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# Comparative Perspectives on Strategic Remedial Delays

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# Comparative Perspectives on Strategic Remedial Delays

Holning Lau\*

*In controversial constitutional cases, courts sometimes grant the government an extended period of time to correct rights violations—what I call “remedial grace periods”—hoping that the postponed implementation of change will temper backlash. The most well-known example of such remedial delay followed the U.S. Supreme Court decision in *Brown v. Board of Education II*. This Article spotlights a more recent remedial grace period. In *Minister of Home Affairs v. Fourie*, South Africa’s highest court ruled that depriving same-sex couples of marriage was unconstitutional. It could have implemented same-sex marriage immediately by reading it into the law, but it chose not to. Instead, it sought to defuse controversy by giving Parliament time to remedy the situation legislatively. Fourie’s grace period complicates prevailing wisdom about grace periods that derives from *Brown II*.*

*Part I of this Article provides background by comparing remedial grace periods to other judicial delay tactics. Part II looks closely at Fourie. Through a content analysis of newspaper stories and interviews with rights activists, I examined the Fourie grace period’s effectiveness at addressing backlash. The grace period appears to have mitigated backlash by enhancing the perceived legitimacy of the Constitutional Court and of same-sex marriage. Whereas previous commentators have focused on *Brown II*’s grace period and derided its failure to mitigate backlash, the South African grace period is much more commendable. By presenting an in-depth account of the Fourie grace period, this Article helps to develop a fuller picture of remedial grace periods. Part III examines how the South African experience can inform judicial behavior in other parts of the world.*

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I.	INTRODUCTION.....	260
II.	STRATEGIC JUDICIAL BEHAVIOR.....	265
	A. <i>Judges and Political Constraints</i> .....	266
	B. <i>Delaying Rulings and Delaying Rights</i> <i>Recognition</i> .....	269
	C. <i>Remedial Delays as Strategic Behavior</i> .....	273
III.	SOUTH AFRICAN CASE STUDY .....	277
	A. <i>The Fourie Litigation</i> .....	278
	B. <i>Method of Investigation</i> .....	283
	C. <i>Unfolding the Story of the Grace Period</i> .....	286
	1. <i>Altering Perception of Options</i> .....	286
	2. <i>Shifting the Target Away from the Court</i> .....	292
	3. <i>Fortifying Support for Same-Sex Marriage and</i> <i>Equal Citizenship</i> .....	296
	4. <i>Allowing Provisional Compromise</i> .....	300
	5. <i>Weaving the Themes Together and Identifying</i> <i>Remaining Questions</i> .....	302
IV.	BEYOND SOUTH AFRICA.....	305
	A. <i>Grace Periods and Contextual Factors</i> .....	306
	B. <i>Thought Experiment: European Court of Human</i> <i>Rights</i> .....	312
V.	CONCLUSION.....	315
	APPENDIXES.....	318

## I. INTRODUCTION

Conventional wisdom says that judges act strategically to mitigate backlash against the judiciary and its decisions concerning controversial social issues.<sup>1</sup> Recent attention has focused on the U.S. Supreme Court's strategic behaviors with respect to same-sex marriage. Realists believe that the Court strategically delayed deciding the constitutionality of same-sex marriage bans. Prior to

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1. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 12-17 (1998) (explaining that judges act strategically based on the preferences of other actors); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (describing ways in which public opinion influences judicial interpretation of the Constitution); Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 157 (2007) ("But there can be no question that the Court's decisions can provoke public outrage, and that the Court sometimes works to reduce the likelihood and intensity of that outrage.").

legalizing same-sex marriage nationwide in *Obergefell v. Hodges*,<sup>2</sup> the Court avoided other opportunities to decide the issue by denying grants of certiorari and dismissing *Hollingsworth v. Perry* on procedural grounds.<sup>3</sup> Many people believed that the Court would eventually rule in favor of marriage equality, but was dodging that ruling because of the backlash it could engender.<sup>4</sup> As public support for same-sex marriage steadily grew over time, the magnitude of potential backlash diminished.<sup>5</sup> Thus, the Court had an interest in postponing deciding the constitutionality of same-sex marriage bans. Among sitting judges, Justice Ruth Bader Ginsberg has spoken most publicly about the benefits of strategic delay.<sup>6</sup> She stated that the

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2. 135 S. Ct. 2584 (2015). Prior to *Obergefell*, forty-seven states had extended marriage rights to same-sex couples. *Obergefell* required the rest of the country to legalize same-sex marriage as well. See Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html> (noting that *Obergefell* required thirteen states to cease banning same-sex marriage). Throughout this Article, I adopt the commonly used phrase “legalize same-sex marriage” as a shorthand to describe government decisions to start recognizing same-sex marriage as legally valid, which is not to suggest that it was previously a crime for same-sex couples to marry through religious or cultural ceremonies that had no legal effect.

3. 133 S. Ct. 2652 (2013); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

4. While we are unable to enter the justices’ minds to ascertain their true intentions, many realists believe that some justices who ruled in favor of same-sex marriage in *Obergefell* avoided earlier opportunities to do so because of concerns about backlash. On strategic avoidance as an explanation for dismissing *Hollingsworth* on procedural grounds, see, for example, Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 144-46 (2013); Douglas NeJaime, *The View from Below: Public Interest Lawyering, Social Change, and Adjudication*, 61 UCLA L. REV. DISCOURSE 182, 196 (2013). For discussions about strategic reasons for denying certiorari in same-sex marriage cases, see, for example, Robert Barnes, *Supreme Court Lets Stand State Rulings Allowing Same-Sex Marriage*, WASH. POST (Oct. 6, 2014), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-lets-stand-state-rulings-allowing-same-sex-marriage/2014/10/06/9991bbb6-4d89-11e4-aa5e-7153e466a02d\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-lets-stand-state-rulings-allowing-same-sex-marriage/2014/10/06/9991bbb6-4d89-11e4-aa5e-7153e466a02d_story.html); Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES (Oct. 6, 2014), [www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html?\\_r=0](http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html?_r=0); Dahlia Lithwick, *The Right Outcome for the Wrong Reasons*, SLATE (Oct. 6, 2014, 3:59 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/10/supreme\\_court\\_gay\\_marriage\\_cases\\_the\\_court\\_misses\\_its\\_moment\\_to\\_rule\\_on.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/supreme_court_gay_marriage_cases_the_court_misses_its_moment_to_rule_on.html).

5. See Andrew R. Flores, *Examining Variation in Surveying Attitudes on Same-Sex Marriage: A Meta-Analysis*, 79 PUB. OPINION Q. 580, 590 (2015) (presenting polling data that show growing support for same-sex marriage).

6. See Nancy Scherer, *Viewing the Supreme Court’s Marriage Cases Through the Lens of Political Science*, 64 CASE W. RES. L. REV. 1131, 1152-53 (2014) (discussing

Court's landmark abortion rights decision in *Roe v. Wade* was correct in principle but provoked backlash by moving "too far, too fast."<sup>7</sup> Justice Ginsburg's comments implied that a slower approach to marriage equality was therefore wise.<sup>8</sup>

While the strategy of delaying *rulings* has been widely discussed, this Article shifts our gaze to a different tactic: delaying *remedies*. Various courts around the world have adopted remedial grace periods, but this approach remains poorly understood.<sup>9</sup> South Africa offers a paradigmatic example of the remedial grace period. Like the U.S. Supreme Court, the Constitutional Court of South Africa acted strategically in dealing with same-sex marriage, but in a different way. In 2005, the court ruled that denying same-sex couples the ability to marry violated rights to equality and dignity.<sup>10</sup> The court could have implemented same-sex marriage immediately by "reading in" language to South Africa's Marriage Act to render its definition of marriage gender-neutral, but the court chose instead to grant Parliament a one-year grace period to remedy the constitutional violations through legislative reform.<sup>11</sup> Parliament eventually passed a bill to legalize same-sex marriage, and Deputy President Phumzile Mlambo-Ngcuka signed it into law.<sup>12</sup> My research examines whether and how the grace period defused backlash against the court and the legalization of same-sex marriage.

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remarks made by Justice Ginsburg at Columbia University Law School and the University of Chicago Law School).

7. *Id.* (quoting Justice Ginsburg); see also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381-82 (1985) ("[I]n my judgment, *Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures."). *But cf.* Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2030-34 (2011) (contending that commentators have overstated the backlash caused by *Roe*).

8. Although Justice Ginsburg did not explicitly draw parallels between abortion and same-sex marriage, "the connection could not have been lost on [her] audience." Geoffrey R. Stone, *Justice Ginsburg, Roe v. Wade and Same-Sex Marriage*, HUFFINGTON POST: BLOG (May 12, 2013, 11:02 PM), [http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa\\_b\\_3264307.html](http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa_b_3264307.html); see also Barnes, *supra* note 4 (quoting Justice Ginsburg saying that there was "no urgency" for the Court to rule on same-sex marriage).

9. When a court grants the government an extended period of time to remedy a rights deprivation, I refer to that time as a "remedial grace period." I use this phrase generically to cover various cases around the world, including cases in which courts themselves do not use the phrase to describe what they are doing.

10. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at para. 114 (S. Afr.).

11. *Id.* at paras. 136, 161.

12. Civil Union Act 17 of 2006 (S. Afr.). Deputy President Mlambo-Ngcuka signed the law while President Thabo Mbeki was traveling abroad.

This Article fills a gap in the existing literature because, even though much has been written about strategic judicial behavior, very little research examines the effectiveness of grace periods at mitigating backlash.<sup>13</sup> Most scholarship on the effectiveness of strategic delays focuses on *Brown v. Board of Education II*, in which the U.S. Supreme Court stated that the integration of racially segregated schools should proceed with “all deliberate speed,” thereby creating a flexible grace period for desegregation.<sup>14</sup> While commentators have largely disparaged *Brown II*'s grace period, my research suggests that the South African grace period is much more commendable.<sup>15</sup> This Article presents a fuller picture of remedial grace periods, complicating existing understandings of how they operate.

By understanding the grace period in South Africa's marriage case, we can better understand how grace periods might operate in other contexts. Courts around the world are increasingly adopting grace periods. In Canada, grace periods have become quite common.<sup>16</sup> For example, the Supreme Court of Canada recently concluded that certain criminal laws violated sex workers' rights, and it granted Parliament a year to pursue relevant legislative reform.<sup>17</sup> Earlier, some Canadian provincial courts adopted grace periods in

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13. See, e.g., Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341 (2010) (reviewing literature on strategic judicial behavior).

14. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955). For a rare examination of the effectiveness of remedial delay outside the context of *Brown II*, see Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 L. & SEXUALITY 11 (2006) (examining the grace period following Massachusetts's same-sex marriage ruling). For a discussion of Jacobi's findings, see *infra* notes 94-97 and accompanying text.

15. For critiques of *Brown II*'s remedial delay, see DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 95-107 (2004); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 313-20 (2004); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION xiii (2004); Jim Chen, *Mayteenth*, 89 MINN. L. REV. 203, 219-21 (2004); H. Jefferson Powell, *Enslaved to Judicial Supremacy?*, 106 HARV. L. REV. 1197, 1201-02 (1993) (reviewing ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992)). But see BURT, *supra* 301-03 (defending *Brown II*'s remedial delay).

16. See Kent Roach, *Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity*, 35 U.B.C. L. REV. 211, 218-20 (2002) (discussing the increased frequency of remedial delays in Canadian human rights cases).

17. *Canada (Att'y Gen.) v. Bedford*, [2013] 3 S.C.R. 1101 (Can.).

their same-sex marriage decisions.<sup>18</sup> Similarly, the Constitutional Court of Colombia issued a grace period in its first same-sex marriage case.<sup>19</sup> More recently, the Hong Kong Court of Final Appeal adopted a grace period in its landmark transgender marriage case.<sup>20</sup> The South African experience sheds light on these cases and on remedial grace periods that may emerge in the future.

The remainder of this Article is divided into three primary parts. Part II develops a three-part typology of strategic delays—delaying rulings, delaying rights recognition, and delaying remedies—to illustrate how remedial grace periods relate to other judicial delay tactics. This Part also reviews the small body of existing literature on remedial grace periods, much of which is critical of remedial delays.

Part III turns to the case study of same-sex marriage in South Africa. I begin by introducing the consolidated cases of *Minister of Home Affairs v. Fourie* and *Lesbian and Gay Equality Project v. Minister of Home Affairs*, often referred to collectively as the *Fourie* case.<sup>21</sup> After explaining how the *Fourie* decision provided a grace period, I investigate whether and how the grace period succeeded in limiting backlash against the court and the legalization of same-sex marriage. I initially expected that the grace period would be ineffective at limiting backlash. I suspected that throughout the grace period the public would dwell on the court's decision in *Fourie* and continue to deride it as judicial overreach.<sup>22</sup> Human rights advocates had denounced the grace period as an unwarranted delay of justice,

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18. Halpern v. Canada (Att'y Gen.), [2002] O.J. No. 2714 (Can. Ont. Sup. Ct. J.); EGALE Can. Inc. v. Canada (Att'y Gen.) (2001), 95 B.C.L.R. 3d 122 (Can. B.C. S.C.), *aff'd*, (2003) 13 B.C.L.R. 4th 1 (Can. B.C. C.A.). *But see* Halpern v. Canada (Att'y Gen.) (2003), 65 O.R. 3d 161 (Can. Ont. C.A.) (affirming lower court's protection of the right to same-sex marriage, but rejecting the remedial grace period).

19. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11 (Colom.). While I was finalizing this Article for publication, a second same-sex marriage case was pending before the Colombian Constitutional Court. See Sibylla Brodzinsky & Jo Tuckman, *Colombia: The Next Battleground in the Global Fight for Marriage Equality*, GUARDIAN (July 9, 2015, 6:00 AM), <https://www.theguardian.com/world/2015/jul/09/colombia-same-sex-marriage-decision-latin-america>.

20. W. v. Registrar of Marriages, [2013] 16 H.K.C.F.A.R. 112 (C.F.A.) (H.K.).

21. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

22. For examples of criticisms targeting the court immediately after it decided *Fourie*, see Brandon Bailey, Letter to the Editor, *Gay Marriage Ruling Reflects Un-African Values*, SOWETAN (S. Afr.), Dec. 7, 2005, at 12; William Dicks, Letter to the Editor, *Marriage Exists Between a Man and a Woman*, CAPE ARGUS (S. Afr.), Dec. 5, 2005, at 11; Raymond Thomas, Letter to the Editor, *Once Moral Laws Go, We Return to Dark Ages*, CITIZEN (S. Afr.), Dec. 5, 2005, at 13.

echoing critiques of the grace period that followed *Brown II*.<sup>23</sup> At the outset of my project, I found myself moved by such critiques. My research sought to investigate the merits of these inclinations.

To the best of my knowledge, this Article offers the first in-depth examination of the grace period's impact on South Africans' perceptions of the judiciary and same-sex marriage. My research is based on a content analysis of 215 South African newspaper articles covering same-sex marriage and interviews I conducted with South African human rights advocates. Contrary to what I expected at the start of my research, my case study ultimately found that the remedial grace period did in fact defuse criticisms of the court. It also enhanced the perceived legitimacy of same-sex marriage.

Part IV examines the South African case study's implications beyond South Africa. It explores how the case study can inform discussions about whether remedial grace periods are justifiable, or even desirable, in various contexts around the world. While the case study suggests that the grace period worked well at mitigating backlash in South Africa, there can be difficulties replicating that success in other contexts. This Part examines the factors that can contribute to, or detract from, the appeal of remedial grace periods. It then focuses specifically on Europe, presenting a thought experiment on how grace periods could improve the jurisprudence of the European Court of Human Rights.<sup>24</sup> Perhaps somewhat counterintuitively, the thought experiment illustrates how, in some situations, a court can accelerate the delivery of justice by adopting a remedial grace period.

## II. STRATEGIC JUDICIAL BEHAVIOR

This Part begins with a primer on strategic judicial behavior. Afterwards, I develop a three-part typology of strategic delay tactics—delaying rulings, delaying rights recognition, and delaying remedies—focusing extra attention on remedial delays.

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23. See Pierre de Vos, *Difference and Belonging: The Constitutional Court and the Adoption of the Civil Union Act*, in *TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA* 29 (Melanie Judge, Anthony Manion & Shaun de Waal eds., 2008) (discussing how “[c]onstitutional lawyers and LGBTI activists rallied against this Bill”).

24. This section builds on my earlier writing on the European Court of Human Rights case *Schalk & Kopf v. Austria*, no. 30141/04, ECHR 2010. See Holning Lau, *Rewriting Schalk and Kopf: Shifting the Locus of Deference*, in *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* 243 (Eva Brems ed., 2013).



### A. *Judges and Political Constraints*

In principle, the judiciary is expected to rise above politics and apply legal principles without concern for whether its decisions please the public. The iconic image of the goddess Justitia embodies this ideal. The blindfold that she wears while balancing her scale represents the objectivity and independence of the judiciary.<sup>25</sup> In reality, however, a robust literature shows that judges are not blind to how their decisions are perceived.<sup>26</sup>

Judges care about public perceptions because the public can constrain the power of an unpopular court.<sup>27</sup> For elected judges, the public can punish them by voting them off the court. Even for judges who are not elected but are instead appointed for life, the political branches of government can constrain their power. For example, the political branches might refuse to cooperate in the implementation of court decisions, as was the case when states refused to desegregate schools after *Brown v. Board of Education*.<sup>28</sup> The political branches might curtail judicial power even more aggressively. For example, the U.S. Congress can strip the Supreme Court of appellate jurisdiction if it wishes to punish the Court for unpopular decisions.<sup>29</sup>

An even more extraordinary threat to judicial power is the specter of court packing. When the U.S. Supreme Court invalidated several of President Franklin Delano Roosevelt's popular New Deal measures, he proposed legislation to increase the number of justices

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25. See JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011) (describing objectivity as one of the values expressed by Justitia's blindfold); see also Sunstein, *supra* note 1, at 158 & n.13 (referencing sources that suggest the judiciary "should interpret the Constitution without attention to the possible objections of the public").

26. E.g., EPSTEIN & KNIGHT, *supra* note 1; FRIEDMAN, *supra* note 1; Epstein & Jacobi, *supra* note 13.

27. See, e.g., sources cited *supra* note 26.

28. Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 AM. J. POL. SCI. 352 (2014); see also *Brown II*, 349 U.S. 294, 301 (1955) (directing lower courts to implement school desegregation "with all deliberate speed"); *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954) (holding that racial segregation in schools was unconstitutional).

