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Justin Driver, "Constitutional Outliers," 81 University of Chicago Law Review 929 (2014).

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Constitutional Outliers

Justin Driver[†]

Legal scholars often contend that prominent Supreme Court opinions interpret the Constitution in a manner that invalidates outliers—measures found in only a small number of states, rather than spread throughout the nation. Despite the term’s ubiquity in constitutional conversation, law professors have dedicated scant attention to exploring either its conceptual underpinnings or its conceptual borders. This paucity of scholarly attention is regrettable because the term has become enshrouded in analytical confusion, which severely diminishes its utility and instills deep misperceptions about the Supreme Court’s role in issuing outlier-suppressing opinions.

This Article—the first extended effort to cast a critical eye on the notion of constitutional outliers—aims to clarify understanding of the concept by dispelling three principal sources of analytical confusion. First, although scholars overwhelmingly invoke the term “outlier” as though it were a single entity, scrutinizing the Court’s outlier-suppressing opinions demonstrates that four distinct concepts are in fact huddled together under the outlier umbrella: holdouts, upstarts, back-ups, and throwbacks. When the Supreme Court invalidates each type of outlier, it eliminates a measure during a specific temporal moment, and conflating these moments often conceals their discrete implications for constitutional theory. Second, by identifying and disentangling these outlier variants, it becomes possible to appreciate how conventional assessments of outlier-suppressing opinions founder upon close examination. Contextualizing the Court’s outlier-suppressing opinions reveals, contrary to prevalent scholarly assumptions, that they do not invariably reject measures that the nation deems antiquated, backward, and insignificant to the constitutional order. Third, because law professors have never explicitly articulated their criteria for identifying what constitutes an outlier, the term appears in legal scholarship in inconsistent and even contradictory fashions, as outlier-minded theorists disagree whether some of the Court’s most celebrated opinions even fit within the outlier rubric. In an effort to foster increased coherence with the term’s usage, this Article provides specific guidelines for distinguishing outliers from nonoutliers and identifies instances in which scholars have used the term in-

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appositely. Bringing outliers to the very center of scholarly inquiry recasts dominant understandings of critical constitutional opinions—and the institution that issued them.

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INTRODUCTION

A little more than two decades ago, tucked into the middle of a not especially well-known law review article, Judge Frank Easterbrook introduced a new term to describe the Supreme Court's role in constitutional interpretation. Seeking to challenge the notion that the judiciary often vindicates individual rights in the face of national opposition, Easterbrook imported a term from statistics to suggest that the Court's constitutional opinions typically invalidate practices found in only a small number of states. "The Court's role in civil liberties . . . has been that of a follower, not a leader," Easterbrook explained.¹ "It extirpates in the name of the Constitution practices that have already disappeared or dwindled among the states. It obliterates *outliers*."²

¹ Frank H. Easterbrook, *Abstraction and Authority*, 59 U Chi L Rev 349, 370 (1992).

² Id (emphasis added). See also Frank E. Grubbs, *Procedures for Detecting Outlying Observations in Samples*, 11 *Technometrics* 1, 1 (1969) ("An outlying observation, or 'outlier,' is one that appears to deviate markedly from other members of the sample in which it occurs."); Vic Barnett and Toby Lewis, *Outliers in Statistical Data* 32 (Wiley 3d

Since its debut in 1992, usage of the term “outlier” has proceeded along a path from the foreign to the familiar, as it is now deeply embedded within scholarly constitutional discourse. Today, a strikingly large number of prominent constitutional law scholars—including Professors Akhil Amar, Jack Balkin, Steven Calabresi, William Eskridge, Roderick Hills, Michael Klarman, Lucas Powe, Jeffrey Rosen, David Strauss, Cass Sunstein, Mark Tushnet, and Keith Whittington—employ the term outlier in their scholarship.³ This eclectic collection of scholars, along dimensions both ideological and methodological, might be thought incapable of agreeing on just about any question in constitutional law.⁴ But the group is firmly united in the belief that understanding the Supreme Court’s role in constitutional interpretation demands understanding the Court’s penchant for suppressing outliers. These professors insist that many of the Court’s canonical constitutional decisions during the twentieth century and beyond can helpfully be examined through the outlier lens. Merely a partial listing of the Court’s renowned opinions that legal scholars

ed 1994) (stating that an outlier observation is “jar[ring]” because it “stands out in contrast to other observations, as an extreme value”).

³ See, for example, Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* 112 (Basic Books 2012) (contending that the Supreme Court takes account of what he calls the nation’s “lived Constitution” by invalidating outlier statutes); Jack M. Balkin, *Living Originalism* 211–12, 240, 286, 288 (Belknap 2011) (referring to the Court’s invalidation of outlier statutes); Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 Ohio St L J 1097, 1113–15 (2004) (observing the Court’s invalidation of outliers); William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich L Rev 2062, 2373 (2002) (referring to the Court’s outlier-suppressing role); Roderick M. Hills Jr., *Counting States*, 32 Harv J L & Pub Pol 17, 19–23 (2009) (referring to the Court’s outlier-suppressing function); Michael J. Klarman, *From Jim Crow to Civil Rights* 453 (Oxford 2004) (“More constitutional law than is commonly supposed reflects this tendency to constitutionalize consensus and suppress outliers.”); L.A. Powe Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 Wake Forest L Rev 697, 716 (2003) (contending that the Warren Court “forc[ed] outliers to conform to national values”); Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* 4, 89, 124, 203 (Oxford 2006) (referring to the Court’s outlier-suppressing role); David A. Strauss, Book Review, *Not Unwritten, After All?*, 126 Harv L Rev 1532, 1551–52 (2013) (contending that the Court’s outlier-suppressing function is “an important feature of American constitutional law”); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 Harv L Rev 246, 260–64 (2008) (highlighting the Court’s outlier-suppressing opinions); Mark Tushnet, *Why the Constitution Matters* 98–105 (Yale 2010) (emphasizing the significance of constitutional outliers); Keith E. Whittington, *Political Foundations of Judicial Supremacy* 105 (Princeton 2007) (emphasizing the Court’s role in suppressing outliers).

⁴ The group contains not only liberals and conservatives, but also self-avowed originalists and dedicated opponents of originalism.

contend have suppressed outliers might include the following ten cases: *Griswold v Connecticut*,⁵ *Harper v Virginia State Board of Elections*,⁶ *Gideon v Wainwright*,⁷ *Romer v Evans*,⁸ *Plyler v Doe*,⁹ *Moore v City of East Cleveland*,¹⁰ *United States v Virginia*,¹¹ *Coker v Georgia*,¹² *Lane v Wilson*,¹³ and *Kennedy v Louisiana*.¹⁴ These ten decisions span an extremely wide array of constitutional doctrines, underscoring the notion's transsubstantive nature.

⁵ 381 US 479, 485–86 (1965) (invalidating Connecticut's anticontraceptive statute). See also Eskridge, 100 Mich L Rev at 2372 n 1436 (cited in note 3) (construing *Griswold* as suppressing an outlier); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 Va L Rev 1, 16 (1996) (same); Sunstein, 122 Harv L Rev at 260 (cited in note 3) (same); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U Chi L Rev 859, 878–79 (2009) (same).

⁶ 383 US 663, 666 (1966) (invalidating Virginia's poll tax). See also Balkin, *Living Originalism* at 240 (cited in note 3) (construing *Harper* as invalidating an outlier); Klarman, 82 Va L Rev at 16–17 (cited in note 5) (same).

⁷ 372 US 335, 344–45 (1963) (invalidating Florida's effort to deny counsel to an indigent criminal defendant accused of a felony). See also Amar, *America's Unwritten Constitution* at 121 (cited in note 3) (construing *Gideon* as invalidating an outlier); Klarman, 82 Va L Rev at 16–17 (cited in note 5) (same).

⁸ 517 US 620, 635 (1996) (invalidating Colorado's effort to preclude homosexuality from receiving protection under local antidiscrimination laws). See also Eskridge, 100 Mich L Rev at 2372 n 1436 (cited in note 3) (construing *Romer* as invalidating an outlier); Michael J. Klarman, *Bush v. Gore through the Lens of Constitutional History*, 89 Cal L Rev 1721, 1749 (2001) (same); Tushnet, *Why the Constitution Matters* at 140 (cited in note 3) (suggesting that *Romer* might be viewed as invalidating an outlier).

⁹ 457 US 202, 230 (1982) (invalidating Texas's effort to exclude unauthorized immigrants from public schools). See also Michael J. Klarman, *Antifidelity*, 70 S Cal L Rev 381, 414 (1997) (construing *Plyler* as suppressing an outlier).

¹⁰ 431 US 494, 506 (1977) (invalidating a local housing ordinance in Ohio that prohibited some family members related by blood from cohabiting). See also Klarman, 82 Va L Rev at 16–17 (cited in note 5) (characterizing *Moore* as striking down a local outlier); Strauss, 76 U Chi L Rev at 882 (cited in note 5) (same); Mark Tushnet, *Taking the Constitution Away from the Courts* 144 (Princeton 1999) (same).

¹¹ 518 US 515, 557–58 (1996) (invalidating Virginia's effort to prohibit women from enrolling at an all-male military academy). See also Eskridge, 100 Mich L Rev at 2372 n 1436 (cited in note 3) (construing *Virginia* as invalidating an outlier); Klarman, 70 S Cal L Rev at 414 (cited in note 9) (same); Strauss, 76 U Chi L Rev at 873–74 (cited in note 5) (same); Sunstein, 122 Harv L Rev at 262–63 (cited in note 3) (same).

¹² 433 US 584, 600 (1977) (invalidating Georgia's effort to permit the death penalty to be imposed for rape). See also Klarman, 82 Va L Rev at 16–17 (cited in note 5) (construing *Coker* as rejecting an outlier); Rosen, *The Most Democratic Branch* at 203 (cited in note 3) (same).

¹³ 307 US 268, 276–77 (1939) (invalidating Oklahoma's effort to retain a grandfather clause for voting purposes). See also Klarman, *From Jim Crow to Civil Rights* at 236 (cited in note 3) (construing *Lane* as suppressing an outlier).

¹⁴ 554 US 407, 446–47 (2008) (invalidating Louisiana's effort to permit the death penalty to be imposed for raping children). See also Strauss, 76 U Chi L Rev at 864–65 (cited in note 5) (construing *Kennedy* as suppressing an outlier).

While outlier terminology has become an increasingly familiar feature of constitutional conversation, familiarity in this particular instance has bred not so much contempt as inattention.¹⁵ Among constitutional scholars, outlier-suppressing opinions are frequently identified but seldom scrutinized. Indeed, no law review article or book chapter has ever been dedicated primarily to identifying and analyzing either the conceptual underpinnings or the conceptual borders of the outlier phenomenon in constitutional law. This paucity of sustained scholarly examination is lamentable because it has permitted the Court's outlier-suppressing opinions to become enshrouded in analytical confusion.¹⁶

This Article aims to clarify understanding of the outlier concept in constitutional law by dispelling three principal sources of analytical confusion. The first area in need of clarity stems from scholars using the term outlier as though it were a single entity, when it is actually composed of multiple entities. Upon close inspection, it becomes possible to discern four distinct concepts huddled together under the outlier umbrella, which this Article labels: *holdouts*, *upstarts*, *backups*, and *throwbacks*. The Supreme Court invalidates each of these outlier variants during a particular temporal moment, and failing to distinguish among them often conceals their discrete implications for constitutional theory. When the Court invalidates a holdout—as with *Griswold's* rejection of an anticontraceptive statute that dated back eight decades—it eliminates a measure that, although perhaps once prevalent, has now receded and exists in at most a few remaining jurisdictions. When the Court invalidates an upstart—as with *Romer's* rejection of an antigay referendum that passed only four years earlier—it eliminates a measure that represents a departure from the dominant mode and exists in at most a few jurisdictions. When the Court invalidates a backup—as with *Virginia's* rejection of the effort to preserve an all-male military academy by creating an all-female institution—it eliminates the adoption of a substitute measure that is designed to retain either a recently invalidated model, or one that seems headed toward

¹⁵ See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (Harvard 1980) (“Familiarity breeds inattention, and we apparently need periodical reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”).

¹⁶ Paucity, not absence. Tushnet has to date provided the most thorough and insightful examination of constitutional outliers as a phenomenon. See Tushnet, *Why the Constitution Matters* at 98–105 (cited in note 3). As will become apparent, however, my account departs from Tushnet's in significant ways.

invalidation soon. When the Court invalidates a throwback—as with *Kennedy's* rejection of an effort to impose capital punishment for raping a child—it eliminates a measure that seeks to revive a model from an earlier era that has disappeared. While the term outlier can accurately communicate that the Court invalidated laws or practices existing in only a small number of states, it provides no insight whatsoever into the context surrounding that invalidation. Where the outlier label provides merely a snapshot of state practices, the variant labels provide the moving pictures—rendering it possible to distinguish fading embers from flickering sparks.

Second, by distinguishing among these outlier variants, it also becomes possible to appreciate the ways in which many conventional scholarly understandings of outlier-suppressing opinions founder upon close examination. Scholars have often asserted that when the Supreme Court invalidates outliers, it attacks antiquated measures and replaces them with modern views. Although this modernization theory may well capture the dynamic for outlier-suppressing opinions invalidating holdouts and backups, it fails to convey the dynamic for upstarts and—perhaps somewhat surprisingly—for throwbacks. When the judiciary invalidates upstarts and throwbacks, in fact, it may come closer to the mark to view those decisions as resisting, rather than enabling, modern views. Similarly, paying insufficient heed to the distinctions among outliers has led scholars to claim that when the Court issues outlier-suppressing opinions, it diminishes tension posed by the countermajoritarian difficulty and simultaneously increases tension with the ideals of federalism. But both of these claims, as it turns out, are dramatically overdrawn. Understanding that outliers come in different variants also complicates broad scholarly claims asserting that outlier-suppressing opinions invariably reject measures that the nation as a whole deems backward and arguing that such decisions are, therefore, insignificant to the constitutional order. It is erroneous to assume that, simply because a measure currently exists in a small number of states, underlying national support for the measure must be modest. To the contrary, some outlier-suppressing opinions have invalidated statutes that appear to enjoy significant popularity across the nation. Accordingly, some outlier-suppressing opinions can be viewed as ensuring that measures currently found in a small number of states do not spread across the country. Simply because a law is an outlier, in

other words, does not mean that the views it embodies are necessarily considered outlandish.

Third, the dearth of sustained outlier analysis has even resulted in confusion and unacknowledged disagreement regarding whether some of the Supreme Court's most celebrated opinions in its entire history—*Brown v Board of Education of Topeka*,¹⁷ *Loving v Virginia*,¹⁸ and *Lawrence v Texas*¹⁹—can accurately be viewed as fitting within the outlier rubric. Disagreement exists in large part because outlier-minded theorists have never explicitly articulated their criteria for identifying how widespread a measure can become and still legitimately be deemed an outlier. Rather than permitting these idiosyncratic identification methods to persist without comment, this Article initiates an overdue conversation regarding what, exactly, qualifies as an outlying measure by proposing specific guidelines for identifying them. The outlier criteria advanced here suggest that scholars have sometimes used the term too promiscuously, applying it to judicial opinions that invalidate practices that are fairly widespread throughout the nation and—in the process—stretching the term virtually beyond recognition. Some scholars will almost certainly disagree with my normative assessments regarding how the territory of constitutional outliers should be demarcated. Disagreements about my proposed conceptual borders are welcome, however, because they would elicit sustained analysis of what constitutes an outlier. And such exchanges over the fundamental meaning of constitutional outliers have thus far been conspicuous in their absence.

None of these efforts to interrogate and clarify the meaning of outliers as a term in constitutional discourse should be mistaken for contending that the word should be purged from legal scholarship. To the contrary, the term presents a welcome addition to our constitutional vocabulary, as it arms scholars with a helpful appellation for identifying opinions that invalidate measures found in only a small number of states. Its usage encourages professors to note the actual magnitude of Supreme Court opinions, and represents a major advancement over the blithe assumptions of yore when scholars asserted a decision radically altered legal conditions throughout the land when it in fact tackled a relatively isolated practice. The term outlier, in

¹⁷ 347 US 483 (1954).

¹⁸ 388 US 1 (1967).

¹⁹ 539 US 558 (2003).

sum, merits the essential place it has so rapidly attained in constitutional discourse. It is precisely because the overarching term is so helpful, however, that its usage must be examined and refined in order to alleviate the analytical confusion that currently abounds. Scholarly invocations of the term outlier demonstrate no signs of abating anytime soon. If anything, usage appears to be intensifying, as new scholars continue to add the word to their constitutional lexicons, and early converts seem to use the term with ever-escalating frequency. Before the term becomes even more widespread, and the attendant confusion follows suit, it seems well worthwhile attempting to ascertain, with much greater precision than currently exists, what we talk about when we talk about outliers.²⁰

The balance of this Article unfolds as follows. Part I develops a taxonomy of constitutional outliers and analyzes how several of the Court's leading outlier-suppressing opinions fit into that taxonomy. Building on this taxonomy, Part II challenges leading academic portrayals of the Court's outlier-suppressing opinions as rejecting measures that the nation deems antiquated, backward, and insignificant to the constitutional order. Part III pivots to explore the conceptual boundaries of outliers and establishes criteria for distinguishing outliers from nonoutliers. A brief conclusion follows.

I. THE ANATOMY OF OUTLIERS

This Part provides a taxonomy of constitutional outliers by breaking down that broad phenomenon into its smaller components. Legal scholarship analyzing the judiciary's invalidation of *outliers* would be improved by conceiving of those opinions as invalidating *holdouts*, *upstarts*, *backups*, and *throwbacks*. After briefly defining the characteristics of each outlier variant, the bulk of this Part analyzes opinions in which the Supreme Court can be understood as having invalidated the pertinent type of outlier. The outlier-suppressing opinions analyzed herein should be understood as illustrative rather than exhaustive, as this Part makes no effort to identify and analyze every opinion that scholars contend rejected an outlier measure.

²⁰ Consider Raymond Carver, *What We Talk about When We Talk about Love* (Knopf 1981).

A. Holdouts

An outlier that is a *holdout* involves a state law or practice that, although perhaps once prevalent, has now receded and exists in, at most, a few remaining jurisdictions. The jurisdiction that retains the formerly widespread model, that is, holds out from adopting what has become the dominant mode. In so doing, holdouts prevent what seems to be a nearly defunct model from altogether vanishing.

In *Griswold*, the Supreme Court in 1965 invalidated constitutional law's best-known holdout: a Connecticut statute dating back to 1879 that prohibited even married couples from using contraceptives.²¹ Many justices who considered the Connecticut law highlighted the anticontraceptive statute's lengthy—if not exactly august—lineage and suggested that the law embodied a remnant from a previous era. In *Poe v Ullman*,²² when the Court initially determined that the law presented a nonjusticiable question in 1961, Justice Felix Frankfurter's opinion for the Court nevertheless noted, "The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879."²³ Frankfurter's next sentence noted, perhaps for the many lawyers with mathematical difficulties, it had been "more than three-quarters of a century since its enactment."²⁴ Justice John Marshall Harlan II's much-celebrated dissenting opinion in *Poe* similarly contended that anticontraceptive laws "may be regarded as characteristic of the attitude of a large segment of public opinion on this matter through the end of the last century," and noted that modern criticisms understood such laws to stem from "a bygone day."²⁵ When the Court in *Griswold* reconsidered the statute—a mere fourteen years shy of its centennial—the brief challenging the law amplified Harlan's point, calling it "a relic of . . . a psychological attitude which, if it ever were, is no longer part of the mainstream of American life and thought."²⁶ The brief supported this assertion by noting that only Connecticut and Massachusetts continued to regulate contraceptives in the

²¹ *Griswold*, 381 US at 527 (Stewart dissenting).

²² 367 US 497 (1961).

²³ *Id.* at 501.

²⁴ *Id.*

²⁵ *Id.* at 546 n 12 (Harlan dissenting).

