I. INTRODUCTION

I am honored to follow the many eminent scholars who have delivered the Leary Lecture. Like many prior lectures, mine focuses on a contemporary civil-rights struggle. I wish to discuss the issue of same-sex marriage, and more specifically the case of *Hollingsworth v. Perry*,1 a federal challenge to a state restriction on marriage on appeal to the United States Supreme Court.2 *Perry’s* development has served at least one function of our multi-tiered judicial system, which is to generate several options for the Court. I first review five possibilities, which range from a holding that same-sex marriage is constitutionally required in no states to a holding that same-sex marriage is constitutionally required in all fifty. I then turn to the question of how far I believe the Court should go along this continuum. In particular, I consider how the often-invoked question of the political power of gays and lesbians should affect that determination.

For these purposes, the story of the *Perry* litigation begins with a ruling by the California Supreme Court on May 15, 2008.3 In that case, the state high court held that same-sex couples were entitled to marry under the California state constitution. Opponents of same-sex marriage were braced for this ruling. They placed a voter initiative on the ballot known as Proposition 8 (Prop 8), which stated, “Only marriage between a man and a woman is valid or recognized in California.”4 On November 4, 2008, Prop 8 passed in California with 52 percent of the vote. While the California Supreme Court subsequently upheld Prop 8 against a challenge that it had been procedurally defective, that court also found that the 18,000 marriages that had occurred between its May ruling and the November election remained valid.5

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2 At the time this paper was going to press, the Court was considering whether to grant review in this case. This analysis will be more topical if the Court grants review. However, even if the Court declines review, many of the options discussed below, as well as the theory of political powerlessness, will remain salient in future cases.
4 *Perry I*, 704 F. Supp. 2d at 927.
In Perry, two same-sex couples challenged Prop 8 under the U.S. Constitution. California’s governor and attorney general declined to defend the suit. The proponents of the ballot initiative (Proponents) therefore assumed the task of defending the initiative. On August 4, 2010, the federal district court struck down Prop 8. The court held that Prop 8 violated the plaintiffs’ fundamental right to marry under the Due Process Clause and their right to fair treatment under the Equal Protection Clause. Consistent with their earlier decision not to defend the suit at trial, California officials declined to appeal. When the Proponents appealed the decision, the plaintiffs challenged their standing to do so. The Ninth Circuit panel held that the standing issue rested in part on whether California law afforded the Proponents the authority to represent California’s interests. Because that issue was solely one of state law, the Ninth Circuit panel certified this question to the California Supreme Court, which answered in the affirmative. The case then returned to the Ninth Circuit.

On February 7, 2012, the Ninth Circuit panel held that the Proponents had Article III standing in the case, and affirmed the district court’s opinion on a much narrower equal protection ground. In response to the Ninth Circuit panel decision, the Proponents petitioned for a rehearing en banc. The Ninth Circuit denied this petition. The Proponents have now asked the U.S. Supreme Court to review their case. This leads to two questions—first, what are the Supreme Court’s options, and second, which option (assuming it grants review) should it choose?

II. SUPREME COURT OPTIONS

When the Supreme Court considers this case, it has at least five options before it. I call these options (A) the zero-state solution; (B) the one-state (procedural) solution; (C) the one-state (substantive) solution; (D) the eight-state solution; and (E) the fifty-state solution. Each solution locates the federal constitutional floor below which states cannot fall. To be clear, the number associated with each

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6 Perry I, 704 F. Supp. 2d at 928.
7 Id.
8 Id.
9 Id. at 991–1003.
10 Perry III, 671 F.3d 1052, 1068 (9th Cir. 2012).
11 See id. at 170.
12 Id.
14 Perry III, 671 F.3d at 170.
15 Id.
16 Appellants’ Petition for Rehearing En Banc, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (Nos. 10-16696, 11-16577), ECF No. 402.
17 Perry v. Brown (Perry IV), 681 F.3d 1065 (9th Cir. 2012).
solution is not the actual number of states to have legalized same-sex marriage, as states may build above that floor. For instance, we are now effectively operating under a zero-state solution, because no Supreme Court decision has interpreted the U.S. Constitution to require any state to grant same-sex couples the ability to marry. Even so, nine states and the District of Columbia permit same-sex couples to marry.\(^{19}\)

