Marriage is in the air at One First Street, N.E., and thoughts about it pop up in the oddest places. Like discussions over whether the Constitution confers a right to postconviction DNA testing. 1 Faced with that issue, a majority of the Court found no “freestanding, substantive due process right.” 2 But in the course of his dissent, Justice David Souter, who was to leave the Court a fortnight later, included the following extraordinary passage about “the right moment for a court to decide whether substantive due process requires recognition of an individual right unsanctioned by tradition (or the invalidation of traditional law)”:\footnote{2} [It is] essential to recognize how much time society needs in order to work through a given issue before it makes sense to ask whether a law \footnote{1} or practice on the subject is beyond the pale of reasonable choice, and subject to being struck down as violating due process ....

Changes in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally. Just as attachment to the familiar and the limits of experience affect the capacity of an individual to see the potential legitimacy of a moral position, the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim before it makes sense to declare unsympathetic state or national laws arbitrary to the point of being cruncon-stitutional.\footnote{4}

It is hard to read Justice Souter's observations as a commentary on whether convicted criminals should be able to gain access to physical evidence within the state's control for the purpose of running scientific tests designed to establish their innocence. What individual even has an “inherited view” on that question, let alone a view, however obtained, involving “issues of fundamental belief”? And postconviction DNA testing hardly seems the kind of question that society needs to “work through” in some therapeutic or “dialectic” way. It is a discrete, albeit important, issue of criminal justice policy.

But if the question is whether the Supreme Court should recognize a constitutional right to marriage for same-sex couples--well, then, this passage makes much more sense. That issue does involve moral claims, inherited views, societal understandings, and questions of timing. Social scientific evidence regarding changes in popular opinion and demography suggests that marriage equality is coming,\footnote{5} and coming more quickly than anyone might have hoped or feared eight years ago when the Supreme Court held, in Lawrence v Texas,\footnote{6} that “[t]he liberty protected by the Constitution” as a matter of substantive due process protects gay people's intimate\footnote{1} sexual relationships.\footnote{7} Five states plus the District of Columbia now issue marriage licenses to same-sex couples.\footnote{8} Three other states recognize same-sex marriages performed elsewhere.\footnote{9} California exists in an uneasy state of suspended animation.\footnote{10} Overall, when newly created institutions like civil unions and registered domestic partnerships are taken into account as well, we have moved in roughly a generation from a nation in which no state provided legal recognition to same-sex couples to one in which two in five Americans live in states that do.\footnote{11}
The question whether the Constitution requires such recognition will, at some point in the foreseeable future, arrive at the Supreme Court, since it is unlikely that we will achieve national legal uniformity regarding same-sex marriage through the political process any time soon. When the issue does arrive at the Court, the Justices will have to choose sides on an issue about which many Americans care passionately. They have, of course, done that before. In *Loving v Virginia*, the Court recognized a constitutional right for interracial couples to marry even though sixteen states still forbade it. Yet there was nearly a generation between when the California Supreme Court became the first court to reach that conclusion and when the United States Supreme Court so held. In the meantime, the Court dodged the issue for a decade, apparently because it feared that a decision striking down state bans on interracial marriage would imperil its recent decision in *Brown v Board of Education*.

Moreover, by the time the Supreme Court decided *Loving*, it had largely completed the project of dismantling formal Jim Crow. During the Warren Court years, the Supreme Court clearly took sides, embracing African Americans' constitutional claims for equality, striking down every formal racial distinction that came before it, and rejecting white litigants' constitutional challenges to the Second Reconstruction across the board. Summing up this position in *Norwood v Harrison*, Chief Justice Burger wrote that the "the Constitution ... places no value on discrimination," and therefore even if some private discrimination "may be characterized as a form of exercising freedom of association protected by the First Amendment ... it has never been accorded affirmative constitutional protections."

When it comes to gay rights, the Court's approach has been more equivocal. On the one hand, in *Romer v Evans* and *Lawrence v Texas*, a majority of the Justices recognized gay litigants' claims for equal treatment and equal dignity under the law. On the other hand, in cases like *Hurley v Irish-American Gay, Lesbian, and Bisexual Group of Boston* and *Boy Scouts v Dale*, a majority of the Justices accorded First Amendment protection to groups that sought to exclude gay people from participating in their activities. Chief Justice Rehnquist's opinion for the Court in *Dale* drew a direct link between changes in social understandings and constitutional protection for the cultural rear guard:

[I]t appears that homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of the popular variety or not. And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.

In fundamental ways, the question of marriage equality *per se* more closely resembles *Romer* and *Lawrence* than it does *Hurley* and *Dale*. Gay people are seeking access to a state-created institution, and not a privately run activity. And whatever the merits of the metaphysical assertion that marriage equality somehow dilutes the value of opponents' own marriages, no one has seriously suggested that opposite-sex couples in states that have recognized same-sex marriage have a constitutional claim against their states' extension of marriage to gay couples. That being said, constitutional claims on behalf of marriage traditionalists can arise in a range of contexts. Whether, and how, to respect those claims is likely to confront the Court repeatedly.

Last Term, the Court got a taste of what is to come in a trilogy of cases. In *Hollingsworth v Perry*, the Court overturned a district court's decision to allow closed-circuit televising of the trial challenging California's ban on same-sex marriage. In *Doe v Reed*, the Court rejected a challenge to Washington State's Public Records Act by opponents of Washington's domestic partnership law who wanted to keep private their signatures on a referendum petition. And in *Christian Legal Society v Martinez*, the Court upheld a public law school's refusal to fund a student group that restricted its membership to individuals who agreed that sexual intimacy was permissible—and that they would engage in it—only within a "marriage between a man and
a woman.” 29 Each time, the Court was sharply, indeed angrily, divided. In contrast to the Loving Court, on the Roberts Court partisans of the cultural rear guard are within the building as well as outside.

Precisely because the marriage issue will be in the background of a range of constitutional issues, it may come to inflect a range of constitutional doctrines. Unlike the “gravitational pull” that race exercised over the Warren Court, 30 where the Court's overarching and unanimous commitment to racial equality shaped the development of doctrine on issues ranging from constitutional criminal procedure to the state action doctrine to the scope of libel law under the First Amendment, how the Justices' views of marriage equality will influence the development of doctrine in other areas is less certain, at least for now.

Moreover, at the same time that the Justices are confronting rapid cultural change with respect to marriage, they are also confronting rapid cultural change with respect to methods of expression and association, and understandings of privacy, more generally. The rights to communicate about political issues, to associate with like-minded people, and to retain one's decisional and informational privacy touch core constitutional values. The internet has transformed the nature of information, simultaneously enhancing and threatening these values and posing new problems for constitutional interpretation. The interaction of rapid social and technological change makes it quite plausible that many, perhaps most, of the gay-rights-related constitutional cases the Supreme Court will see over the coming decades will involve the claims of gay-rights opponents. 31 What makes this phenomenon particularly interesting is that, perhaps because of the sheer speed of political and social change, the Court is confronting the claims of opponents before it has confronted, let alone worked out, the primary rights claim itself. In this article, I suggest that much of the conservative Justices' apparent agitation in last Term's cases comes from their sense that they are fighting a rear-guard action to protect traditionalists against an emerging mainstream.

*166 I. HOLLINGSWORTH V PERRY: A PRELIMINARY SKIRMISH IN THE CALIFORNIA MARRIAGE CASE

In the years following Lawrence--where Justice Kennedy's opinion for the Court and Justice O'Connor's concurrence in the judgment bracketed same-sex marriage rights, while Justice Scalia's dissent thundered that the Court had irretrievably set off down that road 32--it became virtually an article of faith within the gay-rights bar that the time for mounting a federal constitutional challenge to state laws restricting marriage to opposite-sex couples had not yet come. 33 The leading organizations litigating marriage-equality cases (Lambda Legal, the Gay & Lesbian Advocates & Defenders, the National Center for Lesbian Rights, and the American Civil Liberties Union) adopted a carefully calibrated strategy of challenging marriage laws on state-law grounds before relatively liberal state courts. While there were significant defeats in states like New York 34 and New Jersey, 35 there also was a countervailing string of victories in states like Massachusetts, 36 Connecticut, 37 Iowa, 38 and California. 39

*167 California, however, differed from these other states in one critical respect: Like many of its western neighbors, California had adopted the initiative as a Progressive Era constitutional reform. With the requisite number of signatures, voters could put nearly any constitutional or statutory question up for popular vote. 40 In the wake of the California Supreme Court's decision that restriction of marriage to opposite-sex couples violated the state constitution, opponents of marriage equality gathered the nearly 700,000 signatures required to put an initiative (Proposition 8) on the November 2008 ballot. The initiative proposed a constitutional amendment reinstating the restriction of marriage to opposite-sex couples. 41 The election was hotly contested, breaking every record for expenditures on an initiative and garnering national attention. Proposition 8 passed with 52.3 percent of the vote. The California Supreme Court subsequently rejected a state constitutional challenge to the initiative, 42 although it did hold that marriages entered into prior to passage of Proposition 8 would remain valid. 43

The same week that the California Supreme Court issued its decision on Proposition 8, two gay couples filed suit in federal district court in the Northern District of California challenging California's marriage restriction under both the Due Process and
the Equal Protection Clauses of the Fourteenth Amendment. The plaintiffs in *Perry v Schwarzenegger* were represented by a legal odd couple: Theodore Olson and David Boies, whose last joint appearance had been before the Supreme Court, arguing on opposite sides in *Bush v Gore.* The case was assigned to Chief Judge Vaughn R. Walker. Coincidentally, one of the most well-known cases in the judge's career as a private attorney had involved a different struggle over gay people's right to use a value-laden term controlled by the government. Walker had represented the U.S. Olympic Committee in its efforts to keep an athletic event from using the phrase “Gay Olympics.”

While the nominal defendants in *Perry* were state officials, it was immediately evident that the state would not mount a full-scale defense of Proposition 8. Most of the government defendants “refused to take a position on the merits of plaintiffs' claims and declined to defend Proposition 8.” The governor's answer actively invited judicial resolution, stating that the complaint “presents important constitutional questions that require and warrant judicial determination” because “[i]n a constitutional democracy, it is the role of the courts to determine and resolve such questions.” The attorney general (who was subsequently elected governor) went further, conceding the proposition's unconstitutionality. Thus, the substantive defense of Proposition 8 fell to a group of defendant-intervenors consisting of the five California voters who had acted as the “official proponents” of Proposition 8 along with ProtectMarriage.com-Yes on 8, which was the ballot measure committee that proponents had formed to receive contributions and disburse expenditures in support of the measure.

In October 2009, the district court denied the defendant-intervenors' motion for summary judgment, holding that a trial would be necessary to resolve disputed factual and legal issues. It set the date for the trial in early January 2010.

*169 Public interest in the case was intense. At the end of a hearing on a discovery dispute in September 2009, the district judge called the lawyers for the parties into chambers to notify them that he planned to “relay” some of the proceedings from his own courtroom to a larger ceremonial courtroom in order to accommodate the public and the press. The lawyers responded in unison that they had “[n]o objection at all” to that proposal. The judge also raised the prospect that he might arrange to “broadcast” the proceedings beyond the overflow room, asking the parties to respond to that possibility and noting that the issue of televising federal judicial proceedings was “in flux.”

Shortly thereafter, the chief judge of the Ninth Circuit appointed a three-judge committee to consider amending the Circuit's preexisting 1996 policy prohibiting television or radio coverage of district court proceedings. (During roughly the same time period, the Ninth Circuit, which had no categorical ban, had released video or audio recordings in approximately 200 appellate oral arguments.) The committee recommended to the Circuit's Judicial Council that district courts be permitted to experiment with broadcasting court proceedings on a trial basis. On December 17, the Circuit's Public Information Office issued a press release announcing that the council had voted unanimously to allow district courts within the Circuit “to experiment with the dissemination of video recordings in civil non-jury matters only.”

Following the December 17 announcement, the district court “indicated on its Web site that it had amended Civil Local Rule 77-3, which had previously banned the recording or broadcast of court proceedings” to create an exception allowing “for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit.” The defendant-intervenors objected to the rule revision on procedural grounds, arguing that any change to the rules required a notice-and-comment period. Initially, the district court responded by revising its website to provide notice that the court only intended to make the proposed rule change, and that there would be an eight-day period for public comment—which ultimately produced “138,574 comments, all but 32 of which favored transmitting the proceedings.” But midway through the comment period, the district court changed course and announced that it was adopting the revised rule effective retroactively “pursuant to the ‘immediate need’ provision of Title 28 Section 2071(e).”
On January 6, 2010, following a hearing, the district court announced its intention to permit live streaming of the trial to federal courthouses in several other cities, along with slightly delayed access to the proceedings through a government-provided YouTube channel. In the course of its ruling, the district court identified several reasons why the case was an appropriate one for audiovisual access, ranging from the intense public interest to the educative function that observing the trial process would have. The court pointed out that “today we have the capability of providing that kind of widespread distribution through, essentially, the Internet.”

On January 7, 2010, the district court filed a notice to the parties that it had formally requested that the Chief Judge of the Ninth Circuit “approve inclusion of the trial” in the Circuit’s pilot program permitting broadcast coverage. The next day, the Chief Judge approved the decision to allow real-time streaming to a handful of federal courthouses both within and outside California. But he postponed ruling on the request for dissemination over the internet in light of technical difficulties. That same day, the Ninth Circuit denied a petition for a writ of mandamus ordering the district court to withdraw its order.

