

THE PERILS AND PROMISE OF
THE HOLDER MEMO

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Barack Obama, like his opponent John McCain, opposed same-sex marriage in the 2008 presidential election.¹ At his inauguration, gay marriage was legal in only two states—Massachusetts and Connecticut. On the same night that then-Senator Obama made history as our nation’s first Black president, the state of California made history of its own as the first state to democratically prohibit gay marriage after such marriages had already begun to be performed in the state. Even gay rights proponents had begun to worry whether or not the push for marriage equality—at least at this stage—was a bridge too far.²

Fast-forward to the present day, and things look quite different. Gay marriage is now legal in eight states and the District of Columbia. California’s bar on gay marriage has been held unconstitutional in a federal court.³ President Obama has announced

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¹ *Obama Says He Is Against Same-Sex Marriage But Also Against Ending Its Practice In Calif.*, ABC NEWS (Nov. 2, 2008, 6:36 PM), <http://blogs.abcnews.com/politicalradar/2008/11/obama-on-mtv-i.html>

² See, e.g., Jeffrey Rosen, *Disputations: Learning from Prop. 8*, THE NEW REPUBLIC (Nov. 6, 2008), available at <http://www.tnr.com/article/politics/disputations-learning-prop-8> (characterizing the California Supreme Court as “naïve and overconfident blunderers” who did not heed past lessons about judicial backlash); John D’Emilio, *The Marriage Fight Is Setting Us Back*, GAY & LESBIAN REV. WORLDWIDE 10 (Nov.-Dec. 2006) (“The battle to win marriage equality through the courts has done something that no other campaign or issue in our movement has done: it has created a vast body of *new antigay law*.”) (emphasis in original).

³ *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), *aff’d* *Perry v. Brown*,

that his views on gay marriage are “evolving”; his Vice President, Joe Biden, characterized gay marriage as “inevitable”.⁴ And perhaps most notably, Attorney General Eric Holder informed Congress of the Justice Department’s position that classifications on basis of sexual orientation deserve heightened judicial scrutiny and that, hence, they would no longer defend Section 3 of the Defense of Marriage Act.⁵

The Holder Memo is a significant feather in the cap of the gay rights movement. But it also illuminates a strange doctrinal paradox. Holder’s memo declares the Justice Department’s belief that classifications on basis of sexual orientation should be accorded heightened scrutiny. The doctrinal test for which classifications deserve such enhanced judicial inspection includes, in part, a finding that the protected class is “politically powerless.”⁶ Yet, of course, the Holder memo is remarkable precisely as a demonstration of significant political clout on the part of the LGBT community. The very fact that the LGBT community was able to persuade such a high-profile political actor to release such a letter seemingly renders them outside the contours of heightened scrutiny analysis.

In this Essay, I explore how the Holder Memo interacts with the formal structure of equal protection doctrine and how it has been applied to LGBT legal claims. The claim that the gay and lesbian community is too politically influential to enjoy heightened judicial scrutiny has been a critical argument used to stymie gay rights claims in the courts.⁷ The high-profile reversal by the Justice Department regarding the constitutionality of the Defense of Marriage Act only strengthens this argument. Yet, neither can it be said that such political triumphs are consistently the enemy of LGBT litigants. After all, however difficult it remains for marriage equality

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⁴ Laurie Kellman, *Biden Says Gay Marriage “Inevitable”*, MSNBC (Dec. 24, 2010, 2:23:14 PM), http://www.msnbc.msn.com/id/40804631/ns/politics-white_house/t/biden-says-gay-marriage-inevitable/.

⁵ Letter from Attorney General Eric Holder to Speaker John Boehner (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

⁶ *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (declaring one of the “traditional indicia of suspectness” as whether the group in question has been “relegated to . . . a position of political powerlessness . . .”).

⁷ See generally David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437 (2010). More recently, Jane Schacter made a similar argument in using the course of gay rights litigation to expose inadequacies latent in John Hart Ely’s political process theory. See generally Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363 (2011).

advocates to convince courts that restrictions on gay marriage are unlawful, certainly, their prospects are better today than they were even a decade ago. Rising gay political power has opened as many judicial doors as it has closed. And the very act of drawing the executive branch into the fray of the gay rights legal controversy also significantly elevates its political salience, helping mainstream what was once an electorally fringe position.

