

WHOSE MAJORITY IS IT ANYWAY?

ELITE SIGNALING AND FUTURE PUBLIC PREFERENCES

Will Marks[†]

with a Preface by Suzanna Sherry^{*}

PREFACE

This paper and the two that follow come from a seminar I taught in the fall of 2013 on Judicial Activism. The students read excerpts from books and articles about judicial review, judicial activism, and the role of the courts in a democracy. Each student was required to submit four papers (of at least ten pages each, not more than half of which could be description) in response to the assigned readings. The students were free to choose which weeks they wanted to write, and the papers were due at the beginning of that week's class. Incidentally, I highly recommend this format for a seminar: the papers kept all the students engaged throughout the semester, and the students who wrote for any particular week tended to be particularly active in the discussion.

We spent two weeks, late in the course, discussing Barry Friedman's *The Will of the People* and several commentators on that book. This paper by Will Marks focuses largely on those readings.

Marks criticizes both Friedman's theory that the Court follows popular opinion and the response by Lawrence Baum and Neal Devins that the Court follows elite opinion.^a Marks argues, using gay rights

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^{*} Herman O. Loewenstein Professor of Law, Vanderbilt University.

^a Lawrence Baum & Neal Devins, *Why The Supreme Court Cares About Elites, Not the American*

as an example, that what the Court is *really* doing is trying to divine *future* public opinion – to maximize both the Court’s institutional legitimacy and individual justices’ historical legacies. Of course, as he points out, predicting the future is a risky business with substantial costs. All in all, Marks first suggests, then descriptively supports, and ultimately normatively criticizes, a novel approach to describing the interaction between the court and popular opinion. A fine addition to the literature, and something that deserves further study.

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I.

INTRODUCTION

Justice Sandra Day O’Connor’s majority opinion in *Grutter v. Bollinger*¹ upholding the University of Michigan Law School’s race-conscious admissions policy ended with an important proviso. “We expect that 25 years from now,” proclaimed Justice O’Connor’s “sunset”² provision, “the use of racial preferences will no longer be necessary to further the interest approved today.”³

In one sense, the Court was giving much-needed direction to colleges and universities across the country: “Affirmative action in admissions is acceptable – but only for so long.” In another sense, however, one could say that the Court was speaking to Americans of the future: “This opinion is the product of the time in which it was decided and need not be binding upon future generations.” In both senses, though, Justice O’Connor appears to have been appealing to popular opinion at some level; a twenty-five-year limit on the Constitution’s meaning seems to have no firm foundation in the Constitution itself.⁴

People, 98 GEO. L.J. 1515 (2010).

¹ 539 U.S. 306 (2003).

² Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1238 (2004).

³ *Grutter*, 539 U.S. at 343.

⁴ See generally Joel K. Goldstein, *Justice O’Connor’s Twenty-Five Year Expectation: The Legitimacy of Duration Limits in Grutter*, 67 OHIO ST. L.J. 83, 134-35 (2006) (arguing that the reading of *Grutter*’s sunset provision as setting up a firm deadline conflicts with judicial precedent interpreting and policy rationales underlying the Equal Protection Clause).

The notion that popular opinion shapes outcomes at the Supreme Court is controversial. In his recent book *The Will of the People*, Professor Barry Friedman argues that the Court's holdings closely align with public majority opinion in important cases.⁵ But as many of Friedman's critics have noted, this cannot be the whole story – the Court has been truly counter-majoritarian too many times for things to be so simple.⁶

In a twist on Professor Friedman's thesis, Professors Lawrence Baum and Neal Devins argue the Justices largely follow the opinions of society's elites, rather than popular opinion generally.⁷ That, however, seems problematic as well. True, in some major cases involving hotly contested issues in which the Court did not follow popular opinion, "elites" (defined as those having some postgraduate education) tend to support the Court's opinion more than does the overall populace.⁸ But the authors' data reveal that, in several seminal cases, not even a majority of elites supported the outcome.⁹ Is it simply false to suggest that, as a descriptive matter, the Court considers the policy preferences of *any* lay groups?