On January 9, 2010, the Saturday before the trial was to begin, the defendant-intervenors filed an application with the Supreme Court for a stay of the plan for closed-circuit dissemination. On January 11, the Court issued a one-paragraph order temporarily staying the streaming “except as it permits streaming to other rooms within the confines of the courthouse in which the trial is to be held.” The order was to remain in effect until January 13. Only Justice Breyer dissented. And on January 13, the Court ordered a halt to any remote streaming of the trial. The expressed basis for the Court's ruling was that “the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting.”

It is hard to escape the whiff of Bush v Gore that hangs over the case, and not only because the respondents were represented by Messrs. Olson and Boies and the case was resolved on an exceptionally expedited basis. As in Bush v Gore, the Court seemed motivated to intervene because of the importance of the ultimate issue--there, the presidential election and, here, the constitutionality of restrictions on marriage--rather than the need to resolve the specific legal question presented. The result in both cases was a sharply divided per curiam opinion that resolved virtually nothing except the outcome of an individual case. Also as in Bush v Gore, the five Justices who joined the unsigned opinion seemed motivated to intervene by an almost personal distaste for what they saw as result-oriented procedural irregularities in the lower courts' actions. This played out in an unusual feature of the opinion: its repeated references to Chief Judges Walker and Kozinski by name rather than simply by position, as if to announce that the Court was watching them personally, and skeptically.

Finally, as in Bush v Gore, there was an odd mismatch between the identity of the claimant and the nature of the legally cognizable injury on which the majority fastened. In Bush v Gore, George W. Bush, the Republican candidate for president, invoked the equal protection rights of individual voters and alleged that those voters' ballots were being counted under different standards in different parts of the state. The most plausible remedy for a voter to seek in such a case would have been an order that the ballots be reviewed uniformly. Instead, because his real interest was winning the election quickly, Bush argued for a halt to the recount that left ballots uncounted, basing his arguments on the lateness of the hour. In Hotlingsworth, the rights ostensibly being vindicated were also only indirectly those of the parties. The defendant-intervenors claimed that streaming the trial posed a risk of intimidation to potential witnesses who might thereby decline to testify or modify their conclusions, presumably to the disadvantage of the defendant-intervenors' case. But if the risk to their case had been the defendant-intervenors' sole basis for relief, they might have faced a serious problem obtaining a stay. Presumably, they would have needed to show a real additional risk to the witnesses from streaming their testimony over and above whatever risk might come from their appearance in a courtroom already otherwise open to the public. And it would have been especially hard to identify that risk with respect to expert witnesses or official ballot proponents (the two categories of witnesses they planned to call), since those individuals had sought substantial publicity for their views in a variety of settings already. Had the defendant-intervenors based their arguments against televising the trial solely on how it might affect their defense at trial, they could well have found themselves saddled with a factual finding from the district court that there was no risk they would be deprived of due process.
So the defendant-intervenors instead invoked procedural claims about the adequacy of the process by which the decision to televise the trial had been made—essentially pressing the rights of those members of the public whose ability to participate in the rulemaking process had been short-circuited by precipitous adoption of the rule. This had the benefit of framing the issue more as a question of law that could be litigated before the Court de novo. But as Justice Breyer’s dissent observed, the defendant-intervenors were in an awkward position to claim lack of adequate notice. Whatever the general public’s awareness of the possibility of trials being televised, the parties actually complaining about it in court had known for months that Chief Judge Walker was considering doing so in their case.

As a question of law, moreover, the adequacy of the notice-and-comment process was a close one. The relevant statute provided that a rule for the conduct of business in the federal courts “be prescribed only after giving appropriate public notice and an opportunity for comment.” 69 The statute nowhere defined “appropriate”; it certainly set no specific length for an appropriate comment period. To be sure, there are situations in which a lengthy comment period would be appropriate, both to ensure that relevant stakeholders become aware of the proposed change and have time to evaluate it and to enable the preparation of comments dependent on extensive empirical or legal analysis. The Supreme Court pointed to two court of appeals cases that had suggested, in response to the fact that the Administrative Procedure Act similarly contained no specific time period, that administrative agencies should “‘usually’ provide a comment period of ‘thirty days or more.’” 70 But Hollingsworth seemed an odd case in which to announce a rule of general applicability about the length of a legally required period. For one thing, the district court received 138,574 comments during the week-long comment period it provided, 71 and it is hard to imagine that another three weeks would have changed anything about the overall tenor of the comments. More fundamentally, more or better public comments about the change to the Northern District of California’s Civil Local Rule 77-3 would not, in any event, have directly addressed the Supreme Court’s real concerns, which were quite specific to the California marriage litigation. The rule change did not require that trials be broadcast. It simply created a potential exception to the preexisting ban on broadcasting trial-level proceedings for cases in the Ninth Circuit’s pilot program. 72 Even had the rule been in place for years, after months of public comment, nearly all of the Supreme Court’s declared problems with the district court’s decision to permit remote streaming in this case would presumably have been the same. None of those complaints had anything to do with novelty per se. 73

The crux of the Supreme Court’s concern was not really a failure to provide a sufficient notice-and-comment period for a local rule that would permit district judges to decide on a case-by-case basis whether to permit broadcasts. Rather, as the per curiam opinion acknowledged, even “[i]f Local Rule 77-3 had been validly revised, questions would still remain about the District Court’s decision to allow broadcasting of this particular trial, in which several of the witnesses have stated concerns for their own security.” 74 The Court declared the California marriage case “not a good one for a pilot program,” precisely because it “involve[d] issues subject to intense debate in our society.” 75 The Court pointed with approval to the kinds of proceedings that had been televised in other federal district courts—ones that “were not high profile or did not involve witnesses.” 76

The Court’s position raises two related questions. The first goes to the nature of the interest in televising trials. It seems paradoxical to broadcast trials only in cases where the public has little desire to watch them—what we might call the “low-profile” rationale. Remote public access to judicial proceedings, like other First Amendment-inflected interests, should not be “limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance,” as the Court once reminded us in the free speech setting, is access to cases “that touch the heart of the existing order.” 77 The streaming of a trial can serve its educative function only if people care enough to watch.

That the trial in question involved witnesses actually offers additional reasons why audiovisual distribution might serve important functions. Direct and cross-examination provide a mechanism for the “dialectic” and “back and forth” that Justice Souter urged in his Osborne dissent. While not all of the beliefs that underpin individuals’ views on access to marriage rest on empirical claims, many do. And while the trial process is hardly the only way to evaluate the truth value of such claims, it
happens to be one traditional and important way to do so in our society. Citizens' ability to observe for themselves how well witnesses defend views on empirical questions when those witnesses cannot escape cross-examination and must answer under oath might influence their own answers to those questions. The Confrontation Clause of the Constitution rests on a similar intuition that jurors can better assess the merits of a witness's assertions if they have the ability to see the witness, rather than simply read his testimony or a third party's account of what the witness said.  

Moreover, the Court's approving reference to Congress's authorization of closed-circuit off-site broadcasting in one very high profile case (the federal prosecution of the Oklahoma City bombing) failed to recognize relevant parallels to the California marriage case. The trial court in the bombing case had granted a motion for a change of venue. Congress then enacted a statute that required trial courts to "order closed circuit televising" of proceedings back to the original venue "for viewing by such persons the court determines have a compelling interest in doing so and are otherwise unable to do so by reason of the inconvenience and expense caused by the change of venue." Congress's clear intent was to enable survivors and relatives of individuals killed by the bombing to observe the trial. By the time Perry reached the Supreme Court, it too involved only closed-circuit televising of judicial proceedings to other courthouses. To be sure, four of those courthouses were outside California. The individuals who might attend those venues would generally not have a direct personal stake in the question whether California's marriage statute was unconstitutional, although they might well have a direct interest in the broader question of what the Due Process and Equal Protection Clauses have to say about marriage equality generally. But individuals who would have attended the closed-circuit broadcast at the Pasadena federal courthouse were almost certain to be Californians. And they might well have had a compelling interest in the trial. The trial proceedings were set to determine whether some potential audience members would be allowed to marry the person of their choice, or whether the state would be required to abandon a definition of marriage central to the moral beliefs of other potential viewers. The majority's offhanded dismissal of any substantial public interest in permitting real-time audiovisual access in a single phrase-- "respondents have not alleged any harm if the trial is not broadcast" -- completely missed this point.

Having found no public interest on the side of permitting remote audiovisual distribution, an equities balancing was almost an afterthought. Indeed, the per curiam's view was foreshadowed in the way the opinion started its statement of the facts. After noting that Proposition 8 was designed to overturn the California Supreme Court's decision giving same-sex couples the right to marry, the opinion launched immediately into an account of the plight of Proposition 8 supporters who alleged "harassment as a result of public disclosure of their support." That account elided completely the distinction between criminal conduct and constitutionally protected activity. It is one thing to use death threats, vandalism, or physical violence against potential witnesses as a justification for limitations on the degree of public access courts should provide. It is quite another to privilege the First Amendment activity of Proposition 8's proponents over its opponents.

But that is what the Court implicitly did when it included, in its litany of "harassment," the allegation that opponents "compiled Internet blacklists' of pro-Proposition 8 businesses and urged others to boycott those businesses in retaliation for supporting the ballot measure." In NAACP v Claiborne Hardware Company, the Court had held that a boycott of white merchants by black residents of Port Gibson, Mississippi, involved protected First Amendment activity to the extent that the boycott was designed to put pressure on local businesses to support demands for equal treatment by the government. Like blacks in Port Gibson, the gay community can understandably view Proposition 8 as designed to reinstate "a social order that had consistently treated them as second-class citizens." In Claiborne Hardware, the Court held that "speech does not lose its protected character ... simply because it may embarrass others or coerce them into action." And the picketing and boycott activity did not lose its First Amendment protection because some episodes of violence undeniably occurred. The Hollingsworth Court offered no explanation for why the balance between protest and protection should be struck differently for the proponents of Proposition 8 and their retained experts than it had been for the white merchants and opinion leaders of Mississippi.
Although the Court did not focus directly on the issue here--leaving that discussion for Doe v Reed--technological innovation played some role in the adverse treatment of Proposition 8 supporters. The Court's account suggests it may have played some role in its decision, as well. Websites like eightmaps.com--which, overlaid onto a Google map, shows the names of individuals who donated to pro-Proposition 8 campaign committees along with their approximate location, the size of their contribution, and sometimes their employer--made it far easier for harassers or attackers to locate and contact their targets, as well as for neighbors, colleagues, and customers to conduct unwanted yet constitutionally protected conversations. But these technologies were independent of the remote streaming of trial testimony to a handful of federal courthouses at issue in Hollingsworth, and the Court made no serious effort to explain any connection. Instead, it uncritically adopted the defendant-intervenors' contention that some witnesses might decline to participate if the proceedings were televised.

*179 The Court indicated its concern for three types of witnesses--“members of same-sex couples,” “academics” (by which it seemed to mean expert witnesses), and “those who participated in the campaign leading to the adoption of Proposition 8” (which seemed a reference to the defendant-intervenors). But, in reality, the Court's entire analysis boiled down to a claim about testimony by inter-venor-retained expert witnesses. It would make no sense to take the defendant-intervenors' word on whether the same-sex couples (that is, the plaintiffs) or their “academics” would be chilled from testifying; the plaintiffs were represented by high-powered counsel who were entirely capable of protecting their clients' interest, and those counsel had consistently supported the district court's intention to broadcast the trial to the public at large. Even with respect to a potential chilling effect on the defendant-intervenors or their witnesses, there was a real question about the plausibility of any claimed chill. The defendant-intervenors had turned themselves into public figures through pervasive media appearances during the Proposition 8 campaign and had already mounted “their own videos on You Tube.” It was not at all clear what marginal contribution streaming would make to whatever risk of harassment they already faced, nor what marginal deterrent effect it would have on individuals who had already received intensive media coverage.

The Court's authority for the proposition that “witness testimony may be chilled if broadcast” was a single, decades-old decision in Estes v Texas. The Court's discussion there, however, had focused on the effects of commercial broadcasting on percipient witnesses in a criminal trial. The Court did not consider the fact that in *180 the intervening years, many courts had televised their proceedings without constitutional objection. Many of the factors identified in Estes as problematic seemed inapposite to Perry. The risk that “memories may falter, as with anyone speaking publicly,” does not apply to expert witnesses, who are not generally testifying on the basis of memories to begin with. Unlike percipient witnesses, experts are generally expected to “shape their own testimony as to make its impact crucial” in light of the other testimony being offered. Moreover, expert witnesses, unlike percipient ones, are seldom involuntary participants in the trial process; they agree to appear in full awareness of the potential for “withering cross-examination.” In Hollingsworth, the Court brushed these distinctions aside, writing that its concerns “are not diminished by the fact that some of applicants' witnesses are compensated expert witnesses” because “[t]here are qualitative differences between making public appearances regarding an issue and having one's testimony broadcast throughout the country.” The Court gave no hint as to what those qualitative differences might be. Testifying at a trial is, of course, not the same as making a public appearance, where one can refuse to go before a hostile audience or to answer uncomfortable questions. But isn't that the point?

