



European  
University  
Institute

MAX WEBER  
PROGRAMME FOR  
POSTDOCTORAL  
STUDIES

MAX WEBER  
LECTURE  
SERIES

MWP – 2016/04  
Max Weber Programme

Same-Sex Marriage and Backlash:  
Constitutionalism through the Lens of Consensus and  
Conflict

Reva B. Siegel



European University Institute  
**Max Weber Programme**

**Same-Sex Marriage and Backlash:  
Constitutionalism through the Lens of Consensus and Conflict**

Reva B. Siegel

Max Weber Lecture No. 2016/04

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

ISSN 1830-7736

© Reva B. Siegel, 2016

Printed in Italy  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu](http://www.eui.eu)  
[cadmus.eui.eu](http://cadmus.eui.eu)

## **Abstract**

In the decades before the United States Supreme Court recognized the right of same-sex couples to marry in *Obergefell v. Hodges*, Americans disdained, denounced, and debated same-sex marriage. When state courts recognized the right of same-sex couples to marry, opponents passed laws and state constitutional amendments that defined marriage as the union of a man and a woman. This fierce conflict provoked argument about the capacity of courts to defend minority rights.

Critics argued that judicial judgments shutting down politics were counterproductive and provoked a backlash that exacerbated political polarization. Conversation about the backlash ranged widely from academics and advocates to judges. These “realist” accounts of judicial review depicted courts as majoritarian institutions whose authority is tied to public consensus.

In this lecture, I argue that the backlash narrative and the consensus model of constitutionalism on which it rests simultaneously underestimates and overestimates the power of judicial review. The Court’s decision in *Obergefell* was possible not simply because public opinion changed, but also because the struggle over the courts helped change public opinion and forge new constitutional understandings. Even so, *Obergefell* has not ended debate over marriage but instead has channeled it into new forms. Constitutions do not merely reflect consensus; they also structure conflict. I employ concepts of constitutional culture to explore how constitutions can give contested beliefs legal form and structure conflict in ways that help sustain community in disagreement.

## **Keywords**

Same-sex marriage, judicial review, backlash, consensus, constitutional culture

*The lecture was delivered on 16 March 2016*

*Reva B. Siegel  
Yale University*



## Introduction

In the decades before the United States Supreme Court recognized the right of same-sex couples to marry in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), Americans denounced and debated same-sex marriage. When state courts recognized the right of same-sex couples to marry under their *state* constitutions, opponents amended the constitutions to define marriage as the union of a man and a woman. This fierce conflict provoked argument about the capacity of courts to defend minority rights. Can courts enforce judgments that challenge the beliefs and the prerogatives of the privileged?

Critics argued that same-sex marriage decisions that shut down democratic debate were counterproductive and provoked backlash that exacerbated political polarization. Conversation about backlash ranged widely from academics and advocates to judges. These “realist” accounts of judicial review depicted courts as majoritarian institutions whose authority is tied to public consensus.

In this lecture, I argue that the backlash narrative and the consensus model of constitutionalism on which it rests simultaneously underestimates *and* overestimates the power of judicial review. The Court’s decision in *Obergefell* was possible not simply because public opinion changed, but also because the struggle over the courts helped change public opinion and forge new constitutional understandings. Even so, *Obergefell* has not ended debate over marriage but instead has channeled it into new forms. Opponents of same-sex marriage now assert rights of conscience and religious liberty to resist recognizing the rights of same-sex couples.

We understand constitutions as reflecting consensus, and look to courts to settle conflict over their meaning. But in this lecture I argue that courts play an important role in structuring conflicts they cannot settle. I employ concepts of constitutional culture to explore how constitutions can give contested beliefs legal form and structure conflicts in ways that help sustain community in disagreement.

\*\*\*\*

## I. The Conflict over Marriage, 1970-2015

In 1972, the United States Supreme Court refused to recognize a same-sex marriage claim in *Baker v. Nelson*, 409 U.S. 810. Four decades later, in 2015, the Court held that a state law defining marriage as the union of a man and a woman denied same-sex couples a right to marry protected by the Fourteenth Amendment’s Due Process Clause.

