

Winter 1-18-2017

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Publication Citation

Pat Andriola, *The Process of Power: A Process-Oriented Approach to Dissecting a Group's Political Power*, 5 Ind. J.L. & Soc. Equality 133 (2017).

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The Process of Power: A Process-Oriented Approach to Dissecting a Group's Political Power

Pat Andriola*

ABSTRACT

Minority groups receiving protection under the Fourteenth Amendment must typically show that they have little "political power," the idea being that the judiciary ought not step in on their behalf if there are legislative outlets available to them. But how should a court determine whether a group is politically powerful (or powerless)? This article argues that the typical indicia of political power relied on by the courts are unwisely based on political outputs, or what minority groups strive for (such as laws in their favor), rather than political inputs, or the things that determine whether groups can get political outputs in the first place (such as money).

INTRODUCTION

The gist behind the “politically powerless” criterion of *Carolene Products*’ Footnote Four is that the judiciary should pay special attention to certain groups who, due to institutional failures of the democratic system, are particularly vulnerable to public action that discriminates against them.¹ Determining whether a group is politically powerless is more of an art than a science, given that there is no visible bright line a court can look to for guidance (or even anything resembling a test articulated by the Supreme Court).² During the trial on Proposition 8 in *Hollingsworth v. Perry*, the testimony of Stanford political science professor Gary Segura (and the questions he was asked by both counsel) seemed to indicate that the components of a group’s political power were the number of members it has,³ its financial resources,⁴ and its societal clout (as a byproduct of the public’s attitude toward the group).⁵ There was also an indication from the testimony that these inputs

* The author is a litigator in New York City who received his JD/MBA from New York University in 2015. He would like to dedicate this Article to Kenji Yoshino, the professor with whom the idea for this article was developed, and to Judge Gonzalo Curiel, a great alumnus of the Maurer School of Law.

1 See Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, UTAH L. REV. 527, 537–38 (2012) (“[T]he Court reversed the spin of the countermajoritarian difficulty, suggesting that it was squarely within the competence of an unelected minority of judges to be solicitous of minority groups shut out of the political process”).

2 See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F.Supp. 417, 437 n.17 (1994) (calling the Court’s political power test “ill-defined”). In fact, the Supreme Court has never even indicated if the inquiry is best determined by a simple binary approach, such as asking if a group either does or does not maintain political power or conceptualizing the issue on a continuum.

3 Transcript of Direct-examination of Gary Segura at 1538, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW) http://kenjiyoshino.com/KY/wp-content/uploads/2015/03/Perry_Volume_7_1480-1741.pdf. (stating that gays don’t have the “numbers” to be effective advocates).

4 *Id.* at 1818 (“[W]hen there is money to be given, there are politicians to come accept it.”).

5 *Id.* at 1564. A group’s clout is also intimately tied to the activities of other organizations that coalesce to oppose the group. See *id.* at 1594.

would typically produce outputs of legislation beneficial to the group and elected representatives who are members of the group themselves and/or allies of it.⁶

My argument is that although outputs are without question more practically important to disadvantaged groups in the long run, courts should focus more on the inputs, or process, rather than the results in determining whether a group actually has sufficient political power. Part and parcel of being a minority group with a history of discrimination against you is vulnerability, or an anxious unease that the political tides can shift in your disfavor as they have before. Since the Court in *Carolene Products* was interested in specifying which groups were at risk of majoritarian attack (such that it was the task of the judiciary to curb the kinds of factionalism Madison once warned about)⁷, looking to inputs is a good method to determine how stable a group's present political power is; whereas looking at outputs, complimentary data is most likely to tell us more about past inputs than they do about current ones.⁸ Importantly, this Article also serves to undercut three myths that have accompanied the respective inputs when it comes to the political power of gays: (1) that gays make up ten percent of the population and thus by themselves constitute a significant voting bloc; (2) that gays are mostly affluent and well-connected and thus can attract the political capital of lawmakers; and (3) that America has done a complete 180 and is currently very accepting of homosexuality.

I. POKER, POLITICAL POWER, AND OUTPUTS

In the game of poker, a player who is a ninety-nine percent favorite with one card remaining will still lose one out of a hundred times. The player is definitely more concerned with the result of the hand than her favorable odds before the last card is turned, since the odds are only valuable instrumentally in that they give her a greater chance of winning the hand itself. However, if we were trying to gauge the player's chances of winning before the last card is turned, looking to the result of the hand would do nothing but muddle the analysis. Similarly, if we conceptualize a group's political power by looking to its inputs, valuable instrumentally insofar as they allow for greater political results (which *is* the ultimate goal), I believe we have a better chance of rebuffing the counter-majoritarian difficulty the Court was concerned with in *Carolene Products*.