This paper defends the thesis that lay opinion influences Supreme Court decision-making while attempting to explain why neither those who claim the Court follows public opinion generally nor those who focus instead on elite opinion fully describe the role of lay opinion in many of the Court's significant decisions. The paper focuses especially on cases whose outcomes do not align with the preferences of *either* a majority of the general public or a strong majority of elites. Both theories have missed the mark, this paper posits, because each fails to acknowledge the particular way in which both types of opin-

⁵ BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 374 (2010).

⁶ See, e.g., Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 151 (providing some examples of Court striking down, in one decision, the laws of a majority of states); William E. Forbath, *The Will of the People? Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191, 1202-06 (2010) (arguing that the Court's slew of pro-business opinions undermines Friedman's arguments).

⁷ Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010).

⁸ *Id.* at 1571 (recounting popular and elite opinion on seven seminal civil liberties cases).

⁹ *Id.*; see also *infra* note 27 and accompanying text.

ion play an important role in counter-majoritarian cases.

This paper more specifically suggests that the Justices use elite opinion as a signal to identify *future general public preferences*. Just as Justice O'Connor looked to the future in *Grutter*, the Justices often attempt to forecast what future majorities will desire by considering social trends rather than current polling numbers. One way in which the Justices do this, the paper will explain, is by assuming that elite opinion precedes and guides general popular opinion. A trend in elite opinion thus likely signals future majority public support. The Justices, accordingly, may use elite opinion to decide difficult cases consistently with their prediction about how the tides of general public opinion will turn.

II.

CURRENT THEORIES OF POPULAR OPINION AND JUDICIAL REVIEW

A. Does the Court Follow Today's Public Preferences?

Alexander Bickel's "counter-majoritarian difficulty" – the perceived tension that exists when members of an unelected judiciary invalidate laws enacted by a democratically elected legislature¹⁰ – has long been a primary issue underlying debates over the propriety, scope, and limits of judicial review.¹¹ Some scholars, however, reject the assumption on which the counter-majoritarian difficulty rests: that the Court *is* counter-majoritarian. In one of the most recent works from this band of academic iconoclasts, Barry Friedman's *The Will of the People* surveys the modern Court and concludes that the Court in fact usually follows the policy preferences

¹⁰ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1349 (2006) (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1986)).

¹¹ Solving the counter-majoritarian difficulty seems to be what underlies both empirical analyses of judicial activism, see, e.g. Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752 (2007), and many scholars' "grand theories" of constitutional interpretation, see, e.g. DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002) (deconstructing grand theories).

of the general public.¹² Marshaling a sea of polling data, and focusing on the Rehnquist Court in particular, Friedman argues that, from the *Casey v. Planned Parenthood* opinion upholding *Roe v. Wade*,¹³ to the *Lopez v. United States* case striking down the federal Gun-Free School Zones Act on Commerce Clause grounds,¹⁴ to the *Adarand Constructors, Inc. v. Peña* opinion limiting governmental use of affirmative action,¹⁵ the Court's opinions on controversial issues typically follow public desires. The counter-majoritarian difficulty, then, is really no difficulty at all.

But as myriad commentators have responded, a host of significant decisions really do disagree with public opinion. A quick glance at the public response to *Brown v. Board of Education* should alone prove the point.¹⁶ There are, however, many other examples. Decisions that line constitutional-law casebooks, including those on school prayer, flag burning, sodomy, and affirmative action, are all inconsistent with majority preferences.¹⁷ It seems impossible, moreover, to rationally argue that the widely despised *Citizens United v. FEC* decision is consonant with public opinion.¹⁸ It appears, then, that there is still some difficulty left to resolve when it comes to counter-majoritarian judicial review.

B. Does the Court Follow Today's Elite Preferences?

What if the Court follows not *public* preferences, but *elite* preferences? After all, the Justices mostly grew up in the upper echelons of American society, attending some of the nation's most prestigious schools.¹⁹ Perhaps the Justices are most concerned with "self-

¹² FRIEDMAN, *supra* note 5, at 14-15, 324.

¹³ *Id.* at 329-30 (discussing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

¹⁴ *Id.* at 330-31 (discussing *United States v. Lopez*, 514 U.S. 549 (1995)).

¹⁵ *Id.* at 326-27 (discussing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)).

¹⁶ See L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 866-70 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) and describing the violent, disobedient Southern response to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

¹⁷ See Baum & Devins, *supra* note 7, at 1571.

