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

**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

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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. 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. 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

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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.


\(^6\) 383 US 663, 666 (1966) (invalidating Virginia’s poll tax). See also Balkin, Living Originalism at 240 (construing Harper as invalidating an outlier); Klarman, 82 Va L Rev at 16–17 (same 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 (same in note 3) (construing Gideon as invalidating an outlier); Klarman, 82 Va L Rev at 16–17 (same 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 (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 (construing in note 3) (suggesting that Romer might be viewed as invalidating an outlier).


\(^10\) 431 US 484, 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 (characterizing Moore as striking down a local outlier); Strauss, 76 U Chi L Rev at 882 (same 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 (same in note 3) (construing Virginia as invalidating an outlier); Klarman, 70 S Cal L Rev at 414 (same in note 9) (same); Strauss, 76 U Chi L Rev at 873–74 (same in note 5) (same); Sunstein, 122 Harv L Rev at 262–63 (same 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 (same in note 5) (construing Coker as rejecting an outlier); Rosen, The Most Democratic Branch at 203 (construing 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 (same 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 (same 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.\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{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 \textit{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

\textsuperscript{15} See John Hart Ely, \textit{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.’").

\textsuperscript{16} Paucity, not absence. Tushnet has to date provided the most thorough and insightful examination of constitutional outliers as a phenomenon. See Tushnet, \textit{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,*\(^\text{17}\) *Loving v Virginia,*\(^\text{18}\) and *Lawrence v Texas,*\(^\text{19}\)—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

\(^\text{17}\) 347 US 483 (1954).
\(^\text{18}\) 388 US 1 (1967).
\(^\text{19}\) 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. 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*, 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.” 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.” 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.” 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.” The brief supported this assertion by noting that only Connecticut and Massachusetts continued to regulate contraceptives in the

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21 *Griswold*, 381 US at 527 (Stewart dissenting).
23 Id at 501.
24 Id.
25 Id at 546 n 12 (Harlan dissenting).
marital context. Strikingly, even Griswold’s two dissenting justices heaped scorn on the statute. Justice Hugo Black’s dissent called the law “offensive” and “evil.” 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. “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.”

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. The poll tax, whose origins stretched back well into the nineteenth century, had once been a common practice. 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.” Of the four holdouts that retained the practice, moreover, Douglas observed that lower courts had recently invalidated poll taxes for Alabama and Texas. 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. “In determining what lines are

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.
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.”

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.”

Black’s dissent similarly allowed that he “dislik[ed] the policy of the poll tax” and found it “outdated.”

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. 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* that “the great majority of the States” did not afford counsel to indigent criminal defendants, only five holdout states continued to deny that right when the Court decided *Gideon*. Even among the five holdouts, moreover, at least some counties within four of the five states appear to have offered counsel to indigent defendants. 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. Black’s opinion for the Court in *Gideon* thus stood on firm ground in identifying a “widespread belief that lawyers in criminal

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36 Id (emphasis omitted).
38 Id at 675, 678 (Black dissenting).
40 316 US 455 (1942).
41 Id at 471.
44 See Kamisar, 30 U Chi L Rev at 20 (cited in note 43).
courts are necessities, not luxuries.”

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.” 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.”

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. 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).
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.\textsuperscript{49} Amendment 2, Kennedy wrote, not only "confounds [the] normal process of judicial review," but it also "defies . . . conventional inquiry."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{53} At that time, no other state had enacted legislation designed to eliminate unauthorized immigrants' access to education.\textsuperscript{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

\begin{footnotes}
\item[49] See id at 623–36.
\item[50] Id at 632–33.
\item[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) ("Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.").
\item[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).
\item[53] Plyler, 457 US at 230.
\item[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").
\end{footnotes}
“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.” 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.

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. 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. 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.” That tradition, Powell insisted, “has roots . . . equally deserving of constitutional recognition” as protections afforded to nuclear families. In a similar vein, Brennan’s concurring opinion labeled the statute “senseless,” “arbitrary,” and “eccentric.” 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

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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).
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).
66 Virginia, 518 US at 519, 558.
67 See id at 525–26.
contained an all-male military institution of higher education. VWIL would not mirror VMI’s distinctive “adversative” military training, but instead would focus on building self-esteem in a cooperative environment. 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.” 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. The Supreme Court had, of course, invalidated Texas’s second-rate law school in *Sweatt v Painter*, 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.”

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. The Court’s decision in *Coker* arrived five years after the Supreme Court cast severe doubt on capital punishment’s legitimacy as a

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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.”).