I. THE PERILS

A. *The Basics of Heightened Scrutiny*

Under current equal protection review, certain classifications enjoy heightened judicial review—either “strict scrutiny” (applied to race and ethnicity), or “intermediate scrutiny” (applied to sex and legitimacy). But the test for whether a given group ought to be considered a suspect class for purposes of heightened scrutiny is somewhat murky.

In *San Antonio Independent School District v. Rodriguez*, the Supreme Court described the “traditional indicia of suspectness” as “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁸ In addition to those three factors, other decisions have also asked whether the group has “been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities,”⁹ or whether it “exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group.”¹⁰

Among these five factors (current disadvantage, past discrimination, political powerlessness, a history of stereotyping, and exhibition of distinguishing or immutable characteristics), there is no indication of whether any or all of them are necessary or sufficient,

⁸ 411 U.S. 1, 28 (1973).

⁹ *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). *See also* *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (“[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”) (footnote omitted).

¹⁰ *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

or how (if at all) they should be weighed against one another. The Supreme Court, which has largely not altered the list of suspect classes since the 1970s, has given virtually no guidance on the subject.¹¹ Consequently, courts have many options available to them to label a given class suspect or not according to their preferences.

The Holder Memo's main contribution was its determination that, under the above analysis, sexual orientation ought to receive heightened scrutiny.¹² Homosexuality has been the subject of past and ongoing discrimination, is an immutable (albeit not necessarily visible) characteristic, and bears no relation to one's ability to contribute meaningfully to society. Moreover, the Holder Memo argued that, in comparison to other groups which do receive heightened scrutiny, the ability of gays and lesbians to command the attention of lawmakers is significantly limited.¹³ Declaring that homosexuality ought to be seen as a quasi-suspect classification is critical, because the Justice Department had previously successfully defended challenges to DOMA under rational basis review. Under rational basis review, Section 3 of DOMA may pass muster, but under heightened scrutiny, it almost assuredly does not.¹⁴

B. "Political Power" and the Gay Rights Movement

The legacy of anti-gay discrimination in America runs very deep.¹⁵ But one of its more distinct characteristics has been the notion of gays and lesbians as an insidious force, one whose power and influence over important American institutions needs to be checked. For many years, Hollywood censorship boards were adamant in refusing to allow gay and lesbian characters on screen,¹⁶

¹¹ EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 24 (1999) ("The list of protected classes has been in stasis since [the mid-1970s]."). The primary exception is the application of strict scrutiny analysis in "reverse discrimination" cases where White persons are allegedly disadvantaged, an extension which was made in the late 1980s and early 1990s. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-96 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

¹² Holder, *supra* note 5 ("Each of these factors [the Supreme Court has considered] counsels in favor of being suspicious of classifications based on sexual orientation.").

¹³ *Id.*

¹⁴ *Cf. Hernandez v. Robles*, 855 N.E.2d 1, 27 (N.Y. 2006) (Kaye, C.J., dissenting) (noting that even the defendants conceded that restrictions on gay marriage could not survive if heightened scrutiny applies).

¹⁵ *See* GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY RIGHTS* 5-22 (2004) (overviewing the history of anti-gay animus in 20th century America).

¹⁶ *Id.* at 5-6.

and more homosexual persons were dismissed from government jobs in the McCarthy era than communists.¹⁷ More recently, the rallying cry against the LGBT movement has been the accusation that gays and lesbians seek “special rights”—powers and protections not accessible to other American citizens.¹⁸

The “special rights” argument has obvious appeal for organizations opposing gay and lesbian political claims. The classic “American dilemma” pits normative commitments to equality against deep-seated discriminatory impulses; consequently, it is important for persons seeking to maintain (or extend) a discriminatory state of affairs to be able to recast the debate in terms consistent with broader liberal norms.¹⁹ Instead of being an instance of the strong picking on the weak, casting gay rights claims as demands for “special rights” instead allows social conservatives to situate themselves as bold defenders of the beleaguered common man. Far from being victims of discrimination, gays and lesbians are depicted as “privileged and powerful actors who covet new and unwarranted” protections enjoyed by nobody else.²⁰

Justice Scalia’s dissenting opinion in *Romer v. Evans* relied heavily on this trope. *Romer* invalidated a Colorado constitutional amendment which would have forbade any level of state or local government from enacting any law or ordinance “whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.”²¹ Justice Scalia characterized the amendment as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those

¹⁷ DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 166 (2004).

¹⁸ For example, the group which formed to reverse Cincinnati’s inclusion of sexual orientation among those classes protected against discrimination named itself “Equal Rights Not Special Rights.” See *Equal. Found. v. City of Cincinnati*, 860 F. Supp. 417, 422 (S.D. Ohio 1994).