¹⁸ See generally Pildes, *supra* note 6, at 111-14 (detailing the public response to *Citizens United v. FEC*, 558 U.S. 310 (2010)).

¹⁹ Baum & Devins, *supra* note 7, at 1537 ("[T]he Justices are 'sheltered, cosseted,' and

presentation” to similarly elite audiences.²⁰

Professors Baum and Devins have argued just that. Employing social psychology, they explain that the Justices “are not single-minded pursuers of their preferred policy positions; instead, they adopt legal policy positions that take account of both their ideological and personal preferences.”²¹ These personal preferences include a “reluctan[ce] to disappoint [the Justices’] respective reference groups,” groups with whom the Justices identify.²² These reference groups, the authors continue, consist of elites in the legal academy, the news media, and political or judicial interest groups.²³

The crux of this argument is that the Justices do care about pleasing a majority, but the relevant majority is that of the particular elite groups whose opinions they value and whose esteem they seek.²⁴ This, Professors Baum and Devins explain, is true whether or not an individual Justice is particularly partisan. More ideological Justices may look to ideological groups – such as the Federalist Society or the American Constitution Society – for guidance.²⁵ Yet the same is true with moderate or “swing” Justices, although their desire may be to “cultivate reputations of neutrality and amenability to persuasion by groups with disparate ideological positions.”²⁶

Sometimes, however, the Court’s decisions do not align even with elite opinion. Baum and Devins report, for example, that of “elite” public opinion survey participants – those having at least some postgraduate education – only 41.4% supported the Court’s school-prayer decision in *Engel v. Vitale*, 44.1% supported the flag-burning decision in *Texas v. Johnson*, and 43.0% supported the *Grut-*

‘overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation’s more elite universities’ (quoting RICHARD POSNER, *HOW JUDGES THINK* 306 (2008) and Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 *NW. U. L. REV.* 145, 189 (1998)).

²⁰ See *id.* at 1537-44 (identifying the Court’s core elite constituencies).

²¹ *Id.* at 1533-34.

²² *Id.* at 1534.

²³ *Id.* at 1537-44.

²⁴ *Id.*

²⁵ *Id.* at 1534-35, 1541-42.

²⁶ *Id.* at 1536 (discussing the outsized attention on and power of Justices O’Connor and Kennedy).

ter opinion.²⁷ The Supreme Court, in other words, is often counter-majoritarian even with regard to the elites who form the Justices' reference groups.

Why is this so? One possibility is that the Justices' reference groups may be even more elite than those with some postgraduate education, and the Court's decisions in fact align with "über-elite" opinion. This could especially be true with respect to decisions about gender equality, gay rights, free speech, and reproductive rights, since those decisions tend to lean towards the left, and at least with respect to those issues, "people with more education are more likely than other Americans to take positions that are typically identified as liberal."²⁸ But in some cases, the preference gap between "elites" and "über-elites" would need to be almost ten percent for this explanation to have traction.²⁹ That is perhaps possible, but such a large swing seems unlikely considering that "elites" (as defined by Baum and Devins) already start at such high levels of educational attainment.

It might seem, then, that the Justices do not care about public opinion at all. That certainly might be true of some,³⁰ but the Justices are people too, so they probably do consider at some level how the public, their social and professional circles, the academy, the news media, or even the history books will think of them. What we need, then, is an account of how public opinion shapes Supreme Court decision-making that does not require a current majority of either the public or elites to support the Court's decision. This paper now attempts to provide such an account.

²⁷ *Id.* at 1571.

²⁸ *Id.*; see also *Beyond Red vs. Blue Part 3: Demographics, Lifestyle, and News Consumption*, PEW RESEARCH CTR. (May 10, 2005), <http://perma.cc/H2U7-RXVG> ("Liberals have the highest education level of any typology group – 49% are college graduates and 26% have some postgraduate education.").

²⁹ See *supra* text accompanying note 27 (revealing the elite-support data for school prayer and affirmative action).

³⁰ Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (October 6, 2013), <http://perma.cc/7JD-XY6H> ("I don't know [how I will be regarded in the future]. And, frankly, I don't care. . . . I have never been custodian of my legacy. When I'm dead and gone, I'll either be sublimely happy or terribly unhappy.").

III.

