

The Hollow Hope: Can Courts Bring About Social Change?

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Outline

1. Introduction
2. Constraints on, and Conditions for, Courts Furthering the Interests of the Relatively Disadvantaged
3. An Empirical Approach to Examining Judicial Efficacy
4. *Brown* and Civil Rights
5. *Roe* and Abortion
6. *Obergefell* and Marriage Equality
7. Conclusion

Significant Social Reform

- The broadening and equalizing of the possession and enjoyment of what are commonly perceived as basic goods in American Society
- "Rights and liberties, powers and opportunities, income and wealth...[and] self-respect" (Rawls 1971, 42, 440)
- Includes political goods such as participation in the political process and freedom of speech and association

Significant Social Reform (continued)

- Legal goods such as equal and non-discriminatory treatment of all people
- Material goods
- Self-respect, the opportunity for every individual to lead a satisfying and worthy life
- **Policy change with nationwide impact**

Modern View – The Dynamic Court

Courts are **uniquely suited** to produce significant social reform

Access

- Courts not electorally constrained
- Can't easily duck contentious issues
- Don't suffer from institutional blockages created by seniority, inert bureaucracies, etc.

Combined with...

Rights

- Courts deal in them
- Not politically beholden, not partisan
- Rather independent & principled — objective

Equals Legitimacy

- Legitimacy allows court to serve as a:

Catalyst

- Courts can "politicize issues that otherwise might have remained unattended" (Monti, *Law and Policy Q*, 1980)
- Courts can provide "a cheap method of pricking powerful consciences" (*Harvard Law Review* 1977)

Educator

- Supreme Court is an "educational body, and the Justices are inevitably teachers in a vital national seminar" (Rostow)
- Courts are "a great and highly effective educational institution" (Bickel)

Educator (continued)

- Courts can "reinforce the legal foundations of society[and serve] a major educative role in promoting greater awareness of, and respect for, human rights." (Sir Anthony Mason, former Chief Justice, Australian High Court)

"Since the early 1950s, the courts have been the most accessible and, often, the most effective instrument of government for bringing about the changes in public policy sought by social protest movements"

– Aryeh Neier

"the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution;

The judiciary, on the contrary, has no influence over either the sword or the purse;

must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

– Alexander Hamilton, "The Judiciary Department," *Federalist Paper #78*

Over the last decade, has the U.S. Supreme Court made important decisions concerning any of the issues listed on the next slide?

- Abortion
- Affirmative Action
- Campaign Expenditures
- Climate Change
- Death Penalty
- Elections
- Flag Burning
- Gay Rights
- Gun Control
- Health Care
- Immigration
- Income Tax
- Marijuana
- NSA Surveillance
- Physician-Assisted Suicide
- Police Use of Force
- Pornography
- Prayer in Schools
- Presidential Appointments
- Religious Freedom
- Same-Sex Marriage
- State's Rights
- 3rd Amendment
- Voting Rights

For how many of these issues did a majority of the students respond that the Court had issued a major decision?

- 1-5
- 6-10
- 11-15
- 16-20
- 21-24

Constraints on Judicial Efficacy in Promoting Significant Social Reform

Constraint I - The limited nature of constitutional rights

Constraint II – the lack of judicial independence

Constraint III – the judiciary's lack of powers of implementation

Courts can be effective producers of significant social reform when:

1. Overcoming Constraint I, there is ample legal precedent for change; and,
2. Overcoming Constraint II, there is support for change from substantial numbers in Congress and from the executive; and,
3. Overcoming Constraint III, there is either support from some citizens, or at least low levels of opposition from all citizens; and, either

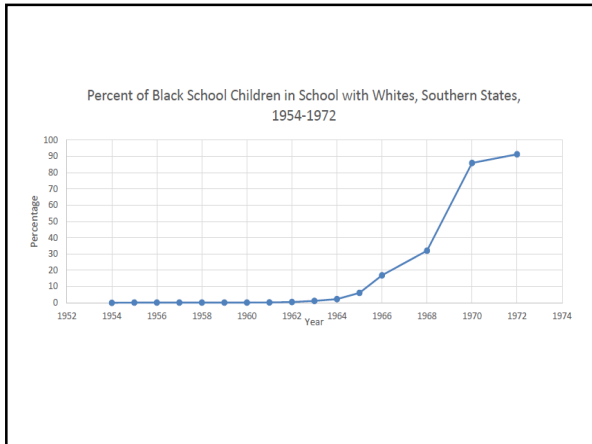
Conditions for Judicial Efficacy in Promoting Significant Social Reform

Condition I – Positive incentives are offered to induce compliance; or,

Condition II – Costs are imposed to induce compliance; or,

Condition III – Court decisions allow for market implementation; or,

Condition IV – Administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind.



