

# *Obergefell's Audiences*

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I.	INTRODUCTION .....	1011
II.	BRIEF BACKGROUND OF <i>OBERGEFELL</i> AND THE DEBATE THAT PRECEDED IT .....	1013
III.	MULTIPLE AUDIENCES .....	1016
	A. <i>Professional Legal Audience</i> .....	1016
	1. <i>Lawyers and Lower Courts</i> .....	1016
	2. <i>The Court's Role in a Democracy</i> .....	1019
	B. <i>The Public as Audience</i> .....	1021
IV.	IMPLICATIONS AND CONCLUSION .....	1033

## I. INTRODUCTION

*Obergefell v. Hodges*<sup>1</sup> was a blockbuster by almost any measure. It resolved one of the most high-profile social and cultural debates of the day. It created a new fundamental right or extended an existing one—depending on whom you ask—for the first time in decades. It reflected in self-conscious fashion on the very purpose of a constitution. It seems uncontroversial to say that it will enter the pantheon of Fourteenth Amendment landmarks—along with decisions like *Brown v. Board of Education*,<sup>2</sup> *Loving v. Virginia*,<sup>3</sup> *Roe v. Wade*,<sup>4</sup> *Lawrence v. Texas*,<sup>5</sup> and others. There are similarities and differences between and among these cases, but all of them used the Fourteenth Amendment to confer significant rights, and all were contested, albeit to varying extents and in varying ways. *Obergefell's* sibling, *United States v. Windsor*,<sup>6</sup> belongs on this list as well, though it was technically decided under the Fifth, not Fourteenth, Amendment.<sup>7</sup>

What influence will *Obergefell* have? What are its doctrinal implications? How will the opinion be viewed in history? Such questions are commonly asked about a new landmark decision. Framed in this way, though, these questions are too general to be useful, for there are multiple audiences for Supreme Court opinions and they are likely to look at the opinion through

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<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>2</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>3</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>4</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>5</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>6</sup> *See generally* *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding the Defense of Marriage Act's definition unconstitutional under the Fifth Amendment).

<sup>7</sup> *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that the Fourteenth Amendment Equal Protection Clause applies to the federal government through the Fifth Amendment Due Process Clause).

different lenses. In the case of *Obergefell*, lawyers, litigants, lower court judges, public officials, activists, interest groups, media observers, and scholars are all likely to be interested in the case. What about the broad public? Is it, too, a meaningful audience for the Court's opinions? There is a rich tradition of scholarship that gives pride of place to this idea and casts the Court as a critical teacher of constitutional values.<sup>8</sup> That view might hold special sway in the context of a case as exceptionally salient as *Obergefell*.

In this Article, I will focus on two kinds of audiences for *Obergefell*. I will call the first a conventional legal audience and include here lawyers, lower court judges, and constitutional law scholars. These observers would likely bring to the decision questions about what the case means for constitutional doctrine and future cases, what it might reflect about the role of courts in producing social change, and what it tells us about the contested boundary line between democratic decision-making and judicial review. The second audience I will consider is the broad public, by which I mean the lay, non-lawyer public. This public audience is the focus of the didactic view of the Court, in which the Justices are tasked with being a “republican schoolmaster[]”<sup>9</sup> or teacher of a “vital national seminar.”<sup>10</sup> The lay public is, in other words, the object of those who think the Court writes opinions that teach the country about constitutional values. How, if at all, were any teachings of this kind transmitted, and what lessons might this audience have taken from *Obergefell*?

My purpose in proceeding in this fashion is, in part, simply to emphasize that there are multiple audiences for the Court's work, and that it matters in assessing a major opinion which perspective is brought to bear. Moreover, juxtaposing these audiences suggests some ways in which the fact that the Justices are writing for multiple audiences can help to shape their opinions.

In Part II, I very briefly summarize the same-sex marriage debate and the *Obergefell* opinions. In Part III, I examine the majority opinion and some of the dissents from the perspective of the two audiences I have identified. I begin with the conventional legal audience. I focus first on the opinion's doctrinal elements, and next on the debate among the Justices about a classic question: whether the Court acted appropriately in judicially resolving one of the most hotly contested cultural debates of its time. I then turn to the public audience for *Obergefell*, reviewing some of the prominent themes reflected in responses to the opinion by public figures and by non-lawyers on the Internet and through social media in particular. In Part IV, I briefly consider how the public's increased access to the Court's work might bear on the Justices' elaboration of doctrine and their role in democracy—that is, on matters of interest to its more conventional audience.

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<sup>8</sup>Classic accounts include Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, and Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

<sup>9</sup>Lerner, *supra* note 8, at 180.

<sup>10</sup>Rostow, *supra* note 8, at 208.

## II. BRIEF BACKGROUND OF *OBERGEFELL* AND THE DEBATE THAT PRECEDED IT

*Obergefell* settled a long running controversy in this country about the right of same-sex couples to marry.<sup>11</sup> It was essentially a play in three acts.<sup>12</sup> The first act began in 1993, when the Hawaii Supreme Court was poised to declare a right to marry under the equal rights amendment in the State's constitution,<sup>13</sup> though it never actually did so. The mere suggestion was enough to produce a massive backlash, including the federal Defense of Marriage Act (DOMA) and what, over time, came to be some forty state law analogues of varying sorts.<sup>14</sup> That consumed most of the first decade, with only a Vermont decision leading to the creation of civil unions representing a major legal step forward for same-sex couples.<sup>15</sup>

The second act spanned from 2003 to 2013, and it began and ended with extraordinary victories for LGBT rights. In 2003, the Supreme Court overturned sodomy bans in *Lawrence v. Texas*<sup>16</sup> and, a few months later, the Massachusetts Supreme Judicial Court became the first to find a state constitutional right to same-sex marriage in the pathbreaking decision *Goodridge v. Department of Public Health*.<sup>17</sup> That decision was followed by legal defeats and victories for marriage equality, along with intensifying legislative and political debates. Those political debates increasingly involved fights over whether and how religious liberty should be preserved in states that enacted same-sex marriage.<sup>18</sup> In 2013, the Supreme Court took the dramatic step of declaring DOMA unconstitutional in *United States v. Windsor*.<sup>19</sup> The

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<sup>11</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605–07 (2015).

<sup>12</sup> Citations for this chronology appear in Jane S. Schacter, Commentary, *What Marriage Equality Can Tell Us About Popular Constitutionalism (and Vice-Versa)*, 52 HOUS. L. REV. 1147, 1154–62 (2015) [hereinafter Schacter, *What Marriage Equality Can Tell Us*]. See also MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1165–75 (2009) [hereinafter Schacter, *Courts and the Politics of Backlash*].

<sup>13</sup> *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding that the bar to same-sex marriage must be reviewed by the lower court under a strict scrutiny standard), *abrogated by Obergefell*, 135 S. Ct. 2584.

<sup>14</sup> See David Masci & Ira C. Lupu, *Overview of Same-Sex Marriage in the United States*, PEW RES. CTR. (Dec. 7, 2012), <http://www.pewforum.org/2012/12/07/overview-of-same-sex-marriage-in-the-united-states/> [<https://perma.cc/E59S-FZRM>] (noting that forty states legislated against same-sex marriage and many also enacted constitutional bans).

<sup>15</sup> *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (holding that the state constitution entitled same-sex couples to equal rights, whether called marriage or something else).

<sup>16</sup> *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

<sup>17</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

<sup>18</sup> Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2558–65 (2015).

<sup>19</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

majority opinion cursorily deferred for another day the question whether there was a federal constitutional right to marry in every state,<sup>20</sup> but *Windsor* plainly teed up that question. It turned out that it did not take long to get the answer.

The third act began with the post-*Windsor* filing of federal court marriage equality cases in states all over the country, the vast majority of which succeeded.<sup>21</sup> The most significant exception was the Sixth Circuit's decision upholding bans on same-sex marriage in Ohio, Kentucky, Michigan, and Tennessee.<sup>22</sup> That case ultimately brought *Obergefell* to the Court. It is worth noting that, as I have argued elsewhere, when *Obergefell* did reach the high Court, the marriage debate had by that time involved virtually every branch of government, state and federal.<sup>23</sup> Courts, legislatures, governors, attorneys-general and voters themselves through ballot initiatives (and in one case a contested judicial retention election) had participated at various points.<sup>24</sup> When *Obergefell* was argued, thirty-seven states allowed same-sex couples to marry.<sup>25</sup> Some states had adopted same-sex marriage through legislative or voter action, though more had done so because of constitutional rulings by state or federal courts.<sup>26</sup> While the state supreme court decisions had begun with *Goodridge* in 2003, the federal rulings were much more recent and had come in a rapid and compressed wave of post-*Windsor* decisions in favor of marriage equality.<sup>27</sup>

The Supreme Court's 5–4 decision in *Obergefell*, striking down four state laws that prevented the licensing and/or recognition of same-sex marriages, was thus the culmination of more than two decades of noisy legal, political and cultural debate. The principal basis for Justice Kennedy's conclusion was the substantive due process-based notion of a fundamental right to marry.<sup>28</sup> His opinion acknowledged that “[i]t cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners” before concluding that “[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.”<sup>29</sup> There was a heavy dose of living constitutionalism in this approach, which the opinion made explicit by saying that “[t]he nature of injustice is that we may

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<sup>20</sup> *Id.*

<sup>21</sup> Schacter, *What Marriage Equality Can Tell Us*, *supra* note 12, at 1160.