²⁶ Brief for Appellants, *Griswold v Connecticut*, Docket No 496, *24 (US filed Feb 11, 1965) (available on Westlaw at 1965 WL 92619) ("*Griswold* Appellants' Brief").

marital context.²⁷ Strikingly, even *Griswold*'s two dissenting justices heaped scorn on the statute. Justice Hugo Black's dissent called the law "offensive" and "evil."²⁸ Justice Potter Stewart's dissent—in addition to deeming the law "uncommonly silly" and suggesting that it was perhaps "even asinine"—encouraged voters to jettison the antiquated model.²⁹ "If, as I should surely hope, the law before us does not reflect the [current community] standards of the people of Connecticut," Stewart wrote, "the people of Connecticut can . . . persuade their elected representative to repeal it."³⁰

In *Harper*, the Supreme Court held that states could no longer retain the poll tax in state elections without violating the Fourteenth Amendment's Equal Protection Clause.³¹ The poll tax, whose origins stretched back well into the nineteenth century, had once been a common practice.³² By the time the Court decided *Harper* in 1966, however, the Twenty-Fourth Amendment prohibited the practice in federal elections, and states also had overwhelmingly rejected the practice in their own elections. As Justice William O. Douglas's opinion for the Court in *Harper* noted, "Only a handful of States today condition the franchise on the payment of a poll tax."³³ Of the four holdouts that retained the practice, moreover, Douglas observed that lower courts had recently invalidated poll taxes for Alabama and Texas.³⁴ Douglas construed *Harper* not as vindicating the vision of the Fourteenth Amendment's framers, but as attacking an outmoded practice that offended modern understandings of equality. "[T]he Equal Protection Clause is not shackled to the political theory of a particular era," Douglas explained.³⁵ "In determining what lines are

²⁷ See *id.* Whereas the Connecticut law prohibited *using* contraceptives, the Massachusetts law prohibited *distributing* contraceptives. See David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 70 (Macmillan 1994).

²⁸ *Griswold*, 381 US at 507 (Black dissenting).

²⁹ *Id.* at 527, 531 (Stewart dissenting).

³⁰ *Id.* at 531 (Stewart dissenting). Like Frankfurter's opinion in *Poe*, Stewart's dissent began: "Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone." *Id.* at 527 (Stewart dissenting). One of the underappreciated oddities in Douglas's strikingly odd opinion for the Court in *Griswold* is its failure to note either the statute's vintage or its highly unusual status.

³¹ *Harper*, 383 US at 670.

³² See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 111–12 (Basic Books 2000).

³³ *Harper*, 383 US at 666 n 4 (noting that—in addition to Virginia—Alabama, Mississippi, and Texas also retained the poll tax).

³⁴ *Id.*

³⁵ *Id.* at 669.

unconstitutionally discriminatory, we have never been confined to historic notions of equality Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.”³⁶ Although three justices dissented in *Harper* because they thought that the opinion exceeded the bounds of judicial propriety, they nonetheless agreed that the poll tax was an idea whose time had gone. Observing that *Harper* altered the practices of merely four states, Harlan conceded: “Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized.”³⁷ Black’s dissent similarly allowed that he “dislik[ed] the policy of the poll tax” and found it “outdated.”³⁸

In *Gideon*, the Supreme Court in 1963 famously determined that the Sixth Amendment afforded all criminal defendants charged with felonies the right to counsel, even if they could not afford an attorney.³⁹ Far less commonly appreciated, however, is that the overwhelming majority of the nation already adhered to the rule that *Gideon* would articulate even before the Court issued its landmark decision. Although the Court noted as late as 1942 in *Betts v Brady*⁴⁰ that “the great majority of the States” did not afford counsel to indigent criminal defendants,⁴¹ only five holdout states continued to deny that right when the Court decided *Gideon*.⁴² Even among the five holdouts, moreover, at least some counties within four of the five states appear to have offered counsel to indigent defendants.⁴³ For instance, had Clarence Gideon been arrested in one of Florida’s more populous counties, like Dade or Broward, he would have been entitled to counsel.⁴⁴ Black’s opinion for the Court in *Gideon* thus stood on firm ground in identifying a “widespread belief that lawyers in criminal

³⁶ *Id* (emphasis omitted).

³⁷ *Harper*, 383 US at 686 (Harlan dissenting).

³⁸ *Id* at 675, 678 (Black dissenting).

³⁹ *Gideon*, 372 US at 342–45. For an account of the case, see generally Anthony Lewis, *Gideon’s Trumpet* (Random House 1964). See also Laura Kalman, *Abe Fortas: A Biography* 180–83 (Yale 1990).

⁴⁰ 316 US 455 (1942).

⁴¹ *Id* at 471.

⁴² See Brief for the Petitioner, *Gideon v Cochran*, Docket No 155, *30 (US filed Nov 21, 1962) (available on Westlaw at 1962 WL 115120) (“*Gideon* Petitioner’s Brief”) (noting that only Alabama, Florida, Mississippi, North Carolina, and South Carolina resisted the trend).

⁴³ See *id* at *30–31 (cited in note 42). See also Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on “The Most Pervasive Right” of an Accused*, 30 U Chi L Rev 1, 19–20 (1962).

⁴⁴ See Kamisar, 30 U Chi L Rev at 20 (cited in note 43).

courts are necessities, not luxuries.”⁴⁵ In *Gideon*’s conclusion, Black expressly noted that, among the twenty-five states that weighed in at the Supreme Court, a lopsided number urged the abandonment of *Betts* as a relic, even when the case was initially decided: “Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was ‘an anachronism when handed down’ and that it should now be overruled. We agree.”⁴⁶ Similarly, the merits brief that Abe Fortas filed on behalf of Gideon contended that only a scarce few locales continued clinging to the bygone model: “The task here is essentially a modest one: to bring into line with the consensus of the states and professional opinion the few ‘stragglers’ who persist in denying fair treatment to the accused.”⁴⁷

B. Upstarts

An outlier that is an *upstart* involves a state law or practice that represents a departure from the dominant mode and exists in, at most, a few jurisdictions. The first few jurisdictions that adopt an innovation, that is, start up a model that has yet to become widely adopted. There is no guarantee, of course, that the upstart model will eventually sweep the nation, transforming what was an upstart into a newly dominant norm. Some upstarts, for better and for worse, simply remain upstarts. Yet it is crucial to bear in mind that upstarts at least potentially signify the wave of the future, rather than a mere legislative blip.

In *Romer*, the Supreme Court in 1996 invalidated a statewide referendum that Colorado voters passed four years earlier that prohibited state entities from treating sexual orientation as a protected attribute.⁴⁸ Three liberal enclaves in Colorado—Aspen, Boulder, and Denver—had previously expanded antidiscrimination laws to protect homosexuality, and the referendum, titled Amendment 2, in effect aimed to repeal that local legislation. Justice Anthony Kennedy’s opinion for the Court, deter-

⁴⁵ *Gideon*, 372 US at 344.

⁴⁶ *Id.* at 345.

⁴⁷ *Gideon* Petitioner’s Brief at *32 (cited in note 42). See also *id.* at *11, quoting *Mapp v. Ohio*, 367 US 643, 653 (1961) (“We believe that ‘time has set its face’ against *Betts v. Brady*.”). Intriguingly, when *Mapp* declared that the time had elapsed for deeming illegally seized evidence admissible, 50 percent of the states still employed the practice. See *Mapp*, 367 US at 680 (Harlan dissenting).

⁴⁸ *Romer*, 517 US at 623–24.

mining that Amendment 2 violated the Equal Protection Clause, repeatedly framed the measure as representing a sharp departure from standard legislation, one that constituted a decidedly unwelcome upstart.⁴⁹ Amendment 2, Kennedy wrote, not only “confounds [the] normal process of judicial review,” but it also “defies . . . conventional inquiry.”⁵⁰ Because no other statewide measure had previously deprived gays and lesbians of legal protections they had won at the local level, Kennedy could contend: “It is not within our constitutional tradition to enact laws of this sort.”⁵¹ Kennedy asserted Amendment 2’s “disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence,” and suggested “[t]he absence of precedent for Amendment 2 is itself instructive.”⁵²

In *Plyler*, the Supreme Court in 1982 invalidated a recently enacted Texas statute that permitted local school districts to exclude school-aged unauthorized immigrants from their public schools.⁵³ At that time, no other state had enacted legislation designed to eliminate unauthorized immigrants’ access to education.⁵⁴ Intriguingly, although the justices might have plausibly cast the Texas statute as an idiosyncratic departure from longstanding practice, they declined to portray *Plyler* as involving a jarring legislative innovation, applicable to only one state. To the contrary, Justice William Brennan’s opinion for the Court expressly noted that unauthorized immigrants “now live within

⁴⁹ See *id.* at 623–36.

⁵⁰ *Id.* at 632–33.

⁵¹ *Id.* at 633. See also *id.* (noting that “laws singling out a certain class of citizens for disfavored legal status or general hardships are rare”); *id.*, quoting *Louisville Gas & Electric Co v Coleman*, 277 US 32, 37–38 (1928) (“[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”).

⁵² *Romer*, 517 US at 633. *Romer*’s depiction of the Colorado referendum as an undesirable upstart bore strong similarities to the amicus brief submitted in the case by Professor Laurence Tribe. See Brief of Laurence H. Tribe, et al, as Amici Curiae in Support of Respondents, *Romer v Evans*, Docket No 94-1039, *3 (US filed June 9, 1995) (available on Westlaw at 1995 WL 17008432) (“Never since the enactment of the Fourteenth Amendment has this Court confronted a measure quite like Amendment 2—a measure that, by its express terms, flatly excludes some of a state’s people from eligibility for legal protection from a category of wrongs.”). For an early notice of the close connection between the arguments contained in *Romer* and Tribe’s brief, see Linda Greenhouse, *Colorado Law Void*, NY Times A1 (May 21, 1996).

⁵³ *Plyler*, 457 US at 230.

⁵⁴ See Linda Greenhouse, *Justices Rule States Must Pay to Educate Illegal Alien Pupils*, NY Times A1, D22 (June 16, 1982) (noting that Texas’s law was “the only one cutting off school funds for illegal aliens in the nation”).

various States,” and framed the decision as one holding national implications.⁵⁵ Similarly, Justice Lewis Powell began his concurring opinion by taking pains to emphasize that the Lone Star State was far from alone in feeling the effects of unauthorized immigration. “Access from Mexico into this country, across our 2,000-mile border, is readily available and virtually uncontrollable,” Powell wrote, before explicitly stating, “This is a problem of serious national proportions.”⁵⁶ Not surprisingly, the four dissenting justices agreed with the *Plyler* majority that the case raised important questions for the nation, rather than exclusively for Texas.⁵⁷

In *Moore*, the Supreme Court in 1977 determined that a local housing ordinance that permitted nuclear families to occupy a single household, but prohibited some extended families from doing so, violated the Fourteenth Amendment’s Due Process Clause.⁵⁸ Although the Supreme Court had previously authorized local governments to limit occupants of a residence to families, East Cleveland’s upstart ordinance defined “family” in such a narrow way as to prevent Inez Moore, a grandmother, from living with one of her grandchildren.⁵⁹ The five justices who voted to invalidate the ordinance emphasized that East Cleveland’s statutory definition of “family” sharply deviated from traditional definitions. Writing for a plurality, Powell called the ordinance “unusual,” and suggested that it flouted “[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children.”⁶⁰ That tradition, Powell insisted, “has roots . . . equally deserving of constitutional recognition” as protections afforded to nuclear families.⁶¹ In a similar vein, Brennan’s concurring opinion labeled the statute “senseless,” “arbitrary,” and “eccentric.”⁶² Justice John Paul Stevens’s opinion concurring in the judgment submitted that the ordinance was not merely rare or odd, but genuinely one of a kind, as

⁵⁵ *Plyler*, 457 US at 205. See also *id.* at 224, 230 (explicitly taking account of the costs to “the Nation” from Texas’s statute).

⁵⁶ *Id.* at 237 (Powell concurring).

⁵⁷ See *id.* at 242 (Burger dissenting).

⁵⁸ *Moore*, 431 US at 505–06. For an overview of *Moore*’s factual and legal backdrop, see generally Peggy Cooper Davis, *Moore v. East Cleveland: Constructing the Suburban Family*, in Carol Sanger, ed., *Family Law Stories* 77 (West 2008).

⁵⁹ *Moore*, 431 US at 496 n 2, 498–99 (Powell) (plurality), citing *Village of Belle Terre v. Boraas*, 416 US 1 (1974).

⁶⁰ *Moore*, 431 US at 496, 504.

⁶¹ *Id.* at 504.

⁶² *Id.* at 507 (Brennan concurring).

no locality had previously ventured such a constricted conception of family. “There appears to be no precedent for an ordinance which excludes any of an owner’s relatives from the group of persons who may occupy his residence on a permanent basis,” Stevens wrote.⁶³ At least one of the dissenting justices thought that the bizarre nature of East Cleveland’s statutory innovation should militate in favor of affirming its constitutionality. Justice Byron White contended that, precisely because the ordinance departed from the norm, affected residents should have little difficulty relocating outside of East Cleveland, “an area with a radius of three miles and a population of 40,000.”⁶⁴ While the ordinance precluded Moore from residing “with all her grandchildren in this particular suburb,” White noted “she is free to do so” anywhere beyond this statute’s modest reach.⁶⁵

C. Backups

An outlier that is a *backup* involves the adoption of a replacement state law or practice designed to preserve as much as possible of a legal model that either has recently been invalidated or seems certain to be invalidated in the near future. The few jurisdictions that respond to invalidation or its threat by seeking to retain the model, that is, back up or reinforce the preceding order, often by making only the slightest modifications. In so doing, backups attempt to extend the life of a model that has been marked for extinction.

In *Virginia*, the Supreme Court in 1996 rejected the state’s efforts to avoid admitting women to the all-male Virginia Military Institute (VMI) by devising a new educational program that would be available only to females.⁶⁶ After a lower court previously found that the gender exclusion violated the Equal Protection Clause, Virginia sought to preserve VMI’s all-male status by introducing the Virginia Women’s Institute for Leadership (VWIL).⁶⁷ By the 1990s—when Virginia introduced VWIL to back up VMI—not only did all of the federal military academies admit women, but South Carolina was the only other state that still

⁶³ Id at 520 (Stevens concurring in the judgment).

⁶⁴ *Moore*, 431 US at 550 (White dissenting).

⁶⁵ Id (White dissenting). For an illuminating commentary exploring a similar critique, see Robert A. Burt, *The Constitution of the Family*, 1979 S Ct Rev 329, 390–91.

⁶⁶ *Virginia*, 518 US at 519, 558.

⁶⁷ See id at 525–26.

contained an all-male military institution of higher education.⁶⁸ VWIL would not mirror VMI's distinctive "adversative" military training, but instead would focus on building self-esteem in a cooperative environment.⁶⁹ Justice Ruth Bader Ginsburg's opinion for the Court concluded that the hastily created VWIL did not offer women an equivalent educational environment and succeeded only in extending VMI's existence as an all-male enclave: "Virginia . . . while maintaining VMI for men only, has failed to provide any comparable single-gender women's institution. Instead, the Commonwealth has created a VWIL program fairly appraised as a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence."⁷⁰ In Ginsburg's assessment, Virginia's effort to reinforce VMI by erecting VWIL strongly resembled Texas's earlier effort to preserve racial segregation by creating an all-black law school after a lower court ruled that it could not categorically exclude blacks.⁷¹ The Supreme Court had, of course, invalidated Texas's second-rate law school in *Sweatt v Painter*,⁷² and Ginsburg concluded that *Sweatt's* logic compelled the same action in *Virginia*: "In line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI."⁷³

In *Coker*, the Supreme Court in 1977 held that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibited states from imposing the death penalty for raping an adult.⁷⁴ The Court's decision in *Coker* arrived five years after the Supreme Court cast severe doubt on capital punishment's legitimacy as a

⁶⁸ See *id.* at 569 (Scalia dissenting). Justice Ruth Bader Ginsburg also underscored that VMI had been founded more than 150 years earlier and noted that many leading universities initially refused to admit women but had long since abandoned all-male higher education. See *id.* at 520–21, 536 (majority) (noting that VMI opened in 1839); *id.* at 536–39 (majority) (noting admission practices at Harvard and other leading schools).

⁶⁹ *Id.* at 548.

⁷⁰ *Virginia*, 518 US at 553 (quotation marks and citations omitted).

⁷¹ See *id.* ("Virginia's VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African-Americans could not be denied a legal education at a state facility.").

⁷² 339 US 629 (1950).

⁷³ *Virginia*, 518 US at 554.

⁷⁴ *Coker*, 433 US at 600. For an insightful examination of Ruth Bader Ginsburg's role in drafting an amicus brief challenging the Georgia statute at issue in *Coker*, see generally Melissa Murray, *Inequality's Frontiers*, 122 Yale L J Online 235 (2013).

penalty for any crime in *Furman v Georgia*.⁷⁵ In response to *Furman*, an overwhelming majority of states immediately revised their statutes, making capital punishment a permissible punishment for at least some crimes.⁷⁶ But, as White noted in his plurality opinion in *Coker*, a very small number of states that still treated rape as a capital offense at the time of *Furman* sought to retain rape as a death-eligible offense in their revised statutes following *Furman*.⁷⁷ Indeed, of the sixteen states in which rape remained a capital offense in 1972, only three states provided the death penalty for raping an adult in their revised statutes.⁷⁸ When the Court decided *Coker*, moreover, two of those states' initial post-*Furman* death penalty statutes had been judicially invalidated altogether, and those states both omitted rape from their subsequent lists of death-eligible crimes.⁷⁹ As White explained in *Coker*, "The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman."⁸⁰ White's *Coker* opinion can be understood, thus, as invalidating Georgia's retention of capital punishment for raping an adult at least in part because it backed up a practice that enjoyed negligible legislative support throughout the nation. "The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures," White wrote, "but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."⁸¹

In *Lane*, the Supreme Court in 1939 invalidated Oklahoma's backup statute governing voter eligibility because it violated the Fifteenth Amendment's prohibition on race-based voting discrimination.⁸² The Oklahoma legislature enacted the backup statute in a special session following the Supreme Court's earlier decision in *Guinn v United States*,⁸³ which invalidated the state's

⁷⁵ 408 US 238, 239–40 (1972) (per curiam). See also *Coker*, 433 US at 591–92 (White) (plurality).

⁷⁶ See David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* 231–55 (Belknap 2010).

⁷⁷ *Coker*, 433 US at 593–94 (White) (plurality).

⁷⁸ See *id.* at 594 (noting that only Georgia, Louisiana, and North Carolina permitted capital punishment for raping an adult woman).

⁷⁹ See *id.*

⁸⁰ *Id.* at 595–96.

⁸¹ *Coker*, 433 US at 596 (White) (plurality).

⁸² See *Lane*, 307 US at 275–77.

⁸³ 238 US 347 (1915).

“grandfather clause.”⁸⁴ The backup statute at issue in *Lane* provided that anyone who voted in the election preceding the grandfather clause’s invalidation automatically remained an eligible voter.⁸⁵ For people who had not voted in the preceding election, the backup statute required these nonvoters to either register during an extremely short window or else permanently forfeit their voting rights.⁸⁶ Oklahoma’s backup voting statute was the only one of its kind in the nation.⁸⁷ Frankfurter’s opinion for the Court in *Lane* identified the statute as a backup measure, noting that the Oklahoma legislature’s special session was “obviously directed towards the consequences” of *Guinn*, and suggesting that the subsequent statute amounted to *Guinn*’s “simple-minded mode[] of discrimination” merely being replaced with a “sophisticated” mode.⁸⁸ After *Guinn*, Frankfurter wrote, “Oklahoma was confronted with the serious task of devising a new registration system consonant with her own political ideas but also consistent with the Federal Constitution.”⁸⁹ Frankfurter contended that what he referred to as Oklahoma’s “new scheme” smacked too much of the old order: “We are compelled to conclude . . . that the legislation . . . partakes too much of the infirmity of the ‘grandfather clause’ to be able to survive.”⁹⁰

⁸⁴ Id at 367. Oklahoma’s grandfather clause exempted white Oklahomans from passing an otherwise-mandatory literacy test. See *Lane*, 307 US at 276.

⁸⁵ *Lane*, 307 US at 270–71.

⁸⁶ Id at 271.

⁸⁷ See Klarman, *From Jim Crow to Civil Rights* at 236 (cited in note 3). In Klarman’s felicitous phrasing, Oklahoma’s backup statute “grandfathered the grandfather clause.” Id.

⁸⁸ *Lane*, 307 US at 270–71, 275.

⁸⁹ Id at 275.