¹⁹ See GUNNER MYRDAL, *AN AMERICAN DILEMMA* lxxix (Transaction 1996) (1944); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1169 (1991) (“Where discrimination is illegal or socially disapproved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly.”).

²⁰ Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 291 (1994).

²¹ COLO. CONST. art. II, § 30b, held unconstitutional by *Romer v. Evans*, 517 U.S. 620 (1996).

mores through use of the laws.”²² The Colorado amendment had the legitimate purpose “to counter both the geographic concentration and the disproportionate political power of homosexuals.”²³

Given both its doctrinal availability and its warding effect against claims of majoritarian oppression, it is unsurprising that the political power objection has become a, if not the, critical argument against affording gays and lesbians heightened scrutiny protection.²⁴ What is shocking is just how low the bar has been set before legal actors and commentators have been willing to declare gays and lesbians politically powerful.

Perhaps the earliest case to explicitly rely on allegedly disproportionate gay political power as reason to reject heightened scrutiny for gays and lesbians came in the 1989 case of *Ben-Shalom v. Marsh*.²⁵ There, the court declared that “homosexuals are proving that they are not without growing political power.”²⁶ Its support for this assertion was the fact that “one congressman is an avowed homosexual,” as well as the “charge” that another five “top officials” may be as well.²⁷ A year later, the Ninth Circuit cited a bare handful of state and municipal provisions (most of which were outside the borders of the circuit) to buttress its claim that gays were not entitled to heightened scrutiny review.²⁸

Things scarcely improved as the 1990s progressed. Justice Scalia’s argument in favor of massed gay political power rested on Colorado’s relatively early repeal of its anti-sodomy law, as well as the geographic concentration, relative affluence, and political

²² *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

²³ *Id.* at 647.

²⁴ *See, e.g.*, *Andersen v. King County*, 138 P.3d 963, 975 (Wash. 2006) (holding that state enactments providing legal protections to gay and lesbian citizens proved that “as a class gay and lesbian persons are not powerless, but instead, exercise increasing political power.”); *Conaway v. Deane*, 932 A.2d 571, 611-13 (Md. 2007) (holding that alleged gay political power was sufficient to outweigh the admitted history and continuance of anti-gay discrimination across law and society).

²⁵ 881 F.2d 454 (7th Cir. 1989)

²⁶ *Id.* at 466.

²⁷ *Id.* at 466 n. 9. Helpfully noting that non-gay Americans can also support gay rights, the court also mentioned the participation of the mayor of Chicago in a gay rights parade. *Id.* For whatever reason, political participation in such parades seems to be a favorite point of reference for judges—a federal court in D.C. also remarked on the presence of a mayor (albeit not the D.C. mayor) in a St. Patrick’s Day gay rights march in order to show that gays and lesbians could “gain the attention of politicians.” *Steffan v. Cheney*, 780 F. Supp. 1, 8-9 (D.D.C. 1991), *aff’d* *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

²⁸ *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 n. 10 (9th Cir. 1990).

mobilization of the gay community.²⁹ The trial court in *Romer* cited the *passage* of the anti-gay constitutional amendment as evidence of significant gay political power, because their position was not defeated by a crushing margin.³⁰ In 1996, a prominent opponent of gay rights initiatives argued that “[t]he potential of same-sex couples to influence the processes is reflected in a report that American voters have elected at least seventy-five open homosexuals into local, state and federal offices.”³¹ By point of comparison, the United States Census found that there were over 500,000 elected officials total in the United States around that time.³² This would place the total percentage of LGBT elected officials at roughly .015% of the nationwide total—truly, an astounding display of political influence and clout.

Why is seemingly so little political success treated as representing so much? Surely, the answer is not consistency—other groups which receive heightened scrutiny protection have enjoyed considerably more political integration and *de jure* protections than those possessed by gays and lesbians, even today. As the Connecticut Supreme Court noted in *Kerrigan v. Commissioner of Public Health*, “when African-Americans and women first were recognized as suspect and quasi-suspect classes, respectively, comprehensive legislation barring discrimination against those groups had been in effect for years [without deterring] the United States Supreme Court from according them protected status.”³³ Rather, it is the very unusualness of gay political success that paradoxically causes it to stand out as so visible and memorable.³⁴ And while it is increasingly

²⁹ *Romer*, 517 U.S. at 645-46 (Scalia, J., dissenting) (arguing that this gave the community “political power much greater than their numbers, both locally and statewide.”). It is worth noting that the claim that gays are more affluent than the general population may not be accurate, as surveys claiming such have been accused of drawing from a sample skewed towards wealthier and Whiter members of the gay community. See Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1372-74 (2000).