6 *Id.* at 1539 (“[W]e would want to take into account the process whereby the outcome was achieved, and the subject matter of the outcome, before we concluded that the outcome by itself was sufficient evidence”).

7 Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403 (1982).

8 Current inputs might actually be a better correlative indicator of future outputs than current outputs are. This idea was actually taken from the world of advanced baseball statistics, which the author has a background in. It has been demonstrated that input-based pitching statistics, such as FIP, are actually better predictors of future ERA, an output-based statistic, than current ERA is. See Colin Wyers, *How well can we predict ERA?*, THE HARDBALL TIMES (June 18, 2009), <http://www.hardballtimes.com/how-well-can-we-predict-era/>.

A. Allies

Professor Segura highlighted some of the main analytical problems with looking to outputs as an indication of a group's intrinsic political power. Political allies, which Segura defines as "an individual or group who are willing to expend political capital on behalf of that position, not merely embrace it," are a good example of a particularly poor metric for political power analysis.⁹ Because politicians will almost always support a group when there are no political costs to doing so, pointing to a bunch of politicians across the state and federal levels who claim to be allies is futile because the real issue comes when the politician has to make a zero-sum calculation (i.e., support the group at the expense of possible votes).¹⁰ A politician's favorite approach when it comes to policy and constituents is being able to have her cake and eat it too: if a politician can somehow claim to support gay rights while at the same time not offending more traditional voters, she may be characterized as an ally when really he or she has done nothing but garden-variety opportunism. Since the factors that go into a politician's political capital are fragile and dynamic, it's tough to decipher how long she will be willing to actually spend effort on a group if the return on investment (for reelection or legacy-building purposes) is no longer positive.¹¹

A prominent example of someone who only came to be an ally once the cards were stacked in his favor is President Obama, who steadfastly believed in limiting marriage to opposite-sex couples in 2008 when the issue was more controversial and his election chances were exceedingly unclear, but he changed his mind during the 2012 campaign when public sentiment had shifted and he was a considerable favorite for reelection.¹² Since the point of Footnote Four's inclusion of political power is to figure out when the judiciary should step in because the political process has failed to protect vulnerable groups, the benefits of looking to allies is limited since they could easily abandon the group if either public opinion shifts or they need to use their political capital for more personally pressing concerns.

9 Transcript of Cross-examination of Gary Segura, *supra* note 3, at 1686.

10 *Id.* at 1581 (commenting that many allies will "retreat and retreat quickly" when "faced with difficult decisions that might be electorally risky").

11 *Id.* at 1696 (citing Congressperson Pelosi as an example of someone who waned support for gay rights in 2009 because of diminished political capital).

12 See Nate Silver, *Support for Gay Marriage Outweighs Opposition in Polls*, FIVETHIRTYEIGHT (May 9, 2012, 4:52 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/05/09/support-for-gay-marriage-outweighs-opposition-in-polls>. Ironically, Obama was a supporter of same sex marriage as early as 1996, so his position "evolved" not once, but twice. See Jesse Singal, *Obama's Incoherent Stance on Gay Marriage*, THE DAILY BEAST (May 8, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/05/08/obama-s-incoherent-stance-on-gay-marriage.html>. President Obama was not the only presidential candidate to flip flop on issues relating to gays. Mitt Romney said during his campaign run that, as President, he would not interfere with a state's decision regarding adoption or marriage. He then switched gears and openly supported a Constitutional amendment to limit marriage to opposite sex couples. See Zack Ford, *Romney Campaign Flops Twice on Marriage Amendment and Same-Sex Benefits*, THINKPROGRESS.ORG (Oct. 22, 2012, 9:03 AM), <http://thinkprogress.org/lgbt/2012/10/22/1057711/romney-campaign-flops-twice-on-marriage-amendment-and-same-sex-benefits/>.