### A. The Zero-State Solution

The Court could agree with the Proponents that the federal Constitution does not afford same-sex couples the right to marry. In doing so, it could rely on *Baker v. Nelson*,\(^ {20}\) a 1972 case in which the Supreme Court dismissed an appeal “for want of a substantial federal question” after the Minnesota Supreme Court had rejected a same-sex couple’s claim that the federal Constitution entitled them to marry.\(^ {21}\) A summary dismissal of an appeal for want of a substantial federal question is a ruling on the merits to which lower courts must defer.\(^ {22}\) However, lower courts are bound only on “the precise issues presented and necessarily decided” by such dismissals.\(^ {23}\) Moreover, even lower courts appear to be given some leeway to diverge from such rulings “when doctrinal developments indicate otherwise.”\(^ {24}\)

It is therefore unlikely that *Baker* will dispose of this case. Even Judge N.R. Smith, who dissented in part from the Ninth Circuit panel decision, observed that

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\(^{20}\) 409 U.S. 810 (1972).

\(^{21}\) *Id.*; *see also* Baker v. Nelson, 291 Minn. 310 (Minn. 1971).


\(^{23}\) *Id.*

\(^{24}\) Hicks v. Miranda, 422 U.S. 332, 344 (1975).
Baker could be distinguished.\textsuperscript{25} Intervening cases, such as Romer v. Evans\textsuperscript{26} and Lawrence v. Texas,\textsuperscript{27} have substantially altered the doctrinal landscape with respect to same-sex marriage. If the Court rules for the Proponents, it will likely analyze the issues of due process and equal protection anew. A ruling upholding Prop 8 would probably look much like Judge Smith’s partial dissent—it would find no heightened scrutiny under either constitutional provision and then uphold Prop 8 under rational basis review.

If the Court ruled in this way, no state would have to guarantee same-sex marriage. The move to legalize same-sex marriage would continue through state court rulings interpreting state constitutions or through legislative enactments. Nevertheless, there would be one great difference: it would be much harder to secure a fifty-state constitutional solution from the Court in the future, because the Court would have established a much more decisive precedent than Baker. In an early memorandum expressing concerns about filing a federal case in the wake of Prop 8’s passage, some LGBT-rights organizations noted, “Let’s not forget: it took 17 years to undo Bowers v. Hardwick, the 1986 Supreme Court decision that upheld Georgia’s sodomy law. That was fast for the Supreme Court.”\textsuperscript{28} The groups were generally right about Supreme Court rulings on major social issues—for instance, it took fifty-eight years for Brown v. Board of Education\textsuperscript{29} to overrule Plessy v. Ferguson.\textsuperscript{30} If the Supreme Court held that there was no federal constitutional right to same-sex marriage, it is likely that a zero-state solution would stand for at least a generation.

\textbf{B. The One-State (Procedural) Solution}

The Court could adopt a one-state (procedural) solution, holding that the Proponents lacked standing in this case. This ruling would entail reversing the

\begin{footnotesize}
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\item \textsuperscript{25} Perry III, 671 F.3d 1052, 1097–100 (9th Cir. 2012) (Smith, J., concurring in part and dissenting in part).
\item \textsuperscript{26} 517 U.S. 620 (1996) (holding that a state constitutional amendment violated the Equal Protection Clause because it was meant only to harm a politically unpopular group).
\item \textsuperscript{27} 539 U.S. 558 (2003) (holding that a state anti-sodomy law violated the liberty protected under the Due Process Clause).
\item \textsuperscript{28} Why the ballot box and not the courts should be the next step on marriage in California, ACLU (May 2009), http://www.aclu.org/pdfs/lgbt/ballot_box_20090527.pdf (joint statement issued by the ACLU, Equality Federation, Freedom to Marry, Gay & Lesbian Alliance Against Defamation, Gay & Lesbian Advocates & Defenders, Human Rights Campaign, Lambda Legal, the National Gay and Lesbian Task Force, and the National Center for Lesbian Rights). See also Bowers v. Hardwick, 478 U.S. 186 (1986).
\item \textsuperscript{29} 347 U.S. 483 (1954) (finding racial segregation in public schools unconstitutional and overruling the “separate but equal” doctrine established by the Court in Plessy v. Ferguson).
\item \textsuperscript{30} 163 U.S. 537 (1896) (finding racial segregation of public transportation to be constitutional under the “separate but equal” principle).
\end{itemize}
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Ninth Circuit panel decision authored by Judge Stephen Reinhardt, which held that the Proponents had standing to appeal the district court decision.31

