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VIEWING THE SUPREME COURT'S MARRIAGE CASES THROUGH THE LENS OF POLITICAL SCIENCE

Nancy Scherer[†]

ABSTRACT

Political scientists have developed two principal models for analyzing and predicting the decision making of justices. First, the attitudinal model predicts that decisions are made based on the justices' personal policy preferences. This model can be utilized to correctly predict the votes of each justice in *United States v. Windsor*. The second model, the strategic model—which is well demonstrated by the votes in *Craig v. Boren*—borrows its foundation from the attitudinal model, but it also accounts for the fact that justices sometimes must consider the votes of other members of the Court if they want to reach consensus and avoid their most undesirable policy preferences. This model provides an explanation for the seemingly unpredictable results found in *Hollingsworth v. Perry*, by examining the alleged motivations of the five justices whose opinions broke from how they decided *Windsor*. Justices Ginsburg, Kagan, and Breyer switched votes between *Windsor* and *Hollingsworth*, to find no standing in *Perry* based on, among other things, their fear that a judgment on the merits would have a backlash similar to that of *Roe v. Wade*. Justices Alito and Thomas, the most conservative justices, decided that there was standing because the most idealistic tend to resist compromise. With these taken into account, the strategic model is able to predict the *Perry* outcome.

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INTRODUCTION

Both legal and political science scholars have long contemplated the question, why do Supreme Court justices vote the way they do? The traditional “legal model” of decision making is premised on “the belief that, in one form or another, the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent.”¹ But, as esteemed jurist Richard Posner once observed, “[t]here is a tremendous amount of sheer hypocrisy in judicial opinion-writing. . . . Judges have a terrible anxiety about being thought to base their opinions on guesses or their personal views. To allay that anxiety, they rely on the apparatus of precedent and history, much of it extremely phony.”²

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1. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 48 (2002). In contrast to the statistical and formal models used by behavioralists—in economics, political science, and empirical legal studies—the majority of legal scholars and practitioners use what has been termed the “legal model” to understand the decisions of the Supreme Court. Some legal scholars have tried to reconcile the legal model and the attitudinal model by engaging in a case-by-case consideration of political and historical conditions at the time of the holding along with the precepts of the legal model. Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 *GEO. L.J.* 173, 174 (2001). This type of analysis, however, is done after the decision is rendered. Behavioralists’ models of decision making are able to predict the outcome of cases *before* they are decided by the Court, and political science scholars have argued that the legal model’s inability to predict the future demonstrates its deficiencies. See SEGAL & SPAETH, *supra* note 1, at 86.
 2. Linda Greenhouse, *In His Opinion*, N.Y. TIMES, Sept. 26, 1999, § 7, at 14 (interviewing Judge Posner).

Tension over the legal model dates as far back as 1897; Justice Oliver Wendell Holmes Jr. acknowledged that law is but “[t]he prophecies of what the courts will do in fact, and nothing more pretentious”³ But, his belief that predicting future decisions is but “prophesy” would prove over time to be naïve. In their discipline, political scientists have firmly established that Supreme Court decisions can, indeed, be predicted with great accuracy.

In this Article I will first present the two principal models—the attitudinal⁴ and strategic⁵ models—used by political scientists to predict Supreme Court decisions.⁶ Then I will apply these models to explain the outcomes of the two same-sex marriage cases at the center of this symposium.⁷ I leave the arduous task of explaining and reconciling the decisions through use of the legal model to constitutional law experts.⁸ Here, my task is to present the political science models of decision making, one applicable to *United States v. Windsor*⁹ and the other to *Hollingsworth v. Perry*.¹⁰ Without reference

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3. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).
 4. The attitudinal model states that justices’ votes are predominantly based on their personal policy preferences and not fidelity to the law. SEGAL & SPAETH, *supra* note 1, at 86. By ascertaining each of the justices’ preference, one can predict with great accuracy the outcome of a Supreme Court case.
 5. This model assumes justices make decisions based on their personal policy preferences, but acknowledges that in certain types of cases justices may have to settle for their second preferences in order to avoid having their least preferred preferences become the law of the land. Such cases usually involve two issues, one based on an Article III standing issue and the substantive issue. When justices look to the votes of their fellow justices and observe that no majority on the merits can be reached, they then begin to ascertain what their votes should be to avoid the enactment of their least favorite policy issue. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9–21 (1998).
 6. As discussed below, there are still political scientists who adhere to the legal model to interpret cases, rather than to the statistically based attitudinal model. See *infra* notes 40–42 and accompanying text.
 7. Symposium, *The Supreme Court's Treatment of Same-Sex Marriage in United States v. Windsor & Hollingsworth v. Perry: Analysis and Implications*, 64 CASE W. RES. L. REV. 823 (2014).
 8. Some political science scholars have argued that, whenever a majority of the Court fails to follow its own prior decisions, as the dissent in *United States v. Windsor* suggests of the majority, the legal model cannot explain the outcome of the case. See SEGAL & SPAETH, *supra* note 1. If, in fact, the legal model were true, then all of the justices would join a single opinion, applying prior case law to the current case. *Id.*
 9. 133 S. Ct. 2675 (2013) (holding that DOMA’s unequal treatment of same-sex marriage was unconstitutional under the Fifth Amendment).

to the facts of the cases, prior precedents, or methods of constitutional interpretation, these models were able to predict the outcome of the two cases as well as a method to reconcile the judicial decision-making behavior in the two cases.

In Part I, I present a historical account of the attitudinal model. In Part II, I apply the attitudinal model to the *Windsor* decision. The analysis demonstrates the power of the attitudinal model, which correctly predicted the votes of all nine Justices on the Court and does so simply by knowing each justice's judicial ideology. Part III turns to the development of another model of decision making. This model, the strategic model, builds on the attitudinal model by acknowledging that justices are rational political actors, seeking to see their personal policy preferences become the law of the land. But the strategic model goes one step further, as it recognizes that sometimes justices vote with an eye towards the other justices' preferences in order to form a majority opinion. To elucidate how strategic voting is used by the Supreme Court, I briefly discuss the strategic voting that occurred in the landmark case, *Craig v. Boren*.¹¹ In Part IV, I look at the strategic voting that occurred in the *Windsor* dissent and the *Perry* majority opinion.

I. HISTORICAL DEVELOPMENT OF THE ATTITUDINAL MODEL

Following Holmes's original observation,¹² in the early 1920s there was a movement afoot among legal scholars known as *legal realism*; principally, they questioned the common wisdom¹³ that judges follow

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10. 133 S. Ct. 2652 (2013) (finding the proponents of California's constitutional amendment prohibiting same-sex marriage did not have standing to appeal the district court's order).
 11. 429 U.S. 190 (1976). In *Craig v. Boren*, the Court ruled that claims that the government has engaged in discrimination based on gender warrants heightened scrutiny by the Court. However, rejecting both the strict scrutiny test and the traditional rational basis test, the Court used a new standard of review to scrutinize gender discrimination under the Fifth and Fourteenth Amendments. *Id.* That test is now known as intermediate scrutiny. As discussed in Part III, this case had an initial standing issue and a lack of a majority on the level of scrutiny to apply to gender discrimination. Through strategic voting, a majority formed around the intermediate scrutiny test.
 12. See *supra* note 3 and accompanying text.
 13. According to British jurist Sir William Blackstone, judges are sworn "to determine, not according to [their] own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." WALTER F. MURPHY & C. HERMAN PRITCHETT, *COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 14 (4th ed. 1986).

standing legal rules (or precedents) to decide all cases.¹⁴ Instead, they argued that these rules are of limited use in predicting judicial decisions.¹⁵ Kalman called it the “idiosyncrasy” of judicial decision making.¹⁶ Critically, they acknowledged that decisions are made in the context of social reality¹⁷ and personal life experiences;¹⁸ they questioned the reliability of legal precedents and rules used in decisions to justify a jurist’s vote.¹⁹ Legal realists thus concluded that any given decision could be read in different ways depending on these two factors.²⁰ For the legal community, the legal realists’ contribution towards understanding judicial decision making was both enlightening and disturbing: “The realists’ exposure of the judge as a human being who reasoned from the gut and manipulated legal rules to cover it up cast judicial subjectivity in a frightening light.”²¹

Political Scientist C. Herman Pritchett is sometimes accredited with being the first behavioralist in the study of Supreme Court decision making.²² Rather than making unproven empirical claims, Pritchett would systematically study the voting behavior of the Roosevelt Court.²³ His study was based on the theory that “justices are motivated by their own preferences.”²⁴ His critical findings