In the four decades between the Court’s two marriage decisions a great debate raged over the constitutional protections afforded gays and lesbians. In 1986, the Supreme Court ruled in *Bowers v. Hardwick*, 478 U.S. 186, that the United States Constitution allowed states to criminalize same-sex sex. A decade later, without mention of *Bowers*, the Court imposed modest limits on the ability of legislators to discriminate against gays in *Romer v. Evans*, 517 U.S. 620 (1996). In 2003, the Court reversed *Bowers* and ruled in *Lawrence v. Texas*, 539 U.S. 558, that laws criminalizing same-sex sodomy denied gays dignity, liberty, and equality protected by the Due Process Clause.

The marriage debate unfolded in the midst of this tumult. In the 1990s, courts began to recognize the rights of same-sex couples to marry under state constitutions, first in Hawaii and Alaska. But citizens mobilized against these early state decisions. In 1996, Congress enacted the Defense of Marriage Act, which defined marriage for purposes of federal tax and benefits law as the union of a man and a woman and allowed states to refuse to recognize same-sex unions solemnized in other states. Soon after, citizens overturned the Hawaii and Alaska decisions by amending their state constitutions to define marriage as a relationship between a man and a woman.

This pattern recurred. In 2003, months after the Supreme Court struck down a law criminalizing same-sex sodomy in *Lawrence*, the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, that denial of marriage licenses to same-sex couples violated the state constitution. Again, Americans mobilized to block the spread of same-sex marriage. In a majority of states, citizens enacted a wave of laws and state constitutional amendments that prohibited marriage between same-sex couples. A movement to ban same-sex

marriage by amending the United States Constitution drew conservatives to the polls in the 2004 presidential election, with many attributing President Bush's margin of victory to the marriage debate.

## II. "Backlash" and the Institutional Limitations of Courts

Amidst these developments, a growing number of commentators began to argue that popular reaction to decisions recognizing the right of same-sex couples to marry demonstrated the impotence of courts to vindicate minority rights. According to the judicial backlash thesis, courts striking down popular legislation to vindicate minority rights were not only ineffective, but *counterproductive*; judicial decisions "shutting down" politics could frustrate democratic majorities in ways that would produce more virulent politics than might have resulted had judges refused to intervene.

In a prominent article published in 2005, Professor Michael Klarman (now of Harvard Law School) compared the response to *Goodridge*, the Massachusetts marriage decision, to the massive resistance to *Brown v. Board of Education*, 347 U.S. 483 (1954). He argued that "Court rulings such as *Brown* and *Goodridge* produce political backlashes for three principal reasons: They raise the salience of an issue, they incite anger over 'outside interference' or 'judicial activism,' and they alter the order in which social change would otherwise have occurred." Romance about *Brown* was romance only. Courts were poor vehicles for social change, Klarman argued: "[J]udicially mandated social reform may mobilize greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions." Loss through litigation specially enraged citizens accustomed to self-government: "because [*Goodridge*] was a court decision, rather than a reform adopted by voters or popularly elected legislators, critics were able to deride it as the handiwork of arrogant 'activist judges' defying the will of the people." In the short run at least, Klarman emphasized, litigation can lead to perverse results: "By outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance."

Klarman was joined by political scientist Gerald Rosenberg, known for the argument that racial desegregation resulted from the enforcement of federal civil rights laws and *not Brown v. Board*—a decision he famously called *The Hollow Hope*. Court decisions could consolidate social change, but courts could not prompt social change, Rosenberg argued. He pointed to the many laws and amendments enacted to ban same-sex marriage. "The problem is that activists for same-sex marriage turned to the courts too soon in the reform process...only when political, social, and economic forces have already pushed society far along to the road to reform will courts have any independent effect. And even then their decisions may be more a reflection of significant social reform already occurring than an independent, important contribution to it...That change has yet to occur with same-sex marriage, so litigation as a method of social reform is premature." His bottom line: "The battle for same-sex marriage would have been better served if [advocates] had never brought litigation, or had lost their cases."

Concern about backlash to court decisions recognizing the right to marry was not limited to academics. Faced with litigation losses and warnings of backlash, gay rights litigators assumed a self-consciously cautious litigation strategy, inaugurating campaigns to educate the public before filing suit in state courts, and seeking at all costs to avoid suits under the federal Constitution. In 2008, when lawyers unaffiliated with the gay rights movement prepared to challenge state marriage bans under the United States Constitution in the case that became *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), lawyers in the gay rights movement worked *to stop them* from bringing the case. How would the public respond to a court decision recognizing the constitutional right of same-sex couples to marry that changed the law in all 50 states? As the *Perry* case made its way toward the Supreme Court—along with *United States v. Windsor*, 133 S. Ct. 2675 (2013), which ultimately held the federal Defense of Marriage Act unconstitutional—a variety of [liberal and conservative] academics and advocates urged judges to narrow or to avoid decision in the cases, warning the Supreme Court that a court decision striking down state marriage bans could trigger powerful backlash.