29. Article III, Section 2 of the Constitution states that the Supreme Court's appellate jurisdiction shall be subject to "such Exceptions . . . as the Congress shall make." U.S. CONST. art. III, § 2. For discussions about limitations on Congress's jurisdiction-stripping powers, see, for example, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 195, 234-35 (2007).

on the Court, which would allow him to appoint up to six additional justices who favored New Deal reforms.<sup>30</sup> Although this so-called court-packing bill never passed, discussion of the bill seemed to place enough pressure on the Court to influence its jurisprudence.<sup>31</sup> The Court changed direction, viewing New Deal provisions much more favorably.<sup>32</sup> While court packing never materialized in the United States, it did in South Africa. To protect apartheid policies in the early 1950s, South Africa's National Party added five new judicial seats to the Supreme Court of Appeals.<sup>33</sup> This ensured that the court would not stray too far from the National Party's apartheid ideology.<sup>34</sup>

Judges care not only about efforts to constrain their power, but also about political opposition to causes that they support. For example, Justice Ruth Bader Ginsburg has been an outspoken advocate of women's rights and was a cofounder of the American Civil Liberties Union's Women's Rights Project.<sup>35</sup> While she believes that *Roe v. Wade* was correct in principle, she laments that the case provoked backlash by moving "too far, too fast."<sup>36</sup> Justice Ginsburg believes that *Roe* gave "opponents of access to abortion a target to aim at relentlessly" and that the decision "seemed to have stopped the momentum that was on the side of change."<sup>37</sup> The conventional wisdom is that *Roe* galvanized social conservatives who have now succeeded in chipping away at *Roe*'s rights protections through subsequent litigation and legislative reforms.<sup>38</sup> The fact that judicial

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30. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 132-37 (1995).

31. *See id.* Some scholars have argued that factors beyond the threat of court-packing help to explain the Supreme Court's ultimate jurisprudential support of New Deal policies. *E.g.*, BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 33-43 (2000).

32. This jurisprudential shift helped to repair the public's image of the Supreme Court. *See* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1149-50 (1987).

33. WJ HOSTEN ET AL., *INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY* 626-30 (1977).

34. *Id.*

35. *See* Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940, 1950-54 (1991) (celebrating Justice Ginsburg's work at the ACLU's Women's Rights Project).

36. *See* Scherer, *supra* note 6 (quoting Justice Ginsburg).

37. *Id.* at 1151 (quoting Justice Ginsburg).

38. *See e.g.*, William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 520 (2001) (asserting that *Roe* "undermine[d] abortion] right[s] by stimulating extra opposition to [them]"); Robin West, *From Choice to*

protection of certain rights could mobilize opposition against such rights can be troubling to judges, creating incentives for judges to avoid moving “too far, too fast.”<sup>39</sup>

The issue of same-sex marriage offers illustrative examples of judicial actions triggering backlash. Consider the 1993 Hawaii Supreme Court case of *Baehr v. Lewin*.<sup>40</sup> The court ruled that same-sex couples’ inability to marry warranted strict scrutiny, one of the most stringent forms of constitutional review, and the court remanded the case.<sup>41</sup> By requiring strict scrutiny, the court positioned Hawaii to become the first jurisdiction in the world to legalize same-sex marriage. On remand, the trial court held that Hawaii’s ban on same-sex marriage failed strict scrutiny.<sup>42</sup> The state appealed, but the unpopularity of Hawaii’s judicial decisions pushed the political process to outpace litigation. While the state’s appeal was pending, opponents of same-sex marriage mobilized to pass a constitutional amendment that stripped the courts of power to decide the constitutionality of same-sex marriage bans.<sup>43</sup> Moreover, the *Baehr* decision galvanized national opposition to same-sex marriage, resulting in the passage of the federal Defense of Marriage Act (DOMA) and numerous same-sex marriage bans in states across the country.<sup>44</sup> For a more recent example of backlash, we can turn to

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*Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1396–1405 (2009) (describing how reproductive rights have been curtailed since *Roe*).

Recent historical research by Linda Greenhouse and Reva Siegel suggests that the backlash against *Roe* is often overstated. See Greenhouse & Siegel, *supra* note 7; see also Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, 71 WASH. & LEE L. REV. 969, 974 (2014) (“[S]cholars have overstated the degree to which *Roe* immediately polarized discussion.”). *Roe* seems to have contributed to backlash, while the degree of that contribution is contested.

39. See Scherer, *supra* note 6 (quoting Justice Ginsburg’s comments on *Roe*).

40. 852 P.2d 44 (Haw. 1993).

41. *Id.* at 67-68 (stating that the exclusion of same-sex couples from marriage amounted to sex discrimination, which receives strict scrutiny under Hawaii’s state constitutional law).

42. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*4-9 (Haw. Cir. Ct. Dec. 3, 1996).

43. See HAW. CONST. art. I, § 23; *Baehr v. Miike*, No. 20371, 1999 WL 35643448, at \*1-3 (Haw. Dec. 9, 1999) (stating that the constitutional amendment rendered the plaintiffs’ complaint moot); see also Michael D. Sant’Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 716-18 (2011) (discussing Hawaiian same-sex marriage case).

44. Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (1996), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013); see also H.R. REP. NO. 104-664, at 2-3 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 (naming *Baehr v. Lewin* as an underlying motivation for DOMA). In the ten years after *Baehr*, before Massachusetts became the first

Iowa, where the state supreme court unanimously decided to legalize same-sex marriage in *Varnum v. Brien*.<sup>45</sup> Iowans retaliated against the court by dismissing the three justices who sought reelection in 2010.<sup>46</sup>

### B. *Delaying Rulings and Delaying Rights Recognition*

Judges sometimes adjust their behaviors due to the fact that the public and its political representatives can punish the judiciary for unpopular decisions.<sup>47</sup> Delay tactics are a means through which judges seek to mitigate backlash. Judges can resort to delaying *rulings*, delaying *rights recognition*, or delaying *remedies*. This section will focus on the first two of these three tactics. Same-sex marriage litigation is a lens through which we can observe these strategic behaviors. Conventional wisdom is that the U.S. Supreme Court delayed ruling on whether the federal Constitution requires states to legalize same-sex marriage.<sup>48</sup> In 2015, the Court ruled in *Obergefell v. Hodges* that states must legalize same-sex marriage.<sup>49</sup> Prior to *Obergefell*, the Court declined other opportunities to decide the issue. It did so by exercising its discretionary power to deny certiorari on same-sex marriage cases.<sup>50</sup> It also dodged the merits of the constitutional claim to same-sex marriage in 2013 by dismissing *Hollingsworth v. Perry* on procedural grounds.<sup>51</sup> To be sure, one might argue that the dismissal was animated purely by doctrinal

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state to legalize same-sex marriage, three states in addition to Hawaii passed constitutional amendments to ban same-sex marriage and thirty-eight states adopted statutory bans on same-sex marriage. For a list of these bans, see Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165-94 (2005).

45. 763 N.W.2d 862 (Iowa 2009).

46. Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715, 715-17 (2011); see generally MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013) (discussing the backlash generated by *Baehr* and *Varnum*).

47. See, e.g., sources cited *supra* note 26.

48. See, e.g., Klarman, *supra* note 4; NeJaime, *supra* note 4; Barnes, *supra* note 4; Liptak, *supra* note 4; Lithwick, *supra* note 4.

49. 135 S. Ct. 2584 (2015).

50. See *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014). For commentary suggesting that the denials of certiorari were a form of strategic delay, see, for example, Barnes, *supra* note 4; Liptak, *supra* note 4; Lithwick, *supra* note 4.

51. 133 S. Ct. 2652 (2013).

dictates. The political realist explanation, however, is that the Court decided not to reach the merits of the case for strategic reasons.<sup>52</sup>

Public support for same-sex marriage had been rapidly growing around the time of *Hollingsworth*.<sup>53</sup> According to the Pew Research Center, public support for same-sex marriage rose from 48% in 2012, the year that the Court heard *Hollingsworth*, to 57% in 2015, the year that the Court decided *Obergefell*.<sup>54</sup> While the Supreme Court delayed ruling on nationwide same-sex marriage, it nudged lower courts toward ruling in favor of same-sex marriage. It did so through *United States v. Windsor*.<sup>55</sup> *Windsor* invalidated section 3 of DOMA, which banned the federal government from recognizing same-sex marriages that were already recognized by state governments.<sup>56</sup> *Windsor* did not address whether the Constitution required states nationwide to legalize same-sex marriage, but the *Windsor* opinion contained dicta that clearly favored same-sex marriage.<sup>57</sup>

Influenced by *Windsor*'s reasoning and rhetoric, lower courts legalized same-sex marriage in twenty-three states by invalidating same-sex marriage bans.<sup>58</sup> In addition, three states legalized same-sex marriage by legislative means during the time between the *Windsor*

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52. Klarman, *supra* note 4; NeJaime, *supra* note 4. For a classic example of the U.S. Supreme Court delaying a ruling on the merits for strategic reasons, consider the interracial marriage case of *Naim v. Naim*, 350 U.S. 891 (1955), as described by ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 174 (1962). See also Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 446-50 (2005) (describing *Naim*).

53. See Flores, *supra* note 5.

54. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (May 12, 2016), <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/>.

55. 133 S. Ct. 2675 (2013).

56. *Id.*

57. See *id.*

58. See *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931 (2015); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); *Rolando v. Fox*, 23 F. Supp. 3d 1227 (D. Mont. 2014); *Majors v. Home*, 14 F. Supp. 3d 1313 (D. Ariz. 2014); *Hamby v. Parnell*, 56 F. Supp. 3d 1056 (D. Alaska 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Lee v. Orr*, No. 13-cv-8719, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill. Feb. 21, 2014); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012); *Garden State Equal. v. Dow*, 79 A.3d 1036 (N.J. 2013); see also Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System: Racial Segregation, Reapportionment, and Obergefell Appendix A*, 70 VAND. L. REV. (forthcoming 2017) (characterizing *Windsor* as an important influence on subsequent cases that invalidated same-sex marriage bans).

and *Obergefell* rulings.<sup>59</sup> As a result, same-sex marriage was legal in thirty-seven states and the District of Columbia by the time the Supreme Court decided *Obergefell*, whereas only eleven states and the District of Columbia had legalized same-sex marriage when the Court decided *Hollingsworth*.<sup>60</sup> This corpus of lower court decisions helped to mitigate allegations that the majority in *Obergefell* engaged in unsavory judicial activism.<sup>61</sup> Indeed, when deciding *Obergefell*, the Supreme Court was not at the vanguard of change. Rather, it was demanding that thirteen laggard states join the rest of the country in legalizing same-sex marriage.<sup>62</sup> The strategic delay that preceded *Obergefell* placed the Court in a much less controversial position than it would be in if it had legalized same-sex marriage earlier.

Whereas the U.S. Supreme Court delayed its same-sex marriage ruling, courts can instead issue a ruling but delay the recognition of rights. For brevity, I will call this “delaying rights.” *Schalk & Kopf v. Austria*, a case decided by the European Court of Human Rights, is an example of delaying rights.<sup>63</sup> In *Schalk & Kopf*, the court reached the merits of the dispute and ruled that the European Convention on Human Rights did not require member states to legalize same-sex marriage—not *yet*.<sup>64</sup> The court acknowledged that it was likely to recognize a right to same-sex marriage in the future.<sup>65</sup>

The court has long recognized that the European Convention on Human Rights is a living document and, therefore, its rights protections evolve over time.<sup>66</sup> The reasoning in *Schalk & Kopf* is anchored to the court’s consensus doctrine.<sup>67</sup> In short, the court

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59. Minnesota, Rhode Island, and Delaware legalized same-sex marriage legislatively during this time. See *Timeline Gay Marriage Chronology*, L.A. TIMES (June 26, 2015), <http://graphics.latimes.com/usmap-gay-marriage-chronology/> (showing an interactive timeline of the legalization of same-sex marriage across the United States).

60. See *id.*; Liptak, *supra* note 2 (noting that *Obergefell* required thirteen states to cease banning same-sex marriage).

61. Cf. Liptak, *supra* note 2 (“[T]he [Supreme C]ourt had responded cautiously and methodically, laying judicial groundwork for a transformative decision [on same-sex marriage]. It waited for scores of lower courts to strike down bans on same-sex marriages before addressing the issue . . .”). To be sure, allegations of judicial activism were not entirely prevented. The dissenting justices in *Obergefell* were quick to accuse the majority of judicial overreach. 135 S. Ct. 2584 (2015) (Roberts, C.J., dissenting; Alito, J., dissenting).

62. See Liptak, *supra* note 2.

63. No. 30141/04, ECHR 2010.

64. *Id.*

65. See *id.* at ¶ 105.

66. See *id.*

67. For background on the consensus doctrine, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J.

acknowledged that, after member states reach a relative “consensus” in favor of same-sex marriage, the court would require exceptional states to conform to the norm of same-sex marriage.<sup>68</sup> Remarkably, the court stated explicitly that a consensus seemed likely to emerge in the near future and, thus, a right to same-sex marriage would likely be protected sometime soon.<sup>69</sup>

Scholars have explained that the European Court of Human Rights strategically developed its consensus doctrine to safeguard the court’s perceived legitimacy.<sup>70</sup> The consensus doctrine ensures that the court does not step too far in front of public opinion, thus containing the controversy that the court attracts. The consensus doctrine still allows the court to nudge member states toward finding new rights. In *Schalk & Kopf*, the court pointed to the “emerging European consensus” that was “rapidly” growing in favor of same-sex marriage.<sup>71</sup> Highlighting this trajectory signaled to member states that they should legalize same-sex marriage, or else the court might rule against them in the near future.<sup>72</sup>

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273, 382 (1997); Holning Lau & Derek Loh, *Misapplication of ECHR Jurisprudence in W v Registrar of Marriages*, 41 H.K. L.J. 75, 79-85 (2011).

68. See *Schalk & Kopf*, no. 30141/04.

69. The court seemed to suggest that, if a majority of member states were to legalize same-sex marriage, that would constitute a consensus. See *id.* ¶ 105 (“[T]here is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus.”).

70. E.g., Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L.J. 1730, 1734-45 (2011); Helfer & Slaughter, *supra* note 67, at 327.

71. *Schalk & Kopf*, no. 30141/04, ¶ 105.

72. Of course, another way to say that the European Court of Human Rights *delayed* rights recognition is to say that it *denied* rights recognition temporarily. Sometimes, a court might strategically deny a right without signaling that it will recognize the right in the future. *Baker v. State* can be viewed as an example of strategic rights denial, as opposed to strategic delay. 744 A.2d 864 (Vt. 1999). In *Baker*, the Vermont Supreme Court held that same-sex couples have a right to legal recognition other than marriage. This decision led to the creation of civil unions in Vermont, the first time a state in the United States granted any legal status to same-sex couples. The court gave no indication that it would require the legalization of same-sex marriage in the future. By denying the right to same-sex marriage and allowing civil unions as a substitute, the court struck a strategic compromise. It seems that the Vermont Supreme Court sought to shield itself from the sort of backlash that the Hawaii Supreme Court provoked just a few years earlier in its same-sex marriage case. For discussion about this strategic compromise, see WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002); Tonja Jacobi, *Same-Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary’s Role*, 26 VT. L. REV. 381, 396 (2002). Vermont eventually legalized same-sex marriage through legislation in 2009. 2009 Vt. Acts & Resolves 33.

C. Remedial Delays as Strategic Behavior

We now turn to the third type of strategic delay, remedial delay, which is the primary focus of this Article. The *Brown* litigation provides an early example of remedial delay. In *Brown I*, the U.S. Supreme Court recognized that African Americans have a right to attend desegregated schools based on the constitutional guarantee of equal protection.<sup>73</sup> The Court did not, however, require state governments to integrate public schools right away. Instead, in *Brown II*, the Court asked that schools desegregate “with all deliberate speed,” creating a temporal separation between rights (recognized now) and remedy (to be fully implemented later).<sup>74</sup> Almost a decade later, the Court finally stated in *Griffin v. County School Board of Prince Edward County* that “[t]he time for mere ‘deliberate speed’ ha[d] run out.”<sup>75</sup> In *Griffin*, the Court ordered an injunction to immediately integrate the Virginia schools at issue.<sup>76</sup>

To be clear, concern about potential backlash is not the sole factor behind remedial grace periods. For clarity, it is helpful to recognize a distinction between what I will call “structural” factors and “strategic” factors. A court might believe that there is a range of legitimate structural frameworks for remedying a rights violation. If so, the court might grant other branches of government a grace period to develop the remedial framework of its choice. For example, there are various tools for integrating schools, including, but not limited to, mandatory busing, strategic placement of new schools, and development of integrated magnet schools.<sup>77</sup> In *Brown II*, the Supreme Court gave states time to choose among such administrative tools for structuring integrated schools. In contexts such as school integration, a court might allow a grace period because developing a remedial structure takes time, involving policy decisions that other

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73. *Brown I*, 347 U.S. 483 (1954).

74. *Brown II*, 349 U.S. 294, 301 (1955).

75. 377 U.S. 218, 234 (1964) (ordering an injunction to immediately desegregate the Virginia public schools at issue, explaining that the Constitution did not permit the government to simply close its public schools in lieu of desegregation).

76. *Id.* at 232-34.

77. See Davison M. Douglas, *The End of Busing?*, 95 MICH. L. REV. 1715, 1730-36 (1997) (reviewing GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996)) (discussing policy debate concerning different desegregation tools).



branches of government are better at handling.<sup>78</sup> These considerations are what I call “structural” motivations.

The Supreme Court justices’ conference notes, however, suggest that the grace period after *Brown II* was not motivated solely by structural concerns.<sup>79</sup> The Court seemed worried that, even if it were logistically feasible to push for rapid desegregation, demanding integration at too quick a pace would exacerbate backlash against the Court and its recognition of the right to integration.<sup>80</sup> These worries can explain why the Court created a weak and flexible deadline for its grace period, directing the government to act “with all deliberate speed,” instead of imposing a more concrete temporal requirement. Such considerations about public perceptions are what I call “strategic” motivations for judicial grace periods.<sup>81</sup>

Same-sex marriage presents a situation in which remedial delays seem mostly—even entirely—animated by strategic concerns. If a court tells the legislature it must legalize same-sex marriage within a grace period or else same-sex marriage will be read into the law, the court is not engaging the legislature in dialogue about how to choose among different policy options for remedying a rights violation; instead, the court has already determined that same-sex marriage is the required remedy.<sup>82</sup> In terms of logistics, same-sex marriage can be implemented quickly. The only required administrative change is usually the revision of marriage application forms to render them

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78. For another example of structural factors, see *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In this case, the U.S. Supreme Court invalidated bankruptcy jurisdiction and gave Congress a one-year grace period to develop an alternative jurisdictional structure. *Id.* Congress was granted discretion to evaluate different policy options for fulfilling constitutional requirements. *Id.* Congress ultimately failed to meet the Supreme Court’s deadline. See Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 360-63 (2016) (discussing the government response to *Northern Pipeline Construction Co.*).