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14. *See generally* LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, at 3–4 (1986) (discussing the legal realism movement at Yale Law School).
 15. *See id.* at 5–7.
 16. *Id.* at 6–7.
 17. *Id.* at 33–34.
 18. *See id.* at 70. These life experiences, however, were deemed indeterminate. However, like today’s attitudinalists, legal realists believed that a judge’s ideology and the social (or political) context surrounding the decision could help predict outcomes. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 19–61, 121–32, 178–219 (1960).
 19. Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 *HARV. L. REV.* 1222, 1237 (1931).
 20. *See* Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 *PHIL. & PUB. AFF.* 205, 209 (1986).
 21. KALMAN, *supra* note 14, at 121.
 22. *See* C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–47* (1948).
 23. *Id.* He reached this conclusion by studying the Supreme Court decisions during the Roosevelt presidency and found that, in the great majority of cases, justices dissented from the majority or concurred only in the outcome, but disagreed with the majority’s legal reasoning. *Id.* at 32–44 (noting that dissents occurred in fifty-eight percent of all cases in 1943–44). He looked to voting patterns to establish that certain justices consistently voted in a liberal fashion, and some consistently voted in a conservative fashion. *Id.* at 33–34.
 24. *Id.* at xiii (arguing that the justices do not intentionally act politically but are, to some extent, motivated by politics).

demonstrated that the Roosevelt Court justices did not follow legal precedent or respect prior decisions through the doctrine of stare decisis and that there were voting blocs on the Court that could be categorized as “left” or “right.” Based on his findings, Pritchett concluded that “the Court is a political institution performing a political function.”²⁵ It was his use of descriptive statistics that built upon the original themes of the legal realists. But Pritchett did not develop a model capable of predicting future decisions of Supreme Court justices—one that could be applied generally and not just to the Roosevelt Court.

In the 1950s, political scientists began to take their role as “scientists” more seriously.²⁶ This new movement, known as behavioralism, mimicked the dictates of the hard sciences. For example, political scholars began to insist that research in their field should posit refutable hypotheses, use quantifiable data, and rely on observable unbiased data to test the hypotheses. This trend also found traction among political science scholars of the Supreme Court.²⁷

The next major advancement in the development of the attitudinal model was Glendon Schubert’s research. He applied true scientific methods to the study of Supreme Court decision making²⁸ and found that Justices on the Court were political actors and their decisions part of the political process.²⁹ In *The Judicial Mind*, Schubert went further. He hypothesized that a given fact pattern and a justice’s preferences (referred to as “ideal points”) could be scaled along a conservative-liberal vector.³⁰ Later, Harold Spaeth looked to

25. *Id.* (internal citation omitted).

26. See ALBERT SOMIT & JOSEPH TANENHAUS, *THE DEVELOPMENT OF AMERICAN POLITICAL SCIENCE: FROM BURGESS TO BEHAVIORALISM 177–79* (Irvington Publishers 1982) (1967) (recording the articles of faith for behavioralism, which clearly indicate behavioralism should be viewed as a science backed by data, observations, prediction, and explanation).

27. *Cf.* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL 32–64* (1993) (exploring the four precepts of the legal model, how they are deficient for determining judicial decisions and how the legal model and attitudinal model differ).

28. GLENDON A. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 77–371* (1959).

29. Glendon A. Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 *AM. POL. SCI. REV.* 1007 (1958) (suggesting different techniques to study the Court’s political behavior).

30. GLENDON A. SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF THE SUPREME COURT JUSTICES, 1946–1963*, at 236–72 (1965).

psychological theories of behavior, and set down the precepts of the attitudinal model we use today:

*vote = case stimuli (facts) + the justice's attitudes (ideology)*³¹

An attitude was defined as an enduring “interrelated set of beliefs about an object or situation.”³² “Thus, for example, as searches by the police grow[] more intrusive, first liberal, then moderate, and then conservative judges should become increasingly likely to reject the search.”³³

In 1993, Spaeth and his colleague Jeffrey A. Segal would demonstrate empirically the strength of the attitudinal model.³⁴ Looking at thousands of Supreme Court decisions, each vote coded as “liberal” or “conservative,” they found that seventy-one percent of a justice’s decision making could be explained solely by reference to the two facets of the attitudinal model.³⁵ In touting the power that political ideology plays in a justice’s final vote, Segal and Spaeth presciently predicted that “if a case on the outcome of a presidential election should reach the Supreme Court . . . the Court’s decision might well turn on the personal preferences of the justices.”³⁶ Seven years later, their prediction would be proven correct in *Bush v.*

31. HAROLD J. SPAETH, AN INTRODUCTION TO SUPREME COURT DECISION MAKING 61–69 (rev. ed. 1972).

32. *Id.* at 65.

33. Jeffrey Segal, *The Attitudinal Model*, EMPIRICAL LEGAL STUDIES BLOG (July 13, 2006, 1:03 PM), <http://www.elsblog.org>. It must also be said that this explanation of the attitudinal model applies principally to cases in which the judge decides whether a particular fact pattern deserves a liberal or conservative outcome (for example, in a search and seizure case). In many cases, however, the facts of a case will be largely irrelevant in applying the attitudinal model, as the political question at stake is not dependent on the underlying facts. See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1151–52 (2004). For instance, in *United States v. Windsor*, the facts of the case raise a federal tax question, but the central legal issue is whether the federal government must accord equal treatment to same-sex couples and heterosexual couples, not how the underlying tax issue should be decided. *United States v. Windsor*, 133 S. Ct. 2675 (2013). Since the facts of the tax question are largely irrelevant to the same-sex marriage issue, judicial ideology will predominate in predicting the outcome of the case.

34. SEGAL & SPAETH, *supra* note 27, at 73 (noting that the Supreme Court “may freely implement their personal policy preferences as the attitudinal model specifies”).

35. Segal, *supra* note 33.

36. SEGAL & SPAETH, *supra* note 27, at 70.

Gore.³⁷ In this case each justice voted in line with the candidate closest to his or her preferred policy outcome and in so doing elected the President of the United States in 2000.³⁸

It should be noted that the attitudinal model is not without its critics. In fact, for political scientists who study the Court, there is a deep divide between those who agree with the attitudinal model³⁹ and those who defend the legal model of decision making.⁴⁰ Other political scientists simply ignore the attitudinal model and continue to engage in the same type of doctrinal analyses of Supreme Court cases—application of the legal model—as do law professors and practitioners.⁴¹

One of the biggest challenges to testing the attitudinal model is how to measure the justices' policy preferences (or unique judicial ideology). Over the years, a series of proxies were used to stand for judicial ideology; at first, it was the justice's political party or the appointing president. Eventually, Segal and Cover devised a more

37. 531 U.S. 98 (2000).

38. At issue in *Bush* was whether the federal Equal Protection Clause prohibited certain counties in Florida from continuing to count votes, while other counties could not. *Id.* at 103. Here, the law cited for each side's position was clearly pretext, as the liberals voted to restrict the meaning of equal protection and voting rights, and the conservatives to broaden the meaning and use of equal protection and voting rights. The citations and reasoning were inconsistent with the way conservative and liberal justices have voted in cases involving equal protection or voting rights.

39. SEGAL & SPAETH, *supra* note 1, at 114 (“[A]ttitudinalists believe the structure of the American political system virtually always allows the justices to engage in rationally sincere behavior on the merits.”).

40. See, e.g., Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the “Legal Model” of Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001) (critiquing attitudinal research); Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 65–87 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing flaws in the attitude-based model); see also Ronald Kahn & Ken I. Kersch, *Introduction to THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 1, 3–6 (Ronald Kahn & Ken I. Kersch eds., 2006) (discussing the tension between attitude-based and legal models).

41. See, e.g., Ronald Kahn, *Originalism, the Living Constitution and Supreme Court Decision Making in the Twenty-First Century: Explaining Lawrence v. Texas*, 67 MD. L. REV. 25, 25 (2007) (discussing the effects of the Court's “Social Construction Process” on decision making); Ronald Kahn, *Marbury v. Madison as a Model for Understanding Contemporary Judicial Review*, in MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY 155, 155–60 (Mark A. Graber & Michael Perhac eds., 2002) (rejecting the empirical behavioralist and empirical interpretive analyses).

precise method to measure judicial policy preferences. Rather than measuring preferences dichotomously (either Democrat or Republican) or by a series of dummy variables (one for each of the appointing presidents in a given data set), Segal and Cover would place justices on a continuum with very conservative justices on one side and very liberal justices on the other.⁴²

They determined where the justices should be placed on a scale of -1 to 1 by looking at newspaper editorials written at the time of the justices' nominations and before their confirmations.⁴³ They count the number of liberal versus conservative newspapers endorsing confirmation, and based on the total number of liberal endorsements versus the total number of conservative ones, they assign a score to each justice (the "Segal-Cover Score"). For example, if there are no conservative newspapers endorsing confirmation of a nominee, her score would be -1; a person with no liberal newspaper endorsements would receive a score of 1. Most nominations fall somewhere in between on the ideological spectrum. For each new justice, a Segal-Cover score is calculated.⁴⁴

The Segal-Cover ideology scores for the justices sitting on the Court at the time of the same sex marriage decisions are, from most conservative to most liberal, as follows: Scalia, Alito, Roberts, Thomas, Kennedy, Breyer, Ginsburg, Kagan, and Sotomayor.⁴⁵ On this scale, Kennedy lies closer to the mean of the liberal justices than he does to the mean of the conservative justices.⁴⁶

With quantitative techniques becoming more and more advanced, political methodologists Andrew D. Martin and Kevin M. Quinn

42. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561-63 (1989).