It is axiomatic that the state may appeal adverse lower court decisions issued against it.32 In *Karcher v. May*,33 the Court permitted state legislators to defend a statute when the governmental officials named in the suit refused to defend it, noting that the legislators possessed “authority under state law to represent the State’s interests.”34 One open question in *Perry* was whether California law similarly authorized the Proponents to bring the suit. As noted, the Ninth Circuit panel certified the issue to the California Supreme Court, which determined that Proponents possessed such authority.35 The case then returned to the Ninth Circuit, which determined that the Proponents had established Article III standing.36

To reach that result, however, the Ninth Circuit majority opinion had to square its analysis with an earlier statement by the U.S. Supreme Court. In *Arizonans for Official English v. Arizona*,37 sponsors of a ballot initiative had also launched an appeal after state officials declined to do so. The Court expressed “grave doubts” about whether sponsors of a ballot initiative in Arizona had standing to bring suit.38 It observed that the sponsors of the initiative “are not elected representatives, and we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”39 However, given that it found the case non-justiciable on mootness grounds, the Court did not need to resolve the question of standing.40

The Ninth Circuit panel in *Perry* found that *Arizonans* was distinguishable.41 It noted that Arizona had not delegated authority to the sponsors of the initiative, while California had done so.42 The panel sought to insulate its decision by casting this determination, at least in part, as a federalism issue, noting that it should defer to the California Supreme Court.43 However, the U.S. Supreme Court could easily extend its statement in *Arizonans* rather than resolving its “grave doubts” in the

31 *Perry III*, 671 F.3d at 1075.
32 Diamond v. Charles, 476 U.S. 54, 62 (1986) (emphasizing that “a State has standing to defend the constitutionality of its statute”).
34 Id. at 82.
35 *Perry II*, 265 P.3d 1002, 1165 (Cal. 2011).
36 *Perry III*, 671 F.3d at 1075.
38 Id. at 66 (“We thus have grave doubts whether AOE and Park have standing under Article III to pursue appellate review.”).
39 Id. at 65.
40 Id. at 66.
41 *Perry III*, 671 F.3d 1052, 1135–37 & n.11, 1165 n.27 (9th Cir. 2012).
42 Id.
43 Id. at 1072 (“It is not for a federal court to tell a state who may appear on its behalf any more than it is for Congress to direct state law-enforcement officers to administer a federal regulatory scheme to command a state to take ownership of waste generated within its borders, or to dictate where a state shall locate its capital.”).
panel’s favor. It could, for instance, lay more stress on the fact that the Proponents are “not elected representatives” rather than on the fact that the Proponents received authority under state law to bring the suit.

A ruling by the U.S. Supreme Court that the Proponents lacked standing would reinstate the district court’s opinion, given that it would mean that an improper party had appealed that decision. As the Ninth Circuit indicated during oral argument, the impact of a ruling based on standing would be limited to requiring the clerks of Alameda County and Los Angeles County—the only county clerks named in the complaint—to issue marriage licenses to same-sex couples. Plaintiffs’ attorney David Boies stated that he believed the Governor would then require other counties in California to operate in a manner that would ensure statewide consistency. He further observed that he would bring suit if necessary to require state officials to mandate that result. The upshot of this solution would be that only California would be affected.

Of course, such a ruling could have consequences for future federal constitutional challenges brought against restrictions on same-sex marriage passed solely through plebiscite. If the relevant elected officials (the formal defendants or an elected official authorized by state law) refused to defend the suit, the proponents of such an initiative would not be able to do so. This would be the case even if state law authorized such proponents to represent the state.

C. The One-State (Substantive) Solution

The narrowest merits-based ground on which the Supreme Court could rule for the plaintiffs is probably the one crafted by the Ninth Circuit panel. The Ninth Circuit held that under the Equal Protection Clause, a state could not grant an entitlement, such as the right to marry, and then take it away without a legitimate reason. Call this the “Reinhardt rule.” The Reinhardt majority opinion stressed that prior to Prop 8, the California Supreme Court had held that the state constitution required the state to allow same-sex couples to marry. According to the Ninth Circuit, this deprivation of the previously granted right could only be explained by voter animus.