Across a variety of dimensions, the Supreme Court remains a holdout in an era of immediate information. For many years, the Court delayed release of transcripts of oral arguments that failed to indicate the name of the Justice asking a question. Even now, the Court delays release of audio recordings of oral arguments, for no apparent technological reason. Many observers attribute the delay to the Court's desire that news outlets not have snippets of oral arguments available for their regular coverage. And Justice Souter famously told a congressional committee that “the day you see a camera coming into our courtroom it is going to roll over my dead body.” The Court's visceral distaste for televised judicial proceedings combined with its sensitivity about the issues involved in the marriage equality case to prompt its unusual intervention into an ongoing district court case.
The upshot of Hollingsworth was that the California marriage trial was not televised and, one might think, essentially nothing else. Despite their victory in preventing live streaming, the defendant-intervenors nevertheless “elected not to call the majority of their designated witnesses to testify at trial and called not a single official proponent of Proposition 8.”102 The Northern District of California ultimately adopted a revision to its local rule that permits participation in the Ninth Circuit’s pilot program to broadcast judicial proceedings. And the Supreme Court issued very little guidance to lower courts going forward, save for (perhaps) a thirty-day requirement for notice-and-comment judicial rulemaking.

From another angle, though, Hollingsworth revealed something significant about the Supreme Court and the Justices’ view of the marriage issue. The decision marked the Court’s first articulation of the view that supporters of traditional marriage are at substantial risk of unfair treatment and therefore deserving of special judicial solicitude. Indeed, this sentiment reverberated through the Term with discussions in Citizens United v Federal Election Commission,103 Doe v Reed,104 and Christian Legal Society.105 By the time the Term ended, with Christian Legal Society, four members of the Hollingsworth majority--the Chief Justice and Justices Scalia, Thomas, and Alito--had expressed their view that “prevailing standards of political correctness” threatened cultural conservatives with “margin-alization.”106

If the California marriage case ever arrives at the Supreme Court, it may well reinforce their belief. After the district court held that California’s restriction of marriage to opposite-sex couples violates the Due Process and Equal Protection Clauses of the Fourteenth *182 Amendment,107 the state governmental defendants all declined to appeal, and the state courts rebuffed various efforts to force the government to defend the marriage restriction.108 The only appellants who remain are the defendant-intervenors.109 If they ultimately seek the Supreme Court’s assistance in reinstating Proposition 8, the conservative Justices will face a strong temptation to relax the restrictive standing doctrines they have adopted over the past several Terms.110 In the interim, the Court’s decision in Hollingsworth may reflect five Justices’ sense that decorum and restraint are particularly critical when courts are on the verge of adjudicating contentious social issues--and that cultural conservatives should have their day in court conducted in the traditional way.

II. DOE V REED: POPULAR LAWMAKING AND UNPOPULAR POSITIONS

Given the Court’s solicitude for the fears of potential expert witnesses in Hollingsworth, its decision later in the Term permitting Washington State to release the names of people who petitioned to put its domestic partnership law up for popular vote was perhaps a bit surprising. The fractured nature of the Justices’ analysis (the case produced seven opinions) reflects the fact that however divided the Court may turn out to be on questions of gay rights and marriage equality, it is already splintered on questions about the constitutional structure of the political process. The position of marriage *183 traditionalists within that process simply adds another layer of complexity.

In 2009, Washington State adopted a new domestic partnership law. Referred to as the “everything but marriage act,”111 the law expanded the rights and responsibilities of state-registered domestic partners to make them largely equivalent to those of married couples. In response, opponents of the new law formed a political committee--Protect Marriage Washington--and sought to hold a referendum. In order to force one, they were required to obtain valid signatures from slightly more than 120,000 voters.112 Protect Marriage and its allies collected over 137,000 signatures, which they submitted to the secretary of state in July 2009.113 He certified the measure, commonly referred to as “R-71.” As a result, the law was suspended pending the results of the referendum.114

Within a month, several supporters of the domestic partnership law had filed requests with the secretary for copies of the R-71 petitions. They invoked the state’s Public Records Act, which generally permits public access to “any writing containing information relating to the conduct of government.”115 In recent years, the secretary of state’s office had released a number of
petitions connected with initiatives, but it had never before received a request for a *184 referendums. Moreover, two of the requesters issued a press release announcing their intention to post the signatories' names "online, in a searchable format."117

Seeking to prevent the disclosure of signatories' names, Protect Marriage Washington and two anonymous voters filed suit in federal district court. They alleged that the Public Records Act involved "compelled political speech" by requiring the public disclosure of petition signers' names and addresses and "infringe[d] on privacy of association and belief guaranteed by the First Amendment." Their complaint contained two counts. Count I alleged that the Public Records Act was "unconstitutional as applied to referendum petitions."119 Count II alleged that the act was "unconstitutional as applied to the Referendum 71 petition because there is a reasonable probability of threats, harassment, and reprisals."120 Addressing only Count I, the district court granted the R-71 proponents a preliminary injunction, which the Ninth Circuit stayed and ultimately reversed. Justice Kennedy, acting as the Circuit Justice, then stayed the Ninth Circuit's stay, and his decision was confirmed by the full Court.121 The election went forward without the signatories' names being disclosed and the voters approved the new domestic partnership law.122

Following the election, the Supreme Court granted certiorari,123 and Chief Justice Roberts delivered the opinion of the Court.124 Despite the language of the pleadings, he recast Count I as a facial challenge to the Public Records Act, rather than an as-applied challenge. The explanation he gave was that the relief the petitioners *185 sought--an injunction preventing the release of referendum petitions--"reach[ed] beyond the particular circumstances" of their case.125

At first blush, it is not entirely clear why the Court felt the need to classify Count I as a facial challenge, which is the sort of claim the Roberts Court has generally frowned upon.126 After all, the Court itself recognized that the claim straddled the line: "The claim is "as applied" in the sense that it does not seek to strike the [Public Records Act] in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions."127 While the first of those two sentences is clearly true, the second seems to expand the category of facial challenges significantly. If as-applied challenges are restricted to cases where the relief extends no further than the "particular circumstances" of the plaintiffs themselves, a significant number of constitutional challenges that have until now been understood to be as-applied challenges will be treated as facial attacks instead. Countless plaintiffs seek injunctive relief that will benefit others whose particular circumstances differ along at least some dimensions.128 Even in class actions, for example, courts permit *186 named representatives to seek relief under a typicality standard.129

Recasting the dividing line between facial and as-applied challenges as one that turns on the nature of the relief requested makes little sense given the spillover consequences of many constitutional adjudications.

Given that at least five Justices were prepared to reject an as-applied challenge, as well,130 it was unclear why the Court postponed that issue. Moreover, as members of the Court had previously recognized, relegating election-related litigation to as-applied challenges poses serious problems if one element of a successful as-applied challenge is a showing of how the practice operated in a particular instance.131 Justice Thomas's solo dissent and Justice Alito's solo concurrence picked up on this point.132 Circulators of *187 a petition, Justice Thomas explained, will be unable to provide evidence of risk "specific to signers or potential signers of that particular referendum" at the time they decide to circulate a petition.133 If voters demand public anonymity as a condition of signing petitions, permitting circulators to challenge disclosure at some later date by showing that some signatories have faced harassment will do nothing to protect either the circulators' or the signers' interests: Without the ability to promise anonymity, circulators will be unable to persuade some voters to sign. As Justice Alito put it, an "as-applied exemption becomes practically worthless if speakers cannot obtain the exemption quickly and well in advance of speaking."134 Having agreed on the problem, Justices Thomas and Alito diverged on the solution. For Justice Thomas, the "significant practical problems" with requiring as-applied challenges led him to address the claim as a facial challenge, and
ultimately to conclude that disclosure regimes are facially unconstitutional--a result consistent with his dissent in *Citizens United v Federal Election Commission*, where he was the lone Justice who would have struck down the disclosure provisions regarding corporate and union electioneering communications. For Justice Alito, the evidentiary difficulties associated with timely as-applied challenges led to a remarkably relaxed burden of proof for plaintiffs seeking exemption from disclosure regimes. After categorizing the challenge as a facial one, however, the Court declined to apply the test articulated in *United States v Salerno*. Under that test, a plaintiff bringing a facial challenge must show that “no set of circumstances exists under which the [challenged] Act would be valid.” Instead, along with the Court's decision earlier in the Term in *United States v Stevens*, *Doe* formalized a distinct test for First Amendment-based facial attacks. In this category, plaintiffs are required to show only that “a substantial number of [the act's] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” That substantive standard shares some features with First Amendment overbreadth doctrine. The unifying idea is the fear that if courts wait to adjudicate claims of constitutional infringement until individuals facing “particular circumstances” experience feared injuries, there will be no cases to adjudicate. Individuals will forgo exercising their rights rather than risk the consequences of the offending statute.

The blurring of categorical lines continued when the Justices turned to the merits of Protect Marriage's constitutional challenge. The starting point for the majority's analysis was the holding that petition signers are engaged in First Amendment-protected expression. At the very least, by signing a referendum petition, a signer is indicating a belief that the issue in question ought to be put up for popular vote; presumably, most signatories also are expressing their opposition to the law being subject to the referendum.

Regulations targeting political speech generally trigger the most searching judicial scrutiny. Indeed, the Court had long ago determined that “the circulation of a petition [to place an issue on the ballot] involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” A decade earlier, the Court had therefore struck down a Colorado statute that required signature gatherers to wear name badges on the grounds that such a disclosure requirement might deter their participation. And earlier in the Term, the Court had reiterated that “[l]aws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”

But Chief Justice Roberts's opinion in *Doe* adopted a decidedly more deferential approach. He pointed to “a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context” that had, he wrote, “reviewed such challenges under what has been termed ‘exacting scrutiny.’” The “exacting scrutiny” standard, he explained, “requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest. To withstand this scrutiny, ‘the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.’” In short, “exacting scrutiny” was less exacting than strict scrutiny, which would have required a compelling, rather than a merely “important,” government interest and would have required narrow tailoring, rather than simply a “substantial relation” between the disclosure regime and that governmental end. Thus, “exacting scrutiny” resembled most closely the sliding scale the Court had already adopted for a variety of other election-related regulations--such as limitations on write-in voting or voter identification requirements -- that did not implicate core political speech at all.

The Court's prior decisions had not squarely stated that the phrase “exacting scrutiny” constituted a term of art--like “strict scrutiny” or “rationality review”--with a distinct framework for assessing whether the government's interest was sufficiently weighty or the fit between the statute and that interest was sufficiently tight. Rather, cases often used the phrase in an offhanded way that suggested it was a description of conventional strict scrutiny. By turning “exacting scrutiny” into a technical standard of review, *Doe* marked another stage in the ongoing splintering of the seemingly rigid system of tiered scrutiny erected during the latter years of the Warren Court and cemented into place by the Burger Courts.

The spate of separate opinions took wildly different positions on the nature of the First Amendment interest at stake and therefore, not surprisingly, on the framework for analyzing the petitioners’ claims. At one end of the spectrum, Justice Scalia, concurring in the judgment, denied that petition signers had any First Amendment right to “partial anonymity” at all.153 His approach was avowedly historical: “Our Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect.”154 As a matter of Washington constitutional law, voters within the referendum process are exercising legislative power. Such power, Justice Scalia explained, was traditionally exercised publicly. Indeed, the United States and many state constitutions expressly require recording legislative action, including the votes of individual legislators. To be sure, the referendum was a turn-of-the-twentieth-century device,155 and the only direct evidence we had of the Fram-ers' views was that they structured the federal government to avoid it altogether. But, in keeping with his professed commitment to original public meaning originalism, Justice Scalia pointed out that the town hall meeting of the eighteenth century was a precursor to popular lawmaking. At the time of the framing (and since, for that matter), participation in town hall meetings was always public. More expansively, Justice Scalia argued that even if participation in the referendum process were treated simply as voting, rather than legislating, there was no originalist support for anonymity as a constitutional requirement.191 Vive voce voting was commonplace at the time the First Amendment was ratified and for years thereafter. And the adoption of secret ballots in the latter part of the nineteenth century apparently rested on arguments about ordinary policy--most notably, concerns with vote buying and corruption--rather than on appeals to constitutional privacy concerns.156

Four other Justices assigned the First Amendment interests more weight, but not by much. Justice Sotomayor, in a concurrence joined by Justices Stevens and Ginsburg, pointed to the public nature of “the process of legislating by referendum” as a reason for treating any First Amendment-based interest in nondisclosure as relatively slight.157 Justice Stevens, in his opinion concurring and concurring in the judgment, which was joined by Justice Breyer, likewise downplayed any strong First Amendment interest in participating anonymously. Although the “democratic act” of signing a petition “does serve an expressive purpose, the act ... is ‘not principally’ one of individual expression; rather, it serves the public function of “sorting those issues that have enough public support to warrant limited space on a referendum ballot.”158 As a result, both Justice Sotomayor and Justice Stevens concluded that Washington State was entitled to considerable deference in applying the Public Records Act to the R-71 petitions. Justice Sotomayor found it “by no means necessary” for a state to show that its restrictions “are narrowly tailored to its interests.”159 Because Justice Scalia had found no First Amendment rights implicated at all, it seems as if five Justices actually would not have applied “exacting scrutiny” if that term really means anything. Justice Sotomayor denounced her opinion a concurrence, rather than a concurrence in the judgment. Justice Stevens did not expressly identify the parts of the opinion of the Court he found inconsistent with his concurrence in part and in the judgment. So while there was technically an opinion for the Court, it is not entirely clear that all the analysis in that opinion in fact garnered support from a majority of the Justices.