Supreme Court Lacked Power to Implement *Brown*

1. Congressional opposition (1956 *Southern Manifesto*)
2. Lack of executive support
3. State opposition – legislation (Virginia massive resistance)
4. State opposition – local courts
5. State opposition – governors
6. Opposition from private groups
7. Violence

Political and social forces did not support the Court's decision, providing no pressure for compliance

Table 3.2 Percentage of Public Elementary and Secondary School Budgets Received from Federal Funds in Southern and Border States, 1963–1971, and Percentage of Blacks in School With Whites, 1964–65 and 1972–73

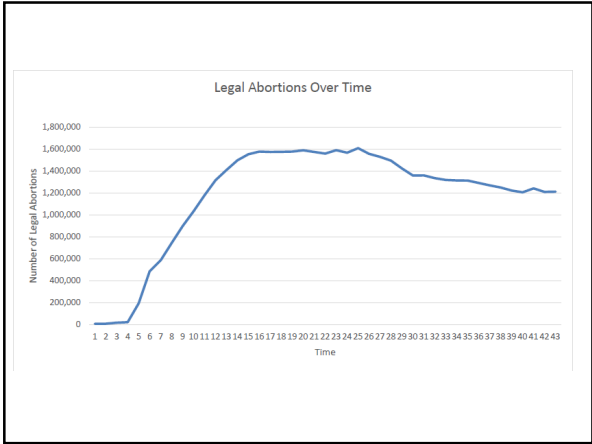
State	Federal Funds as a % of State School Budgets					% of Blacks in School with Whites	
	1963–64	1967–68	1969–70	1970–71	1971–72	1964–65	1972–73
<i>Southern</i>							
Alabama	7.6	20.2	18.4	22.5	21.5	.03	83.5
Arkansas	11.1	20.0	18.9	19.0	21.2	.81	98.1
Florida	7.0	12.8	10.7	11.2	12.0	2.7	96.4
Georgia	7.1	13.8	14.3	14.0	15.7	.40	86.8
Louisiana	4.8	12.7	12.0	14.2	14.6	1.1	82.9
Mississippi	8.1	16.8	20.9	28.1	27.8	.02	91.5
N. Carolina	6.1	18.6	16.2	15.8	18.0	1.4	99.4
S. Carolina	7.5	17.5	15.2	19.8	18.7	.10	93.9
Tennessee	8.0	17.8	14.6	15.6	14.7	5.4	80.0
Texas	4.6	11.2	11.5	10.3	12.5	7.8	92.8
Virginia	9.5	12.8	14.1	11.3	14.0	5.2	99.3
<i>Border</i>							
Delaware	4.4	8.6	6.9	7.5	8.4	62.2	98.9
D.C.	15.7	24.4	25.8	16.0	27.1	86.0	64.2
Kentucky	6.5	16.0	17.6	17.2	17.7	68.1	92.6
Maryland	6.0	9.5	8.2	8.0	7.8	50.9	75.9
Missouri	4.3	9.0	7.4	8.0	9.3	42.3	69.4
Oklahoma	10.6	14.6	12.7	12.8	13.5	31.1	100
W. Virginia	5.0	13.6	13.6	16.8	13.7	63.4	98.9

Source: U.S. Department of HEW (1973); *Revenues*, 1972–73, 1973–74, 1974–75, 1975–76; *Statistics*, 1963–64, 1965–66, 1967–68, 1969–70, 1971–72.
 Note: all figures rounded.

Indirect Effects

Assumption: 1964 Civil Rights Act Made a Huge Difference (easy to demonstrate)

1. Court influenced the Political Agenda;
2. Court influenced Elected Officials;
3. Court influenced Whites who influenced Elected Officials;
4. Court influenced Blacks who influenced Elected Officials and/or Whites



Where on the Graph is Roe v. Wade?

- 1-4
- 5-8
- 9-12
- 13-16
- 17+

Building Precedent for Marriage Equality

Romer v. Evans (1996)

Lawrence v. Texas (2003)

U.S. v. Windsor (2013)

Litigation for Marriage Equality,
State Courts: The First Wave

1990's

Baehr v. Lewin, Hawaii Supreme Court (1993)

Baker v. Vermont, Vermont Supreme Court (1999)

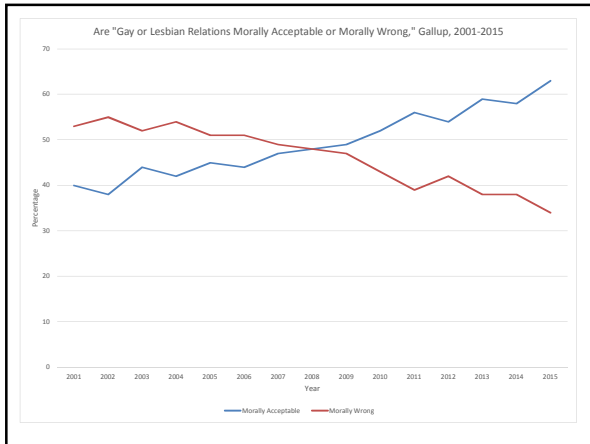
2000's

Goodridge v. Department of Public Health, Supreme Judicial Court of Massachusetts (2003)