B. Legislation

Looking to pro-gay legislation for indicia of political power is rife with similar problems. First, as Professor Segura notes, antidiscrimination legislation is clear evidence of a group's vulnerability, as it addresses the fact that the group suffers from systematic discrimination in the first place.¹³ This is a phenomenon that mirrors Professor Yoshino's point in *The Paradox of Political Power*: just as it takes a certain amount of political power for the judiciary to even notice a certain group, it takes a similar amount of political power for the legislature to notice a group as well.¹⁴

Second, it's easy to simply count up laws that are ostensibly pro-gay but in actuality do nothing more than codify judicial mandates or grant only some benefits while leaving others out of reach.¹⁵ There is a troubling irony to these laws: they are examples of the legislature reacting to decrees from the courts, but they are often used as examples for why the courts need not step in because the legislature has acted. If anything, these laws help to demonstrate that the only way for a minority group to get the legislature's attention is by asking the judiciary to twist the legislature's arm.

Third, legislation is not stagnant; it can be overturned either by the same legislature (if opinion changes) or by ballot initiatives (for example, Proposition 8). The reason input analysis is applicable here is that it looks at what conditions need to be present in order for laws favorable to minority groups to be overturned, whereas output analysis asks a relatively superficial question of, "Is there a law benefitting this group on the books?" Again, while favorable legislation is obviously a significant goal in advancing a group's interests, courts should consider this evidence with a strong grain of salt because of its tenuousness.

C. Elected Representatives

Electing representatives who themselves are members of the group is also an important end, but how that relates to political power can be deceiving. First, because sexual orientation is a complicated concept and less conspicuous than gender or race, and because gay politicians are often forced into the closet, it is hard to judge both the percentage of gays in the overall population and the percentage of gays in representative bodies (in order to see if there is a substantial difference between the two).¹⁶ Second, these politicians are usually elected from locales that are much more comfortable with homosexuality than the nation as a whole, so there is a local-versus-national divide at play. Third, while having elected representatives from your group is a good proxy for group representation, those representatives may not always have

13 Transcript of Direct-examination of Gary Segura, *supra* note 3, at 1549 (analogizing an antidiscrimination statute to a medical prescription, saying the prescription doesn't mean you're healthy, but that there's actually a problem).

14 Equality Foundation of Greater Cincinnati, Inc., 860 F.Supp. at 437 n.17.

15 Transcript of Direct-examination of Gary Segura, *supra* note 3, at 1549 (noting that some antidiscrimination ordinances in California "were passed in the wake of court decisions ordering that policies be adopted").

16 *See id.* at 1574–75.

the interests of the group at the forefront of their agenda. Finally, like legislation, politicians can be removed from their public positions with a change in the political atmosphere.

II. INPUTS

A. Strength in Numbers

Inherent in the idea of “insular” and “minority” groups is that the groups are literally outnumbered by the majority. While a strict numerical advantage cannot guarantee that a group will be properly represented, or even avoid oppression (for example, South African apartheid or nineteenth century women’s suffrage), it is certainly a correlative indicator of potential group success. Below is a comparison of the demographics of the population of the United States compared to that of the Congress whose session ended in 2015:¹⁷

| Group | Percentage of Population | Percentage of 113 th Congress |
|-------------|--------------------------|--|
| Male | ~49.2 | ~81.5 |
| Female | ~50.8 | ~18.5 |
| White | ~74.8 | ~82.5 |
| Black | ~13.1 | ~8.3 |
| Latino | ~16.7 | ~7.0 |
| Asian | ~5.0 | ~2.4 |
| LGBTQIA | ~3.4 | ~1.3 |
| White Males | ~36.8 | ~68.0 |

The numbers show that a group’s federal representation will somewhat mirror its countrywide population; a basic linear regression of the two for the groups above (not including White males so as not to double count) shows an r^2 value of .73, which means there is a very solid correlation between them.¹⁸ However, every group except Whites and males (and the cross section of the two) exhibit lower representation in Congress than their overall demographics would suggest. This should not be surprising given the history of socioeconomic domination of Whites and males in America and the zero-sum nature of demographic statistics (for example, if a white or male is elected to a seat, necessarily a non-white or non-male is not).

17 See generally JENNIFER E. MANNING, CONG. RESEARCH SERV., R42964, MEMBERSHIP OF THE 113TH CONGRESS: A PROFILE (2013), <http://www.fas.org/sgp/crs/misc/R42964.pdf>; see also UNITED STATES CENSUS BUREAU, *State & County QuickFacts*, <http://quickfacts.census.gov/qfd/states/00000.html>.