In reaching this conclusion, the Ninth Circuit panel relied heavily on an opinion written by Justice Anthony Kennedy in the 1996 case of Romer v. Evans. Justice Kennedy is generally the swing vote on the current Court. He is also more
specifically viewed to be a crucial vote in the same-sex marriage cases on appeal to the Court, as he wrote the majority opinions in both \textit{Romer} and \textit{Lawrence}. In \textit{Romer}, the Court struck down a Colorado constitutional amendment that stated that there could be “no protected status” on the basis of gay, lesbian, or bisexual identity. The constitutional amendment in question (Amendment 2) superseded anti-discrimination laws protecting gays that had been passed by progressive cities in Colorado. In essence, those cities were blue dots in a red state. Amendment 2 invalidated those municipal ordinances and, going forward, prohibited the state or any of its subdivisions from enacting a similar kind of anti-discrimination ordinance.

The Supreme Court struck down the Colorado amendment under the Equal Protection Clause of the Fourteenth Amendment, without specifying a level of review. It observed that Amendment 2 was “at once too narrow and too broad”—it singled out a group of people on the basis of a single trait and then denied them protections across the board. The sweeping nature of the disability on a small group of people effectively made gay individuals “strangers” to the law. The Court stated that the imposition of such harm could only be explained by animus, and it struck down the legislation as incompatible with the Equal Protection Clause “in the most literal sense.”

In the \textit{Perry} case, the Ninth Circuit panel detected the same animus. Commentary in the immediate aftermath of the decision highlighted two potential issues with its analysis. The first was that the panel disregarded the potentially limiting effect of the language in \textit{Romer} about the breadth of the harm involved. In

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Romer, a key part of the analysis was the overweening breadth of the harm Amendment 2 imposed on gays.\textsuperscript{56} In Perry, however, Prop 8 eliminated only one right—the right to marry. The panel acknowledged this distinction, saying that animus could be present even (or perhaps especially) when a state enacted legislation with “surgical precision.”\textsuperscript{57} Yet this interpretation extends Romer, which repeatedly emphasized the breadth of the harm imposed by Amendment 2 as part of what was constitutionally objectionable about it.\textsuperscript{58}

This objection, however, only means that Romer, in and of itself, may not dispose of Perry. Because they are both gay-rights cases involving ballot initiatives, the understandable tendency has been to link Perry with Romer. Yet Romer is but one member of a family of cases in which the Court has invalidated legislation that lacked a rational basis. Many of these cases invalidated laws much narrower than Prop 8. In \textit{City of Cleburne v. Cleburne Living Center},\textsuperscript{59} the Court struck down a city zoning ordinance that discriminated against individuals with mental disabilities under equal protection rational basis review. Similarly, in \textit{U.S. Department of Agriculture v. Moreno},\textsuperscript{60} the Court struck down a portion of a food stamps program that discriminated against “hippies.”\textsuperscript{61} I think the best reading of these precedents is that the problem with legislation based solely on animus is the animus, not the breadth of the legislation. Such breadth is but one of many possible indicia pointing to the existence of animus.

The second concern with the Ninth Circuit’s reading of Romer is slightly more troubling. The Ninth Circuit panel focused heavily on temporality—specifically, on the point that California had given same-sex couples the right to marry through a state Supreme Court decision before eliminating that right through Prop 8. Colorado did grant gays some protection against discrimination before it took away that protection through Amendment 2. However, it is not at all evident that the Romer Court relied on this sequencing in arriving at its decision.

If the Court adopted this substantive rule, the decision would only affect the capacity of same-sex couples to marry in California, at least for the time being. No other state has permitted same-sex couples to marry before taking away that right. It is true that in 2009, the Maine legislature enacted a bill that would permit same-sex marriage, and that this legislation was superseded later that year by a voter initiative.\textsuperscript{62} However, the marriage right never “hit the ground” in Maine—couples were not permitted to marry as the initiative was pending. Maine, of course,

\textsuperscript{56} Romer, 517 U.S. at 632, 635.
\textsuperscript{57} Perry III, 671 F.3d 1052, 1081 (9th Cir. 2012).
\textsuperscript{58} Romer, 517 U.S. at 632, 635.
\textsuperscript{59} 473 U.S. 432 (1985).
\textsuperscript{60} 413 U.S. 528 (1973).
\textsuperscript{61} Id. at 538.
recently legalized same-sex marriage. Yet even if the Supreme Court had adopted the Reinhardt rule before it had done so, Maine would not have been affected.