A MIDDLE WAY: CURRENT ELITE OPINION AS A
SIGNAL FOR FUTURE PUBLIC OPINION*A. How Does the Signaling Mechanism Work?*

In *The Will of the People*, Barry Friedman oscillates between utilizing current polling numbers and speaking of “social trends.” Friedman specifically notes, for example, that a more accurate version of his thesis is that “the justices were following *social trends* and by so doing were often deciding cases consistent with public opinion.”³¹ He later notes that the Rehnquist Court, although it may have broken from the American majority at certain times, was “following *cultural trends* with remarkable steadfastness.”³² “[T]he Court,” he says, “looked to be tracking public reaction to rapidly *developing events*.”³³ Perhaps, then, what the Rehnquist Court was following was not the state of current public opinion, but the *perceived direction* of the tide of public opinion.

The Justices, however, are not soothsayers; they need some way to discern what public opinion will be years in the future. This is where elite opinion can play a role. Since the 1960s, the American public has become more progressive with respect to many individual rights, especially reproductive rights, racial equality, gender equality, and sexual-orientation equality. And elites, being more liberal than the overall public, generally lead the way. It was liberal elite whites, after all, who supported *Brown*;³⁴ now the opinion is possibly the most popular of all time. It was liberal elites, too, who supported *Roe v. Wade*;³⁵ by the time *Casey* was decided, the public had fol-

³¹ FRIEDMAN, *supra* note 5, at 354 (emphasis added).

³² *Id.* at 359 (emphasis added).

³³ *Id.* (emphasis added).

³⁴ JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 1-2, 9-10 (2001) (conveying the arguments of liberal whites, including President Harry Truman, who sought to end desegregation).

³⁵ Eric M. Uslaner & Ronald E. Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and States: Changes and Stability After the Roe and Doe Decisions*, 77 MICH. L. REV. 1772, 1777 (1979) (showing that in December 1972, only 46% of the general public sup-

lowed along.³⁶ And finally, it is elites who have most championed gay rights,³⁷ and it seems again that public opinion is following.³⁸

Both the public-opinion and elite-opinion scholars may therefore be correct. The Justices often do care about public opinion – not so much what today’s majority thinks, but rather what majorities in the future will think. And to determine what those future majorities will think, Justices look to policy groups, members of the media, and academics they respect – all potential vanguards of future policy preferences. This effect, of course, is likely subconscious, just as most social psychological effects are. The Justices may simply interact with the elite and unwittingly envision those elites’ opinions as necessarily ahead of the curve. That, however, does not diminish the effect. If the Justices see a social trend that they forecast into the future, that vision may shape case outcomes.

*B. One Example of the Signaling Effect in Action:
Windsor and Gay Marriage*

A 2012 Gallup poll indicated that exactly fifty percent of the population favored legal validation of same-sex marriages.³⁹ But at the time of *Windsor v. United States*, only twelve states and the District of Columbia permitted such marriages.⁴⁰ Thus, despite the Gallup numbers, less than a third of the U.S. population lived in a state

ported legalizing abortion, as compared to 63% of those with at least a college education).

³⁶ FRIEDMAN, *supra* note 5, at 329 (showing that, two years before the *Casey* decision, a majority of the population opposed overturning *Roe*).

³⁷ See Baum & Devins, *supra* note 7, at 1571 (indicating that as of 2003, 75.6% of persons polled with at least some postgraduate education thought that private, adult homosexual relations should be legal, compared with a bare majority of people with lower levels of education).

³⁸ Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What it Means*, N.Y. TIMES FIFTYTHREE BLOG (Mar. 26, 2013, 10:10 AM), <http://perma.cc/9ZVB-GL39> (showing clear trend from mid-1990s of increasing support for same-sex marriage). The trend, indeed, is quite pronounced: Silver’s data reveal that the polling numbers for supporters and opponents of same-sex marriage have inverted over the past decade. See *id.*

³⁹ Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP (May 8, 2012), <http://perma.cc/FP7P-M7A2>.

⁴⁰ 133 S. Ct. 2675, 2689 (2013).

where gay marriage was legal when *Windsor* came down.⁴¹ What the majority of Americans really wanted at that moment is thus unclear, but for argument's sake, let's say the country was split precisely down the middle. The *Windsor* Court could not therefore have been siding with majoritarian opinion – no majority existed on the issue of gay marriage.