79. See MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* 305 (1994).

80. *Id.*; see also KLARMAN, *supra* note 15 (discussing the Court’s decision in *Brown II* to delay full desegregation of public schools).

81. In a forthcoming article, Rosalind Dixon and Samuel Issacharoff elaborate on the distinction between structural and strategic factors. They refer to structural motivations for delay as “first-order” goals, while referring to strategic motivations as “second-order” goals. See Rosalind Dixon & Samuel Issacharoff, *Living To Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. (forthcoming).

82. Cf. Emmett Macfarlane, *Dialogue or Compliance? Measuring Legislatures’ Policy Responses to Court Rulings on Rights*, 34 INT’L POL. SCI. REV. 39, 39-51 (2012) (presenting data from Canada suggesting that genuine dialogue between the judicial and political branches has been rare).

gender-neutral. In the United States, states that received court orders to implement same-sex marriage typically accomplished the task with ease, giving marriage licenses to same-sex couples days, if not hours, after final judicial rulings.<sup>83</sup> Likewise, the government in Ontario, Canada began issuing marriage licenses to same-sex couples just hours after the Court of Appeal for Ontario ruled that excluding same-sex couples from marriage violated the Canadian Charter of Rights and Freedoms.<sup>84</sup> The Court of Appeal rejected the grace period that the lower court originally adopted.<sup>85</sup> Ontario's ability to implement same-sex marriage so quickly suggested that the lower court was motivated by strategic, not structural, reasons when it granted a two-year grace period for implementing same-sex marriage. Because remedial grace periods in the same-sex marriage context seem clearly motivated by strategic concerns, they present a fitting case study for examining whether and how grace periods influence public perceptions.

Many scholars have critiqued remedial delays.<sup>86</sup> Most of this literature centers on *Brown II*. While scholars applaud *Brown I* for articulating an important equality principle, they lament *Brown II* for doing more harm than good, emboldening opponents of desegregation to dig in their heels.<sup>87</sup> Despite the grace period in *Brown II*, the Court's *Brown* decisions still generated enormous backlash in the American South.<sup>88</sup>

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83. See Niraj Chokshi & Jeff Guo, *Where Gay Marriage Stands in the States that Didn't Have It*, WASH. POST: GOVBEAT (June 26, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/06/26/where-gay-marriage-stands-in-the-states-that-didnt-have-it/> (“Within hours of the Supreme Court’s decision on Friday, gay couples were exercising what the justices said is their constitutional right to marry in states that have long denied them.”).

84. See Estanislao Oziewicz, *Same-Sex Married Couples Rejoice*, GLOBE & MAIL (June 11, 2003, 3:55 AM), [www.theglobeandmail.com/news/national/same-sex-married-couples-rejoice/article20449572/](http://www.theglobeandmail.com/news/national/same-sex-married-couples-rejoice/article20449572/) (noting that the City of Toronto complied with the Ontario Court of Appeal immediately, issuing marriage licenses to same-sex couples the same morning that the court issued its decision).

85. *Halpern v. Canada* (Att’y Gen.) (2003), 65 O.R. 3d 161, paras. 154-56 (Can. Ont. C.A.).

86. For criticisms based on *Brown II*, see, for example, sources cited *supra* note 15. For criticisms from the Canadian context, see, for example, Grant R. Hoole, *Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law*, 49 ALTA. L. REV. 107 (2011); Roach, *supra* note 16.

87. See, e.g., sources cited *supra* note 15.

88. See KLARMAN, *supra* note 15. Klarman’s research suggests that Southern backlash against *Brown* eventually prompted a counter backlash from integrationists, spurring federal civil rights legislation to prohibit race discrimination. See *id.* This silver lining notwithstanding, scholars are deeply critical of *Brown II*’s remedial delay.

Following the U.S. Supreme Court's decision in *Brown II*, other courts have refined the use of remedial grace periods by setting concrete deadlines, in contrast to the flexible deadline in *Brown II*. For example, in the South African same-sex marriage case, the Constitutional Court set a one-year deadline.<sup>89</sup> Some Canadian superior courts adopted two-year grace periods in their same-sex marriage cases.<sup>90</sup> The Massachusetts Supreme Judicial Court allowed 180 days for the implementation of same-sex marriage.<sup>91</sup> Colombia also adopted a two-year grace period in its same-sex marriage case, and Hong Kong adopted a one-year grace period in its transgender marriage case.<sup>92</sup> As discussed below, however, the Colombian and Hong Kong cases are somewhat distinguishable from the more straightforward same-sex marriage cases. These two courts granted their respective legislatures significantly more discretion to explore different ways to structure their remedies. Thus, these cases were arguably motivated by both structural and strategic concerns.

Despite the growing judicial resort to remedial delays, there has been very little empirical evaluation of the effectiveness of remedial grace periods beyond the research on *Brown II*. Understanding the effects of grace periods is important in light of the strong normative claim that judges should not let politics influence their decisions.<sup>93</sup> Accepting that judges should generally be blind to politics, we should expect judges to adopt strategic remedial delays only under exceptional circumstances where the threat of political backlash is extreme and remedial delay is likely to mitigate that threat. In this Article, my focus is not on developing a methodology to address the first part of this equation: the severity of the threat of backlash. Instead, my focus is on the latter part of the equation: mitigation effectiveness. If there is no reason to believe that remedial delays can

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89. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at para. 114 (S. Afr.).

90. *Halpern v. Canada* (Att'y Gen.), [2002] O.J. No. 2714, paras. 268-70 (Can. Ont. Sup. Ct. J.); *EGALE Can. Inc. v. Canada* (Att'y Gen.) (2001), 95 B.C.L.R. 3d 122 (Can. B.C. S.C.), *aff'd*, (2003) 13 B.C.L.R. 4th 1 (Can. B.C. C.A.). *But see* *Halpern v. Canada* (Att'y Gen.) (2003), 65 O.R. 3d 161, paras. 154-56 (Can. Ont. C.A.) (affirming lower court's protection of the right to same-sex marriage, but rejecting the remedial grace period).

91. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003); *see also* *Ops. of the Justices to the Senate*, 802 N.E.2d 565, 568 (Mass. 2004) (holding that a bill permitting same-sex civil unions, but banning same-sex marriages, was unconstitutional).

92. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11 (Colom.); *W. v. Registrar of Marriages*, [2013] 16 H.K.C.F.A.R. 112 (C.F.A.) (H.K.).

93. *See supra* note 25 and accompanying text.

effectively mitigate backlash, then they should not be pursued. Thus, this Article explores whether remedial delays are effective.

A notable exception to the dearth of relevant research is Tonja Jacobi's work on the Massachusetts same-sex marriage case, *Goodridge v. Department of Health*.<sup>94</sup> Jacobi studied national public opinion polls from the 180-day grace period following the Massachusetts Supreme Judicial Court's decision.<sup>95</sup> She found that there was a net decrease in opposition to same-sex marriage over the course of the grace period and, in particular, opposition diminished after the legislature agreed to follow the court's instructions to legislate marriage equality.<sup>96</sup> Jacobi concluded that the court was "able to manipulate the state's legislative body's influence over public opinion to mitigate the constraining effect of popular opposition to equal marriage rights."<sup>97</sup>

While Jacobi's research sheds light on remedial grace periods, many research questions remain unanswered. For example, it is unclear whether the grace period in Massachusetts mitigated backlash against the court, which is not necessarily the same as backlash against same-sex marriage. The public could have come to accept same-sex marriage while still faulting the court for judicial activism. In terms of methodology, Jacobi's study was limited to data from Gallup's national public opinion polls. The South African case study that follows builds on Jacobi's research by evaluating new data to assess the effectiveness of remedial grace periods in mitigating backlash against the South African Constitutional Court and backlash against same-sex marriage itself.

### III. SOUTH AFRICAN CASE STUDY

This Part presents the case study on the grace period following South Africa's same-sex marriage ruling. I begin by painting a backdrop to the case study by offering a brief account of the litigation that produced the grace period. Next, I describe the methodology of the case study, and then I discuss my research findings.

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94. Jacobi, *supra* note 14.

95. *Id.*

96. *Id.*

97. *Id.* at 37.

### A. *The Fourie Litigation*

South Africa's post-apartheid constitution has been heralded as one of the most rights-protective constitutions in the world.<sup>98</sup> The Interim Constitution of 1993 became the first national constitution to explicitly ban sexual orientation discrimination, and that provision was later adopted in the Final Constitution of 1996.<sup>99</sup> Gay rights advocates leveraged the new constitution in litigation, securing same-sex couples' rights in domains such as immigration, employment benefits, and parenting.<sup>100</sup> Building on those precedents, the Constitutional Court handed down its landmark same-sex marriage decision in December 2005, in the consolidated cases of *Minister of Home Affairs v. Fourie* and *Lesbian and Gay Equality Project v. Minister of Home Affairs*, often referred to collectively as the *Fourie* decision.<sup>101</sup> The court ruled that denying same-sex couples the "status, entitlements and responsibilities" of marriage violated equality and dignity rights enshrined in sections 9 and 10 of the Constitution.<sup>102</sup>

The court made history in *Fourie*, becoming the first national apex court to rule that excluding same-sex couples from marriage is unconstitutional.<sup>103</sup> Scholars have discussed the thoroughness with

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98. *E.g.*, Louise Arbour & Fannie Lafontaine, *Beyond Self-Congratulation: The Charter at 25 in an International Perspective*, 45 OSGOODE HALL L.J. 239, 271 (2007) ("The South African Constitution is one of the most progressive and modern constitutions in the world, with one of the most comprehensive bills of rights.")

99. S. AFR. CONST., 1996, ch. 2, §§ 9(3), 9(4); S. AFR. (INTERIM) CONST., 1993, ch. 3, § 8(2).

100. *Du Toit v. Minister of Welfare and Population Dev.* 2003 (2) SA 198 (CC) at paras. 38-42 (S. Afr.) (protecting the rights of same-sex couples to be joint legal parents of an adopted child); *J v. Dir.-Gen., Dep't of Home Affairs* 2003 (5) SA 621 (CC) at paras. 23-28 (S. Afr.) (protecting the right of same-sex couples to become joint legal parents through artificial insemination); *Satchwell v. President of the Republic of S. Afr.* 2002 (6) SA 1 (CC) at paras. 8-9, 12-14 (S. Afr.) (ruling that a permanent same-sex life partner of a judge is entitled to the same pension benefits as a judge's spouse); *Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Home Affairs* 2000 (2) SA 1 (CC) at paras. 97-98 (S. Afr.) (holding that same-sex permanent life partners should have the same immigration rights as spouses).

101. *See Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at paras. 48-56 (S. Afr.) (discussing Constitutional Court case law on the rights of same-sex couples).

102. *Id.* at para. 114.

103. *Id.* When *Fourie* was decided, four other countries had legalized same-sex marriage nationwide: the Netherlands, Belgium, Luxembourg, and Canada. All four of these countries did so through national legislation. Responding to a request from the Canadian Government, the Supreme Court of Canada issued an advisory opinion clarifying that Parliament had the authority to legalize same-sex marriage nationwide; in doing so, the court focused on defining the scope of Parliament's powers and did not rule on the constitutionality of limiting marriage to different-sex couples. *See Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Can.). For background on the legalization of same-sex marriage in Canada,

which the majority opinion addressed the practical and symbolic harms of excluding same-sex couples from marriage.<sup>104</sup> My research focuses on yet another remarkable aspect of the opinion: its unique remedy in the form of a grace period. The court could have legalized same-sex marriage immediately by reading the gender-neutral term “spouse” into the Marriage Act.<sup>105</sup> Instead, the court gave Parliament one year to remedy the situation through legislative reform.<sup>106</sup> If, however, Parliament failed to correct the constitutional defects within a year, the word “spouse” would automatically be read into the Marriage Act.<sup>107</sup> One member of the court, Justice Kate O’Regan, dissented. She disagreed with the majority only with respect to its remedy because she preferred to grant same-sex couples immediate access to marriage.<sup>108</sup>

Why did the majority delay relief? Justice Albert (“Albie”) Sachs explained: “It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect.”<sup>109</sup> Justice Sachs opined that engaging the legislature could enlarge the government’s “institutional imprimatur” on same-sex marriage, thereby enhancing same-sex marriage’s legitimacy.<sup>110</sup> Accordingly, the grace period “would best serve [same-sex couples’] equality claims by respecting the separation of powers and giving Parliament an opportunity to deal appropriately with the matter.”<sup>111</sup>

These statements reveal the court’s aim of mitigating potential criticism that it was disrupting the balance of power among branches of government. The court also exhibited interest in fortifying the perceived legitimacy of same-sex marriage. Writing for the majority, Justice Sachs seemed acutely aware that, despite the expansion of legal rights for gays and lesbians in the post-apartheid era, many, if

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including the role that lower courts played in prompting national legislation, see Peter W. Hogg, *Canada: The Constitution and Same-Sex Marriage*, 4 INT’L J. CONST. L. 712 (2006).

104. E.g., Pierre de Vos, *The ‘Inevitability’ of Same-Sex Marriage in South Africa’s Post-Apartheid State*, 23 S. AFR. J. ON HUM. RTS. 432, 453-57 (2007); Lisa Newstrom, Note, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT’L L.J. 781 (2007).

105. *Fourie* 2006 (1) SA 524 at paras. 135, 158.

106. *Id.* at para. 156.

107. *Id.* at paras. 157-62.

108. *Id.* at paras. 163-73 (O’Regan, J., dissenting).

109. *Id.* at para. 138.

110. *Id.* at para. 137.

111. *Id.* at para. 139.

not most, South Africans still considered homosexuality a taboo.<sup>112</sup> With this backdrop, the majority opinion sought to legalize same-sex marriage in a way that would minimize backlash.<sup>113</sup>

To be sure, the court acknowledged that the legislature might fail to pass legislative reform during the grace period.<sup>114</sup> If that were to happen, same-sex marriage would not bear the enlarged institutional imprimatur that the court sought. It seems that Justice Sachs and the other justices who joined him were willing to take the gamble. Perhaps this is because they figured that the backlash to a judicial reading-in of same-sex marriage would provoke similar backlash regardless of whether it were done right away or in a year. In this view, there was little to lose by waiting a year to see if Parliament would lend its support.

The court anchored the grace period to section 172 of the Constitution, which explicitly allows courts to “suspend declarations of invalidity,” granting the legislature time to cure constitutional defects.<sup>115</sup> In the past, however, the court suspended its decisions when it found that new government policies needed to be developed to comply with the Constitution, but it was hesitant to decide among various constitutionally sound ways of crafting such policies. For example, in *Dawood v. Minister of Home Affairs*, the court held that certain provisions of immigration policy were unconstitutional because they failed to explain clearly how immigration officers should determine the privileges of noncitizen family members of South African citizens.<sup>116</sup> Instead of pronouncing new immigration rules to remedy this vagueness, the court granted Parliament a two-year deadline to do so.<sup>117</sup> There was “a range of possibilities” that

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112. See *id.* at para. 138 (“This is a matter that touches on deep public and private sensibilities.”); *id.* at para. 153 (noting patterns of discrimination and homophobia).

113. See THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005* 256 (2013) (“The genius of Justice Sachs’s solution lies in the way it balances the Court’s duty to enforce the constitutional value system against the danger of political backlash.”).

114. *Fourie* 2006 (1) SA 524 at para. 157.

115. S. AFR. CONST., 1996, ch. 8, § 172 (“When deciding a constitutional matter within its power, a court . . . may make any order that is just and equitable, including . . . an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”).

116. 2000 (3) SA 936 (CC) at para. 61 (S. Afr.).

117. *Id.* at para. 65.

Parliament could pursue to render immigration law clearer and, therefore, constitutionally sound.<sup>118</sup>

In contrast, *Fourie* left Parliament with little room for creative policymaking.<sup>119</sup> Justice Sachs highlighted two possible ways that Parliament could choose to legalize same-sex marriage. Parliament could amend the Marriage Act, or it could create a separate piece of legislation to allow same-sex couples to wed.<sup>120</sup> Either way, same-sex marriage would become a legal reality.<sup>121</sup> Despite this fact, the court opted for a grace period instead of implementing same-sex marriage immediately.<sup>122</sup> The court's main reason for the grace period seemed to be its hope that the grace period could defuse controversy and mitigate backlash by enlisting the support of Parliament.<sup>123</sup>

Ultimately, in December 2006, Parliament passed a bill to legalize same-sex marriage, and the President's office signed it into law.<sup>124</sup> South Africa became the fifth country in the world, and the first in Africa, to legalize same-sex marriage.<sup>125</sup> Parliament chose to leave the original Marriage Act intact and passed a parallel piece of

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118. *Id.* at paras. 63-64.

119. *See de Vos, supra* note 104.

120. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at paras. 139-47 (S. Afr.).

121. The court stated that “the present exclusion of same-sex couples from enjoying the status and entitlements coupled with the responsibilities that are accorded to heterosexual couples by the common law and the Marriage Act, is constitutionally unsustainable.” *Id.* at para. 147. The court did not say explicitly that Parliament needed to extend the label “marriage” to same-sex couples. However, it did declare that same-sex couples are entitled to the “status” that marriage affords, and it emphatically rejected the idea of separate but equal. *Id.* at paras. 147, 150. As such, one would be extremely hard-pressed to argue that *Fourie* required anything less than the legalization of same-sex marriage. Justice Sachs has since reiterated that the *Fourie* decision required same-sex marriage and did not permit the relegation of same-sex couples to a separate but equal relationship status. *See* Albie Sachs, Opinion, *South Africa's Path to Marriage Equality*, L.A. TIMES (June 13, 2013), <http://articles.latimes.com/2013/jun/13/opinion/la-oe-sachs-gay-marriage-south-africa-20130613>.

Advocates who campaigned for marriage equality wished that *Fourie* had been more explicit about extending the label “marriage” to same-sex couples. As David Bilchitz explained, the *Fourie* opinion “left some room for political wrangling” even though, logically, denying the label “marriage” would not satisfy the court's requirement of equal status. Interview with David Bilchitz, in Johannesburg, S. Afr. (May 22, 2015). Parliament's first draft of the Civil Union Bill would have established a “so-called ‘separate but equal’” system, and Parliament ultimately rejected it. *de Vos, supra* note 104, at 458-61.

122. *See supra* notes 109-112 and accompanying text; *infra* text accompanying note 123.

123. *See supra* notes 109-113 and accompanying text.