Like the standing theory, this rule would have downstream consequences. The breadth of the rule’s applicability will depend on whether the Court substantively endorses the rule or simply leaves it in place by denying certiorari. The former would obviously make the rule applicable to all fifty states, while the latter would make it applicable only to the nine states in the Ninth Circuit. Wherever the rule applied, a state would be barred from allowing same-sex couples to marry and then later preventing other same-sex couples from doing so, unless it could produce a rational basis for withdrawing the right.

D. The Eight-State Solution

The Court could find yet another breakpoint on the spectrum that would change the law in the eight states that have broad relationship recognition laws that afford all or essentially all the rights and responsibilities of marriage. Under this theory, once the state has given same-sex couples the rights and responsibilities of marriage, it cannot justify withholding the word “marriage.” This resolution differs from the Reinhardt rule because it removes any issue of temporality from the analysis. What is important is not that California went all the way to same-sex marriage and then retreated, but rather that California went all the way to “everything but marriage.” Once it did so, it reached the point of no return. Currently, seven states besides California would be affected by such a ruling: Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island.

See supra note 19.

Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island.

The Delaware Civil Union and Equality Act of 2011 came into effect on January 1, 2012. The law provides:

Parties to a civil union lawfully entered into or otherwise recognized pursuant to this chapter shall have all the same rights, protections and benefits, and shall be subject to the same responsibilities, obligations and duties under the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, as are granted to, enjoyed by or imposed upon married spouses.


Hawaii’s civil union law took effect on January 1, 2012. It provides that

Partners to a civil union lawfully entered into pursuant to this chapter shall have all the same rights, benefits, protections, and responsibilities under law, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil law, as are granted to those who contract, obtain a license, and are solemnized pursuant to chapter 572.
Such a ruling, of course, could have perverse effects, given that legislators who might have been willing to compromise at “everything but marriage” unions might switch to endorsing only weaker recognitions or denying same-sex couples rights and benefits altogether. Increasingly, however, the popularity of such “marriage-lite” arrangements appears to be waning. In the Perry litigation, plaintiff Jeffrey Zarrillo stated that he and his partner decided against getting a domestic partnership because it “would relegate me to a level of second class citizenship, maybe even third class citizenship, currently, the way things are in California

HAW. REV. STAT. § 572B-9 (West 2012).

66 The Illinois Religious Freedom Protection and Civil Union Act entered into effect on June 1, 2011. The statute provides that “[a] party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.” 750 ILL. COMP. STAT. 75/20 (2012).

67 Nevada’s domestic partnership law was enacted in 2009. It provides that “[d]omestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law . . . as are granted to and imposed upon spouses.” NEV. REV. STAT. §§ 122A.010–.510 (2012).

68 The New Jersey Supreme Court, in Lewis v. Harris, invalidated the state’s domestic partnership law and required that the legislature “either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name.” 908 A.2d 196, 224 (N.J. 2006). The New Jersey legislature responded with the Civil Union Act, which took effect on February 19, 2007. The Act provides that “[c]ivil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage.” N.J. STAT. ANN. § 37:1-31(a) (West 2012).

69 The Oregon Family Fairness Act of 2007 allows for domestic partnerships, providing that

[a]ny privilege, immunity, right or benefit granted by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was married, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership or because the individual is or was, based on a domestic partnership, related in a specified way to another individual.


70 Rhode Island’s civil union law took effect July 1, 2011. It provides the same “rights, benefits, protections, and responsibilities under law, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil or criminal law as people joined together [in marriage].” R.I. GEN. LAWS ANN. § 15-3.1-6 (West 2012).
today.”71 He is not alone. Reports from other states with “marriage-lite” arrangements maintain that same-sex couples are unwilling to avail themselves of them because they are holding out for full marriage equality.72

E. The Fifty-State Solution

After the eight-state solution, it is difficult for this author to discern another breakpoint short of requiring same-sex marriage in all fifty states. If the one-state (substantive) solution is represented by the Ninth Circuit’s decision, the “fifty-state solution” is represented by Judge Walker’s district court opinion. If the Court embraces that decision, it would change the law in forty-one states.73