⁹⁰ Id at 270, 275. *Lane* is only one of many election-law cases that can be regarded as rejecting backup plans. In *Harman v Forsenius*, 380 US 528 (1965), a case that resonates strongly with *Lane*, the Supreme Court in 1965 invalidated Virginia’s plan to sustain the poll tax that state legislators passed when they anticipated (correctly) that the Twenty-Fourth Amendment would win ratification. Id at 530–31, 544. Reading the handwriting on the constitutional wall, Virginia’s governor convened a special legislative session to preserve the poll tax to the greatest extent possible. Id at 531. Accordingly, the special session did not in any way alter the poll tax for state elections because the Twenty-Fourth Amendment did not purport to touch those elections. See id. For federal elections, however, the special session enacted legislation permitting voters either to pay a poll tax or to file a certificate of residence before every election. Id at 531–32. Writing for a unanimous Court, Chief Justice Earl Warren deemed Virginia’s modified plan an unconstitutional effort to preserve the poll tax by slightly diluting it: “For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed.” Id at 542. See also *Gomillion v Lightfoot*, 364 US 339, 347–48 (1960) (reversing dismissal of petitioners’ claims that a city’s redrawn district boundary lines were contorted to exclude nearly every black voter from the district). Relatedly, the Supreme Court’s successive rejection of numerous devices designed to maintain the

D. Throwbacks

The rarest outlier variant is a *throwback*, which involves a state law or practice that strongly resembles a model from an earlier era that has now generally disappeared from the scene. The first jurisdictions that revive a version of what had become an abandoned mode, that is, throw back or recall one's mind to a previous time with their newly enacted legislation or practices. In so doing, throwbacks breathe new life into a model that had been left for dead, but, as it turns out, was merely sleeping.

In *Kennedy*, the Supreme Court in 2008 held that the Eighth Amendment prohibited states from imposing capital punishment for the crime of raping a child.⁹¹ Although *Coker* had made clear in 1977 that the death penalty was an impermissible punishment for raping an adult woman, at least some ambiguity existed well after *Coker* regarding whether states could impose capital punishment for raping a minor.⁹² During the initial post-*Furman* era, three states had revised their death penalty statutes to permit capital punishment for child rape.⁹³ Yet state courts had, for various reasons, invalidated all three of those statutes stemming from the immediate post-*Furman* period.⁹⁴ But beginning in the mid-1990s—in the midst of frenzied national concerns about sexual assaults of children—states began enacting new measures that would make child rape a capital offense.⁹⁵ As

“white primary” in Texas can usefully be regarded as invalidating a series of backups. See *Smith v Allwright*, 321 US 649, 658–59 (1944) (recounting the Court's many engagements with the white primary in Texas over the previous seventeen years). Texas's many efforts to back up the white primary following each judicial invalidation caused the Court's run of decisions invalidating the various measures to resemble nothing so much as an extended session of Whac-A-Mole.

⁹¹ *Kennedy*, 554 US at 446–47.

⁹² *Coker* was somewhat unclear on the question, as the victim in the case was only sixteen years old when she was raped, but the Court's decision regarded her as an adult. See *Coker*, 433 US at 592, 605 (White) (plurality).

⁹³ See *id.* at 595.

⁹⁴ See *Collins v State*, 550 SW2d 643, 646 (Tenn 1977) (invalidating a mandatory capital punishment scheme); *Buford v State*, 403 S2d 943, 951 (Fla 1981) (holding capital punishment for sexual assault unconstitutional); *Leatherwood v State*, 548 S2d 389, 402–03 (Miss 1989) (invalidating capital punishment for child rape on state-law grounds).

⁹⁵ In 1994, Congress enacted a federal law requiring states receiving particular federal funds to create sex offender registries. Violent Crime Control and Law Enforcement Act of 1994, Pub L No 103-322, 108 Stat 1796, 2038–42, replaced by the Adam Walsh Child Protection and Safety Act of 2006, Pub L No 109-248, 120 Stat 587, 600. Two years later, Congress passed Megan's Law, which required public disclosure of the information contained in the sex offender registers. Megan's Law, Pub L No 104-145, 110 Stat 1345, 1345 (1996), replaced by the Adam Walsh Child Protection and Safety Act, Pub L No 109-248, 120 Stat at 600. For an overview of legislation responding to concerns

Justice Kennedy wrote for the Court in *Kennedy*, Louisiana in 1995 became the first of what eventually totaled six states that passed legislation permitting capital punishment for child rape.⁹⁶ This new wave of legislation could not, in Kennedy's estimation, counteract the "national consensus" opposing the death penalty for child rape, as forty-four states had declined to join the movement.⁹⁷ Kennedy further suggested that an absence of such provisions in federal law undercut the six state measures.⁹⁸ Writing on behalf of the four dissenting justices, Justice Samuel Alito suggested that what might be labeled the six throwback statutes at issue in *Kennedy* could have been a budding trend that may well have been on the verge of sweeping the nation. "I do not suggest that the six new state laws necessarily establish a 'national consensus' or even that they are sure evidence of an ineluctable trend," Alito wrote.⁹⁹ "But they might . . . have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage."¹⁰⁰

E. Clarifications

Before analyzing how this taxonomy of constitutional outliers both enriches and complicates current academic understandings, it may prove useful to explore two notions that clarify what the framework both does and does not purport to provide. First, the same underlying legal dispute may be best understood as falling into different outlier categories during particular moments, depending on changes in the surrounding legal context. Thus, for instance, when the US government initially filed suit against Virginia for VMI's refusal to admit women, that suit may most plausibly be viewed as attempting to suppress a holdout. Only after the state introduced VWIL as a substitute for VMI, in response to a lower court decision invalidating its admissions program, should *Virginia* be construed as challenging a backup.

about the sexual assault of children, see generally Monica C. Bell, *Grassroots Death Sentences? The Social Movement for Capital Child Rape Laws*, 98 J Crim L & Criminol 1 (2007).

⁹⁶ *Kennedy*, 554 US at 423. The other states that passed such laws were Georgia, Montana, Oklahoma, South Carolina, and Texas. *Id.*

⁹⁷ *Id.* at 423–24.

⁹⁸ See *id.* at 423.

⁹⁹ *Id.* at 461 (Alito dissenting).

¹⁰⁰ *Kennedy*, 554 US at 461 (Alito dissenting).

Second, and more importantly, it is crucial to understand that, even in the absence of altered context, different people may hold differing assessments regarding which outlier subset best houses a particular judicial opinion. Sorting outliers into these various categories constitutes an exercise in judgment and cannot be reduced to a mathematical equation that elicits absolutely correct and incorrect answers.¹⁰¹ Even if an overwhelming majority agrees that a judicial opinion falls into one outlier category, such broad agreement does not necessarily mean that others are wrong for conceiving of the opinion as falling into a different outlier category. To take one example that may at first blush appear to belong inescapably in a single category, reconsider the Court's opinion in *Griswold*. It hardly seems adventurous to maintain that most scholars would, if confronted with the outlier taxonomy, identify the Connecticut statute assessed in *Griswold* as a holdout. After all, only two states continued to regulate contraceptives in the marital context when the Court decided *Griswold*.¹⁰² Conceiving of *Griswold* as invalidating a holdout is not, however, the only way to construe the opinion as involving an outlier. Rather, the Connecticut statute, with its evidently unique regulatory focus on contraceptive *usage* (as distinct from distribution or possession), might also be validly understood as an upstart—one that no other jurisdiction ever emulated during its eighty-seven years of existence.¹⁰³ Although it may seem far-fetched to believe that anyone would seriously entertain the notion of an octogenarian upstart, this view of Connecticut's statute is far from fantastical. Indeed, perhaps the most well-known passage of Harlan's dissenting opinion in *Poe* can be understood as espousing this view. When Harlan explained the decisive factor leading him to condemn Connecticut's statute was its "utter novelty," he in effect advanced the notion of an elderly upstart.¹⁰⁴ "Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use . . .* a crime," Harlan wrote.¹⁰⁵ In Harlan's

¹⁰¹ See Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 97 (Yale 1978) ("Even when the law pretends to be a science, it is not, after all, mathematics.").

¹⁰² *Griswold* Appellants' Brief at *24 (cited in note 26).

¹⁰³ See *Griswold*, 381 US at 480, 485–86.

¹⁰⁴ *Poe*, 367 US at 554 (Harlan dissenting).

¹⁰⁵ *Id.*

eyes, that Connecticut failed to gain even a single fellow anti-use adherent after eight long decades sealed the statute's fate.

Whatever the truth of the First Amendment axiom holding that "one [person's] vulgarity is another's lyric,"¹⁰⁶ it seems abundantly clear that one person's holdout is another's upstart. Disagreements over the appropriate placement of judicial opinions involving various types of outliers might easily, if tediously, be adduced. Accordingly, the foregoing outlier taxonomy does not aim to achieve anything approaching universal agreement regarding where particular opinions should best be placed within each subset of outliers. Such a goal would not only make for an exercise in futility, but would extend into sheer folly. Nevertheless, disagreements about the proper designation for various outlier opinions should not be permitted to obscure the overarching point: rather than all outliers being the same, they can be sorted into various categories. One need not agree with the comparatively small-bore question of how particular decisions are categorized, in other words, to appreciate the larger notion that various outlier categories do in fact exist. Comprehending the existence of those various outlier categories, as will become evident, yields insight into significant matters in constitutional law and constitutional theory.

II. ANALYZING OUTLIERS

This Part aims to challenge several scholarly misperceptions that have flowed from treating the outlier notion as an undifferentiated mass instead of several distinct entities. Contrary to widespread understanding, outlier-suppressing opinions cannot all accurately be depicted as rejecting antiquated measures in favor of modern attitudes. Understanding the vulnerabilities of this modernization idea as applied to some outlier variants in turn complicates two prominent scholarly contentions associated with the judiciary's invalidation of outliers. First, suppressing outliers cannot, as is sometimes suggested, invariably be viewed as diminishing judicial review's tension with democracy; indeed, the invalidation of some outlier variants can be seen as only accentuating that tension. Second, suppressing outliers cannot, as is sometimes suggested, invariably be viewed as conflicting with all notions of federalism; indeed, at least one well-known notion of federalism might be understood, over time, to require the invalidation of most

¹⁰⁶ *Cohen v California*, 403 US 15, 25 (1971).

outlier variants. In addition, awareness of the outlier varieties undermines scholarly assertions that outlier-suppressing opinions necessarily invalidate measures that the nation regards as backward. Outlier measures often appear not to conflict as sharply with national attitudes as is commonly assumed. Finally, awareness of outliers' multiplicity also casts doubt on the claim that invalidating outlier measures holds merely insignificant import for the nation's constitutional order. This view accords an excessively marginal position to at least some opinions that reject outliers.

A. Modernization?

Appreciating the distinctions among outlier variants complicates the temporal notions that legal scholars frequently ascribe to judicial opinions invalidating a small number of state practices. Legal scholarship too often suggests that the Court's outlier-suppressing opinions, as a general proposition, reject practices that have already peaked and are now fading. Thus, in addition to Judge Easterbrook's broad claim that outlier-suppressing decisions reject state practices after they have "disappeared or dwindled,"¹⁰⁷ Professor Klarman has contended that such decisions reject "lingering outliers."¹⁰⁸ Professor Powe has similarly asserted that the Court eradicates "outmoded values"¹⁰⁹ when it "tak[es] on . . . anachronistic outliers."¹¹⁰ Although such temporal references pervade the scholarly literature on constitutional outliers, those statements are typically fleeting. Professor Strauss has, however, recently offered the most elaborate and articulate version of this idea, which he styles the judiciary's "modernizing role."¹¹¹ When judges interpret the Constitution in a modernizing fashion, Strauss argues, they "treat a statute's outlier status as evidence that it is archaic," "outmoded," and "a relic of an earlier time."¹¹² The primary distinguishing characteristic of modernizing courts, Strauss contends, is the view that "the constitutionality of a statute depends in large part on whether the statute, although still on the books, is a product of a

¹⁰⁷ Easterbrook, 59 U Chi L Rev at 370 (cited in note 2).

¹⁰⁸ Michael J. Klarman, *What's So Great about Constitutionalism?*, 93 Nw U L Rev 145, 178 (1998).

¹⁰⁹ Lucas A. Powe Jr., *The Warren Court and American Politics* 490 (Belknap 2000).

¹¹⁰ L.A. Powe Jr., 38 Wake Forest L Rev at 719 (cited in note 3).

¹¹¹ Strauss, 76 U Chi L Rev at 907 (cited in note 5).

¹¹² *Id.* at 887–88.

bygone era and is no longer supported by a political consensus.”¹¹³ In assessing whether current conditions have passed a statute by, Strauss argues that modernizing judges contemplate:

Is there a national trend that has left this statute an outlier, not found in other jurisdictions—thus suggesting that even if the statute enjoys local support, it is out of touch with sentiment in the society at large, on a subject on which local variation is not likely to persist?¹¹⁴

In the course of invalidating such outdated outliers, modernizing courts “look[] to the future, not the past,”¹¹⁵ and succeed in “bringing statutes up to date [by] anticipating changes that have majority support.”¹¹⁶ This “hostility to outliers,” Strauss maintains, is a core “feature of modernization.”¹¹⁷

This depiction of outlier-suppressing opinions as extinguishing practices that time has left behind applies quite sensibly to cases rejecting holdouts. By the mid-1960s—when the Supreme Court invalidated an anticontraceptive law in *Griswold*, rejected poll taxes in *Harper*, and required counsel for indigent criminal defendants in *Gideon*—many observers regarded those opinions as dragging a few straggling jurisdictions into constitutional modernity.¹¹⁸ Indeed, several justices’ opinions in that trio of cases expressly portrayed the decisions as invalidating anachronisms.¹¹⁹ Even justices who dissented in *Griswold* and *Harper* allowed that the contested statutes emitted the unpleasant odor of a

¹¹³ Id at 862.

¹¹⁴ Id.

¹¹⁵ Strauss, 76 U Chi L Rev at 860 (cited in note 5).

¹¹⁶ Id at 861.

¹¹⁷ Id at 864. Although he is careful to confess normative ambivalence about judicial modernization, Strauss nevertheless suggests that this approach accurately describes large swaths of current constitutional doctrine. Id at 860.

¹¹⁸ See, for example, Ernest Katin, *Griswold v. Connecticut: The Justices and Connecticut’s “Uncommonly Silly Law,”* 42 Notre Dame L Rev 680, 694 (1967) (contending that judicial deference to the legislature in *Griswold* would be “absurd in determining the constitutionality of an eighty-three-year-old statute having no contemporary relevance”); Editorial, *Taps for the Poll Tax*, NY Times 40 (Mar 25, 1966) (noting that “[t]he poll tax [w]as finally [] killed in America” when it was eliminated from the final four jurisdictions that retained it); William M. Beaney, *The Right to Counsel: Past, Present, and Future*, 49 Va L Rev 1150, 1153–54 (1963) (characterizing *Gideon* as “part of a wider movement in which the Court is turning away from the older style ‘fair trial’ rule,” and suggesting that “[p]erhaps the most surprising aspect of the overruling of *Betts v. Brady* is that it was so long in coming”).

¹¹⁹ See text accompanying notes 28–30, 37–38, 45–47.

bygone age.¹²⁰ It seems probable that *Gideon* does not contain similar allowances in dissent, moreover, only because the case generated no dissenting opinions at all.¹²¹

This modernization idea can also be viewed as illuminating the judiciary's regulation of backups. When the Court invalidated the backup regimes at issue in *United States v Virginia* and *Lane v Wilson*, nearly every other jurisdiction had already abandoned all-male military academies and grandfather clauses before the backup states sought to reinforce those practices.¹²² Accordingly, it sheds light on the underlying legal dynamic to view *Virginia* and *Lane* as eradicating measures that appeared outmoded. Virginia, virtually alone, stubbornly refused to abandon gender segregation of military academies; Oklahoma, literally alone, stubbornly refused to abandon the grandfather clause for voting. Although Georgia's revival of capital punishment for rape presents a somewhat more complicated legal backdrop, *Coker v Georgia* can also be understood as eliminating what was widely regarded as an antiquated practice.¹²³ Sixteen states permitted death sentences for rape when *Furman* invalidated capital punishment across the board in 1972.¹²⁴ While it may be difficult to view a practice that existed in nearly one-third of the nation as obsolete, it is important to consider the legislative response to *Furman*. Of the thirty-five states that scrambled to pass new death penalty statutes after *Furman*, only three of them aimed to include rape as a death-eligible offense, and Georgia stood alone in retaining capital punishment for raping an adult woman when the Court decided *Coker*.¹²⁵ Under the modernizing theory, such mild legislative activity might persuasively be viewed as indicating that enthusiasm for the practice had subsided.

Beyond the realm of holdouts and backups, though, the notion that outlier-suppressing opinions should be construed as modernizing decisions encounters considerable analytical difficulty. Predictably, nowhere is that analytical difficulty more pronounced than within the upstart category of outliers. When the judiciary reins in upstarts, after all, it is not casting aside meas-

¹²⁰ See *Griswold*, 381 US at 507 (Black dissenting); *Harper*, 383 US at 675 (Black dissenting).

¹²¹ See *Gideon*, 372 US at 335–36.

¹²² See text accompanying notes 68, 87.

¹²³ See text accompanying notes 80–81.

¹²⁴ *Furman*, 408 US at 341.

¹²⁵ See *Coker*, 433 US at 593–94, 596.

ures that large segments of society once embraced but have now rejected. Instead of attacking measures that seem to be on the verge of disappearing, upstart-suppressing opinions invalidate measures soon after they first appear. When the Court invalidates upstarts, thus, it may be less accurate to view such opinions as modernizing than as antimodernizing.

Consistent with this notion of antimodernization, the justices' opinions rejecting upstarts in *Moore*, *Romer*, and *Plyler* did not portray the various measures under review as archaic, or somehow disconnected from modern realities.¹²⁶ Such a sell would have been tough, if not impossible, given that all three measures had been enacted within a decade of arriving at the Court. In the shortest timeframe, not even four full years had elapsed between Colorado's passage of Amendment 2 and the Court's opinion in *Romer*.¹²⁷ Rather than awkwardly depicting upstart measures as outmoded, the justices instead moved decisively in the opposite direction—casting their opinions, in various ways, as efforts to restore a status quo that the new measures threatened. Justice Powell's plurality opinion in *Moore* strikes this theme with perhaps the greatest force. Not only does Powell concede that East Cleveland's housing ordinance can be understood as responding to modernity, but he goes further by portraying the decision as a defense of old-fashioned values. "Even if conditions of modern society have brought about a decline in extended family households," Powell wrote, "they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family."¹²⁸ Echoing some of these themes, Justice Kennedy's opinion for the Court in *Romer* portrayed Amendment 2 as an assault on "our constitutional tradition" and construed the decision as forestalling the "[s]weeping and comprehensive . . . change in legal status effected by this law."¹²⁹ *Moore* and *Romer* may thus be characterized as united in

¹²⁶ But see Strauss, 76 U Chi L Rev at 881–82 (cited in note 5) (construing *Moore* as invalidating an outlier statute and the Court's decision as modernizing); Klarman, 93 Nw U L Rev at 178 (cited in note 108) (contending broadly that the Court's outlier-suppressing opinions reject "lingering outliers," after identifying *Moore* and *Plyler* as outliers); Klarman, 89 Cal L Rev at 1749 (cited in note 8) (identifying *Moore*, *Plyler*, and *Romer* as outliers alongside *Griswold* and *Harper*).

¹²⁷ *Romer*, 517 US at 623.

¹²⁸ *Moore*, 431 US at 505 (Powell) (plurality).

¹²⁹ *Romer*, 517 US at 627, 633.

attempting to ensure continuity with the past, and evincing suspicion of newfangled measures that depart from tradition.

In *Plyler*, the justices who voted to invalidate the Texas statute did not contend that the measure sprung from some well of archaic anti-immigrant sentiment. Rather, they portrayed the measure as being all too consonant with current frustrations over unauthorized immigration and the federal government's failure to address the matter.¹³⁰ Unlike *Moore* and *Romer*, though, the decision in *Plyler* was justified not by a backward-looking focus on tradition and the statute's rupturing of that tradition. To the contrary, *Plyler* was substantially a forward-looking opinion, though not in the way that modernizing theorists might posit. The Court did not issue *Plyler*, in other words, because it anticipated that emerging attitudes toward unauthorized immigration would soon render the Texas statute an anachronism. Instead, the result in *Plyler* stemmed from a desire to avoid realizing the dystopian future that would result from affirming the statute. Writing for the Court, Justice Brennan explained: "This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents."¹³¹ Powell's concurring opinion amplified this theme. "These children . . . have been singled out for a lifelong penalty and stigma," Powell wrote.¹³² "A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment."¹³³

Turning away from upstarts, it also seems misguided to construe the Court's invalidation of the throwback regime in *Kennedy* as an opinion that "modernized" attitudes toward capital punishment for raping children.¹³⁴ Not only had six states adopted measures permitting the death penalty for child rape

¹³⁰ See *Plyler*, 457 US at 228 (noting the assertion that the law at issue was justified by the need to stem the tide of unauthorized immigration); id at 237 (Powell concurring) (lamenting Congress's lack of leadership in dealing with the problem of unauthorized immigration).