18 For more on r^2 value, also known as the “coefficient of determination,” see generally PENN STATE EBERLY C. OF SCI., *The Coefficient of Determination, r-squared*, <https://onlinecourses.science.psu.edu/stat501/node/255> (stating that “Social scientists who are often trying to learn something about the huge variation in human behavior will tend to find it very hard to get r -squared values much above, say 25% or 30%. Engineers, on the other hand, who tend to study more exact systems would likely find an r -squared value of just 30% merely unacceptable”).

Strict population percentages for a group are not as valuable for quality political power analysis independent of the other inputs; indeed, inputs simply have to be looked at holistically. For example, in order to understand the discrepancy for most minority groups between their population percentage and their congressional percentage, we need to better understand the group's financial position and how the public views the group, which are both incredibly important to winning seats on the Hill.

It is also important to note just how small of a percentage of the population LGBT members are compared to popular misconceptions. Gay activists used an obscure passage from an Alfred Kinsey book in the 1970's to argue that the LGBT population hovered somewhere around ten percent in an attempt to choose a number that was significant but not threatening.¹⁹ Unfortunately, that number has still stuck around and is used as an informal statistic by many, overestimating the political might of gays. In reality, a Gallup poll, which used the largest representative sample of LGBT men and women ever, found the number to be roughly 3.4%.²⁰ That number also includes bisexuals, whom the Supreme Court does not seem to consider as being independently constitutionally implicated.²¹ Since the Court is focusing on homosexuals, the number it should focus on is probably maxed somewhere around 1.7% considering that recent studies have shown that self-identified bisexuals outnumber self-identified gays.²²

The presence of the closet also complicates demographic statistics of the LGBT community. There seems to be a consensus that self-identification for race is not the same as for sexual orientation, and that there are many more gays in the population than studies show.²³ For political power analysis, however, the potential presence of these "silent members" seems to do us little good. Aside from some sort of closeted political action, such as voting for or supporting gay politicians or allies, closeted members will have an extremely limited impact on the group's overall progress. In fact, some studies have supported the age-old notion of the "closeted homophobe," meaning that closeted gays actually are not silent and are instead counterproductively vocal in a way that cannibalizes group resources.²⁴

19 See *LGBTs Are 10% of US Population? Wrong, Says Demographer*, NPR (June 8, 2011, 12:00 PM), <http://www.npr.org/2011/06/08/137057974/institute-of-medicine-finds-lgbt-health-research-gaps-in-us>.

20 See Gary J. Gates & Frank Newport, *Gallup Special Report: The U.S. Adult LGBT Population*, THE WILLIAMS INSTITUTE (Oct. 2012), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/gallup-special-report-18oct-2012/>.

21 Or, at the least, the Court has not articulated, in regard to suspect class analysis, if bisexuals are a subsection of hetero or homosexuals, a separate group, or something else altogether.

22 See Simone Wilson, *How Gay Is America? UCLA Study Shows Only 3.5 Percent of U.S. Claims Rainbow – But 11 Percent Are Tempted*, LA WEEKLY BLOGS: THE INFORMER (April 8, 2011, 11:30 AM), http://blogs.laweekly.com/informer/2011/04/how_many_gays_in_america_ucla_study_9_million.php.

23 *Id.* (quoting activist Cathy Renna as saying, "of course [9 million] is an undercount").

24 See Jeanna Bryner, *Homophobes Might Be Hidden Homosexuals*, SCIENTIFIC AMERICAN (April 10, 2012), <http://www.scientificamerican.com/article.cfm?id=homophobes-might-be-hidden-homosexuals>.

B. Wealth

In a post-*Citizens United* capitalist democracy, the connection between wealth and political power cannot be understated. High-income citizens are more likely to vote than low-income citizens.²⁵ US senators are more responsive to constituents who are affluent, and statistical evidence shows the bottom third of income distribution have zero effect on their senators' roll call votes.²⁶ The wealthy help to shape ideology and social norms that eventually permeate into more tangible policy.²⁷ Corporations spent almost one billion dollars on political lobbying in 2010 alone.²⁸ Not only is money important in order to get your voice heard in Washington, it is also important in order to get the opportunity to legislate. Fifty-seven members of the Congress in 2011 were in the top one percent of wealth; 250 of them were millionaires and their median net worth was \$891,506, nine times that of the average household.²⁹