III. THE ROLE OF POLITICAL POWERLESSNESS IN SUPREME COURT ADJUDICATION

So which of these courses should the Supreme Court take? Many factors will guide the Court in its analysis. Eschewing any attempt to be comprehensive, I focus on one—the role of political powerlessness. There is a paradox with respect to political power and judicial review. Under one theory, when a group seeking protection has political power, the judiciary ought to refrain from meaningful review of the legislation, given that the group can engage in self-help through the political process. Under another theory, however, political powerlessness requires this restraint. Fortunately, this tension can be reconciled. Understanding that reconciliation will be crucial to guiding the choice among the Supreme Court’s alternatives.

A. In Theory: Political Power Justifies Judicial Restraint

The conventional wisdom that courts should not protect groups with sufficient political power dates back at least to the famous 1938 case of United States v. Carolene Products Co.74 Decided after the bruising showdown between President Franklin Roosevelt and the Supreme Court, the case inaugurated a new era of judicial deference to legislative determinations. One exception to that deference, articulated in the famous “Footnote Four,” involved instances in which “prejudice

73 See supra note 19 for a list of the jurisdictions—nine states and the District of Columbia—that have legalized gay marriage.
74 304 U.S. 144 (1938).
against discrete and insular minorities” would keep individuals from participating effectively in the political process.\textsuperscript{75} Through this formulation, the Court reversed the spin of the countermajoritarian difficulty, suggesting that it was squarely within the competence of an unelected minority of judges to be solicitous of minority groups shut out of the political process. John Hart Ely’s 1980 book \textit{Democracy and Distrust}\textsuperscript{76} elaborated an entire theory of judicial review out of this footnote.

The modern doctrinal home for the idea that political powerlessness is a predicate for more rigorous judicial review lies in the equal protection heightened scrutiny jurisprudence. The Supreme Court has determined that five classifications merit such enhanced scrutiny—race, national origin, sex, alienage, and non-marital parentage.\textsuperscript{77} The Court has also set out four factors that it explores in determining which classifications merit heightened scrutiny. The Court asks whether the group has suffered a history of discrimination; whether the group is politically powerless; whether the group is marked by an obvious, distinguishing, or immutable characteristic; and whether the trait defining the group has any effect on a capacity to contribute to society.\textsuperscript{78}

In a pre-trial order, Judge Vaughn Walker set all four questions for trial.\textsuperscript{79} Both sides provided experts on the question of political powerlessness. During the trial, the Proponents offered political science professor Kenneth P. Miller of Claremont McKenna College.\textsuperscript{80} Miller testified that gays were politically powerful because, for instance, they had allies among politicians, labor unions, churches, and corporations.\textsuperscript{81} To challenge this characterization, the plaintiffs offered their own political science expert, Professor Gary Segura of Stanford.\textsuperscript{82} Segura observed that the allies cited by Miller were not reliable.\textsuperscript{83} He also observed that the political power of opponents to gay rights (specifically certain religious denominations) significantly diminished the political power of the gay community.\textsuperscript{84} Although their experts vehemently disagreed about the magnitude of gay political power, both sides were operating under the assumption that only politically powerless groups could get elevated protection from the courts. Yet the practice of the courts only partially reflects that principle.
B. In Practice: Political Power Justifies Judicial Intervention

As a matter of practice, a group usually must have significant political power before the Court grants it heightened scrutiny. If a group is sufficiently politically powerless, it will never even get on the Court’s radar. We could think here of groups, such as the intersexed,\(^{85}\) that are so marginal that the Supreme Court has not even acknowledged their existence. Even when a group is recognized, the courts will be loath to move too quickly if not enough states have moved in its favor. While we like to think of the courts as forums of principle that ignore prudential considerations, this is not how the courts always operate.\(^{86}\)