<sup>22</sup> *DeBoer v. Snyder*, 772 F.3d 388, 418 (6th Cir. 2014), *rev'd*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>23</sup> Schacter, *What Marriage Equality Can Tell Us*, *supra* note 12, at 1175–82.

<sup>24</sup> *Id.* at 1172–82.

<sup>25</sup> Julia Zorthian, *These are the States Where SCOTUS Just Legalized Same-Sex Marriage*, TIME (June 26, 2015), <http://time.com/3937662/gay-marriage-supreme-court-states-legal/> [<https://perma.cc/5ZAZ-WZ7Y>].

<sup>26</sup> Schacter, *Courts and the Politics of Backlash*, *supra* note 12, at 1192–93.

<sup>27</sup> *Id.* at 1201–03.

<sup>28</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2585 (2015).

<sup>29</sup> *Id.* at 2598–602.

not always see it in our own times.”<sup>30</sup> The embrace of evolving constitutional norms reinforced the majority’s assertion that it was not constrained by *Washington v. Gluckberg*,<sup>31</sup> an important precedent that had limited the reach of substantive due process doctrine by requiring courts to find historical protections for claimed rights.<sup>32</sup>

In addition to relying on the fundamental right to marry, Kennedy sprinkled in references to equal protection<sup>33</sup> and emphasized—though did not clearly explicate the basis for—the “synergy between,” and “interlocking nature of,” liberty and equality.<sup>34</sup> The idea that banning same-sex marriage denied couples and their children dignity—a familiar theme for Justice Kennedy<sup>35</sup>—suffused the opinion and can be assimilated to ideas of both liberty and equality.<sup>36</sup> He closed the opinion on this theme, asserting that same-sex couples “ask for equal dignity in the eyes of the law. The Constitution grants them that right.”<sup>37</sup>

The dissents by the Chief Justice and Justice Scalia mostly pressed claims of judicial activism that focused on the idea that the Court had usurped what should have been a majoritarian decision. Roberts, for example accused the majority of “stealing” the issue from the people.<sup>38</sup> In a dramatic rhetorical flourish, he asked: “Just who do we think we are?”<sup>39</sup> Scalia pursued similar arguments, ratcheting up the rhetorical level further and calling the majority decision a “judicial Putsch”<sup>40</sup> achieved by a non-democratic body comprised of “nine unelected lawyers,”<sup>41</sup> and a “pretentious” and “egotistic” opinion that would lead him to “hide [his] head in a bag” if he ever signed it.<sup>42</sup> In his dissent, Justice Thomas focused on the meaning of liberty and contested the premise that the government could either confer or deny dignity.<sup>43</sup> Justice Alito most emphatically worried about stifling and stigmatizing those who opposed marriage equality on religious grounds.<sup>44</sup>

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<sup>30</sup> *Id.* at 2598.

<sup>31</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>32</sup> *Obergefell*, 135 S. Ct. at 2602.

<sup>33</sup> *Id.* at 2602–05.

<sup>34</sup> *Id.* at 2603–04.

<sup>35</sup> *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (invoking dignity in the context of race).

<sup>36</sup> *Obergefell*, 135 S. Ct. at 2603–04.

<sup>37</sup> *Id.* at 2608.

<sup>38</sup> *Id.* at 2612 (Roberts, C.J., dissenting).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2629 (Scalia, J., dissenting).

<sup>41</sup> *Id.*

<sup>42</sup> *Obergefell*, 135 S. Ct. at 2630 & n.22 (Scalia, J., dissenting).

<sup>43</sup> *Id.* at 2631–40 (Thomas, J., dissenting).

<sup>44</sup> *Id.* at 2640–43 (Alito, J., dissenting).

## III. MULTIPLE AUDIENCES

A. *Professional Legal Audience*1. *Lawyers and Lower Courts*

There is much to ponder if we look at the opinion and ask what traditional legal audiences will make of it. Most fundamentally, the question is how the case will be understood by lower courts and litigators, and how it will push and shape the doctrine. As is always the case, answers to these questions must await future application of *Obergefell* by lawyers and judges. Still, many important issues fairly leap off the pages of the opinion. To name a few: did the case categorically overrule *Washington v. Glucksberg*<sup>45</sup> and lay down a newly flexible marker for *all* fundamental rights? Is the due process–equal protection “synergy” stressed in the opinion a doctrinal innovation that will make a difference in future cases? What is the core idea of that synergy? Is it protecting “equal dignity,” as the end of the majority opinion suggested?<sup>46</sup> Or is it something more like “equal liberties?”<sup>47</sup> Is “synergy” a nod to the small but important body of decisions that travel under the name of equal protection–based fundamental interests?<sup>48</sup> If so, why was that not noted? Does the absence of any reference to “animus” in the opinion signal the abandonment of that idea in equal protection, notwithstanding the prominent role that it played in *Romer v. Evans*<sup>49</sup> and *Windsor*,<sup>50</sup> the Court’s two biggest equal protection decisions concerning sexual orientation?<sup>51</sup> While *Obergefell* made no reference to standard of review, did it nevertheless plant the seeds for heightening scrutiny for purposes of equal protection analysis at a later point? It is conceivable that it did so by touching on elements commonly used in traditional heightened-scrutiny analysis, including references to the history of

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<sup>45</sup> See generally *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>46</sup> *Obergefell*, 135 S. Ct. at 2608.

<sup>47</sup> See Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1491–500 (2002); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 133–40 (2007); Laurence H. Tribe, Essay, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1902–05 (2004); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50 (2011).

<sup>48</sup> For a review of “equal protection fundamental interests” as part of an attempt to situate marriage equality within that body of doctrine, see Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1413–21 (2010).

<sup>49</sup> *Romer v. Evans*, 517 U.S. 620, 632, 644 (1996).

<sup>50</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

<sup>51</sup> See Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 284–85; Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 910–14 (2012).

anti-gay discrimination and the political obstacles to gay political gains,<sup>52</sup> along with two breezy assertions that sexual orientation is immutable.<sup>53</sup>

These kinds of basic doctrinal questions about how *Obergefell* will play out in future cases are intensified by a striking fact: the majority opinion was written by the same justice who wrote every other Fourteenth Amendment opinion on lesbian and gay rights. Justice Kennedy wrote *Romer*, the first decision to apply the Equal Protection Clause to a gay rights claim in striking down a broadly worded ballot measure banning civil rights protections for lesbians, gays, and bisexuals;<sup>54</sup> *Lawrence*, striking down the Texas ban on same-sex sodomy;<sup>55</sup> and *Windsor* striking down the federal DOMA.<sup>56</sup> One is hard pressed to think of any other hotly contested area of constitutional law in which one justice wrote every major decision over the course of two decades.

The reason that Kennedy's monopoly of authorship deepens questions about the case is that all of these opinions have a shared quality of doctrinal obscurity that raises uncertainty about how they will be understood and applied in the future, especially a future when Kennedy is no longer on the Court. His approach in these cases has the anomalous quality of being both unusual and consistent. Three shared traits tie together the majority opinions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. First, they are full of lofty rhetoric. In *Romer*, for example, Justice Kennedy quoted Justice Harlan's famous language from the *Plessy v. Ferguson* dissent in saying "that the Constitution 'neither knows nor tolerates classes among citizens,'"<sup>57</sup> and called Colorado's Amendment 2 "unprecedented in our jurisprudence" and "not within our constitutional tradition."<sup>58</sup> In *Lawrence*, he invoked the idea that criminalizing same-sex sodomy demeaned and deprived gay people of dignity and respect,<sup>59</sup> and quoted the famously far-reaching language from *Planned Parenthood of Southeastern Pennsylvania v. Casey* linking personal liberty to "the mystery of human life."<sup>60</sup> Ideas about dignity and respect likewise pervade *Windsor* and *Obergefell*, with references, for example, to the "dignity and status of immense import" that marriage confers<sup>61</sup> and to the fact that "[i]t demeans gays and lesbians for the State to lock them out of a central

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<sup>52</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596–97 (2015).

<sup>53</sup> *Id.* at 2594, 2596.

<sup>54</sup> *Romer*, 517 U.S. at 635.

<sup>55</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>56</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>57</sup> *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>58</sup> *Id.* at 633.

<sup>59</sup> *Lawrence*, 539 U.S. at 560, 570.

<sup>60</sup> *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion)) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

<sup>61</sup> *Windsor*, 133 S. Ct. at 2681.

institution of the Nation's society" because such "couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."<sup>62</sup>

A second characteristic of these cases is that the ambitious rhetoric is not matched by doctrinal clarity or strength. To the contrary, the opinions conspicuously eschew the usual trappings of conventional constitutional standards of review. *Romer* seems to be a rational basis case, but does not follow the recognized formula of that doctrine. It instead heavily turns on a finding of animus that seems central to the analysis, yet is only sparsely explained.<sup>63</sup> *Lawrence* fails to tell us whether it found a fundamental right, and left lower courts divided on that point.<sup>64</sup> *Windsor* uses some combination of liberty, equality, and federalism, but again avoids conventional categories.<sup>65</sup> In comparison to these earlier decisions, *Obergefell* seems, at first glance, like the most doctrinally conventional because it unambiguously says that same-sex couples have the fundamental right to marry.<sup>66</sup> But that is where the doctrinal clarity ends. Under black letter rules, fundamental rights mean governmental regulation will be upheld only where there is a strong state interest and the law is closely drawn to meet that interest.<sup>67</sup> Oddly, the opinion never clearly weights the government's interest or assesses the fit between ends and means. One can search and find ideas in the opinion about why the ban on same-sex marriage is not justifiable, but they are not presented in terms of the standard approach.<sup>68</sup>

The third feature of the Kennedy opinions is the one alluded to earlier in reviewing his approach in *Obergefell*—the consistent intertwining of liberty and equality, bringing together the two most significant clauses in Section 1 of the Fourteenth Amendment. The combination is promising, yet strikingly underspecified as a doctrinal matter. Thus far, it has mostly been left to scholarly efforts to elaborate a conceptual structure for this idea of a two-clause symbiosis.<sup>69</sup>

These qualities of *Obergefell*—its soaring rhetoric, doctrinal puzzles, and blended equality and liberty rationales—leave us with multiple questions. For example, has this approach replaced and finally interred more conventional doctrines, like the tiers of equal protection scrutiny? Is it to be applied beyond

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<sup>62</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

<sup>63</sup> *Romer*, 521 U.S. at 632, 644.