³⁰ *Evans v. Romer*, No. 92 CV 7223, 1993 WL 518586, at *12 (Colo. Dist. Ct.) (“[M]ore than 46% of Coloradans voting voted against Amendment 2. Testimony placed the percentage of homosexuals in our society at not more than 4%. If 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness.”).

³¹ Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 93 (quotations and footnote omitted).

³² 1 1992 CENSUS OF GOVERNMENT: POPULARLY ELECTED OFFICIALS, at v (June 1995), available at http://www.census.gov/prod/2/gov/gc/gc92_1_2.pdf.

³³ 957 A.2d 407, 440-41 (Conn. 2008).

³⁴ J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2341 (1997) (“All groups tend to look more powerful once a boot has been lifted off their neck. If one never

unacceptable to deny, homosexuality's immutable quality, its irrelevance to the performance of day-to-day activities, or the existence of prejudice against gays and lesbians, the argument that the class in question is sufficiently influential to require its claims be pressed in legislatures rather than the courts is attractively removed from such embarrassingly retrograde presumptions about gay and lesbian persons.³⁵

As time progresses and gays and lesbians slowly do earn more and more political victories, it becomes ever-easier to make the political power objection with a straight face. Meanwhile, each of the older decisions—difficult to justify on their face—are converted instead into a web of precedent that courts can hide behind to ratify their decision as well within the mainstream.³⁶ And if gays and lesbians were too politically influential to warrant heightened protection in 1989, how can they claim they deserve it today?³⁷ Two seemingly “neutral” principles of constitutional law—protecting the powerless and respect for precedent—are thus contorted to throw up a façade of legality behind decisions almost impossible to reconcile with either the formal or normative requirements of equal protection.

C. The Holder Memo's Paradox

The Holder Memo received significant media attention when it was released.³⁸ And deservedly so: In addition to the hot-button

noticed the boot (or its impropriety) in the first place, the group may now look positively arrogant.”); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1806 (1996) (arguing that the whole reason we remember such instances as a politician joining a gay pride parade is that “it is the exception that proves the rule of politicians not wanting to support gays.”). See *supra* note 27 for the apparent attraction of citing to parade participation.

³⁵ Hence, courts which concede the existence of anti-gay discrimination and the irrelevance of homosexuality to one's ability to contribute to society still rely on the alleged lack of political powerlessness to reject gay rights claims. See *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007) (“While there is a history of purposeful unequal treatment of gay and lesbian persons, and homosexual persons are subject to unique disabilities not truly indicative of their abilities to contribute to society, we shall not hold that gay and lesbian persons are so politically powerless that they constitute a suspect class.”).

³⁶ See, e.g., *id.* at 607-08; *Lofton v. Sec. of the Dept. of Children & Family Services*, 358 F.3d 804, 818 & n. 16 (11th Cir. 2004); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990).

³⁷ Were we to actually take that line of argument seriously, *Bradwell v. Illinois*, 83 U.S. 130 (1873) (finding no constitutional violation in Illinois' refusal to admit women to the bar) should have been the last word on the constitutional status of sex discrimination. Surely, the position of women in America didn't *deteriorate* from 1873 to 1973. *But see* *Frontiero v. Richardson*, 411 U.S. 677 (1973).

³⁸ See, e.g., Jan Crawford, *Obama Administration decision to not defend Defense of Marriage Act will trigger heated political battle*, CBS NEWS, Feb. 23, 2011 (quoting reactions to the decision as “shocking” and “breathtaking.”); Kevin Johnson & Joan

nature of the topic, and the ensuing controversy regarding the Justice Department's obligation to defend a duly-enacted federal statute, the fact is that the opinion of the Justice Department exerts considerable influence over the judiciary. The pace of civil rights reform accelerated dramatically when the United States began intervening in support of the NAACP in the post-war era.³⁹ Where the Solicitor General argues as a party or even elects to file an amicus brief in support of a litigant before Supreme Court, there is a measurable boost in that party's chance of success.⁴⁰ The Holder Memo, as a signal from the Justice Department of a dramatic shift in the executive branch's outlook on the proper legal doctrine on LGBT issues, was a watershed moment.