43. *Id.* at 559.

44. The Segal-Cover "ideology" scores have been calculated for all nominations to the Court dating back to Hugo Black's nomination in 1937; such scores are ascertained only if the nominations reach the Senate floor for a confirmation vote, but regardless of whether or not the nominees were ultimately confirmed. Nominations which are withdrawn before newspapers render their endorsements do not receive Segal-Cover scores. The scores calculate not only an ideology score but a qualification score as well. It has been argued that ideology alone is unlikely to render a candidate unconfirmable provided his qualifications scores are high; if a nominee lacks sufficient qualifications, ideology can derail a nomination. *See, e.g.*, LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 99-102 (2005) (arguing that the Senate's chief concern in confirming nominees is political).

45. See Jeffrey A. Segal, *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2012*, available at <http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf>.

46. *Id.*

developed a new quantitative method to pinpoint judicial ideology, but they do so not by measuring ideology directly.⁴⁷ Unlike the Segal-Cover scores, the Martin-Quinn scores rely only on past rulings by each justice. Using these data, their model is run a million times on computers to determine the likelihood that each justice will vote in a bloc with each of the other justices. Because of such tightly connected voting blocs on the Supreme Court today, the liberal and the conservative blocs also serve as a measure of judicial ideology. Martin-Quinn scores vary from year to year as more data points become available for evaluation of each justice. The authors consider this a more sophisticated method of gauging the justices' personal ideology compared to past measurements.⁴⁸

The Martin-Quinn scores for the 2012 Supreme Court session scale the justices, from most conservative to most liberal, as follows: Thomas, Alito, Scalia, Roberts, Kennedy, Breyer, Kagan, Sotomayor, and Ginsburg.⁴⁹ On this scale, Kennedy's score lies closer to the mean of the conservative justices than the liberal ones. More importantly, Martin and colleagues have found that their model does particularly well "due in large part to its ability to predict more accurately the important votes of the moderate Justices."⁵⁰

II. PREDICTING THE OUTCOME OF *UNITED STATES V. WINDSOR* WITH THE ATTITUDINAL MODEL

In *United States v. Windsor*,⁵¹ there were two legal issues for the Court to consider. First, whether the plaintiff had standing to bring

47. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). But see Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, With Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. 1891 (2007) (critiquing the Martin-Quinn analysis).

48. Martin and Quinn actually tested the accuracy of their ideology scores, and pitted the success of their scores against the predictions of legal experts. For the 2002 term, employing their statistical model, Martin and colleagues "predicted 75% of the Court's affirm/reverse results correctly, while the experts collectively got 59.1% right." Ruger et al., *supra* note 33, at 1150.

49. See Andrew D. Martin & Kevin M. Quinn, *Measures*, MARTIN-QUINN SCORES, <http://mqscores.wustl.edu/measures.php> (follow "court.xls" hyperlink) (last visited Feb. 10, 2014) (containing all Martin-Quinn scores of Justices for 2012); see also Martin & Quinn, *supra* note 47 (discussing the methodology of the Martin-Quinn scores).

50. Ruger et al., *supra* note 33, at 1150.

51. 133 S. Ct. 2675.

the lawsuit,⁵² and if so, whether the Defense of Marriage Act (DOMA) was unconstitutional under the Fifth Amendment's Due Process Clause.⁵³ As I discuss below, these circumstances raise two policy issues for the justices. If one's first priority is to ensure that social policy is made—the federal government can or cannot treat same-sex marriages differently than heterosexual marriages—and, critically, he or she knows that there are a majority of votes to put their preferred substantive policy into place, then that majority would all vote *yes* on standing. Those justices who know they would lose on the merits would vote *no* on standing to delay a decision contrary to their first policy preference. In *Windsor*, with five justices wanting to strike down DOMA, they were eager to vote *yes* on the standing issue and proceed to the merits.⁵⁴

On the merits, were we to use the Segal-Cover or Martin-Quinn scores as a measurement of the justices' ideologies and apply the attitudinal model, we could state with great confidence that the personal policy preference for the four liberals on the Court (Ginsburg, Breyer, Sotomayor, and Kagan) would be to strike down DOMA. Although Kennedy, the median justice, is often difficult to predict,⁵⁵ in this case his vote can be predicted according to the precepts of the attitudinal model. That is because Kennedy has “a strong libertarian streak.”⁵⁶ In *Windsor*, because the key issue concerned the liberty/privacy rights of citizens to marry whom they

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52. *Id.* at 2679–80. A standing question arose in *Windsor* during the district court proceedings when U.S. Attorney General Eric Holder issued a statement from the Obama administration that agreed with *Windsor*'s position that DOMA violated the U.S. Constitution. See Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> (stating that the Justice Department would no longer defend the law in court). The Bipartisan Legal Advisory Group (BLAG) moved to intervene in order to continue defense of the law. Both the district court and appeals court held BLAG had standing to bring the suit. *Windsor v. United States*, 833 F. Supp. 2d 394, 397–99 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012).
53. *Windsor*, 133 S. Ct. at 2680; The Court has held that the Fifth Amendment's Due Process Clause also encompasses an equal protection provision and that such provision should be applied as it would under the Fourteenth Amendment's Equal Protection Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).
54. See *infra* Table 2.
55. See Ruger et al., *supra* note 33, at 1150, 1184, 1188 (discussing the difficulty in assessing the way moderate justices will vote).
56. David Boaz, *Justice Kennedy's Mysterious Philosophy*, THE CATO INSTITUTE, (June 17, 2012, 2:44 PM). www.cato.org/blog/justice-kennedys-mysterious-philosophy.

choose, we would expect that this libertarian justice's policy preference would be to strike down DOMA.⁵⁷ And, given this configuration of votes, the conservatives—knowing they have no chance to garner a majority of votes on the merits—would vote *no* on standing and try to delay a ruling on same-sex marriage.⁵⁸

Kennedy's complex set of views is actually consistent with the principles of Libertarians according to the Cato Institute, an influential think tank that promotes libertarian policies.⁵⁹

Unlike traditional conservatives, libertarians promote political causes that protect the right of individual privacy: "Governments should not use their powers to censor speech, conscript the young, prohibit voluntary exchanges, steal or 'redistribute' property, or interfere in the lives of individuals who are otherwise minding their own business."⁶⁰ In other words, *government, stay out of my personal business*. On the other hand, libertarians support many traditional conservative political causes.⁶¹ Kennedy supports shifting the balance of power away from the federal government and toward the states;⁶² unlimited political donations by individuals and corporations;⁶³ the

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57. Justice Kennedy's past decisions also indicate this strong libertarian streak regarding the privacy of homosexuals. *See, e.g., Texas v. Lawrence*, 539 U.S. 558, 564–67 (2003) (holding that anti-sodomy laws are a violation of the constitution).
58. Even though they voted *no* on the standing issue, the conservatives in *Windsor* all argued in dissenting opinions that their first preferences were to rule on the merits and uphold DOMA. *Windsor*, 133 S. Ct. at 2687 (Scalia, J., dissenting); *id.* at 2711 (Alito, J., dissenting). However, given the configuration of votes, this was not going to occur, making the denial of standing their best option. *See infra* Part IV.A.
59. David Boaz, *supra* note 56 (stating that, while Justice Kennedy is not a strict Cato Institute libertarian, he has a streak of libertarian tendencies).
60. Cato Institute, *Libertarianism*, <http://www.cato.org/research/libertarianism> (last visited Feb. 10, 2014).
61. *Cf. About Us*, THE FEDERALIST SOCIETY, <http://www.fed-soc.org/aboutus/> (last visited Feb. 10, 2014) (stating that members of this influential think tank include an alliance between libertarians and conservatives).
62. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999) (holding that a state has sovereign immunity when in federal court pursuant to a federal statute); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that a state has sovereign immunity when sued in federal court pursuant to the U.S. Constitution); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that the federal government has no authority under Fourteenth Amendment to abrogate a state's sovereign immunity in age discrimination cases).
63. *See Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (striking down McCain-Feingold law regulating campaign funding of federal elections).

elimination of race as a factor in elementary school assignments;⁶⁴ and an individual's right to bear arms.⁶⁵ Where the libertarians and the traditional conservatives part company is precisely the issue at stake in the same-sex marriage cases: the freedom to marry a person of one's choosing. Consistent with libertarian values (which seem to be Kennedy's policy preferences), Kennedy has twice ruled that legislation borne of hatred towards homosexuals cannot survive heightened scrutiny.⁶⁶ And, that is exactly what happened in *Windsor*.