The Supreme Court’s delay in the context of interracial marriage demonstrates how the Court is reluctant to move too far ahead of public opinion. In 1954, *Brown v. Board of Education* struck down the principle of “separate but equal” in the educational context.\(^{87}\) The year after *Brown*, the Supreme Court issued a series of *per curiam* orders that extended the integrationist principle to other domains, such as public transportation and public recreational facilities.\(^{88}\) However, it deemed the extension of this principle to the context of marriage to be a bridge too far. It initially granted review in a case titled *Naim v. Naim*,\(^{89}\) in which the Supreme Court of Virginia had upheld that state’s anti-miscegenation statute. In 1955, the Supreme Court then vacated its grant of certiorari for “the failure of the parties to bring here all questions relevant to the disposition of the case.”\(^{90}\) The Court did not consider the issue again for twelve years, when it adopted a fifty-state rule striking down all anti-miscegenation laws in *Loving v. Virginia*.\(^{91}\)

In other words, the Court waited for the nation to catch up with a principle it had already embraced. At the time *Naim* was decided, fewer than half the states permitted interracial marriage.\(^{92}\) By the time *Loving* was decided, thirty-four states did so.\(^{93}\) The Court was much more comfortable washing out the sixteen outliers than in taking out a majority of the states.

At a time when only nine states and the District of Columbia have legalized same-sex marriage, *Perry* looks more like *Naim* than like *Loving*. To be sure, there

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\(^{85}\) Intersexuality “refer[s] to a physical and/or chromosomal set of possibilities in which the features usually understood as belonging distinctly to either the male or female sex are combined in a single body.” Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination “Because of . . . [Perceived] Sex*”, 34 N.Y.U. REV. L. & SOC. CHANGE 55, 57 (2010) (quoting MORGAN HOLMES, INTERSEX: A PERILOUS DIFFERENCE 32 (2008)).


\(^{87}\) 347 U.S. 483, 495 (1954).


\(^{89}\) 87 S.E.2d 749 (Va. 1955).

\(^{90}\) 350 U.S. 891 (1955) (per curiam).

\(^{91}\) 388 U.S. 1, 12 (1967).

\(^{92}\) *Naim*, 87 S.E.2d at 753.

\(^{93}\) *Loving*, 388 U.S. at 6.
is some question about whether adding up states is the correct way to gauge national sentiment. If we look instead at opinion polls, we see that the percentage of individuals favoring same-sex couples is significantly greater than the percentage of individuals who favored inter-racial marriage in 1967. In 1968, the year after *Loving v. Virginia*, a Gallup poll showed that only 20 percent of Americans supported marriage between whites and blacks; 73 percent were opposed.\textsuperscript{94} In contrast, in a Gallup poll released on May 20, 2011, 53 percent Americans favored the legalization of same-sex marriage.\textsuperscript{95} Nonetheless, *Naim* stands as an object lesson for the premise that the Court will not get too far ahead of public opinion.

Moreover, in the rare instance where the Court is viewed to have gotten too far ahead of public opinion, it has engendered significant criticism. *Roe v. Wade*\textsuperscript{96} changed the laws in virtually every state. In an article penned while she was a D.C. Circuit judge, Justice Ruth Bader Ginsburg criticized *Roe* as an instance where the Court wrote an overly broad decision and pre-empted a pro-choice consensus that was coalescing in the country: “A less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day . . . might have served to reduce rather than to fuel controversy.”\textsuperscript{97}

There are reasons to doubt the analogy between *Perry* and *Roe*. Scholars such as Reva Siegel and Linda Greenhouse have challenged the traditional account that *Roe* pre-empted a growing consensus in favor of the abortion right.\textsuperscript{98} In addition, unlike opinion on the issue of abortion, opinion on the issue of same-sex marriage appears to be trending in one direction in this country. Twenty-year-olds appear to be more opposed to reproductive choice and more in favor of same-sex marriage than the generation before them.\textsuperscript{99} Even if the Court issues a fifty-state solution in *Perry*, it seems unlikely that the backlash will be as great as it was reputed to be with *Roe*.

What both *Naim* and *Roe* show, however, is that there is a deeply entrenched conventional wisdom that the Court should not get too far ahead of public sentiment. Judge Richard Posner has applied this common understanding to the case of same-sex marriage:

\textsuperscript{96} 410 U.S. 113 (1973).
This is not to say that courts should refuse to recognize a constitutional right merely because to do so would make them unpopular. Constitutional rights are, after all, rights against the democratic majority. But public opinion is not irrelevant to the task of deciding whether a constitutional right exists. . . . If it is truly a new right, as a right to same-sex marriage would be . . . [judges] will have to go beyond the technical legal materials of decision and consider moral, political, empirical, prudential, and institutional issues, including the public acceptability of a decision recognizing the new right.  