Hence, in normal situations, the Holder Memo would represent an unqualified boon for gay rights litigants. It would not guarantee success—any more than the intervention of the solicitor general guarantees that her favored side will prevail—but it certainly could not hurt matters.

But, as the prior discussion makes clear, the gay rights context is not a normal situation. The particular doctrinal sticking point, which is carrying ever-more weight in the post-*Lawrence* era,⁴¹ is that gays and lesbians are not politically powerless and thus do not need special judicial solicitude. The same litany of LGBT advances one might expect to see in a rally-the-troops fundraiser letter by the Human Rights Campaign now forms the linchpin of

Biskupic, *Anti-gay marriage law dealt a setback; Obama team says it won't defend DOMA*, USA TODAY, Feb. 24, 2011, at 4A (calling the decision “a major legal reversal that reinvigorates a national debate over gay rights.”); Steve LeBlanc, *Cantor 'taken aback' by DOMA decision*, BOSTON GLOBE, Feb. 25, 2011, at 4 (citing a Republican leader's contention that Holder's decision was “contrary to the sense that we are a nation of laws”).

³⁹ See Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1306-09 (2000).

⁴⁰ See, e.g., Michael A. Bailey, Brian Kamoie, & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 73 (2005); Karen O'Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 JUDICATURE 256, 260-61 (1983) (detailing the solicitor general's “extraordinary influence” over the Supreme Court).

⁴¹ Many early cases rejecting heightened scrutiny for gays and lesbians did so because gay sexual activity was legally proscribable and it would thus be “anomalous” for a class defined by such activity to enjoy enhanced legal protection. See, e.g., *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Equal. Found. v. City of Cincinnati*, 54 F.3d 261, 266 (6th Cir. 1995) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (holding that a “classification comprised of persons who engage in acts that the military can legitimately proscribe is not suspect”) (citing *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994)). As the Holder Memo itself observes, these precedents would seem to have limited vitality after *Bowers* was overruled. *Lawrence v. Texas*, 539 U.S. 558 (2003).

legal briefs seeking to arrest that advance.⁴² Attorney General Holder's memo is, if nothing else, certainly a far clearer demonstration of political influence than mayoral participation in a gay pride parade. Judges reluctant to expand heightened scrutiny doctrine to include gays and lesbians will easily be able to seize upon this fact to justify their continued reticence. To the extent someone like Justice Scalia already believes that gays and lesbians possess "disproportionate political power"⁴³ and have locked down the support of the "law—profession culture,"⁴⁴ it is highly unlikely that the Holder Memo will make him more amenable to gay rights claims—solicitor general intervention or no.

The paradox of the Holder Memo is not simply that the release of the letter may make the substantive outcome it desires less likely.⁴⁵ It is that the release of the letter undoubtedly will be used to refute a key argument made by the letter itself—that gays and lesbians "have limited political power and 'ability to attract the [favorable] attention of the lawmakers.'"⁴⁶ Far from being a subsidiary issue, this is precisely the point upon which judges hostile to gay rights claims have decided to plant their flag.

II. THE PROMISE

Doctrinally, then, the Holder Memo is surprisingly problematic for gay rights litigants. But that does not mean it has no value. In this Section, I explore what the Holder Memo does have to offer—its awkward intersection with the political power doctrine notwithstanding.

⁴² Robert Barnes, *Same-Sex Marriage Cases Wind Their Way to the Supreme Court as Political Climate Changes*, WASH. POST (Sept. 25, 2011), available at http://www.washingtonpost.com/politics/same-sex-marriage-cases-wind-their-way-to-supreme-court-as-political-climate-changes/2011/09/25/gIQABW03wK_story.html?hpid=z2.

⁴³ *Romer v. Evans*, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting).

⁴⁴ *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

⁴⁵ For a sustained discussion of the phenomenon where prior accomplishments act to hinder, rather than assist, social movement progress, see generally David Schraub, *Sticky Slopes*, 101 CAL. L. REV. ___ (forthcoming 2013).

⁴⁶ Holder, *supra* note 5 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985)).

A. The Non-Fringe Nature of Gay Equality

The prior Section focused primarily on those judges who are disinclined to support gay and lesbian litigants. But of course, not every judge is predisposed to rule against gay rights claims. Many are in the opposite situation—sympathetic to the constitutional plight of gays and lesbians, but deterred from acting on fears that their decision will be seen as extreme or outside the mainstream.