73 *Virginia*, 518 US at 554.

penalty for any crime in *Furman v Georgia*. In response to *Furman*, an overwhelming majority of states immediately re-visited their statutes, making capital punishment a permissible punishment for at least some crimes. 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*. 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. 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. 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.” 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.”

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. The Oklahoma legislature enacted the backup statute in a special session following the Supreme Court’s earlier decision in *Guinn v United States*, which invalidated the state’s

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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.” 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. 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. Oklahoma’s backup voting statute was the only one of its kind in the nation. 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. 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.” 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.”

84 Id at 367. Oklahoma’s grandfather clause exempted white Oklahomans from passing an otherwise-mandatory literacy test. See *Lane*, 307 US at 276.
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.
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 Forssenius*, 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.\(^\text{91}\) 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.\(^\text{92}\) During the initial post-*Furman* era, three states had revised their death penalty statutes to permit capital punishment for child rape.\(^\text{93}\) Yet state courts had, for various reasons, invalidated all three of those statutes stemming from the immediate post-*Furman* period.\(^\text{94}\) 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.\(^\text{95}\) As

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\(^{91}\) *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).

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.  

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. Kennedy further suggested that an absence of such provisions in federal law undercut the six state measures. 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. “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.”

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.

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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.\footnote{See Alexander M. Bickel, \textit{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.").} 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 \textit{Griswold}. It hardly seems adventurous to maintain that most scholars would, if confronted with the outlier taxonomy, identify the Connecticut statute assessed in \textit{Griswold} as a holdout. After all, only two states continued to regulate contraceptives in the marital context when the Court decided \textit{Griswold}.\footnote{\textit{Griswold Appellants’ Brief} at *24 (cited in note 26).} Conceiving of \textit{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 \textit{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.\footnote{See \textit{Griswold}, 381 US at 480, 485–86.} 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 \textit{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.\footnote{\textit{Poe}, 367 US at 554 (Harlan dissenting).} “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.\footnote{Id.}

\begin{thebibliography}{1}

\bibitem{bickel} See Alexander M. Bickel, \textit{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.").

\bibitem{griswold} \textit{Griswold Appellants’ Brief} at *24 (cited in note 26).

\bibitem{griswold3} See \textit{Griswold}, 381 US at 480, 485–86.

\bibitem{poe} \textit{Poe}, 367 US at 554 (Harlan dissenting).

\bibitem{harlan} Id.

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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,” 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

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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,” Professor Klarman has contended that such decisions reject “lingering outliers.” Professor Powe has similarly asserted that the Court eradicates “outmoded values” when it “tak[es] on . . . anachronistic outliers.” 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.” 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.” 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

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.”\footnote{Id at 862.}

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?\footnote{Id.}

In the course of invalidating such outdated outliers, modernizing courts “look[] to the future, not the past,”\footnote{Strauss, 76 U Chi L Rev at 860 (cited in note 5).} and succeed in “bringing statutes up to date [by] anticipating changes that have majority support.”\footnote{Id at 861.} This “hostility to outliers,” Strauss maintains, is a core “feature of modernization.”\footnote{Id at 864.}

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.\footnote{See text accompanying notes 28–30, 37–38, 45–47.} Indeed, several justices’ opinions in that trio of cases expressly portrayed the decisions as invalidating anachronisms.\footnote{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”).} Even justices who dissented in Griswold and Harper allowed that the contested statutes emitted the unpleasant odor of a
bygone age. It seems probable that *Gideon* does not contain similar allowances in dissent, moreover, only because the case generated no dissenting opinions at all.

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. 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. Sixteen states permitted death sentences for rape when *Furman* invalidated capital punishment across the board in 1972. 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*. 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-

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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.


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 validates 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. 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. 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.”

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.” Moore and Romer may thus be characterized as united in

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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 Plyer as outliers); Klarman, 89 Cal L Rev at 1749 (cited in note 8) (identifying Moore, Plyer, 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. 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.”

Powell’s concurring opinion amplified this theme. “These children . . . have been singled out for a lifelong penalty and stigma,” Powell wrote. “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.”

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. Not only had six states adopted measures permitting the death penalty for child rape.

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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 “countermajoritarian 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).


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 countermajoritarian 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. 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. “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.” 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.”

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. 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

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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.
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. The inability to overturn existing legislation should not, of course, be confused with affirmative support for that legislation. 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. 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.” 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. 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. 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).
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.