<sup>64</sup> See WILLIAM B. RUBENSTEIN ET AL., *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 191 (5th ed. 2014).

<sup>65</sup> See *Windsor*, 133 S. Ct. at 2681–96.

<sup>66</sup> *Obergefell*, 135 S. Ct. at 2599.

<sup>67</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”).

<sup>68</sup> *Obergefell*, 135 S. Ct. at 2601–05.

<sup>69</sup> Leading scholarly accounts are collected in *supra* note 47.



the realm of sexual orientation? And perhaps of greatest immediate relevance: Is it of consequence that Justice Kennedy's distinctive approach has not yet been utilized by other members of the Court?

## 2. *The Court's Role in a Democracy*

The *Obergefell* opinions should also become an object of fascination for legal scholars interested in classic questions about the role of courts in a democracy. The dissents sound the familiar alarm of judicial activism. The Chief Justice leaves subtlety aside here, not only criticizing the Court for "stealing"<sup>70</sup> the issue from the people, but bringing in the heavy artillery of two of the most reviled cases in the Court's history: *Dred Scott*<sup>71</sup> and *Lochner v. New York*.<sup>72</sup> And Roberts somewhat caustically tells those celebrating the opinion that it is fine to do so, with a caveat: "[D]o not celebrate the Constitution. It had nothing to do with it."<sup>73</sup> Justice Scalia's dissent adopts a similar theme by calling the Court's decision a "judicial Putsch," and in doing so, invoking the German language for the second time in a gay rights dissent.<sup>74</sup>

These lines of attack are, of course, numbingly familiar in constitutional law. But what is perhaps more interesting and novel is the degree to which the Justices explicitly discuss themes that could have been ripped from the pages of Professor Gerald Rosenberg's classic book, *The Hollow Hope*.<sup>75</sup> Rosenberg famously argues that courts cannot autonomously produce social change, and that activists misplace their faith in the judiciary when they should be using the political process to generate enduring reforms.<sup>76</sup> His book originally focused on *Brown v. Board of Education* and *Roe v. Wade* as object lessons, but he issued a second edition in 2008, in the midst of anti-marriage equality backlash, to add the same-sex marriage debate to the list of examples of litigation gone awry.<sup>77</sup>

Query whether Rosenberg would defend that position after *Obergefell*,<sup>78</sup> but irrespective of his own view, it is striking that the Justices so explicitly

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<sup>70</sup> *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

<sup>71</sup> *Id.* at 2616–17 (discussing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).

<sup>72</sup> *Id.* at 2617–21 (discussing *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>73</sup> *Id.* at 2626.

<sup>74</sup> *Id.* at 2629. In his dissent in *Romer v. Evans*, Justice Scalia argued that the majority had "mistaken a Kulturkampf for a fit of spite." *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

<sup>75</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9 (1991).

<sup>76</sup> *Id.*

<sup>77</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339–420 (2d ed. 2008).

<sup>78</sup> In relation to Rosenberg and other scholars, I have argued that the marriage debate counsels a more pragmatic approach that accounts for the fact that judicial decisions can produce both progress and backlash at the same time. Jane S. Schacter, *Making Sense of the Marriage Debate*, 91 TEX. L. REV. 1185, 1196–97 (2013) (book review).

addressed the question whether it would have been better for advocates of marriage equality to forego litigation and stick to the political process. This issue was perfectly framed for them by Judge Jeffrey Sutton, who had upheld the four state bans on same-sex marriage when *Obergefell* was in the Sixth Circuit.<sup>79</sup> Sutton began his opinion with the line that “[t]his is a case about change—and how best to handle it under the United States Constitution.”<sup>80</sup> He ended on the same theme, concluding:

Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.<sup>81</sup>

At the Supreme Court, the Chief Justice continued in exactly this vein, making a pointed citation to the published lament of a “thoughtful commentator”—Justice Ginsburg—that premature judicial intervention in the abortion debate produced backlash and set back the cause of reproductive autonomy.<sup>82</sup> He went on to assert that “however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause.”<sup>83</sup> He added that “they lose this just when the winds of change were freshening at their backs.”<sup>84</sup>

The apparent role-shift here is striking. It is one thing for scholars like Gerry Rosenberg or Michael Klarman to consider, from an academic perspective, whether it is in some sense preferable—because more effective—for advocates to win a significant victory through majoritarian versus judicial means.<sup>85</sup> It is quite another for Supreme Court Justices to step into a role that casts them less as judges and more as strategists, focused on matters of timing and likely impact. Put differently, it is one thing for the Justices to say that the definition of marriage rightly belonged to the political branches. Roberts and the other dissenters all made that utterly standard claim. It is quite another thing to say that it would have been *tactically wiser* for plaintiffs in these cases

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<sup>79</sup> *DeBoer v. Snyder*, 772 F.3d 388, 418 (6th Cir. 2014), *rev'd*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>80</sup> *Id.* at 395. Justice Scalia made a related point, chiding the majority for terminating “public debate over same-sex marriage,” which he said, “displayed American democracy at its best.” *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting).

<sup>81</sup> *DeBoer*, 772 F.3d at 421.

<sup>82</sup> *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) (quoting Justice Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985)).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See generally, e.g., KLARMAN, *supra* note 12; ROSENBERG, *supra* note 77.

to pursue political and not judicial recourse. The oddity of this chosen theme casts a different light on the Chief Justice's provocative question: "Just who do we think we are?"<sup>86</sup>

Justice Kennedy seemed to grasp exactly the question of institutional role raised by the Chief Justice's argument. In response, he said that "[i]t is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process"<sup>87</sup> He emphasized that the question before the Court was a "legal" one.<sup>88</sup> He cited *Bowers v. Hardwick* as an example of the problems with the Court giving "a cautious endorsement of the democratic process"—problems of people continuing to be harmed and of "[d]ignitary wounds" that "cannot always be healed with the stroke of a pen."<sup>89</sup> And he relied on the canonical language in *West Virginia Board of Education v. Barnette*, emphasizing that the very "idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'"<sup>90</sup>

Justice Kennedy's strong—though predictable—retort begs the question why Chief Justice Roberts would have chosen to deploy this argument. A plausible hypothesis relates to the theme of this Article: he was writing for multiple audiences. The argument about tactics and timing allowed the Chief Justice to write for lay readers (the subject of the next Part) and for history. Roberts was at pains in his opinion to mention more than once that he did not begrudge same-sex couples this victory and to couch his objection as much, if not more, in terms of process (how this change should be made) than substance (whether it should be made at all). Seen in that light, his language seems less about doctrine than about positioning the Court in the socially and historically salient struggle over same-sex marriage.

### B. *The Public as Audience*

A threshold question is to what extent the Justices were intending to speak to the public. There are textual clues that some were. As the last Part would suggest, the clearest comes from the Chief Justice's dissent, and especially on

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<sup>86</sup> *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

<sup>87</sup> *Id.* at 2606 (majority opinion).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 2605–06 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). Justice Kennedy did hedge a bit on this issue by noting the "years of litigation, legislation, referenda, and the discussions that attended these public acts" regarding same-sex marriage, *id.* at 2597, and including in Appendix B to his opinion a list of the states that had legalized same-sex marriage in statutes, *id.* at 2611. These references seemed to be a way to say that the democratic debate had gone on for many years, as if to respond to the Chief Justice's arguments about timing and tactics.

the points just discussed. Indeed, portions of the Roberts opinion were unambiguous about their target:

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.<sup>91</sup>

Less explicit, but to a similar effect:

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law.<sup>92</sup>

Justice Kennedy’s opinion did not address itself to “Americans” quite as literally, but it pursued its own distinctive form of exhortation. Kennedy noted that if the Court were to uphold the ban on same-sex marriage, “it would teach the Nation that these laws are in accord with our society’s most basic compact.”<sup>93</sup> The idea that the Court’s opinions impart a lesson is consistent with Kennedy’s past pronouncements, including public remarks in 2008 indicating that he considers it the role of judges to “teach” the Constitution through their opinions.<sup>94</sup> This self-conscious mission of instruction offers explanatory context for *Obergefell*’s emphasis on rhetoric over doctrine, a quality that, we have seen, is also shown in Kennedy’s prior gay rights opinions. Eschewing standards of review and emphasizing dignity, respect and “[t]he centrality of marriage to the human condition”<sup>95</sup> provide ways to speak beyond an audience of lawyers. A pedagogical objective of this sort also sheds light on the passages in the *Obergefell* majority opinion that seem carefully crafted to address those readers unlikely to agree with the outcome, such as Kennedy’s assurance that “[m]any who deem same-sex marriage to be wrong

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<sup>91</sup> *Id.* at 2626 (Roberts, C.J., dissenting).