In sum, by using the current metrics for judicial ideology and knowing Kennedy's political leanings towards libertarianism, the attitudinal model correctly predicted the votes of the justices in *Windsor* and was capable of doing so without any reference to the doctrine of stare decisis or constitutional method of interpretation, the tenets on which the legal model of decision making is based. While the *justices* may cite an array of decisions *political behavioralists* would dismiss these legal arguments; they argue that such citations are made due to institutional norms and that they also provide cover for the true rationale behind the justices' votes: to see their own policy preferences become the law of the land.

III. HISTORICAL DEVELOPMENT OF THE STRATEGIC MODEL

The application of microeconomic theory to Supreme Court decision making came simultaneously with the development of the attitudinal model. Indeed, "rational choice" voting could be said to include both the attitudinal and strategic models.⁶⁷ For early pioneers of the attitudinal model, their recognition that justices vote according

64. *See* *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (holding that race cannot be an even a factor in assignment of children to public schools).

65. *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008) (ruling that the federal government restriction on handguns violated the constitution). Admittedly, supporting an individual's right to bear arms is not a traditional conservative political cause. *See* KENNETH JANDA ET AL., *THE CHALLENGE OF DEMOCRACY: AMERICAN GOVERNMENT IN GLOBAL POLITICS* 26 fig.1.2 (12th ed. 2014) (diagramming that conservatives favor social order over individual liberties). However, Justice's Kennedy's vote in *Heller* advancing an individual's right to bear arms is included in this list because it is a libertarian value that aligns with a modern Republican Party political cause. *See* REPUBLICAN PLATFORM 2012, at 13, available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf> (indicating that the Republican Party "uphold[s] the right of individuals to keep and bear arms").

66. *Romer v. Evans*, 517 U.S. 620 (1996).

67. EPSTEIN & KNIGHT, *supra* note 5, at xiii.

to their own policy preferences is a statement of rational behavior,⁶⁸ and they began to explore how this premise of rational-choice theory applied to members of the Supreme Court.⁶⁹

However, as the attitudinal model dominated research for the next two decades,⁷⁰ it was not until the 1990s that we begin to see a rise in scholarship grounded in rational-choice theory.⁷¹ Perhaps the most recognized work of this new wave of research is by Lee Epstein and Jack Knight. In their ground-breaking book, *The Choices Justices Make*, the authors set forth a new model of decision making known as the strategic model. As the authors explain:

[J]ustices may be primarily seekers of legal policy, but they are not unsophisticated characters who make choices based merely on their own political preferences. Instead, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act.⁷²

The strategic model as outlined in Epstein and Knight's work first posits that justices are "primarily seekers of legal policy," the central

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68. See DENNIS CHONG, *RATIONAL LIVES: NORMS AND VALUES IN POLITICS AND SOCIETY* 12 (2000) (defining rational choice as "choos[ing] the best available means to achieve what they understand to be in their interest").
69. See Schubert, *supra* note 29, at 1022–23 (invoking game theory to understand the strategic behavior of the Court's decision making during the New Deal); SCHUBERT, *supra* note 28, at 66 (speaking about the granting of certiorari petitions, Schubert observed "the Court appears frequently to estimate what the outcome of a case may be if it were taken"); see also WALTER M. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 198–210 (1964) (using anecdotal evidence of Supreme Court justices' attempts to influence other justices' behavior); DAVID W. RHODE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 72–78 (1976) (integrating attitudinal and rational choice models of decision making).
70. See Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 57 J. OF POL. 812, 812–13 (1995) ("A predominant, if not the predominant, view of U.S. Supreme Court decision making is the attitudinal model." (emphasis in original)).
71. See, e.g., Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. OF POL. SCI. 421, 423–25 (1996) (applying strategic model to explain opinion assignment); Jeffrey A. Segal, *Separation of Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (applying strategic model to explain Congress' constraint of Supreme Court voting).
72. EPSTEIN & KNIGHT, *supra* note 5, at xiii.

tenet of the attitudinal model. However, this model goes one step further and recognizes that, under certain circumstances, justices' will conclude that their own preferences are not consistent with four other justices, making it impossible for the justices to reach a majority vote on their first policy preference.⁷³ In such cases, justices will engage in strategic behavior—voting based on what other justices' votes are.⁷⁴ Finally, the strategic model assumes that the justices rank for themselves their preferred policy outcomes. When considering their final votes in a particular case, justices will vote in a manner that realizes their best policy option given the configuration of votes by the other justices.⁷⁵ This often means voting to avoid your least favorite policy outcome.

Certain cases are more likely to involve strategic voting than others; those that provide three or more policy choices for the justices are harder to amass a five-vote majority. Under these circumstances, the justices may engage in bargaining to reach a compromise position on the merits, one that satisfies a majority. Cases with standing issues also provide justices with another strategic tool, giving them the option of stalling a decision on the merits when they know their first policy preferences cannot garner a majority of votes.

Looking briefly at *Windsor*, for the conservative justices, the majority's votes could be predicted using the attitudinal model. However, the dissenters' voting behavior could be described as strategic, opting for a denial of standing first over voting their sincere preference on the merits—to apply the traditional rational basis tests to claims of same-sex marriage discrimination and to rule DOMA constitutional.⁷⁶ As the standard of review adopted in this particular

73. *Id.* at 9–10.

74. *Id.*; see also FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 128–48 (2000) (analyzing the factors of how justices' impact one another in their voting). Later, other scholars would argue that the Supreme Court justices are constrained beyond that of what other justices' votes are. See Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. OF POL. SCI. 123 (2004).

75. If the Court is considering a statutory case and is asked to interpret Congress's intent, they must remember that Congress can overturn their decision if the Court strays too far on the ideological spectrum from Congress's median voter. For purposes of analyzing *Perry v. Hollingsworth*, 133 S. Ct. 2652 (2013), we need not consider this constraint because Congress cannot overturn a constitutional ruling of the Court. Here, only the majority rule of five votes and the votes of the other justices constrains each justice's vote. See EPSTEIN & KNIGHT, *supra* note 5, at 112–81.

76. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting) (stating the limits of the majority opinion to avoid answering an issue that lacks standing); see also *id.* at 2697–98 (Scalia, J., dissenting)

case, some type of heightened scrutiny that is not clearly defined, may well have been a compromise between the four liberals and one moderate justice, the attitudinal model still perfectly predicted their ultimate votes in the case.

The first step in application of the strategic model is a determination of what the justices' ranked policy preferences likely are. But how do we determine their post-oral argument preferences when these votes, and subsequent bargaining over language in the opinions, are highly-guarded secrets?⁷⁷ In *The Choices Justices Make*, the authors took advantage of the private papers of Justices William J. Brennan Jr., William O. Douglas, Thurgood Marshall, and Lewis F. Powell, all of which were previously released to the public.⁷⁸ In these papers, they discovered not only the recordings of initial voting at preliminary conferences, but also the notes written between justices to reach consensus on a legal policy capable of mustering a five-vote majority.⁷⁹ The authors used Justice Brennan's papers on the landmark case *Craig v. Boren*⁸⁰ to demonstrate just how strategic voting works on the Court.⁸¹

At issue in *Craig* was the appropriate level of scrutiny to be applied under the Fourteenth Amendment's Equal Protection Clause

(arguing that the Court does not have the power to hear this case, and even if it did, they do not hold the power to invalidate a “democratically adopted legislation”); *id.* at 2716 (Alito, J., dissenting) (stating that the Court has “the authority and the responsibility to interpret and apply the Constitution” but that the people hold the right to change that).

