke, Acting Sec'y Homeland Sec. (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.

¹⁶⁸ Maggie Haberman & Yamiche Alcindor, *Pelosi and Schumer Say They Have Deal With Trump to Replace DACA*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/us/politics/trump-dinner-schumer-pelosi-daca-obamacare.html>. On September 14, 2017, President Trump tweeted: "Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really! . . . They have been in our country for many years through no fault of their own - brought in by parents at young age." Donald Trump (@realDonaldTrump), TWITTER (Sept. 14, 2017, 3:35 AM), <https://twitter.com/realDonaldTrump/status/908278070611779585>.

from the previous status quo in which no expectation of rights existed. Occasional exceptions from a binding norm are never the same as a denial of the baseline existence of an authoritative principle.

The social realities involved in the making of rights are confirmed by the manner in which wily advocates talk about particular controversies. Astute participants in a constitutional debate speak with one eye on an imaginary clock. Proponents of rights try to act as expeditiously as possible to make reliance on rights part of their constituents' social existence and to maximize the advantages of path dependency. Opponents, too, see themselves as working furiously to prevent a critical mass of citizens from giving up on their narrower vision of rights. For instance, Obamacare's detractors sought to delay implementation of the plan and stoke support for its repeal at every turn. They worried, justifiably, that once the rollout occurred the right to healthcare would become ingrained as part of what they called "a culture of dependence."¹⁶⁹

Despite the pejorative quality of these statements (intended to foster a lingering sense of shame and illegitimacy), they nevertheless confirmed a sense that once rights are granted and a constituency develops around such a right, a contrary interpretation of law will be far more difficult to dislodge. The same can be said of the social foundations of same-sex marriage rights; the more that civilly recognized bonds of this nature became a part of everyday life, the harder it would be to reverse this dynamic without incurring major social, institutional, and political costs.

The gay marriage issue bears many of the indicators of a transformation of an individual right that may prove to be lasting rather than fleeting. For one thing, the pressure to resist development of this right has seemingly reached its high point and begun to slide, whereas support for the right has been swift, surprisingly broad-based, and sustainable in an intergenerational way. Second, the weight of judicial decisions is markedly one-sided, with rulings striking down state DOMA's in liberal and conservative jurisdictions across the country—culminating in *Obergefell*. The emergence of a juristic resolution hinted at a broader popular consensus, but more importantly, suggested a unifying way of thinking of the constitutional stakes—one that became increasingly attractive to legal

¹⁶⁹ See AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY, at lix (William F. Buckley, Jr., ed., 2011) (describing welfare state generally as creating a "culture of dependence"); Bobby Jindal, *Declaration of Independence, Not Dependence*, REDSTATE (July 3, 2012, 5:30 PM), <http://www.redstate.com/bobbyjindal/2012/07/03/declaration-of-independence-not-dependence> (arguing that Supreme Court's healthcare ruling and Obama's policies foster "culture of dependence"); Merrill Matthews, *We've Crossed the Tipping Point; Most Americans Now Receive Government Benefits*, FORBES (July 2, 2014), <http://www.forbes.com/sites/merrillmatthews/2014/07/02/weve-crossed-the-tipping-point-most-americans-now-receive-government-benefits/> ("But attitudes can change once people are on the receiving end of benefits, even if they are owed those benefits.").

actors.¹⁷⁰ Third, in both appearance and fact, judges could be said to have followed a durable shift in public attitudes rather than trying to lead them.

None of this means that disagreement will disappear, for religious dissent remains critical to a pluralist legal order. Efforts to strike the right balance between equality and pluralism will continue. What it does mean is that now that a right to same-sex marriage has been backed by a sitting president and inscribed by the Court into its precedents, the costs of resistance to the new constitutional norm go up considerably for successors.¹⁷¹

B. *Does Presidential Leadership Imply Judicial Subordination?*

Recognizing that the modern presidency possesses great power to transform individual rights does not relegate courts to an inferior position. Instead, it simply recognizes several realities. First, each coordinate branch has an independent duty to read and apply the Constitution. Presidential leadership is merely the primary mechanism used by ideologically committed executive branch officials to make changes to dominant constitutional understandings. In that sense, the Constitution is superior to both the presidency and the judiciary. Second, in the ideal world, we should want presidential actors to care deeply about their constitutional responsibilities, to become expert at carrying them out, and to strive to persuade others of the correctness of their interpretation when they believe others have fallen short. Third, executive-based development of rights assumes even greater importance when one understands that courts can handle only so many cases as a practical matter and have restricted court access through a host of technical legal doctrines. That means that for many kinds of executive actions, policies, and practices, regular judicial oversight is simply not realistic.