¹³¹ Id at 218–19 (majority).

¹³² Id at 238–39 (Powell concurring).

¹³³ Id at 239 (Powell concurring).

¹³⁴ For an example of the modernizing position, see Strauss, 76 U Chi L Rev at 865 (cited in note 5) (construing *Kennedy* as invalidating an outlier statute and the Court's decision as modernizing).

between 1995 and 2007, but three of these states joined the group during the two years preceding *Kennedy*.¹³⁵ These states—and several others that contemplated similar laws in the period leading up to *Kennedy*—were responding to a rising tide of public concern over sexual assaults against children.¹³⁶ Shortly after *Kennedy*, moreover, it became clear that the briefs filed in the case and the Court’s opinion overlooked that Congress had in 2006—a mere two years earlier—enacted federal legislation that made military personnel convicted of raping a child eligible for capital punishment.¹³⁷ It is extraordinarily difficult, thus, to view laws permitting capital punishment for child rape in 2008 as relics from a bygone age. Indeed, if any aspect of *Kennedy* conflicted with modern attitudes, it may be more accurate to portray the Court’s opinion itself as an anachronism rather than the statutes it invalidated.

1. Countermajoritarianism.

Understanding how modernization cannot account for all varieties of outlier-suppressing opinions challenges scholarly claims of how the Court’s invalidation of outliers implicates the relationship between democracy and judicial review. At least since Professor Alexander Bickel coined the term “counter-majoritarian difficulty,” constitutional law professors have dedicated considerable energy to wrestling with the fundamental question of how a nation that fancies itself a democracy can permit a bare majority of nine unelected justices to set aside legislation enacted by popularly elected officials.¹³⁸ Several scholars in recent years have argued that the apparent tension between

¹³⁵ See *Kennedy*, 554 US at 423 (noting that South Carolina and Oklahoma joined the group in 2006, and Texas followed suit in 2007).

¹³⁶ See, for example, Bell, 98 J Crim L & Criminol at 16–17 (cited in note 95) (suggesting that the media fascination with the stories of Megan Kanka and Jessica Lunsford—two children who were raped and murdered—helped to make people in this era receptive to capital child-rape legislation).

¹³⁷ See National Defense Authorization Act for Fiscal Year 2006 § 552(b), Pub L No 109-163, 119 Stat 3136, 3263.

¹³⁸ See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–23 (Bobbs-Merrill 1962). For a particularly important work that can be understood as grappling with Bickel’s difficulty, see generally Ely, *Democracy and Distrust* (cited in note 15). Bickel coined the term counter-majoritarian difficulty; he did not, of course, discover the underlying concept. For relatively early adumbrations of the concept, see generally James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129 (1893). For a sophisticated treatment building on Thayer’s skepticism of judicial review, see Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* 230–89 (Harvard 2006).

democracy and judicial review is more illusory than real, at least when one traces the actual contours of that relationship.¹³⁹ The countermajoritarian difficulty, these scholars claim, proves upon sufficiently close inspection to be not all that difficult. Strauss has suggested that the Court's modernizing opinions may in part stem from an effort to make the practice of judicial review more compatible with democracy. "Perhaps in response to the relentless criticism of judicial review as antidemocratic, the courts have, both consciously and unconsciously, shaped constitutional law so as to reduce the degree of confrontation between the judiciary and the elected branches," Strauss contends.¹⁴⁰ "If the courts are doing no more than bringing statutes up to date, and anticipating changes that have majority support . . . then judicial review has, in principle, a more comfortable place in democratic government."¹⁴¹ When the judiciary rejects an outlier institution, Strauss argues, its opinion "suggests that popular sentiment may no longer support the institution, and that a decision invalidating it will reinforce, not defeat, the democratic process."¹⁴²

The idea that invalidating outlier practices alleviates judicial review's tension with democracy must be examined through the lens of public sentiment on two different levels: the state and the national. On the state level, the notion that invalidating outlier practices relieves the countermajoritarian difficulty possesses explanatory appeal for at least some holdouts, but it appears to possess far less force for the remaining three outlier variants. To take the most glaring example, the holdout measure at issue in *Griswold* dated back nearly one century.¹⁴³ It seems plausible that when the Court invalidated the measure, it could no longer garner popular support even within the confines of Connecticut. Thus, in 1966, Connecticut's extreme anticontraceptive statute may have remained on the books, but there are plenty of reasons

¹³⁹ See, for example, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 4–9 (Farrar, Straus and Giroux 2009). For a critique of Friedman's approach, see Justin Driver, *Why Law Should Lead*, *New Republic* 28 (Apr 8, 2010).

¹⁴⁰ Strauss, 76 *U Chi L Rev* at 861 (cited in note 5).

¹⁴¹ *Id.*

¹⁴² David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 *Stan L Rev* 761, 768 (2004).

¹⁴³ *Griswold*, 381 US at 527 (Stewart dissenting) ("Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone.").

to believe that it did not reflect sentiment in the streets.¹⁴⁴ The inability to overturn existing legislation should not, of course, be confused with affirmative support for that legislation.¹⁴⁵ To the extent that the judiciary's invalidation of holdout measures can accurately be understood as implementing the views of current democratic majorities that—for whatever reason—cannot be implemented through local politics, such opinions might be viewed as less in tension with democracy.

When one pivots away from *Griswold's* invalidation of a holdout and examines other types of outliers, however, the tension between democracy and the judiciary's invalidation of even a small number of state practices becomes more apparent. When judges invalidate upstarts, backups, and throwbacks, they cannot typically claim that the invalidated measures simply embody the views of generations past and do not represent current attitudes within the jurisdiction. With all three nonholdout variants of outliers, some entity within the state has made clear that it prefers the policy that the judiciary subsequently invalidates. On the local level, it is difficult to dismiss such policies as the voices of those who are dead and gone when they are uttered by people from the here and now. In its not-so-distant past, the upstart has innovated, the backup has reaffirmed, and the throwback has reintroduced. If one assumes that the state level is at times the appropriate locus for decisionmaking authority, then judicial decisions that set aside recently enacted upstarts, backups, and throwbacks do not seem to alleviate judicial review's pinch on democracy.¹⁴⁶ If anything, they seem to accentuate it.

Turning from the state to the national level, it is certainly true that outlier-suppressing opinions do not invalidate measures found in a majority of states. Extrapolating from this point, some legal scholars come perilously close to positing that because outlier measures exist in only a few jurisdictions, such measures must not enjoy majority support on a national scale.

¹⁴⁴ See, for example, Garrow, *Liberty and Sexuality* at 256 (cited in note 27) (observing that the Catholic hierarchy in Connecticut considered the statute a “bad one because it was unenforceable”).

¹⁴⁵ See Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 106 (Chicago 1991) (observing that statutes are “hard to amend or repeal” and, “[c]onsequently, a statute may stay on the books indefinitely even though it has become out of step with current public policy”).

¹⁴⁶ See Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 *S Ct Rev* 103, 151–52 (criticizing majoritarian scholars for ignoring state decisionmaking authority).

Klarman has written: “Historically, the justices, perhaps comprehending the risk [of issuing unpopular decisions], generally have used the Constitution to suppress outlier state practices. Such decisions are, almost by definition, likely to generate support among national majorities.”¹⁴⁷ In suggesting that, even if local majorities condemn outlier-suppressing opinions, national majorities will still almost certainly applaud them, this notion has the effect of minimizing Bickel’s countermajoritarian difficulty.

Yet it is far from clear that laws and practices found in only a small number of states should be taken to indicate that nationwide majorities currently oppose the measures. The potential discrepancy between state practices and national popular support may be most readily grasped in the context of opinions that invalidate upstarts and throwbacks. Even if majorities in all fifty states favored the underlying measures, lags often exist between when such support materializes and when the support translates into legislation—assuming that it ever does so. If the Supreme Court eliminates upstarts and throwbacks found in a small number of states before they enjoy an opportunity to spread widely, it may well invalidate what, in the absence of judicial intervention, would have become a dominant practice.

This point that laws and practices found in only a few states may conceal broad public support is not exclusively a law professor’s hypothetical. Rather, the point finds some support in polling data concerning measures in outlier-suppressing opinions. In the wake of the Supreme Court’s invalidation of the throwback measure in *Kennedy*, for instance, 55 percent of respondents to a national public opinion poll supported capital punishment for child rape and only 38 percent opposed it.¹⁴⁸ Perhaps not surprisingly, the Democratic and Republican presidential nominees in 2008—Senators Barack Obama and John McCain—appeared to concur with majority sentiment, as the candidates immediately denounced *Kennedy* for rejecting capital punishment in the context of what they both called a “heinous” crime.¹⁴⁹ Similarly, although no public opinion polling gauged contemporaneous reaction to the Court’s decision invalidating the upstart measure

¹⁴⁷ Klarman, 89 Cal L Rev at 1749 (cited in note 8).

¹⁴⁸ Quinnipiac University, *American Voters Oppose Same-Sex Marriage* (July 17, 2008), online at <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/national/release-detail?ReleaseID=1194> (visited Aug 12, 2014).

¹⁴⁹ Linda Greenhouse, *Execution Ruled Out, 5-4, If Life Isn’t Taken*, NY Times A1, A19 (June 26, 2008).

in *Plyler*, it hardly seems implausible to maintain that a national majority may have supported Texas's upstart effort to exclude unauthorized immigrants from public schools. Two years after *Plyler*, a Gallup poll determined that 55 percent of the public deemed unauthorized immigration a "very important" problem, and respondents in states bordering Mexico expressed that view only slightly more frequently than citizens in other states.¹⁵⁰ In May 1995, when Gallup conducted the first nationwide poll asking respondents whether they favored or opposed "providing free public education, school lunches, and other benefits to the children of" unauthorized immigrants, 67 percent expressed opposition and only 28 percent expressed support.¹⁵¹ It seems mistaken, then, to construe opinions rejecting outliers as almost definitionally finding support among national majorities.

None of the foregoing should be taken as suggesting that the Supreme Court should avoid invalidating outlier practices because of these potential strains on democracy. Sometimes, the Court must issue decisions that contravene majority preferences in order to fulfill its constitutional role.¹⁵² But when judges invalidate outliers, they should not delude themselves into thinking that their opinions invariably display democracy's imprimatur. On the state level, most variants of outlier-suppressing opinions cannot accurately be viewed as disabling statutes that no longer enjoy support in the modern world. To the contrary, the nonholdout outlier variants typically involve measures that have recently been endorsed by current constituencies. On the national level, moreover, it is mistaken to believe that outlier measures—almost by necessity—do not currently enjoy majority support throughout the nation. The countermajoritarian difficulty, even if the matter is elevated to the national level, would seem to retain some of its thorns after all.

¹⁵⁰ See Tom Morganthau, et al, *Closing the Door?*, Newsweek 18, 20 (June 25, 1984) (reporting that "residents of states along the Mexican border are only slightly more likely . . . to call the problem 'very important'" than citizens nationally).

¹⁵¹ Stanley Elam and Lowell C. Rose, *Phi Delta Kappa/Gallup Poll of the Public's Attitudes toward the Public Schools*, 77 Phi Delta Kappan 41, 52 (1995).

¹⁵² See *West Virginia State Board of Education v Barnette*, 319 US 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

2. Federalism.

These temporal considerations similarly complicate dominant readings of the relationship between outlier-suppressing opinions and notions of federalism. Some scholars have suggested that the relationship between outlier suppression and federalism is almost inherently a hostile one.¹⁵³ When judicial opinions interpret the Constitution to suppress outliers, scholars note, those opinions impose national uniformity and undercut state autonomy, thus impinging on what they regard as the very hallmark of federalism. Yet just as it is crucial to remember that not all outliers are relics in need of modernization, the same observation holds for theories of federalism.¹⁵⁴ By examining the outlier variants through various federalism lenses, it becomes possible to see that scholars should not view outlier-suppressing opinions as colliding with all federalism ideals with equivalent force.

To be sure, the notion that outlier-suppressing opinions clash with federalism contains some explanatory power—at least as applied to certain notions of federalism. If one values federalism primarily because it permits different states to arrive at different solutions, outlier-suppressing opinions typically should be viewed as clashing with federalism.¹⁵⁵ New York and Florida are extremely different states, this state-autonomy version of federalism runs, and courts should not force them to follow precisely the same rules. Under a related theory, to the extent that one values federalism primarily because it permits people to relocate from one state to a different state whose policies better reflect their values, outlier-suppressing opinions also should generally be seen as disrespecting federalism.¹⁵⁶ Under this competitive-federalism theory, for instance, New Yorkers who object to state income taxes may decide to express that policy

¹⁵³ See, for example, Powe, *The Warren Court* at 494 (cited in note 109) (contending that outlier-suppressing opinions eradicate respect for federalism); Easterbrook, 59 U Chi L Rev at 370 (cited in note 2) (contending that outlier-suppressing opinions violate federalism); Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L Rev 365, 418 (2009) (same).

¹⁵⁴ See Michael S. Greve, *The Upside-Down Constitution* 4 (Harvard 2012) (observing that federalism carries multiple concepts rather than a single one).

¹⁵⁵ See Michael W. McConnell, *Evaluating the Founders’ Design*, 54 U Chi L Rev 1484, 1487 (1987). For a recent comprehensive overview of the voluminous literature on federalism, see generally Vicki C. Jackson and Susan Low Bloch, *Federalism: A Reference Guide to the United States Constitution* (Praeger 2013).

¹⁵⁶ See McConnell, 54 U Chi L Rev at 1493–94 (cited in note 155). See also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J Polit Econ 416, 423–24 (1956).

preference by relocating to Florida, a state that eschews income taxation.¹⁵⁷ Both of these federalism theories stand in considerable tension with judicial opinions that suppress all outlier variants because the theories are predicated on maintaining and permitting the existence of diverse measures that satisfy people with diverse preferences. Such state diversity seems plainly incompatible with outlier-suppressing opinions.

Yet not all theories of federalism are predicated on maintaining diverse approaches within states across all points in time. The federalism theory that Justice Louis Brandeis espoused in *New State Ice Co v Liebmann*¹⁵⁸—which portrayed states as laboratories of experimentation—is often understood as rejecting the idea that federalism necessarily entails fostering a diverse set of state approaches in perpetuity.¹⁵⁹ For Brandeis, a diverse set of state approaches to answering particular questions was a temporary, rather than a permanent, feature of federalism. Consistent with the scientific metaphor of experimentation, Brandeis’s conception of federalism implicitly views states as attempting to discover a single “correct” policy.¹⁶⁰ After the various state experiments yield evidence and it becomes apparent which policy best addresses a problem, Brandeis’s version of federalism assumes that all states will eventually adopt the policy.¹⁶¹ Thus, following a period of permitting decentralized approaches, the laboratories of experimentation would ultimately be expected to produce a uniform approach.

Adherents to this Brandeisian conception of federalism can be understood as harboring quite distinct attitudes toward different outlier-suppressing opinions, depending on the particular type of outlier that the judiciary attacks. In the context of outliers, Brandeis’s language from *New State Ice* warrants extended scrutiny because it makes clear that he was most concerned with judicial invalidations of one particular type of outlier:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may

¹⁵⁷ Instead of voting with their feet, New Yorkers might also express that policy preference by attempting to have New York change its law. See generally Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard 1970).

¹⁵⁸ 285 US 262 (1932).

¹⁵⁹ *Id.* at 311 (Brandeis dissenting).

¹⁶⁰ Edward A. Purcell Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 NY L Sch L Rev 635, 673 (2006).

¹⁶¹ See *id.*

be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.¹⁶²

Here, when Brandeis extols the ability of states to depart from a uniform approach and try something “novel,” he can best be understood as counseling skepticism of outlier-suppressing opinions that invalidate upstarts. After all, when the Court invalidates an upstart measure, it precludes an experiment from getting off the ground and effectively freezes the status quo in place. Eliminating an upstart could have deleterious consequences for the nation, in Brandeis’s estimation, because it thwarts the kind of trial-and-error process that may eventually lead states throughout the nation to adopt what was once a genuinely novel approach.¹⁶³ Brandeis’s theoretical aversion to upstart-suppressing opinions seems unmistakable.

It is far less clear, however, that Brandeis’s federalism theory would be equally offended by judicial opinions that rein in nonupstart types of outliers. The Brandeisian conception of federalism may evince the least skepticism toward a judicial opinion that invalidates a holdout. If many states have independently rejected an approach that was once popular and only a few states continue with the old model, Brandeisians might plausibly view that trend as evidence that the experiment has run its course and construe the holdout states as offering merely an antiquated, “incorrect” answer to a policy question. The laboratory notion of federalism might view a backup-suppressing opinion in much the same way. With backups and holdouts alike, states can be regarded not as embarking on some novel approach, but only attempting to preserve a model that has been widely discarded as inferior. Yet it is possible that the Brandeisian might regard the backup as importantly distinct from the holdout: if the backup measure is regarded as sufficiently distinct from its predecessor so as in effect to inaugurate a new experiment, then

¹⁶² *New State Ice*, 285 US at 311 (Brandeis dissenting).

¹⁶³ See *id.* at 310 (Brandeis dissenting) (“The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation.”).

the Brandeisian would be extremely reluctant to invalidate the backup measure. Finally, with throwback measures, it seems likely that Brandeis would regard states as attempting to revive a policy solution that has already been widely deemed inferior. But, as with holdouts, a caveat applies: if the throwback measure in question is regarded as sufficiently distinct from the measures of the earlier era that it constitutes an altogether new experiment, then the Brandeisian would seek to avoid invalidating the measure in its infancy.

The claim here is, thus, not that jurists committed to advancing a Brandeisian conception of federalism would invariably uphold state measures that were upstarts and invariably invalidate state measures involving all three remaining outlier variants. No statement so unequivocal can even remotely be supported. Brandeis himself, in voting to invalidate Oregon's upstart legislation requiring public school attendance in *Pierce v Society of Sisters*,¹⁶⁴ demonstrated that his willingness to indulge what he must have regarded as ill-conceived experimentation was not limitless.¹⁶⁵ Still, it is important to understand that Brandeisian federalism admonishes judges to be particularly aware of the heightened hazards that accompany the judiciary's invalidation of upstarts. At a minimum, it seems safe to say that outlier-suppressing opinions invalidating holdouts, backups, and throwbacks generally pose less acute problems for Brandeisian notions of federalism. It may not even be too much to suggest that such opinions sometimes actually advance Brandeisian federalism, given that they can be construed as extending the "correct" answer to states that are slow to heed the lessons provided by the laboratories. In all events, though, broad statements about the acrimonious relationship between outlier-suppressing opinions and federalism should give way to accounts that allow for finer gradations.

¹⁶⁴ 268 US 510 (1925).

¹⁶⁵ Intriguingly, some Catholic leaders perceived the Oregon public school statute at issue in *Pierce* as an opening salvo that portended virulent anti-Catholic legislation across the nation. See generally *Oregon's Outlawing of Church Schools*, *Literary Digest* 34 (Jan 6, 1923). If this interpretation is possibly accurate, it suggests that the Court's opinion in *Pierce* contained broader significance than some outlier-minded theorists have allowed.

B. Backwardness?

Related to this modernization theory, scholars have suggested that outlier statutes embody values that the nation collectively deems “different” or “backward,” and that the Court’s opinions rejecting such outliers impose “national values” in flushing out these “backwaters.”¹⁶⁶ On this view, the Court’s outlier-suppressing opinions identify the troglodytes in our midst and effectively force them to see the light. But viewing outliers as invariably disconnected from the country at large is misleading because it may offer an unduly sanguine conception of the attitudes that exist within the larger nation. This sharp delineation of states—and even whole regions of the country—into camps of the enlightened and the unenlightened may do a poor job of capturing complex realities on the ground. A local attitude commonly dismissed as backward and outré may sometimes be less distinct from the whole than is initially assumed. Referring to a particular measure as an outlier should not be taken to mean that the larger society contains either no, or only scant, traces of the animating viewpoint.