77. There have been several incidents of Supreme Court clerks breaking the norm of confidentiality. For example, in 1998, Edward Lazarus published a book about the inner workings of the Court during his tenure as a clerk for J. Blackmun during the 1998–99 Supreme Court term. EDWARD P. LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998). Another famous example came just a few years later; in 2004, anonymous clerks divulged to Vanity Fair Magazine what went on behind closed doors during the justices' deliberations of *Bush v. Gore* in the 2000–01 term. David Margolick et al., *The Path to Florida*, VANITY FAIR, Oct. 1, 2004, 310.
78. EPSTEIN & KNIGHT, *supra* note 5, at xiv; *see also* MALTZMAN ET AL., *supra* note 74, at 57–124 (using internal memos circulated between justices to demonstrate strategic voting).
79. EPSTEIN & KNIGHT, *supra* note 5, at 1–9, 100–05 (showing the change in votes from the preliminary conference to the final vote in *Craig v. Boren*, 429 U.S. 190 (1976) and depicting policy changes in selected landmark Supreme Court cases from 1971 to 1985).
80. 429 U.S. 190 (1976).
81. EPSTEIN & KNIGHT, *supra* note 5, at 12–17 (discussing Justice Brennan's policy preferences and how his ultimate course of action was to opt for his second preferred preference over his first).

to cases of gender discrimination.⁸² But, before the justices could reach this decision on the merits, they first had to decide whether the

82. For almost two centuries, the idea that men and women must be treated equally by the government was not open to debate. In several cases at the turn of the twentieth century, the Court held that the genders can never be considered equal, affording states the opportunities to treat women as second-class citizens under the rational basis test. *See, e.g., Bradwell v. The State*, 83 U.S. (16 Wall.) 130, 139 (1872) (statute prohibiting women's admission to the Illinois Bar deemed constitutional); *Radice v. New York*, 264 U.S. 292, 294 (1924) (statute prohibiting women from working at night was constitutional because "the two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength" and to overwork women threatened "the future well-being of the [human] race"); *Hoyt v. Florida*, 368 U.S. 57, 62 (1964) (statute making jury duty for women optional held constitutional because most women had to be home to care for their families).

As the women's movement came into full force in the early 1970s, feminists turned to the courts to realize equality for women. DOROTHY MCBRIDE-STETSON, *WOMEN'S RIGHTS IN THE USA: POLICY DEBATES AND GENDER ROLES* 33 (3d ed. 2004). The first case to signal a change in approach was *Reed v. Reed*, 404 U.S. 71 (1971). In this case the Court ruled that a state statute automatically authorizing the husband, rather than the wife, to act as executor of a child's estate (all things being equal) violated the Equal Protection Clause. While the Court uttered the words of the rational basis test, its application of the test was decidedly different than in past cases, in which legislatures were accorded the utmost deference. Instead, in *Reed*, no such deference was bestowed on the Idaho legislature. The Court held that the statute's different treatment of men and women was unconstitutional because "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment" *Id.* *Reed* was the first case in history to strike down a statute based on sex discrimination under the Equal Protection Clause.

Since the State lost this case, many believed that the Court had, for the first time, engaged in a form of heightened scrutiny regarding gender classifications, a test above the traditional rational basis test but below the strict scrutiny test, which Sally Reed's lawyers, including Ruth Bader Ginsburg, strongly urged in their brief. *Breaking New Ground—Reed v. Reed*, 404 U.S. 71 (1971), THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/learning-center/womens-rights/breaking-new-ground/#breaking> (last visited Mar. 24, 2014). Some called this new form of heightened scrutiny "rational basis with bite." *See, e.g.,* Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 180 (1997) (under the rational basis plus bite standard, the Court "while purporting to use the rational basis test, actually applies some form of heightened scrutiny and invalidates the challenged law after a close examination of the law's purpose and effects"). It was not until *Craig v. Boren*, 429 U.S. 190, 199 (1976), that the Court finally settled the confusion

plaintiffs had standing to bring the action under Article III. Set forth in Table 1 are the initial and final votes of the *Craig* Justices on both standing and the merits.

Justice	First Preferences at Conference			Actual Votes		
	<u>Standing</u>	<u>Standard</u>	Merits (if Standing Exists)	Standing	Standard	Merits (if Standing Exists)
Rehnquist	No	Rational	Oklahoma	No	Rational	Oklahoma
Burger	No	Rational	Craig	No	Rational	Oklahoma
Powell	No	Rational	Craig	Yes	Intermediate	Craig
Blackmun	No	Undecided	Craig	Yes	Intermediate	Craig
Brennan	Yes	Strict	Craig	Yes	Intermediate	Craig
Stewart	Yes	Rational	Craig	Yes	Unclear	Craig
White	Yes	Strict	Craig	Yes	Intermediate	Craig
Marshall	Yes	Strict	Craig	Yes	Intermediate	Craig
Stevens	Yes	Above Rational	Craig	Yes	Intermediate	Craig

Table 1: *Craig v. Boren's* Initial Votes Compared with Actual Votes⁸³

As Table 1 indicates, a majority of five immediately formed in favor of standing (Stewart, White, Marshall, Stevens, and Brennan). However, on the merits, this majority did not immediately agree on the standard review.⁸⁴ Instead, we see a situation where three distinct policy choices were raised by the litigants' and amicus curiae's briefs—the traditional rational basis test, strict scrutiny, or some form of heightened standard of review.⁸⁵ Eventually, a compromise was proposed that the Court use a form of heightened scrutiny higher

regarding the standard of review in gender discrimination cases, adopting a test now known as intermediate scrutiny.

Though no longer applicable to gender classifications after *Craig*, the rational basis with bite test continues to be used by the Court when the government engages in discrimination against “politically unpopular groups.” See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580 (2008) (O'Connor, J., concurring) (applying the test to homosexual discrimination); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (indicating that legislation must be relationally related to a governmental purpose when government accused of discrimination against the mentally challenged); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (applying a rational basis review).

83. EPSTEIN & KNIGHT, *supra* note 5, at 8.

84. See *supra* Table 1.

85. *Id.*

than ordinary scrutiny plus bite but lower than strict scrutiny.⁸⁶ The intermediate scrutiny test thus emerged, and a majority of six justices signed onto the opinion as part of the compromise.⁸⁷ As expected, the two justices who did not want to strike down the Oklahoma legislation under the intermediate scrutiny test voted *no* on the standing issue.

Concededly, it is only when one of the justices dies and his or her papers are released to the public that we can be certain of all of the facets of the strategic voting that occurred in *Perry*. But, the strategic model aids in predicting how the justices likely came to their final votes. I shall apply the lessons learned from Epstein and Knight's account of the *Craig* decision to guide my theories about strategic voting in *Perry*.

IV. APPLICATION OF THE STRATEGIC MODEL TO THE PROPOSITION 8 CASE

In *Hollingsworth v. Perry*,⁸⁸ the justices were again asked to consider whether a government's ban on same-sex marriage violates the Fourteenth Amendment; this time it was the State of California's voter referendum banning same-sex marriage being considered.⁸⁹ Here, we know that the attitudinal model alone cannot predict the votes of the justices since the voting blocs in the majority and dissent were

86. Pursuant to the intermediate scrutiny test, when a government statute is challenged under the Equal Protection Clause based on the unequal treatment of one gender over the other, the State must prove that the statute serves an "important government objective" and that the means chosen by the legislature to further the important government interest are "substantially related" to that end. *Craig*, 429 U.S. at 199. Later, the Court has suggested that a third requirement must be met under intermediate scrutiny, that the government's arguments in support of a statute must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 524 (1995) (citing *Miss. Univ. For Women v. Hogan*, 458 U.S. 718, 721 (1996)). Justice Scalia accused the majority in *Virginia* of trying to move the intermediate scrutiny test closer to strict scrutiny than originally intended. *Id.* at 571 (Scalia, J., dissenting).

87. The policy choice of the seventh vote in favor of *Craig*, Justice Stewart, is described as "unclear" by Epstein and Knight. EPSTEIN & KNIGHT, *supra* note 5, at 8.

88. 133 S. Ct 2652 (2013).

89. Since *Windsor* was a federal case, the Equal Protection Clause contained within the Fifth Amendment was applicable, while in *Perry*, a state case, the Fourteenth Amendment's Equal Protection Clause is at issue. The two clauses have been interpreted to have the same content. *See supra* note 53.

not split along ideological lines.⁹⁰ Almost certainly, the strategic model explains the votes in this case.

The substantive issue in *Perry* was whether California could ban same-sex marriage under the Equal Protection Clause, rather than, as in *Windsor*, whether the federal government could institute such ban. To rule in favor of the same-sex couples in *Perry*, as a practical matter, would be tantamount to overturning the same-sex marriage bans of thirty-three sovereign states—separate from the United States, the single sovereign at issue in *Windsor*.⁹¹ But, before reaching this very broad and controversial decision on the merits, the Court was required to consider whether the designated representative of the State of California, Hollingsworth, had Article III standing to bring this case.⁹² Though the circumstances of the standing issue in *Perry*

90. Sotomayor, considered among the most liberal according to Martin-Quinn and Segal-Cover scores, was joined in dissent by Kennedy—the median voter—and two of the most conservative justices on the Court, Alito and Thomas. See *Hollingsworth*, 133 S. Ct. 2652, 2668 (2013) (Kennedy, J., dissenting). Clearly, these Justices wanted to decide the central issue on gay marriage now, without regard to what the outcome of that vote might be. In the majority, we also see an unusual voting bloc, two conservatives, Scalia and Roberts, joined by three liberals, Breyer, Ginsburg, and Kagan; these justices agreed that the central issue in *Perry* should not be decided now but put off for another day. *Id.* (majority opinion).