At the other end of the spectrum, Justices Alito (in a solo concurrence)192 and Thomas (in a solo dissent) saw the case as implicating core constitutional principles of privacy. Particularly in light of their extensive invocations of history four days later in McDonald v City of Chicago,160 it is striking that they did not engage, let alone dispute, Justice Scalia’s account of the original understanding of the First Amendment. Justice Alito repeatedly described the circulators and signers of petitions as “speakers,”161 and also referred to their “right to privacy of belief and association.”162 In contrast to the majority, who treated the act of signing a petition as an individual act of expression, Justice Thomas characterized signers as engaging in First Amendment-protected “political association.”163 And unlike the Court, he believed that the appropriate standard was conventional “strict scrutiny,” which would require the state to show that disclosure under the Public Records Act was “narrowly tailored--i.e., the least restrictive means--to serve a compelling state interest.”164

In fact, Justices Thomas and Alito were strikingly nonoriginalist in their approach to Protect Marriage Washington's claim, perhaps because their substantive sympathies pushed in the opposite direction. The next Term, during oral argument over a California statute restricting the sale of violent video games to minors, Justice Alito interrupted Justice Scalia’s questioning
regarding the original understanding of the First Amendment to joke that “I think what Justice Scalia wants to know is what James Madison thought about video games.” Of course, he thought nothing (“Grand Theft Horse and Buggy”?). Modern technology inflects privacy in a number of ways, and Justices Alito and Thomas seemed strongly influenced by those considerations. The “state of technology today,” Justice Thomas declared, “creates at least some probability that signers of every referendum will be subjected to threats, harassment, or reprisals if their personal information is disclosed. [T]he advent of the Internet enables rapid dissemination of the information *193 needed to threaten or harass every referendum signer.” Justice Alito emphasized that if signers’ names were posted on the internet, “then anyone with access to a computer could compile a wealth of information about all of those persons.” He detailed the information retrievable through on-line links, ranging from the amount of their mortgage to newspaper articles about their children’s athletic activities before concluding that “[t]he potential that such information could be used for harassment is vast.”

Regardless of how they characterized the right at issue, the eight Justices who agreed that some First Amendment-based interest was at stake were faced with the need to balance those interests against the state’s countervailing considerations. Washington had asserted two justifications for its disclosure regime: first, an electoral integrity rationale focused on combating fraud and promoting governmental transparency; second, an informational rationale focused on giving voters information about the source of a petition’s support. The most remarkable aspect of the Court’s brief discussion of the integrity rationale was just how unexacting “exacting scrutiny” turned out to be—something more akin to rationality review than to strict scrutiny. In rationality review cases, courts do not ask about a law’s actual purpose. Rather, they often hypothesize some purpose that fits the challenged classification. They require only the most relaxed fit between the challenged law and a permissible government purpose. Nor do they require much empirical evidence of such a link, instead asking whether “any state of facts reasonably may be conceived to justify [the challenged law].” I think it is a fair bet that when Washington’s voters enacted the state’s Public Records Act, they were not thinking of how disclosure of ballot petitions would combat fraud in the electoral process. But on the basis of relatively thin evidence, the Court hypothesized that disclosure would enable the public to backstop the secretary of state’s verification process, enable individuals to discover that their names *194 had been forged on petitions, and deter bait-and-switch fraud in which voters are induced to sign petitions based on misrepresentations about the nature of the ballot measure. Finding that concerns with electoral integrity provided a sufficient basis for disclosure, Chief Justice Roberts’s opinion declined to address the informational rationale. The Court discussed the case as if disclosure would lead only to more accurate signature verification, and thereby enhance public confidence in the electoral process.

But had the Court addressed the informational rationale, it would have had to confront more directly the range of uses to which electoral information can be put and where to draw the line between legitimate and unacceptable uses. At a wholesale level, aggregated information about a measure’s supporters serves long-recognized legitimate purposes. Such information can provide voters with a useful cue in deciding how to vote on a ballot measure. For example, if the bulk of a petition’s signatories are gathered in heavily Democratic or heavily Republican neighborhoods or from relatively wealthy or relatively less affluent parts of the state, this can tell a voter something about the predicted impact of a particular measure. By contrast, both the groups requesting the petitions and the petitioners in Doe seemed more focused on the retail use of information—namely, the identification of individual signatories for the purpose of enabling opponents of the referendum to contact them. The opponents hoped that voters supporting same-sex couples’ rights would engage in core political speech with neighbors, coworkers, relatives, and acquaintances who had signed the petition. The proponents feared that signatories would be subjected to harassment and retaliation by strangers. As I have already suggested, *195 the line between protected First Amendment activity and retaliation can be hazy. Would refusal to associate with a measure’s supporters, for example, be an instance of the former or of the latter? And can that question necessarily be answered in the abstract? On top of the conceptual haziness rest challenging empirical questions. What is the likelihood that disclosure will produce valuable robust debate as opposed to impermissible harassment or intimidation? If it produces both, in what proportions will they occur?

More fundamentally, because none of the other Justices engaged Justice Scalia’s originalist account, they did not grapple with another potential justification for requiring participants in the referendum process to act publicly. As Justice Scalia described,
historically one rationale for requiring citizens to cast their votes publicly was precisely its effect on their decision making. Vive voce voting required a voter to “show at the hustings the courage of his personal conviction.” It forced the voter, in short, to be accountable. This loss of accountability was precisely why the English political philosopher John Stuart Mill opposed the adoption of the secret ballot:

The best side of their character is that which people are anxious to show, even to those who are no better than themselves. People will give dishonest or mean votes from lucre, from malice, from pique, from personal rivalry, even from the interests or prejudices of class or sect, more readily in secret than in public. And cases exist ... in which almost the only restraint upon a majority of knaves consists in their involuntary respect for the opinion of an honest minority.

The practice of direct democracy itself, and not only disclosure laws regulating it, “significantly implicates competing constitutionally protected interests in complex ways.” On the one hand, it allows greater public participation in the lawmaking process. On the other hand, as many scholars have noted, direct democracy lacks many of the braking features that protect minorities in republican, representative politics.

One way to get a handle on the possible effect of public accountability on voter decision making is to think about the “Bradley effect.” The idea is that the votes actually cast for minority candidates lag behind the estimates derived from survey data— including exit polls, which involve voters being asked not to predict how they may vote but to report how they actually voted, generally within minutes of doing so. The conventional explanation for the effect centers on voters' unwillingness to be thought to have cast their votes on the basis of a candidate's race. Most recently, the 2008 presidential primaries may have involved a refinement of the Bradley effect: The gap between survey data and actual vote totals for Barack Obama was lower in caucus states, where voters must indicate their preference publicly, than in primary states with secret ballots. The Bradley effect raises the question whether a state might plausibly balance its competing desires to permit direct public input into the legislative process and to reduce the discriminatory potential of direct democracy by instituting a disclosure regime.

The countervailing argument, of course, is that the electoral system is supposed to report voters' preferences, and not to shape them, or at least not to shape citizens' fundamental beliefs about critical issues of public policy. In some ways, the contemporary understanding that voters are free to cast their ballots on whatever basis they choose may explain why none of the other Justices took an originalist approach. Public voting occurred in an era when voting itself was not yet viewed as a fundamental constitutional right. In such a world, states' control over the electoral process would have been virtually plenary. Thus, when it came to voting and views on marriage, the Supreme Court in 1885 upheld the disenfranchisement of polygamists because states should be entitled to “withdraw all political influence from those who are practically hostile” to “the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony.” If the state could outright disenfranchise such citizens, then a disclosure rule that deterred individuals from expressing those views might be less problematic than it would be today. Once the Court had held that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible,” there is a strong argument that a voter's choices should be protected, not only from illegal acts, but from other forms of pressure as well.

The Doe Court's decision to address only the facial challenge-- leaving the petitioners' as-applied claim to be litigated in the first instance before the district court--enabled the Court essentially to sidestep the petitioners' relatively case-specific predictions of harassment and intimidation. The Court emphasized that the question before it was not whether disclosure of the R-71 petitions, or even other controversial ballot measures more generally, posed a “reasonable probability” of impermissible action against signatories. Rather, the petitioners had to show that across the broad range of ballot measures, including the arcane and the mundane, there was a significant risk of harassment or intimidation. This they could not do. Washington and other
states had disclosed petitions regarding a variety of issues in recent years “without incident” -- indeed, apparently without objection. And the steady stream of citizen-driven ballot measures on controversial issues further suggests that the prospect of disclosure (if in fact voters are even aware of the possibility) seems not to have chilled petitioning activity. Although Chief Justice Roberts's opinion for the Court suggested that signers who demonstrated a “reasonable probability of harassment” might prevail in an as-applied challenge, what constitutes such a probability is unclear.

Justice Alito, in his separate opinion, claimed that Protect Marriage Washington had a “strong argument” that disclosure violated the First Amendment "as applied to the Referendum 71 petition." The evidentiary basis for his argument was the assertion of “widespread harassment and intimidation suffered by supporters of California’s Proposition 8.” The source for that claim was in turn the Court’s earlier statements to that effect in Hollingsworth v Perry and Justice Thomas’s dissent in Citizens United. But those statements in turn were based on allegations of intimidation and harassment, rather than evidence subjected to any official assessment or adversarial testing. To be sure, several of the allegations involved criminal behavior, such as threats or vandalism. Some of that vandalism, however, was the sort of near-universal behavior that attends nearly all heated elections--for example, the destruction or removal of campaign yard signs. Nothing about that activity suggests what the comparable activity would be against petition signatories, whose political speech is further removed from opportunities for retaliation.

Moreover, other allegations characterized as “threats and harassment” in the complaint on which Justice Thomas had relied may fall within the boundaries of protected speech and association: for example, the distribution of a flyer in one individual’s hometown calling him a “bigot” for having made a four-figure financial contribution to Proposition 8 and identifying him as a Catholic deacon; and emails sent to another contributor stating that “I am boycotting your organization as a result of your support of Prop 8” and that “I will tell all my friends not to use your business. I will not give you my hard earned money knowing that you think I don’t deserve [sic] the same rights as you do. This is a consequence of your hatred.” Justice Alito claimed that “if the evidence relating to Proposition 8 is not sufficient to obtain an as-applied exemption in this case, one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons who circulate and sign referendum and initiative petitions.” But if this evidence is sufficient, one may wonder whether there are any as-applied challenges that would fail. There may be little daylight in practice between Justice Alito and Justice Thomas.

In contrast, Justices Sotomayor and Stevens announced standards for assessing as-applied challenges that made it unlikely that any plaintiff will ever prevail in preventing disclosure of his signature on an initiative or referendum petition. Justice Stevens observed that “[a]s a matter of law, the Court is correct to keep open the possibility” that a plaintiff could challenge disclosure, but almost immediately shut the door to claims about disclosure regimes like the Public Records Act. Even “a significant threat of harassment” would not be enough, in his view, unless that threat “cannot be mitigated by law enforcement measures.” This could mean that absent conditions like those in the mid-century American South, whence came the anonymity cases like NAACP v Alabama -- and which hardly describe life in even the bluest of states today--a challenge to general disclosure requirements will fail. Justice Sotomayor similarly announced the view that “any party attempting to challenge particular applications of the State’s regulations will bear a heavy burden,” and would limit as-applied challenges to the “rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control.”

The various opinions’ invocations of NAACP v Alabama and Bates v Little Rock may indicate something about how they view the struggle over marriage equality. Justice Sotomayor’s and Stevens’s use of those cases suggests they saw a clear distinction between the difficulties faced by (largely African American) civil rights activists in the 1950s and 1960s and the situation confronting marriage traditionalists today. In Alabama and Arkansas, not only were African Americans pervasively excluded from the formal political process altogether, but they faced official suppression, pervasive private violence to which the government never responded, and discrimination across the entire range of civic life. In distinguishing NAACP v Alabama, the more liberal wing of the Court implicitly rejected the claim that marriage traditionalists were a group needing such special solicitude from the courts. By contrast, Justices Alito and Thomas seemed to see a kinship between two sets of
movement activists subject to reprisals and needing judicial protection from (or even within) majoritarian political processes. That perception of kinship was to play out more fully in Christian Legal Society, where questions of First Amendment association were more directly at stake than in the fleeting association attached to signing a petition circulated by an evanescent group. In their solicitude for opponents of marriage equality, the conservative Justices seemed not to notice another, ironic, historical parallel: Opponents of marriage equality were essentially complaining about being “outed” by gay people and their supporters who had come out of the closet to participate actively in politics.

*201 III. CHRISTIAN LEGAL SOCIETY V MARTINEZ: SEXUAL ORIENTATION, RELIGION, AND THE RELATIONSHIP AMONG STATUS, CONDUCT, AND BELIEF

Herbert Wechsler infamously identified the central question in Brown v Board of Education as a “conflict in human claims of high dimension, not unlike many others that involve the highest freedoms.” He asked, Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? At least with respect to the claims of African Americans, that conflict was resolved during the 1960s and 1970s by the political process and judicial acquiescence. The antidiscrimination statutes of the Second Reconstruction, upheld by the Supreme Court, came down heavily on the side of nondiscrimination and full inclusion.