Even Supreme Court Justices joined the conversation. In several public interviews in 2012 and 2013, Justice Ruth Bader Ginsburg offered not so veiled warnings about the dangers of a Supreme Court decision in *Perry* by reiterating her view that an early and overbroad ruling in *Roe v. Wade*, 410

U.S. 113 (1973), had caused backlash. The Court should not move “too far, too fast.” When the Supreme Court struck down the Defense of Marriage Act in *Windsor*, but ruled that the parties in *Perry* lacked standing to bring the case, Justice Kennedy objected that the Court should not have avoided the merits and adverted to judicial concerns about backlash as he did so. Instead *Windsor* and *Perry* sent the decision back to the lower federal and state courts.

Over the years, talk of backlash had changed shape, and assumed variant forms. Did backlash concern the question whether courts *could* intervene in democratic politics and vindicate minority rights or whether judges *should* intervene in democratic politics and vindicate minority rights? Or was concern about backlash not a *whether* question, but a *when* question: At what point in the evolution of public opinion should a lower court—or the Supreme Court itself—intervene?

When in 2015 the Court finally recognized the right to marry, Chief Justice Roberts dissented quoting Justice Ginsburg on the backlash that a judicial decision in the abortion case, *Roe v. Wade*, provoked. Michael Klarman disagreed. By the time of *Obergefell*, he was arguing that the Court *could* decide the question of marriage without concern of backlash because there was already majority public support for marriage.

### III. Consensus Constitutionalism

The judicial backlash thesis spread, not only because of the statutes, amendments, and initiatives enacted to block court decisions protecting the right of same-sex couples to marry, but also because the judicial backlash thesis echoed widespread “realist” views about the institution of judicial review. In *The Least Dangerous Branch*, law professor Alexander Bickel famously characterized the institution of judicial review as “counter majoritarian.” But scholars in political science in the U.S. have long reasoned differently, following the work of political scientist Robert Dahl who characterized courts as *majoritarian* institutions. In an admiring account, backlash theorist Gerald Rosenberg observed of Dahl, “First, he found that the Court historically had seldom strayed from the policy wishes of the lawmaking majority, generally failing to protect minorities against majoritarian outcomes. . . . Second, he found that when the Court did stray from the policy wishes of the lawmaking majority, Congress overturned those decisions.” Backlash theorist Michael Klarman also acknowledges his indebtedness to Dahl. These views have increasingly spread in the American legal academy—where academics have long argued in the shadow of the counter-majoritarian difficulty—a shift in outlook on judicial review that may reflect the experience of living with an American Supreme Court under fire, whose membership, and interpretation of the Constitution, has shifted dramatically over the decades, and is about to shift again.

In these realist accounts of judicial review, courts are tied to representative government through judicial appointments, or conform to the will of the majority in the quest to avoid political reprisals and secure popular compliance with their judgments. Courts can issue judgments that force regional minorities—so-called “outliers”—to conform to majority views, but courts cannot issue judgments that step too far ahead of popular opinion.

### IV. Some Realism About Realism: What Talk of Backlash and Consensus Constitutionalism Obscures

So what is wrong with realist accounts that emphasize the importance of public opinion in judicial decisions? It seems clear enough that public opinion *does* play an important role. A Supreme Court decision recognizing marriage in 2015—when by some measures 58% of the American public support marriage equality—is surely less controversial than it would have been at the time of the Hawaii decision in the 1990s.

But one can acknowledge the decisive importance of judicial appointments and public opinion without treating majority support as indispensable or sufficient to sustain a constitutional ruling as realist accounts often do. For example, Michael Klarman voiced what I believe is a widely shared intuition when he asserted that the Court could decide *Obergefell* because public support had tipped in favor of marriage. Once the public supports a particular constitutional understanding, so this view holds, the Court can vindicate that view and impose it on regional outliers.