124. Civil Union Act 17 of 2006 (S. Afr.).

125. *See Hogg, supra* note 103, at 712 (discussing the earlier legalization of same-sex marriage in the Netherlands, Belgium, Spain, and Canada).



legislation called the Civil Union Act.<sup>126</sup> The Civil Union Act gives same-sex couples and different-sex couples the option to get married, as well as the option of entering a “civil partnership” instead.<sup>127</sup> Note that the South African meaning of “civil union” differs from the meaning in the United States, where civil unions and marriages are separate institutions.<sup>128</sup> In contrast, South Africa’s Civil Union Act makes marriages a subcategory of civil unions.<sup>129</sup>

By promulgating the Civil Union Act without repealing the Marriage Act, Parliament created a great deal of redundancy.<sup>130</sup> However, whereas the Marriage Act does not allow civil marriage officials to opt out of performing different-sex marriages, the Civil Union Act permits civil marriage officers to opt out of performing same-sex marriages and same-sex civil partnerships based on their conscience.<sup>131</sup> This opt-out provision, coupled with the symbolism of preserving the exclusionary Marriage Act, perpetuates an inequality based on sexual orientation.<sup>132</sup> Practically speaking, however, same-sex marriage became legal in 2006, and human rights advocates have not challenged the opt-out provision in court, choosing to set their sights on more pressing goals instead.<sup>133</sup>

Although it is clear that same-sex marriage is now legal, the yearlong legalization process after *Fourie* prompts many questions. What happened during the grace period? Did the grace period enhance the perceived legitimacy of the court and same-sex marriage? Or did the grace period simply delay justice without altering the public’s perceptions of the court and same-sex marriage? Since the

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126. For a primer on the Civil Union Act, see David Bilchitz, *A Short Guide to the Civil Union Act*, in *TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA*, *supra* note 23, at 202.

127. *Id.*

128. See Courtney Megan Cahill, *(Still) Not Fit to Be Named: Moving Beyond Race To Explain Why ‘Separate’ Nomenclature for Gay and Straight Relationships Will Never Be ‘Equal.’* 97 GEO. L.J. 1155, 1156-71 (2009) (providing background on civil unions in the United States).

129. Civil Union Act 17 of 2006 § 1 (S. Afr.).

130. For example, the Marriage Act and the Civil Union Act both grant different-sex couples the ability to marry legally. See Civil Union Act 17 of 2006 § 8 (S. Afr.); Marriage Act 25 of 1961 § 30 (S. Afr.).

131. See Civil Union Act 17 of 2006 § 6 (S. Afr.).

132. For an elaboration on compromise embodied by the Civil Union Act, see David Bilchitz with Melanie Judge, *The Civil Union Act: Messy Compromise or Giant Leap Forward?*, in *TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA*, *supra* note 23, at 149.

133. For example, all of my interview subjects stated that hate crimes are a priority issue.

Constitutional Court directed Parliament's actions, did the public view the court as activist and ultimately responsible for same-sex marriage? I explore these questions in the following subparts. Using data from newspaper articles and interviews I conducted with South African human rights activists, I seek to deepen our understanding of how the grace period unfolded.

### B. *Method of Investigation*

My research strives to develop an understanding of how, if at all, the grace period influenced perceptions of the Constitutional Court and same-sex marriage.<sup>134</sup> To investigate this question, I first turned to newspaper articles. Reports and editorials in newspapers provide a window into public sentiments. To be sure, newspapers present a filtered representation of public views because their staffs decide what to publish and what not to publish. Even as an imperfect reflection of public sentiments, however, newspaper content sheds light on the grace period after *Fourie*. In addition to *reflecting* public opinion, newspaper content is also illuminating because of its role in *shaping* public views. Newspapers develop narratives about current events, and such narratives powerfully impact public perceptions.<sup>135</sup>

It is worth noting that my research did not evaluate public opinion polling data, which would have provided a more direct measure of public sentiments. Jacobi's study on the grace period following Massachusetts's same-sex marriage decision suggests that public opinion data could be insightful. Unfortunately, relevant polling data is not available for the grace period following *Fourie*.

My content analysis of newspapers is based on a set of 215 articles published during the grace period.<sup>136</sup> I collected these articles from nine English-language newspapers in South Africa. Five were daily newspapers: *Business Day*, *Cape Argus*, *Citizen*, *Daily Sun*, and *Sowetan*. Four were weekly publications: *City Press*, *Sunday Sun*,

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134. In this inquiry, I defined "influence" broadly to include ways that the grace period might have indirectly affected public perceptions. I was interested in whether prolonging the timeline for realizing same-sex marriage enabled any social or political developments that altered public perceptions.

135. MAXWELL MCCOMBS, *SETTING THE AGENDA: THE MASS MEDIA AND PUBLIC OPINION* (2004) (explaining how mass media shapes public opinion through "agenda-setting").

136. I counted each letter to the editor as one article. Compendia of quotes published under a headline, such as a *voices populi*, were counted as an article. Each editorial cartoon was also counted as an article.

*Sunday Times*, and *Sunday World*. I chose these newspapers because of their relatively high circulation rates.<sup>137</sup> With differing reputations in terms of their readerships' social and political backgrounds, the dataset's newspapers reach a considerable cross section of the South African population.<sup>138</sup> Details about these newspapers' circulation and readership can be found in Appendix 1.

Of these newspapers, only *Business Day's* articles from the grace period have been completely digitized.<sup>139</sup> I retrieved articles from the remaining newspapers in either hard copy or microfilm format. Because the nondigitized sources were not searchable by keyword, I scoured each newspaper for relevant articles published within four windows during the grace period. Each window corresponded with an event triggering media coverage: (1) the issuance of the *Fourie* decision, (2) the Cabinet's preapproval of relevant legislation, (3) the introduction of legislation in Parliament, and (4) the final weeks of the grace period, during which Parliament passed the Civil Union Act and the acting President signed it into law. I considered an article to be relevant if it referred to law reform prompted by *Fourie*.<sup>140</sup> Appendix

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137. Circulation data came from the Audit Bureau of Circulations of South Africa. *Cape Argus*, *The Citizen*, *Daily Sun*, and *Sowetan* were four of the five English-language dailies with highest circulation. I did not include the fifth newspaper from that category, *The Star*, because it is a tabloid that is not archived at the National Library of South Africa, where I conducted most of my research. *City Press*, *Sunday Sun*, *Sunday Times*, and *Sunday World* were four of the five English-language weeklies with highest circulation. I did not include the fifth newspaper from this category, *Soccer Laduma*, because of its focus on soccer news. In addition to selecting these eight newspapers, I included *Business Day* because of easy access and the fact that it ranked highly in circulation, even though it was not one of the top five dailies (it ranked eighth). *Business Day* was easily accessible and searchable in digital format. The other newspapers were available only in hard copy or on microfilm.

138. My dataset did not include newspapers published in languages other than English, such as Afrikaans or isiZulu. It is important to note that this omission might obscure differences among demographic groups in South Africa. English, however, is the lingua franca of South African media, education, politics, and business. As such, English-language publications reach a broad range of readers. See Neville Alexander, *Language Politics in South Africa*, in 2 SHIFTING AFRICAN IDENTITIES 141, 146-47 (Simon Bekker et al. eds., 2001) (describing English's lingua franca status in South Africa).

139. A small number of articles from the other newspapers had been selectively digitized by Sabinet, a library services company. Sabinet's database includes only a small number of articles from the grace period.

140. The dataset includes articles that explicitly discussed the legalization of same-sex marriage or civil partnerships in South Africa. The dataset also includes articles that implicitly referred to same-sex marriage or civil partnerships in South Africa. For example, I would include an article if it discussed law reform regarding gay relationships without using the terms "marriage" or "civil partnership," and the article was published immediately after the Civil Unions Bill was introduced in Parliament.

2 provides dates for each search period and the number of articles identified for each period.<sup>141</sup>

Using NVivo qualitative research software, I coded the 215 articles to explore how the articles described events and opinions.<sup>142</sup> For example, when Parliament passed the bill to legalize same-sex marriage, I examined the language that newspapers used to report that event. The report could describe the event as Parliament exercising its own agency to make same-sex marriage a legal right, or alternatively, it could describe Parliament as simply following the Constitutional Court's directive. The manner in which the event is described can impact public perceptions of the court vis-à-vis Parliament. Likewise, when examining opinion pieces, I examined how praise and criticism were formulated and whether such sentiments were directed at the court, other branches of government, or both. Appendix 3 provides an outline of my coding scheme.

The second component of my case study was interviews with seven LGBTI<sup>143</sup> rights advocates in South Africa.<sup>144</sup> The advocates I interviewed shared their thoughts on how they sought to shape public opinion during the grace period. They also discussed how they believe the grace period ultimately affected public perceptions. A list of my interview subjects can be found in Appendix 4.

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The dataset does not include articles that focus on same-sex marriage outside of South Africa. For example, several articles from the grace period reported the same-sex wedding of British celebrity Elton John without delving into the topic of law reform in South Africa. Those articles were excluded. The dataset also excludes articles reporting solely on the Constitutional Court case of *Gory v. Kolver NO*, which concerned the inheritance rights of unmarried same-sex partners. See *Gory v. Kolver NO* 2007 (4) SA 97 (CC) (S. Afr.).

141. A full list of the 215 articles in the dataset is available via SSRN. Holning Lau, *Comparative Perspectives on Strategic Remedial Delay: Newspaper Source List*, SSRN (May 25, 2016), <http://ssrn.com/abstract=2784262> [hereinafter Lau, *Newspaper Source List*].

142. To strengthen the reliability of my coding, I had a research assistant independently code the main subsets of data that I determined to be most relevant to the discussions in subpart III.C. I made minor adjustments to my coding based on this cross-check. I also controlled the quality of my newspaper analysis by corroborating key findings through interviews with LGBTI rights activists in South Africa. (The acronym "LGBTI" is commonly used in South Africa and elsewhere as a shorthand for "lesbian, gay, bisexual, transgender, and intersex.") For a list of interview subjects, see *infra* Appendix 4.

143. For an explanation of the acronym "LGBTI," see *supra* note 142.

144. I received Institutional Review Board (IRB) approval from the University of North Carolina prior to conducting these interviews.

### C. *Unfolding the Story of the Grace Period*

A close look at my newspaper and interview data revealed four overlapping themes that ultimately enhanced the perceived legitimacy both of the Constitutional Court and of same-sex marriage.<sup>145</sup> Note that these two areas of legitimacy are not inherently linked. For example, people might believe that same-sex marriage is a socially legitimate institution, yet believe that the judiciary legalized same-sex marriage through illegitimate means. The four themes in the data suggest, however, that the grace period enhanced the perceived legitimacy of both the court and same-sex marriage. This subpart explores each of these themes.

#### 1. Altering Perception of Options

The *Fourie* opinion contemplated a very narrow path for Parliament.<sup>146</sup> The court directed Parliament to legalize same-sex marriage, and if Parliament refused to do so within a year, the court would legalize same-sex marriage by judicial decree.<sup>147</sup> In light of this demand, it was reasonable to believe that public accusations of judicial activism would not wane much during the grace period. Based on the *Fourie* opinion alone, the public would likely perceive Parliament as a passive partner in the legalization process, assigning primary responsibility to the court.

Beyond the pages of the *Fourie* opinion, however, the media constructed a different view of Parliamentary action. The media portrayed Parliament's legalization of same-sex marriage as an assertive act of volition, not merely passive following of the Constitutional Court's directive. Based on this understanding of Parliamentary agency, same-sex marriage opponents' complaints of

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145. It is worth emphasizing that my research examines extrinsic *perceptions* of legitimacy among the public, as opposed to intrinsic measures of legitimacy such as the strength of a legal decision's logic and fidelity to precedent. In other words, my study focuses on what Richard Fallon has described as "sociological legitimacy," as opposed to "legal legitimacy." Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-96 (2005). "When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward." *Id.* at 1795 (emphasis omitted).

146. See *supra* notes 119-121 and accompanying text.

147. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at para. 157 (S. Afr.).

judicial overreach eventually diminished, and criticism was redirected at Parliament.

Newspapers emphasized Parliament's volition by expanding the scope of Parliament's options beyond *Fourie's* contemplation and by focusing attention on Parliament's agency in decision-making. Consider first the media's role in constructing the scope of Parliament's options. In *Fourie's* wake, the most vociferous opponents of same-sex marriage drew attention to a path that *Fourie* did not explicitly contemplate. These activists pressed Parliament to pass a constitutional amendment to override *Fourie* and enshrine the exclusion of same-sex couples from marriage. Four of the five major dailies—*Business Day*, *Cape Argus*, *Citizen*, and *Sowetan*—presented the idea of constitutional amendment, and the idea had a recurring presence in three of these newspapers.<sup>148</sup>

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148. See Mike Atkins, Letter to the Editor, *Marriage Exists Between a Man and a Woman*, CAPE ARGUS (S. Afr.), Dec. 5, 2005, at 11 [hereinafter Atkins, *Marriage Exists*]; Mike Atkins, Editorial, *Not Fitting Bill*, BUS. DAY (S. Afr.) (Nov. 28, 2006), <http://infoweb.newsbank.com/resources/doc/nb/news/132D6E9F514AF4C8?p=AWNB> [hereinafter Atkins, *Not Fitting Bill*]; Andrew Bateman, Letter to the Editor, *Tomorrow's Children Would Tell Us the Truth*, CAPE ARGUS (S. Afr.), Nov. 16, 2006, at 18; Wyndham Hartley, *All Same-Sex Law Needs Is President's Signature*, BUS. DAY (S. Afr.) (Nov. 29, 2006), <http://infoweb.newsbank.com/resources/doc/nb/news/132D6E905E3C6310?p=AWNB> [hereinafter Hartley, *All Same-Sex Law Needs*]; Wyndham Hartley, *MPs Dig in Heels Against Same-Sex Unions*, BUS. DAY (S. Afr.) (Sept. 14, 2006), <http://infoweb.newsbank.com/resources/doc/nb/news/132D6E789067C4A0?p=AWNB>; Wyndham Hartley, Editorial, *Uneasy Marriage Between Creed and Constitution*, BUS. DAY (S. Afr.) (Nov. 29, 2006), <http://infoweb.newsbank.com/resources/doc/nb/news/132D6E906E263580?p=AWNB> [hereinafter Hartley, *Uneasy Marriage*]; Norman Joseph, *Mass Christian Protests Against Same-Sex Union Bill Planned*, CAPE ARGUS (S. Afr.), Sept. 12, 2006, at 6; Melanie Judge, Editorial, *Social Amnesia*, BUS. DAY (S. Afr.) (Sept. 18, 2006), <http://infoweb.newsbank.com/resources/doc/nb/news/132D6EA3DA1B6538?p=AWNB>; Ernest Mabuza, *Constitutional Court Orders Law to Bless Same-Sex Ties*, BUS. DAY (S. Afr.) (Dec. 2, 2005), <http://infoweb.newsbank.com/resources/doc/nb/news/132D7065D8964020?p=AWNB>; Sipokazi Maposa, *Mixed Reaction to Same-Sex Ruling*, CAPE ARGUS (S. Afr.), Dec. 2, 2005, at 2 [hereinafter Maposa, *Mixed Reaction*]; Sipokazi Maposa, *Same-Sex Union Bill Slated for Lack of Consultation*, CAPE ARGUS (S. Afr.), Sept. 14, 2006, at 6 [hereinafter Maposa, *Same-Sex Union Bill*]; Waghled Misbach & South African Press Association (SAPA), *Parties Split on Gay Marriages*, SOWETAN (S. Afr.), Dec. 2, 2005, at 4; Kennedy Mudzuli, *Same-Sex Bill 'Not Needed'*, CITIZEN (S. Afr.), Nov. 16, 2006, at 6; Angela Quintal, *Bill Recognises Partnerships*, CAPE ARGUS (S. Afr.), Aug. 25, 2006, at 10; Philip Rosenthal, Letter to the Editor, *Civil Union Bill Is an Insult to Marriage*, CITIZEN (S. Afr.), Nov. 30, 2006, at 13; Bob van der Berg, Letter to the Editor, *'Marriage' of Gays Not God's Purpose*, CITIZEN (S. Afr.), Dec. 8, 2005, at 13; Mzolisi Witbooi, *Ndungane Sees Red over Same-Sex Marriages*, CAPE ARGUS (S. Afr.), Sept. 15, 2006, at 5; see also Waghled Misbach, *Last-Gasp Bid to Stop Signing of Gay Bill*, SOWETAN (S. Afr.) (Nov. 24, 2006), <http://www.sowetanlive.co.za/sowetan/archive/2006/11/24/last-gasp-bid-to-stop-signing-of-gay-bill> (noting the proposal of a national referendum on same-sex marriage).

Although the amendment was tabled in the National Assembly's Portfolio Committee, it never made it out of the committee.<sup>149</sup> None of the human rights activists whom I interviewed perceived the proposed amendment as a real threat.<sup>150</sup> Most South Africans and the ruling party, the African National Congress (ANC), had such pride in the relatively new constitution that they were reluctant to tinker with it.<sup>151</sup> The proposed amendment was never likely to garner the requisite two-thirds support in the National Assembly.<sup>152</sup>

Yet, newspapers presented a different story, portraying the constitutional amendment as a real possibility. Newspapers spoke of wide support for the constitutional amendment. For example, pieces in *Business Day* stated that the amendment "was proposed by a broad range of individuals and organisations,"<sup>153</sup> "a large number of people have argued that the constitution should be changed,"<sup>154</sup> and "many of the submissions to Parliament . . . called for the constitution to be changed."<sup>155</sup> Likewise, *Cape Argus* ran pieces stating that "[m]ass Christian demonstrations"<sup>156</sup> were planned to support the amendment and that the amendment was "quite possible."<sup>157</sup> A piece in *The Citizen* echoed this sentiment: "It is so easy for the government with their two-thirds majority to change the constitution."<sup>158</sup>

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The proposed constitutional amendment did not appear in articles from the dataset's weeklies. This omission may be a result of methodological limitations. I only reviewed articles published during certain windows of time within the grace period, but articles discussing the constitutional amendment could have been published outside of those windows. It is also possible that these newspapers chose not to cover the proposed constitutional amendment because they considered the amendment's passage unlikely.

149. *Civil Union Bill, Films & Publications and Immigration Amendment Bills: Briefing by Minister of Home Affairs*, PARLIAMENTARY MONITORING GROUP (Sept. 6, 2006), <https://pmg.org.za/committee-meeting/7285/> (committee meeting minutes).

150. See *infra* Appendix 4 (listing interview subjects).

151. See Interview with Anonymous, in S. Afr. (Aug. 5, 2014) (notes on file with author) ("At that point in history, the new constitution was very powerful in public discourse. Going against the constitution implied a slippery slope of all types of rights being taken away."); Interview with David Bilchitz, in Johannesburg, S. Afr. (May 22, 2015) ("I don't think constitutional amendment was ever on the cards. There was really a fear about tampering with the Constitution and particularly the Bill of Rights.").