<sup>92</sup> *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

<sup>93</sup> *Id.* at 2606 (majority opinion); *cf. id.* at 2602 (noting that the marriage bans themselves have “the effect of teaching that gays and lesbians are unequal in important respects”).

<sup>94</sup> Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 7 (2008) (“The Constitution is the enduring and common link that we have as Americans and it is something that we must teach to and transmit to the next generation. Judges are teachers. By our opinions, we teach.” (quoting Justice Anthony M. Kennedy, responding to a Harvard Law School student’s question in 2008)).

<sup>95</sup> *Obergefell*, 135 S. Ct. at 2594.

reach that conclusion based on decent and honorable . . . premises”<sup>96</sup> and are “reasonable and sincere people” who hold that view “in good faith.”<sup>97</sup> Taking all of this together, it will not be surprising if we someday learn from the Justice’s papers or otherwise that he, indeed, did seek to speak to the country in this highly visible opinion, much as it was revealed that Chief Justice Warren and Justice Felix Frankfurter had this function in mind in connection with *Brown*.<sup>98</sup>

A final reason to surmise that the Justices would have contemplated the public as an audience is that they could not have failed to observe the enormous public interest in the case. From the heavy press coverage,<sup>99</sup> to the scores of amicus briefs,<sup>100</sup> to the well-covered lines to score entry to the argument,<sup>101</sup> surely the Justices were aware of the intense attention being paid to *Obergefell*. Indeed, the Court’s decision to depart from normal practice and make the audio file of the oral argument immediately available to the public on the day of the argument was premised on exactly this high level of interest.<sup>102</sup>

There is, moreover, a traditional stream of legal and political science scholarship that models the Court as a “republican schoolmaster,” executing precisely the task of educating the public about the law through its opinions.<sup>103</sup> While this approach has been debated from a number of perspectives, the most

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<sup>96</sup> *Id.* at 2602.

<sup>97</sup> *Id.* at 2594 (noting that the view that marriage is for a man and a woman “long has been held—and continues to be held—in good faith by reasonable and sincere people”); *see also id.* at 2607 (noting that religious believers also “may continue to advocate with [the] utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned”).

<sup>98</sup> MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 301–02 (2004); Mark Tushnet, *Style and the Supreme Court’s Educational Role in Government*, 11 CONST. COMMENT. 215, 222 (1994).

<sup>99</sup> *See, e.g.*, Kristen Hare, *Front Pages from All 50 States on the Same-Sex Marriage Ruling*, POYNTER (June 27, 2015), <http://www.poynter.org/2015/front-pages-from-all-50-states-on-the-same-sex-marriage-ruling/353539/> [<https://perma.cc/MKN5-YU36>] (collecting front page stories on *Obergefell* from all fifty states).

<sup>100</sup> Nina Totenberg, *Record Number of Amicus Briefs Filed in Same-Sex-Marriage Cases*, NPR (Apr. 28, 2015), <http://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases> [<https://perma.cc/HWP2-885X>].

<sup>101</sup> Dahlia Lithwick & Mark Joseph Stern, *Not All Must Rise*, SLATE (Apr. 27, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/04/standing\\_in\\_line\\_f\\_or\\_supreme\\_court\\_gay\\_marriage\\_arguments\\_draw\\_crowd\\_days.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/standing_in_line_f_or_supreme_court_gay_marriage_arguments_draw_crowd_days.html) [<https://perma.cc/MB28-M6DS>].

<sup>102</sup> Amy Howe, *A Reporter’s Guide to Covering the Same-Sex Marriage Cases at the Supreme Court*, SCOTUSBLOG (Apr. 20, 2015), <http://www.scotusblog.com/2015/04/a-reporters-guide-to-covering-the-same-sex-marriage-cases-at-the-supreme-court/> [<https://perma.cc/7CFN-25KK>].

<sup>103</sup> Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 963 n.3 (1992); *see also* Lerner, *supra* note 8, at 180; Rostow, *supra* note 8, at 208; Tushnet, *supra* note 98, at 218.

fundamental objection has been an empirical one. If this model of a didactic court is to have traction, the public must—at the very least—consume judicial opinions in order to absorb the lessons. According to Gerald Rosenberg, however, decades of scholarship reveal that “most Americans are unaware the Court has acted, even on important issues,” and “do not have a clue as to what the Court is doing or has done.”<sup>104</sup> Rosenberg points out, for example, that even in a case as visible as *Roe v. Wade*, there was (and remains) striking ignorance about the constitutional status of abortion.<sup>105</sup>

*Obergefell* nicely raises the question whether the empirical critique of the “republican schoolmaster” might be out of date, at least in highly salient cases. The informational environment in which the Court operates today would suggest that the Justices have the ready capacity to address the country in their opinions if they wish to do so. In a case with as much public interest and visibility as *Obergefell*, would that capacity have been enough to drain the empirical critique of force?

The enhanced ability of the Court to reach a wide audience flows principally from the Internet and social media. To appreciate the significance of this capacity, let us look first at some of the changes over the last half-century in the informational environment in which the Court works. *Loving*, the Court’s last landmark case on marriage equality, provides an instructive comparison. Various differences between 2015 and 1967 underscore how limited the public’s access to the work of the Court was when that case was decided. For example, the Court audio-taped oral arguments in 1967, but the recordings were not made available until the following term, and even then were accessible only in the National Archives.<sup>106</sup> Opinion announcements were not consistently recorded until the early 1990s.<sup>107</sup> Opinions were handed out in hard copy to the small Supreme Court press corps, but not made widely available to the general public.<sup>108</sup> Indeed, it was a reporter who informed lawyers for Mr. and Mrs. Loving that the Court had ruled in their favor.<sup>109</sup> And the *Loving* case, as significant as it was, generated relatively limited publicity. To use the *New York Times* as a benchmark, it published four stories addressing *Loving* on the day after the case was decided and none for the remainder of 1967.<sup>110</sup> In fact, between 1958 (when the Lovings were married

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<sup>104</sup> Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. Rev. 563, 566 (2009).

<sup>105</sup> *Id.* at 566 & nn.25–26. In addition to the literature collected in Rosenberg, some of the grounds for skepticism about the “republican schoolmaster” view are set out in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008).

<sup>106</sup> Vincent James Strickler, *The Supreme Court and New Media Technologies*, in COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE 61, 71 (Richard Davis ed., 2014).

<sup>107</sup> *Id.*

<sup>108</sup> *See id.* at 70–71.

<sup>109</sup> Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 HOW. L.J. 229, 240 (1998).

<sup>110</sup> N.Y. TIMES, <http://query.nytimes.com/search/sitesearch/?action=click&contentColl>

and arrested soon thereafter) and 1967, the paper published only a total of fifteen stories about the litigation.<sup>111</sup>

Compare *Obergefell*. The difference in *New York Times* coverage alone is striking. In contrast to the four stories the paper published about *Loving* from the decision date in May 1967 through the rest of the year,<sup>112</sup> the *Times* published thirty-nine stories mentioning *Obergefell*,<sup>113</sup> and some 497 stories mentioning “same-sex marriage” from June 26 through the remainder of 2015.<sup>114</sup> And the differences go far beyond newspaper coverage. As of 2015, oral arguments at the Supreme Court were taped, and the transcript was routinely made available later in the day of the argument.<sup>115</sup> Typically, audio files were released at the end of the week of the argument, but in cases of great public interest, like *Obergefell*, the audio was made available the afternoon after the argument.<sup>116</sup> And, of course, digital technology made the audio widely accessible all over the globe.

The *Obergefell* decision itself was posted online immediately upon announcement of the decision.<sup>117</sup> The SCOTUSblog’s “Live blog” reported

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ection&region=TopBar&WT.nav=searchWidget&module=SearchSubmit&pgtype=Homepage#/%22interracial+marriage%22/from19670501to19671231/ [https://perma.cc/53NA-D2EQ] (results from a New York Times search on September 2, 2016 using the key words “interracial marriage”); N.Y. TIMES, <http://query.nytimes.com/search/sitesearch/?action=click&contentCollection&region=TopBar&WT.nav=searchWidget&module=SearchSubmit&pgtype=Homepage#/%22Virginia%22/from19670501to19671231/> [https://perma.cc/PER5-KPTS] (results from a New York Times search on September 2, 2016 using the key word “Virginia”); N.Y. TIMES, <http://query.nytimes.com/search/sitesearch/?action=click&contentCollection&region=TopBar&WT.nav=searchWidget&module=SearchSubmit&pgtype=Homepage#/%22Loving+v.+Virginia%22/from19670501to19671231/> [https://perma.cc/4QP-N-WBL5] (results from a New York Times search on September 2, 2016 using the key words “Loving v. Virginia”).

<sup>111</sup> Jennifer Hoewe & Geri Alunit Zeldes, *Overturing Anti-Miscegenation Laws: News Media Coverage of the Lovings’ Legal Case Against the State of Virginia*, 43 J. BLACK STUD. 427, 428–29, 438 (2012).

<sup>112</sup> See *supra* note 110.

<sup>113</sup> N.Y. TIMES, <http://query.nytimes.com/search/sitesearch/?action=click&contentCollection&region=TopBar&WT.nav=searchWidget&module=SearchSubmit&pgtype=Homepage#/%22Obergefell%22/from20150626to20160101/> [https://perma.cc/CBB7-7DXM] (results from a New York Times search on September 2, 2016 using the key word “Obergefell”).