One reason why signals such as the Holder Memo are seen as important is because of the very real influence that popular opinion has on the range of acceptable legal outcomes. Mr. Dunne's famous maxim that "th' supreme coort follows th' iliction returns" may be too pat,⁴⁷ but it is fair to say that courts rarely, if ever, stray too radically from the boundaries of democratically acceptable outcomes. One only has to recall the fallout from the Ninth Circuit's ill-fated attempt to declare the "under God" clause of the Pledge of Allegiance unconstitutional to understand the consequences of legal opinions that are too far in front of broader society.⁴⁸

Narratives of courts as bold crusaders in defense of the powerless notwithstanding, the fact is that the judiciary is an unlikely candidate for defending minority rights—at least, when the relevant minority is truly marginal. One reason is that judges are members of society, and thus are unlikely to differ dramatically from other Americans (or at least other elite Americans) in their views of a given social group.⁴⁹ A claim thought by most Americans to be absurd, offensive, or frivolous most likely will be seen the same way

⁴⁷ FINLEY PETER DUNNE, *The Supreme Court's Decisions*, in MR. DOOLEY'S OPINIONS 26 (1901).

⁴⁸ *Newdow v. U. S. Congress*, 292 F. 3d 597 (9th Cir. 2002), *rev'd* Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004). It is notable that the reversal was not on the merits but rather on a technical issue of standing that many commentators believed was concocted as a convenient dodge. See Andrew Cohen, *High Court Ducks Hot Potato Case*, CBS NEWS (June 14, 2004), available at <http://www.cbsnews.com/stories/2004/06/14/opinion/courtwatch/main623036.shtml> (arguing that the justices used the "technicality" of standing "as a tidy way to get this decidedly untidy case off their docket."). Only two justices, Chief Justice Rehnquist and Justice O'Connor, were actually willing to say that the lower court was incorrect on the merits of then-prevailing Establishment Clause doctrine. Justice Scalia had recused himself; Justices Stevens, Ginsburg, Souter, Breyer, and Kennedy disposed of the case on standing alone; and Justice Thomas agreed that adherence to precedent required striking down "under God" but argued that these precedents should be reversed. *Newdow*, 542 U.S. at 46 (Thomas, J., concurring in the judgment).

⁴⁹ Schraub, *supra* note 7, at 1463 ("Where there is no social support for protecting a given minority, it is unclear why judges, who are part of that same society, should be expected to consistently rise above the prejudices of their times.").

in the courts.⁵⁰ Another problem is that even sympathetic judges are deeply constrained in how much influence they can have in the face of a hostile political climate.⁵¹ Judges usually have to rely on elected officials and other judges to implement their rulings, and appellate judges need to muster a majority coalition for any position they wish to adopt (and must anticipate a similar coalition to exist on any reviewing court). And many scholars argue that the legitimacy of the judiciary—and with it, its ability to command obedience in future cases—is sapped when it issues decisions that are wildly at odds with popular opinion.⁵²

In the not-so-distant past, gay marriage could be seen as such an extreme position. When the Defense of Marriage Act was passed in 1996, a mere 25% of Americans supported legalizing same-sex marriage.⁵³ DOMA itself was precipitated by a Hawaii Supreme Court decision which seemed to open the door to gay marriage in that state.⁵⁴ The decision set off a wave a panic in Washington, which—dissatisfied with the state level response—swiftly passed DOMA on the federal level.⁵⁵ In general, the few isolated victories (or even high-profile defeats) enjoyed by same-sex marriage

⁵⁰ See Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1552 (2004) (“If [minorities] are truly politically powerless, courts may not even recognize their grievances; and if they have just enough influence to get on the political radar screen, courts will usually dismiss their claims with a wave of the hand.”).

⁵¹ See GERALD N. ROSENBERG, *A HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9-36 (2d ed. 2008).

⁵² See, e.g., James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 61 (2008) (linking popular obedience to judicial decisions to courts’ reservoir of institutional legitimacy); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1748 (2001) (“[T]he Court’s institutional standing ultimately depends on producing decisions that garner the long-term approval of the American public.”). *But see* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 778-85 (2009) (asserting that judicial power is actually enhanced when courts issue and enforce unpopular rulings, because it entrenches their status as effective coordinators of political action).

⁵³ Andrew Gelman, Jeffrey Lax, & Justin Phillips, *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES (Aug. 21, 2010), available at <http://www.nytimes.com/2010/08/22/weekinreview/22gay.html>.

⁵⁴ *Baehr v. Lewin*, 852 P.2d 44, 68 (Hawaii 1993). The court only held that the restriction of marriage to opposite-sex couples was subject to strict scrutiny, it then remanded to the lower court to determine whether the law could meet that burden.