But just as the population of gay Americans has been mythically overstated, so has their economic success.³⁰ A report by the Williams Institute at UCLA finds that poverty is a major problem in the gay community.³¹ The study found that “gay and lesbian couple families are significantly more likely to be poor than heterosexual married couple families”; that “children in gay and lesbian couple households have poverty rates twice those of children in heterosexual married couple households”; and that lesbian couples are economically worse off than both heterosexual couple households and gay male couple households.³² Below is the median income for certain groups compared to their congressional representation:³³

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- 25 See Annalyn Censky, *Why the rich vote more*, CNN MONEY (Sept. 24, 2012, 5:46 AM), <http://money.cnn.com/2012/09/24/news/economy/rich-vote-more/index.html>.
- 26 See Larry M. Bartels, *Economic Inequality and Political Representation* (Aug. 2005), <http://www.princeton.edu/~bartels/economic.pdf>.
- 27 See generally Arthur MacEwan, *The Wealth-Power Connection* (Pol. Econ. Research Inst., Univ. of Mass. Amherst, Working Paper No. 299, 2012), http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_251-300/WP299.pdf.
- 28 See Scott Hirst, *Corporations and Political Spending: A New Lobbying Focus in the 2012 Proxy Season*, THE HARVARD L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (March 10, 2012, 10:17 AM), <http://blogs.law.harvard.edu/corpgov/2012/03/10/corporations-and-political-spending-a-new-lobbying-focus-in-the-2012-proxy-season/>.
- 29 See Gregory Korte & Fredreka Schouten, *57 members of Congress among wealthy 1%*, USA TODAY (Nov. 11, 2011, 7:21 PM), <http://usatoday30.usatoday.com/news/washington/story/2011-11-15/congress-wealthy-1/51216626/1>.
- 30 See Jonathan Capehart, *Myth: 'Gays make more money than non-gays,'* WP OPINIONS: POSTPARTISAN (Feb. 8, 2012, 8:00 AM), http://www.washingtonpost.com/blogs/post-partisan/post/myth-gays-make-more-money-than-non-gays/2011/03/04/gIQA26CexQ_blog.html.
- 31 See Randy Albelda, M.V. Lee Badgett, Alyssa Schneebaum & Gary J. Gates, *Poverty in the Lesbian, Gay, and Bisexual Community*, THE WILLIAMS INST. (March 2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>.
- 32 *Id.*
- 33 See Carmen DeNavas et al., *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, CURRENT POPULATION REPS.: CONSUMER INCOME (Sept. 2011), <http://www.census.gov/prod/2011pubs/p60-239.pdf>; see also Associated Press, *Report: Gay couples similar to straight spouses in age, income*, USA TODAY (Nov. 3, 2009, 3:09 AM), http://usatoday30.usatoday.com/news/nation/2009-11-02-census-gay-couples_N.htm?csp=34.

| Group | Median Annual Salary | Percentage of 113 th Congress |
|--------------------------|----------------------|--|
| Male | \$47,715 | ~81.5 |
| Female | \$36,931 | ~18.5 |
| White | \$54,620 | ~82.5 |
| Black | \$32,068 | ~8.3 |
| Latino | \$37,759 | ~7.0 |
| Asian | \$64,308 | ~2.4 |
| LGBT (household) | \$91,558 | ~1.3 |
| Heterosexual (household) | \$95,075 | ~98.7 |

Gay families seem to be in strong financial competition with their heterosexual counterparts *on average*, but as the study above showed they are also much more likely to fall under the poverty line.³⁴ Moreover, although there is less data available in this area than is true of that for gay couples, studies have shown that non-partnered gay individuals also make less than both partnered gays and non-partnered heterosexuals.³⁵

Personal finances are also significantly different from successful group lobbying. The Human Rights Campaign, the largest LGBT equal rights advocate in America, came in 359th place of the top spenders in lobbying for 2012.³⁶ While that number is not terrible considering the advocate is going against the likes of the US Chamber of Commerce and Google, it also is pretty far down for the largest advocacy group of its kind. Gay lobbying is far less powerful than the conservative myth of the omnipotent, megalithic “gay agenda” that the late Justice Scalia, in his *Lawrence* dissent, said had deeply influenced the law-profession culture.³⁷

C. Societal Clout

Quakers seem as vulnerable as any group based on the inputs above: there are only 130,000 of them in the country and they do not seem to have amassed any

34 This most likely means that more gays reside at the ends of the income distribution gradient than is the case for heterosexuals (for example, if you are gay and poor you are more likely to be very poor than if you are straight and poor, and the same goes for being gay and rich). See Albelde et al., *supra* n. 31, at iii (finding that “After controlling for other factors, same-sex couples are significantly more likely to be poor than heterosexual couples”).