91. “[T]he Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject.” *Id.* at 2674 (Kennedy, J., dissenting).

92. After arguing before the California lower courts that Proposition 8 should be respected, the then-Attorney General of California, Jerry Brown (D), did an about-face and argued before the California Supreme Court that the voter referendum was unconstitutional. Justin Evers, *California Attorney General Jerry Brown Asks Court to Overturn Prop 8*, U.S. NEWS & WORLD REPORT (Dec. 22, 2008), <http://www.usnews.com/news/articles/2008/12/22/california-attorney-general-jerry-brown-asks-court-to-overturn-prop-8>. Then, as the case moved to the federal courts, the State of California defended Prop 8 before Judge Vaughn Walker. See generally *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal 2010). After the decision, Governor Schwarzenegger and Governor-elect Jerry Brown declined to pursue an appeal. The leader of a group that had proposed and campaigned for Proposition 8, Hollingsworth, was allowed by the State to carry on the case. Though the Ninth Circuit held Hollingsworth had standing, the Supreme Court overruled this decision. The Court held that “[n]o matter how deeply committed petitioners may be to upholding Proposition 8 or how ‘zealous [their] advocacy,’ that is not a ‘particularized’ interest sufficient to create a case or controversy under Article III.” *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (citation omitted) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

bear stark resemblance to those in *Windsor*, the *Perry* Court reached the opposite conclusion.⁹³

Lacking any of the justices' personal notes about the voting in *Perry*, I turn to other sources to glean first preferences. The logical place to turn to gauge initial preferences is the final decision in *Windsor*, each case presenting similar standing and equal protection issues over recognition of same-sex marriage. Set forth in Table 2 are the final votes in *Windsor* and *Perry*. Comparing the votes in the two same-sex marriage cases, two puzzling issues are raised. First, why did three of the five justices (Ginsburg, Breyer, and Kagan) who voted in favor of standing in *Windsor* decline to do so in *Perry*? These justices, together with Sotomayor and Kennedy, had already approved the application of heightened scrutiny in striking down the federal DOMA because the *raison d'être* of the statute was to discriminate against a class of people the legislature did not like.⁹⁴ Arguably, the same could be said of the California voter referendum. Why did they want to delay a decision here?

Justice	<i>Windsor</i> Votes/Likely First Preferences in <i>Hollingsworth</i>			Actual Votes in <i>Hollingsworth</i>
	Standing	Standard of Review	Position on Same-Sex Marriage	Standing/Delay
Roberts	No	Rational	No	No/Delay
Scalia	No	Rational	No	No/Delay
Thomas	No	Rational	No	Yes
Alito	No	Rational	No	Yes
Kennedy	Yes	Heightened? ⁹⁵	Yes	Yes
Ginsburg	Yes	Heightened?	Yes	No/Delay
Breyer	Yes	Heightened?	Yes	No/Delay
Sotomayor	Yes	Heightened?	Yes	Yes
Kagan	Yes	Heightened?	Yes	No/Delay

Table 2: Comparison of Votes in *U.S. v. Windsor* and
Hollingsworth v. Perry

93. Like *Windsor*, both standing issues involved a determination whether the party opposing same-sex marriage could pursue the case after the respective governing bodies refused to defend bans on same-sex marriage.

94. *Windsor*, 133 S. Ct. 2675, 2696 (2013).

95. I place question marks for the standard of review pronounced in *Windsor* because it is not clear whether this test is the same one used in cases like *Reed v. Reed* or is some other form of heightened scrutiny.

The second puzzling issue is why two conservatives (Thomas and Alito) voted in favor of standing in *Perry* but took the opposite view in *Windsor*? Surely these justices understood, in light of *Windsor*, that it was highly unlikely they could pick up three more votes to see their first policy preference as expressed in *Windsor*—use of the traditional rational basis test to analyze homosexual discrimination under the Equal Protection Clause—realized.

Instead of the votes in *Windsor*, I relied on statements made by Justice Ginsburg before the *Perry* decision was handed down, in conjunction with scholarship about the timing of *Roe v. Wade*.⁹⁶ This evidence provides me with insight as to the strategic voting that may account for the three liberal justices' switch in positions on standing from the *Windsor* to *Perry* cases. In addition, political science literature can explain why Justices Thomas and Alito voted to proceed to a decision on the merits despite their inability to prevail. Alternatively, relying on the strategic voting patterns in *Craig*, I posit two more theories that suggest that the five-member majority in *Windsor* may not have been able to reach a compromise over the correct standard of review on the merits in *Perry* and whether the Due Process Clause also provides an avenue to analyze the case.

A. *Delay the Decision on the Merits*

The most likely explanation for the switch in position by Justices Ginsburg, Breyer, and Kagan was foreshadowed by Justice Ginsburg beginning a year preceding the *Perry* decision. In a speech at Columbia University Law School in early 2012, Ginsburg explained that judicial restraint can sometimes be a more effective policy choice for the justices than making an expansive, aggressive decision like *Roe*: “It’s not that the judgment was wrong, but it moved too far too fast.”⁹⁷ More than a year later, in a public conversation about *Roe v. Wade* at the University of Chicago Law School, Justice Ginsburg reiterated her uneasiness about the Court’s timing of the *Roe* decision: “It should have held only that the Texas law before it in *Roe*, which prohibited abortion unless necessary to save the life of the woman, was unconstitutional, leaving for the future the question of what other restrictions on abortion might be constitutional.”⁹⁸ Later, she spoke of the backlash the decision unleashed “the Court had given

96. 410 U.S. 113 (1973).

97. David Crary, *Ruth Bader Ginsburg Questions Timing of Roe v. Wade, Gives Hint on Same Sex Marriage Issue*, HUFFINGTON POST (Feb. 10, 2012, 6:16 PM), http://www.huffingtonpost.com/2012/02/10/ruth-bader-ginsburg-roe-v-wade-gay-marriage_n_1269399.html.

98. Geoffrey R. Stone, *Justice Ginsburg, Roe v. Wade and Same-Sex Marriage*, HUFFINGTON POST (May 12, 2013, 11:42 PM), http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa_b_3264307.html.

opponents of access to abortion a target to aim at relentlessly . . . My criticism of *Roe* is that it seemed to have stopped the momentum that was on the side of change.”⁹⁹ Instead, she advocated that the Court “put its stamp of approval on the side of change and let that change develop in the political process.”¹⁰⁰

Clearly her remarks suggest that she was worried that a bold, sweeping decision on same-sex marriage at this time would lead to enormous political backlash from conservatives, particularly since the Court would be cutting off political debate on a highly divisive social issue. There is a large body of scholarship which supports her call for judicial restraint under the political conditions present in *Perry*.¹⁰¹

Specifically regarding *Roe*, scholars, such as Gerald N. Rosenberg, argue that the Court’s decision to step into the abortion debate, just as the pro-choice movement was starting to gain political momentum, but before the issue had fully percolated with the American public and state legislatures, was an ill-advised path to take.¹⁰² He and others maintain that the Court’s premature action over a sweeping and controversial social issue led to the birth of the then-nascent pro-life countermovement.¹⁰³ The influence of the pro-life movement created by *Roe* cannot be overstated.

99. Jason Keyser, *Ruth Bader Ginsburg: Roe v. Wade Ruling Flawed*, HUFFINGTON POST (May 11, 2013, 10:40 PM), http://www.huffingtonpost.com/2013/05/11/ruth-bader-ginsburg-roe-v-wade_n_3261187.html.

100. *Id.*

101. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 464 (2004) (noting that the *Brown v. Board of Education*, 347 U.S. 483 (1954) decision prompted backlash from Southern States over civil rights); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 182 (1991) (discussing that *Roe* led to a pro-life countermovement); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 459–73 (2005) [Klarman, *Brown and Lawrence*] (discussing the backlash against homosexual rights and same-sex marriage after the *Lawrence* and *Goodridge* decisions); Neal Devins, *I Love You, Big Brother*, 87 CALIF. L. REV. 1283, 1297 (1999) (discussing the post-*Roe* backlash); William N. Eskridge Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312–13 (2005) (opining that the *Roe* Court should not have intervened in the political process over abortion rights); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 54 (1999) (advocating that the Court engage in “minimalism,” or judicial restraint, to allow the political process to decide certain sweeping social issues).