152. See S. AFR. CONST., 1996, ch. 4, § 74 (describing the requirements for amending the Constitution).

153. Atkins, *Not Fitting Bill*, *supra* note 148.

154. Hartley, *Uneasy Marriage*, *supra* note 148.

155. Hartley, *All Same-Sex Law Needs*, *supra* note 148.

156. Maposa, *Same-Sex Union Bill*, *supra* note 148.

157. Atkins, *Marriage Exists*, *supra* note 148.

158. van der Berg, *supra* note 148.

None of the newspapers' discussions about the proposed amendment considered the difficulty of securing two-thirds approval in the National Assembly.<sup>159</sup> The media's framing of the amendment as a real possibility contributed to the public's perception of Parliament's power.<sup>160</sup> Under this perception, Parliament was free to override *Fourie*, and the most ardent opponents of same-sex marriage expected Parliament to do so.

Providing an alternative to constitutional amendment, opponents of same-sex marriage also championed a bill that would have defined civil unions differently than in the version of the Civil Union Bill that Parliament ultimately passed.<sup>161</sup> This first version of the Civil Union Bill would have preserved marriage exclusively for different-sex couples, while same-sex couples could enter a separate institution called "civil unions."<sup>162</sup> Parliament jettisoned this framework because it was pretty clear that it did not satisfy *Fourie*.<sup>163</sup> Nonetheless, opponents of same-sex marriage preferred the original bill's framework. They urged Parliament to adopt the first bill, which would have been a symbolic rebuke of the Constitutional Court.<sup>164</sup> Further litigation would have been necessary to invalidate the original bill's framework and replace it with marriage equality.<sup>165</sup>

While conservative activists and the media expanded the scope of Parliament's options, newspapers also emphasized Parliament's

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159. See sources cited *supra* note 148.

160. Cf. MCOMBS, *supra* note 135 (explaining how mass media shapes public opinion through "agenda-setting").

161. For background on this initial version of the Civil Union Bill, see de Vos, *supra* note 104, at 458-61. As discussed above, the final version of the Civil Union Bill legalized same-sex marriage and uses the term "civil union" as an umbrella term that includes same-sex marriage. See *supra* notes 124-129 and accompanying text.

162. See de Vos, *supra* note 104.

163. See *supra* notes 119-121 and accompanying text.

164. Even after the National Assembly approved the version of the Civil Union Act that extends the "marriage" label to same-sex couples, some advocates urged Parliament's lower house, the National Council of Provinces (NCOP), to withhold the "marriage" label and grant legal recognition to same-sex couples using a different term. See, e.g., *Same-Sex Marriage Bill Needs to Be Finalised*, DAILY SUN (S. Afr.), Nov. 23, 2006, at 36 (quoting a spokesman from the African Christian Democratic Party); see also Rosenthal, *supra* note 148 (lamenting that the NCOP approved the version of the Civil Union Bill that legalized same-sex marriage, as opposed to the earlier version of the bill).

165. The first version of the Civil Union Bill posed a much more realistic threat than the proposed constitutional amendment. Several of the activists I interviewed feared that the first version of the Bill would pass and need to be litigated for violating *Fourie*. Interview with Jonathan Berger, in Johannesburg, S. Afr. (May 21, 2015); Interview with David Bilchitz, in Johannesburg, S. Afr. (May 22, 2015); Videoconference Interview with Fikile Vilakazi (June 14, 2015).



agency in choosing among the options. Toward the end of the grace period, newspapers often focused on Parliament's actions without reminding readers that Parliament was following orders. Some pieces went further by using language that connotes agency and volition on Parliament's part. After both houses of Parliament voted to legalize same-sex marriage, one op-ed put it particularly bluntly: "[I]t must never be said that Parliament did not have a choice in this."<sup>166</sup>

Consider the final period of this Article's dataset. Within that time, fifty-four articles mentioned Parliament's deliberations on, or passage of, the Civil Union Bill.<sup>167</sup> Among those articles, only twelve pieces stated that the court directed Parliament to change existing law or otherwise ascribed responsibility to the court for legalizing same-sex marriage.<sup>168</sup> An additional seventeen articles were more opaque, mentioning that the court had prompted parliamentary deliberations without acknowledging that the court expected the deliberations to result in the legalization of same-sex marriage.<sup>169</sup> Forty-six percent of the articles—twenty-five of fifty-four—did not mention at all that Parliament was acting under a judicial directive.<sup>170</sup>

Close examination of the articles from the end of the grace period suggests that the shift in focus away from the court is tied to authors' fixation on parliamentary agency.<sup>171</sup> Numerous articles used language that emphasized Parliament's decision-making capacity.<sup>172</sup> Consider the way that newspapers covered the fact that the ANC leadership decided to require its Members of Parliament (MPs) to vote for the Civil Union Act, while other parties either voted as a

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166. Atkins, *Not Fitting Bill*, *supra* note 148.

167. See Lau, *Newspaper Source List*, *supra* note 141, at annots. 1-3.

168. See *id.* at annot. 1.

169. See *id.* at annot. 2.

170. See *id.* at annot. 3.

171. At first, one might hypothesize that newspaper articles shifted their focus away from the court because they assumed readers already knew that the court directed legislative action and, therefore, that fact need not be stated explicitly. A closer look at the articles, however, suggests that the focal shift stemmed at least partly from authors' beliefs that *Fourie* did not greatly constrain the political branches of government. See *supra* note 170 and accompanying text; *infra* notes 172-174 and accompanying text.

172. See, e.g., Linda Daniels, *Same-Sex Marriage Bill Will Be Signed into Law by Constitutional Court Deadline*, CAPE ARGUS (S. Afr.), Nov. 29, 2006, at 3; Wyndham Hartley, *ANC Forces Gay Union Bill over Next Hurdle*, BUS. DAY (S. Afr.), Nov. 28, 2006, at 3; Wyndham Hartley, *Civil Union Bill Deadline Draws Nearer*, BUS. DAY (S. Afr.), Nov. 22, 2006, at 3; Waghied Misbach, *Marriage Bill Deadline Looms for ANC*, SOWETAN (S. Afr.), Nov. 15, 2006, at 4; Jon Qwelane, Editorial, *No Conscience as ANC Vote for "Stabani Act"*, SUNDAY SUN (S. Afr.), Nov. 19, 2006, at 14.

block against the bill or were divided on the issue.<sup>173</sup> Some articles described the ANC as using its legislative majority to “force,” “push,” or “steamroller” the Civil Union Act through Parliament, against the resistance of MPs from other political parties who voted against the bill.<sup>174</sup> Language such as “force,” “push,” and “steamroller” paint the picture of an assertive ANC, as opposed to an ANC that was passively following the court’s directions. Meanwhile, by emphasizing that MPs outside the ANC voted against the bill, newspapers created a foil highlighting the ANC’s agency; readers were reminded that the ANC could have rebuked the Constitutional Court by voting against the legalization of same-sex marriage. This rebuke would have had little practical consequence because, pursuant to *Fourie*, the court would have legalized same-sex marriage by judicial decree anyway.<sup>175</sup> Yet, as discussed below, opponents of same-sex marriage ascribed great significance to Parliament’s decision not to symbolically reject the Constitutional Court’s support of same-sex marriage.

To be clear, the newspapers could have developed a very different narrative. Instead of highlighting Parliament’s agency, newspapers could have emphasized that Parliament was following the Constitutional Court’s order, underscoring the role of the court in legalizing same-sex marriage.<sup>176</sup> A variety of factors could have animated the decision to present Parliament’s actions as volitional. For example, it is possible that stories about controversial parliamentary decisions boost readership or that reporters’ preexisting views of Parliament biased their reporting style.<sup>177</sup> However, these are just speculations. The data cannot explain newspapers’ motives for

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173. The ANC leadership steered the party’s MPs through a procedure known as the “three-line whip.” See *‘Now We Have Reached Consensus’: Interview with Andries Nel*, in *TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA*, *supra* note 23, at 109-110 (discussing the three-line whip in relation to the Civil Union Act in an interview with the Deputy Chief Whip of the ANC).

174. See sources cited *supra* note 172.

175. See *supra* notes 105-107 and accompanying text.

176. A few newspaper articles did take this approach. See, e.g., Editorial, *State of the Union*, *BUS. DAY (S. Afr.)*, Nov. 14, 2006, at 18 (“Parliament was between a rock and a hard place: it had no choice but to legalise gay marriage by the end of this month but was also under immense pressure from its conservative constituencies to acknowledge the traditional form of the institution.”).

177. Activists against same-sex marriage may have sought to exaggerate the viability of a constitutional amendment, and this may have been reflected in some editorialists’ writings. The question remains, however, why the newspapers chose not to balance those perspectives by also presenting more realistic accounts of the proposed amendment’s lack of support.

drawing attention to Parliament's decision-making agency. For the purposes of this Article, my focus is on describing what narrative the newspapers developed, while leaving the question why to another day.

In sum, the *Fourie* Court limited Parliament's power by ordering it to legalize same-sex marriage. Yet, the media presented a different understanding of Parliamentary power. In this light, Parliament had a broad range of options from which to choose with a great degree of volition. Parliament became an active participant in legalizing same-sex marriage, as opposed to being the passive partner of an assertive court. As discussed in the next subpart, this perception of Parliament helped to redirect criticism away from the court and enhance the legitimacy of same-sex marriage.

## 2. Shifting the Target Away from the Court

The growing emphasis on parliamentary agency during the grace period corresponded with shifts in people's opinions about the government. This is evident in newspapers' opinion pieces concerning the government's role in legalizing same-sex marriage. The opinion pieces in my dataset illuminate interesting patterns in which criticism and praise of the Constitutional Court shifted as Parliament became involved in the legalization of same-sex marriage.

First, consider the diffusion of criticism. In *Fourie's* immediate wake, opinion pieces that opposed same-sex marriage targeted their criticism at the Constitutional Court. Ten opinion pieces criticized either the Constitutional Court or the *Fourie* decision specifically.<sup>178</sup> Three pieces chastised the "government" for supporting same-sex marriage, apparently using "government" as a synecdoche for the Constitutional Court.<sup>179</sup> One piece targeted the ANC, critically foreshadowing the ANC's compliance with *Fourie*.<sup>180</sup>

The newspapers published virtually no opinion pieces during the second and third periods of study. By the fourth period, however, opinion pieces proliferated and the target shifted. Opponents of same-sex marriage redirected their criticism at the political branches of government, at the ANC, and at the government generally. In the fourth period, only two articles criticized the court for its role in legalizing same-sex marriage; meanwhile, twenty articles couched

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178. See Lau, *Newspaper Source List*, *supra* note 141, at annot. 4.

179. See *id.* at annot. 5.

180. See *id.* at annot. 6.

their criticism in broad references to the South African government, and twenty-five articles criticized the ANC or the political branches of government.<sup>181</sup>

Beyond this numerical breakdown of the articles, I observed changes through a qualitative assessment of the articles' arguments. Initial criticism of the court came in roughly two categories. Most criticism chastised the court for being immoral and for dishonoring tradition.<sup>182</sup> The second strand of criticism derided the court for being undemocratic and counter-majoritarian. For example, commentators stated: "[T]hese judges are not elected by the people of South Africa and they have now made a decision that definitely goes against the grain of South African society. . . . The court has given the God-given rights of heterosexuals away to a minority."<sup>183</sup> "Now that the Constitutional Court has made its ruling on gay marriages it is with great sadness that the majority of people of this once beautiful country have to live with such an immoral law."<sup>184</sup> "[T]he highest court in the land has seen fit to ignore the warnings of the majority of South Africans."<sup>185</sup>

Over time, however, criticism of the legalization of same-sex marriage transformed as the court passed the baton to the political branches. As noted earlier, many of the opinion pieces from the end of the grace period framed their criticism around the state generally.<sup>186</sup> Meanwhile, other pieces specifically targeted the political branches of government and the ANC. Critics argued that elected officials "abused [their] mandate" by failing to validate their constituencies'

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181. These categories were not mutually exclusive. See *id.* at annots. 7 (criticizing the Constitutional Court), 8 (criticizing government generally), 9 (criticizing the ANC or political branches of government). I included criticisms of South Africa's democratic form of governance in the second category of criticism (i.e., criticism of government generally).

182. See, e.g., Mongameli Motabane, Letter to the Editor, *Marry God's Way*, DAILY SUN (S. Afr.), Dec. 7, 2005, at 35 (criticizing *Fourie* for violating religious principles); Opinion, 'No Law or Church Invented Marriage,' SUNDAY TIMES (S. Afr.), Dec. 4, 2005 (quoting Isak Burger, head of the Apostolic Faith Mission); Opinion, *SMS the Argus*, CAPE ARGUS (S. Afr.), Dec. 5, 2005, at 10 (*vox populi* featuring numerous criticisms based on religion and morality).

183. Dicks, *supra* note 22.

184. Thomas, *supra* note 22.

185. See Maposa, *Mixed Reaction*, *supra* note 148 (quoting news reports with Errol Naidoo, spokesperson for His People Christian Church).

186. See *supra* note 181 and accompanying text; see also Thandeka Khoza, Letter to the Editor, *Gays Invite God's Wrath*, SUNDAY WORLD (S. Afr.), Dec. 10, 2006, at 16 ("As for government, you bunch of cowards should be ashamed of yourselves."); Ntate Mojela, Letter to the Editor, *Always Wrong!*, DAILY SUN (S. Afr.), Nov. 27, 2006, at 47 ("Everything that the government does is a disgrace to our culture and to Christianity.").

rejection of same-sex marriage.<sup>187</sup> Critics complained that the Civil Union Act was a “trashing of democracy,”<sup>188</sup> “a slap in the face for democracy and the so-called will of the people,”<sup>189</sup> and evidence that South Africa “is no more a democracy than Zimbabwe.”<sup>190</sup> Critics complained further: “It is clear that the ruling part [sic] does not represent the views of the majority, but are only interested in our votes. . . . I will not vote for the ANC again because they are all irresponsible.”<sup>191</sup> “We voted for you, and now you are oppressing us more than the Bothas of the past.”<sup>192</sup> “President Mbeki and his cabinet must learn to consult the people.”<sup>193</sup>

These critiques generally failed to acknowledge that the court provoked the political branches’ participation in the legalization of same-sex marriage.<sup>194</sup> In fact, consistent with our earlier discussion,<sup>195</sup> some opinion pieces used language to suggest that the ANC wielded a great degree of decision-making agency—acting “as it pleased,” “pushing [its] own . . . agenda,” and “steamrolling” the Civil Union Bill over opposition.<sup>196</sup> In such articles, same-sex marriage opponents

187. See Abraham T. Sibiya, Editorial, *Same-Sex Marriage Is Last Straw To Break Our Back*, SUNDAY SUN (S. Afr.), Nov. 19, 2006, at 30.

188. Philip Rosenthal, Letter to the Editor, *Civil Union Bill Is a Trashing of Our Democracy*, CAPE ARGUS (S. Afr.), Nov. 30, 2006, at 24.

189. Opinion, *SMS Feedback*, CAPE ARGUS (S. Afr.), Nov. 15, 2006, at 18 (“So much for democracy when [elected officials] do just as they please.”).

190. Judy van Aardt, Editorial, *Age of Consent*, BUS. DAY (S. Afr.) (Nov. 14, 2006), <http://infoweb.newsbank.com/resources/doc/nb/news/132D6E9F520C7008?p=AWNB>; see also Dennis Rasebotja, Letter to the Editor, *Same-Sex Couples Are Useless*, DAILY SUN (S. Afr.), Nov. 20, 2006, at 39 (“Is this the benefits of democracy?”).

191. Bongani Nyoni, Letter to the Editor, *Same-Sex Law Shocks*, DAILY SUN (S. Afr.), Dec. 5, 2006, at 39; see also Thabile Mange, Letter to the Editor, *Call for Effective Opposition*, SOWETAN (S. Afr.), Dec. 4, 2006, at 16 (calling for a strengthening of opposition parties, so that voters could punish the ANC for supporting same-sex marriage).

192. Thandeka Khoza, Letter to the Editor, *Our Country Is Losing the Plot*, DAILY SUN (S. Afr.), Dec. 5, 2006, at 39.

193. Gab Mokoena Mthambothini, Letter to the Editor, *Gay Marriages Will Ruin Us*, DAILY SUN (S. Afr.), Nov. 17, 2006, at 47; Mzwebandla Nongaza, Letter to the Editor, *Gay Union Is Satanic*, DAILY SUN (S. Afr.), Nov. 28, 2006, at 35 (“When I voted in [the first post-Apartheid election in] 1994 there was a slogan which said: ‘The people shall govern’. But today everybody has forgotten that, even the president.”).

194. Of the twenty-five opinion pieces from the final observation period that criticized the ANC or political branches, only two also criticized the Constitutional Court. See Lau, *Newspaper Source List*, *supra* note 141, at annots. 7-8.

195. See *supra* notes 171-174 and accompanying text; cf. Interview with David Bilchitz, in Johannesburg, S. Afr. (May 22, 2015) (“The ANC—the majority party—was forced to take ownership of [the legalization of same-sex marriage].”).

196. See, e.g., Thabile Mange, Letter to the Editor, *The ANC Does as It Pleases!*, DAILY SUN (S. Afr.), Dec. 4, 2006, at 39; Qwelane, *supra* note 172 (“ANC steamrollered”);

turned their attention away from the Constitutional Court not simply because the grace period provided a cooling-off period that tempered anger at the court through the mere passage of time; instead, the grace period facilitated political developments that contributed to a focal shift.

Commentary that *praised* the government for legalizing same-sex marriage shifted similarly to the commentary that was critical. Many opinion pieces supported same-sex marriage and celebrated the principle of equality without praising particular government institutions.<sup>197</sup> In the pieces that did praise the government, however, the target of praise shifted from the court to the political branches and to the government generally. In the dataset's first period, three articles praised the Constitutional Court for its decision in *Fourie*.<sup>198</sup> By the final period, four articles praised the political branches or the ANC, one article praised the South African government generally, and only one article specifically complimented the court for pushing the state forward on its journey to marriage equality.<sup>199</sup>

Anecdotal evidence suggests that these shifts in criticism and praise have endured to the present. Some of the activists I interviewed remarked that the ANC is still attributed responsibility, and therefore criticism and praise, for same-sex marriage's legalization. For example, Jonathan Berger remarked that he recently saw an ANC spokesperson credit the ANC for the legal recognition of same-sex marriage.<sup>200</sup> Likewise, David Bilchitz put it simply: "[T]he ANC took ownership of the issue."<sup>201</sup>

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Sibiya, *supra* note 187 (accusing the ANC of "steamrolling" and "pushing [its] own immoral agenda"); *SMS Feedback*, *supra* note 189 (claiming that elected officials "do just as they please").

197. See, e.g., Matome Seima, Letter to the Editor, *Gays, Lesbians Have Rights*, SOWETAN (S. Afr.), Nov. 17, 2006, at 28; Brian Venter, Letter to the Editor, *Bible-Bashers Show Intolerance*, CITIZEN (S. Afr.), Dec. 4, 2006, at 13.