<sup>114</sup> N.Y. TIMES, <http://query.nytimes.com/search/sitesearch/?action=click&contentCollection&region=TopBar&WT.nav=searchWidget&module=SearchSubmit&pgtype=Homepage#/%22same-sex+marriage%22/from20150626to20160101/> [https://perma.cc/MA36-5G86] (results from a New York Times search on September 2, 2016 using the key words “same-sex marriage”).

<sup>115</sup> See Strickler, *supra* note 106, at 67.

<sup>116</sup> Howe, *supra* note 102.

<sup>117</sup> Amy Howe, *#waitingforLyle: Live Blog of Opinions*, SCOTUSBLOG (June 26, 2015, 10:05 AM), [http://live.scotusblog.com/Event/Live\\_blog\\_of\\_opinions\\_\\_June\\_26\\_2015?Page=2](http://live.scotusblog.com/Event/Live_blog_of_opinions__June_26_2015?Page=2) [https://perma.cc/D6DK-P6F5].

the outcome at 10:01 a.m.,<sup>118</sup> at a time when over a half-million users were logged on that blog.<sup>119</sup> The full decision was widely available online within moments at the SCOTUSblog,<sup>120</sup> and at the Supreme Court's own website. Perhaps more significantly, over the next few hours, the full opinions were available at a wide array of heavily trafficked websites. In fact, every website among the top ten news websites as of January 2015,<sup>121</sup> and among the top ten digital-native news entities as of that date,<sup>122</sup> covered the decision and each one offered readers a link to the full opinion. In almost all cases, the link to the full opinion was embedded in the site's story on *Obergefell*;<sup>123</sup> on a few sites,

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<sup>118</sup> Amy Howe, *#waitingforLyle: Live Blog of Opinions*, SCOTUSBLOG (June 26, 2015, 10:01 AM), [http://live.scotusblog.com/Event/Live\\_blog\\_of\\_opinions\\_\\_June\\_26\\_2015?Page=1](http://live.scotusblog.com/Event/Live_blog_of_opinions__June_26_2015?Page=1) [<https://perma.cc/2CNY-EJ9E>].

<sup>119</sup> Email from Andrew Hamm, Manager, SCOTUSBLOG, to author (July 20, 2016) (on file with author).

<sup>120</sup> Howe, *supra* note 117.

<sup>121</sup> *Top 15 Most Popular News Websites: January 2015*, IDEA WEB DEV. (Jan. 26, 2015), <http://ideawebdevelopment.com/top-15-most-popular-news-websites-january-2015/> [<https://perma.cc/XDK4-CZNN>].

<sup>122</sup> See Rick Edmonds, *State of the News Media 2015—A New Ranking of Digital Sites*, POYNTER (Apr. 29, 2015), <http://www.poynter.org/2015/state-of-the-news-media-2015-a-new-ranking-of-digital-sites/339941/> [<https://perma.cc/T2VN-RAWH>].

<sup>123</sup> For stories in the top ten news websites, in order of rank, see Nat'l Constitution Ctr., *Why June 26 is Already a Landmark Day for Gays and the Supreme Court*, YAHOO! NEWS (June 26, 2015), <https://www.yahoo.com/news/why-june-26-already-landmark-day-gays-supreme-095343150--politics.html?ref=gs> [<https://perma.cc/42GG-N5YE>]; Dana Liebelson & Amanda Terkel, *Supreme Court Legalizes Gay Marriage Nationwide*, HUFFINGTON POST (June 26, 2015), [http://www.huffingtonpost.com/2015/06/26/supreme-court-gay-marriage\\_n\\_7470036.html](http://www.huffingtonpost.com/2015/06/26/supreme-court-gay-marriage_n_7470036.html) [<https://perma.cc/56S8-2H74>]; Ariane de Vogue & Jeremy Diamond, *Supreme Court Rules in Favor of Same-Sex Marriage Nationwide*, CNN (June 27, 2015), <http://www.cnn.com/2015/06/26/politics/supreme-court-same-sex-marriage-ruling/> [<https://perma.cc/B2YA-ANC5>]; John Schwartz, *Highlights from the Supreme Court Decision on Same-Sex Marriage*, N.Y. TIMES, <http://www.nytimes.com/interactive/2015/us/2014-term-supreme-court-decision-same-sex-marriage.html?r=0> [<https://perma.cc/9TXL-TXS9>]; *'Threat to Democracy': See the 4 Justices' Dissent on Gay Marriage Ruling*, FOX NEWS INSIDER (June 26, 2015), <http://insider.foxnews.com/2015/06/26/quotes-scalia-thomas-roberts-alito-dissent-supreme-court-gay-marriage-ruling> [<https://perma.cc/2PZF-8W66>]; Pete Williams & Halimah Abdullah, *Landmark: Supreme Court Rules Same-Sex Marriage Legal Nationwide*, NBC NEWS (June 26, 2015), <http://www.nbcnews.com/news/us-news/same-sex-marriage-legal-nationwide-supreme-court-rules-n375551> [<https://perma.cc/VD83-9S5T>]; Robert Barnes, *Supreme Court Rules Gay Couples Nationwide Have a Right to Marry*, WASH. POST (June 26, 2015), [https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5\\_story.html?asf](https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5_story.html?asf) [<https://perma.cc/5NUL-D6Z5>]; and Alan Yuhas et al., *Supreme Court Legalizes Gay Marriage Across the US—As It Happened*, GUARDIAN (June 26, 2015), <https://www.theguardian.com/law/live/2015/jun/26/supreme-court-rules-same-sex-marriage> [<https://perma.cc/KCK7-45BA>]. For stories in the top ten digital-native sites, see Liebelson & Tekel, *supra*; Chris Geidner, *Supreme Court Rules in Favor of Nationwide Marriage*



the opinions were linked in a separate story that was itself linked by the site's own story.<sup>124</sup> Either way, very shortly after the decision came down, the full text of the majority and all dissents were readily accessible to readers all over the world—including at “news” sites on these top-ten lists that were normally devoted to sports (Bleacher Report) and technology (CNET).<sup>125</sup>

The instant and wide accessibility of *Obergefell* makes a sharp and striking contrast to *Loving* in 1967. Yet, standing alone, this ready digital access neither guarantees, nor necessarily even predicts, that broad swaths of the public would take advantage of this access. By analogy, the dramatically expanded access to information about politics and policy that the Internet facilitates does not necessarily mean new segments of the population will necessarily seek out or consume that information. In previous work, I have explored the ways in which the ready accessibility of digital information about Congress can meaningfully address the limited political accountability of that

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*Equality*, BUZZFEED (June 26, 2015), [https://www.buzzfeed.com/chrisgeidner/supreme-court-rules-for-nationwide-marriage-equality?utm\\_term=.fvn47n7mVY#.ekDzvovkqM](https://www.buzzfeed.com/chrisgeidner/supreme-court-rules-for-nationwide-marriage-equality?utm_term=.fvn47n7mVY#.ekDzvovkqM) [https://perma.cc/E24P-3X6D]; Erin Fuchs, *The Supreme Court Legalizes Gay Marriage Nationwide*, BUS. INSIDER (June 26, 2015), <http://www.businessinsider.com/supreme-court-gay-marriage-ruling-2015-6> [https://perma.cc/3Y4T-PEL9]; Rebecca Ruiz, *Same-Sex Marriage Is the Law of the Land in America*, MASHABLE (June 26, 2015), <http://mashable.com/2015/06/26/gay-marriage-ruling/#AxjNHrd4Fmqz> [https://perma.cc/R A5U-KTMY]; Jordan Weissmann, *The Beautiful Closing Paragraph of Justice Kennedy's Gay Marriage Ruling*, SLATE (June 26, 2015), [http://www.slate.com/blogs/the\\_slatest/2015/06/26/supreme\\_court\\_legalizes\\_gay\\_marriage\\_here\\_is\\_the\\_beautiful\\_last\\_paragraph.html](http://www.slate.com/blogs/the_slatest/2015/06/26/supreme_court_legalizes_gay_marriage_here_is_the_beautiful_last_paragraph.html) [https://perma.cc/S39S-8ADT]; Jay Hathaway, *Supreme Court: Same-Sex Marriage Is Legal Nationwide*, GAWKER (June 26, 2015), <http://gawker.com/supreme-court-same-sex-marriage-is-legal-nationwide-1713867578> [https://perma.cc/T8P3-P7BM]; and German Lopez, *The Supreme Court Just Legalized Same-Sex Marriage Across the US*, VOX (June 26, 2015), <http://www.vox.com/2015/6/26/8823655/gay-marriage-legal-sctus-obergefell-v-hodges> [https://perma.cc/P2VP-UHS8].