This past Term saw a reprise of the conflict, this time involving sexual orientation rather than race. The University of California Hastings College of the Law (UC Hastings) denied official recognition to a student organization that excluded gay students from membership. The organization sued, claiming a violation of its First Amendment rights to freedom of speech, freedom of association, and free exercise of religion. Ultimately, the Court upheld the law school's decision. Along the way, the Justices revealed vastly different worldviews when it comes to what Justice Scalia years ago referred to as the “culture wars” over gay rights. The barely suppressed rage in Justice Alito's dissent supporting the Christian Legal Society may reflect the Justices' sense of who's winning that battle.

The Christian Legal Society (CLS) is a national association of Christian lawyers and law students. It had long required all members to sign a Statement of Faith embracing the group's principles. In early 2004, the society adopted a resolution declaring that engaging in “acts of sexual conduct outside of God's design for marriage between one man and one woman” was “inconsistent” with the society's foundational belief “and consequently may be regarded by CLS as disqualifying such an individual from CLS membership.”

At the beginning of the 2004-05 academic year, the leaders of a preexisting and officially recognized Christian students' group at UC Hastings decided to affiliate the group with CLS. Shortly thereafter, the students applied to the law school for travel funds to attend a national CLS conference. The law school provided such funding only to registered student organizations (RSOs). Accordingly, the Hastings CLS submitted a copy of its new bylaws as part of the registration process.

That was where the trouble began. The UC Hastings administration determined that the group's bylaws did not comply with the school's Nondiscrimination Policy, which provided in pertinent part that school-sponsored activities would not “discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.” After some back and forth, the school denied the group RSO status. This meant the group was ineligible for certain financial benefits and access to certain law school facilities.
Hastings CLS sued. Both the society and the law school moved for summary judgment. In a fairly lengthy opinion, the district court granted the school's motion, concluding that UC Hastings' “uniform enforcement of its Nondiscrimination Policy” passed constitutional muster as a regulation of conduct whose incidental effects on First Amendment rights were justified by the school's “compelling interest in prohibiting discrimination on its campus.” The Ninth Circuit affirmed in a one-paragraph, unpublished opinion that stated, in its entirety, The parties stipulate that Hastings imposes an open membership rule on all student groups--all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable.

The arguments before the Supreme Court concerned, to an unusual degree, a factual question: What precisely was the UC Hastings policy at issue? Justice Ginsburg, in her opinion for the Court, relied on a stipulation between the parties to describe the regulation as “an all-comers policy.” UC Hastings required RSOs to open their membership to all students, subject to “neutral and generally applicable membership requirements unrelated to ‘status or beliefs,’” such as paying dues, refraining from misconduct, or achieving distinction on a skill-based test such as a journal writing competition. By contrast, Justice Alito's dissent insisted that the school's actual policy was not an all-comers rule. As he saw it, groups were entitled to exclude students on any basis other than those listed in the school's Nondiscrimination Policy, which proscribed exclusion on only a “limited number of specified grounds.” He further claimed that the school's actual practice was more arbitrary. Although UC Hastings had denied CLS's application for RSO status, it had granted that status to other groups that discriminated on bases enumerated in the Nondiscrimination Policy--most notably La Raza, which Justice Alito claimed had limited membership to Latino students.

The heated language surrounding this factual disagreement raises the question why the Justices cared so much about the precise contours of the UC Hastings policy. Some part of the disagreement seemed to center on the school's bona fides. The dissenters, in particular, hinted that the school's refusal to recognize the Christian Legal Society reflected little more than antireligious bigotry--“prevailing standards of political correctness,” Left Coast-style. The majority, by contrast, criticized the dissent for “impugning the veracity of a distinguished legal scholar and a well respected school administrator.” It credited the law school's account of its policy as designed to provide equal educational opportunities to all students, encourage interaction among students, and vindicate state antidiscrimination principles.

But both an all-comers and a nondiscrimination policy forbidding exclusion on only specified bases would serve the school's goals, at least to some extent. In fact, one of the justifications for the allcomers policy was its utility in enforcing the overarching Nondiscrimination Policy. The main consequence of characterizing UC Hastings' policy as an all-comers rule was to relieve the Court of the need to address CLS's claim that a nondiscrimination policy itself constitutes a form of impermissible viewpoint discrimination. That claim has some intuitive appeal: A nondiscrimination policy permits groups formed around criteria not enumerated in the policy to exclude students on the basis of viewpoint--for example, Silenced Right, a pro-life group, could exclude students who favored abortion rights, and the Hastings Democratic Caucus could reject students who were Republicans--while not according groups identified in terms of the enumerated criteria, such as religion, the right to restrict membership to people who share their beliefs.

All nondiscrimination rules are, as Wechsler observed, nonneutral in at least one sense: They identify particular reasons or motivations as illegitimate bases for a decision, while leaving actors free to act on the basis of other characteristics. In this sense, nondiscrimination law is viewpoint based because it treats the view that an individual's religion or his sexual orientation is relevant to whether he should be accorded a benefit differently from views, for example, that his test scores or his political affiliation can be taken into account. But unless the entire edifice of modern antidiscrimination law is to be declared unconstitutional, a government's decision not to permit public discrimination on the basis of religion or sexual orientation cannot...
really be understood as viewpoint discrimination of the type the First Amendment disfavors. Indeed, in his *Romer* dissent, Justice Scalia recognized this point, writing that “homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments” through enactment of antidiscrimination laws “as is the rest of society.”

Focusing on an all-comers rule also enabled the Court to side-step the question whether CLS was seeking to exclude gay students based on those students’ belief, their conduct, or their status. For tactical reasons, CLS had argued that it was not engaged in status-based discrimination. It claimed that it excluded students not because they were gay, but rather because of “a conjunction of conduct and the belief that the conduct is not wrong.” Had CLS not qualified its policy in this respect, it would have faced the unappealing prospect of having to explain how its status-based membership restrictions could be sustained without also compelling official recognition and support of student groups that discriminated on the basis of race or gender. CLS hoped to avoid that problem by claiming that while race or gender are matters of status, homosexuality (and religion) are not.

The Court’s opinion rejected CLS’s attempted framework with the observation that “[o]ur decisions have declined to distinguish between status and conduct” when it comes to gay people. But in quoting *Lawrence v Texas* to support this proposition, the Court subtly reframed that decision as an antidiscrimination case. In *Lawrence* itself, the Court had rejected a call to ground its decision striking down Texas’s homosexual sodomy statute in the Equal Protection Clause as well as in substantive due process. To be sure, as I have explained elsewhere, *Lawrence* should be understood as *more* than just a decision about conduct: “Protecting gay people’s choices within the intimacy of their homes serves essentially as a *safeguard* of their dignity in a more public sphere. That, whatever the Court chooses to call it, is as much a claim about equality as it is a claim about liberty.” By quoting *Lawrence* in the context of explaining the nature of discrimination against gay people, and by juxtaposing the Court’s statement with Justice O’Connor’s concurrence in the judgment, which had expressly relied on the Equal Protection Clause rather than substantive due process, the Court may have signaled a new willingness to scrutinize claims by gay people under the Equal Protection Clause.

That possibility is reinforced by the Court’s reference, in the course of upholding UC Hastings’ policy as “reasonable,” to California’s treatment of discrimination on the basis of sexual orientation on the same terms as discrimination on the basis of gender, race, or religion. Although the Court referred only to California’s statutory antidiscrimination requirement, it may well have been aware also of the California Supreme Court’s recent decisions holding that, under the state constitution’s equal protection clause, discrimination on the basis of sexual orientation should be subjected to the same heightened scrutiny accorded to discrimination on the basis of race or gender.

In his concurrence, Justice Stevens drew the parallel between various protected aspects of personal identity even more tightly. “A person’s religion,” he observed, “often simultaneously constitutes or informs a status, an identity, a set of beliefs and practices, and *much else besides.* (So does sexual orientation for that matter, notwithstanding the dissent’s view that a rule excluding those who engage in ‘unrepentant homosexual conduct’ does not discriminate on the basis of status or identity.)” And he followed by criticizing the dissent for “see[ing] pernicious antireligious motives and implications where there are none,” while failing to recognize “the fact that religious sects, unfortunately, are not the only social groups who have been persecuted throughout history simply for being who they are.”

Perhaps the fervor of the dissent stems from the dissenters’ sense that public opinion—or, as they might resentfully frame it, “the views and values of the lawyer class from which the Court’s Members are drawn”--is coming to view sexual orientation as an aspect of personhood as central and as worthy of protection as race, gender, or religion. The dissenters, by contrast, seem to view religion—and traditional religious beliefs in particular—as uniquely worthy of protection and respect. (Given the dissent’s dismissive treatment of La Raza, a Latino-oriented student group, it is hard to imagine that the dissenters would have sided with a racial minority group’s attempt to obtain official recognition while excluding white students.) A particularly
strong illustration of their perspective was the fact that the only “claim of unlawful discrimination” they saw implicated by UC Hastings' policy belonged to CLS. The dissenters never stopped to consider why UC Hastings might have adopted a Nondiscrimination Policy in the first place; they ignored entirely the problem of discrimination against groups other than religious traditionalists. For the dissenters, religious conservatives seemed to be the most marginalized and victimized group within the legal academy. Left unsaid, but perhaps in the back of their minds, is the sense that nowhere is the process of full inclusion for gay people, even at the cost of overriding religious objections, further along than in San Francisco, where UC Hastings is located.

The dissent's near-paranoia came through most clearly in its claim that Hastings' policy rendered groups like CLS vulnerable to infiltration or hijacking. Justice Alito expressed the fear that “[a] true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses.” He was not reassured by the absence of any example in the record of “RSO-hijackings at Hastings.” Nor did he offer any plausible explanation for why students would join a group for the purpose of destroying it. His hypothetical example of how such a “threat” might play out was itself telling:

Not all Christian denominations agree with CLS's views on sexual morality and other matters. During a recent year, CLS had seven members. Suppose that 10 students who are members of denominations that disagree with CLS decided that CLS was misrepresenting true Christian doctrine. Suppose that these students joined CLS, elected officers who shared their views, ended the group's affiliation with the national organization, and changed the group's message. The new leadership would likely proclaim that the group was “vital” but rectified, while CLS, I assume, would take the view that the old group had suffered its “demise.” Whether a change represents reform or transformation may depend very much on the eye of the beholder.

What the dissent seemed not to notice was that a similar dynamic, only in reverse, produced—and rather recently, at that—the Hastings CLS whose views the dissent saw as entitled to protection from change. From the 1994-95 academic year through the 2003-04 academic year, UC Hastings had several avowedly Christian RSOs (including one that had called itself “Hastings Christian Legal Society” whose expressed objectives were “to encourage those who identify themselves as followers of Jesus Christ to more faithfully live out their commitment in their personal and academic lives, to prepare members for future lives as Christian attorneys, and to provide a witness and outreach for Jesus Christ in the Hastings community.” At the same time, those RSOs each agreed in their bylaws to comply with UC Hastings' Nondiscrimination Policy. In the two years prior to the emergence of the current group, the Hastings Christian Fellowship's bylaws provided that the organization “welcomes all students of the University of California, Hastings College of law” and the organization admitted members without regard to religion or sexual orientation. Hastings CLS emerged from this inclusive organization through a “takeover.” Three students became the leaders of the small group (around a dozen members) at the end of the 2003-04 academic year and “decided to affiliate their student organization officially” with CLS, thereby triggering the adoption of the exclusionary membership rules to which UC Hastings objected.

But the central point—which the dissent never confronts—is that it is in the nature of student groups to change. If the next cohort of Christian students to enroll at UC Hastings were to join CLS and then decide to “end[] the group's affiliation with the national organization, and change[] the group's message,” why should anyone care? To be sure, the national Christian Legal Society must remain free to disaffiliate student chapters that do not hew to its policies. But that group is not entitled itself to participate in UC Hastings' limited public forum, because that forum is limited to groups comprised entirely of current students. I cannot see anyone with a legally cognizable interest in cementing into place a set of bylaws that do not attract support from the existing cohort of students. In a sense, UC Hastings' all-comers policy adopts John Hart Ely's anti-entrenchment principle: By requiring that groups remain open to all students, the policy keeps the current officers or membership from “choking off the channels of
political change to ensure that they [or their values] will stay in and the outs will stay out.” The dissent's fear, by contrast, almost seems to presuppose that it is entirely sensible for a Christian legal society (with a lower-case “I” and “s”) to exclude gay students. It is clear with which “beholder” the dissent has aligned its eyes. And the dissent in Christian Legal Society reflects the same sense underlying the per curiam in Hollingsworth v Perry as well as Justice Alito's concurrence and Justice Thomas's dissent in Doe v Reed—the sense that traditionalists face distinctive threats demanding special judicial solicitude.

IV. CONCLUSION

The Court ended its foundational opinion in Griswold v Connecticut by declaring that marriage “is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” Griswold was a case about both marriage and privacy: the defendants sought to keep the government out of their marriage. Today, however, the fundamental legal question about marriage involves assertions of positive rights rather than negative liberties: Same-sex couples demand not that the state stay out of their marriages, but that the state admit them to a civic institution.