It is possible, of course, for a populist president to conceive of rights in ways that depart from established judicial understandings. For example, during his campaign, President Trump endorsed policies that diverged

¹⁷⁰ Elections that lead to a change in party control of the executive branch qualify as such a jurisprudentially disruptive event, though the degree of disjunction will vary depending on the right in question. Trump's political rhetoric suggests that he does not consider reversal of established gay rights as a priority, but his pick of Jeff Sessions as Attorney General suggests augur changes in areas that are not yet well established. For instance, a shift in position on the rights of transgendered persons was always more likely than not given his choice of Vice-President and Attorney General, both of whom are social conservatives opposed to expanding rights for sexual minorities, and the other shoe indeed dropped within two months of Trump taking office. See Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>.

¹⁷¹ Running against the Court and its same-sex marriage ruling is one thing (one would expect most Republican presidential candidates to do this), but what resources an elected president would actually devote to undermining the individual right is quite another.

from judicial rulings on free speech, religious freedom, search and seizure, and cruel and usual punishment. My model recognizes a president's prerogative to make claims that judicial conceptions fail to strike the right balance given the people's sentiments or priorities. Every president has the power to test the social foundations of constitutional law. But he will have to be ready to battle to actually alter settled expectations about rights.

Where a conception of rights is not well codified, either in judicial rulings or statutes, a change in position on the part of a president does not threaten the judicial function. It might result in unwise policy, but that alone would not upset the constitutional balance. Granting more protections to individuals within a president's sphere of authority than the courts have done (say, as the military's new policies regarding sexuality do) generally raises no problem, unless there is a direct conflict with another constitutional power or individual liberty.

But what if a president decides that individual rights have gone too far, and insists that judicial interpretations should be restricted further or explicitly overruled? This might characterize President Trump's Muslim travel ban, which has tested well-established ideas of equality and religious freedom, as much as it describes FDR's more limited theory of the right of contract in the 1930s.¹⁷² Here, too, a president's chances of success will turn on whether he resists judicial interpretations in ways that still respect the courts' prerogative to say what the law is. Outright defiance of a binding judicial order will rarely be countenanced. Yet, short of waging open war against the judiciary, a president can often reshape rights in his own domain, and then cajole others—agencies, legislators, and even judges—to go along.

C. Presidential Leadership Rather than Partisan Entrenchment or the "Ground Up" Approach

Political parties play an important role in the development of rights and the prospect that a president might seize a leadership role over such matters. Parties shape agendas by determining policies that can impact established rights, and by describing certain kinds of issues in rights-based rhetoric. They generate support for some rights over others, and try to force

¹⁷² Upon taking office, President Trump signed an Executive Order restricting travel and refugees from seven majority-Muslim nations, while declaring publicly that Christian refugee claims would be given priority over others (the Executive Order itself speaks of minority religions in each country). Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017). That order was immediately enjoined by the courts. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). Trump then signed a second executive order, which reduced the number of countries affected to six and deleted the minority-religion preference. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). That order, too, has been tied up by judges. *Hawaii v. Trump*, 859 F.3d 741, 755 (9th Cir.), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), and *cert. granted, judgment vacated*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017).

candidates who wish to bear a party's standard to pre-commit to these rights. Once elected, party leaders can try to keep the momentum going on certain rights through lobbying the president, and if a president commits openly to a rights-based course of action (e.g., healthcare, ending the ban on gays in the military), the party may lend a hand by reinforcing an administration's messages.