In analyzing the outlier-as-backwater framework, students of law might learn something from statistics, the field from which legal scholars have imported the term outlier. When statisticians encounter a datum that they consider an outlier, they

¹⁶⁶ Powe’s scholarship features this theme prominently. See Powe, *The Warren Court* at 376 (cited in note 109) (contending that *Griswold* rejected laws in Connecticut and “its backward cousins”); id at 492 (suggesting that outlier-suppressing opinions “bring[] backwaters into the mainstream”). See also L.A. Powe Jr., *Does Footnote Four Describe?*, 11 Const Commen 197, 197 (1994) (contending that the Court’s decisions between 1938 and 1973 “create[d] a set of national norms [and] eradicat[ed] in the process that which was different or backward”); id at 210 (contending that the Court’s opinions rejected “what was different—backward”); L.A. Powe Jr., Book Review, *Are “the People” Missing in Action (and Should Anyone Care)?*, 83 Tex L Rev 855, 888 (2005) (contending that the Court’s outlier-suppressing opinions impose “national values”). But Powe’s scholarship is not the only work that articulates such notions. See, for example, Tushnet, *Why the Constitution Matters* at 100 (cited in note 3) (contending that outlier-suppressing opinions might be understood as imposing national ideas on “backwater[]” practices); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 Yale L J 1037, 1042–43 (1980) (contending that *Moore* invalidated “backwater[]” ideas). Klarman’s generalized claim that outlier-suppressing opinions check “recalcitrant” states can be viewed as sounding a similar theme. See, for example, Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* ix (Oxford 2013) (“Sometimes courts take dominant social mores, convert them into constitutional commands, and then use them to suppress outlier practices in a few recalcitrant states.”). The term “recalcitrant” seems to apply most readily to backup measures, but would seem to be an inapposite term for other outlier variants.

do not automatically reject it out of hand. Instead, they sometimes scrutinize the datum in an effort to understand what, if anything, the isolated value signals about the larger data set.¹⁶⁷ In that same spirit, legal scholars might do well to contemplate what, if anything, an outlier signals about the larger nation. Sometimes, upon close inspection, legal scholars may conclude that the outlier signals nothing particularly meaningful about the country as a whole. But other times, perhaps even most times, legal scholars may determine that the jurisdictional outlier, while certainly representing a noteworthy point in the data, is not completely aberrant from the remainder of the nation.

The Supreme Court's opinion in *Romer* may offer the most compelling evidence of how the outlier-as-backwater theory sometimes obscures more than it clarifies. Legal scholars have routinely labeled Colorado's upstart Amendment 2 measure not merely an outlier but have also called it "extreme," "highly unusual," and "an obvious outlier."¹⁶⁸ These descriptions are not inaccurate; Colorado truly did tread where no state had previously trod. But such descriptions also seem incomplete, as they fail to address precisely why this measure first appeared in Colorado. Without elaboration, such terms may give readers the misimpression that Colorado contained unusually backward antigay attitudes that manifested themselves in the statewide referendum. Professor Eskridge has offered perhaps the most overt portrayal of Colorado as a backwater on matters of sexual orientation. *Romer*, in Eskridge's estimation, is best understood alongside *Griswold's* rejection of the Connecticut holdout statute and *Virginia's* invalidation of the effort to back up VMI.¹⁶⁹ Each of those opinions, he argues, illustrates the Supreme Court's penchant for targeting "easy kill[s]" that merely reject "outlier laws" lacking national support.¹⁷⁰ According to Eskridge, the

¹⁶⁷ See Robert M. Lawless, Jennifer K. Robbennolt, and Thomas S. Ulen, *Empirical Methods in Law* 222 (Aspen 2010) ("[O]utliers should not always be viewed simply as annoyances or as problematic data that need to be corrected. In some instances, the identification of outliers can be a discovery that is worth examining further.").

¹⁶⁸ Tushnet, *Why the Constitution Matters* at 140 (cited in note 3) ("No state had a measure as extreme as Colorado's in its denial of protection to gays and lesbians."); Sunstein, 122 Harv L Rev at 263 (cited in note 3) (contending that *Romer* "str[uck] down a highly unusual Colorado state constitutional amendment" and asserting that *Romer* was one of many instances in which the Court "insist[s] that states must obey a national consensus"); Michael J. Klarman, Book Review, *Rethinking the History of American Freedom*, 42 Wm & Mary L Rev 265, 281 n 79 (2000) (calling Amendment 2 "an obvious outlier").

¹⁶⁹ See Eskridge, 100 Mich L Rev at 2372 n 1436 (cited in note 3).

¹⁷⁰ *Id.*

Supreme Court shrinks from issuing opinions that protect minority rights when doing so may prove unpopular, a tendency that led it to trail national attitudes before offering any judicial protection for sexual minorities.¹⁷¹ When the Supreme Court finally issued *Romer*, what Eskridge in 1999 called “[a]bout the only significant progay decision the Supreme Court has ever handed down,” the opinion simply invalidated a measure from “a small-population, outlier state and after an incendiary antigay campaign.”¹⁷²

This account of Colorado as a “small-population” state with backward attitudes on sexual orientation seems hard to square with reality. Colorado was the twenty-sixth-most-populous state in the nation, according to the 1990 census.¹⁷³ Nor was Colorado’s campaign “incendiary,” at least as assessed by contemporary standards. To the contrary, legal commentary following the passage of Amendment 2 expressly lamented that “the Colorado campaign’s more muted emphasis” enabled it to be more effective than the vitriolic approach taken by a campaign in Oregon during the same year.¹⁷⁴

It similarly strains credulity to maintain that Colorado enacted Amendment 2 because the state harbored citizens with outlandish views on sexual orientation when compared to the nation as a whole. During the mid-1990s, the nation seemed to best be characterized as closely divided, and even ambivalent, on the question of what legal rights should be extended to gays and lesbians. It is important to remember, for instance, that when the Court decided *Romer*, more than twenty states still had antisodomy statutes on the books.¹⁷⁵ Colorado was not among them; in 1971 it became among the first states to jettison its antisodomy law.¹⁷⁶ This ambivalence may most readily be captured, however,

¹⁷¹ Id at 2372.

¹⁷² Id at 2372 n 1436.

¹⁷³ US Census Bureau, *Population Change and Distribution: 1990 to 2000*, *2 (Apr 2001), online at <http://census.gov/prod/2001pubs/c2kbr01-2.pdf> (visited Aug 12, 2014).

¹⁷⁴ Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 Harv CR–CL L Rev 283, 289–90 (1994).

¹⁷⁵ See Garrow, *Liberty and Sexuality* at 725 (cited in note 27).

¹⁷⁶ See *Romer*, 517 US at 645 (Scalia dissenting). The spur for Colorado to abandon its antisodomy statute in 1971 was not necessarily enlightened views on gay equality, but rather its adoption of the Model Penal Code (MPC), which did not include a statute prohibiting sodomy between consenting adults. But even if the initial motivation for losing the antisodomy statute was mundane, Colorado’s decision to make sure it stayed lost is noteworthy. After all, approximately half of the states that revised their laws based on the MPC during this era either expressly retained their antisodomy provisions or later

by public opinion data.¹⁷⁷ Depending on how questions about the issue were framed, responses demonstrated volatile swings. According to a *Newsweek* poll taken in *Romer's* wake, 84 percent of respondents indicated homosexuals should receive equal job opportunities.¹⁷⁸ That incredibly high percentage might be taken to suggest that the Colorado voters who supported Amendment 2 held views on sexual orientation that contradicted the views held by overwhelming percentages of Americans. Yet the further one delves into this poll, the murkier the picture becomes. Although 73 percent of respondents acknowledged that homosexuals faced discrimination, for instance, “only 27 percent believe[d] more effort [was] needed to protect homosexual rights.”¹⁷⁹ In response to a polling question asking whether there should be “special legislation” guaranteeing equal rights for homosexuals, moreover, a mere 52 percent of respondents indicated that such laws should not exist.¹⁸⁰ This figure is almost identical to the 53 percent of Coloradans who supported Amendment 2, which its backers framed as denying “special rights” on the basis of sexual orientation.¹⁸¹ One should, of course,

reinstated them. See Ellen Ann Andersen, *Out of the Closets & into the Courts: Legal Opportunity Structure and Gay Rights Litigation* 63, 72–73 (Michigan 2005). That Colorado declined to do so made it a relatively progressive state on such matters.

¹⁷⁷ This ambivalence is also revealed in *Romer's* amicus briefs. To be sure, seven states—Iowa, Maryland, Massachusetts, Minnesota, Nevada, Oregon, and Washington—and the District of Columbia joined an amicus brief arguing that Amendment 2 violated the Fourteenth Amendment. Brief of Amici Curiae States of Oregon, et al, Supporting Respondents, *Romer v Evans*, Docket No 94-1039, *1–5 (US filed June 19, 1995) (available on Westlaw at 1995 WL 17008441). But seven states—Alabama, California, Idaho, Nebraska, South Carolina, South Dakota, and Virginia—also joined an amicus brief arguing that Amendment 2 should be affirmed in the Supreme Court. Brief of Amici Curiae States of Alabama, et al, in Support of Petitioner, *Romer v Evans*, Docket No 94-1039, *1–6 (US filed Apr 21, 1995) (available on Westlaw at 1995 WL 17008426). Not all of those states can be dismissed as hotbeds of homophobia. Indeed, California, Nebraska, and South Dakota no longer had antisodomy provisions on the books in 1996. Some may suspect that the pro-Amendment 2 amicus brief was framed at a high level of generality and simply affirmed the legitimacy of statewide popular referenda. But the brief went further, expressly contending that Amendment 2 did not run afoul of the Equal Protection Clause or any other constitutional provision. *Id.* at *11–17.

¹⁷⁸ David A. Kaplan and Daniel Klaidman, *A Battle, Not the War*, *Newsweek* 24, 29 (June 3, 1996).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* As the accompanying *Newsweek* article explained, “The majority does not support legislation guaranteeing equal rights for gays—the kind of measures Coloradans are now free to adopt.” *Id.*

¹⁸¹ *Leading Cases*, 110 Harv L Rev 135, 156–57 (1996). Will Perkins of Colorado for Family Values, which backed Amendment 2, stated: “Our objectives have never been to discriminate. . . . Our position is that sexual orientation is not an acceptable criterion for special rights.” Dirk Johnson, *Colorado Homosexuals Feel Betrayed*, *NY Times* 39 (Nov 8,

avoid placing too much stock in polling results. Nevertheless, when Amendment 2 is placed within the context of the larger nation, it seems inaccurate to depict Colorado's views on sexual orientation as unusually retrograde. Instead, it seems closer to the mark to view the state as a microcosm of the nation.

A more convincing explanation for the upstart status of Amendment 2 may concentrate less on the unusual nature of Coloradans' antigay sentiment, and more on the state's particular political realities. In addition to its lengthy and extensive history of passing statewide referenda through popular sovereignty, it risks only mild exaggeration to view Colorado as containing a few extremely liberal islands surrounded by a sea of conservatism.¹⁸² In other words, the reason Mississippi, say, did not enact a version of Amendment 2 is not because its residents held more progressive views on sexual orientation than Coloradans. They almost certainly did not.¹⁸³ Instead, Mississippi lacked an Amendment 2 because residents of Biloxi, Gulfport, and Jackson held less progressive views on sexual orientation than residents of Aspen, Boulder, and Denver. Even as *Romer* begins to approach its twentieth anniversary, not a single locality in Mississippi protects employees against discrimination on the basis of sexual orientation. Repealing antidiscrimination laws for gays and lesbians was evidently not on the legislative agenda in Mississippi—and many other states—because local antidiscrimination laws did not exist to be repealed.

One reason for this common misperception that the Court's invalidation of outliers involves backwater statutes may stem from the long shadow that *Griswold* casts over the phenomenon of constitutional outliers. Professor Whittington has accurately written: "Of course, the classic instance of regime enforcement against state outliers came in *Griswold v. Connecticut*, where

1992). Justice Antonin Scalia's dissent in *Romer* advanced a version of this idea: "The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment." *Romer*, 517 US at 653 (Scalia dissenting). For an incisive account of how proponents of antigay measures became more sophisticated over time, particularly in reframing their measures as merely opposing "special rights," see Schacter, 29 Harv CR-CL L Rev at 302 (cited in note 174).

¹⁸² See Johnson, *Colorado Homosexuals Feel Betrayed* at 39 (cited in note 181) (noting that Amendment 2 "was rejected soundly in Denver, Boulder, and Aspen[,] [b]ut it passed in most suburbs and rural communities").

¹⁸³ See Andrew Gelman, Jeffrey Lax, and Justin Phillips, *Over Time, a Gay Marriage Groundswell*, NY Times WK3 (Aug 22, 2010) (observing that among the fifty states Mississippi has had relatively low support for same-sex marriage).

the Court articulated a new constitutional right to privacy in order to strike down Connecticut's unique and rarely enforced ban on contraceptives."¹⁸⁴ Whittington's opening two words here are, of course, instructive. Legal scholars often treat *Griswold* as the paradigmatic instance of a judicial opinion invalidating an outlier statute.¹⁸⁵ Indeed, when legal scholars list various Supreme Court decisions that have suppressed outliers, they occasionally begin with *Griswold*—even though the opinion arrives first in neither alphabetical nor chronological order.¹⁸⁶ When it comes to constitutional outliers, then, it seems that *Griswold* is literally first among equals.

Griswold's taking pride of place among outlier-suppressing opinions is at once understandable and regrettable. It is understandable because, viewed in isolation, the Connecticut statute's one-of-a-kind status appears the very apotheosis of the outlier phenomenon and does so in a particularly arresting context. That any statewide statute prohibited the use of contraceptives during the mid-1960s, let alone among married couples, understandably strikes many observers as the epitome of a statute that seemed well outside the mainstream. *Griswold's* eminent position among outlier-suppressing opinions is clinched by its doctrinal connection to *Roe v Wade*,¹⁸⁷ which serves to elevate the opinion in modern constitutional controversy to a height that no other decision involving outliers can surpass. But *Griswold's* looming presence over the entirety of constitutional outliers is regrettable because it seems to have helped instill a distorted scholarly understanding of the broader outlier phenomenon. Although *Griswold* may present, in Professor Amar's terms, "the most illustrious instance" of outlier suppression, the opinion should not be mistaken for the most illustrative instance.¹⁸⁸ The quintessential holdout should not be conflated with the quintessential outlier because, as should by now be evident, the broad outlier category defies the search for a single quintessence.

¹⁸⁴ Whittington, *Political Foundations of Judicial Supremacy* at 120 (cited in note 3).

¹⁸⁵ See, for example, Rosen, *The Most Democratic Branch* at 4 (cited in note 3) (noting the Court's propensity for "identif[ying] a strong national sentiment and impos[ing] it on a few isolated state outliers (striking down an obsolete state ban on contraceptives, for example)"); Sunstein, 122 Harv L Rev at 260 (cited in note 3) (treating the statute at issue in *Griswold* as the quintessential outlier).

¹⁸⁶ See, for example, Klarman, 82 Va L Rev at 16–17 (cited in note 5) (listing *Griswold* first as an instance of the Court's outlier jurisprudence).

¹⁸⁷ 410 US 113 (1973).

¹⁸⁸ Amar, *America's Unwritten Constitution* at 117 (cited in note 3).

Even *Griswold*, when contextualized within its larger era, reveals the frailties of the outlier-as-backwater framework. Connecticut certainly boasted the most comprehensive anticontraceptive statute in the country, closely followed by Massachusetts; it is tempting to view these two states as utterly isolated, even fetid, backwaters.¹⁸⁹ In actuality, though, those two states' anticontraceptive statutes were not nearly so isolated as one might assume when assessed from the standpoint of the 1960s. While Connecticut and Massachusetts were alone in prohibiting all sale and distribution of contraceptives, more than half of the states in the nation joined them with statutes forbidding advertisements for contraceptives.¹⁹⁰ Nearly one-third of the states, moreover, had laws permitting only certain authorized medical professionals to distribute contraceptives.¹⁹¹ Only a minority of states had no laws whatsoever on the books regulating contraceptives during that time.¹⁹² Thus, to the extent one regards any contraceptive regulation during the 1960s as evincing backwater attitudes, it is important to understand that the backwaters engulfed much of the country.

An examination of the voting margins by which the Court has rejected outlier statutes further undermines the notion that the Court's opinions invariably involve bringing what the justices generally regard as local backwaters into the national current. If the outlier measures embodied attitudes that observers widely agreed were alarming and eccentric, one might expect Supreme Court justices to invalidate outlier laws by consistently lopsided margins. Judicial assessments of constitutional law cannot, of course, be reduced solely to a judge's normative inclinations; but neither would it be wise to deny that such inclinations often play an important role in shaping judicial assessments of a statute's constitutionality.¹⁹³ Justices are selected from a national elite that—regardless of political affiliation—might be thought to have a common disdain for measures that they deem beyond the pale and therefore might be able to locate common ground in

¹⁸⁹ See C. Thomas Dienes, *Law, Politics, and Birth Control* 44–47 (Illinois 1972).

¹⁹⁰ See *id.* at 317–19.

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 *Harv L Rev* 32, 40 (2005) (noting that constitutional law often assumes a “political” cast); Klarman, *From Jim Crow to Civil Rights* at 5–6 (cited in note 3) (emphasizing how a judge's normative views shape interpretations of indeterminate constitutional text).

invalidating such outré measures.¹⁹⁴ Yet the Supreme Court has often suppressed outliers by not overwhelming majorities, but the narrowest of margins.¹⁹⁵ When a statute's constitutionality hinges on the votes of one or two justices, it seems difficult to believe that informed observers almost uniformly view the measure as a blatant affront to the current constitutional order.

The Court's resolution of the upstart measure at issue in *Plyler* illustrates the point. Perhaps somewhat surprisingly from today's vantage point, the statute that *Plyler* invalidated was not contemporaneously derided as a law that only an outlandish cowboy mentality prevalent in Texas could possibly find constitutional. Four justices found the Texas statute passed constitutional muster.¹⁹⁶ This 5–4 split in *Plyler* hardly suggests the sort of lopsided spread that one might anticipate if the statute embodied truly bizarre attitudes from a national perspective. When the Court discussed *Plyler* in conference, moreover, Justice William Rehnquist referred to the schoolchildren targeted by Texas's law as "wetbacks."¹⁹⁷ That a Supreme Court justice would use such inflammatory language in discussing a closely divided case with colleagues vividly attests to the animus directed toward unauthorized immigrants during the early 1980s—even on the national stage, even in the most rarefied environments. Perhaps even more tellingly, though, only one of Rehnquist's colleagues—Justice Thurgood Marshall—appears to have orally objected to his using the term.¹⁹⁸ At least one close Court watcher thought that *Plyler* quite conceivably could have resulted in a decision that affirmed the Texas statute: John Roberts, who was a special assistant to the US attorney general when the Court issued *Plyler*, coauthored a memorandum lamenting the solicitor general's failure to support the Texas law because he speculated it may have prompted the Court to uphold the statute.¹⁹⁹

¹⁹⁴ See Klarman, *From Jim Crow to Civil Rights* at 6, 452 (cited in note 3) (noting that justices are drawn from society's elite).

¹⁹⁵ In Professor Adrian Vermeule's terms, the lesson here is that the Supreme Court is a "they," not an "it." See generally Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 *J Contemp Legal Issues* 549 (2005).

¹⁹⁶ See *Plyler*, 457 US at 242 (Burger dissenting, joined by White, Rehnquist, and O'Connor).

¹⁹⁷ Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* 475 (Houghton 2010).

¹⁹⁸ See *id.*

¹⁹⁹ See Linda Greenhouse, *What Would Justice Powell Do? The "Alien Children" Case and the Meaning of Equal Protection*, 25 *Const Commen* 29, 30–31 (2008).

Plyler is not, moreover, unusual in eliciting considerable support from justices to uphold the challenged outlier. Only five justices voted to invalidate the throwback death penalty statute for child rape in *Kennedy* and the upstart local housing ordinance in *Moore*.²⁰⁰ Similarly, only six justices voted to prohibit the upstart antigay legislation at issue in *Romer*, the holdout poll tax in *Harper*, and the backup death penalty for rape at issue in *Coker*.²⁰¹ Indeed, the only three archetypal outlier-suppressing opinions explored in Part I that garnered lopsided majorities occurred when the Court invalidated the anticontraceptive holdout statute in *Griswold*, the holdout jurisdictions' views on counsel for indigent defendants in *Gideon*, and the backup establishment of VWIL in *Virginia*. All three of those cases saw at least seven justices vote to invalidate the measures under review.²⁰²

When one examines the frequency with which the Supreme Court's outlier-suppressing decisions invalidate measures that lower courts have affirmed, a similar pattern emerges—again belying the notion that outliers always strike judges as backward. *Griswold* reversed a Connecticut Supreme Court opinion that validated the anticontraceptive statute.²⁰³ *Harper* reversed a three-judge district court opinion that upheld Virginia's imposition of the poll tax.²⁰⁴ *Gideon* reversed a Florida Supreme Court opinion that denied counsel to an indigent defendant charged with a felony.²⁰⁵ *Moore* reversed an Ohio Court of Appeals decision that upheld a grandmother's conviction for the crime of living with her grandchild.²⁰⁶ *Virginia* reversed a Fourth Circuit opinion that validated the establishment of VWIL as an alternative to admitting women to VMI.²⁰⁷ *Coker* reversed a

²⁰⁰ *Kennedy*, 554 US at 411; *Moore*, 431 US at 494.