It is difficult, moreover, to gather precisely where elite opinion lay. The same Gallup poll cited above explains that fifty-seven percent of college graduates favored gay marriage.⁴² The study's margin of error, however, is three percentage points;⁴³ thus, the elite preference number could have been as low as fifty-four percent of college graduates. So elites do favor gay marriage more than the rest of the population, but not by a lot. It even could be fair to argue that, with the conservative-leaning Roberts Court, the majority of elites in the current Justices' reference groups might fall on the other side of the fifty-percent threshold.

So what did the Court do in *Windsor*? A majority of the Justices, led by Justice Kennedy, struck down the Defense of Marriage Act (“DOMA”) as a violation of the equal-protection component of the Fifth Amendment's Due Process Clause because, the majority believed, the Act's passage was based primarily on animus towards gays and lesbians.⁴⁴ The Court did not, of course, determine the issue of gay marriage once and for all – it dodged that issue in *Perry v. Hollingsworth*.⁴⁵ But at least according to Justice Scalia's dissent,

⁴¹ I used Google's population data to calculate this figure. Rounding to the nearest 100,000 people, the total U.S. population is 314.0 million. When the Court handed down *Windsor*, twelve states had legalized same-sex marriage. See Caitlin Stark & Amy Roberts, *By The Numbers: Same-Sex Marriage*, CNN (Aug. 29, 2012), <http://perma.cc/APS4-6R6G> (noting that, as of June 2013, twelve states permitted same-sex marriage). The population of all states where gay marriage was then legal, therefore, was approximately 94 million. Thus, roughly thirty percent of the population lived in a gay-marriage state when *Windsor* came down.

⁴² Molly Ball, *Poll of the Day: America's Gay-Marriage Evolution*, THE ATLANTIC (May 8, 2012, 12:01 PM), <http://perma.cc/YA2-G7RP>.

⁴³ See *supra* note 39.

⁴⁴ See generally *Windsor v. United States*, 133 S. Ct. 2675 (2013).

⁴⁵ 133 S. Ct. 2652, 2661-63 (holding that the proponent of a California ballot initiative banning gay marriage in the state did not have standing to appeal a federal district court's invalidation of that initiative).

Justice Kennedy's rationale in *Windsor* could apply directly in a head-on challenge to a state-law gay-marriage ban and might spell such a ban's defeat.⁴⁶ This may not turn out to be so. But if the Court was willing to accuse Congress of acting out of animus against homosexuals when passing DOMA despite at least plausible rational bases for enacting the law,⁴⁷ then surely it will not hold back when it comes to state laws, which the Court has always invalidated more frequently than federal laws.⁴⁸

Of some significance, too, the *Windsor* Court ignored a long-standing, albeit weak, precedent on the issue of gay marriage. In the 1972 case *Baker v. Nelson*, the Court dismissed in a one-sentence order an appeal seeking to locate a right to gay marriage in the Constitution as lacking a substantial federal question.⁴⁹ As one lower court has subsequently recognized, *Windsor*'s refusal to rely on *Baker* amounted to a sub silentio reversal.⁵⁰ *Baker*'s unsigned jurisdictional dismissal is obviously not of much precedential significance, but the reversal, at least according to the Court's stare decisis jurisprudence,⁵¹ indicates that something besides mere legal opinion changed between 1972 and 2013.

To summarize: Polls suggest that, when the Court handed down *Windsor*, the populace was split down the middle on the issue of gay marriage. Elites, at least defined as those with college educations,

⁴⁶ See *Windsor*, 133 S. Ct. at 2709-10 (Scalia, J., dissenting) (explaining why, in his opinion, the majority's reasoning will necessarily lead to the invalidation of state-law bans on gay marriage).

⁴⁷ See *id.* at 2708 (explaining potential rationales for DOMA rooted in conflict-of-laws issues and desired preservation of the original intent of pre-same-sex-marriage legislation).

⁴⁸ See Pildes, *supra* note 6, at 149-154 ("Most of the laws the Court invalidates are state laws. By one count, for example, the Burger Court struck down ten times as many state as federal laws; the Warren Court, seven times as many.")