This account of judicial review is unsatisfying for a variety of reasons. My own sense is that the backlash narrative and the consensus model of constitutionalism on which it rests lead us to underestimate *and* to overestimate the power of judicial review.

Talk of backlash and consensus constitutionalism depicts judicial review as reflecting, and restrained by, public opinion. Yet innumerable court and legislative decisions preceded *Obergefell*, as appendices to the Court's own opinion emphasize—with many of *these* decisions growing out of the Supreme Court's earlier decisions in *Lawrence* and *Windsor*. The Court's decision in *Obergefell* was possible not simply because public opinion changed, but also because struggle over the courts helped change public opinion and forge new constitutional understandings.

At the same time, consensus constitutionalism may *overestimate* the power of judicial review. The story of courts enforcing social consensus and repressing regional “outliers” imputes to judicial review more power than I believe courts have. Just as *Brown* did not end debate over racial segregation, *Obergefell* has not ended debate over marriage but instead has channeled it into new forms. Public support for gay marriage has risen dramatically over the last decade, but many Americans remain passionately opposed, especially when one attends to differences in age, region, religion, and political party. These Americans are mobilizing to continue the fight over marriage, under the banner of conscience and religious liberty, in the courts and in campaigns for the presidency.

What leads to these common forms of “realist” thought that underestimate and overestimate the power of judicial review? I believe the backlash narrative and consensus constitutionalism are persuasive, not only because they reflect assumptions about the power of majority decision making, but also because they assume a familiar model of judicial review. They assume that courts settle conflict, and courts that fail to settle conflict have failed in their essential mission.

Judicial review does serve crucial conflict resolution goals. But, as I will emphasize in the remainder of my remarks, conflict resolution is not judicial review's sole function. When courts—and other government officials interpreting the constitution—lack power to impose particular constitutional settlements, they may still shape political conflict in ways that advance constitutional values. Law and politics help constitute one another, in many ways, by changing meanings and by altering the legitimacy conditions of political and legal argument. Advocates appreciate this. They advocate to win, and to shape debate when they cannot.

In what follows, I look back at backlash to same sex marriage from the vantage point of my work on social movement conflict and constitutional change. I am interested briefly in considering how a fight over the courts—and other sites of government decision making—helped *structure* conflict and infuse it with new constitutional meaning.

I contrast *structuring* conflicts with *settling* conflicts, but do so provisionally and with caution. Structuring conflict is not always a self-conscious aim of advocates or officials. To the contrary: As we begin to look at constitutional decision making as reiterated across the system and over time, we can think about individual decisions as having multiple and intersecting logics. State court judges were interpreting their own constitutions *and* participating in the opening phases of a dialogue about the meaning of the federal constitution, as those who mobilized for and against them well appreciated. Constitutional conflict played out over the decades in lower and apex courts, in representative government in struggles over amendments, laws, and referenda, and in civil society.

## **V. Conflict's Constructive Effects**

Conflict can have constructive effects. Without a doubt, the first decisions recognizing same-sex marriage sparked conflict that, in the short run, produced immense setbacks. Yet, it was precisely by amplifying the claims of despised minorities in the legislative process that courts changed the shape of the conflict and infused it with new meanings. Opponents mobilized to ban same-sex marriage *because* they understood that court decisions recognizing the claim had imbued it with increasing legitimacy. Countermobilization was a response to the claim's growing power. Debate widened as advocates on each side tried to justify their views to wider publics to whom government officials were accountable. The first marriage decisions thus had mixed effects. As a growing number of commentators have observed, *Goodridge* and other early decisions not only set back the cause of

same-sex marriage, they also strengthened the claim's authority in a variety of significant ways. The early court decisions were, as Robert Cover might put it, "jurisgenerative."