<sup>124</sup> Kees\_B, *Same Sex Marriage Now Legal in the Whole USA.*, CNET SPEAKEASY F. (June 26, 2015), <https://www.cnet.com/forums/discussions/same-sex-marriage-now-legal-in-the-whole-usa/> [https://perma.cc/ZPH4-SZL8]; David Martosko et al., *States Halt Washington Pride: Same-Sex Couples Rush to Marry After Supreme Court Legalizes Gay Marriage—But Handful of Hold-Outs STILL Refuse to Grant Licenses*, DAILYMAIL.COM (June 26, 2015), <http://www.dailymail.co.uk/news/article-3140610/Supreme-Court-delivers-win-gay-marriage-backers-forcing-states-authorize-sex-unions-United-States.html> [https://perma.cc/UCB7-JM7M]; Mike Pearl, *Here's How the Same Sex Marriage Ruling Works Legally*, VICE (June 26, 2015), <http://www.vice.com/read/heres-how-the-same-sex-marriage-ruling-works-legally-472> [https://perma.cc/PF4A-WF7J]; Adam Wells, *Sports World Reacts to US Supreme Court's Same-Sex Marriage Ruling*, BLEACHER REP. (June 26, 2015), <http://bleacherreport.com/articles/2507621-sports-world-reacts-to-us-supreme-courts-same-sex-marriage-ruling> [https://perma.cc/RRR6-KBCF]. Google News probably also belongs on this list, rather than the list cited in *supra* note 121, where it was ranked second as a news site, because Google is an aggregator, not a supplier of original news content. See *About Google News*, GOOGLE NEWS, [https://www.google.com/intl/en\\_us/about\\_google\\_news.html](https://www.google.com/intl/en_us/about_google_news.html) [https://perma.cc/Z39R-WZ9R].

<sup>125</sup> See Kees\_B, *supra* note 124; Wells, *supra* note 124.

body to the public.<sup>126</sup> One reason for this limited accountability is the general public's longstanding lack of knowledge about politics.<sup>127</sup> In theory, the Internet offers a promising means of ameliorating this problem, but a line of research suggests that ready digital information about politics and government has mostly "activated the active"—that is, created better and faster political information for those *already* interested and engaged.<sup>128</sup> Those not already interested in politics are likely to use the digital resources of the Internet to pursue other interests.

One might hypothesize a similar effect in the context of the Supreme Court. I have found no research on the effect that ready digital access to full opinions has on public readership of those opinions in major cases. It would not, though, be surprising if many of those who click through from news websites to the opinions and read them carefully are those who are *already* interested in constitutional law or public policy. Indeed, it seems likely that a significant number of such readers are lawyers, rather than members of the "lay public" as I have defined it. In the case of *Obergefell*, perhaps broad interest in same-sex marriage would have been enough to spur more of the lay public to read the opinions, and thus bring new people into contact with the Court's work product. Careful research would be useful on these points, but we can say, at the very least, that access to opinions cannot be equated with interest in, or consumption of, them.

But the prompt availability of the formal opinions (and oral arguments) in *Obergefell*, while important, only begins to scratch the surface in terms of public access. Social media is a major factor to consider and is probably more important in terms of its effect on the mass public. A whopping two-thirds of all Americans use social networking sites, with usage almost ubiquitous among young people.<sup>129</sup> Moreover, nearly two-thirds of Facebook's and Twitter's users report getting news from the two social media platforms,<sup>130</sup> so it is reasonable to assume that the wide availability of stories about *Obergefell* was greatly intensified by social media. This ease of access could only have been expanded by the explosion of smart phones.

In the case of *Obergefell*, Twitter and Facebook became rapid and powerful tools of dissemination with force-multiplying capacity. Within minutes of *Obergefell* coming down, news of the ruling flooded Facebook and

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<sup>126</sup>Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 655, 670 (2009).

<sup>127</sup>*Id.* at 643–46.

<sup>128</sup>*Id.* at 668 (quoting PIPPA NORRIS, DIGITAL DIVIDE 229 (2001)).

<sup>129</sup>Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RES. CTR. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> [<https://perma.cc/P3BJ-RJU9>].

<sup>130</sup>Joseph Lichterman, *New Pew Data: More Americans Are Getting News on Facebook and Twitter*, NIEMANLAB (July 14, 2015), <http://www.niemanlab.org/2015/07/new-pew-data-more-americans-are-getting-news-on-facebook-and-twitter/> [<https://perma.cc/LJX6-5V4Z>].

Twitter. Indeed, in the first hour after the decision alone, 3.8 million people had used Facebook to communicate about it in some respect—including posting, sharing, and liking.<sup>131</sup> On Twitter, there were 6.2 million messages in the first four hours, at a clip of 20,000 per minute.<sup>132</sup> Between the hours of 9:30 a.m. and 5:30 p.m. on the day of the decision, there were over 10 million tweets about *Obergefell*.<sup>133</sup> On both Facebook and Twitter, hashtags like “#LoveWins” and “#LoveisLove” proliferated, as did rainbow avatars.<sup>134</sup>

Responses to the decision from elected officials and office-seekers also quickly flooded social media. For example, the President promptly spoke out, and his tweet about *Obergefell* was later ranked the number one political tweet of 2015.<sup>135</sup> Most of the Democratic and Republican nominees for President also tweeted promptly in reaction.<sup>136</sup> Consider the following examples, in which a range of political elites quickly interpreted and framed the decision, and communicated about it to the public. Note that many of these statements echo themes sounded by the Justices themselves:

- President Barack Obama tweeted: “Today is a big step in our march toward equality. . . . #LoveWins.”<sup>137</sup>
- Barack Obama, in a Rose Garden speech, characterized the decision as “justice that arrives like a thunderbolt,” noting that the “ruling will . . . offer[] to all loving same-sex couples the dignity of marriage across this great land,” and that “compared to so many other issues, America’s shift has been so quick.”<sup>138</sup>

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<sup>131</sup>Nick Corasaniti, *On Social Media, an Outpouring of Support*, Update in *Supreme Court Rules on Gay Marriage—Highlights*, N.Y. TIMES (June 26, 2015, 3:10 PM), <http://www.nytimes.com/live/supreme-court-rulings/on-facebook-an-outpouring-of-support/> [https://perma.cc/J87Z-KD75].

<sup>132</sup>*Id.*

<sup>133</sup>*Same-Sex Marriage Tweets Takeover the Internet*, USA TODAY (June 27, 2015), <http://www.usatoday.com/story/news/nation-now/2015/06/27/same-sex-marriage-scotus-gay-marriage-twitter-love-wins-trending/29389167/> [https://perma.cc/9X5B-46JL].

<sup>134</sup>*Id.*

<sup>135</sup>Eliza Collins, *Obama’s Gay-Marriage Message Tops List of Political Tweets*, POLITICO (Dec. 7, 2015), <http://www.politico.com/story/2015/12/twitter-top-political-tweets-2015-216495> [https://perma.cc/MPD7-BJJY].

<sup>136</sup>Jonathan Topaz & Nick Gass, *Republican Presidential Candidates Condemn Gay-Marriage Ruling*, POLITICO (June 26, 2015), <http://www.politico.com/story/2015/06/2016-candidates-react-supreme-court-gay-marriage-ruling-119466> [https://perma.cc/Q85D-9S45] (collecting reactions from candidates in both parties).

<sup>137</sup>President Barack Obama (@POTUS), TWITTER (June 26, 2015, 7:10 AM), <https://twitter.com/POTUS/status/614435467120001024> [https://perma.cc/J85A-SUHJ].

<sup>138</sup>*Remarks by the President on the Supreme Court Decision on Marriage Equality*, WHITE HOUSE BRIEFING ROOM (June 26, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/26/remarks-president-supreme-court-decision-marriage-equality> [https://perma.cc/2695-HJ6P].

- Representative Jackie Speier tweeted a photo of the printed-out slip majority opinion, with margin note: “28 pages to say ‘love wins’!”<sup>139</sup>
- Hillary Clinton, Democrat, former Senator and Secretary of State, and 2016 Democratic nominee for President, posted on her Facebook page: “From Stonewall to the Supreme Court, the courage and determination of the LGBT community has changed hearts and changed laws.”<sup>140</sup>
- Bernie Sanders, Democrat and then-presidential candidate, posted a statement that, “Today the Supreme Court fulfilled the words engraved upon its building: ‘Equal justice under law.’ This decision is a victory for same-sex couples across our country as well as all those seeking to live in a nation where every citizen is afforded equal rights. For far too long our justice system has marginalized the gay community and I am very glad the Court has finally caught up to the American people.”<sup>141</sup>
- Donald Trump, Republican 2016 Republican nominee for President (and President-Elect as this Article goes to press), tweeted: “Once again the Bush appointed Supreme Court Justice John Roberts has let us down. Jeb pushed him hard! Remember!”<sup>142</sup>
- Rick Santorum, Republican, former Senator and then-presidential candidate, tweeted: “Today, 5 unelected judges redefined the foundational unit of society. Now it is the people’s turn to speak #Marriage[.]”<sup>143</sup>
- Jeb Bush, Republican, former Florida Governor and then-presidential candidate, stated that he believed the Court should have allowed the states to make this decision but that “[i]n a country as diverse as ours, good people who have opposing views should be able to live side by side. It is now crucial that as a country we protect religious freedom and the right of conscience and also not discriminate.”<sup>144</sup>

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<sup>139</sup> Representative Jackie Speier (@RepSpeier), TWITTER (June 26, 2015, 10:48 AM), <https://twitter.com/RepSpeier/status/614490384840966144> [<https://perma.cc/2N26-J4ZV>].

<sup>140</sup> Hillary Clinton, FACEBOOK (June 26, 2015), <https://www.facebook.com/hillaryclinton/videos/933179836738546/> [<https://perma.cc/FGY5-X2QY>].

<sup>141</sup> Sanders Statement on Supreme Court Decision on Same-Sex Marriage, BERNIE SANDERS (June 26, 2015), <http://www.sanders.senate.gov/newsroom/press-releases/sanders-statement-on-supreme-court-decision-on-same-sex-marriage> [<https://perma.cc/3WY3-AQEV>].