35 See Joe Clark, *Full Findings: Singles as opposed to couples*, GAY MONEY, <http://joeclark.org/gaymoney/findings/#singles>.

36 *Human Rights Campaign Organization Profile*, OPENSECRETS.ORG, <http://www.opensecrets.org/orgs/summary.php?id=D000000158>.

37 *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). Conservatives also argued that the gay agenda was using biased pollsters prior to the 2012 election in order to drum up support for Barack Obama by lying about polling data to show him as the favorite. Of course, not only was this homophobic conspiracy theory laughably wrong, but gay statistician and blogger Nate Silver ended up predicting all 50 states correctly. See Jordan Sargent, *Don't Listen to Nate Silver's Gay Polls, Says Superstar Conservative Pollster*, GAWKER (Oct. 27, 2012, 4:06 PM), <http://gawker.com/5955480/dont-listen-to-nate-silvers-gay-polls-says-superstar-conservative-poster>.

spectacular amount of wealth.³⁸ But Quakers are not in a poor position because there is no apparent animosity toward them. If there were any reason for the majority to make the lives of Quakers miserable, it would not be easy for the group to defend itself, but at this point nobody is proposing anti-Quaker referenda. Societal clout, which is a group's social standing based on the public's attitude towards it, is important because it can serve as a weathervane for potential animosity-inspired legislation. Although the history of the discrimination prong takes into account prior feelings of societal ill will, current public views are just as important.

Despite a recent media and political narrative of societal acceptance of gays, they are still one of the most targeted, discriminated against, and distrusted groups in society.³⁹ For example, thirty-one percent of the country still thinks that not only should same sex marriage not be allowed, but that gay relationships should be illegal.⁴⁰ This number was as high as 40% in 2009, but also as low as 35% in 2003, 36% in 1989, and 39% in 1982. However, it also hit 57% in 1988 and 49% in 2004, demonstrating just how non-linear public opinion can be (despite the media's insistence that the trend in the status quo is somewhat permanent).⁴¹ A 2006 study found that 22.6% of respondents to a poll did not think gays shared their vision of American society, slightly better than the rate for Muslims and five times as high as that of African-Americans.⁴² Thirty-six percent of the nation still opposes allowing gays to adopt.⁴³ Thirty-nine percent of the country thinks gay marriage will make things worse, while forty percent thinks there will be no effect and only nineteen percent thinks it will make things better.⁴⁴

A significant hurdle in looking at these polls is the perception that homophobia and similar biases are fading away as society progresses, thus making it less necessary for the judiciary to step in.⁴⁵ Professor Richard Epstein specifically warned

38 *Table 75. Self-Described Religious Identification of Adult Population: 1990, 2001, and 2008, U.S.* CENSUS, <http://www.census.gov/compendia/statab/2012/tables/12s0075.pdf>.

39 *See generally* DISCRIMINATION AND VIOLENCE AGAINST INDIVIDUALS BASED ON THEIR SEXUAL ORIENTATION AND GENDER IDENTITY, REPORT OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (May 4, 2015), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc (documenting the “continuing, serious and widespread human rights violations perpetrated, too often with impunity, against individuals based on their sexual orientation”).

40 *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (also finding that less than half the country thinks someone is born gay and that thirty-eight percent of the country still finds homosexuality to be “morally wrong”).

41 *Id.*

42 *See* John Allen Paulos, *Who's Counting: Distrusting Atheists*, ABC NEWS (April 2, 2006), <http://abcnews.go.com/Technology/story?id=1786422&page=1#.UZpZSLuBIq4>.

43 *See* Susan Page, *Poll: Attitudes toward gays changing fast*, USA TODAY (Dec. 5, 2012, 5:02 PM), <http://www.usatoday.com/story/news/politics/2012/12/05/poll-from-gay-marriage-to-adoption-attitudes-changing-fast/1748873/>.

44 *See* Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP (May 13, 2013), <http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx>.