The struggle over marriage equality is a cause. How to referee that struggle poses profound questions of political and jurisprudential faith. Along the way, as this Term shows, there will be a series of subsidiary disputes that raise issues of method, as well as marriage. Standing, the distinction between facial and as-applied challenges, the scope of rationality review and of “exacting scrutiny,” adherence to originalism in the face of rapid social and technological change, and the continuing vitality of antidiscrimination law-- each involves questions likely to dog the Court for years to come. If this Term's cases are any indication, the Court will divide along a variety of dimensions.

But the Court must confront more than doctrinal complexities. The marriage cases raise anew the recurring question of when the Court should intervene to declare that a contested social or political issue has been resolved as a matter of constitutional law, and how it should deal with the losing side. Few institutions are more deeply rooted in the popular consciousness than marriage. That is why it always appears, regardless of the Justice writing the opinion, in the list of fundamental rights protected by the substantive due process principle.

But in asking what that tradition means today, the Court is being called upon to police an “evolving boundary” between marriage as it used to be and marriage as it is becoming. Obviously, litigation—albeit litigation in state courts raising state constitutional claims—has played a significant role, not only in achieving marriage equality directly but also in changing the context of the national debate. The Supreme Court's decisions, when they come, will do the same. How the Justices answer the marriage question may influence the Court's political and moral capital with future generations in the way that the Court's substantive due process decisions in Dred Scott v Sandford, Loving v Virginia, and Roe v Wade have done for previous generations. And so, precisely because feelings about marriage are so fundamental to so many people, there may be two institutions whose future is on the line: marriage and the Court.

Footnotes

1. Pamela S. Karlan is Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School.


3. Id at 2312.


Id at 567.


Id (showing that Maryland, New York, and Rhode Island will recognize same-sex marriages performed elsewhere).

In May 2008, the California Supreme Court struck down the state’s then-existing law restricting marriage to opposite-sex couples. See In re Marriage Cases, 43 Cal 4th 757 (2008). In November 2008, California voters approved an amendment to the state constitution (known colloquially as “Proposition 8”) reinstating the restriction of marriage to opposite-sex couples. See Cal Const, Art I, § 7.5. Between those two events, over 18,000 same-sex couples obtained marriage licenses in California. In Strauss v Norton, 46 Cal 4th 364 (2009), the California Supreme Court held that these marriages remain valid. See id at 475. And in Perry v Schwarzenegger, 704 F Supp 2d 921 (ND Cal 2010), a federal district court struck down Art. I § 7.5 as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court of appeals stayed the district court’s judgment pending review. See Perry v Schwarzenegger, No 10-16696 (9th Cir Aug 16, 2010), online at http://www.ca9.uscourts.gov/dataserver/general/2010/08/16/order_motion_stay.pdf.

See Andrew Koppleman, Twenty-Eight Percent, Balkanization (Dec 2, 2010), online at http://balkin.blogspot.com/. Koppleman calculates that 28 percent of the American population “now lives in a jurisdiction that recognizes same-sex marriage or its functional equivalent.” He identifies five jurisdictions that currently allow same-sex marriage (Connecticut, District of Columbia, Iowa, Massachusetts, New Hampshire, and Vermont) and six states that currently provide for civil unions or domestic partnerships (California, Illinois, Nevada, New Jersey, Oregon, and Washington). Those jurisdictions contain slightly more than 28 percent of the U.S. population.

In addition, according to the National Conference of State Legislatures, three other states (Maryland, New York, and Rhode Island) recognize same-sex marriages from other states and a further three (Hawaii, Maine, and Wisconsin) have “[s]tatewide law providing some state-level spousal rights to unmarried couples.” National Conference of State Legislatures, Same-Sex Marriage, Civil Unions and Domestic Partnerships (2010), online at http://www.ncsl.org/default.aspx?tabid=16430. When those six states are added to Kopple-man’s total, 39.7 percent of Americans live in a jurisdiction which provides some legal recognition.

There are at least two major marriage-related cases in the federal courts of appeals. Perry v Schwarzenegger—the case challenging California’s restriction of marriage to opposite-sex couples—is before the Ninth Circuit. That appeal may be delayed by the court’s recent decision certifying to the California Supreme Court the question whether, under California law, the official proponents of Proposition 8 “possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity” sufficient to permit them to defend the restriction given the decision of the state defendants not to appeal. See Perry v Schwarzenegger, 628 F3d 1191 (9th Cir 2011). In the companion cases of Massachusetts v Dept of Health and Human Services, 698 F Supp 2d 234 (D Mass 2010), and Gill v Office of Personnel Management, 699 F Supp 2d 374 (D Mass 2010), a federal district court held that section 3 of the federal Defense of Marriage Act—which provides, with respect to federal law, that “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife,” 1 USC § 7 (2006)—is unconstitutional as applied to deny federal benefits to same-sex couples who are married under Massachusetts law. Those cases are currently on appeal to the First Circuit.

In recent years, there has been a widespread reaction to the prospect of swift social change occasioned by the Supreme Court’s decisions in Romer v Evans, 517 US 620 (1996), and Lawrence v Texas, 539 US 558 (2003), and the Massachusetts Supreme Judicial Court’s decision in Goodridge v Dep’t of Public Health, 798 NE2d 941 (Mass 2003). See Jane S. Schacter, Courts and the Politics of
Backlash: Marriage Equality Then and Now, 82 S Cal L Rev 1153, 1155 (2009) (“In all, forty-one states and the U.S. Congress have enacted measures restricting the protections afforded same-sex couples since 1995, and twenty-six states have passed constitutional bans just since the Goodridge decision in 2003.”). In the states that have constitutionalized the nonrecognition of same-sex marriage, it seems plausible to assume that it may be harder to achieve marriage equality through the political process than would otherwise be the case.

388 US 1 (1967).

See Perez v Sharp, 32 Cal 2d 711 (1948).


For a fascinating comparative history of public reactions to the California Supreme Court's decision legalizing interracial marriage, and the recent same-sex marriage cases, see Schacter, 82 S Cal L Rev (cited in note 13).

See, for example, the Court's decision in Heart of Atlanta Motel V United States, 379 US 241, 258-62 (1964) (rejecting the defendant's claims that forcing it to provide services to black patrons violated various constitutional provisions). Burt Neuborne's contribution to this volume, The Gravitational Pull of Race on the Warren Court, explores in detail the ways in which the Court shaped constitutional law across a wide range of domains to serve its overarching commitment to racial equality.

413 US 455 (1973) (striking down a Mississippi program providing textbooks to private schools).

Id at 469, 470.


Id at 660 (citations omitted). One wonders what to make of the fact that the Chief Justice chose to illustrate his assertion that unpopular views must be protected by citing Texas v Johnson, 491 US 397 (1989) (protecting flag burning), and Brandenburg v Ohio, 395 US 444 (1969) (protecting speech by leaders of the Ku Klux Klan). It can hardly have gratified the Boy Scouts to travel in such company.

I describe and reject the argument that recognizing same-sex marriage will somehow dilute the value of opposite-sex marriages in Pamela S. Karlan, Constitutional Law as Trademark, 43 UC Davis L Rev 385, 405-09 (2009).

130 S Ct 705 (2010).

130 S Ct 2811 (2010).

130 S Ct 2971 (2010).

Id at 2980.

See Neuborne, Gravitational Pull of Race (cited in note 17).

I say “constitutional” here because I expect that once Congress passes antidiscrimination legislation protecting individuals on the basis of sexual orientation--for example, something like the proposed Employment Non-Discrimination Act, which would provide Title VII-style protection--that legislation will generate litigation as well. To be sure, even some of that litigation will raise constitutional questions.

See Lawrence, 539 US at 578 (stating that the Court's decision “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”); id at 585 (O'Connor, J, concurring in the judgment) (reserving the question whether “other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review”
and describing “preserving the traditional institution of marriage” as a “legitimate” state interest); id at 590 (Scalia, J, dissenting) (declaring that state laws against same-sex marriage are “called into question by today's decision”),


Lewis v Harris, 188 NJ 415 (2005). But note that although the New Jersey Supreme Court refused to recognize a right to marry, it did hold, as the Vermont Supreme Court had held in Baker v State, 170 Vt 194 (1999), that the state constitution required the state to provide some legal structure for providing same-sex couples “on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples.” Lewis, 188 NJ at 423.


Varnum v Brien, 763 NW2d 862 (Iowa 2009). In the 2010 election, all three of the Iowa Supreme Court justices who were facing a retention vote were defeated after groups opposing marriage equality poured huge amounts of resources into the election. See A. G. Sulzberger, In Iowa, Voters Oust Judges Over Marriage Issue, NY Times, Nov 3, 2010 (web edition).

In re Marriage Cases, 43 Cal 4th 757 (2008).

I say “nearly any” because California constitutional law did impose one important substantive restriction (along with more quasi-procedural restrictions, such as the requirement that any initiative deal with only a single subject). Voters could only “amend,” but not “revise,” the state constitution through the initiative. A constitutional “revision”—which involved a more fundamental change in the constitution—could be accomplished only through a more deliberative process. See Strauss v Horton, 46 Cal 4th 364 (2009) (explaining the amendment/revision distinction and holding that Proposition 8's restriction of marriage to only opposite-sex couples constituted an amendment).

Under California law, a constitutional initiative, as opposed to a statutory one, requires a number of signatures equal to 8 percent of the votes cast in the prior gubernatorial election. See Cal Const, Art II, § 8. Roughly 8.6 million votes had been cast in the 2006 gubernatorial race.

See Strauss, 46 Cal 4th at 391.

See id at 392.


See Administration’s Answer to Complaint for Declaratory, Injunctive, or Other Relief at 2, 9, 49, Perry v Schwarzenegger, Case 3:09-cv-02292-VRW (ND Cal June 16, 2009) (Doc 46).


See id at *14-*15.


This being the fiftieth anniversary of the Supreme Court Review, it is worth noting Kenneth Karst's wonderful article in the first: Legislative Facts in Constitutional Litigation, 1960 Supreme Court Review 75. Karst begins his article—which discusses, among other things, cases involving what he terms “political privacy,” id at 90, a concept central to Doe v Reed—with the following observation: “Judges makes constitutional law as they make other kinds of law, on the basis of facts proved and assumed. They are likely to do a better job when their assumptions rest on information rather than hunch.” Id at 75. Although it is beyond the scope of this article, one
of the distinctive features of the *Perry* litigation was Chief Judge Walker’s insistence on holding a full-scale trial and issuing lengthy findings of fact rather than treating the issue before him as entirely a question of law.


Id at 70.

Id at 72.


Id at 1.


Id at 716 (Breyer, J, dissenting).

Id at 708 (opinion of the Court). Section 2071 contains the general rulemaking powers of the federal courts. Subsection (a) authorizes the Supreme Court “and all courts established by Act of Congress” to “prescribe rules for the conduct of their business.” Subsection (b) requires that such rules “shall be prescribed only after giving appropriate public notice and an opportunity for comment,” but subsection (e) provides that “[i]f the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.”


Id at 41.


See *Hollingsworth*, 130 S Ct at 709.


To be precise, the Supreme Court continued the earlier-ordered stay, which was to remain in effect “pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus.” *Hollingsworth*, 130 S Ct at 715. Given that the trial lasted only a few weeks, the stay had the practical effect of being a permanent injunction. While the defendant-intervenors did file a petition for a writ of certiorari in mid-April, that petition was dismissed by stipulation a month later. See *Hollingsworth*, 130 S Ct 2432 (2010).

In response to the Supreme Court’s decision, a troupe of actors set about doing a reenactment of the trial and subsequent proceedings on You Tube. See MarriageTrial.com. Going beyond verisimilitude, the troupe also had an actor read the district court’s decision on the merits aloud—a five-hour undertaking.

*Hollingsworth*, 130 S Ct at 706.

Compare *Bush v Gore*, 531 US 98, 109 (2000) (per curiam) (stating that the Court’s decision was “limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities”), with *Hollingsworth*, 130 S Ct at 709 (declining to “here express any views on the propriety of broadcasting court proceedings generally” and declaring that its review was “confined to a narrow legal issue: whether the District Court’s amendment of its local rules to broadcast this trial complied with federal law”), and id at 717 (Breyer, J, dissenting) (stating that “this legal question is not the kind of legal question that this Court would normally grant certiorari to consider,” given that there was no conflict among the lower courts over the procedures by
which district courts change their rules and that “[t]he technical validity of the procedures followed below does not implicate an open ‘important question of federal law’”) (citing Sup Ct R 10(c)).

Compare Hollingsworth, 130 S Ct at 714-15 (characterizing the district court's action as having “attempted to change its rules at the eleventh hour to treat this case differently than other trials in the district” and declaring that “[i]f courts are to require that others follow regular procedures, courts must do so as well”), with Bush, 531 US at 105-09 (criticizing various aspects of the Florida state courts' attempts to handle the recount), and id at 119-20 (Rehnquist, CJ, joined by Scalia and Thomas, JJ, concurring) (using words like “absurd,” “peculiar,” and “inconceivable” to refer to the Florida Supreme Court's interpretations of Florida law).

Hollingsworth, 130 S Ct at 711 (quoting Riverbend Farms, Inc. v Madigan, 958 F2d 1479, 1484 (9th Cir 1992), and citing Petry v Block, 737 F2d 1193, 1201 (DC Cir 1984)).

Curiously, the Court failed to cite Executive Order 12866, 58 Fed Reg 51735 (Oct 4, 1993), which might have provided more systematic support for its position. That order provides, in pertinent part, that a “meaningful opportunity to comment on any proposed regulation” from an administrative agency “in most cases should include a comment period of not less than 60 days.” Id at 51740.