⁵⁵ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996). While the Hawaii legislature had acted immediately in criticizing the decision, Hawaii Rev. Stat. § 572-1 (1993 & Supp. 1994), the first effort to formally overturn it via constitutional amendment was unsuccessful. That failure was what motivated the United States Congress to act. David Orgon Coolidge, *The Hawai’i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAWAII L. REV. 19, 38 (2000).

proponents in the courts were immediately counteracted by a boomlet of state “mini-DOMAs” passed in response.⁵⁶

The Holder Memo is only the latest example of how the debate over same-sex marriage has shifted dramatically. Gay marriage has transitioned from a right-wing wedge issue to a position enjoying an emergent majority consensus.⁵⁷ Marriage equality opponents are now on the defensive, losing 2011 legislative votes in New York and the District of Columbia,⁵⁸ followed by defeats in Maryland and Washington in 2012.⁵⁹ Only a gubernatorial veto blocked gay marriage in New Jersey,⁶⁰ and while Minnesota Republicans succeeded in placing an anti-gay-marriage question on the ballot for 2012, early polling on the matter has been decidedly mixed.⁶¹

Hence, judges who may have worried that a pro-gay marriage ruling would be futile, or even counterproductive, now have at least some signal that the political winds are at their backs. Even if gay political influence is not sufficient to reverse decades of entrenched statutory law that relegates them to second-class citizenship, it may

⁵⁶ Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265(2007) (identifying three waves of mini-DOMAs, each passed in response to high-profile agitation in favor of gay marriage).

⁵⁷ See Joel Benenson & Jan van Lohuizen, *The Rapid Increase in Support for Marriage Changes Political Equation: Emerging Majority Supports the Freedom to Marry*, BENENSON STRATEGY GROUP (July 28, 2011), available at http://freemarry.3cdn.net/5ae85613318ade1b2e_8dm6bnq72.pdf (claiming that polls are beginning to show majority support for gay marriage); Michelle Goldberg, *How to Split the GOP*, THE DAILY BEAST (June 26, 2011), available at <http://www.thedailybeast.com/articles/2011/06/26/gay-marriage-the-new-democratic-wedge-issue.html> (claiming that gay marriage is now an effective wedge issue for the left).

⁵⁸ Elizabeth Gorman, *D.C. Council Votes to Allow Same-Sex Marriage, Mayor Fenty to Sign*, ABC NEWS (Dec. 15, 2009), available at <http://abcnews.go.com/Politics/gay-marriage-poised-approval-nations-capital/story?id=9344029>; Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES (June 24, 2011), available at <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html>.

⁵⁹ Annie Linskey, *Same-sex marriage bill is signed into law; Measure is expected to have an impact beyond the state's borders*, BALTIMORE SUN, March 2, 2012, at 1A; *Washington: Gay Marriage Legalized*, N.Y. TIMES, Feb. 24, 2012, at A17.

⁶⁰ Joelle Farrell, *Christie vetoes gay-marriage bill, offers ombudsman instead*, PHIL. INQUIRER, Feb. 19, 2012, at B1.

⁶¹ Rachel E. Stassen-Berger, *Minnesota Poll: Support Falls for Ban on Gay Marriage*, MINN. STAR-TRIB., May 13, 2011, available at <http://www.startribune.com/politics/statelocal/121750534.html> (finding 55% of respondents opposing the measure, with 39% in support); Rachel E. Stassen-Berger, *Minnesota Poll: Marriage amendment divide is deep*, MINN. STAR-TRIB. (Nov. 8, 2011), available at <http://www.startribune.com/politics/statelocal/133406223.html> (finding 48% in favor of the measure and 43% opposed).

now be strong enough to hold the line and protect a favorable ruling by another branch.

B. The Holder Memo as a Political Signal

The Holder Memo is not, on its face, a political document. It confines its argument to a point of technical legal doctrine, applicable only to the administration's courtroom defense of DOMA (indeed, only to the defense of DOMA in circuits which have not explicitly ruled that sexual orientation classifications ought to be governed under rational basis review).⁶² Yet it may well be that the most important impact of the Holder Memo may be in the political, not legal, arena.

Because most people do not have either the time or the inclination to become informed on political issues themselves, they instead rely on a small cadre of politically active individuals whom they believe hold views roughly in line with their own opinions.⁶³ This serves as an information heuristic, whereby citizens attempt to simulate the effect of attaining full information.⁶⁴ Voters align themselves to hold positions roughly akin to those propagated by ideologically amenable opinion leaders.