At the same time, partisan processes describe some, but not all, of the dynamics at work when the executive branch seeks to lead the development of rights. Some comparative points can be drawn in reference to Jack Balkin and Sandy Levinson's work, which outlines a model of constitutional lawmaking that they call "partisan entrenchment."¹⁷³ According to this model, constitutional doctrines change in large part as presidents try to inscribe their party's policy preferences on the law. For Balkin and Levinson, the key to the model is that partisans anticipating an eventual loss of access to formal power take steps to entrench their constitutional visions by appointing judges who seem to share their values.¹⁷⁴ Although these authors at times seem to limit the scope of their theory to the appointments power and exclude presidential constructions of the Constitution, at other times they suggest that a full version of the theory would include advisory actions and litigation conducted by executive branch lawyers.¹⁷⁵

What Balkin and Levinson get right is that judicial endorsement of another actor's constitutional theory is the gold standard as a matter of party strategy; judicial interpretations carry a normative claim, backed by the practice of judicial review, across multiple social domains. But the theory of partisan entrenchment is incomplete in several ways.

First, it blurs partisan processes with other institutional dynamics that are not overtly partisan in nature. These non-partisan processes that can influence executive-based development of rights include agencies, the civil service, the foreign policy establishment, advocacy groups, and the legal profession. As the Trump administration's troubles in advancing its agenda have revealed, these actors, organizations, and their non-governmental allies have independent characters of their own; they can find themselves acting in concert with a party in power on a question of rights, but can also find themselves at odds with a presidential agenda to preserve a predecessor's theories of rights and powers. To subsume all of these

¹⁷³ Balkin & Levinson, *supra* note 20, at 491; *see also* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) ("Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.").

¹⁷⁴ Balkin & Levinson, *supra* note 20, at 490–92.

¹⁷⁵ *See id.* at 497–500 (discussing prominent theories of constitutional change).

dynamics within a president's desire to advance his party's interests is to deny these individuals and associations agency.

Second, the fact that the appointments power remains central to the story of partisan entrenchment keeps courts at the center of constitutional theory. By doing so, it misses that a president can often make constitutional law in his own domain without resorting to the courts, even if doing so goes beyond, or at times appears to undermine, judicial interpretations of rights. A president's vision of constitutional liberty and equality can be spread among executive branch institutions, administrative regulations, advisory opinions, and agency policies, quite apart from what courts say (which I should add, tends to be cautious and undertheorized most of the time, anyway).

Third, partisan considerations are crucial, but not always determinative, features of presidential decision making. Not all individual rights are prominently featured in a party's platform and when they are, a president is free to set his own priorities and timetable for progress on such matters. Moreover, partisan dynamics cannot fully account for the dynamics of transformative leadership. A president inhabits a different mindset from that of a party leader when he seeks to articulate a theory of individual rights, one in which he believes he must represent all of the people of the United States.

My criticism of partisan entrenchment does not mean that political parties are irrelevant. It means only that actions have to be justified on more than partisan terms and that it is important for a president to avoid charges of overly partisan behaviors when seeking to transform constitutional rights. Any president worth his salt is driven by a desire to create a historical legacy, and this psycho-political dimension of legal development is broader and more complicated than satisfying one political party's demands. A president's reputation—if he is to be remembered as a great leader—entails successfully confronting national problems that arise, rather than simply pushing a list of policy objectives drawn up by political patrons. In this sense, partisan entrenchment misstates the frame of mind necessary to alter constitutional commitments in a durable fashion.

If the two-party system alone cannot drive or authorize constitutional change, neither can a particular social movement do all the work that is necessary for lasting shifts. “Bottom-up” accounts of law have helped recover lost details about the lives of less celebrated social activists and the forgotten connections between legal ideas.¹⁷⁶ But social movement theory

¹⁷⁶ See, e.g., NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* (2017); LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF STRUGGLE* (2016); SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915* (2013); DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* (2001).

ultimately runs out of explanatory power when it comes to constitutional change. For one thing, because a movement lacks formal authority under the Constitution and laws, no social movement can ever exercise the power to initiate or authorize constitutional change. For another thing, concerns will always be raised that a movement does not represent widespread sentiment. Instead, every movement is vulnerable to charges that it represents parochial or partial interests.