102. ROSENBERG, *supra* note 101, at 182–89.

103. *Id.* at 188; Eskridge, *supra* note 101, at 1326; Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991). *But see* LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S

For instance, the movement became very influential within the Republican Party. Beginning in 1980 and continuing through the 2012 presidential election, every Republican Party platform has promised to appoint judges who believe in “traditional family values” and the “sanctity of human life.”¹⁰⁴ Carrying out that promise, Republican presidents Ronald Reagan and George H.W. Bush appointed five justices to the Court in the period of 1981–1992, all of whom were believed to support the party’s position on “the sanctity of human life.” But, the right to life proponents ultimately failed in their mission to overturn *Roe* because, in *Planned Parenthood v. Casey*,¹⁰⁵ three of these five Republican appointees (O’Connor, Kennedy, and Souter) agreed with *Roe* that women have a constitutional right to terminate a pregnancy before viability.¹⁰⁶

The movement’s efforts did not end there. Besides influencing the appointment of Supreme Court justices, the pro-life interest groups have lobbied state legislatures to enact restrictions on a woman’s right to choose, many of which were upheld in *Casey*, including twenty-four-hour waiting periods, informed consent, parental consent for minors, and onerous reporting requirements for doctors providing abortions. Since *Casey*, states have enacted other harsh measures designed to impede the availability of abortions.¹⁰⁷

RULING ix (2012), available at http://documents.law.yale.edu/sites/default/files/BeforeRoe2ndEd_1.pdf (discussing that the backlash against abortion rights began prior to *Roe* and was led by the Catholic Church); William N. Eskridge Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 520 (2001) (“The pro-life countermovement was already well under way by the time *Roe* was handed down.”).

104. See, e.g., Republican Platform 1980, available at www.Presidency.ucsb.edu/ws/?pid=25844 (“We will work for the appointment of judges at all levels of the federal judiciary who respect traditional family values and the sanctity of human life.”); Republican Platform 1984, available at www.presidency.ucsb.edu/ws/?pid=25845 (“[W]e reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”); REPUBLICAN PLATFORM 1988, available at www.Presidency.ucsb.edu/ws/?pid=25846 (same); REPUBLICAN PLATFORM 1992, available at www.Presidency.ucsb.edu/ws/?pid=25847 (same); REPUBLICAN PLATFORM 1996, available at www.Presidency.ucsb.edu/ws/?pid=25848 (same); REPUBLICAN PLATFORM 2000, available at www.Presidency.ucsb.edu/ws/?pid=25849 (same); REPUBLICAN PLATFORM 2004, available at www.Presidency.ucsb.edu/ws/?pid=25850 (same); REPUBLICAN PLATFORM 2008, available at <http://www.presidency.ucsb.edu/ws/?pid=78545> (same.); REPUBLICAN PLATFORM 2012, *supra* note 65 (same).

105. 505 U.S. 833 (1992).

106. *Id.*

107. Twenty states now require that abortions be performed in hospitals after a certain point; nineteen states prevent partial-birth abortions; twenty-seven

Many of the political factors present in *Roe* were also present when a series of state supreme courts lifted bans on same-sex marriage, beginning with a Hawaii Supreme Court ruling in 1993 making same-sex marriage legal,¹⁰⁸ prompting many scholars to lament the onset of a backlash.¹⁰⁹ Now, twenty years after the Hawaii decision, the political landscape concerning same-sex marriage has considerably changed, but is still deemed not appropriate for Supreme Court intervention by at least three justices. At the time of the *Perry*

states allow individual health care providers to refuse to fund abortion procedures regardless of religious reasons; seventeen states require a woman receive counseling before an abortion—this counseling may require telling women that there is a purported link between abortion and breast cancer (in five states), the fetus can feel pain (in twelve states), or long term mental health consequences will befall a woman who has an abortion (in eight states). GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (Feb. 1, 2014), available at www.guttmacher.org/statecenter/spibs/spib_OAL.pdf. One state, Virginia, required women to undergo transabdominal ultrasounds prior to receiving an abortion. VA. CODE ANN. § 18.2-76 (West Supp. 2013); see also Lucy Madison, *Virginia Gov. Bob McDonnell Signs Virginia Ultrasound Bill*, CBS NEWS (Mar. 7, 2012, 5:47 PM), <http://www.cbsnews.com/news/Virginia-gov-bob-mcdonnell-signs-virginia-ultrasound-bill/>. And, now, nine states have legislation pending which would make abortions illegal after twenty weeks of pregnancy (Arkansas passed such legislation), which is before viability, or have defined “personhood” as beginning at conception, making abortions a form of homicide. *State Policy Trends 2013: Abortion Bans Move to the Fore*, GUTTMACHER INSTITUTE (Apr. 11, 2013), www.guttmacher.org/media/inthenews/2013/04/11.

108. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

109. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339–419 (2d ed. 2008) (extending the thesis of the book’s earlier edition to the marriage equality decisions in Hawaii (1993), Vermont (1999), and Massachusetts (2003)); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 813 (2006) (arguing that marriage equality would have advanced more quickly if the social-movement lawyers had never brought their cases or had lost all of them); John D’Emilio, *The Marriage Fight Is Setting Us Back*, *GAY & LESBIAN REV. WORLDWIDE*, Nov.–Dec. 2006, 10 (lamenting the LGBT rights movement’s over-reliance on courts); Klarman, Brown and Lawrence, *supra* note 101 at 459–73 (applying Rosenberg’s backlash thesis to the Massachusetts marriage decision); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 *S. CAL. L. REV.* 1153, 1217–23 (2009) (applying Rosenberg’s backlash thesis to the California marriage decision and contrasting it with California’s 1948 decision requiring recognition of interracial marriages, which produced much less backlash). *But see* William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 *B.U. L. REV.* 275, 279 (2013) (arguing that Rosenberg’s theory of constitutional backlash is not applicable to same sex-marriage cases).

decision, only seventeen states allowed same-sex marriages, but public opinion on same-sex marriage was on the rise.¹¹⁰

Given her public remarks about *Roe*, we can glean Ginsburg's thinking about *Perry*. Clearly she fears the possibility of the *Roe* history repeating itself. While she had expressed her approval of same-sex marriage in *Windsor*, *Perry* was another story as it would have affected all thirty-three state laws banning same-sex marriage. Instead, she wanted to take a wait-and-see approach.

Ginsburg, fearing the possibility of anti-gay forces becoming an influential political powerhouse as happened in *Roe*, clearly favored a wait-and-see approach. She seems to have influenced the voting of the other two liberal justices who voted to delay a ruling on the broader issue of same-sex marriage presented in *Perry* compared to *Windsor*. Thus, even though these three justices favor the legalization of same-sex marriage as stated in *Windsor* (their first preference), by ruling that Hollingsworth did not have standing (their second preference), they were able to avoid the possibility of a fervent anti-gay backlash. At the same time, they also avoided a ruling that the U.S. Constitution does not guarantee citizens the right to same-sex marriage (their last choice). By exercising judicial restraint and letting the political process continue to grapple with this issue, the *Ginsburg Three* hoped that the gay rights movement would have time to develop, eventually reaching the hearts and minds of a greater percentage of the American public and, in turn, the hearts and minds of state legislators. It is only when a more sizable number of states have adopted pro-same-sex marriage legislation or state constitutional amendments that the Court should rule on the matter and jump into the political debate. But, with recent developments providing federal circuit courts the opportunity to rule on this issue—causing a split in the circuits over the interpretation of the federal Equal Protection Clause—the Court may be forced to render a decision on the merits sooner than Ginsburg, Breyer, and Kagan would like.¹¹¹

110. See Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1206–07 (2014) (discussing the shift in public opinion toward acceptance of same-sex marriage). As of July 2013, fifty-two percent of Americans favor making same-sex marriage legal. Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP POLITICS (July 29, 2013), www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx. But, for those between eighteen and thirty-four years old, that number was sixty-nine percent while the number for those fifty-five and older was thirty-eight percent. *Id.* Through generational change, it is said that by 2020, gay marriage will be legal in forty-four states. Nate Silver, *Assessing the Shift in Public Opinion*, N.Y. TIMES, Mar. 27, 2013, at A15.

111. There is now a split in the Circuits on whether the denial of same-sex marriage violates the Equal Protection Clause or the Due Process Clause's

What about Alito and Thomas, who both voted in *Windsor* that standing did not exist? Why the change of heart in *Perry* when they certainly knew that they would not amass a majority of votes to carry out their first preferences as revealed in *Windsor*? Though they could have voted again to delay the issue, as did Justices Roberts and Scalia, they likely accepted the fact that the same-sex marriage issue is a ship that has sailed. Accordingly, they simply voted in accordance with their true preferences—to proceed to a decision on the merits and adopt the traditional rational basis test as the standard of review—regardless of the likelihood they would prevail.