198. See Lau, *Newspaper Source List*, *supra* note 141, at annot. 10. One of these articles agreed with *Fourie*'s finding of a rights deprivation, but criticized the decision for its remedial delay. See Carmel Rickard, Editorial, *At Heart, Ruling Lacks Courage*, SUNDAY TIMES (S. Afr.), Dec. 4, 2005, at 7.

199. These categories were not mutually exclusive. See Lau, *Newspaper Source List*, *supra* note 141, at annots. 11 (praising political branches of government), 12 (praising government generally), 13 (praising the Constitutional Court).

200. Interview with Jonathan Berger, in Johannesburg, S. Afr. (May 21, 2015).

201. Interview with David Bilchitz, in Johannesburg, S. Afr. (May 22, 2015).

### 3. Fortifying Support for Same-Sex Marriage and Equal Citizenship

Thus far, we have examined how the grace period influenced views of the Constitutional Court vis-à-vis other branches of government. Beyond shaping views of the Constitutional Court's legitimacy, the grace period also influenced perceptions of same-sex marriage, as the majority in *Fourie* had hoped.

Supporters and opponents of same-sex marriage seem to agree that the grace period ultimately helped to legitimize same-sex marriage, though the two sides disagree on whether that is good or bad. The grace period enhanced the legitimacy of same-sex marriage in at least two ways. First, Parliament and the President's office helped to legitimize same-sex marriage by giving their stamps of approval through the legislative process. As the majority in *Fourie* had hoped, the grace period expanded the "government imprimatur" on same-sex marriage. Almost all the human rights advocates I interviewed agreed that securing Parliament's official support for same-sex marriage legitimized it.<sup>202</sup> As Melanie Judge put it: "The Civil Union Act is far from perfect, but what it did do was lend the weight of Parliament to the outcome [of same-sex marriage] in a way the court on its own would not have done. I think, from a sociological perspective, that had great merit to it."<sup>203</sup> Worries about this legitimizing function also animated some of the comments that same-sex marriage opponents made in newspapers, even though they did not expressly use the term "legitimacy." These critics were concerned that passage of the Civil Union Bill put same-sex marriage on firmer ground than the *Fourie* decision alone did, deepening the so-called insult to tradition.<sup>204</sup>

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202. See *infra* Appendix 4 (list of interview subjects). One interview subject, Zethu Matebeni, said that while she understands this legitimization argument, she believes that the political branches of government did not truly support marriage equality because they chose to enact the Civil Union Act instead of simply amending the Marriage Act; as such, she is skeptical of whether the actions of Parliament and the President really served any legitimizing function. Telephone Interview (via Skype) with Zethu Matebeni (Aug. 27, 2015).

203. Interview with Melanie Judge, in Cape Town, S. Afr. (Aug. 4, 2014).

204. See Atkins, *Not Fitting Bill*, *supra* note 148 (suggesting that "[a]lthough the ruling of the Constitutional Court was explicit," Parliament and the President made matters worse by enacting the Civil Union Act); Rosenthal, *supra* note 148 (criticizing the Constitutional Court and arguing further that the Civil Union Bill "insults and undermines true marriage").

The second way that the grace period enhanced the legitimacy of same-sex marriage is by creating a discursive space in which advocates humanized the issue of same-sex marriage. Prior to the *Fourie* decision, marriage equality advocates did not have a strong presence in public discourse beyond the courts. Media coverage of gay issues prior to the grace period was relatively scant and often insensitive.<sup>205</sup>

The grace period fostered a new visibility. As part of the legislative process for legalizing same-sex marriage, Parliament arranged public hearings in each of South Africa's nine provinces.<sup>206</sup> These venues gave LGBTI advocates a chance to share their stories and win over the hearts and minds of fellow South Africans. The grace period also brought LGBTI advocates unprecedented access to the media, which fostered a newfound feeling of empowerment. Melanie Judge recounted:

The one-year period definitely opened up a space for visibility and vocality of queer folk, without a doubt, and I think people took that space. LGBTI people went to the hearings. They spoke out. There was a great presence. There was an increase in letters to editors and an increase in LGBTI people being on the radio, responding to homophobic vitriol. I think there was a claiming of citizenship and public space in the one-year process that was very important.<sup>207</sup>

Other activists echoed Melanie Judge's sentiment. For example, David Bilchitz made clear that he does not believe that the rights of minority groups should be subject to majority approval, yet he also emphasized that "social attitudes are important and the opportunity to force a public discussion on this question [of same-sex marriage] was a good call. Homosexuality was the love that dare not speak its name,

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205. See 'Counting the Gay Faces': Interview with Glenn de Swardt, in TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA, *supra* note 23, at 111-12 (discussing the "shift in the media as [a] result of the same-sex marriage process"); Interview with Melanie Judge, in Cape Town, S. Afr. (Aug. 4, 2014) (noting changes in media coverage).

206. The public hearings were conducted between September and October 2006. For a government report on these hearings, see *A Report of the Portfolio Committee on Home Affairs on Peoples' Public Hearings in Provinces on the Civil Union Bill, 20 September to 09 October 2006, and the Public Submissions*, PARLIAMENTARY MONITORING GROUP, <http://www.pmg.org.za/docs/2006/061031hearings.htm> (last visited Oct. 29, 2016).

207. Interview with Melanie Judge, in Cape Town, S. Afr. (Aug. 4, 2014).



but the legislative process forced a discussion.”<sup>208</sup> The amplification of LGBTI voices in public discourse made a lasting impact. “Even if you look at media representations after the Civil Union Act, I think you see a media representation that speaks to queer realities. [The grace period] put queer lives and bodies into a broader public realm.”<sup>209</sup>

Had the Constitutional Court read same-sex marriage into the law immediately, the media probably would have featured stories of same-sex weddings during the court decision’s immediate aftermath. In contrast, the yearlong grace period created an extended period of public discussion, expanding opportunities for same-sex couples to engage the public and the media. To be sure, the public hearings and media accounts also provided space to individuals who expressed their disgust with same-sex relationships. While hostile remarks can be hurtful to LGBTI people, activists said that the grace period was important nonetheless.<sup>210</sup> In fact, Melanie Judge said that homophobic outrage during the grace period made it all the more clear that LGBTI rights activists needed to engage the public in discussions to challenge prejudices, whereas their energy had previously focused on quietly achieving victories in court.<sup>211</sup> This public dialogue was facilitated by the public hearings and media coverage during the grace period.

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208. Interview with David Bilchitz, in Johannesburg, S. Afr. (May 22, 2015); *see also* Videoconference Interview with Fikile Vilakazi (June 14, 2015) (“What was good was that [the remedial delay] opened up a national dialog.”).

209. *See* sources cited *supra* note 208. It is worth noting that, while the public hearings opened up conversations about LGBTI people, they had their limitations. For example, Zethu Matebeni believes that the potential of the public hearings was not fully realized. She wishes that the deliberations would have focused less narrowly on access to marriage and, instead, situated the issue of same-sex marriage in broader critiques of heteronormativity and patriarchy. Telephone Interview (via Skype) with Zethu Matebeni (Aug. 27, 2015).

210. David Bilchitz explained:

Sometimes [the public hearings] became opportunities to vent homophobia. They were not friendly to LGBTI people. Some LGBTI people were scared to express themselves. So there’s a real question about how to run public consultations . . . but they certainly forced the discussion and there was a lot of media around them. I have a problem with the notion that LGBTI rights are subject to majority approval, but at the same time, social attitudes are important and the opportunity to force a public discussion on this question [of same-sex marriage] was a good call. . . . Homosexuality was the love that dare not speak its name, but the legislative process forced a discussion.

Interview with David Bilchitz, in Johannesburg, S. Afr. (May 22, 2015).

211. According to Melanie Judge:

One high-profile example of how such conversations changed hearts and minds is that of Nosiviwe Mapisa-Nqakula, Minister of Home Affairs during the grace period, and her husband Charles Nqakula, then-Minister of Safety and Security. Minister Mapisa-Nqakula acknowledged that she and her husband originally had difficulty accepting *Fourie*.<sup>212</sup> However, the deliberative process following *Fourie* was transformative. Recognizing this change in attitude, she stated: “We would attend a gay wedding, definitely. We have matured so much. This process was, for both of us, a personal growth, I must say.”<sup>213</sup> According to this account, Minister Mapisa-Nqakula grew to support same-sex marriage not simply to comply with the Constitutional Court’s order, but because she and her husband came to appreciate the significance of marriage equality.

The grace period obviously did not convert all opponents of same-sex marriage into supporters like Minister Mapisa-Nqakula and her husband. Homosexuality and same-sex marriage continue to be controversial.<sup>214</sup> The grace period seems, however, to have helped humanize the issue of same-sex marriage by fostering a yearlong public dialogue about the injustices of excluding same-sex couples from marriage. This humanization is an important step toward changing hearts and minds in South Africa.

To be sure, a limitation of my case study is that I do not have public opinion data for assessing the extent to which hearts and minds actually changed. One could reasonably expect, however, that the increased visibility of LGBTI people helped to cultivate social acceptance of same-sex marriage. A wealth of social science research

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Prior to the one-year period, marriage equality was very much waged outside of the public eye. It was pushed through by legal finesse. The suspension period finally forced the public conversation, however horrific it was. It was very shocking for me to [hear vitriolic comments] and realize how out of sync the law reform strategy was with the broader debates. We hadn’t done the important work of building a culture of equality through public education advocacy work, and the suspension period opened up a space for that work.

Interview with Melanie Judge, in Cape Town, S. Afr. (Aug. 4, 2014).

212. See Brendan Boyle, *Gay Marriage Bill ‘Moving, Painful,’* SUNDAY TIMES (S. Afr.), Nov. 19, 2006, at 15 (quoting Minister Mapisa-Nqakula).

213. *Id.*

214. According to a 2013 survey of people in Gauteng, South Africa’s most populous province, 71% of respondents “believe that gay and lesbian people deserve equal rights with other South Africans,” but 13%, roughly “the equivalent of 1.2 million people, believe that it is acceptable to be violent towards gay and lesbian people.” Guy Trangoš, *LGBTI Attitudes in the GCR*, GAUTENG CITY-REGION OBSERVATORY (March 2015), [http://www.gcro.ac.za/media/reports/vignette\\_24\\_lgbti\\_attitudes\\_in\\_gcr.pdf](http://www.gcro.ac.za/media/reports/vignette_24_lgbti_attitudes_in_gcr.pdf).

suggests that sharing personal stories from gays and lesbians generally reduces biases based on sexual orientation.<sup>215</sup> This literature supports the idea that amplifying LGBTI voices during the grace period helped to cultivate social acceptance of same-sex marriage.

#### 4. Allowing Provisional Compromise

A fourth feature of the grace period was the possibility of compromise. Had the Constitutional Court implemented same-sex marriage by judicial decree, there would have been no exceptions for civil marriage officials who object to performing same-sex marriages based on conscience; these exceptions currently exist under the Civil Union Act.<sup>216</sup>

As noted earlier, LGBTI rights advocates have criticized the exceptions for civil marriage officials as unconstitutional, but ten years have passed, and they have not challenged the exceptions in court.<sup>217</sup> While advocates believe the exceptions are an affront to the equality and dignity of same-sex couples, the exceptions have been a relatively small problem for LGBTI communities.<sup>218</sup> Instead of expending resources on challenging the exceptions, advocates have focused their attention on addressing much graver issues, such as violent hate crimes against LGBTI individuals, especially a troubling pattern of so-called corrective rape crimes targeting black lesbians in townships.<sup>219</sup>

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215. See Holning Lau, Charles Q. Lau & Kelley Loper, *Public Opinion in Hong Kong About Gays and Lesbians: The Impact of Interpersonal and Imagined Contact*, 26 INT'L J. PUB. OPINION RES. 301, 304-06 (2014) (summarizing existing research on how people's attitudes are influenced by their exposure to gays and lesbians through media and other forms of storytelling).

216. See Civil Union Act 17 of 2006 § 6 (S. Afr.).

217. See *supra* notes 131-132 and accompanying text.

218. See Bilchitz with Judge, *supra* note 132.

219. All of my interview subjects listed hate crimes as a priority issue. Advocacy on this front includes preventing violence through education, as well as ensuring that victims of violence are treated fairly by law enforcement, healthcare professionals, and other social service providers. Racial and class-based disparities influence the risk of victimization, and activists are becoming more attuned to this intersectionality. See, e.g., Interview with Melanie Judge, in Cape Town, S. Afr. (Aug. 4, 2014) ("The last four or five years, I think there's been a real shift in queer activism. You've seen a reemergence of grassroots voices that is articulating a politics that is much more intersectional and much more nuanced."). Zackie Achmat, however, emphasized that activists still have a long way to go "to break out of the ghetto of queer identity" and advance truly intersectional politics. Interview with Zackie Achmat, in Cape Town, S. Afr. (Aug. 5, 2014).

The grace period allowed Parliament to broker the compromise embodied by the exception for conscientious objectors. The arrangement is arguably provisional because a successful constitutional challenge against the conscientious objector exceptions seems likely.<sup>220</sup> Nonetheless, this compromise helped to mitigate tensions when South Africa was grappling with the legalization of same-sex marriage.<sup>221</sup> The grace period made this stabilizing compromise possible.

If the court had created same-sex marriage by reading it into existing law, Parliament might have passed legislation after the fact to create exceptions for marriage officials who object on grounds of conscience.<sup>222</sup> One can speculate, however, that carving out exceptions *after* the court fully implemented same-sex marriage by decree would have had a different effect. This course of events might have created a more difficult pill for supporters of same-sex marriage to swallow. Commentators have suggested that people feel particularly wronged when the government chips away at an existing and operational right, as opposed to denying or circumscribing the right before it becomes implemented.<sup>223</sup>

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220. See, e.g., de Vos, *supra* note 104, at 463 (explaining that the conscientious objector provision for civil marriage officers “clearly endorses sexual orientation discrimination by state officials and will most probably be struck down by the Constitutional Court if challenged”).

221. See Editorial, *State of the Union*, *supra* note 176:

The Civil Union Bill could be seen in the same way as some of the political reforms that were introduced in the dying days of the apartheid era. They did not go nearly far enough, but served as a means of persuading a conservative society to accept long-overdue change without provoking avoidable conflict. The sky did not fall in, and racial attitudes have progressed rapidly since then.

222. For an example of this order of events, consider the state of North Carolina, where the legislature passed a law allowing court officials to refuse to perform marriages based on their religious beliefs; this legislation was passed in response to a federal lawsuit that gave same-sex couples in North Carolina the right to marry. See Jonathan M. Katz, *North Carolina Allows Officials To Refuse To Perform Gay Marriages*, N.Y. TIMES (June 11, 2015), [www.nytimes.com/2015/06/12/us/north-carolina-allows-officials-to-refuse-to-perform-gay-marriages.html?\\_r=0](http://www.nytimes.com/2015/06/12/us/north-carolina-allows-officials-to-refuse-to-perform-gay-marriages.html?_r=0).

223. E.g., Craig J. Konnoth, *Revoking Rights*, 66 HASTINGS L.J. 1365, 1375-85 (2015) (applying the notion of endowment effects to the context of repealing rights); see also Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1318-19 (1998) (“People react more negatively to being deprived of something that they *have* had than to being denied something that they have *never* had. Behavioral economists and cognitive psychologists refer to this phenomenon as the ‘endowment effect.’” (citation omitted)).

### 5. Weaving the Themes Together and Identifying Remaining Questions

Taken together, the four themes suggest that the grace period was relatively successful in achieving the goals that Justice Sachs articulated in the majority opinion. The grace period contributed to the perceived legitimacy of both same-sex marriage and the role of the Constitutional Court, thereby mitigating potential backlash against marriage equality and the court. The interviews I conducted confirm this overall assessment of the grace period. Nearly all the LGBTI rights advocates said they believed that the grace period served a legitimizing function. Many activists who initially denounced the remedial delay now see things differently. As David Bilchitz explained: “A lot of LGBTI people were upset originally, but I think many of us in the campaign have changed our minds. I initially thought Justice O’Regan was right. I was rather outraged that the court hadn’t gone in her direction. Today, I think the majority was actually right.”<sup>224</sup>

The legitimizing force of the grace period was perhaps particularly important in light of the threat of backlash against LGBTI people in South Africa. Even with the grace period, there was a wave of backlash immediately after *Fourie*. According to Fikile Vilakazi, the frequency of reported hate-based violent crimes spiked.<sup>225</sup> “Rape and killings intensified in that period—brutal kinds of murder and mutilation.”<sup>226</sup> It is unclear whether there were actually more crimes or whether the *Fourie* ruling emboldened more victims to speak up, but hate crimes were more visible during the period just after the ruling. “It was like a state of war.”<sup>227</sup> In light of this backlash, the grace period’s legitimizing function becomes all the more relevant. One could reasonably posit that backlash against LGBTI people might have been even more severe without the legitimizing and humanizing processes of the grace period.

Many of the advocates I interviewed shared the view that the majority in *Fourie* had been vindicated for allowing the grace period.<sup>228</sup> That sentiment, however, was not unanimous. Not everyone

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224. Interview with David Bilchitz, in Johannesburg, S. Afr. (May 22, 2015).

225. Videoconference Interview with Fikile Vilakazi (June 14, 2015).

226. *Id.*

227. *Id.*

228. See Interview with Zackie Achmat, in Cape Town, S. Afr. (Aug. 5, 2014) (calling Justice O’Regan’s dissenting opinion “correct in law and in morality, but wrong in

agreed that the boost to legitimacy outweighed the costs of delaying justice.<sup>229</sup> Jonathan Berger, in particular, focused on the sad reality that Marié Fourie and her partner Cecelia Bonthuys never married because Fourie passed away during the grace period.<sup>230</sup> One is left to wonder how many similar tragedies resulted from the remedial delay. Jonathan Berger acknowledged that “there was certainly value in the majority party getting its members in line to push the Civil Union Bill through. It took away the argument that same-sex marriage was created by just judges. There’s the legitimacy of the Civil Union Bill being passed by Parliament.”<sup>231</sup> However, he disagreed that the majority in *Fourie* had been vindicated. “Fourie and Bonthuys never got married because Fourie died and, for me, that’s not vindication. The very person who brought the case never got to benefit from it.”<sup>232</sup>

Some of my interview subjects emphasized the importance of safeguarding the reputation of the court. For example, Zackie Achmat noted that the Constitutional Court decided *Fourie* after having issued other unpopular decisions in areas such as the abolition of the death penalty, protection of criminal defendants’ rights, the decriminalization of sodomy, and other gay rights cases.<sup>233</sup> “The court became known as the court that protected criminals and the evil.”<sup>234</sup> In contrast, the court won popular approval when it ordered state

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strategy,” and stating that “it’s vital that we win battles in the streets and in Parliament, and that the courts should be the very last resort”); Interview with Anonymous, in S. Afr. (Aug. 5, 2014) (notes on file with author) (“The one-year period served the function of legitimacy. In terms of how things work in South Africa, it was important to do it right procedurally.”) Interview with Melanie Judge, in Cape Town, S. Afr. (Aug. 4, 2014) (“Justice delayed was justice denied . . . but legality doesn’t happen in a social vacuum, and at some level I became very alive to the importance of lending legitimacy to legal remedies . . . I saw the importance of bringing the law reform to a public space.”).