<sup>142</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 26, 2015, 7:06 AM), <https://twitter.com/realDonaldTrump/status/614434531861512193> [<https://perma.cc/VJ8Y-PXZR>].

<sup>143</sup> Rick Santorum (@RickSantorum), TWITTER (June 26, 2015, 7:29 AM), [https://twitter.com/RickSantorum/status/614440408748265472?ref\\_src=twsrc%5Etfw](https://twitter.com/RickSantorum/status/614440408748265472?ref_src=twsrc%5Etfw) [<https://perma.cc/26ZZ-6UH6>].

<sup>144</sup> Amita Kelly, ‘Abide by the Law’: Campaign Trail Responds to Same-Sex-Marriage Ruling, NPR (June 26, 2015), <http://www.npr.org/sections/itsallpolitics/2015/06/26/417727757/abide-by-the-law-campaign-trail-responds-to-same-sex-marriage-ruling> [<https://perma.cc/26ZZ-6UH6>].

- Carly Fiorina, Republican and then-presidential candidate, posted on Facebook: “This is only the latest example of an activist Court ignoring its constitutional duty to say what the law is and not what the law should be. Justice Alito spoke for so many of us when he said that ‘[t]oday’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage . . . All Americans, whatever their thinking on that issue, should worry about what the majority’s claim of power portends.’”<sup>145</sup>
- John Boehner, Republican and then-Speaker of the House, tweeted a link to his statement, which expressed disappointment “that the Supreme Court disregarded the democratically-enacted will of millions of Americans by forcing states to redefine the institution of marriage.”<sup>146</sup>
- Marco Rubio, Republican Florida Senator and then-presidential candidate, stated that while he did not agree “with this decision, we live in a republic and must abide by the law. As we look ahead, it must be a priority of the next president to nominate judges and justices committed to applying the Constitution as written and originally understood.”<sup>147</sup>
- Chris Christie, Republican, New Jersey Governor and then-presidential candidate, stated that he agreed with Chief Justice Roberts and that the decision “should be decided by the people and not by . . . five lawyers.”<sup>148</sup> He also said, “I don’t agree with the way it was done. But it’s been done and those of us who take an oath have a responsibility to abide by that oath.”<sup>149</sup>

There were many electronic ways for people to get excerpts or salient lines from the opinions, and social media amplified these channels of communication. For example, an ideologically diverse array of online publications published selected lines from the opinions within hours of the

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cc/C23B-J4CF].

<sup>145</sup> Carly Fiorina, FACEBOOK (June 26, 2015), <https://www.facebook.com/CarlyFiorina/posts/10156088226625206> [<https://perma.cc/8DWX-2R6P>].

<sup>146</sup> Speaker John Boehner (@SpeakerBoehner), TWITTER (June 26, 2015, 7:51 AM), <https://twitter.com/SpeakerBoehner/status/614445799645310976> [<https://perma.cc/2LW4-YJZ4>] (linking to Speaker Boehner’s Press Office, *Statement on the Supreme Court’s Decision on Marriage*, SPEAKER.GOV (June 26, 2015), <http://www.speaker.gov/press-release/boehner-supreme-court-s-decision-marriage> [<https://perma.cc/3GA3-UNHV>]).

<sup>147</sup> Christine Rousselle, *ROUNDUP: 2016 Candidate Reaction to Obergefell v. Hodges Decision*, TOWNHALL (June 26, 2015), <http://townhall.com/tipsheet/christinerousselle/2015/06/26/roundup-2016-candidate-reactions-to-n2017928> [<https://perma.cc/AK36-46ZF>].

<sup>148</sup> Governor Chris Christie (@GovChristie), *Governor Christie on Supreme Court Ruling on Same-Sex Marriage*, YOUTUBE (June 26, 2015), <https://www.youtube.com/watch?v=7dHN0BWjQe&feature=youtu.be> [<https://perma.cc/MV2E-PPHG>].

<sup>149</sup> *Id.*

decision's release.<sup>150</sup> In addition, many individuals also tweeted language from the opinions. For example, a Radian6 search of Twitter revealed that 31,163 tweets specifically mentioned the name of the case, "*Obergefell*," between June 26, when it was decided, and June 30.<sup>151</sup> Some 16,222 tweets included this passage from the end of the majority opinion: "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."<sup>152</sup> Over 2,000 tweeted one of the following terms from a dissent: "judicial Putsch," "Just who do we think we are," or "But do not celebrate the Constitution. It had nothing to do with it."<sup>153</sup> Because this does not account for "likes" of tweets, nor for how many people simply received and read those tweets, we do not have a precise count of the numbers of people who were exposed to language from the opinion in this way. And, of course, this is only Twitter, and does not attempt to account for Facebook, YouTube, Snapchat, or other social media. While the numbers of individuals tweeting specific language from the opinions are not overwhelming, this glimpse at Twitter provides an intriguing snapshot of what is made possible by the contemporary digital environment. Social media offers a channel through which the Court's words can reach many people who would otherwise never see them.

There is an irony involved with journalists or individuals tweeting snippets of an opinion. For many years, the Court has opposed cameras in its courtroom. This is still a matter of apparent agreement among most of the Justices, who fear the reduction of law to soundbites.<sup>154</sup> But social media can permit something very much like that, as illustrated by the *Obergefell* reaction. Tweeting language from a lengthy opinion in 140 characters can surely strip language from context and permit significant reductionism.

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<sup>150</sup>To pick just a few, see Isaac Cohen, *The Best Lines from the Gay-Marriage Dissents*, NAT'L REV. (June 26, 2015), <http://www.nationalreview.com/article/420383/best-lines-gay-marriage-dissents-isaac-cohen> [<https://perma.cc/V27W-233S>]; David Corn, *The 19 Best Lines from the Supreme Court Decision that Just Legalized Gay Marriage*, MOTHER JONES (June 26, 2015), <http://www.motherjones.com/politics/2015/06/supreme-court-gay-marriage-best-lines-kennedy-decision> [<https://perma.cc/F264-VL48>]; Adam B. Lerner, *The Supreme Court's Most Memorable Quotes on Gay Marriage*, POLITICO (June 26, 2015), <http://www.politico.com/story/2015/06/supreme-court-justices-opinions-memorable-quotes-gay-marriage-119477> [<https://perma.cc/AQZ8-EBY7>]; and Andrew Soergel, *9 Need-to-Know Quotes from the Obergefell v. Hodges Decision*, U.S. NEWS & WORLD REP. (June 26, 2015), <http://www.usnews.com/news/articles/2015/06/26/9-need-to-know-quotes-from-the-obergefell-v-hodges-opinions> [<https://perma.cc/MB66-X3PZ>].

<sup>151</sup>Radian6 analysis conducted by Kathleen Gabel, Assistant Dir. of Dig. & Soc. Media, Stanford Law School (on file with author). Radian6 is a commercial analytical software program that collects and monitors social media data. For more information about Radian6, see SALESFORCE MARKETING CLOUD, <https://www.marketingcloud.com/products/social-media-marketing/radian6/> [<https://perma.cc/P7JP-YYKK>].

<sup>152</sup>Radian6 analysis conducted by Gabel, *supra* note 151.

<sup>153</sup>*Id.*

<sup>154</sup>Adam Liptak, *Supreme Court TV? Nice Idea, but Still Not Likely*, N.Y. TIMES (Nov. 28, 2011), <http://www.nytimes.com/2011/11/29/us/supreme-court-tv-still-not-likely-sidebar.html> [<https://perma.cc/U36M-MQWE>].

It seems certain that many more people engaged with *Obergefell* through social media on a very general level, one not involving reading language from the opinion. Consider that from June 26–June 30, 2015, 8,984,233 tweets around the world used the hashtag “#LoveWins,”<sup>155</sup> the hashtag that Obama had used in his early tweet. But even this can be a way that the Court’s work “teaches” the public something about constitutional values.

To some degree, the tweeting and retweeting of information from or about *Obergefell* might be analogized to newspapers very briefly excerpting or characterizing opinions at the time of *Loving*. But there are important differences: Social media allows this material to reach people who do not read newspapers, it blasts out the content almost immediately, and it allows people to readily participate by assessing what the Court has done and by reading or responding to the assessments of others. This mode of active public engagement with the Court can simultaneously involve more people, and engage them differently, than in the past. Granted *Obergefell* is no run of the mill case, and it would be folly to generalize about public attention to the work of the Court based on this case and the issue of same-sex marriage alone. But to return to where we began, the ways in which a groundbreaking Fourteenth Amendment opinion can be absorbed and understood by a public audience today stands in sharp contrast to what was possible at the time of earlier landmarks.

#### IV. IMPLICATIONS AND CONCLUSION

I have disaggregated legal from lay audiences as a way to underscore the different perspectives brought to bear on *Obergefell*. In the case of conventional legal audiences, I have highlighted some doctrinal and theoretical issues of particular interest. In the case of the public audience, I have emphasized what the Internet and social media can facilitate. This sketch can render no verdict on whether the “republican schoolmaster” approach is meaningfully strengthened by the easy flow of digital information about the Court. On this point, it is worth noting that the interactive nature of social media and the Internet suggest that the public is not plausibly modeled as a passive group of students who simply absorb “lessons” directly from the Justices. Any lessons are likely to be shaped by the reactions and commentary of others. Still, the current media environment is suggestive of interesting ways in which lay citizens may learn about what the Court does and how public officials, movement leaders, public intellectuals, and other citizens respond to it.