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\(^{150}\) 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. 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. 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. 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. Under this competitive-federalism theory, for instance, New Yorkers who object to state income taxes may decide to express that policy...
preference by relocating to Florida, a state that eschews income taxation.\textsuperscript{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 \textit{New State Ice Co v Liebmann}\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{New State Ice} warrants extended scrutiny because it makes clear that he was most concerned with judicial invalidations of one particular type of outlier:

\begin{quote}
To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may
\end{quote}

\textsuperscript{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, \textit{Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States} (Harvard 1970).

\textsuperscript{158} 285 US 262 (1932).

\textsuperscript{159} Id at 311 (Brandeis dissenting).


\textsuperscript{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.\footnote{New State Ice, 285 US at 311 (Brandeis dissenting).}

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.\footnote{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.”).} 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
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*, demonstrated that his willingness to indulge what he must have regarded as ill-conceived experimentation was not limitless. 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.

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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.” 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 Power’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 Comm 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 inappropriate 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. 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.” 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. 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. According to Eskridge, the

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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. 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.”

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. 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.

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. Colorado was not among them; in 1971 it became among the first states to jettison its antisodomy law. This ambivalence may most readily be captured, however,
by public opinion data.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{181} One should, of course,

\textsuperscript{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.

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

\textsuperscript{179} Id.

\textsuperscript{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.

\textsuperscript{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. 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. 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[,] but 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.”\textsuperscript{184} Whittington’s opening two words here are, of course, instructive. Legal scholars often treat \textit{Griswold} as the paradigmatic instance of a judicial opinion invalidating an outlier statute.\textsuperscript{185} Indeed, when legal scholars list various Supreme Court decisions that have suppressed outliers, they occasionally begin with \textit{Griswold}—even though the opinion arrives first in neither alphabetical nor chronological order.\textsuperscript{186} When it comes to constitutional outliers, then, it seems that \textit{Griswold} is literally first among equals.

\textit{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. \textit{Griswold}’s eminent position among outlier-suppressing opinions is clinched by its doctrinal connection to \textit{Roe v Wade},\textsuperscript{187} which serves to elevate the opinion in modern constitutional controversy to a height that no other decision involving outliers can surpass. But \textit{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 \textit{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.\textsuperscript{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.

\textsuperscript{184} Whittington, \textit{Political Foundations of Judicial Supremacy} at 120 (cited in note 3).
\textsuperscript{185} See, for example, Rosen, \textit{The Most Democratic Branch} at 4 (cited in note 3) (noting the Court’s propensity for “identifying] 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 \textit{Griswold} as the quintessential outlier).
\textsuperscript{186} See, for example, Klarman, 82 Va L Rev at 16–17 (cited in note 5) (listing \textit{Griswold} first as an instance of the Court’s outlier jurisprudence).
\textsuperscript{187} 410 US 113 (1973).
\textsuperscript{188} Amar, \textit{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. 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. Nearly one-third of the states, moreover, had laws permitting only certain authorized medical professionals to distribute contraceptives. Only a minority of states had no laws whatsoever on the books regulating contraceptives during that time. 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. 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

190 See id at 317–19.
191 See id.
192 See id.
invalidating such outré measures.\textsuperscript{194} Yet the Supreme Court has often suppressed outliers by not overwhelming majorities, but the narrowest of margins.\textsuperscript{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 \textit{Plyler} illustrates the point. Perhaps somewhat surprisingly from today’s vantage point, the statute that \textit{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.\textsuperscript{196} This 5–4 split in \textit{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 \textit{Plyler} in conference, moreover, Justice William Rehnquist referred to the schoolchildren targeted by Texas’s law as “wetbacks.”\textsuperscript{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.\textsuperscript{198} At least one close Court watcher thought that \textit{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 \textit{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.\textsuperscript{199}

\textsuperscript{194} See Klarman, \textit{From Jim Crow to Civil Rights} at 6, 452 (cited in note 3) (noting that justices are drawn from society’s elite).

\textsuperscript{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, \textit{The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division}, 14 \textit{J Contemp Legal Issues} 549 (2005).

\textsuperscript{196} See \textit{Plyler}, 457 US at 242 (Burger dissenting, joined by White, Rehnquist, and O’Connor).

\textsuperscript{197} Seth Stern and Stephen Wermiel, \textit{Justice Brennan: Liberal Champion} 475 (Houghton 2010).

\textsuperscript{198} See id.