²⁰¹ *Romer*, 517 US at 621; *Harper*, 383 US at 664; *Coker*, 433 US at 584. Powell's opinion rejected the imposition of capital punishment on *Coker*'s particular facts, but refused to categorically prohibit states from imposing the death penalty for rape. See *Coker*, 433 US at 603–04 (Powell concurring in the judgment in part and dissenting in part).

²⁰² *Griswold*, 381 US at 480; *Gideon*, 372 US at 336; *Virginia*, 518 US at 518.

²⁰³ *Griswold*, 381 US at 480, 485, revg *State v Griswold*, 200 A2d 479 (Conn 1964).

²⁰⁴ *Harper*, 383 US at 664–65 & n 2, 670, revg *Harper v Virginia State Board of Elections*, 240 F Supp 270 (ED Va 1964).

²⁰⁵ *Gideon*, 372 US at 336–37, 345, revg *Gideon v Cochran*, 135 S2d 746 (Fla 1961).

²⁰⁶ *Moore*, 431 US at 496–97, 506, revg *City of East Cleveland v Moore*, No 33888 (Ohio App July 18, 1975).

²⁰⁷ *Virginia*, 518 US at 528–29, 557–58, revg *United States v Virginia*, 44 F3d 1229 (4th Cir 1995).

Georgia Supreme Court opinion that upheld imposition of the death penalty for raping an adult woman.²⁰⁸ *Lane* reversed a Tenth Circuit opinion that upheld Oklahoma's effort to preserve the grandfather clause.²⁰⁹ And *Kennedy* reversed a Louisiana Supreme Court opinion that deemed capital punishment permissible for raping a minor.²¹⁰

These reversals effectively mean that, had the Court declined to grant relief, all of these outlier measures would have remained in place. Indeed, among all of the archetypal outlier cases, the Court's opinions in *Romer* and *Plyler* were the only two that affirmed lower court decisions.²¹¹ It is at least somewhat confounding that lower courts granted relief only in those particular two cases because the upstart regimes at issue appeared to rank among the most popular outlier measures that the Court has invalidated.²¹² *Romer* and *Plyler* thus do precious little to confirm the narrative of Supreme Court justices issuing outlier-suppressing opinions that merely invalidate backwater statutes.²¹³

When legal scholars portray outliers as emerging only from isolated backwaters, the move bears some resemblance to modern politicians who proclaim to audiences on the campaign

²⁰⁸ *Coker*, 433 US at 586, 600, revg *Coker v State*, 216 SE2d 782 (Ga 1975).

²⁰⁹ *Lane*, 307 US at 269, 277, revg *Lane v Wilson*, 98 F2d 980 (10th Cir 1938).

²¹⁰ *Kennedy*, 554 US at 413, revg *State v Kennedy*, 957 S2d 757 (La 2007).

²¹¹ See *Romer*, 517 US at 636; *Plyler*, 457 US at 230.

²¹² See text accompanying notes 150–51, 178–81.

²¹³ In the broader context of the Court's outlier-suppressing opinions, this marked pattern of reversing lower court decisions does not appear aberrational. Consider the Court's outlier-suppressing opinions that involved gender equality during the 1970s. See, for example, *Duren v Missouri*, 439 US 357, 359–60, 370 (1979), revg *State v Duren*, 556 SW2d 11 (Mo 1977) (reversing the Missouri Supreme Court opinion that validated a state measure granting women, but not men, an automatic exemption from jury duty on request); *Craig v Boren*, 429 US 190, 191–92 (1976), revg *Walker v Hall*, 399 F Supp 1304 (WD Okla 1975) (reversing the three-judge district court opinion that validated the state's inequitable statute for alcohol consumption); *Taylor v Louisiana*, 419 US 522, 523, 525 (1975), revg *State v Taylor*, 282 S2d 491 (La 1973) (reversing the Louisiana Supreme Court opinion that validated the state's measure requiring women, but not men, to volunteer in order to be eligible for juror service); *Reed v Reed*, 404 US 71, 74, 77 (1971), revg *Reed v Reed*, 465 P2d 635 (Idaho 1970) (reversing the Idaho Supreme Court opinion that validated the state's male-preferring intestacy statute). It is certainly true that the Supreme Court has for many years far more frequently reversed lower court decisions than it has affirmed them. See Lee Epstein, et al, *The Supreme Court Compendium: Data, Decisions, and Developments* 244–45 (CQ Press 4th ed 2007) (noting reversal rates). Yet one might suppose that outlier-suppressing opinions would buck this broad trend if the outlier measures struck the bench as truly backward. That appears not to be the case.

stump: *This is the real America*.²¹⁴ The outlier-as-backwater notion works in a similar way, only in reverse. *That outlier jurisdiction is not the real America*, the academic argument might be formulated. But skepticism of both essentialist notions about the nation and its ideological commitments would appear to be warranted. Thus, the overly broad view that construes all outlier-suppressing opinions as challenging backward measures may contain some backwardness of its own.

C. Insignificance?

A direct result of the misperceptions that outlier-suppressing opinions simply modernize outdated statutes and flush out backwaters is the notion that these opinions involve issues that are of, at most, modest significance to the nation generally. Outlier-suppressing decisions may matter to the people who have the misfortune of living within the borders of a particular outlying state, scholars allow, but that should not be mistaken for understanding the decisions to hold national significance. Professor Tushnet contends: “Almost by definition ‘outliers’ aren’t all that important to the nation as a whole, no matter how difficult they make life in one or another state.”²¹⁵ Professor Klarman advances a version of this claim with particular verve: “Invoking the Constitution to invalidate extreme outlier practices hardly represents a momentous contribution to the story of American freedom.”²¹⁶ Outlier-suppressing opinions, Klarman insists, “are consonant with dominant national norms and thus are best described as reflecting rather than producing national unity.”²¹⁷ When judges issue outlier-suppressing opinions, this analysis suggests, they are not shaping society’s foundations; instead, they are merely tweaking society’s edges. Articulating this view, Easterbrook has contended that the Court’s penchant for challenging outliers, rather than “changing the rules under which most persons lived,” is consistent with its ex-

²¹⁴ See Paul Krugman, *E Pluribus Unum*, NY Times A19 (July 5, 2013) (critiquing the idea of the “real America” as rural, white, and Protestant).

²¹⁵ Tushnet, *Why the Constitution Matters* at 103–04 (cited in note 3).

²¹⁶ Klarman, 42 Wm & Mary L Rev at 279 (cited in note 168).

²¹⁷ Klarman, 93 Nw U L Rev at 172 (cited in note 108) (contending that constitutional interpretation “deploy[s] a national consensus to suppress outliers”). See also Klarman, *From Jim Crow to Civil Rights* at 453 (cited in note 3) (“More constitutional law than is commonly supposed reflects this tendency to constitutionalize consensus and suppress outliers.”).

tremely narrow ability to produce social reform.²¹⁸ “To understand the effect of law,” Easterbrook instructs, “you must look at effects on the margin.”²¹⁹ Whittington has echoed Easterbrook’s sentiment, contending that judges “correct small-scale injustices by bringing outliers into line with mainstream norms” and suggesting the effects of such opinions occur “at the margin.”²²⁰ The language that legal scholars often use to describe outlier-suppressing opinions—drawn from the context of domestic work that purportedly demands only modest exertion—bolsters this notion that such opinions do not present constitutional issues of central importance. Thus, when the Supreme Court invalidates outlying measures, it engages in what scholars have variously termed “mopping up operations,”²²¹ “cleaning up operations,”²²² and “housecleaning.”²²³

The Court’s outlier-suppressing opinions do not, however, always involve interventions in realms that are ancillary to foundational national concerns. At least some of the Court’s outlier-suppressing opinions help to ensure that measures currently found in a small number of states do not spread to other states and eventually become the dominant approach. There is a vast difference between invalidating what appears to be among the last of a few remaining statutes and invalidating the first of what could be a great many statutes to come. In rejecting some outlier variants, judges do not discard a bouquet that has overstayed its welcome so much as nip an unwelcome development in the statutory bud. After glimpsing what could be the nation’s legislative future, the Court sometimes rejects the outlying legislation and issues an opinion that is designed to prevent that

²¹⁸ Frank H. Easterbrook, *Bills of Rights and Regression to the Mean*, 15 Harv J L & Pub Pol 71, 74 (1992).

²¹⁹ *Id.* at 77.

²²⁰ Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 NC L Rev 773, 834 (2002).

²²¹ Mark Tushnet, *The Role of Courts in Social Change: Looking Forward?*, 54 Drake L Rev 909, 925 (2006). See also Steven G. Calabresi, *Substantive Due Process after Gonzales v. Carhart*, 106 Mich L Rev 1517, 1539 (2008) (referring to outlier-suppressing opinions as “mopping up”); Mark Tushnet, *Political Power and Judicial Power: Some Observations on Their Relation*, 75 Fordham L Rev 755, 759 n 19, 767 (2006) (referring to outlier-suppressing opinions as “mopping-up operations” and “mop[ping] up outliers”).

²²² Eskridge, 100 Mich L Rev at 2373 (cited in note 3). See also Tushnet, *Why the Constitution Matters* at 101 (cited in note 3) (contending that elected officials “assigned the job of cleaning up the statute books to the Supreme Court”); William N. Eskridge Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U Pa L Rev 419, 513 (2001) (labeling outlier-suppressing decisions as “clean-up operations”).

²²³ Eskridge, 150 U Pa L Rev at 513 (cited in note 222).

future development from taking hold. Even if outlier-suppressing opinions are not—in the moment—widely appreciated as carrying national import, those opinions may ultimately still play an important role in shaping the entire nation's constitutional order. By issuing opinions that severely constrain the likelihood that other jurisdictions will successfully implement an invalidated measure, some outlier-suppressing opinions can indeed be viewed as representing significant contributions to the nation's freedom.

The Supreme Court's invalidation of the upstart statute at issue in *Plyler* richly illustrates how outlier-suppressing opinions can, at least sometimes, shape foundational values across the nation. Texas may well have been the first state in the nation that sought to exclude unauthorized immigrants from its public schools, but it certainly was not the last. In 1994, California voters adopted Proposition 187, a measure that would have, among other things, prohibited unauthorized immigrants from attending public schools.²²⁴ It did not take long for a federal district court to conclude that the measure conflicted with *Plyler's* interpretation of the Equal Protection Clause.²²⁵ In 2011, the Alabama legislature enacted a broad immigration law that included a provision requiring public school officials to ascertain the immigration status of enrolling students.²²⁶ One year later, the Eleventh Circuit rejected the education provision because it contravened *Plyler*.²²⁷ Perhaps even more consequential than these judicial invalidations of state laws, though, is how civil rights groups have wielded *Plyler* against school districts that have demanded information from enrolling students that unauthorized immigrants cannot provide. Those enrollment practices are not confined to school districts located in either southern states or states that border Mexico. Instead, such practices have been found in states throughout the nation, including Illinois, Indiana, Maryland, Michigan, Nebraska, New Jersey, and New York.²²⁸

²²⁴ See David A. Sklansky, *Proposition 187 and the Ghost of James Bradley Thayer*, 17 UCLA Chicano-Latino L Rev 24, 35 (1995). The measure passed with 59 percent of the vote. *Id.*

²²⁵ See *League of United Latin American Citizens v Wilson*, 908 F Supp 755, 774 (CD Cal 1995).

²²⁶ Beason-Hammon Alabama Taxpayer and Citizen Protection Act (HB 56), 2011 Ala Laws 535, codified at Ala Code Ann § 31-13-27(a).

²²⁷ See *Hispanic Interest Coalition of Alabama v Alabama*, 691 F3d 1236, 1245 (11th Cir 2012).

²²⁸ See Kirk Semple, *US Warns Schools against Checking Immigration Status*, NY Times A14 (May 7, 2011); Jaclyn Brickman, Note, *Educating Undocumented Children in*

In recent years, civil rights groups have motivated state education officials in all of those jurisdictions to warn school districts against requiring information from enrolling students that would cause unauthorized immigrants to reveal their immigration status.²²⁹ Two years ago, the federal government joined the chorus condemning these enrollment practices when the Department of Justice relied on *Plyler* to inform school administrators that the practices violated federal law.²³⁰

The Court's opinion in *Plyler* should not be minimized as some trivial event in the nation's constitutional history. Although the decision initially applied exclusively to Texas, *Plyler* has enjoyed broad applicability throughout the nation, serving as a bulwark against persistent measures that would deprive unauthorized immigrants of an education. It is difficult to identify many opinions in the entire US Reports that have had more profound consequences, in more important arenas, than *Plyler's*, guaranteeing that the schoolhouse doors cannot be closed to one of society's most marginalized groups. Even though many Americans disagree with *Plyler*—or, rather, *precisely because* of that broad disagreement—the opinion should be understood as making a vital contribution to closing the gap between the nation's lofty rhetoric and its lowly realities.²³¹

In suggesting that outlier-suppressing opinions deal with statutes that are insignificant to the nation as a whole, scholars risk unduly discounting the contingent nature of legal history. Simply because modern American society has assumed its current form, in other words, should not be mistaken for meaning that its features were somehow foreordained to assume this particular shape.²³² Yet outlier-minded legal scholars can sometimes seem

the United States: Codification of Plyler v. Doe through Federal Legislation, 20 Georgetown Immig L J 385, 398 & n 76 (2006).

²²⁹ See Semple, *US Warns Schools against Checking Immigration Status*, NY Times at A14 (cited in note 228); Brickman, Note, 20 Georgetown Immig L J at 398 n 76 (cited in note 228).

²³⁰ See Semple, *US Warns Schools against Checking Immigration Status*, NY Times at A14 (cited in note 228).

²³¹ Brennan's opinion for the Court in *Plyler* contended that Texas's statute affronted American ideals: "The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." *Plyler*, 457 US at 219.

²³² See generally Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era before Brown*, 115 Yale L J 256 (2005) (encouraging scholars to avoid examining early legal efforts to achieve racial desegregation with *Brown* in mind as the ultimate destination).

to engage in a type of Whiggish approach to the nation's legal development, in which the past is viewed as an inevitable march toward enlightenment.²³³ After all, a strikingly large number of core outlier-suppressing opinions occupy an exalted place in legal academia. Many constitutional scholars believe the decisions in *Gideon*, *Griswold*, *Harper*, *Romer*, *Plyler*, *Moore*, and *Virginia* not only reached the correct outcomes, but also that the opinions advanced the cause of justice.²³⁴ These cases inspire feelings not only of respect, but also of reverence. And while outlier-minded theorists warn against exaggerating the jurisdictional magnitude of these opinions, their analysis often suggests that society was already moving toward the destination of justice; the Court's decisions simply expedited the nation's arrival.²³⁵ Indeed, it is sometimes suggested that in invalidating outliers, the Court simply predicts the future: the justices determine in which direction the political winds are blowing, identify an obvious outlier, and issue an opinion that anticipates a statute's inevitable demise.²³⁶ If these outlier-suppressing opinions embodied laudable values and the nation as a whole would have certainly embraced these values regardless of the Court's intervention, then the opinions can be viewed as modest steps in the nation's Whiggish procession to enlightenment.

²³³ See Herbert Butterfield, *The Whig Interpretation of History* 9–33 (G. Bell 1931); Ernst Mayr, *When Is Historiography Whiggish?*, 51 *J Hist Ideas* 301, 301–03 (1990).

²³⁴ See generally, for example, Morton J. Horowitz, *The Warren Court and the Pursuit of Justice* (Hill and Wang 1998).

²³⁵ See, for example, Strauss, 76 *U Chi L Rev* at 895 (cited in note 5) (“[I]t seems reasonably clear that part of what is going on in the areas where the Supreme Court is modernizing . . . is that the justices are hastening along developments that are occurring anyway but that the justices would like to see move faster.”). At least one observer contemporaneously portrayed *Harper*'s invalidation of the poll tax as (unnecessarily) expediting a foreordained outcome:

[T]he Court made law in the poll tax case when it was clearly not necessary to do so. If ever there was a legal device doomed for extinction, it was the poll taxes of the South, where politicians are suddenly clamoring for issues to attract the thousands of newly-enfranchised Negro voters.

Fred P. Graham, *Court's Final Word on Poll Taxes: "No,"* *NY Times* 198 (Mar 27, 1966).

²³⁶ See, for example, Strauss, 76 *U Chi L Rev* at 861 (cited in note 5) (contending that modernization involves predicting the future). Klarman's work emphasizes how the Court's legitimacy flows from the accuracy of its predictions. See Klarman, 89 *Cal L Rev* at 1756 (cited in note 8) (“[T]he Court's reputation may depend, to a significant degree, on the Justices' skill at predicting the future.”). Such contentions build on the foundational work of Alexander Bickel. See Bickel, *The Supreme Court and the Idea of Progress* at 102–81 (cited in note 101) (contending that the Supreme Court “remembers the future” in deciding cases).

This conception of outlier-suppressing opinions suffers from two interrelated shortcomings. First, this view inaccurately suggests that American attitudes can broadly be mapped onto a narrative of ascent, with each generation embracing ever more egalitarian attitudes than the one that preceded it. But the Court has issued outlier-suppressing opinions in critical areas—including unauthorized immigration, capital punishment, and criminal procedure—in which attitudes seem to defy such tidy accounts. Each of those issues has, as a matter of political contestation, elicited undulating attitudes from American citizens, not unidirectional ascent toward enlightenment.²³⁷ Second, this view unduly minimizes the Supreme Court's role in forging the nation's constitutional values. The justices are not mere bystanders to the nation's constitutional conversation, but full-throated participants who alter its very contours.²³⁸ Portraying the justices as mere forecasters—picture nine meteorologists in black robes—conceals their ability to influence the nation's constitutional climate. Even when the justices depict their outlier-suppressing opinions as merely expediting matters, it is important to understand that those opinions are themselves constitutive of the modern constitutional order. Professor John Hart Ely expressed this point memorably many years ago: “[T]he fact that things turned out as the Supreme Court predicted may prove only that the Supreme Court is the Supreme Court. Thus by predicting the future the justices will unavoidably help shape it, and by shaping the future they will unavoidably . . . shape the present.”²³⁹

Understanding that the Supreme Court's outlier-suppressing opinions cannot all be dismissed as of marginal significance may help scholars to gauge the normative desirability of judicial review with greater accuracy. Some left-leaning scholars have in recent years questioned whether judicial review has been a net negative or positive force in advancing and

²³⁷ See Greenhouse, 25 Const Commen at 29–30, 46, 48–50 (cited in note 199) (noting nativist moments that periodically seize the nation); *Death Penalty* (Gallup 2014), online at <http://www.gallup.com/poll/1606/death-penalty.aspx> (visited Aug 12, 2014) (charting the vacillating rates of support for the death penalty from 1936 to the present); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U Pa L Rev 1361, 1421–27 (2004) (noting fluctuations in public opinion polling about the rights of criminal defendants).

²³⁸ See Archibald Cox, *The Warren Court: Constitutional Decisions as an Instrument of Reform* 26–27 (Harvard 1968) (contending that Supreme Court justices help to shape national values).

²³⁹ Ely, *Democracy and Distrust* at 70 (cited in note 15).

preserving liberal causes.²⁴⁰ If outlier-suppressing opinions are understood as merely expediting inevitable developments, then it would seem safe to minimize, or perhaps even ignore altogether, such opinions in assessing whether judicial review has made egalitarian contributions to American society. Yet as the above analysis suggests, outlier-suppressing opinions might not be dismissed so casually. If some such opinions involved not only the relatively modest question of *when* (within a concentrated period of time a constitutional right would be recognized), but instead resolved the fundamental question of *whether* (a constitutional right would be recognized at all), then assessing judicial review's value may require grappling with outlier-suppressing opinions at extended length. Properly evaluating the egalitarian contributions of the Court's opinions rejecting outliers could require some left-leaning scholars to undertake a fundamental reassessment of whether judicial review has overall proven beneficial to the causes they hold dear. But even if that reassessment bolsters the case supporting judicial review in only a relatively modest fashion, it may still prove decisive. If, as some have suggested, determining whether judicial review's benefits have outweighed its costs presents an exceedingly close call, even a small amount of weight could make all the difference.²⁴¹

One reason scholars may understate the import of some outlier-suppressing opinions is that the term has overwhelmingly been applied in retrospect. Because the term outlier dates back only to the early 1990s, most archetypal cases involving outliers had long since been decided before they received the appellation. That passage of time could lead to a distorted perspective, as an opinion that initially struck observers as momentous and consequential may over time seem to recede in significance as the opinion becomes simply another fixture of the nation's constitutional framework. While the passage of time may render all judicial opinions at least somewhat vulnerable to such retrospective diminution, outlier-suppressing opinions would seem particularly prone to downgrading precisely because they formally reject

²⁴⁰ See, for example, Tushnet, *Taking the Constitution Away from the Courts* at 172–73 (cited in note 10) (questioning how much judicial review has aided liberal and progressive causes); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 247–48 (Oxford 2004) (advocating a severely diminished role for judges in constitutional interpretation).