229. Not all the interviewees had clear feelings about how to weigh the costs and benefits of the grace period. In the wake of *Fourie*, the press quoted Fikile Vilakazi for her criticism of the grace period. *E.g.*, Mabuza, *supra* note 148; Natasha Marrian, *Gay Delay Dismay*, CITIZEN (S. Afr.), Dec. 2, 2005, at 1-2. Fikile Vilakazi’s feelings are now a lot more complicated. “I vaccilate,” she said. She explained that she is now “grateful” for the one-year grace period because it played an enormous role in sensitizing the public to same-sex marriage and the equal citizenship of LGBTI people; yet she still feels “robbed” of full marriage equality because of the compromises in the Civil Union Act. Videoconference Interview with Fikile Vilakazi (June 14, 2015). Most of my other interview subjects, however, placed less weight on the compromises embodied in the Civil Union Act, viewing them as rather minimal.

230. Interview with Jonathan Berger, in Johannesburg, S. Afr. (May 21, 2015).

231. *Id.*

232. *Id.*

233. Interview with Zackie Achmat, in Cape Town, S. Afr. (Aug. 5, 2014).

234. *Id.*

healthcare facilities to offer antiretroviral drugs to HIV-positive pregnant women.<sup>235</sup> This was an important antidote to unpopular cases. Zackie Achmat emphasized that it is important for the court to mitigate tensions between the judiciary and the people as well as the political branches. If these other social actors were to perceive the court as illegitimate and begin ignoring judicial rulings, “the state of legal anarchy would be very dangerous for the protection of vulnerable people in society.”<sup>236</sup> Therefore, he said, “Justice O’Regan’s dissent was correct in law and in morality, but wrong in strategy.”<sup>237</sup>

The *Fourie* grace period provides a contrast to the remedial delay in *Brown II*, which has elicited nearly universal criticism for failing to adequately remedy the problem of racial segregation.<sup>238</sup> Even after acknowledging downsides, such as the unfortunate passing of Marié Fourie, it is difficult to ignore the successful legitimizing function of the grace period. At the very least, the grace period following *Fourie* complicates previous understandings of remedial delays, forcing us to grapple more seriously with their potential benefits.

The South African Constitutional Court took a gamble with the grace period in *Fourie*. Parliament could have rebuked the court, allowing the grace period to expire without enacting legislation to legalize same-sex marriage. Based on the data, it is difficult to say why the ANC ultimately chose action over inaction. One could speculate the ANC was motivated by a variety of factors, ranging from fidelity to constitutional principles to the potential political benefits of presenting South Africa to the world as an international

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235. See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 703 (CC) (S. Afr.).

236. Interview with Zackie Achmat, in Cape Town, S. Afr. (Aug. 5, 2014).

237. *Id.* Some interviewees noted that criticism of the South African Constitutional Court is framed less often in terms of judicial activism than it is in the United States. This is partly because the South African Constitution guarantees a broad range of positive rights, and the public generally understands that the court has a role in actively holding the government accountable for advancing those rights through policy reforms. See Interview with Jonathan Berger, in Johannesburg, S. Afr. (May 21, 2015); Interview with David Bilchitz, in Johannesburg, S. Afr. (May 22, 2015). Instead, criticisms of the court are framed in terms of immorality and violations of African culture. See, e.g., sources cited *supra* note 182; see also Interview with Zackie Achmat, in Cape Town, S. Afr. (Aug. 5, 2014) (noting criticisms of the court for protecting “criminals and the evil”).

238. For a rare defense of *Brown II*, see BURT, *supra* note 15.

leader in human rights.<sup>239</sup> Examining such speculation is beyond the scope of this project.

It is also unclear what legitimacy costs would have accrued if Parliament had rebuked the Constitutional Court. Different possibilities exist. It could be that both same-sex marriage and the reputation of the Constitutional Court would have been undermined because Parliament's inaction would have reinforced beliefs that same-sex marriage is the radical creation of an out-of-touch and activist court. In contrast, it could be that, even if the court needed to read same-sex marriage into the Marriage Act at the end of the grace period, the year might have helped to shift public opinion on the issue by creating a space for LGBTI advocates to share their stories and humanize the issue. A more neutral outcome is also conceivable; perhaps the public would have perceived the reading of same-sex marriage into the Marriage Act no differently if it were to happen when *Fourie* was decided or if it were to occur one year later. Indeed, what would have happened if Parliament rebuked the court remains a matter of speculation. As the following Part explains, looking at case studies beyond South Africa could provide a better understanding of the costs associated with grace periods in which political branches do not follow the court's directions.

#### IV. BEYOND SOUTH AFRICA

While *Fourie's* grace period was successful in enhancing the legitimacy of the court and same-sex marriage, we ought to remain mindful that there are good reasons to avoid recourse to remedial delays. As noted earlier, there are costs associated with delaying justice. In addition, *Fourie's* success at mitigating backlash might be difficult to replicate in other issue areas and in other parts of the world because of different contextual factors.

Assuming that judges act—and will continue to act—strategically to mitigate backlash, what is the most principled way to determine whether a remedial grace period is appropriate? This Part of the Article begins by exploring some of the factors that should influence assessment of remedial grace periods' appropriateness in

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239. For discussions about the benefits that states enjoy vis-à-vis other states when they are considered human rights leaders, see Holning Lau, *Human Rights and Globalization: Putting the Race to the Top in Perspective*, 102 NW. U. L. REV. 2021 (2008); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1348 (2008).



different contexts around the world. Afterwards, I focus specifically on Europe. I present a thought experiment on how remedial grace periods could potentially improve the jurisprudence of the European Court of Human Rights. By making use of remedial grace periods, the court could become emboldened to recognize rights it currently avoids recognizing due to its political constraints.

#### A. *Grace Periods and Contextual Factors*

What are some contextual factors that affect the appropriateness of a judicially crafted grace period?<sup>240</sup> The following discussion examines four categories of factors worthy of consideration: (1) the costs and benefits of delaying justice, (2) alternative delay tactics, (3) the sociopolitical landscape that influences the likelihood of political branches cooperating during the grace period, and (4) the conditions of the proposed grace period.

There certainly are costs associated with remedial grace periods. If there are no structural reasons to defer decision-making to the political branches,<sup>241</sup> delaying justice for strategic reasons alone can be an abdication of judicial responsibility for addressing rights violations.<sup>242</sup> In some cases, the costs of delaying justice would be particularly striking. For example, the South African Constitutional Court ruled in 1995 that the death penalty was unconstitutional.<sup>243</sup> Imagine if the court had suspended its declaration of invalidity, giving Parliament one year to reform its criminal code while allowing

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240. In this discussion, I assume that we are talking about a court that is correct on the merits of a case, yet still worries about potential backlash. Our analysis would be more complicated if we were to assume that a court lacks competency to make a sound determination on the merits. While it is beyond the scope of this Article to examine that scenario in detail, it is worth noting that, if a court lacks competency to decide a case correctly, a grace period might be desirable because it would allow political actors to override the judicial decision before it gets implemented. See Sunstein, *supra* note 1, at 156-61, 183-85 (discussing judicial fallibility). Political actors can pursue override through constitutional amendment, among other options.

241. For our earlier discussion about differences between structural and strategic motivations for remedial delay, see *supra* notes 77-84 and accompanying text. For elaborations on the desirability of remedial delay in cases animated primarily by structural concerns, see, for example, KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 152-54 (2001) (defending the practice of delaying remedies in Canadian cases); Robert Leckey, *The Harms of Remedial Discretion*, 14 INT'L J. CONST. L. (forthcoming) (critiquing purported justifications for remedial delays in Canada and South Africa).

242. See sources cited *supra* note 25 and accompanying text.

243. *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

executions in the meantime. Losing lives to state executions during the grace period would have been an extremely severe and irreversible cost of remedial delay. In contrast, denying a same-sex couple the right to marriage for one year poses a less jarring set of costs unless the same-sex couple faces exigent circumstances, such as illness or the deportation of a noncitizen partner.<sup>244</sup>

While the death penalty provides an extreme example where costs of delaying justice likely outweigh benefits, we can also imagine an example at the other end of the spectrum. Backlash against unpopular court decisions could galvanize violence against the social groups that the decisions are meant to protect. In addition, backlash against the judiciary can undermine the long-term health of the rule of law. Consider a hypothetical in which a constitutional court intends to rule in favor of a minority group's rights, but is aware that the decision will provoke a brutal mass campaign of violence against this minority group, and the executive branch of government is likely to turn a blind eye to such violence. In this case, I believe a court decision to delay its remedy to mitigate violence seems not merely defensible, but desirable.<sup>245</sup>

Of course, most cases are likely to pose more difficult determinations than the two stylized hypotheticals I offered. To determine whether delaying justice is warranted, judges will need to ascertain the level of risk posed by backlash and weigh them against the benefits of delaying justice. Courts should be vigilant not to cower to just any threat of backlash and, instead, employ delay tactics sparingly.<sup>246</sup> To be sure, weighing the costs and benefits of delaying justice is difficult, and it is beyond the scope of this Article to offer a methodology for this assessment. For now, my more modest goal is to spotlight the highly contextualized nature of weighing costs and benefits.

Even if we conclude that delaying justice makes good sense in a particular case, a grace period might not be the best delay strategy. Thus, the second factor for consideration is the availability and

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244. For further discussion on grace periods' potential harm to rights holders, see Leckey, *supra* note 241 (critiquing Canadian examples of remedial delay involving the rights of sex workers and the right to assisted suicide).

245. *Cf.* Sunstein, *supra* note 1, at 170-82 (arguing that, in at least some cases, a court is correct to take public sentiment into consideration because the court's actions could produce perverse consequences).

246. *See id.* at 159 (discussing the possibility that judicial consideration of potential backlash could lead to excessive judicial timidity).

relative appeal of alternatives to remedial delay. As discussed in Part II, grace periods like the one in *Fourie* are not the only means for delay. For example, commentators widely believe that the U.S. Supreme Court delayed legalizing same-sex marriage nationwide, but the Court did not use a grace period to do so.<sup>247</sup> Instead, it employed a variety of tactics to avoid ruling on the constitutionality of state-level same-sex marriage bans.<sup>248</sup> The U.S. approach to delaying the legalization of same-sex marriage is a potential alternative to the South African approach in *Fourie*.

Courts around the world can consider delaying rulings instead of delaying remedies.<sup>249</sup> However, in some judicial systems, the approach of the U.S. Supreme Court is impossible due to structural limitations. For example, in South Africa, the Constitutional Court has much less discretion to decline hearing cases. If a South African lower court declares a law to be unconstitutional, the Constitutional Court is obligated to hear the case and decide whether to affirm the lower court ruling.<sup>250</sup> In contrast, if a lower federal court in the United States holds that a state's same-sex marriage ban is unconstitutional, that ruling is binding even if the case is not subsequently heard and decided by the Supreme Court.<sup>251</sup> This difference in judicial structures makes it less feasible for the South African Constitutional Court—and for other similarly situated courts—to avoid deciding cases on their merits.

Additionally, high courts in many judicial systems do not have a network of lower courts on which they can rely to develop a corpus of supportive jurisprudence that mitigates controversy the way that lower court decisions proliferated and supported the U.S. Supreme Court in *Obergefell*.<sup>252</sup> Even in the United States, state supreme courts

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247. See *supra* notes 49-52 and accompanying text.

248. *Id.*

249. Cf. Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016) (explaining that the strategic use of justiciability doctrines is more opaque than the strategic use of remedial delays and that such opacity is sometimes beneficial).

250. S. AFR. CONST., 1996, ch. 8, §§ 167-69, 172(2)(a).

251. In the United States, lower courts' same-sex marriage decisions were binding after the Supreme Court denied certiorari in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

252. For our earlier discussion on the proliferation of supportive lower court opinions prior to *Obergefell*, see *supra* notes 55-62 and accompanying text.

typically cannot punt to lower courts the way that the Supreme Court can. Indeed, the U.S. Supreme Court's approach of delaying ruling on same-sex marriage while waiting for a corpus of lower court rulings to develop is inapposite to some judicial contexts. In a jurisdiction where tools for delaying rulings are limited or nonexistent, the strategy of delaying remedies may be particularly appealing.<sup>253</sup>

Jurisdictions like Canada and South Africa are arguably particularly well-positioned to use remedial grace periods to mitigate backlash because they already used grace periods frequently in other cases where remedial delays are animated by structural concerns.<sup>254</sup> Expanding the use of remedial grace periods in these jurisdictions may be relatively less controversial, as compared to jurisdictions like the United States, which has a much more limited history of remedial delays, *Brown II* notwithstanding. The contrast that I have drawn here is just one example of how different delay tactics might fit different jurisdictions better. It is beyond the scope of this Article to explore comprehensively how to weigh different delay tactics against each other. Rather, my goal is to underscore the relevance of this inquiry.

The third factor for consideration when determining whether to adopt a grace period is the likelihood of political branches cooperating. Failure to elicit such cooperation could exacerbate attacks against a court decision. For example, had the South African Parliament not followed the court's instructions in *Fourie*, tension between branches of government might have enflamed public accusations that same-sex marriage is an illegitimate institution forced upon the country by a small number of unelected judicial activists.<sup>255</sup> If political branches are unlikely to cooperate with the judiciary, the judiciary may be better off crafting a remedy without delay. Of course, the likelihood of eliciting cooperation from the political branches is extremely context specific, depending on the sociopolitical landscape of the particular jurisdiction. Political branches might be especially unwilling to cooperate when the segment of society that opposes the judicial decision is powerful and

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253. *Cf.* Delaney, *supra* note 249 (examining "various doctrinal approaches to strategic legitimation" and illustrating that "not all approaches are available to all courts").

254. For our earlier discussion on the difference between strategic and structural motivations for remedial delays, see *supra* notes 77-84 and accompanying text. For general background on remedial delays in South African and Canadian cases, see Leckey, *supra* note 241.

255. For a more detailed discussion of the legitimacy costs that might have emerged from Parliament's decision not to cooperate with the court, see *supra* note 44.

can effectively use the grace period to organize retaliation against the court.

Finally, the conditions of the grace period—including expiration and the latitude given to the other branches of government during the grace period—are additional considerations. The experience of *Brown II* suggests that courts should be wary of grace periods with no deadlines.<sup>256</sup> Courts should set grace period deadlines to hold the other branches of government accountable. In setting a deadline length, courts should consider how fast the other branches of government are capable of working, as well as the magnitude of harm that delaying justice would inflict on plaintiffs and other stakeholders.

The deadline should be accompanied by an appropriate default solution that becomes law if the political branches fail to act. In the *Fourie* case, same-sex marriage would have been read into the Marriage Act if Parliament or the President failed to comply with the grace period.<sup>257</sup> Outside of South Africa, some grace period deadlines have been accompanied by much more ambiguous defaults. For example, grace periods related to same-sex marriage and transgender marriage have expired in Colombia and Hong Kong, respectively.<sup>258</sup> In both cases, the legislative branches failed to act, leaving interested parties in legal limbo because the courts did not clearly articulate what should happen if the legislative branches fail to comply with the courts' directives.<sup>259</sup> As a result, subsequent litigation may be necessary for the courts to clarify what happens next.<sup>260</sup>

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256. See *supra* notes 86-88 and accompanying text.

257. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at paras. 157-62 (S. Afr.).

258. See Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11 (Colom.) (setting a two-year grace period); *W. v. Registrar of Marriages*, [2013] 16 H.K.C.F.A.R. 112 (C.F.A.) (H.K.) (setting a one-year grace period).

259. The Constitutional Court of Colombia had said that, if Congress failed to pass legislation within two years, judges and notaries could begin formalizing same-sex relationships. "But the court's language was vague" because it did not specify what type of formalization would satisfy constitutional requirements, and "gay couples have been in limbo." Brodzinsky & Tuckman, *supra* note 19; see also *El 'viacrucis' del matrimonio gay*, SEMANA (Colom.) (Feb. 28, 2015, 22:00), <http://www.semana.com/nacion/articulo/el-viacrucis-del-matrimonio-gay/419340-3> (discussing disagreements about whether judges and notaries are to formalize same-sex relationships through marriage or an alternative structure).

The Hong Kong Court of Final Appeal held that the transgender woman in *W.* had a right to be recognized as a woman for the purposes of marriage. *W.* 16 H.K.C.F.A.R. 112. The court also directed Hong Kong's Legislative Council to pass a law defining the criteria for determining when an individual qualifies to be recognized in a gender other than the gender assigned at birth. As far as a default is concerned, the court stated:

In setting conditions for the grace period, a court might also strike a political compromise by allowing the other branches of government some latitude in deciding the substance of the remedy. For example, if there is a real threat that demanding marriage equality could provoke devastating backlash, a court might decide to grant the legislature latitude to decide between legislating same-sex marriage and other forms of recognition, such as civil partnerships, even though the same-sex couples sought marriage rights.<sup>261</sup> From a doctrinal standpoint, this latitude may very well be unprincipled because civil partnerships might not satisfy a strict application of constitutional doctrine.<sup>262</sup> From a realist standpoint, however, civil partnerships might be preferable if legalizing same-sex marriage seems certain to provoke debilitating backlash. In cases of compromise, the grace period would not only *delay* remediation, but also *deny* full remediation for strategic reasons.<sup>263</sup>

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If such legislation does not eventuate, it would fall to the Courts, applying constitutional principles, statutory provisions and the rules of common law, to decide questions regarding the implications of recognizing an individual's acquired gender for marriage purposes as and when any disputed questions arise. That would not, in our view, pose insuperable difficulties.

W., 16 H.K.C.F.A.R. at para. 147.

260. In Colombia, there is now a new same-sex marriage case pending before the Constitutional Court. See Brodzinsky & Tuckman, *supra* note 19. Whether an extended period of remedial delay, caused by the lack of a clear default rule, is appropriate will depend on a cost-benefit analysis. See discussion *supra* notes 239-244 and accompanying text.