⁴⁹ See 409 U.S. 810, 810 (1972) (dismissing appeal from Minnesota Supreme Court on issue of gay marriage for "want of a substantial federal question").

⁵⁰ See *Kitchen v. Herbert*, 2013 WL 6697874, at *8-9 (D. Utah Dec. 20, 2013) (invalidating Utah's ban on same-sex marriage).

⁵¹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (explaining the Court's stare decisis jurisprudence). *But see id.* at 881-85 (arguably not applying the stare decisis doctrine just announced when overruling *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983) and *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 474 (1986)).

avored gay marriage, but not overwhelmingly so. Still, the Court issued an opinion whose rationale appears to spell doom for gay-marriage bans. In so doing, Justice Kennedy's majority opinion expressly noted the recent public opinion shift regarding gay marriage. And finally, the Court tacitly overruled its own precedent in the process. What gives?

The elite-signaling thesis explains the story. Regardless of the ambivalence of public opinion polls, the direction of popular preference appears to be decidedly pro-gay rights. As Justice Kennedy explained in *Windsor*, "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."⁵² He continued to explain that while some were outraged by this challenge to traditional social mores, "others, however, came [to] the beginnings of a new perspective, a new insight."⁵³

The cultural trend, in other words, is towards legalizing gay marriage, even if at the time of *Windsor* it lacked majority support. This comports with the change from *Baker* to *Windsor*: the issue of gay marriage did not even warrant federal jurisdiction forty years ago; now, the Court concluded that a law prohibiting federal benefits to married gay couples was based on nothing but animus. In the meantime, when *Lawrence v. Texas* was decided, roughly half of the country thought homosexual relations between consenting adults should be legal, as did three-fourths of elites.⁵⁴ At bottom, then, the social *trend* of gay rights is not split fifty-fifty, despite current polling numbers.⁵⁵

What Justice Kennedy did, one could thus argue, was look at the trend, realize (whether consciously or not) that elite opinion has led the way, and conclude that future majorities would support his opinion on DOMA even if a current majority did not now. In light

⁵² *Windsor*, 133 S. Ct. at 2689.

⁵³ *Id.*

⁵⁴ Baum & Devins, *supra* note 7, at 1571-72 & n.319.

⁵⁵ See Silver, *supra* note 38.

of his reputation for concern about his public image,⁵⁶ it is possible to surmise that Justice Kennedy went beyond current public (or even elite) opinion and looked to elite opinion to foreshadow future public policy preferences.

Obviously, the gay-marriage example only considers one Justice on one discrete issue. Teasing the elite-signaling thesis out of other case examples is unfortunately beyond this paper's scope. I believe, however, that the Justices have likely used elite opinion to anticipate future public opinion in myriad cases, including *Lawrence v. Texas*,⁵⁷ *Roe v. Wade*,⁵⁸ *Griswold v. Connecticut*,⁵⁹ and *Brown v. Board of Education*.⁶⁰ The thesis does not work in all cases, however: elites support physician-assisted suicide, as does a small majority of the general public,⁶¹ but the Court declined to follow along in *Washington v. Glucksburg*.⁶²

IV.

RATIONALES AND IMPLICATIONS

A. Why Would Justices Want to Follow Future Public Opinion?

Three main rationales might account for why the Justices may at times appeal to future public opinion: (1) institutional legitimacy, (2) personal historical status, and (3) recognition of a constitutional decision's duration. This paper will consider the first two together before turning to the third.

⁵⁶ See, e.g., Michael Klarman, Op-Ed., *Gay Rights May Get its Brown v. Board of Education*, N.Y. TIMES (Oct. 11, 2012), <http://perma.cc/P2G6-UE7G> ("Justice Kennedy's opinions often suggest that he wants to be on the right side of history, which matters greatly here because the future of gay marriage in America is so clear.").

⁵⁷ 539 U.S. 558 (2003).

⁵⁸ 410 U.S. 113 (1973).

⁵⁹ 381 U.S. 479 (1965).

⁶⁰ 347 U.S. 483 (1954).

⁶¹ Joseph Carroll, *Public Continues to Support Right-to-Die for Terminally Ill Patients*, GALLUP (June 19, 2006), <http://perma.cc/JE33-5GRE> (finding that fifty-eight percent of all respondents and seventy percent of college graduates "support doctor assisting patient to commit suicide").