²⁴¹ See, for example, Tushnet, *Taking the Constitution Away from the Courts* at 152 (cited in note 10) (“On balance, the question of whether judicial review benefits progressive and liberal causes more than it harms them seems rather difficult.”).

practices found in only a small number of states. In the context of constitutional outliers, then, hindsight may sometimes yield not perfect vision but myopia.

This notion that seeing outlier-suppressing opinions in the rearview mirror can lead scholars to accord those opinions insufficient import is not mere conjecture. Rather, it acutely describes shifting academic assessment of the Court's most prominent outlier-suppressing opinion issued since the term outlier entered constitutional parlance. When the Court decided *Romer* in 1996, some outlier-minded scholars initially portrayed the opinion as resolving a fraught question in a highly divisive arena.²⁴² The question raised by Colorado's Amendment 2 was regarded as so divisive, in fact, that scholars originally declined to label *Romer* an outlier-suppressing opinion altogether, even in scholarship that viewed cases through that prism.²⁴³ With the passage of time, however, scholars eventually came to classify *Romer* as an outlier-suppressing opinion and, in the process, reconceptualized it as an opinion of marginal import.²⁴⁴

This downgrading of *Romer*'s significance suggests that the outlier framework has, at times, suffered from a form of hindsight bias.²⁴⁵ A few years after the Court invalidated Amendment 2, a statewide measure expressly prohibiting gays and lesbians from seeking the protection of antidiscrimination laws would have likely grown to seem more and more unusual—and perhaps over time even come to seem unthinkable. But that perception of increasing strangeness is inescapably influenced by the constitutional world that the opinion in *Romer* itself helped to create.²⁴⁶ *Romer* can be understood as having effects on two

²⁴² See, for example, Klarman, 70 S Cal L Rev at 413–14 (cited in note 9) (classifying *Romer*—alongside *Brown*, *Furman*, and *Roe*—as a divisive case and juxtaposing that group of cases with outlier-suppressing opinions like *Griswold*, *Harper*, and *Moore*); Tushnet, *Taking the Constitution Away from the Courts* at 144, 150 (cited in note 10) (omitting *Romer* from his category of outlier-suppressing opinions—which included *Griswold* and *Moore*—and instead categorizing the case as anticipating a move toward gay equality).

²⁴³ See Klarman, 70 S Cal L Rev at 414 (cited in note 9); Tushnet, *Taking the Constitution Away from the Courts* at 150 (cited in note 10).

²⁴⁴ See Klarman, 89 Cal L Rev at 1749 (cited in note 8); Tushnet, *Why the Constitution Matters* at 140 (cited in note 3) (contending that Amendment 2 might be construed as an “outlier” measure because “[n]o state had a measure as extreme as Colorado’s in its denial of protection to gays and lesbians”).

²⁴⁵ For a useful overview of this phenomenon, see generally Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U Chi L Rev 571 (1998).

²⁴⁶ See Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 Harv L Rev 1, 4 (1989) (suggesting that, like ob-

different levels. On a concrete level, *Romer*'s existence may, at least conceivably, have dissuaded other states from adopting measures like Amendment 2.²⁴⁷ Perhaps more importantly, on an expressive level, *Romer* was the first consequential Supreme Court decision to communicate the resounding message that animus directed toward gays and lesbians violates the Constitution. From today's vantage point it may be difficult to recall, but *Romer* came as an utter shock to contemporary legal observers—even to ardent advocates of gay equality.²⁴⁸ Professor Louis Michael Seidman's ebullient assessment, offered in *Romer*'s immediate wake, attests to how the decision was initially hailed as a revelation. "If there is ever a final reckoning of twentieth-century constitutionalism," Seidman wrote, "*Romer v. Evans* will stand as a monument to the transformative possibilities of constitutional law. . . . By handing gay people their first major Supreme Court victory in the history of the republic, the opinion substantially alters the legal landscape."²⁴⁹ As a technical matter, *Romer* may

jects in space, judicial opinions "change the space around them—they literally 'warp' it—so that their effect is both complex and interactive") (emphasis omitted); Jane S. Schacter, Book Review, *Making Sense of the Marriage Debate*, 91 Tex L Rev 1185, 1197 (2013) ("The aftermath of litigation can look very different based on when it is assessed.").

²⁴⁷ In a book published recently, Klarman altered his assessment of *Romer*, acknowledging that the opinion may have been an at least somewhat significant victory for gay equality. See Michael J. Klarman, *From the Closet to the Altar* at 69–70 (cited in note 166). Nonetheless, Klarman continues to caution readers against imbuing *Romer* with too much meaning. See *id.* at 69. It is certainly true—as Klarman emphasizes—that shortly after Coloradans passed Amendment 2 in 1992, statewide antigay referenda in three states failed. But it is also important to recognize that those referenda all attempted to exceed the Colorado statute in significant ways. In 1994, Idaho residents (with 50.4 percent of the vote) and Oregon residents (with 51.6 percent of the vote) defeated similar measures that—in addition to what Amendment 2 provided—would have prohibited using state funds in a manner that approved of homosexuality, permitted adverse employment action to be taken against homosexual public employees, and placed age limitations on access to library materials that addressed homosexuality. See *id.* at 69 n 104. In 1995, Maine residents defeated an initiative (with 53.5 percent of the vote) that would have limited the categories that could qualify for legal protections to only certain enumerated classifications. Sexual orientation did not make the list. While this technique of enumeration may have diminished the perception that the initiative was targeting gays, it also meant that the law's effect would have been even more sweeping. See Daniel Levin, *The Constitution as Rhetorical Symbol in Western Anti-gay Rights Initiatives: The Case of Idaho*, in Stephanie L. Witt and Suzanne McCorkle, eds, *Anti-gay Rights: Assessing Voter Initiatives* 33, 36–43 (Praeger 1997). It is certainly plausible that the efforts were doomed by going further than Amendment 2.

²⁴⁸ See Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 S Ct Rev 345, 388–92 (noting how many legal observers predicted *Romer* would uphold Amendment 2 and thus confessed surprise at the decision when it was issued).

²⁴⁹ Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 S Ct Rev 67, 67–68.

have altered the law in only one lonely state, but it seems deeply misguided to deny that its effects were anything less than national in scope.

Finally, it is essential to contest the myth that outlier-suppressing opinions must implicate measures of marginal significance because, if judges accept that notion, it may decrease their willingness to issue constitutional opinions protecting marginalized groups. Outlier-minded constitutional scholars frequently suggest that what the Supreme Court does “best” is reject insignificant outliers, and that the Court invites trouble when it attempts to resolve divisive social issues by counteracting widespread measures.²⁵⁰ But if engaged members of the legal community do not in the heat of the moment regard a particular measure as insignificant, even though it can be found in a small number of states, then justices who internalized the message of outlier-minded theorists may opt to refrain from invalidating the measure solely to avoid causing unwanted controversy. This analysis means that in *Romer*, for instance, justices who subscribed to the traditional understanding of outliers as involving definitionally inconsequential measures may have declined to invalidate Amendment 2 because the measure seemed immensely consequential at the time of decision. And for judges, of course, the time of decision is the time that counts.²⁵¹ Furthermore, a hypothetical–Supreme Court opinion that validated Amendment 2 because the measure seemed too explosive could have had negative downstream consequences, effectively inviting states to enact their own versions of the measure. Justices must understand that, even when invalidating outliers, the opinion may feel less like “housecleaning” than an extremely heavy lift.

More broadly, the historical record undermines the claim that the Supreme Court can engage in nothing more than “mopping

²⁵⁰ See, for example, Rosen, *The Most Democratic Branch* at 124 (cited in note 3) (contending that “suppressing outlier states” is quite simply “what [the Court] does best”); id at 15:

Although the Court . . . can plausibly strike down an occasional state law that is dramatically out of line with a clear national consensus . . . it should hesitate to strike down state laws unless it is confident that a clear national consensus, represented by a strong majority of states, has, in fact, materialized.

See also Kermit Roosevelt III, Book Review, *Reconstruction and Resistance*, 91 *Tex L Rev* 121, 128 (2012) (“[T]here is a reasonable argument that enforcing the will of a national majority against outlier states is what the Supreme Court does best.”).

²⁵¹ See Driver, 2011 *S Ct Rev* at 384 (cited in note 248) (“A theory of judging does not seem to provide much help if it fails to comport with how judges themselves understand their own actions in deciding cases at the time of the decisions.”).

up” fringe statutes, or that the justices invariably inflict long-term damage on the Court as an institution when they endeavor to challenge widespread practices throughout the nation.²⁵² To the contrary, the Court has sometimes interpreted the Constitution in a manner that takes what is for practical purposes an outlier measure and has successfully imposed that vision on the nation as a whole. These opinions—which we might term “outlier-inverting opinions”—have occurred in salient areas and have afforded constitutional protection to widely reviled groups. In *West Virginia State Board of Education v Barnette*,²⁵³ the Supreme Court in 1943 upset practices present in all forty-eight states when it found that public school districts acted unconstitutionally by expelling Jehovah’s Witnesses for refusing to salute the American flag.²⁵⁴ In *Miranda v Arizona*,²⁵⁵ the Supreme Court in 1966 required police officers in nearly every state to follow new arrest procedures.²⁵⁶ In *Shapiro v Thompson*,²⁵⁷ the Supreme Court in 1969 rejected laws found in more than forty states when it determined that jurisdictions may not attach durational residency requirements to welfare benefits without violating the Constitution’s right to travel.²⁵⁸ In *Texas v Johnson*,²⁵⁹ the Supreme Court in 1986 invalidated laws found in forty-eight states when it determined that prohibitions on burning the American flag violated the First Amendment.²⁶⁰ These opinions undoubtedly offer some of the more spectacular instances in which the Supreme Court has successfully mounted challenges to measures that were extremely widespread throughout the nation. They are not alone.²⁶¹ Even if these four opinions provided the only instances of outlier inversion, however, they would suffice to demonstrate

²⁵² See Pildes, 2010 S Ct Rev at 151 (cited in note 146) (contending that it is easy to overstate the Court’s outlier-suppressing role).

²⁵³ 319 US 624 (1943).

²⁵⁴ *Id.* at 627, 642. See also David R. Manwaring, *Render unto Caesar: The Flag-Salute Controversy* 187 (Chicago 1962).

²⁵⁵ 384 US 436 (1966).

²⁵⁶ *Id.* See also Powe, *The Warren Court* at 394 (cited in note 109) (noting that all states had to change their laws in response to *Miranda*).

²⁵⁷ 394 US 618 (1969).

²⁵⁸ *Id.* at 639 n 22.

²⁵⁹ 491 US 397 (1989).

²⁶⁰ *Id.* at 434 (Rehnquist dissenting).

²⁶¹ See, for example, Pildes, 2010 S Ct Rev at 151 (cited in note 146) (noting that *New York Times Co v Sullivan* “invalidated the libel laws of every state”); *Reynolds v Sims*, 377 US 533, 610–11 (1964) (Harlan dissenting) (observing that the Court’s decision invalidated the composition of state legislatures across the nation).

that the Supreme Court possesses far greater judicial capacity than outlier-minded theorists sometimes seem to allow.

III. DEMARCATING OUTLIERS

Until this point, I have charted the divisions that exist within the term outlier and traced some of the more significant implications for constitutional theory that flow from understanding that the term should be viewed as multiple rather than singular. I have not, however, in any way attempted to define the concept's boundaries. Yet it is crucial to explore the borders of what constitutes an outlier-suppressing opinion because scholars have used the term in inconsistent and even contradictory fashions, thereby sowing confusion. Indeed, outlier-minded scholars have implicitly disagreed whether that term applies to three of the Supreme Court's most meaningful constitutional decisions of the last six decades: *Brown*, *Loving*, and *Lawrence*. These silent disagreements within the broad camp of outlier-minded constitutional theorists should be neither ignored nor brushed aside; instead, they demand forthright scholarly acknowledgement and analysis. After all, if leading proponents of the outlier theory of constitutional interpretation do not even agree on how to classify iconic Supreme Court opinions, it might be thought that those disputes raise serious, perhaps even unanswerable, questions about the theory's intellectual coherence. But the internal disagreement over this trio of celebrated opinions presents less a problem than an opportunity. Grappling with whether *Brown*, *Loving*, and *Lawrence* are accurately understood as invalidating outlier practices initiates a sorely needed conversation to determine with greater precision how widely a state practice can spread before it can no longer accurately be termed an outlier. While legal scholarship has overwhelmingly declined to undertake this task, doing so is necessary to avoid the concept of constitutional outliers being either employed in an inconsistent fashion or stretched beyond all recognition.

One major reason that scholars may disagree about whether particular opinions should be construed as invalidating outliers is because these scholars consistently avoid articulating their criteria with any specificity for what constitutes an outlier practice. Whatever its utility as a method for identifying hardcore pornography, "I know it when I see it" has little to recommend it

as a method for identifying outliers.²⁶² Accordingly, after analyzing the three high-profile cases of common disagreement, this Part advances specific guidelines for determining how widespread a practice can become before it can no longer accurately be labeled an outlier. It also includes a recommendation for using the term outlier that would, if followed, go a long way toward reducing confusion about the term among authors and readers alike.

A. Identifying Nonoutliers

Legal scholars who invoke outlier terminology divide sharply on whether *Brown*, perhaps the most celebrated decision in the Supreme Court's entire history, can profitably be understood through the outlier framework.²⁶³ Professor Powe's influential analysis of the Warren Court provides the most familiar depiction of *Brown* as an opinion that reined in outliers.²⁶⁴ Powe's central argument rejects the view that the Warren Court's legendary opinions actually protected minorities and instead insists that the decisions merely "demanded national liberal values be adopted in outlying areas."²⁶⁵ In Powe's estimation, landmark judicial opinions during the 1950s and 1960s that addressed segregation, reapportionment, and contraception demonstrate that "[t]he Warren Court was routing outliers—first and foremost the segregated South, but also rural America and pockets of urban pre-Vatican II Catholic dominance—and bringing national values to bear on all of them."²⁶⁶ *Brown* may have helped to "nationalize[]" what Powe labels "the legal regime of race," but he argues it would be misguided to overlook that the opinion "was directed exclusively at the South and was designed to force the South to conform to northern—that is, national—norms."²⁶⁷ While Powe's portrayal of *Brown* may be the foremost such

²⁶² *Jacobellis v Ohio*, 378 US 184, 197 (1964) (Stewart concurring).

²⁶³ See, for example, *Parents Involved in Community Schools v Seattle School District No. 1*, 551 US 701, 867 (2007) (Breyer dissenting) (calling *Brown* the Supreme Court's "finest hour").

²⁶⁴ See Powe, *The Warren Court* at 490 (cited in note 109). See also Tushnet, *Why the Constitution Matters* at 97 (cited in note 3) (identifying Powe's book on the Warren Court as "the most astute detailed analysis").

²⁶⁵ Powe, *The Warren Court* at 494 (cited in note 109).

²⁶⁶ Powe, 83 *Tex L Rev* at 888 (cited in note 166). For Powe's earliest articulation of this theme, see Powe, 11 *Const Comm* at 197 (cited in note 166).

²⁶⁷ Powe, *The Warren Court* at 490 (cited in note 109).

reading, his assessment of the case as suppressing southern outliers is far from idiosyncratic.²⁶⁸

On the debate's opposing side, it is not simply that some legal scholars who otherwise use the term outlier eschew that word when analyzing *Brown*. Instead, these scholars affirmatively hold up *Brown* as approaching the antithesis of a judicial opinion that merely rejected outliers. Professor Klarman—the scholar most closely associated with this view—has often warned scholars to avoid overstating the Court's countermajoritarian capabilities and has insisted that *Brown* tapped into an “emerging national consensus” on racial egalitarianism.²⁶⁹ Nevertheless, Klarman has also consistently maintained that *Brown* did not involve simple outlier suppression.²⁷⁰ Where Powe broadly conceives *Griswold* and *Brown* as opinions of a piece, Klarman portrays those two decisions as drawing on categorically distinct amounts of judicial capacity.²⁷¹ If *Griswold's* outlier suppression was an easy lift for the Court, Klarman has suggested, *Brown* displayed the Court near maximum exertion.²⁷² Klarman's work is far from the only outlier-influenced scholarship that can be read to contend that *Brown* should not be placed within the outlier framework, and to suggest further that *Brown* may more accurately be construed as the Court's prototypical opinion challenging a nonoutlier practice.²⁷³

²⁶⁸ See, for example, Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw U L Rev 549, 562–65 (2009) (portraying *Brown* as bringing outliers into line with the nation's dominant political norms); Easterbrook, 15 Harv J L & Pub Pol at 74 (cited in note 218) (contesting the notion that the Court, in issuing *Brown*, did anything more than suppress outliers); Roosevelt, 91 Tex L Rev at 128 (cited in note 250) (contending that *Brown* suppressed outliers).

²⁶⁹ Klarman, *From Jim Crow to Civil Rights* at 310 (cited in note 3). For a critique of the notion that *Brown* simply recognized an “emerging national consensus”—and of the phenomenon of consensus constitutionalism more broadly—see Justin Driver, *The Consensus Constitution*, 89 Tex L Rev 755, 758 (2011) (“When the Court decided *Brown v. Board of Education*, the racial attitudes of Americans revealed greater complexity and inner conflict (both regionally and racially) than the consensus-constitutionalist narrative generally allows.”).

²⁷⁰ See, for example, Klarman, *From Jim Crow to Civil Rights* at 453 (cited in note 3) (contending that *Brown* was not a case that should be understood as routing outliers); Klarman, 82 Va L Rev at 16–17 & n 80 (cited in note 5) (same).

²⁷¹ See Klarman, 82 Va L Rev at 16–17 & n 80 (cited in note 5) (identifying *Griswold* as a classic opinion that rejected an outlier practice and *Brown* as a classic opinion that challenged a more widespread practice).

²⁷² See *id.* at 17–18.

²⁷³ See, for example, Rosen, *The Most Democratic Branch* at 4 (cited in note 3) (identifying *Griswold* as the Court's paradigmatic case involving outlier suppression and *Brown* as the Court's paradigmatic case involving considerably more than simple outlier suppression); David A. Strauss, *The Living Constitution* 118 (Oxford 2010) (contrasting

The most compelling notion of constitutional outliers, I believe, excludes *Brown* from the category because an excessively large number of states permitted racial segregation in public schools when the case was decided. In 1954, when the Court decided *Brown*, seventeen states required racial segregation in public schools, and an additional four states allowed localities to implement the practice.²⁷⁴ Given that 21 of the 48 states (44 percent) embraced some form of racial segregation, it is difficult to understand how the term outlier helpfully describes that legal landscape. I have not encountered any constitutional scholar who has labeled a Supreme Court decision that challenged the practices in a majority of states as rejecting outliers. Such a label would, of course, be mystifying because it would require treating the most commonly found arrangement as aberrant. But it is difficult to see how viewing a judicial decision that challenges a near majority of state practices as rejecting outliers has much more to recommend it. Describing public school segregation in 1954 as existing only among outliers, when the terms “near majority of states” or “large minority of states” are readily available, risks giving readers an overly optimistic understanding of the nation’s mid-twentieth-century racial realities. This unduly elastic conception of outliers should, accordingly, be discarded because it invites analytical imprecision and historical misimpression.

Although *Loving* presents a somewhat closer case than *Brown*, legal scholars should also, I believe, discontinue the surprisingly common practice of contending that the Court’s decision in *Loving* merely rejected outliers. Professor Eskridge, to take only one example, has suggested that the Court’s decision invalidating prohibitions on interracial marriage in 1967 rejected “outlier discrimination[.]” and likened *Loving* to *Griswold* in that both opinions amounted to “constitutional housecleaning” and “fine-tuning.”²⁷⁵ But in 1967, sixteen of fifty states continued to prohibit marriages between people of different races.²⁷⁶ It

Brown’s significance with the comparatively insignificant constitutional amendments that result in routing outliers).