Many movements associate themselves with particular parties to gain proximity to power (say, the Labor movement and the gay rights movement with the Democrats, or the Tea Party movement and the pro-life movement with the Republicans). But any movement that links its agenda to party politics risks capture by party operatives and the dilution of movement goals.

At its finest, a social movement can invoke the rhetoric and tradition of popular sovereignty to prick the conscience of fellow Americans and try to shape the terms of debate. Its members can turn to the courts, seek to infiltrate governmental agencies, and agitate outside of formal processes when the odds look long. But most of the time, they must hope for a rupture in historical time or the emergence of a national coalition.

In fact, the best plan for constitutional success is to secure the support of formal decision makers. Courts have been a favorite institution for activists, but for reasons already discussed, judges remain unreliable allies. Constitutional change through judicial appointments takes years, sometimes decades, to reach the point that a major doctrinal shift is pronounced and likely to take place. Legislators, too, are a fractured bunch and the costs of securing enough legislative support can be too high a price for marginalized groups to pay.

Faced with these choices, presidential leadership over rights can present the most dynamic and promising option. Presidents and their allies, more than any other national actor, can efficaciously respond to a movement's grievances and lend legitimacy to its cause. It is easier to infiltrate government agencies and bypass formal processes to gain the ear of a well-connected White House aide. Executive branch officials have a wide range of tools by which to advance the cause of rights outside of the courts—not only in making tangible legal changes but also in trying to shape public discourse.

A president's lawyers enjoy clout precisely because they are not perceived as movement figures. Even so, in the courts, high officials can adopt movement language and ideas, urging judges to see the stakes as they do and to speak about them in similar terms. More than ever, it makes sense to pay close attention to this model of legal transformation, especially in a world where the Supreme Court takes fewer and fewer cases and Congress remains gridlocked for much of the time.

Presidential intervention occurred at a key moment for the marriage equality movement. After major setbacks, activists began to secure achievements at the state level. These successes came in beating back anti-gay marriage laws at the ballot box and advancing the cause of marriage equality in the courts—especially in Massachusetts. Wins in state court helped build momentum for victories in federal court, and those federal judicial decisions could then be taken to other state courts.¹⁷⁷

But even then, the federal DOMA loomed. That federal law, signed by a Democratic President and supported by many legislators at the time, remained a major obstacle to recognition of gay marriage as a social good that implicated the rights of national citizenship. DOMA not only barred federal agencies from treating gay marriages the same as opposite-sex marriages, but it also signaled to important constituencies and state actors that the people as a whole embraced traditional marriage.

President Obama's change of mind on the issue came at a crucial time: late enough that he could not be considered a crusader, but early enough to have an impact on the ultimate outcome. His aides' creation of a different constitutional theory of rights, and their efforts to implement a new conception of equality across multiple agencies, helped alter the social environment in which landmark judicial decisions were made. In both word and deed, the administration characterized gay marriage as a social good governed by constitutional law, as consistent with popular sentiment and the lived experience of ordinary Americans, and as a right that the executive branch would help to enforce. And in the end, those efforts helped put that individual right on a path to wider acceptance.

CONCLUSION

This article has employed the Obama administration's turnabout on gay marriage as a case study on how a president can create constitutional rights in his own spheres of influence, popularize alternative theories of the Constitution, and prod the courts to reconsider their interpretation of rights. This model of constitutional law making is premised on the phenomenon of presidential leadership, which allows such a figure to seek transformative changes in the nation's laws and policies by appealing to popular sentiment.

An American president who invokes this tradition to remake constitutional rights faces many social constraints. Most of the time, he will have to exploit legal opportunities created by others. When the model

¹⁷⁷ *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 968 (Mass. 2003) (“Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under the law protected by the Massachusetts Constitution.”). Justice Kennedy cited *Goodridge* in both *Windsor* and *Obergefell*. *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597, 2600 (2015).

succeeds—and the recognition of same-sex marriage as a constitutional right can be counted as a success story for this model of leadership—social conflict must turn into institutional coordination long enough for new values to be codified. On this occasion, the right to same-sex marriage became mutually reinforced through judicial rulings, executive branch policies, and interpretations of federal law.