⁶² 521 U.S. 702 (1997).

1. Institutional Legitimacy and Personal Historical Status

“Institutional legitimacy” refers to the public’s willingness to defer to the Supreme Court’s interpretation of the Constitution. Presumably, the more out of sync the Court is with societal norms, the less legitimate the Court will be in the public’s eyes.⁶³ “Personal historical status” refers to how positively or negatively future generations view a public official. This status falls on a spectrum from being elevated to the status of a mythical hero, as George Washington, to being widely despised as an utter failure, as Warren Harding.

If Baum and Devins are correct that the Justices are normal people to whom the basic insights of social psychology apply,⁶⁴ then the Justices would naturally wish to maximize both the Supreme Court’s legitimacy and their own personal historical status. By making the Supreme Court more legitimate, the value of a Justice’s service increases in the Justice’s own eyes, his or her reference group’s eyes, and, ultimately, the nation’s eyes. And maximizing personal historical status is a Justice’s way of controlling his or her legacy while still alive.

The drive to increase institutional legitimacy and personal historical status is reinforced by “right side of history”⁶⁵ arguments, which praise or condemn individuals based on whether their actions are viewed by later generations as correct. In the judicial sphere, these arguments stem from a handful of cases, two of which are most significant: *Dred Scott v. Sandford*⁶⁶ and *Brown v. Board of Education*.⁶⁷ In the 1856 *Dred Scott* decision, Chief Justice Taney felt that he was smoothing over the battle between slave and free states by leading a majority of Justices to rule that no slave could ever be a citizen.

⁶³ Cf. Larry D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 247-48 (2004) (arguing for the removal or severe limiting of the Supreme Court’s role in interpreting the Constitution as a reaction against perceived illegitimate decisionmaking of the Rehnquist Court).

⁶⁴ See Baum & Devins, *supra* note 7, at 1532-33 (applying universal social psychology concepts to the Justices).

⁶⁵ See, e.g., Barack Obama, Press Briefing (June 23, 2009), available at <http://perma.cc/6MQ2-6GW7> (“[T]hose who stand up for justice are always on the right side of history”).

⁶⁶ 60 U.S. 393 (1856).

⁶⁷ 347 U.S. 483 (1954).

Many now regard this as one of the worst cases in American legal history.⁶⁸ *Brown*, on the other hand, in which Chief Justice Earl Warren led a unanimous Court to rule that segregated public schools violated the Fourteenth Amendment, is so lauded that its outcome is now invoked as a litmus test for the validity of any jurisprudential theory.⁶⁹ Justices almost certainly want to avoid dragging the Court (and the country) through another *Dred Scott*, and they want to write the next generation's *Brown*.

One way the Justices can avoid becoming the next Chief Justice Taney is by considering how a future America will evaluate their decisions in landmark cases. Over the past seventy years, the liberal elites have generally ended up on the "right side of history," at least in the sense that they have generally foreshadowed future public opinion. By using elite opinion as a signal for future public opinion, a Justice can take a small amount of comfort that the history books will not teach future generations about his or her judicial misdeeds.

2. Duration of Constitutional Decisionmaking

One other possibility is that the Justices consider future public preferences because most Supreme Court interpretations of the Constitution endure for many decades, even centuries. Considering the general difficulty of the amendment process and the relative infrequency of the Court overruling its own constitutional precedent, the Justices may take special care to ensure that any decision rendered today will still garner support in the future. This rationale is tied to the institutional legitimacy rationale in a way: ensuring that

⁶⁸ See, e.g., OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 889 (Kermit L. Hall, ed., 2d ed. 2005) ("American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court."); Mark S. Brodin, *Bush v. Gore: The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563, 563 (2012) (labeling *Bush v. Gore*, 531 U.S. 98 (2000), and *Dred Scott* as the two worst Supreme Court decisions in history); *Four Worst Supreme Court Decision of All Time*, POLICYMIC (Mar. 9, 2013), <http://perma.cc/6Z58-AXV2> (listing *Dred Scott* in the number-one slot).

⁶⁹ See William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1261-64 (2011) (explaining why *Brown* is a benchmark against which jurisprudential theories should be measured).

future generations will respect and value a longstanding Supreme Court precedent cements the Court's legitimacy.