- *The early court decisions amplified minority claims:* Court decisions made claims for same-sex marriage visible and audible in ways they were not in the ordinary legislative process; for better or for worse, court decisions put same-sex marriage on the public agenda.
- *The early court decisions helped legitimate unconventional claims:* Court decisions changed the conditions of debate about same-sex marriage in a variety of ways.
  - *Role modeling: Goodridge* and other early state court decisions created actual married same-sex couples, and through these actual role models allowed the nation to learn: To explore the consequences of same-sex marriage for same-sex relationships, for children, and for the larger community.
  - *Social Meaning - Challenging Stereotypes:* As importantly, as advocates made arguments for marriage equality to the public and to the courts, they challenged stereotypes about gay sex and created counter-images of the family life of same-sex couples.
  - *Social Meaning - Symbolic Associations:* The debate transformed arguments about marriage into a referendum on the citizenship status of gays and lesbians—so that it came to pose the question of their equal membership in the community. (The right to marry posed the question of equal citizenship for gays and lesbians much as the right to vote once raised questions of sex equality for women, and the right to attend integrated schools raised questions of race equality for African Americans.)
- *The early court decisions had a variety of social mobilization effects:*
  - *The decisions influenced movement goals:* The more the argument over marriage turned into a referendum on the equal status of gays in the community, the more the LGBT movement invested in the question. A movement that once understood itself as seeking sexual freedom came to understand itself through the institution of the family.
  - *The decisions fostered movement dialogue:* As advocates on each side attempted to persuade decision makers accountable to wider publics, each side was obliged to answer the arguments of the other, and in the process, incorporated elements of the other's views. LGBT advocates responded to conservative arguments by espousing fidelity to family values; and defenders of traditional marriage responded to liberal arguments by espousing commitments to equality values.

Conflict strains social bonds, and for this good reason we rarely notice the bonds that constitutional conflict can create. Because we understandably view constitutional conflict as a threat to social cohesion, it is worth considering how conflict over the constitution could also function to sustain community across disagreement.

To illustrate, I pause briefly to consider how, over the decades of conflict, objections to same-sex marriage changed in form, from gay-denigrating to gay-respecting modes of constitutional argument. It is not simply that many opponents shifted ground and conceded the equal citizenship of gays, offering same-sex couples recognition through "civil unions" instead of marriage. *The constitutional arguments they offered in objection to same-sex marriage changed as well.*

In the 1980s and 1990s, it was commonplace to oppose same-sex marriage by depicting it as deviant and immoral. But in the aftermath of the Supreme Court decisions according gays rudimentary protections against discrimination, objections to same-sex marriage began to shift into a gay-respecting mode. In the 2000s, litigants and judges began to justify limiting marriage to different sex couples in terms of the needs and vulnerabilities of *heterosexuals*. Heterosexual couples needed incentives to marry, they argued (the so-called "accidental procreation" argument), and children needed different sex parents to model gender roles for them (the "dual gender" marriage argument). Conservative opponents of marriage objected to being outcast as "bigots" and asserted the importance of preserving traditional marriage to protect "religious liberty." Opposition to same-sex marriage increasingly narrowed to a claim *about the proper role of courts*: There might in fact be a case for

recognizing same-sex marriage, opponents argued, but in a constitutional democracy that question was for determination by legislatures, not courts.

Evolving objections to marriage signaled rising respect for gays, *even* among opponents of marriage. These changes in the grounds of constitutional argument illustrate how constitutional conflict can foster relationships, even among adversaries who fiercely disagree about the meaning of constitutional norms to which they share fealty.

The judicial backlash thesis does not treat as significant these changes in the shape of the conflict over same-sex marriage. One reason why, I suspect, is that backlash theory—at least in its original full-throated form—is premised on a familiar understanding of judicial review and social conflict: Courts are supposed to settle conflict, and persisting constitutional conflict is evidence that courts have failed to settle the conflict or have no proper role in addressing the question in the first place. With its expectation that courts should settle conflict, the backlash framework evaluates judicial review within a short time horizon, and tends to rely on opinion polls (and other practices of counting laws) to identify circumstances in which courts can successfully intervene and resolve long-running social conflict.

But a great many constitutional questions are the locus of *intractable* conflict. Making judgments about the role of courts in the backlash framework—with its short time horizons and attachment to opinion polling—depicts courts and conflict in terms that leave advocates and officials reticent to act in some circumstances and overconfident about their efficacy in others.

## **VI. Understanding Backlash through the Lens of Constitutional Culture**

We talk about the counter-majoritarian difficulty as if judicial review “shuts down” politics, but of course it does not. Conflict often arises in response to decision in contested constitutional cases. In my work I have employed concepts of constitutional culture to explore how law structures conflicts over the meaning of constitutional commitments while sustaining community in disagreement.