45 *See* Gary Langer, *Poll Tracks Dramatic Rise in Support for Gay Marriage*, ABC NEWS (March 18, 2013, 2:00 PM), <http://abcnews.go.com/blogs/politics/2013/03/poll-tracks-dramatic-rise-in-support-for-gay-marriage/>.

against the Court creating backlash to gay rights by jumping ahead of the majoritarian opinion. He wrote:

We can and should make an immense advance in this particular area, but the only way we are going to be able to do it is to pull the reins back a little bit and let the horse go at a slower pace. Whip the horse forward and you may collapse the entire carriage.⁴⁶

Epstein is using a statistical narrative (that public opinion is rapidly shifting more pro-gay) in order to argue for temperate judicial restraint. However, one should not take marginal progress and drape a “Mission Accomplished” banner over it. The only reason people are shocked by how quickly homosexuality is being accepted is because of *how far the movement has had to come* to even get to this mediocre position. In other words, it was once so bad to be a gay American that a poll saying *only* a third of the country wants to legalize gay relations is somehow seen as an incredibly positive development in societal tolerance.

That is not to say that the progress the gay rights movement has fought for so strongly is really some sort of illusion; the gains are completely real and show the fortitude of the movement’s organizational and strategic abilities. But that does not mean the war has been won whatsoever, and the numbers are still awful in many places. Seventy-five percent of Arkansas residents opposed same sex marriage in 2004, with a political consultant saying, “You can’t be for gay marriage and be a statewide elected official in Arkansas.”⁴⁷ Public attitude toward same sex marriage has been basically unchanged in over a decade in most southern states.⁴⁸ Even though overall hate crimes are down thirty percent since 1996 (with those against Blacks down forty-three percent), anti-gay hate crimes increased from 1,206 in 1996 to 1,256 in 2011.⁴⁹ Sixty-five percent of Americans do not approve of teaching children that homosexuality is a normal alternative lifestyle.⁵⁰ Meanwhile, self-reported discriminatory opinions against other groups with suspect classification are much lower than that against gays.⁵¹ When a last place sports team wins a few games in a row, it does not mean the team is in the playoffs; it just means the team is doing better than its earlier poor performance. It is dangerous to conflate marginal increases in societal tolerance with the end of homophobia.

46 Richard A. Epstein, *The Constitutionality of Proposition 8*, 34 HARVARD J.L. & PUB. POL’Y 879, 888 (2011).

47 See Alex Roarty, *Why This Democratic Senator Won’t Support Same-Sex Marriage*, THE ATLANTIC (April 4, 2013), <http://www.theatlantic.com/politics/archive/2013/04/why-this-democratic-senator-wont-support-same-sex-marriage/436356/>.

48 *Behind Gay Marriage Momentum, Regional Gap Persists*, PEW RES. CTR. FOR THE PEOPLE & THE PRESS (Nov. 9, 2012), <http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist/>.

49 See Aleks Tzatzev, *There’s A Disturbing Trend Involving Anti-Gay Hate Crime In The US*, BUS. INSIDER: LAW & ORDER (Dec. 12, 2012, 3:01 PM), <http://www.businessinsider.com/anti-gay-hate-crime-stats-dont-budge-2012-12>.

50 See Rebecca Millette, *65% of Americans reject gay-affirmative lessons in elementary school: poll*, LIFESITE NEWS (May 5, 2011, 5:38 PM), <http://www.lifesitenews.com/news/65-of-americans-reject-gay-affirmative-lessons-in-elementary-school-poll/>.

51 Page, *supra* note 43.

CONCLUSION

The concept of political power seems, at least for those who argue the issue in court, more apt for vague and grandiose evidence. The motion for summary judgment for the Proposition 8 proponents mostly included quotes from politicians and pieces of legislation, as compared to any hard data or high-level analysis.⁵² Still, if the concept is to be taken seriously as doctrine, which in the light of *Windsor* and *Obergefell* is all the more unclear, a more rigorous approach is absolutely necessary. The judiciary's role is to step in where the political process has failed, but it is difficult to decipher just when a group is vulnerable to the tyranny of the majority. While outputs are what every group is aiming for, the courts should look to inputs to see whether or not they are likely to get them.

52 See Motion for Summary Judgment on behalf of Proponents, *Perry v. Schwarzenegger* at 45–46, 704 F. Supp. 2d 921 (N.D. Cal. 2009) (No. 09-CV-2292 VRW) (referencing President Obama, the Democratic Party platform, and scorecards given out to politicians on behalf of the Human Rights Campaign).