In the courtroom, the Holder Memo may have a mixed effect—encouraging judges sympathetic to gay rights, but also serving as fodder for those opposed. In the political arena, by contrast, its impact is far less ambiguous. The Attorney General certainly qualifies as a high-profile figure, and the Holder Memo stirred up considerable public controversy.⁶⁵ By increasing the “signal strength” that marriage equality is now a mainstream political position amongst liberal-leaning political elites, the Holder Memo will assist that message in trickling down to the voting patterns of rank-and-file Democrats (and friendly independents).

While the thesis of scholars like Gerald Rosenberg—that the ability of the judiciary to effectuate social change is sharply constrained by surrounding political context—has been well-

⁶² See *supra* notes 13-14 and surrounding text.

⁶³ See JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 14 (1992); PAUL R. BREWER, *VALUE WAR: PUBLIC OPINION AND THE POLITICS OF GAY RIGHTS* 69-71 (2008).

⁶⁴ BREWER, *supra* note 63, at 69 (citing ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957)).

⁶⁵ One Republican presidential candidate cited it as grounds for impeaching the President. Alexander Burns, *Herman Cain: Impeaching Obama would be 'a "Great Thing"'*, POLITICO, available at <http://www.politico.com/news/stories/0811/61518.html> (last modified Aug. 17, 2011).

publicized,⁶⁶ this dynamic helps illustrate that the process runs in the reverse as well: high-profile legal discussions, particularly when instigated by known political actors who can serve as effective opinion leaders, become part of the larger cocktail of considerations voters use to assess a given social question. Because often legal arguments are part of the same cultural milieu as their political counterparts, both can play important roles in signaling to the average voter the prominence and ideological affiliations of the underlying social controversy.⁶⁷

To be sure, identifying the issue as one supported by elite Democrats may sour conservative voters on the prospect of gay marriage, for whom the support of someone like Attorney General Holder would be a bug, rather than a feature. But acquiring the support of half of a two-party system is nothing to sneer at, particularly when starting from a baseline of near-universal opposition.⁶⁸ Even if the courts ultimately do not elect to step in, the Holder Memo is a credible signal by one of the two major parties that they are ready to serve as allies and advocates in the political process.⁶⁹

III. CONCLUSION

When it comes to the struggle over gay marriage in America, the peculiar fact of the Holder Memo is that it may be *least* successful in the specific, narrow aspect of the controversy it elected to address. The case for heightened scrutiny for sexual orientation classifications has primarily been stymied on the grounds that gays

⁶⁶ See generally ROSENBERG, *supra* note 51.

⁶⁷ See Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO L.J. 897, 930 (2005) (observing that the strong influence political—including legal—elites have on popular opinion considerably blurs the supposed distinction between legalistic and popular visions of constitutional values). Even Rosenberg, generally skeptical of the ability of law-centered endeavors to create enduring social change, concedes that litigation over same-sex marriage did help mobilize its supporters (as well as opponents). ROSENBERG, *supra* note 51, at 356-68.

⁶⁸ See *supra* note 53 and surrounding text.

⁶⁹ For example, twenty-two Democratic Senators recently called for the Democratic Party to add a marriage equality plank to the party platform. Chris Johnson, *22 U.S. senators call for marriage equality plank in Dem platform*, WASH. BLADE (Mar. 2, 2012), <http://www.washingtonblade.com/2012/03/02/exclusive-18-u-s-senators-call-for-marriage-equality-plank-in-dem-platform/>. As more Democratic elites publicly sign on to this position, the signaling effect towards to the average liberal-leaning voter strengthens as well.

and lesbians possess too much political influence to deserve such judicial solicitude. It is a conclusion jurists have adopted based on considerably thinner evidence than the extraordinary decision of the Attorney General to decline to enforce a duly-enacted federal statute. While some judges may be emboldened by the apparent political backing represented by Holder's decision, many others will find it even easier to dismiss his underlying legal argument.

But the Holder Memo is incontestably another brick in the foundation of an emergent political consensus in favor of marriage equality. As the most powerful indicator to date of the Obama administration's "evolving" views on gay marriage, it can only embolden LGBT activists on the federal level. And as a signal to the rank-and-file, it further entrenches support for marriage equality as a fundamental position of the Democratic Party—a determination which could help turn the tide in favor of gay rights across broad swaths of the country.