In the most familiar account, constitutional culture refers to the norms, values, and beliefs of a society that penetrate and shape its constitutional law. This understanding of constitutional culture focuses attention on the ways social norms influence legal norms. Consensus constitutionalism gives social norms power of this kind. Without disputing the power of social norms to shape law, I have used constitutional culture in a different sense, to focus attention on specialized features of law. Constitutional culture in this second sense concerns understandings about legal roles and legal argument that citizens and officials draw on in disagreements about the constitution’s meaning. Citizens and officials literate in these understandings of role and practices of argument can make new claims on constitutional law, claims that may draw upon contested social norms, and, in turn, help shape them.

Citizens and officials draw on constitutional culture to make role-informed judgments about the actions and arguments that can best guide constitutional development. These efforts help “steer” constitutional development over time; they also promote the “attachment” to the constitutional order of those who may be deeply estranged from official pronouncements of the law.

We do not typically think about the features of constitutional culture that enable conflict as creating community, yet contest over the constitution can promote attachment of those who are divided in conflict. Looking back at the debates preceding and following *Obergefell* through the lens of constitutional culture, we can see how the constitutional order provides members of a community with the resources and reasons to address one another as members of a shared community, despite disagreement. Understandings of role and practices of argument structure agonistic relationships. Because officials accountable to the public have authority to make binding decisions about constitutional questions, adversaries have reason to translate their case into constitutional frames capable of persuading others who do not share their views. Because there are multiple fora in which adversaries can press their case, adversaries have reason to persist in constitutional argument, even when they lose. Conflict iterates across the system, over time.

In this system, there is closure, and openness; each promotes connection in different ways. Persons literate in constitutional culture understand they are subject to the authority of decision makers whom they must persuade, yet whose authority they also know how to contest. The need to persuade

and the ability to contest each play a part in sustaining engagement and thus enabling community in disagreement.

Looking at the conflict over same-sex marriage through the lens of constitutional culture, we can see how Americans—acting in courts, legislatures, and civil society—argued in ways that created *Obergefell*'s conditions of plausibility. Using many of these same resources, Americans are continuing to argue in the decision's wake as they try to shape *Obergefell*'s meaning for the next phase of conflict. (The debate surrounding Kim Davis, the Kentucky clerk who invoked religious liberty as she refused to officiate at same-sex marriages, as well as the debate now raging over Justice Scalia's replacement on the Supreme Court shows that Americans have understandings about the ways citizens and officials must respect and may properly resist judicial authority—and are prepared to argue with one another about it.)

\*\*\*\*

We have traveled a long distance from the stories about law and conflict on which backlash theory rests. In familiar accounts of backlash, law has authority insofar as it reflects social consensus; conflict begins when law diverges from community, and is a threat to each. In these accounts, there is little attention to the changing constitutional understandings conflict enables, or the web of relationships conflict forges.

In fact, participants in the constitutional order intuitively understand the centrality of conflict in constitutional law, but may not reason from these understandings when discussing backlash. This is at least in part because, I will suggest in closing, claims about backlash are not merely "sociological" or descriptive; they are also legal and prescriptive. Talk about backlash appeals to the legal authority of realism as part of the stock of shared reasons for judicial decision.

Consider how the backlash claims of progressives and conservatives diverged as the debate over marriage evolved. Over time, progressives have shifted from an argument about whether courts could intervene on behalf of minority rights to claims about when and how courts should intervene on behalf of minority rights. In invoking *Roe*, Justice Ginsburg was not warning judges to stay out of the business of vindicating rights, but instead cautioning judges how best to intervene (don't move too far, too fast). Conservatives, by contrast, have invoked backlash as a reason for courts to stay out of the marriage debate and leave resolution of the question to the political process. These various strands of backlash discourse are often tangled together. In his *Obergefell* dissent, Chief Justice Roberts cited Justice Ginsburg and the abortion debate as a reason that the majority was wrong to recognize the constitutional rights of same-sex couples to marry.

Progressive and conservative claims on backlash illustrate a rich paradox: In the American constitutional order, a claim about the institutional weakness of courts has developed into a form of argument directing the exercise of judicial power!

In 21st century America, talk of backlash has emerged as a key language for legitimating and discrediting the work of courts. Once we appreciate that talk of backlash is itself a mode of legal argument, we can better understand persistent recourse to talk of backlash through the lens of constitutional culture, and in ways that help clarify our understanding of judicial review.