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 \textit{Kennedy} and the upstart local housing ordinance in \textit{Moore}.\footnote{\textit{Kennedy}, 554 US at 411; \textit{Moore}, 431 US at 494.} Similarly, only six justices voted to prohibit the upstart antigay legislation at issue in \textit{Romer}, the holdout poll tax in \textit{Harper}, and the backup death penalty for rape at issue in \textit{Coker}.\footnote{\textit{Romer}, 517 US at 621; \textit{Harper}, 383 US at 664; \textit{Coker}, 433 US at 584. Powell’s opinion rejected the imposition of capital punishment on \textit{Coker}’s particular facts, but refused to categorically prohibit states from imposing the death penalty for rape. See \textit{Coker}, 433 US at 603–04 (Powell concurring in the judgment in part and dissenting in part).} 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 \textit{Griswold}, the holdout jurisdictions’ views on counsel for indigent defendants in \textit{Gideon}, and the backup establishment of VWIL in \textit{Virginia}. All three of those cases saw at least seven justices vote to invalidate the measures under review.\footnote{\textit{Griswold}, 381 US at 480; \textit{Gideon}, 372 US at 336; \textit{Virginia}, 518 US at 518.}

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. \textit{Griswold} reversed a Connecticut Supreme Court opinion that validated the anticontraceptive statute.\footnote{\textit{Griswold}, 381 US at 480, 485, revg \textit{State v Griswold}, 200 A2d 479 (Conn 1964).} \textit{Harper} reversed a three-judge district court opinion that upheld Virginia’s imposition of the poll tax.\footnote{\textit{Harper}, 383 US at 664–65 & n 2, 670, revg \textit{Harper v Virginia State Board of Elections}, 240 F Supp 270 (ED Va 1964).} \textit{Gideon} reversed a Florida Supreme Court opinion that denied counsel to an indigent defendant charged with a felony.\footnote{\textit{Gideon}, 372 US at 536–37, 345, revg \textit{Gideon v Cochran}, 135 S2d 746 (Fla 1961).} \textit{Moore} reversed an Ohio Court of Appeals decision that upheld a grandmother’s conviction for the crime of living with her grandchild.\footnote{\textit{Moore}, 431 US at 496–97, 506, revg \textit{City of East Cleveland v Moore}, No 33888 (Ohio App July 18, 1975).} \textit{Virginia} reversed a Fourth Circuit opinion that validated the establishment of VWIL as an alternative to admitting women to VMI.\footnote{\textit{Virginia}, 518 US at 528–29, 557–58, revg \textit{United States v Virginia}, 44 F3d 1229 (4th Cir 1995).}

\footnote{\textit{Powell}’s opinion rejected the imposition of capital punishment on \textit{Coker}’s particular facts, but refused to categorically prohibit states from imposing the death penalty for rape. See \textit{Coker}, 433 US at 603–04 (Powell concurring in the judgment in part and dissenting in part).}
Georgia Supreme Court opinion that upheld imposition of the death penalty for raping an adult woman.\textsuperscript{208} \textit{Lane} reversed a Tenth Circuit opinion that upheld Oklahoma's effort to preserve the grandfather clause.\textsuperscript{209} And \textit{Kennedy} reversed a Louisiana Supreme Court opinion that deemed capital punishment permissible for raping a minor.\textsuperscript{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 \textit{Romer} and \textit{Plyler} were the only two that affirmed lower court decisions.\textsuperscript{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.\textsuperscript{212} \textit{Romer} and \textit{Plyler} thus do precious little to confirm the narrative of Supreme Court justices issuing outlier-suppressing opinions that merely invalidate backwater statutes.\textsuperscript{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

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\item[{\textsuperscript{208}}] Coker, 433 US at 586, 600, revg Coker v State, 216 SE2d 782 (Ga 1975).
\item[{\textsuperscript{209}}] Lane, 307 US at 269, 277, revg Lane v Wilson, 98 F2d 980 (10th Cir 1938).
\item[{\textsuperscript{210}}] Kennedy, 554 US at 413, revg State v Kennedy, 957 S2d 757 (La 2007).
\item[{\textsuperscript{211}}] See Romer, 517 US at 636; Plyler, 457 US at 230.
\item[{\textsuperscript{212}}] See text accompanying notes 150–51, 178–81.
\item[{\textsuperscript{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-prefering 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, \textit{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.
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stump: *This is the real America.* 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.”

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.” Outlier-suppressing opinions, Klarman insists, “are consonant with dominant national norms and thus are best described as reflecting rather than producing national unity.” 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-

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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).


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. “To understand the effect of law,” Easterbrook instructs, “you must look at effects on the margin.” 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.” 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,” “cleaning up operations,” and “housecleaning.”