Hollingsworth, 130 S Ct at 716 (Breyer, J, dissenting).

See ND Cal Local R 77-3, online at http://www.cand.uscourts.gov/cand/LocalRul.nsf/fec20e529a5572f0882569b6006607e07f39eafb2106e60b882569b4005a23f7/$FILE/Civ4-10.pdf (published April 2010).

And had the rule been amended significantly earlier--for example, before the passage of Proposition 8 or before the filing of the complaint in Perry--it seems implausible that the defendant-intervenors or the witnesses who felt chilled would have participated in any notice-and-comment rulemaking. They would have had no reason to anticipate that at some point in the future they would be participants in a case to whose broadcast they would object. Thus, the defendant-intervenors were injured not so much by the truncated opportunity to comment on the proposed amendment of the local rule as by the substance of the amendment.

Hollingsworth, 130 S Ct at 714.

Id.

Id (internal citations omitted).

West Va State Bd of Educ v Bamerette, 319 US 624, 642 (1943). See also Tr 41-12, Perry v Schwarzenegger, Case 3:09-cv-02292-VRW (ND Cal Jan 6, 2010) (Doc 363) (doubting that “a run-of-the-mill is the kind of case that will provide the civic lesson that might be helpful,” and adding that “the only time that you're going to draw sufficient interest in the legal process is when you have an issue such as the issues here, that people think about, talk about, debate about and consider”).

The Supreme Court's own practice seems in some tension with its position here. Traditionally, the Supreme Court generally did not release the audiotapes of oral arguments until years afterward. But in certain cases of intense public interest--for example, Bttsb v Gore and the University of Michigan affirmative action cases--the Court released the tapes within a few minutes after the argument ended. And this Term, the Supreme Court began releasing the tapes of all oral arguments on the Friday of the week in which they occurred. See http://www.supremecourt.gov/oral_arguments/argument_audio.aspx.

In recent Terms, the Supreme Court has reaffirmed that this rationale applies even in the case of expert witnesses. See Melendez-Diaz v Massachusetts, 129 S Ct 2527 (2009).

Hollingsworth, 130 S Ct at 713-14.

42 USC § 10608(a) (2006).

Hollingsworth, 130 S Ct at 713.

Id at 707. Because of the procedural posture of the case, none of the allegations of harassment had been subject to any adversarial testing. Compare Cal Dept Justice, Hate Crime in California 2008 at ii, 20 (Aug 2009) (reporting 403 hate crimes against LGBT individuals, as opposed to three incidents of “anti-heterosexual crime” and 21 incidents targeting Christian denominations), online at http://www.ag.ca.gov/cjsc/publications/hatecrimes/hc08/preface08.pdf.
While percipient witnesses may have distinctive interests that come from their being required to participate in trials as a civic duty, the witnesses in the Perry litigation were far closer to the merchants in *Claiborne Hardware*: Some of them were retained experts who, like the white merchants, were seeking (or having others seek) to dampen public criticism of their positions and who objected to having their livelihoods affected, and others were aspiring civic leaders who had devoted their efforts to seeking changes in public policy. 


One of my colleagues has told me that, after an early internet case led Chief Justice Rehnquist to discover that his home address could be obtained on the internet, he suggested the Court's computers be disconnected--apparently not realizing that it was not the Court's computers that were providing the information.

Moreover, the technology available at the time of *Estes* was dramatically more intrusive than the technology for capturing an audiovisual feed today. The Court actually included photographs of the scene at the pretrial proceedings in an appendix to convey its sense that the proceedings were bound to be shaped by the noise and bustle caused by broadcast media. See also id at 551-52 (“It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.”).

Whatever the deterrent factor--and the defendant-intervenors claimed that some witnesses were concerned for their personal safety, see id at *59--audiovisual dissemination of their testimony did not contribute to their reluctance to appear.

105 130 S Ct at 3000, 3010, 3019-20 (Alito, J, dissenting).


107 Perry v Schwarzenegger, 704 F Supp 2d 921 (ND Cal 2010).

108 Beckley v Schwarzenegger, Case No S186072 (Sept 8, 2010), online at http://appel-latecases.courthinfo.ca.gov/search/case/mainCaseScreen.cfm? dist=0&doctype=1954641&doc_no=S186072; see Bob Egelko, High Court Won’t Order a Defense of Prop. 8, San Francisco Chronicle A1 (Sept 9, 2010) (describing the unsuccessful litigation to force the state to appeal).

109 The Ninth Circuit rebuffed an attempt by Imperial County and some of its officials to intervene as defendants to prosecute the appeal. See Perry v Schwarzenegger, 630 F3d 898, 904-06 (9th Cir 2011).

110 In Arizona for Official English v Arizona, 520 US 43, 66 (1997), the Justices unanimously expressed “grave doubts” as to whether proponents of an initiative have the right to defend the ensuing law if the state declines to do so. The Roberts Court has taken a restrictive view of access to the courts across a broad range of cases. See, for example, Hem v Freedom from Religion Found, 127 S Ct 2553 (2007) (narrowing taxpayer standing); see also David Franklin, The Roberts Court, the 2008 Election, and the Future of the Judiciary, 6 DePaul Bus & Comm LJ 513 (2008) (discussing a range of access to the courts decisions). But see Maxwell L. Stearns, Standing at the Crossroads: The Roberts Court in Historical Perspective, 83 Notre Dame L Rev 875 (2008) (suggesting that once the conservative members of the Court perceive a stable conservative judiciary, they may expand standing doctrine to enable them to adjudicate cases).

111 Doe v Reed, 586 F3d 671, 675 (9th Cir 2009).

112 Under Washington Revised Code § 29A.72.150, they were required to obtain a number of signatures of registered voters equal to 4 percent of the votes cast in the prior gubernatorial election. See Washington Secretary of State, Verifying Signatures for Referendum 71 (2009) (stating that 120,577 signatures were required for ballot measures at the 2009 general election), online at http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Pages/R-71SignatureStats.aspx.

113 Doe v Reed, 130 S Ct 2811, 2816 (2010).

114 Wash Const, Art 2, § 1(d).

115 See Wash Rev Code §§ 42.56.70, 42.56.010(2) (defining “public record”). The act further provides that “[i]n the event of conflict between the provisions of [the act] and any other act, the provisions of [the Public Records Act] shall govern.” Id § 42.56-030. Exceptions must either appear in the act itself or be expressly included in another statute. Id § 42.56.070(1). The Public Records Act itself was the product of an initiative. Another provision of the act makes explicit its populist cast: The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. Id § 42.56.030.

116 See Joint Appendix 26, Doe v Reed, 130 S Ct 2811 (2010).

117 Doe, 130 S Ct at 2816.

118 Joint Appendix 14, Doe v Reed, 130 S Ct 2811 (2010) (quoting Davis v EEC, 128 S Ct 2759, 2774-75 (2008), and Buckley v Valeo, 424 US 1, 64 (1976)).


120 Id at 17 (capitalization altered).

121 See Doe, 586 F3d at 676 n 8.
See Washington Secretary of State, November 3, 2009 General Election Results, online at http://vote.wa.gov/Elections/AEVI/Results.aspx?RaceTypeCode=M&JurisdictionTypeId=2&ElectionId=32&ViewMode=Results (showing that 53.15 percent of the votes cast favored approval of the domestic partnership law).

130 S Ct 1133 (2010).

Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor joined the Chief Justice's opinion--although each of them (save Justice Kennedy) also wrote or joined another opinion as well, some of those opinions in substantial tension with the approach taken by the Chief Justice.

Doe, 130 S Ct at 2817.

In recent Terms, the Court had indicated a general antipathy to facial challenges. For comprehensive treatments of the Roberts Court's approach, see David L. Franklin, Through Both Ends of the Telescope: Facial Challenges and the Roberts Court, 33 Hastings Const L Q 689 (2009), and Gillian Metzger, Facial and As-Applied Challenges Under the Roberts Court, 36 Fordham Urban L J 773 (2009). The Court's approach has been a little more mixed when it comes to the electoral arena. In Washington State Grange v Washington State Republican Party, 552 US 442 (2008), the Court rejected a facial challenge to Washington State's new blanket primary law, and in Crawford v Marion County Election Board, 553 US 181 (2008), it rejected a facial challenge to Indiana's voter identification law. By contrast, in the campaign finance arena, while the late Rehnquist Court seemed similarly hostile to facial challenges, see McConnell v FEC, 540 US 93 (2003) (rejecting a facial challenge to the Bipartisan Campaign Reform Act), the Roberts Court seems to have shifted ground, see Citizens United v FEC, 130 S Ct 876 (2010) (striking down several provisions of the Bipartisan Campaign Reform Act); Davis v FEC, 128 S Ct 2759 (2008) (striking down the so-called "millionaires' provision" of the act).

Doe, 130 S Ct at 2817.

For example, consider what this might mean in the context of an as-applied challenge to voter ID laws--the availability of which the Court expressly recognized in Crawford. Could a court certify a class of voters for whom the law posed an unjustifiable burden? Compare Crawford, 553 US at 200 (opinion of Stevens, J) (suggesting that voters who faced such a burden could challenge the ID law as applied to them). Or would individual classes of such voters--the elderly who lack access to birth certificates, impoverished voters who lack the resources to obtain documentation, and individuals with a religious objection--each have to bring suit?

Federal Rule of Civil Procedure 23(a) provides, in pertinent part, that a court can permit class actions in cases involving "questions of law or fact common to the class" where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." While a plaintiff cannot represent a class of people whose factual circumstances or interests differ in material respects, see Gen. Tel. Co. of Southwest v Falcon, 457 US 147 (1982), the typicality test does not require an absolute identity of circumstances, either.

Justice Scalia, as we shall see, saw no First Amendment right implicated to begin with. Justice Sotomayor, joined by Justices Stevens and Ginsburg, and Justice Stevens, joined by Justice Breyer, each issued concurrences that made it quite plain that they would apply a test that could not be met in this case. Only the Chief Justice, who delivered the opinion for the Court, and Justice Kennedy, who joined that opinion and was otherwise uncharacteristically silent (along with Justice Ginsburg, he was the only Justice who did not write), provided no insight into how they would have approached an as-applied challenge.

As Justice Scalia observed in his concurrence in the judgment in Crawford v Marion County Election Board, 553 US 181 (2008): This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless .... That sort of detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States. See Art I, § 4. It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class. Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, ex ante, whether the burden they impose is too severe. Id at 208.

Interestingly, Justice Thomas agreed with the Court that the petitioners had brought a facial challenge. But unlike the majority, he would have applied the Salerno "no set of circumstances" standard. See Doe, 130 S Ct at 2838 (Thomas, J, dissenting). Or, rather,
having invoked Salerno, he then applied the test only to the subset of cases involving application of the Public Records Act to ballot measure petitions, thereby also blurring the facial/as-applied line.

Doe, 130 S Ct at 2844 (Thomas, J, dissenting) (emphasis in original).

Id at 2822 (Alito, J, concurring).

130 S Ct 876 (2010).

See text accompanying notes 189-93 (describing the evidence Justice Alito found sufficient).


Id at 745.

130 S Ct 1577 (2010).

Id at 1587 (quoting Washington State Grange v Washington State Republican Party, 552 US 442, 449 n 6 (2008)) (internal quotation marks omitted); see Doe, 130 S Ct at 2817 (citing Stevens).

See City of Lake-wood v Plain Dealer Publ'g Co., 486 US 750, 757 (1988) (“Self-censorship is immune to an ‘as-applied’ challenge, for it derives from the individual's own actions, not an abuse of government power.”).

There are also some differences between the Court's approach in Doe and conventional overbreadth doctrine. In the mine-run overbreadth case, the plaintiff before the Court invokes the effect of the challenged law on other, more sympathetic parties; the doctrine functions as a sort of third-party standing device. Here, by contrast, the plaintiffs were seeking to focus the Court's attention on the risk that they, and their allies, would be treated unfairly or chilled from participating fully in the political process.


Id at 421-22.


Doe, 130 S Ct at 2818.

Id (quoting Citizens United, 130 S Ct at 914, and Buckley v Valeo, 424 US at 64).

See id at 2820 n 2 (explaining that justice Thomas's “contrary assessment” of the fit between disclosure and the state's interests was “based on his determination that strict scrutiny applies, ... rather than the standard of review that we have concluded is appropriate”).


See Crawford, 553 US at 190-91 (opinion of Stevens, J).

For example, in McConnell v FEC, 540 US 93 (2003), Justice Kennedy wrote an opinion that the Chief Justice joined in which he pointed to the Court's “ample precedent affirming that burdens on speech necessitate strict scrutiny review,” id at 312, and supported that statement with a citation and quotation of a passage from Buckley v Valeo, 424 US 1, 44-45 (1976) (per curiam), stating that “exacting scrutiny [applies] to limitations on core First Amendment rights of political expression.”


Doe, 130 S Ct at 2832 (Scalia, J, concurring in the judgment).

Id at 2832-33 (Scalia, J, concurring in the judgment).

See *Doe*, 130 S Ct at 2836 (Scalia, J, concurring in the judgment).

Id at 2828 (Sotomayor, J, concurring).