Kerrigan v. Commissioner of Public Health, Connecticut Supreme Court (2008)

In re Marriage Cases, California Supreme Court (2008)

Varnum v. Brien, Iowa Supreme Court (2009)



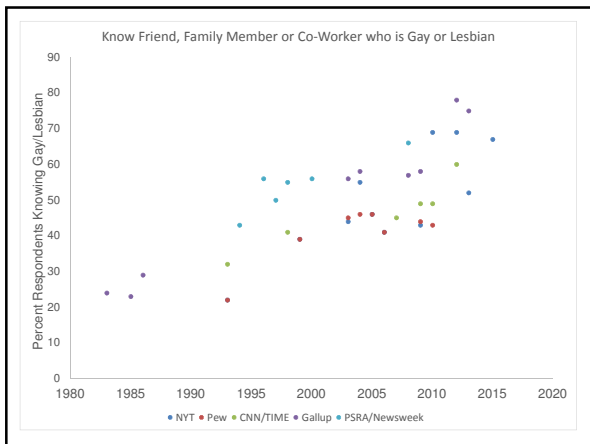
Percentages of Americans Willing to Hire Gay Men & Lesbians for Various Occupations, 1977-2005

Position	% Supporting 1977	First Year with 50+% Support	% Supporting* 2005
Salesperson	68%	1977	92%
Armed Forces	51%	1977	78%
Doctors	44%	1992	80%
Clergy	36%	1996	51%
Elementary School Teachers	27%	1992	59%
High School Teachers	47%^	1992	67%

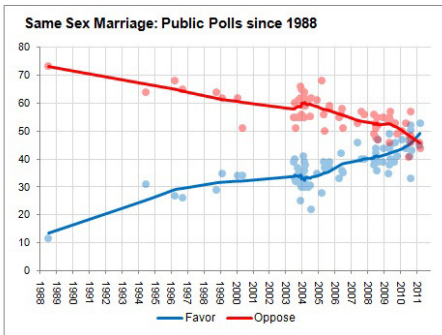
*The percentages reported for 2005 are the average of two sub-samples of a May, 2005, Gallup Poll.

^The reported percentage is from 1989.

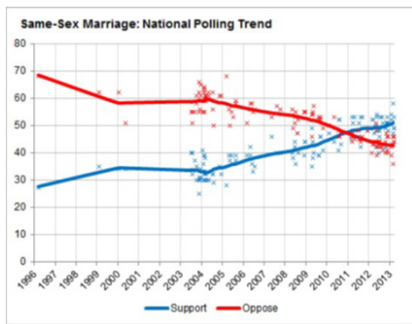
Sources: Bowman & O'Keefe (2004, 13-14); Gallup Poll (2005).



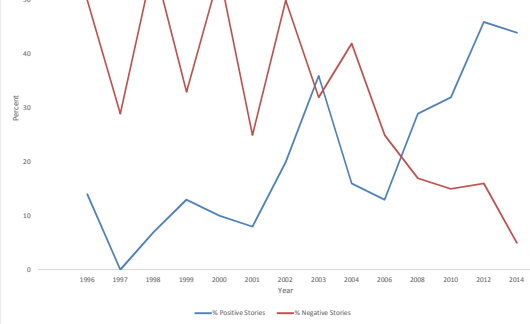
Support for Same-Sex Marriage, Public Polls, 1988-2011



Support for Same-Sex Marriage, Public Polls, 1996-2013



% Positive & Negative New York Times Stories on Same-Sex Marriage, 1996-2014



States Enacting Marriage Equality by Legislation and Ballot Initiative, 2009-2013

Legislation (9)

2009: DC, NH, VT

2011: NY

2013: DE, HI, IL, MN, RI

Ballot Initiative (3)

2012: ME, MD, WA

Countries Adopting Marriage Equality Before the U.S

2001: the Netherlands

2003: Belgium

2005: Spain, Canada

2006: South Africa

2009: Norway, Sweden

2010: Portugal, Iceland, Argentina

2012: Denmark

2013: Brazil, France, Uruguay, New Zealand

2014: United Kingdom, Luxembourg, Finland

2015: Ireland, Mexico

Compare Search terms ▾

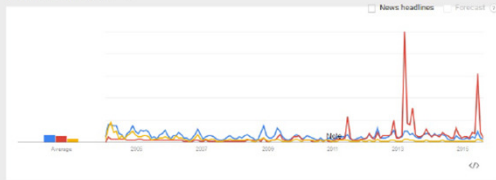
same-sex ma...
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Interest over time ▾





Make Change, Not Lawsuits

Now that we've won marriage in five states, should we be bringing lawsuits in other states or suing the federal government? If not, what can we do to help secure the freedom to marry nationwide?

Bottom Line: If you're ready and it's right for you, get married. If you do, claim the name and act like what you are—married. But don't go suing right away. Most lawsuits will likely set us all back. There are other ways to fight that are more likely to win.

...

May, 2009

Thank You!