²⁷⁴ See Klarman, *From Jim Crow to Civil Rights* at 311 (cited in note 3).

²⁷⁵ Eskridge, 150 U Pa L Rev at 513 (cited in note 222) (contending that *Loving* rejected outliers). See also Amar, *America’s Unwritten Constitution* at 214 (cited in note 3) (contending that, when the Court decided *Loving*, “bans on interracial marriage were relatively rare”); Roosevelt, *Reconstruction and Resistance* at 128 (cited in note 250) (contending that *Loving* suppressed outliers).

²⁷⁶ See *Loving*, 388 US at 6.

seems odd to conclude, absent some extended explanation, that laws found in nearly one-third of the states can meaningfully be termed outliers. Although it may be attractive to believe that Americans overwhelmingly disapproved of antimiscegenation laws when the Court decided *Loving*, nationwide polls taken after the decision found that larger percentages of respondents expressed approval of such laws rather than disapproval.²⁷⁷ It seems, in sum, far more accurate to conceive of state laws against interracial marriage in 1967 as a reasonably common practice—one that enjoyed considerable support throughout the nation—even if they existed in only a minority of states.

Some legal scholars, though certainly not all, have also contended that the thirteen antisodomy provisions invalidated by *Lawrence* in 2003 should be understood as outliers.²⁷⁸ *Lawrence* presents an excruciatingly close call—closer even than the one presented by *Loving*. But, in my judgment, *Lawrence* should not be viewed as suppressing an outlier practice. It seems awfully difficult to contend that thirteen states—making up slightly more than one-quarter of the nation—can helpfully be termed outliers. Appearing to recognize this point, Professor Rosen, who often uses outlier terminology to describe judicial opinions, has suggested that the invalidation of thirteen state laws rendered *Lawrence*'s scope too large to accurately be portrayed as tackling outliers.²⁷⁹ Attempting to suggest how *Lawrence* might have been framed so that it suppressed genuine outliers, Rosen has argued that the opinion should have invalidated only the four statutes that directly proscribed homosexual sodomy.²⁸⁰ That solution, using the Fourteenth Amendment's Equal Protection Clause rather than the Due Process Clause, would have left untouched the other nine statutes purporting to proscribe all sodomy.²⁸¹ But Rosen's approach appears to be predicated on disregarding the

²⁷⁷ See Driver, 89 Tex L Rev at 825 n 412 (cited in note 269).

²⁷⁸ See, for example, Nan D. Hunter, Book Review, *Federal Courts, State Courts and Civil Rights: Judicial Power and Politics*, 92 Georgetown L J 941, 978–79 (2004) (asserting that *Lawrence* rejected outliers); Klarman, *From the Closet to the Altar* at ix (cited in note 166) (same); Strauss, 76 U Chi L Rev at 886 (cited in note 5) (contending, albeit with some hesitation, that *Lawrence* rejected outliers).

²⁷⁹ See Rosen, *The Most Democratic Branch* at 108–11, 113 (cited in note 3).

²⁸⁰ See *id.* at 109 (“Like the Supreme Court’s most successful cases, it would have brought a handful of state outliers into a national consensus that sodomy cannot be criminalized for gays and lesbians alone.”).

²⁸¹ As Rosen acknowledges, this solution echoes Justice Sandra Day O’Connor’s concurring opinion in *Lawrence*. See *Lawrence*, 539 US at 579 (O’Connor concurring in the judgment).

social meaning that *all* antisodomy statutes had obtained by 2003.²⁸² Even if nine statutes were drawn in language that applied to heterosexuals and homosexuals alike, it seems safe to say that citizens and legislators who supported retaining those laws would have overwhelmingly rejected a judicial decision deeming it impermissible to target only homosexual sodomy. To the extent that an outlier inquiry is meant to depict current attitudes toward a particular practice, artificially confining the issue presented in *Lawrence* to a mere four states provides a sorely inaccurate snapshot.

Even the scholars who insist that *Lawrence* actually invalidated outliers—perhaps aware that the statutory context makes the term an awkward fit—often do so in a qualified manner. Thus, Professor Strauss, rather than calling the Texas statute an outlier outright, as he does with other measures,²⁸³ instead contends that it “was something of an outlier.”²⁸⁴ In a similar vein, other legal scholars who suggest that *Lawrence* can be viewed as rejecting outliers seek to shift the traditional outlier focus from statutory prevalence to the nonenforcement of existing statutes.²⁸⁵ It is certainly true that the thirteen antisodomy statutes were seldom enforced when the Court decided *Lawrence* in 2003.²⁸⁶ But by that time, the fight for gay equality centered less on the sporadic enforcement of antisodomy provisions and more on the antigay message communicated by the statutes’ continuing existence on the books.²⁸⁷ Thus, that thirteen states steadfastly refused to abandon laws that had become widely regarded as a proxy for antigay sentiment remained a central question for the outlier inquiry.

To contend that mere nonenforcement renders a practice an outlier is, moreover, an argument that risks proving far too much. After all, jurisdictions infrequently enforced antisodomy

²⁸² See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv L Rev 1893, 1905–06 (2004) (“[E]ven if the Texas law . . . had been applied to opposite-sex as well as same-sex sodomy and had been enforced equally against both (or not enforced at all), it would still have been ‘anti-gay’ in terms of both its practical impact and its cultural significance.”).

²⁸³ See Strauss, 76 U Chi L Rev at 876, 881 (cited in note 5) (calling the statutes at issue in *Griswold* and *Moore* outliers).

²⁸⁴ *Id.* at 886.

²⁸⁵ See, for example, Amar, *America’s Unwritten Constitution* at 122 (cited in note 3) (noting the paucity of enforcement of antisodomy provisions); Klarman, *From the Closet to the Altar* at ix (cited in note 166) (same).

²⁸⁶ *Lawrence*, 539 US at 569.

²⁸⁷ See Tribe, 117 Harv L Rev at 1910 (cited in note 282).

statutes dating back to at least 1986, when the Supreme Court's opinion in *Bowers v Hardwick*²⁸⁸ affirmed the antisodomy measures that still could be located in twenty-four states.²⁸⁹ It would seem not only strained but downright strange to believe that *Hardwick* could be meaningfully construed as propping up outliers when exactly half of the states had such measures. Pursuing such nonenforcement logic would open the theoretical possibility of calling a measure an outlier that existed, but was not enforced, in all fifty states. While negligible statutory enforcement and a small number of statutes on the books may both render a law vulnerable to judicial challenge, those phenomena reach that final destination through conceptually distinct routes. The notion of outliers would already seem to contain quite enough analytical challenges without further complicating matters by collapsing the distinction between statutory prevalence and statutory desuetude.²⁹⁰

B. Identifying Outliers

If neither *Brown*, nor *Loving*, nor *Lawrence* should be viewed as a decision suppressing outliers because each opinion invalidated a law that was too widespread to merit use of the term, the question becomes: How many states can employ a law or practice before a measure becomes too widespread to accurately be labeled an outlier? Over the last one hundred years of American history, the term outlier, in my view, should generally be reserved for describing laws or practices that can be found in fewer than ten states.²⁹¹ If a practice can be found in ten or more

²⁸⁸ 478 US 186 (1986).

²⁸⁹ See *id.* at 198 n 1 (Powell concurring) (noting that twenty-four states had antisodomy laws). See also Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 S Ct Rev 27, 40 (noting that antisodomy statutes overwhelmingly went unenforced even in 1986).

²⁹⁰ See Sunstein, 2003 S Ct Rev at 55 (cited in note 289) (appearing to recognize a distinction between outlier statutes and generally unenforced statutes).

²⁹¹ I limit the claim to the last one hundred years for two reasons. First, the term "constitutional outlier" has overwhelmingly been applied to cases decided within that timeframe. Second, the number of states in the Union has been extremely stable during that period, as the forty-eighth state was admitted in 1912. Obviously, if one were interested in identifying outlier cutoffs for earlier periods in American history, the number would need to be lowered to account for the smaller number of total jurisdictions.

My proposal for identifying outliers concentrates on counting the number of states that feature a particular measure in no small part because scholars who use the terminology typically invoke that metric, when they endeavor to explain the concept at all. This method is, of course, far from the only way that one could identify outlying practices. One might alternately consider, for instance, the number of people residing in the states

states, it will typically be difficult to establish that the phenomenon should be regarded as either isolated or unusual. The selection of a particular number to form the presumptive outer bound for outliers doubtless contains some measure of arbitrariness. (Why not more than eight? Why not more than eleven?) Yet articulating a specific cap for the outlier phenomenon appears necessary to achieve greater consistency in how the term is used. Although invoking a softer term like “a handful of states” to describe the outlier maximum holds undeniable appeal, legal scholars have at least sometimes used that hazy term to describe a situation that may more accurately be characterized as involving two handfuls of states that are heaping.²⁹²

Concerns about arbitrariness should not, however, be overblown for at least three reasons. First, this presumptive ten-state threshold for outliers tracks how scholars have actually applied the term, at least in the mine-run of cases. The dubious application of outlier terminology to refer to some of the most high-profile cases that the Supreme Court has issued during the last sixty years should not be permitted to obscure how professors have generally employed the term. Outside of the Court’s decisions in *Brown*, *Loving*, and *Lawrence*, none of the leading scholars who frequently employ the term outlier so designated a practice that could be found in a double-digit number of states. It hardly seems surprising that some scholars have strained to apply the outlier label in an effort to demonstrate that a favored theory can accommodate these widely revered and widely discussed opinions.²⁹³ But beyond the settings of race and sexual orientation, the largest number of states that adopted a practice a legal scholar refers to as an outlier was nine.²⁹⁴ And in that

that feature a particular practice, taken as a percentage of the overall nation, in determining whether the practice is actually anomalous. The nation’s fifty states have widely varying populations, after all, and these discrepancies are not captured by a metric that affords all fifty states equal weight. As will become clear, my proposal can account for these more sophisticated approaches to identifying outliers by inviting scholars to explain their criteria when they employ the terminology.

²⁹² See, for example, Amar, *America’s Unwritten Constitution* at 122 (cited in note 3) (describing *Lawrence* as invalidating “a Texas statute and a handful of other state laws” when the case invalidated laws in thirteen states).

²⁹³ In a very different context, Powe has advanced a version of this critique with considerable force: “To make the cases conform, theory becomes ideology with all the attendant blinders. Commentators can and do wish theory and results conformed, and they often grant their own wishes. But that doesn’t make it so.” Powe, 11 Const Commen at 214 (cited in note 166).

²⁹⁴ See Klarman, *From Jim Crow to Civil Rights* at 453 (cited in note 3) (stating that the election statutes at issue in *Smith v Allwright* existed only in nine states).

particular instance, the scholar seems to suggest that the outlier notion was approaching—or perhaps even had met—its breaking point.²⁹⁵ Typically, of course, scholars have applied the outlier tag to measures that exist in far fewer than nine states. Indeed, of the archetypal outlier opinions analyzed in Part I, the largest number of states that employed a particular practice was six, and several of the opinions invalidated measures that appeared in only one or two states.²⁹⁶ Yet while scholars have frequently applied the term outlier to measures that can be found in fewer than ten states, a maximum must of course be larger than the median. The ten-state threshold aims to strike the delicate balance between setting the cutoff so low as to exclude what are generally regarded as outlier-suppressing opinions and setting the cutoff so high as to distort the term beyond all recognition.

Second, this ten-state approach to identifying opinions that do not fit into the outlier framework also enjoys at least some modest support in Supreme Court opinions. In *Montana v Egelhoff*,²⁹⁷ for example, the Court in 1996 reasoned—in a case weighing whether a state statute violated the Fourteenth Amendment’s Due Process Clause—that the rule’s existence in ten jurisdictions, what the Court called “fully one-fifth of the States,” militated against concluding that the statute violated a fundamental principle.²⁹⁸ *Egelhoff* proceeded to refer to the controverted statute as existing in “many States,” a term that one would avoid using to describe an outlier practice.²⁹⁹ Nor is *Egelhoff* the only Supreme Court opinion that has refused to treat a measure appearing in ten states as the sort of isolated phenomenon associated with outliers. In *Morgan v Virginia*,³⁰⁰ the Supreme Court in 1946 invalidated a railroad segregation measure that appeared in ten states.³⁰¹ *Morgan* in no way, however, suggested that the ten states made up a trivial percentage

²⁹⁵ See *id.* (referring to several decisions invalidating a small number of state statutes as suppressing outliers, and proceeding to note that “*even Smith v. Allwright* had implications for how primary elections were conducted in just nine southern states”) (emphasis added).

²⁹⁶ *Kennedy* invalidated laws in six states that permitted capital punishment for child rape. *Kennedy*, 554 US at 433. *Griswold*, *Romer*, *Plyler*, *Moore*, *Coker*, *Virginia*, and *Lane* all involved practices found in either one or two states. See text accompanying notes 21, 51, 54, 59–60, 68, 77–80, 87.

²⁹⁷ 518 US 37 (1996).

²⁹⁸ *Id.* at 48.

²⁹⁹ *Id.* at 49.

³⁰⁰ 328 US 373 (1946).

³⁰¹ *Id.* at 382, 385–86.

of the nation, but instead rested its conclusion on the need for uniformity.³⁰² These sparse negative inferences should not, of course, be mistaken for a claim that the Supreme Court in any way recognizes some sort of ironclad “Rule of Ten” in judicial decisionmaking. Such a claim would be risible. Nevertheless, that the Supreme Court has repeatedly resisted treating measures existing in ten states as merely marginal occurrences bolsters the conclusion that it would typically be misguided to label a measure an outlier that appears in ten or more states.

Third, it bears emphasizing that the proposed ten-state maximum for outliers is soft rather than hard, meaning that the ten-state presumption against deeming a practice an outlier can be rebutted. Although I do not believe that the desuetude explanation should suffice to rebut that presumption in the context of *Lawrence*, it is important to make clear that, in my view, at least some unusual circumstances do in fact manage to overcome this presumption against labeling measures outliers. For instance, when the Supreme Court in *Saenz v Roe*³⁰³ in 1999 invalidated California’s effort to limit the welfare benefits new California residents would receive to the amount they would have received from their prior state of residency, approximately fourteen other states had imposed similar residency restrictions.³⁰⁴ Despite the commonness of these welfare statutes, *Saenz* can still accurately be regarded as invalidating an outlier measure. In *Saenz*, the states had all enacted their statutes within the previous decade and, more importantly, those statutes constituted throwbacks to durational-residency requirements that the Supreme Court had invalidated three decades earlier in *Shapiro*.³⁰⁵ Indeed, in the period leading up to *Saenz*, lower courts sometimes set aside the state measures as aberrant and impermissible efforts to revive *Shapiro*-style residential restrictions, even if the new welfare deprivations came in a relative rather than an absolute form.³⁰⁶ These lower court judges

³⁰² See *id.* at 386.

³⁰³ 526 US 489 (1999).

³⁰⁴ See *id.* at 492. See also Jack Tweedie, *Building a Foundation for Change in Welfare*, 24 *State Legislatures* 26, 28 (Jan 1998) (noting that fourteen states lowered welfare benefits for new state residents).

³⁰⁵ *Shapiro*, 394 US at 622–23 & n 1, 638 (invalidating a Connecticut statute that prohibited new residents from receiving welfare benefits altogether because it impinged on the right to travel).

³⁰⁶ See, for example, *Green v Anderson*, 811 F Supp 516, 523 (ED Cal 1993) (granting a preliminary injunction against California’s new welfare residency requirement due to

effectively construed the revised welfare statutes as outliers in the post-*Shapiro* constitutional era, and it would seem peculiar to conclude that the Supreme Court did not issue an outlier-suppressing opinion in *Saenz* simply because it made that same determination a few years later, after several more states had joined the throwback movement. Thus, although scholars have not understood *Saenz* as suppressing an outlier practice, it makes sense to do so.

In all events, the vices associated with selecting a particular maximum for outliers are outweighed by the virtues that will flow from using that term with greater precision. It is essential, however, for this increased precision to be apparent to authors and readers alike. Thus, instead of silently applying the proposed ten-state maximum—or any other maximum for that matter—scholars should adopt the practice of disclosing precisely how many states employed a measure when they contend that an opinion suppressed an outlier. Widespread adoption of that practice would have at least three beneficial effects.³⁰⁷ First, doing so would encourage the scholar contemplating using the term to reconsider whether the phenomenon was sufficiently isolated to merit calling it an outlier. Second, if the number of states endorsing a practice is large enough to make using the term outlier seem awkward, the author could either select another term or endeavor to explain why the term applies despite the seemingly counterintuitive usage.³⁰⁸ Third, and most importantly, the practice would permit readers to make their own independent determinations of whether the opinion may properly be construed as suppressing outliers. Adopting this convention would diminish the ambiguity that currently surrounds the term outlier, helping to advance the nation's scholarly constitutional conversation.

At the risk of belaboring the obvious, none of these proposals will definitively resolve whether every opinion in the Supreme Court's history should be understood as involving an outlier practice. Marginal cases will require more fine-grained analysis

Shapiro); *Mitchell v Steffen*, 504 NW2d 198, 199, 203 (Minn 1993) (invalidating Minnesota's residency requirement in light of *Shapiro*).

³⁰⁷ At least one scholar already appears to follow this convention. Klarman admirably indicates how widespread a practice is when he contends that a decision suppressed outliers. See, for example, Klarman, *From Jim Crow to Civil Rights* at 78, 85, 453 (cited in note 3).

³⁰⁸ For an application of this approach in another context, see Justin Driver, *Recognizing Race*, 112 Colum L Rev 404, 439 (2012) (encouraging judges to explain their reasons for invoking racial identity rather than simply assuming that the reasons speak for themselves).

to determine if the outlier appellation in fact applies. At a minimum, though, my hope is that the foregoing analysis both enables scholars to perceive that the term has been applied too promiscuously in the past, and encourages scholars to use the term in a more discerning, more transparent fashion in future writings. This analysis should provide a useful baseline against which to evaluate the outlier label's applicability and encourage distinctions among various degrees of minority practices. Just as not every outlier should be construed as a holdout, it is important to recognize that not every practice found in a minority of states should be construed as an outlier.

Some scholars—given their assessments of *Brown*, *Loving*, and *Lawrence*—will almost certainly disagree with my normative view of how the territory of constitutional outliers is best demarcated. These scholars may well respond that my boundaries for identifying what constitutes an outlier practice are unduly restrictive. The borders must be expanded, these scholars might claim, so that the outlying territory can encompass this pathbreaking precedent or that landmark opinion. Other scholars, conversely, may protest that my proposed boundaries are excessively capacious and should be narrowed to exclude opinions they perceive as falling beyond outlier precincts. Although there may be disagreement, perhaps even discord, on the classification of particular cases, such exchanges should be welcomed because they will evince serious analysis of what constitutes a constitutional outlier and why. And analysis of constitutional outliers—as opposed to mere incantation—would represent a change that is long overdue.

CONCLUSION

During the last two decades, the term outlier has quickly attained a prominent position within scholarly constitutional conversation. Indeed, at times, that position has been ever so slightly too prominent, as scholars have periodically contended that landmark Supreme Court opinions invalidated outliers when the label seems an awkward fit to describe a practice that appears across reasonably large swaths of the nation. Even accounting for these false positives, though, the term's status as an essential word in the modern constitutional scholar's vocabulary appears secure. The word has become indispensable because—when properly used, at least—it readily conveys the Supreme Court's rejection of measures found in only a small number of

states, a dynamic that applies to many opinions in constitutional law's canon.

Although professors frequently identify Supreme Court opinions as invalidating outliers, they have dedicated little intellectual energy to explaining what the term actually means. The result is that, while references to outliers pervade legal scholarship, the term itself has remained—in some meaningful sense—stuck in the shadows, at once both prominent and peripheral. The shadows are, in C. Vann Woodward's evocative phrase, "one of the favorite breeding places of mythology,"³⁰⁹ and it should come as little surprise to learn that the term outlier has proven generative in the mythmaking department. In an effort to expose those myths, this Article has cast an overhead spotlight on constitutional outliers by identifying the component parts that march behind the outlier banner, recognizing the important legal implications that flow from understanding that the term contains multiple entities, and isolating the territory that lays beyond its conceptual borders. The term outlier is a useful one, but a persistent lack of scholarly examination has resulted in its severely diminished utility. In order to see outliers with clarity, it is necessary to bring them from the periphery of constitutional analysis to its very center.

³⁰⁹ C. Vann Woodward, *The Strange Career of Jim Crow* xvi (Oxford 3d rev ed 1974).