Another line of reasoning under this rationale considers the pure self-interest of the Justices. The average Supreme Court Justice sits for about eighteen years.⁷⁰ The average tenure thus spans at least three different presidential administrations and may sweep across vast changes in American culture or world history. Some justices sit much longer – Justice Douglas sat for thirty-six years⁷¹ and Justice Stevens for thirty-four.⁷² Attempts to predict how future majorities might respond to an opinion could be motivated by a desire to avoid future criticism if the Justice sits long enough to witness major societal changes.

B. What Does This Mean for the Counter-Majoritarian Difficulty?

There are some clear benefits to the Court anticipating public opinion, as long as it predicts correctly. First, doing so in the civil rights realm ensures that disadvantaged groups gain protected status, and thus avoid discrimination, more quickly than they would if progress were tied solely to the generally slow movement of popular opinion. If a Justice is convinced that the tide is changing anyway, then protecting individual liberties sooner might be desirable. Second, this approach might improve the Court's legitimacy and create public confidence in the Constitution and the rule of law. Many look back on *Dred Scott* and question the Supreme Court's moral compass, but if they look to *Brown*, they might trust that good eventually prevails under our system. Finally, this approach allows the Court to lead society into the future without being completely counter-majoritarian: popular opinion plays a significant role, just not a direct one. We need not worry so much about the counter-majoritarian problem if the people are going to end up agreeing with the Court all the same.

⁷⁰ Pildes, *supra* note 6, at 118.

⁷¹ William O. Douglas, OYEZ, <http://perma.cc/S3MD-Z2KC> (archived Jan. 26, 2014).

⁷² John Paul Stevens, OYEZ, <http://perma.cc/VD6N-22VM> (archived Jan. 26, 2014).

There are costs, though, too. Most obviously, the Justices do not always predict correctly. Remember, Chief Justice Taney thought he was doing the nation a great favor in *Dred Scott*. Additionally, if the Court uses elite opinion as a signal for future public opinion, it will usually lock in increasingly liberal cultural norms. It seems to me that we are still, at least in some ways, in the liberal wake of the 1960s. Whether there will be a future conservative cultural shift as strong as the sixties remains to be seen. Hitching future public majorities to current elite trends in opinion, however, may thwart a strong future change in the political and cultural winds.

And even if the Justices do generally guess correctly, there are still substantial costs. Having the Justices decide what the people want before the people actually reach their own conclusions will strike many as both paternalistic and deterministic. Once the Justices have constitutionalized an issue, there is almost no going back. Further, the process of working out contentious issues through the democratic process may provide a sense of resolution and closure that society desperately needs.⁷³ Constitutionalizing an issue based on anticipated future public preferences stops the swinging pendulum that our society may need to settle on an ultimate resting place. Public opinion may move strongly in one direction for a while but may come swinging back even further in the future. The judiciary correctly anticipating the first wave and settling public opinion with a constitutional decision might erroneously forestall the next wave.

In the end, the popular constitutionalist movement may provide a valuable insight. The Founders believed that the aim of government is to help the people create a society that protects core rights but operates primarily democratically.⁷⁴ The Constitution and the

⁷³ Cf. Justice Ruth Bader Ginsburg Offers Critique of *Roe v. Wade* During Law School Visit, U. CHI. L. SCH. (May 15, 2013), <http://perma.cc/LC2Z-WL45> (“My criticism of *Roe* is that it seemed to have stopped the momentum on the side of change,” Ginsburg said. She would’ve preferred that abortion rights be secured more gradually, in a process that included state legislatures and the courts, she added.”).

⁷⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[A]ll men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their powers from the consent of the governed . . .”).

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American government ultimately belong to the people, and it is for the people to determine how they wish to protect their fundamental rights. But the more the government stands in the way of the people's changing social and cultural mores, the less legitimate and less useful government becomes. Perhaps, then, there are some times when the Court should anticipate future public opinion and use it as a guide to solving some of our society's most significant issues. Unfortunately, constructing a method for deciding exactly when that anticipation is appropriate seems challenging, to put it lightly. In the end, whether that fact alone leads to the rejection of consideration of anticipated future public preference is a decision that each jurisprudential thinker must decide for himself or herself.

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