Id at 2829 & n 1 (Stevens, J, concurring in part and concurring in the judgment) (quoting *Timmons v Twin Cities Area New Party*, 520 US 351, 373 (1997) (Stevens, J, dissenting)).

Id at 2828 (quoting *Anderson v Celebrezze*, 460 US 780, 788 (1983)).

130 S Ct 3020 (2010).

*Doe*, 130 S Ct at 2822, 2823, 2825 (Alito, J, concurring).

Id at 2824 (Alito, J, concurring).

Id at 2389 (Thomas, J, dissenting) (quoting *Citizens Against Rent Control/Coalition for Fair Housing v Berkeley*, 454 US 290, 295 (1981), and *Buckley v Valeo*, 424 US 1, 15 (1976) (per curiam)).

Id at 2839 (Thomas, J, dissenting).

Tr 16, *Schwarzenegger v Entertainment Merchants Association*, No 08-1448 (Nov 2, 2010).

*Doe*, 130 S Ct at 2845 (Thomas, J, dissenting) (brackets in the original; internal quotation marks omitted).

Id at 2825 (Alito, J, concurring).

Id.

Justice Breyer offered a one-paragraph separate concurrence devoted entirely to this point. See *Doe*, 130 S Ct at 2822 (Breyer, J, concurring).

See id at 2819.


Only Justice Thomas contested this point. See *Doe*, 130 S Ct at 2843 (Thomas, J, dissenting) (stating that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source” and that “[p]eople are intelligent enough to evaluate the merits of a referendum without knowing who supported it”) (quoting *First Natl Bank of Boston v Bellotti*, 435 US 765, 777 (1978)). But even Justice Thomas has never questioned such voting cues as party identification.

See KnowThyNeighbor.org, *Whosigned.org Refutes Intimidation Charges; Will Post Names of Petition Signers as Planned* (June 9, 2009), online at http://knowthyneighbor.blogs.com/horne/2009/06/whosignedorg-refutes-intimidation-charges-will-post-names-of-petition-signers-as-planned.html (stating that the group did not anticipate an “organized plan to confront petition signers” but rather anticipated that “conversations are triggered between people that already have a personal connection like friends, relatives, and neighbors” and describing such conversations, while potentially “uncomfortable for both parties,” as being “desperately needed to break down stereotypes and to help both sides realize how much they actually have in common”).

See text accompanying notes 83-90.

*Doe*, 130 S Ct at 2837 (Scalia, J, concurring in the judgment) (quoting James Schouler, *Evolution of the American Voter*, 2 Am Hist Rev 665, 671 (1897)).

John Stuart Mill, *Considerations on Representative Government* 210 (2d ed, Parker, Son, & Bourne 1861).

*Doe*, 130 S Ct at 2822 (Breyer, J, concurring).


When Bradley lost, “[s]peculation ranged from inaccurate sampling, to last-minute mind-changes, to latent racism, to freely lying voters, to the reluctance of those being polled to admitting a preference that may be socially unacceptable--anti-black--in talking to interviewers.” Id.


A central premise of the casebook I wrote along with Sam Issacharoff and Rick Pildes is the idea that “[b]efore the first vote is cast or the first ballot counted, the possibilities that democratic politics are already constrained and channeled” by the institutional structures within which voting takes place. Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process 1 (Foundation, 3d ed 2007). Thus, for example, voters who prefer third-party candidates may often feel impelled to vote for a major party candidate instead because the current structure means voting for a minor party candidate will often be fruitless.

See, for example, Minor v Happersett, 88 US 162, 178 (1875) (announcing that the Supreme Court was “unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one”); compare Bush v Gore, 531 US 98, 104 (2000) (per curiam) (declaring that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College”).


Murphy v Ramsey, 114 US 15 (1885).


Doe, 130 S Ct at 2820 (quoting Buckley v Valeo, 424 US 1, 74 (1976) (per curiam)).

Id at 2821.

Id at 2822 (Alito, J, concurring).

Id at 2823.

See Citizens United, 130 S Ct at 980-81 (Thomas, J, dissenting) (citing the complaint in ProtectMarriage.com-Yes on 8 v Bowen, Case No 2:09-cv-00058-MCE-DAD, filed in the Eastern District of California).

Complaint ¶ 34, in ProtectMarriage.com-Yes on 8, online at http://docs.justia.com/cases/federal/district-courts/california/caedce/2:2009cv00058/186477/1/ (capitalization altered).

Doe, 130 S Ct at 2823-24 (Alito, J, concurring).

Id at 2831 (Stevens, J, concurring in part and concurring in the judgment).
Justice Sotomayor cited NAACP as an example of the “rare circumstance” in which “[c]ase specific relief” might be available, *Doe*, 130 S Ct at 2829 (Sotomayor, J, concurring), implicitly suggesting that the cultural rear guard was in no such danger. Similarly, Justice Stevens cited *Bates* in a context that made clear that he saw no danger in the present situation that there was any substantial burden on the rear guard’s speech rights. See id at 2831 n 6 (Stevens, J, concurring in part and concurring in the judgment).


Wechsler, 73 Harv L Rev at 34 (cited in note 199).

In *Heart of Atlanta Motel v United States*, 379 US 241 (1964), for example, the Court brusquely rejected a motel owner’s claim that it had a cognizable liberty interest in “selecting” its guests as it sees fit.” Id at 259. Similarly, in *Romer v McCrary*, 427 US 160 (1976), the Court rejected the freedom-of-association claim of racially exclusive private schools, holding that 42 USC § 1981 prohibited racial discrimination in private contracts. Id at 176.

*Romer v Evans*, 517 US 620, 652 (1996) (Scalia, J, dissenting). Earlier in his dissent, Justice Scalia more stridently termed the disagreement a Kulturkampf. Alluding to the nineteenth-century Prussian effort to bring the Roman Catholic Church under state control provides the unspoken parallel to the University of California’s efforts in *Christian Legal Society*. See id at 636.


Id at 2980 (opinion of the Court). The predecessor group’s bylaws provided that the Hastings Christian Fellowship (which apparently also sometimes called itself the Hastings Christian Legal Society) “welcomes all students of the University of California, Hastings College of law.” The predecessor group, which had official student organization status, “did not exclude members on the basis of religion or sexual orientation.” *Christian Legal Soc’y v Kane*, 2006 US Dist LEXIS 27347 at *8 (ND Cal 2006).

*Christian Legal Soc’y*, 130 S Ct at 2979.


Id at *78.


More than half of the petitioner’s oral argument was consumed by questions relating to the nature of the policy. See Tr of Oral Arg 2-13, *Christian Legal Soc’y v Martinez*, No 08-1371 (Apr 19, 2010).

*Christian Legal Soc’y*, 130 S Ct at 2984. Her opinion for the Court was joined by Justices Stevens, Kennedy, Breyer, and Sotomayor.

Id at 2979 (quoting from Hastings’ brief).

Id at 3003 (Alito, J, dissenting). Justice Alito’s dissent was joined by the Chief Justice and Justices Scalia and Thomas.

See id at 3004 (Alito, J, dissenting).

See, for example, id at 2982 n 6, 2983, 2983 n 7 (opinion of the Court) (accusing the dissent of “spill[ing] considerable ink attempting to create uncertainty” about the policy, “time and again ... rac[ing] away from the facts to which CLS stipulated,” and “indulg[ing] in make-believe” about the Court’s view of the facts); id at 3001, 3005 (Alito, J, dissenting) (accusing the majority of “provid[ing] a misleading portrayal” of the facts and “distort[ing]” the record).
The dissent pressed quite hard on this point, claiming that the Nondiscrimination Policy “singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views.” Christian Legal Soc’y, 130 S Ct at 3010 (Alito, J, dissenting). The dissent was mistaken. While it would be true under the Nondiscrimination Policy that “[a]n environmentalist group was not required to admit students who rejected global warming,” any ideological group whose views centered on a protected category would be required to admit students who did not share its views. For example, a black separatist group would be required to admit white students. Compare Christian Legal Soc’y, 2006 US Dist LEXIS 27347 at *82-*83 (pointing out that Hastings had required La Raza to repudiate a passage in its bylaws that could have been read to suggest that only Latino students could be members). Religion was no more singled out than race or sex.

For a fuller discussion of this point, see Karlan at 1024 (cited in note 199).

Even an all-comers policy might not avoid viewpoint discrimination under a robust version of this approach, since such a policy gives official benefits to groups whose membership policies express an inclusive approach while denying those benefits to groups whose membership rules profess exclusive criteria.


Interestingly, all the Justices focused their attention on Hastings' refusal to recognize CLS because of its exclusion of gay students. There was little discussion of the perhaps thornier question whether CLS's refusal to admit, say, avowedly Christian, straight students who were unwilling to subscribe to one or more of the organization's Statements of Faith would violate school rules.

Christian Legal Soc’y, 130 S Ct at 2990 (quoting CLS's brief).

Compare McDaniel v Paty, 435 US 618 (1978), in which the Court unanimously struck down a Tennessee statute that disqualified members of the clergy from serving as delegates to a state constitutional convention. Chief Justice Burger's plurality opinion treated the disqualification as being “directed primarily at status, acts, and conduct” rather than “belief.” Id at 627. Justice Brennan declared that “[t]he characterization of the exclusion as one burdening appellant's 'career or calling' and not religious belief cannot withstand analysis.” Id at 631 (Brennan, J, concurring in the judgment). Justice Stewart saw any distinction between belief and an individual's “decision to pursue a religious vocation as directed by his belief” as “without constitutional consequence.” Id at 643 (Stewart, J, concurring in the judgment). Justice White avoided the inquiry altogether: Seeing no way in which the law interfered with a clergy member's “ability to exercise his religion as he desires,” id at 644 (White, J, concurring in the judgment), he located the constitutional infirmity in the way the state law deprived voters of the right to elect the delegates of their choice, see id at 645-46.


The quoted passage from Lawrence--“[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination,” id at 575-- appeared within the Court's explanation for why it was grounding its decision in the Liberty Clause of the Fourteenth Amendment, rather than the Equal Protection Clause.


Id at 1459.

See Christian Legal Soc’y, 130 S Ct at 2990 (quoting Lawrence, 539 US at 583 (O'Connor, J, concurring in judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”)).
See Cal Educ Code § 66270 (providing that “[n]o person shall be subjected to discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation,” among other characteristics, “in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid”).

See Strauss v Norton, 46 Cal 4th 364, 412 (2009) (reaffirming, after the passage of Proposition 8, the “general principle that sexual orientation constitutes a suspect classification and that statutes according differential treatment on the basis of sexual orientation are constitutionally permissible only if they satisfy the strict scrutiny standard of review”); see also In re Marriage Cases, 43 Cal 4th 757, 840-41 (2008) (holding that “sexual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision”).

Christian Legal Soc’y, 130 S Ct at 2996 n 1 (Stevens, J, concurring).

Id at 2997 n 3.


There are many points of resemblance between Justice Alito's dissent in Christian Legal Society and his concurring opinion in Ricci v DeStefano, 129 S Ct 2658 (2008), the case in which the Court held that New Haven's decision to discard the results of a promotional exam because of the test's disparate impact violated Title VII. There, too, he criticized Justice Ginsburg for her version of the facts. See id at 2683. There, too, he described the justifications offered by government officials who claimed to be concerned with discrimination as disingenuous or pretextual. See id at 2687-88. And there, too, he expressed his sympathy for individuals who challenge the principles of contemporary antidiscrimination law. See id at 2689.

Christian Legal Soc’y, 130 S Ct at 3006.

See, for example, id at 3000 (Alito, J, dissenting) (claiming that the Court had declared there to be “no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning”); id at 3019 (warning that the consequence of an all-comers policy would be “marginalization” for religious groups acting “in good conscience”).

The city's then-mayor (now California's lieutenant governor) sparked California's current encounter with same-sex marriage during the winter of 2004, when he requested the city and county's clerk to alter the official marriage forms to permit same-sex couples to marry. For a brief account of that history, see Lockyer v City and County of San Francisco, 33 Cal 4th 1055, 1069-72 (2004). For another example of the city's commitment to full equality for gay citizens, even when that equality runs up against religious beliefs, see Catholic League for Religious and Civil Rights v City and County of San Francisco, 624 F3d 1043 (9th Cir 2010) (en banc) (affirming dismissal of a challenge by a Catholic advocacy group and several Catholic residents of San Francisco to a city board of supervisors' resolution declaring it “an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need” by directing the Catholic Charities of the Archdiocese of San Francisco to cease placing children with same-sex couples).

Christian Legal Soc’y, 130 S Ct at 3019 (Auto, J, dissenting).

Id at 2992 (opinion of the Court).

Id at 3019 (Alito, J, dissenting).


Id (quoting from the bylaws used for seven of those years).

Id at *9.

According to the district court, during the 2003-04 academic year, one of the participants in the five- to seven-member group “was an openly lesbian student and two were students who held beliefs inconsistent with what CLS considers to be orthodox Christianity.” Id at *9-*10.
Id at *10.


381 US 479 (1965).

Id at 486.

See, for example, *Glucksberg*, 521 US at 723 (opinion for the Court by Chief Justice Rehnquist); *Loving v Virginia*, 388 US 1, 12 (1967) (opinion for the Court by Chief Justice Warren).

*Glucksberg*, 521 US at 770 (Souter, J, concurring in the judgment).

60 US 393 (1857).

388 US 1 (1967).


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