Judge Posner’s recognition of “the public acceptability of a decision” as a factor suggests that a group that is completely politically powerless will draw less review from the courts. This passage was picked up with the emendations above by the Eighth Circuit when it denied same-sex couples the right to marry.  

Posner’s view is simply the judge’s version of the memorandum issued by the gay-rights groups discouraging individuals from filing federal suits. The gay-rights groups who issued the memorandum believe that there is a constitutional right to same-sex marriage. They simply do not believe that gays have “flipped” enough states or changed enough minds to get that decision from the courts, given that courts “typically [do] not get too far ahead of either public opinion or the law in the majority of states.” But notice how different this view is from the Carolene Products principle followed during the Perry trial. These individuals believe that the courts will not review a case because the group is too politically powerless, not because it is too politically powerful.

C. The Paradox of Political Power

A paradox of political power attends judicial review. It could be stated as follows: A group must have an immense amount of political power before it will be deemed politically powerless by the Court. It is therefore important that we not assume that courts will always help the politically powerless. A group can be so powerless that the Court will not even recognize its existence. It is equally important that we not assume that courts will turn their backs on a group if it has too much political power. When women were granted heightened scrutiny in

101 Citizens for Equal Protection v. Bruning, 455 F.3d 859, 871 (8th Cir. 2006).
102 See Joint Statement, supra note 28.
1976, the Congress had passed the Equal Rights Amendment and many states had ratified it.

The complexity of the political powerlessness inquiry was captured by the 1973 case of *Frontiero v. Richardson*. In that case, the Court considered a Congressional benefits scheme for military service members that discriminated on the basis of sex. The Court had already begun to apply the Equal Protection Clause to sex-based classifications in the 1971 case of *Reed v. Reed*, where it struck down a state statute that favored men over women as executors of estates. However, the *Reed* Court had applied only rational basis review. Given the deferential nature of rational basis review, invalidation under this standard was anomalous. In *Frontiero*, the Court was called upon to clarify its position.

The Court ruled 8–1 that the benefits scheme unconstitutionally discriminated on the basis of sex. There was no majority opinion. Justice Brennan penned the plurality opinion for four Justices maintaining that sex-based classifications should draw strict scrutiny. He acknowledged that women were a majority of the population. Yet because women were still underrepresented in the nation’s decision-making councils, women could still be deemed politically powerless. Moreover, the fact that Congress had enacted legislation to protect women—such as the Equal Pay Act of 1963 and the Civil Rights Act of 1964—cut for, not against, a finding of heightened scrutiny. After all, this meant that a co-equal branch of government had concluded that sex discrimination was illegal.

A three-Justice concurrence written by Justice Powell reached the same result through a radically different theory. Justice Powell argued that the Court should not interrupt the democratic dialogue over the Equal Rights Amendment by granting heightened scrutiny. Rather, the Court should only apply rational basis review to the legislation. Note, however, that Powell still struck down the legislation. Justice Stewart concurred separately to rely on *Reed v. Reed*. Only then-Justice Rehnquist voted to uphold the legislation.

*Frontiero* underscores the paradox of political power. The concurrence takes the conventional view that if a group has political power, the Court should move incrementally. The plurality, in contrast, at times takes the more practical view that
a group’s political power should encourage the Court to engage in more aggressive judicial review. Under either view, the political power of women ultimately did not foreclose a ruling in their favor. The core debate was not over whether to strike down the sex-discriminatory state action, but how aggressively to do so.

However powerful gays may be in 2012, it is hard to say that they are more powerful than women were in 1973. So the lessons of *Frontiero* may be instructive. It may seem like a contradiction to say that gays are simultaneously politically powerless enough and politically powerful enough to warrant aggressive judicial review. But far from being a contradiction, this statement captures a coherent, if nuanced, truth about judicial decisionmaking. The judiciary is most likely to intervene when groups are in the intermediate space of political power—powerful enough to be on the Court’s radar, but powerless enough to remain vulnerable in the political process. That is where gays and lesbians are today.

This does not necessarily mean that the Supreme Court should deliver a fifty-state solution. Obviously, prudential considerations are only one of many factors that will determine how the Court will rule in *Perry*. What it does suggest is that the perceived political power of gays presents no impediment to aggressive review by the Court.