Alito's and Thomas's behavior, as the two most conservative justices,¹¹² mimics that of current members of a right-wing faction in Congress often referred to as the Tea Party. Recently, in the debate over the 2014 federal budget, Tea Party affiliates refused to pass a budget unless implementation of the American Health Act were to be delayed a year. Clearly, they knew that such provision would never be approved by the Democrat-controlled Senate, nor signed into law by President Obama. But, characteristic of the political behavior of *purist* politicians—characterized by a commitment to ideological purity—they voted their true preferences rather than engage in strategic behavior.¹¹³ Eventually, the *professional* politicians in the

right to privacy. *Compare* Baskin v. Bogan, ___ F.3d ___ (7th Cir. 2014) (determining on equal protection grounds) *with* Kitchen v. Herbert, Docket No. 13-4178 (10th Cir. 2014) (determining on due process and equal protection grounds). In addition, a third circuit has ruled same sex marriage bans are unconstitutional, citing *Windsor*. Bostic v. Schaefer, Docket No. 14-1167 (4th Cir. 2014); Bishop v. Smith, ___ F.3d ___, Docket No. 14-5006 (10th Cir. 2014). A fourth circuit court decision from the Sixth Circuit is pending. Citing *Windsor* as precedent on a similar issue, the Ninth Circuit has ruled that under heightened scrutiny, jurors cannot be struck by preemptory challenges on the basis of sexual preference. *SmithKline Beecham Corp. v. Abbott Labs.*, No. 11-17357 (9th Cir. Jan. 20, 2014). Of course, behavioralists would see the *Windsor* citation as cover so that the judges could see their own policy preferences realized.

112. Martin & Quinn, *supra* note 47, at 147. It is no coincidence that these justices wanted to vote on the merits. As is true in party politics, the most fervent ideologues tend to avoid compromise at all costs.

113. JAMES Q. WILSON, *THE AMATEUR DEMOCRAT: CLUB POLITICS IN THREE CITIES* 1–2 (1962); *see also* Aaron Wildavsky, *The Goldwater Phenomenon: Purists, Politicians, and the Two-Party System*, 27 *THE REV. OF POL.* 386, 393–96 (1965) (ideologues coming into the party system characterized as “purists”); NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES OF AMERICAN ELECTORAL POLITICS* 30–31 (4th ed. 1976) (“[P]urists consider the stock-in-trade of the politician—compromise and bargaining, conciliating the opposition, bending a little to capture public support—to be hypocritical; they prefer a style that relies on the announcement of principles and on moral crusades.”).

Republican Party decided to join Democrats in both houses of Congress, and Republicans in the Senate, to pass a budget representing a compromise. Those affiliated with the Tea Party voted *no* to such a budget.

Kennedy and Sotomayor, who also voted to strike down DOMA in *Windsor*, did not agree with the strategic voting choices made by Justices Breyer, Kagan and Ginsburg. Kennedy and Sotomayor were ready to hand down a sweeping decision that would strike down state bans of same-sex marriage, a ruling consistent with their preferences as indicated in *Windsor*.

As for the two conservative justices (Roberts and Scalia) who voted that Hollingsworth had no standing, they engaged in the same type of strategic voting they evidenced in *Windsor*. We know from *Windsor* that their first preferences were to vote on the merits and rule against same sex marriage. But, lacking the votes to gain a majority for their first preferred option, they joined forces with the *Ginsburg Three* and opted for a delay over the possibility that their least favored preference, similar to the *Windsor* holding, would prevail if the Court were forced to address the substantive issue on the merits. Perhaps these two justices hoped that, by delaying the vote, a different configuration of justices may appear in the future, with a new majority forming in support of their favored substantive position.

B. The Standard of Review Pursuant to the Equal Protection Clause

A second explanation of the unusual voting patterns in *Perry* is that the five justices who presumably favor same-sex marriage based on their votes in *Windsor* (Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan) may have been split as to the constitutional level of scrutiny to be applied in homosexual discrimination cases, just as the justices were split over the standard of review for gender discrimination as in *Craig*. Since *Perry* involves an issue arguably equal to gender discrimination, there were three possible levels of scrutiny at play: intermediate scrutiny, ordinary scrutiny with bite (also heightened scrutiny), or the traditional rational basis test.¹¹⁴ I could imagine a scenario in which Justice Kennedy wanted to keep using his vaguely worded heightened-scrutiny standard of review for cases involving homosexuals' liberty rights¹¹⁵ and the four liberal justices wanted the intermediate scrutiny test. Thus, as in *Craig*, no one test could garner a majority. Since no one position on the merits garnered

114. Justice Kennedy seemingly used this standard not only in *United States v. Windsor*, 133 S. Ct. 2675 (2013), but also in prior cases involving state-sanctioned homosexual discrimination. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

115. *See Romer*, 517 U.S. at 620; *Lawrence*, 539 U.S. at 558; *Windsor*, 133 S. Ct. at 2675.

a majority, three liberal justices decided to delay a vote on the merits. And, for the same reasons stated above, two more conservative justices joined their decision to delay a vote on the merits.

Along the same lines, one could imagine another configuration of votes regarding the correct level of scrutiny for homosexual discrimination cases; perhaps the three women on the Court wanted to adopt the intermediate scrutiny test to homosexual discrimination cases, just as other types of gender discrimination are accorded. Since women have suffered similar de jure discrimination, they are better positioned than heterosexual men to understand the plight of homosexuals.¹¹⁶ Moreover this is the test that Justice Ginsburg, as the lead litigator for the ACLU's Women's Rights Project in the 1970s, successfully advocated before the Supreme Court in *Craig*.¹¹⁷

*C. The Right to Marry Should Be Analyzed Under
the Due Process Clause*

There is yet a third possibility for the strategic voting in *Perry*. Perhaps there was a split in votes among the five justices who formed a majority in *Windsor*, which struck down DOMA, as to the appropriate framework for analyzing state legislation that interferes with homosexuals' right to marry. Do they rely on the Equal Protection Clause or the Due Process Clause? Certainly, Kennedy seems attached to an equal protection analysis.¹¹⁸ But the other four justices in the *Windsor* majority may want to consider the same-sex marriage issue under the Due Process Clause, which was the approach in *Roe*. Under such analysis, it is irrefutable that marriage has long been deemed a fundamental right.¹¹⁹ Since marriage is a fundamental right, the State would be required to defend its restrictions on same-sex marriage according to the strict scrutiny test.¹²⁰ Thus, the State

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116. Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. OF POL. SCI. 389, 401-02 (2010) (finding female judges are more likely to vote for a female plaintiff in a gender discrimination case than are men).
117. *Justice for Beer Drinkers—Craig v. Boren*, 429 U.S. 190 (1976), SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/learning-center/womens-rights/justice-for-beer-drinkers/> (last visited Mar. 25, 2014).
118. He used the same reasoning in *Romer*, 517 U.S. at 623, in which the Court struck down a Colorado statute which forbid progressive cities from according homosexuals equal rights, and in *Windsor*, 133 S. Ct. at 2675.
119. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (acknowledging marriage is a fundamental right); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (acknowledging marriage as a fundamental right).
120. The strict scrutiny test requires that the State prove it had a compelling state interest when passing legislation that interferes with a fundamental right and that the means chosen to accomplish the ends are narrowly tailored.

would need to prove it had a compelling state interest in seeing that “marriage” is defined as one between man and woman and that the statute is “narrowly tailored” to accomplish its compelling interest. Under this test, the State almost always loses.¹²¹

In all likelihood, these different standards of analysis under the Equal Protection Clause and the Due Process Clause as applied to same-sex marriage cases will be hotly debated among the justices when the Court finally decides the issue on the merits. Will five justices, all of whom favor same-sex marriage, reach a compromise on the correct standard of review in order to form a majority? Or will they vote their first preferences in which case no one position is likely to muster five votes. In such case, the constitutional issue regarding same-sex marriage will remain unsettled, just as the correct standard of review in gender discrimination cases was unsettled in the early 1970s.

121. One notable exception was *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which the Court found that a state’s right to diversify the student body at an institution of higher learning was a compelling state interest. The University of Michigan’s policy, considering race as a factor in the admissions process, was banned pursuant to a voter referendum, which was held to be constitutional by the Court. *Schuetz v. Coalition to Defend Affirmative Action*, ___ U.S. ___ Docket No. 12–682 (2014).