261. There is widespread belief that the Vermont Supreme Court struck this type of compromise for strategic reasons in *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). *E.g.*, ESKRIDGE, *supra* note 72; Jacobi, *supra* note 72. In *Baker*, the court permitted Vermont's legislature to recognize same-sex relationships by creating a status equal to, but separate from, marriage. 744 A.2d at 864-89. The legislature consequently created civil unions. Note that civil unions in Vermont were defined differently than they are in South Africa's Civil Union Act, which uses the term "civil union" as an umbrella term that subsumes marriage. In the hypothetical above, I borrow the term "civil partnerships" from the context of the United Kingdom, which established civil partnerships in 2004 as a separate status parallel to marriage. See Civil Partnership Act 2004, c. 33 (Eng.).

262. Numerous courts have held that denying same-sex couples access to marriage is unconstitutional, even if the state grants same-sex couples all the equivalent rights and responsibilities of marriage through a registration scheme of another name. *E.g.*, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Ops. of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004).

263. For an elaboration on the distinction between strategic delays and strategic rights denials, see *supra* note 72.

*B. Thought Experiment: European Court of Human Rights*

In this subpart, I offer a thought experiment based on the European Court of Human Rights. I use this exercise to examine how remedial delay could, perhaps counterintuitively, advance the delivery of justice. Consider the same-sex marriage case of *Schalk & Kopf v. Austria*.<sup>264</sup> The applicants contended that Austria's refusal to let them marry violated the fundamental right to marry in article 12 of the European Convention on Human Rights, as well as article 14's prohibition on discrimination, taken in conjunction with article 8's protection of privacy and family life.<sup>265</sup> As discussed earlier, in *Schalk & Kopf* the court refused to recognize the right of same-sex couples to marry.<sup>266</sup>

The court's decision was animated largely by its consensus doctrine.<sup>267</sup> While the court refused to recognize a right to same-sex marriage, it signaled that it would probably recognize such a right in the near future once enough member states legalize same-sex marriage to constitute a consensus on the issue.<sup>268</sup> The court did not clearly explain how many member states would be necessary to form a consensus, but it implied that a majority would suffice. The court stated: "[T]here is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus."<sup>269</sup> The consensus doctrine allowed the court to delay rights recognition. Many commentators believe that the court developed the consensus doctrine as a strategic tool for mitigating backlash.<sup>270</sup>

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264. *Schalk & Kopf v. Austria*, no. 30141/04, ECHR 2010.

265. *Id.*

266. *Id.*

267. See Helfer & Slaughter, *supra* note 67.

268. *Schalk & Kopf*, no. 30141/04, ¶¶ 58-59.

269. *Id.* ¶ 105.

270. See Robert Wintemute, *Consensus Is the Right Approach for the European Court of Human Rights*, GUARDIAN (Aug. 12, 2010, 3:00 AM), <http://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus> (stating that the consensus approach prevents "political backlash, which could cause some governments to threaten to leave the convention system"); see also R. St. J. Macdonald, *The Margin of Appreciation*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83, 122 (R. St. J. Macdonald et al. eds., 1993) ("The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States."); Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG

For our thought experiment, imagine that the court had not delayed rights recognition, but instead opted for delaying the remedy.<sup>271</sup> As commentators have explained elsewhere, the court very well could have drawn on its gay rights jurisprudence to conclude that same-sex couples have a right to marry.<sup>272</sup> The court has repeatedly held that differential treatment based on sexual orientation “require[s] particularly serious reasons by way of justification.”<sup>273</sup> For the purposes of our thought experiment, let us assume that this principle logically leads to the conclusion that member states’ bans on same-sex marriage cannot be justified. Imagine that the court recognized the right to same-sex marriage; however, to temper backlash, the court granted member states a grace period for achieving marriage equality.

The terms of the grace period could be determined by consensus. The court could state that the grace period would reach an end once enough member states legalize same-sex marriage to constitute a consensus. At that point in time, laggard member states would be expected to legalize same-sex marriage immediately and individuals could bring grievances to the court if member states fail to do so. In this thought experiment, the consensus doctrine is used to delay remediation, instead of delaying rights recognition.

What significance is there to the difference between the original outcome in *Schalk & Kopf* and the outcome of our thought experiment? At first, the difference might seem inconsequential because in both instances, the court does not require Austria to legalize same-sex marriage immediately. Furthermore, in both instances, the court exercises judicial restraint by deferring to member states through the consensus doctrine. Yet, upon closer look, significant differences between the two approaches begin to appear. First of all, opting for remedial delay, instead of delaying rights recognition, enhances doctrinal consistency. In *Schalk & Kopf*, the court veered from case law that vigorously reviews differential treatment based on sexual orientation.<sup>274</sup> Instead of actively reviewing

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J. INT’L L.] 240, 304 (1996) (suggesting that the margin of appreciation doctrine promotes “friendly relations” between the ECHR and Contracting States).

271. For elaboration on the distinction between delaying rights recognition versus delaying remedial action, see *supra* subparts II.B-C.

272. See Wintemute, *supra* note 270 (“If the court applied human rights principles strictly, it would have found a violation. The court . . . has said that a couple seeking to marry need not have capacity to procreate, or be of different sexes.”).

273. *Schalk & Kopf*, no. 30141/04, ¶ 97.

274. *Id.* ¶ 47.



Austria's same-sex marriage ban, the original *Schalk & Kopf* judgment simply invoked the consensus doctrine to defer to Austria's decision to bar same-sex couples from marriage.<sup>275</sup> Tension exists between the court's history of vigorously reviewing differential treatment based on sexual orientation and its deference through the consensus doctrine. Our thought experiment helps to reconcile that tension. In our thought experiment, the court maintains fidelity to its previous gay rights cases, while still strategically deferring to member states through a reformulated consensus approach.

Moreover, the thought experiment produces a significantly different result because it prods member states toward marriage equality more forcefully than the original *Schalk & Kopf* opinion does. In the thought experiment, the court does not require member states to implement same-sex marriage immediately, but announcing that there is a right to marriage equality is valuable in and of itself. As William Eskridge has explained: "A court's or a legislature's announcement of an equality right serves an expressive function at the very least."<sup>276</sup> Indeed, when the court articulates the existence of a right, it shapes public dialogue about human rights norms.

[O]fficial announcement of such a right [to equality] contributes to the creation of a public norm to that effect. Public values and norms can influence private as well as public conduct. More important, they can embolden their intended beneficiaries to demand better treatment from private as well as public authorities.<sup>277</sup>

Thus, by announcing the right to marriage equality, the court could help the development of same-sex marriage as a human rights norm.<sup>278</sup>

This thought experiment illustrates that grace periods can be viewed from two different vantage points. Whether a remedial grace period delays or accelerates the provision of justice depends on the baseline that one uses for comparison. In the South African context, the dissenting opinion in *Fourie* provided a baseline for understanding the majority opinion. Justice O'Regan's dissenting approach would have legalized same-sex marriage immediately. The dissenting

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275. *Id.* ¶¶ 58-59.

276. ESKRIDGE, *supra* note 72, at 153.

277. *Id.*

278. I recognize that my thought experiment will not satisfy commentators who resolutely oppose allowing consensus doctrine to shape any part of the European Court of Human Rights' decision-making. In this thought experiment, I chose to retain and modify the consensus doctrine to illustrate how adjusting the court's existing doctrine, without pursuing more radical approaches, could still produce significantly different results.

opinion thus reinforced the understanding that the majority opinion's grace period delayed justice. In contrast, our thought experiment offers a different view. In the thought experiment, the European Court of Human Rights' use of a remedial grace period would delay the implementation of same-sex marriage; however, it would ultimately accelerate the provision of justice when compared to what actually happened in *Schalk & Kopf*.

As previously stated, a careful assessment of the pros and cons of remedial delay required understanding the scope of alternative delay tactics. In that spirit, our thought experiment about the European Court of Human Rights sheds light on how two different delay tactics—delaying rights recognition versus delaying remediation—can produce disparate outcomes.

## V. CONCLUSION

This Article has sought to deepen our understanding of strategic grace periods and encourage greater conversation on this topic. It did this in three ways. First, it developed a three-part typology of strategic delay tactics: delaying rulings, delaying rights recognition, and delaying remedies. This typology provides a framework for understanding how grace periods differ from other forms of delay. Second, this Article provided a case study of the remedial grace period following *Fourie*, South Africa's landmark same-sex marriage decision. Through a content analysis of newspaper articles and interviews with rights activists in South Africa, I found that, for the most part, the grace period enhanced the perceived legitimacy of the Constitutional Court and of same-sex marriage. Third, building on the case study's findings, this Article discussed how grace periods might be implemented in other parts of the world, including in the specific context of the European Court of Human Rights.

I hope this Article will spur further research and deeper discussions on strategic remedial delays. To that end, I close by sharing some reflections from Justice Edwin Cameron, who has shaped my own thinking about future scholarly inquiries. Justice Cameron joined the South African Constitutional Court after it decided *Fourie*.<sup>279</sup> He is one of South Africa's most high-profile

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279. Justice Cameron wrote the Supreme Court of Appeal's majority opinion in *Fourie* before the case reached the Constitutional Court. At that stage of litigation, the Supreme Court of Appeal did not address whether the Marriage Act was unconstitutional. It focused instead on the common law definition of marriage in South Africa. *Minister of Home*

openly gay public figures and has been a vocal supporter of same-sex marriage rights. I had the privilege of sitting down with Justice Cameron for a conversation about my research findings and remaining questions concerning strategic remedial delays.

Justice Cameron generously thanked me for studying *Fourie* and for illuminating ways in which remedial grace periods might mitigate criticism against courts and controversial rights protections. In addition, he acknowledged that the *Fourie* delay, and consequent public debate, had beneficial effects. At the same time, he highlighted some questions that warrant further consideration. He remarked: “From a sociological perspective, it may well be true that delaying the provision of a remedy could mitigate backlash against a court ruling. I still worry, however, about judges accounting unduly for potential backlash when deciding cases.”<sup>280</sup> Justice Cameron maintains that, from a legal perspective, *Fourie*’s remedial delay was “strictly speaking unprincipled, since in no other case not involving distributive rights or state resources has the court ever postponed a pure rights remedy.”<sup>281</sup> Justice Cameron cautioned that “allowing judges to be influenced by fears of backlash could be dangerous, resulting in a judiciary that is overly reticent about protecting constitutional rights.”<sup>282</sup> He questioned whether judges have the capacity to accurately assess the risk of public outcry and, accordingly, whether such evaluations should be part of a judge’s work.<sup>283</sup>

While this Article has shed light on a positive side of remedial grace periods, Justice Cameron’s comments remind us that we need to wrestle with heavy normative questions about the role of judges in choosing strategic remedial delays. As explained in subpart IV.A, I believe that the magnitude of potential backlash can be severe enough to justify remedial grace periods in some cases, but I dodged the difficult question of how judges might go about evaluating the risk of backlash and guarding against excessive timidity in protecting rights. Future scholarship should grapple with this challenging inquiry.

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*Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.). The Supreme Court of Appeal held that the exclusion of same-sex couples from the common law concept of marriage was unconstitutional, and it granted immediate relief instead of suspending its order. *Fourie* 2006 (1) SA 524.

280. Interview with Edwin Cameron, in Johannesburg, S. Afr. (May 25, 2015).

281. *Id.*

282. *Id.*

283. *Id.*

Future research should also examine a host of other lingering questions, including empirical questions about the impact of remedial grace periods beyond the South African experience. We need additional research to understand fully the extent to which the South African experience is exceptional. The marriage cases from Colombia and Hong Kong present fertile ground for additional case studies. Using South Africa's *Fourie* case as a vehicle, this Article has furthered our understanding of strategic remedial delays; it has also prompted new questions and invites others to join the conversation.

## APPENDIXES

## Appendix 1: Circulation and Readership of Newspapers Analyzed

Newspaper Name	Circulation (Average Number of Print Copies Circulated per Publication Day, 2006) <i>Source:</i> Audit Bureau of Circulation of South Africa*	Readership (Estimated Number of Readers Aged 16+ per Publication Day, 2005/2006) <i>Source:</i> AMPS Data from the South Africa Audience Research Foundation	Distributional Reach <i>Sources:</i> Benn's Media (2006), Media Club South Africa (2015)
<i>Dailies</i>			
Daily Sun	1,878,615	3,679,000	Distributed nationally
Sowetan	531,033	1,583,000	Distributed nationally
Cape Argus	298,405	374,000	Distributed primarily in Cape Town
The Citizen	287,344	430,000	Distributed primarily in Gauteng
Business Day	167,539	105,000	Distributed nationally
<i>Weeklies</i>			
Sunday Times	2,017,165	3,292,000	Distributed nationally
Sunday Sun	795,896	2,013,000	Distributed nationally
City Press	742,606	1,903,000	Distributed nationally
Sunday World	698,304	1,040,000	Distributed primarily in Gauteng, Mpumalanga, Limpopo, and North West

\* The Audit Bureau of Circulation (ABC) of South Africa provided quarterly statistics for 2006. This table reports annual figures that are the averages of the four quarterly figures.

## Appendix 2: Search Periods for Content Analysis

Appendix 2, Table 1: Description of Search Periods

	1st Period	2nd Period	3rd Period	4th Period
Trigger Events	<i>Fourie</i> decision (Dec. 1, 2005)	Cabinet preapproves legislation (Aug. 24, 2006)	Legislation introduced in Parliament (Sept. 12, 2006)	Civil Union Bill approved by National Assembly (Nov. 14, 2006) and National Council of Provinces (Nov. 28, 2006); bill signed into law (Nov. 29, 2006)
Dates Searched				
<i>Dailies</i>	Dec. 1-8, 2005	Aug. 24-31, 2006	Sept. 12-19, 2006	Nov. 14- Dec. 6, 2006
<i>Weeklies</i>	Dec. 4 & 11, 2005	Aug. 27 & Sept. 3, 2006	Sept. 17 & 24, 2006	Nov. 19, Nov. 26, Dec. 3, & Dec. 10, 2006

Appendix 2, Table 2: Number of Articles Found Per Search Period\*\*

	1st Period	2nd Period	3rd Period	4th Period
<i>Dailies</i>				
Daily Sun	4	0	1	23
Sowetan	2	0	0	13
Cape Argus	14	4	13	25
The Citizen	15	0	6	24
Business Day	2	1	3	17
<i>Weeklies</i>				
Sunday Times	3	1	3	10
Sunday Sun	3	2	0	13
City Press	3	0	2	3
Sunday World	4	0	0	1

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\*\* The following newspaper issues were excluded from the dataset because they were missing from the National Library of South Africa's archives: *Daily Sun* on Aug. 31 and Dec. 1, 2006; *Cape Argus* from Nov. 22-28, 2006; *The Citizen* on Nov. 27 & 28, 2006; and *Sunday World* on Dec. 3, 2006.

## Appendix 3: Coding Scheme

*Background Characteristics of Articles*

Each article, as a whole, was coded for the following background characteristics whenever applicable.

- The newspaper in which the article appeared
- Whether the newspaper was a daily or weekly
- The search period in which the article appeared
- The type of writing (news report, editorial, letter to the editor, vox populi, etc.)
- Editorial position on same-sex marriage

*Primary Coding Categories for Statements Found in Each Article*

Below are the primary coding categories for content found in each article. Secondary coding categories (not listed here) were also used to further classify content within the primary coding categories.

- Description of judicial action
- Description of actions taken by actors in Parliament or the ANC
- Description of actions taken by members of the President's office
- Description of actions taken by activists or other concerned citizens
- Criticism of the Constitutional Court
- Criticism of Parliament or the ANC
- Criticism of the President or his administration
- Criticism of the South African government generally
- Criticism of legalizing same-sex marriage
- Praise for the Constitutional Court
- Praise for Parliament or the ANC
- Praise for the President or his administration
- Praise for the South African government generally
- Praise for the legalization of same-sex marriage
- Discussion of a proposed constitutional amendment
- Direct references to the remedial grace period



## Appendix 4: Biographies of Activists Interviewed

*Zackie Achmat* has long been a leading activist in South Africa. He is cofounder and former Director of the National Coalition for Gay and Lesbian Equality, former Director of the AIDS Law Project, cofounder and former Chairperson of the Treatment Action Campaign (TAC), cofounder of the Social Justice Coalition, and cofounder of the Centre for Law and Social Justice, subsequently renamed Ndifuna Ukwazi (Dare to Know), where he currently serves as Director. In 2003, *Time* magazine named Mr. Achmat one of its world heroes of the year, and the American Friends Service Committee nominated Mr. Achmat and TAC for a Nobel Peace Prize.

*Jonathan Berger* is a former board chair of the Gay and Lesbian Equality Project (previously known as the National Coalition for Gay and Lesbian Equality). While serving in that role, he was integrally involved in advocacy efforts that led to the legal recognition of same-sex marriage in South Africa. He was also an attorney at the AIDS Law Project during that time. Prior to that, he clerked for Justice Kate O'Regan of the Constitutional Court of South Africa and served as the Legal Education and Advice Officer of the National Coalition for Gay and Lesbian Equality. Mr. Berger presently practices law as an advocate of the High Court of South Africa and a member of the Johannesburg Society of Advocates.

*David Bilchitz* worked as the chief legal advisor to OUT LGBT Well-being, which spearheaded the same-sex marriage campaign of the Joint Working Group (a coalition of LGBTI organizations). He is currently Professor of Fundamental Rights and Constitutional Law at the University of Johannesburg Faculty of Law, Secretary-General of the International Association of Constitutional Law, and Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). He is also a founder and former chair of Jewish Outlook: SA Jewish LGBTI Alliance.

*Melanie Judge* worked on LGBTI advocacy at the Gay and Lesbian Equality Project and at OUT LGBT Well-being and played a leading role in advocacy efforts that led to the passing of South Africa's Civil Union Act. Ms. Judge is presently an associate of Inyathelo: The South African Institute for Advancement and serves on the board of trustees at Gay and Lesbian Memory in Action (GALA). She recently received her doctorate in women's and gender studies from the University of the Western Cape.

*Zethu Matebeni* participated in the campaign for same-sex marriage through OUT LGBT Well-being and through the Forum for the Empowerment of Women (FEW), which focuses on the needs of black lesbian, bisexual, and transgender women. She is currently a Senior Researcher at the Institute for Humanities in Africa (HUMA) at the University of Cape Town, where she is convener of the Queer in Africa series. She is also a documentary filmmaker and serves on the board of trustees at Gay and Lesbian Memory in Action (GALA).

*Fikile Vilakazi* played a central role in the same-sex marriage movement, first as Advocacy Officer for Lesbian and Gay Equality, and then as Advocacy Officer for OUT LGBT Well-being. During the campaign for marriage equality, she also served as Advocacy and Public Education Coordinator for the Forum for the Empowerment of Women (FEW). Ms. Vilakazi also held previous positions as Director of Secretariat and Programs Director at the Coalition of African Lesbians. She is presently a doctoral student of social and public policy at the University of Jyväskylä in Finland.

A final interview subject wished to remain anonymous. Accordingly, this Article refers to this individual as *Anonymous*.