Beyond disaggregating audiences and exploring what the digital environment might open up, there are dynamic aspects of the Court’s multiple audiences to probe. In particular, there are reasons to believe that the very existence of an expanded public audience might help shape what the Court

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<sup>155</sup> See *supra* note 151.

writes for its conventional legal audience. The way that the Internet and social media have radically enhanced the accessibility of Supreme Court opinions is, presumably, not lost on the Justices. Whether or not they consume digital reactions to their work, they surely know that their opinions are more widely and quickly available than they have ever been, and that their decisions are easily drawn into the currents of pitched debates taking place in the political—not judicial—process.

In fact, litigation has been part and parcel of high-profile political and social debates for many years. In his recent book, Thomas Keck has ably traced the rise of litigation as a staple political tactic for the opposing sides in culture wars issues.<sup>156</sup> In the realm of same-sex marriage, Keck analyzes the ways in which gay rights groups sued to pursue marriage equality and block anti-marriage equality measures at the state and federal level, and sympathetic elected officials filed their own litigation to pursue marriage equality.<sup>157</sup> Groups supporting traditional marriage did the same, by seeking to block executive action in favor of same-sex marriage—such as Mayor Gavin Newsom’s decision to license same-sex marriage in 2004—and by opposing other pro-marriage equality initiatives.<sup>158</sup> They also did so by filing free speech and religious liberty-based litigation to shield court clerks like Kim Davis from having to issue marriage licenses to same-sex couples, and bakers, photographers, wedding planners and others from having to do business with same-sex couples wishing to marry.<sup>159</sup>

Given the tight linkages between political and legal advocacy on the marriage issue, it should not be surprising that the *Obergefell* opinions resonated with some of the strongest themes emphasized by advocates in political and cultural debates. For example, for many years, the political campaign for marriage equality deployed rhetoric stressing the uniquely venerated status of marriage and positing its core importance to individuals and society.<sup>160</sup> Justice Kennedy used very similar rhetoric in his opinion at a number of points, asserting “the transcendent importance of marriage” and “[t]he centrality of marriage to the human condition,” and concluding that “[n]o union is more profound than marriage, for it embodies the highest ideals

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<sup>156</sup> See generally THOMAS M. KECK, *JUDICIAL POLITICS IN POLARIZED TIMES* (2014) (discussing debates about other gay rights questions, affirmative action, abortion, and guns).

<sup>157</sup> *Id.* at 34–38.

<sup>158</sup> *Id.* at 79.

<sup>159</sup> *Id.* at 80; Tiffany C. Graham, *Obergefell and Resistance*, 84 *UMKC L. REV.* 715, 725–31 (2016).

<sup>160</sup> See, e.g., Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 *CHI.-KENT L. REV.* 379, 381 (2009) (noting that activists and courts had spoken of marriage as “the highest form of human happiness” and a “vital social institution,” among other expressions of reverent praise (first quoting ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 156 (1995); and then quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003))).



of love, fidelity, devotion, sacrifice, and family.”<sup>161</sup> As we have seen, the dissenting Justices pushed very hard on accusations of judicial activism, a theme that had likewise animated anti-same sex marriage advocates from the outset of the debate.<sup>162</sup> Relatedly, Justice Scalia also emphatically accused the majority of elitism, a theme he had pressed in his earlier gay rights dissents.<sup>163</sup> This, too, is an attack frequently made in political debates about marriage equality.<sup>164</sup> And Justice Alito lamented the victimization of religious objectors to same-sex marriage, predicting that the decision would “be used to vilify Americans who are unwilling to assent to the new orthodoxy,”<sup>165</sup> and tartly observing that he “assume[d] that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes,” but that “if they repeat those views in public, they will risk being labeled as bigots.”<sup>166</sup> This defense of religious objectors as a disadvantaged minority had become a mainstay of supporters of traditional marriage well before *Obergefell*.<sup>167</sup>

I do not mean to suggest that the Justices are necessarily parroting political arguments, though some may be using their opinions to signal constituencies outside the Court. In truth, these political arguments about same-sex marriage were themselves to some degree shaped by constitutional ideas and rhetoric.<sup>168</sup> That is, the flow of information between litigation and politics is two-way, not one-way. At the very least, though, we can observe the coarsening of the debate among the Justices and how, at times, it resonates with the harsh tenor

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<sup>161</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2608 (2015).

<sup>162</sup> See, e.g., KLARMAN, *supra* note 12, at 203; Schacter, *Courts and the Politics of Backlash*, *supra* note 12, at 1156–57.

<sup>163</sup> See *Romer v. Evans*, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting) (contrasting views of the “lawyer class” with more “plebeian attitudes” about homosexuality); see also *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (characterizing the opinion as “the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda”).

<sup>164</sup> William C. Duncan, *How ‘Elites’ Led Dramatic Shift in Favor of Same-Sex Marriage*, SUTHERLAND INST. (Dec. 11, 2015), <http://sutherlandinstitute.org/news/2015/12/11/how-elites-led-dramatic-shift-in-favor-of-same-sex-marriage/> [https://perma.cc/KVV6-67YW]; see also Eun Kyung Kim, *Ted Cruz on Same-Sex Marriage, Health Care: Supreme Court Violated Its Oath*, TODAY (June 29, 2015), <http://www.today.com/news/te-d-cruz-same-sex-marriage-ruling-supreme-court-judges-violated-t29116> [https://perma.cc/QUK3-QSND] (decrying Justices as a “group of elites from Harvard or Yale”).

<sup>165</sup> *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).

<sup>166</sup> *Id.* at 2642–43.

<sup>167</sup> See e.g., NeJaime & Siegel, *supra* note 18, at 2561; Thomas M. Messner, *Same-Sex Marriage and the Threat to Religious Liberty*, HERITAGE FOUND. (Oct. 30, 2008), <http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty> [https://perma.cc/27XS-GDXF].

<sup>168</sup> For an insightful review of how “[t]he Constitution offers resonant frames for social movement actors,” including in the realm of same-sex marriage, see Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 892, 893–96 (2013) (book review).

of the larger national political debate.<sup>169</sup> The key point is that litigation is part of the political struggle over issues like same-sex marriage, so the arguments in one domain, unsurprisingly, find their way into the other.

Moreover, given how polarized partisan politics are today, especially on cultural issues like same-sex marriage,<sup>170</sup> when the Justices make these kinds of arguments, they are bound to be swept into the polarized polity—whether they intend to do so or not. In this sense, the *Obergefell* opinion begins to seem more like the Justices speaking *with* the country rather than *to* it. That is, even if the opinions may aspire to stand outside partisan politics, it is difficult for them to do so and to resist being quickly absorbed within those politics. This is especially true given that media and news habits are polarized, too.<sup>171</sup> Many of those who encountered online accounts of *Obergefell* likely did so through links supplied by ideologically-compatible sources online. Indeed, many of the tweets<sup>172</sup> and “best of *Obergefell*”<sup>173</sup> lines noted earlier were probably selectively seen because of the ideological filtering that has become common on the Internet.<sup>174</sup>

All of this suggests that the context in which the Court operates is shaped not only by the rise of the Internet and social media, but also by extreme partisan polarization and ideological fragmentation. It is likely as difficult for the Justices to reach and meaningfully communicate with a broad national audience as it is for any other public official to do so under current circumstances. These current political conditions, in turn, pose their own obstacle to the aspirational “republican schoolmaster”—one that is distinct from the traditional empirical challenge to that model grounded in the idea the public is simply too poorly informed about the Court to be a meaningful object of teaching. The republican schoolmaster issue aside, the dynamics of the

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<sup>169</sup> An example of this coarsening that attracted attention was some of Justice Scalia’s language in his *Obergefell* dissent. See Michael Dorf, *Symposium: In Defense of Justice Kennedy’s Soaring Language*, SCOTUSBLOG (June 27, 2015), <http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language/> [<https://perma.cc/K9WY-5ESW>] (“In perhaps the most intemperate line in the U.S. Reports, Justice Scalia mocks the opening line of [Justice Kennedy’s] majority opinion [by saying] . . . ‘If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began’ in this way, ‘I would hide my head in a bag.’” (quoting *Obergefell*, 135 S. Ct. at 2630 n.22 (Scalia, J, dissenting))).

<sup>170</sup> KECK, *supra* note 156, at 6. See generally SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (2015) (Nathaniel Persily ed., 2015) (exploring the extent and causes of polarization as well as the possible solutions for it).

<sup>171</sup> See NATALIE JOMINI STROUD, NICHE NEWS 170 (2011); DAVID TEWKSBURY & JASON RITTENBERG, NEWS ON THE INTERNET 15 (2012); see also CASS R. SUNSTEIN, REPUBLIC.COM 2.0, at 44 (2007) (describing the rising ability of consumers to personalize news and to create “information cocoons” and “echo chambers” that undermine democratic engagement).

<sup>172</sup> E.g., Boehner, *supra* note 146; Speier, *supra* note 139; Trump, *supra* note 142.

<sup>173</sup> Corn, *supra* note 150; accord Cohen, *supra* note 150; Lerner, *supra* note 150; Soergel, *supra* note 150.

<sup>174</sup> See generally ELI PARISER, THE FILTER BUBBLE (2011); SUNSTEIN, *supra* note 171.

Internet and social media expose the Court's work to an expanded and different kind of audience that can bring the Court into political debates in new ways. As my analysis of the *Obergefell* opinions suggest, that is a phenomenon with which lawyers, judges, and scholars—the Court's conventional audience—must grapple.