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 over-stayed 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

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219 Id at 77.
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. 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. 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. One year later, the Eleventh Circuit rejected the education provision because it contravened *Plyler*. 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.

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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. 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.

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.

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. Yet outlier-minded legal scholars can sometimes seem

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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.\footnote{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 \textit{Gideon}, \textit{Griswold}, \textit{Harper}, \textit{Romer}, \textit{Plyler}, \textit{Moore}, and \textit{Virginia} not only reached the correct outcomes, but also that the opinions advanced the cause of justice.\footnote{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.\footnote{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.\footnote{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.


\footnote{234} See generally, for example, Morton J. Horwitz, \textit{The Warren Court and the Pursuit of Justice} (Hill and Wang 1998).

\footnote{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 \textit{Harper}'s invalidation of the poll tax as (unnecessarily) expediting a foreordained outcome:

\begin{quote}
[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.
\end{quote}


\footnote{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, \textit{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. 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. 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.”

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


239 Ely, Democracy and Distrust at 70 (cited in note 15).
preserving liberal causes. 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.

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


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. 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. 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.

This downgrading of Romer’s significance suggests that the outlier framework has, at times, suffered from a form of hindsight bias. 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. 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”).


different levels. On a concrete level, Romer’s existence may, at least conceivably, have dissuaded other states from adopting measures like Amendment 2.\footnote{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.\footnote{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.”\footnote{249} As a technical matter, Romer may

\footnote{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.

\footnote{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).

\footnote{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. 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.

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.\textsuperscript{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 \textit{West Virginia State Board of Education v Barnette},\textsuperscript{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.\textsuperscript{254} In \textit{Miranda v Arizona},\textsuperscript{255} the Supreme Court in 1966 required police officers in nearly every state to follow new arrest procedures.\textsuperscript{256} In \textit{Shapiro v Thompson},\textsuperscript{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.\textsuperscript{258} In \textit{Texas v Johnson},\textsuperscript{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.\textsuperscript{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.\textsuperscript{261} Even if these four opinions provided the only instances of outlier inversion, however, they would suffice to demonstrate

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\item \textsuperscript{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).
\item \textsuperscript{253} 319 US 624 (1943).
\item \textsuperscript{254} Id at 627, 642. See also David R. Manwaring, \textit{Render unto Caesar: The Flag-Salute Controversy} 187 (Chicago 1962).
\item \textsuperscript{255} 384 US 436 (1966).
\item \textsuperscript{256} Id. See also Powe, \textit{The Warren Court} at 394 (cited in note 109) (noting that all states had to change their laws in response to \textit{Miranda}).
\item \textsuperscript{257} 394 US 618 (1969).
\item \textsuperscript{258} Id at 639 n 22.
\item \textsuperscript{259} 491 US 397 (1989).
\item \textsuperscript{260} Id at 434 (Rehnquist dissenting).
\item \textsuperscript{261} See, for example, Pildes, 2010 S Ct Rev at 151 (cited in note 146) (noting that \textit{New York Times Co v Sullivan} “invalidated the libel laws of every state”); \textit{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).
\end{itemize}
\end{footnotesize}
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. 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. Professor Powe’s influential analysis of the Warren Court provides the most familiar depiction of *Brown* as an opinion that reined in outliers. 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.” 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.” *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.” While Powe’s portrayal of *Brown* may be the foremost such

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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”).


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.\(^{273}\)

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\(^{268}\) 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. 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.” But in 1967, sixteen of fifty states continued to prohibit marriages between people of different races. It

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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).

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. 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. 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. 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. 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. But Rosen’s approach appears to be predicated on disregarding the

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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).
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.\footnote{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.”).} 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,\footnote{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).} instead contends that it “was something of an outlier.”\footnote{284 Id at 886.} 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.\footnote{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).} It is certainly true that the thirteen antisodomy statutes were seldom enforced when the Court decided Lawrence in 2003.\footnote{286 Lawrence, 539 US at 569.} 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.\footnote{287 See Tribe, 117 Harv L Rev at 1910 (cited in note 282).} 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
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

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\(^{288}\) 478 US 186 (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. 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. 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*, 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. *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. 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*, the Supreme Court in 1946 invalidated a railroad segregation measure that appeared in ten states. *Morgan* in no way, however, suggested that the ten states made up a trivial percentage

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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).


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. 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 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. 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. 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. These lower court judges

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302 See id at 386.
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.

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. 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).

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).

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,” 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.