OBERGEFELL AND DEMOCRACY

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The lead opinions in Obergefell v. Hodges advocated very different conceptions of the Court's role in a democracy. Meanwhile, however, both sides of the debate expressed an allegiance to principles of deliberative democracy. The majority engaged in the practice of deliberative democracy by providing a reasoned explanation for its decision that could reasonably be accepted by people with fundamentally competing perspectives, while the dissenters claimed that the Court should have practiced a form of judicial minimalism and deferred to ongoing deliberations in the political process. This Article evaluates Obergefell from the perspective of deliberative democratic theory and concludes that while the Court could reasonably have waited to resolve the constitutional

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question or invalidated the state laws at issue on narrower grounds, the Court's decision was democratically legitimate based on the relevant legal, moral, and sociological considerations. This Article, therefore, rebuts the charge that Obergefell was undemocratic. It also provides preliminary thoughts on important questions that Obergefell raises for deliberative democratic theory and judicial practice, including the scope of the judiciary's duty to provide reasoned explanations for its decisions and the ideal relationship between deliberative and agonistic principles of democracy within the American constitutional system. This Article concludes by observing that dialogic theories of judicial review have already begun the crucial project of synthesizing the principles of deliberative and agonistic democracy. However, we must continue to think about the best ways to ensure that the entire constitutional system is sufficiently deliberative and that fundamental moral conflict is addressed by individuals and groups who view each other as legitimate adversaries rather than as mortal enemies, and who treat each other accordingly.

INTRODUCTION

Obergefell v. Hodges[1] is, of course, about the constitutional obligation of the states to recognize same-sex marriages.[2] The opinions of the Justices, however, are largely about competing understandings of the role of the Court in a constitutional democracy. While each opinion emphasizes the importance of public deliberation for the legitimate exercise of governmental authority, the majority and dissenting opinions express profoundly different views of the nature of our deliberative democracy. This disagreement colors the fundamentally competing jurisprudential, doctrinal, and institutional views of the Justices, and is therefore crucial to understanding and evaluating the divergent opinions in the case.

This Article contends that the majority opinion reflected *the practice of deliberative democracy*, whereas the dissenting Justices sought to promote further deliberation on the issue of marriage equality in the relevant political processes.[3] The majority engaged in reasoned deliberation, and concluded that there was no public-regarding justification for the government's refusal to extend marital recognition to same-sex couples, particularly given the importance of the interests at stake.[4] As a result, the Court held that the challenged laws deprived the petitioners of their constitutionally protected liberty, and denied same-sex couples the equal protection of the laws.[5]

[1] 135 S. Ct. 2584 (2015).

[2] *Id.* at 2593.

[3] *See infra* Parts I, II.

[4] *See Obergefell*, 135 S. Ct. at 2602.

[5] *See id.* at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

Meanwhile, the dissenters argued that a state's continued adherence to the traditional definition of marriage could not possibly violate the Fourteenth Amendment, and that the serious deliberation that was allegedly occurring on this issue should continue in the political branches.[6] The dissenters complained that the Court's decision was democratically illegitimate, and that five unelected lawyers abused their interpretive authority by cutting off debate and imposing their policy views on the sovereign people.[7] Thus, the opinions expressed profound disagreement about the proper understanding of deliberative democracy and the validity of incorporating this theory's central tenets into the Court's due process and equal protection jurisprudence.

While the dissenters advocated "judicial minimalism" in a manner that is superficially consistent with deliberative democracy, this Article claims that the majority's decision reflects a substantially better understanding of deliberative democratic theory's underlying commitments.[8] Deliberative democratic theory, properly understood, should incorporate civic republican understandings of due process and equal protection, whereby legislation raises serious constitutional difficulties when it does not serve a legitimate, public-regarding purpose that could reasonably be accepted by individuals or groups who are adversely affected by the law. The Court reasonably concluded that prohibitions on same-sex marriage serve no such purpose, and despite the ridicule of the dissenters, it was correct to recognize the mutually illuminating and interrelated nature of these principles in this context. Although deliberative democracy is sometimes understood as a purely procedural ideal, the better understanding of this theory also recognizes its substantive content. The majority opinion properly reflected the substantive nature of reasoned deliberation when it concluded that there was no persuasive justification for the government's refusal to extend marital recognition to same-sex couples. One of the central tenets of deliberative democratic theory is that legal and policy decisions should be provisional because new information and arguments emerge over time. Public officials who seek to make legitimate, collective decisions should consider the most recent learning on a subject. While the dissenters believed that the *Obergefell* case was closed in 1868 when traditional marriage was almost universally accepted, the Court properly invoked the idea of a living Constitution, emphasizing that "[w]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[9]

The most difficult question facing the Court from the perspective of deliberative democracy was whether to require every state to recognize same-sex marriage immediately, or to allow the dialogue on this issue to continue in the ordinary political process, as urged by the dissenters. Contrary to the assumption of the dissenters, deliberative democratic theory does not always

[6] *See id.* at 2642 (Alito, J., dissenting).
[7] *See id.* at 2623-26 (Roberts, C.J., dissenting); *id.* at 2627-29 (Scalia, J., dissenting).
[8] *See infra* Part III.
[9] *Obergefell*, 135 S. Ct. at 2598.

require more deliberation; it requires reasoned deliberation about how much deliberation is necessary or appropriate on any particular question. The dissenters were wrong to suggest that the question of marriage equality could only legitimately be resolved by political deliberation as a matter of law, but they did make some valid prudential arguments about the possible value of postponing judicial intervention.[10] The majority persuasively recognized that justice delayed would be justice denied *for petitioners*, and that after extensive debate in the legal, political, and cultural spheres, the states had failed to provide a rational justification for refusing to recognize their marriages at this time.[11] Accordingly, once the Court granted certiorari, it had a presumptive obligation to decide petitioners' constitutional claims on the merits, and thus to recognize a right to same-sex marriage. Deliberative democracy is compatible with "procedural minimalism" and the passive restraints advocated by Alexander Bickel,[12] but it would reject any version of "substantive minimalism" that prohibits or discourages the Court from adopting its best understanding of the Constitution.[13] Finally, while the dissenters criticized the Court for gratuitously insulting the beliefs of the proponents of traditional marriage, the majority opinion treated traditionalists with respect by recognizing the good-faith religious or philosophical bases for their view, as well as their constitutionally protected freedom of religion, and by focusing on the consequences of the challenged laws rather than their underlying motivations.[14]

This Article highlights how the foregoing principles are woven throughout the Court's opinion, and claims that *Obergefell* can only be properly understood with an appreciation for the way in which the Court engages in the practice of deliberative democracy. This Article also claims that the practice of deliberative democracy is precisely what legitimizes the Court's decision, and ultimately rebuts the charge that *Obergefell* was undemocratic. Nonetheless, this Article recognizes that the Court's opinion exposes some ambiguities or open questions

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[10] *See id.* at 2625-26 (Roberts, C.J., dissenting).

[11] *See id.* at 2605 (noting that there have been referenda, legislative debates, campaigns, studies, papers, books, popular and scholarly writings, litigation, and judicial opinions addressing the issue, and stating "that individuals need not await legislative action before asserting a fundamental right").

[12] *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42-47 (1961) (advocating for the use of doctrines such as standing, ripeness, and political question to decline jurisdiction on prudential grounds).

[13] *See infra* Section III.D (evaluating the potential role of judicial minimalism in *Obergefell*); *cf.* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1459 (2000) (distinguishing between procedural and substantive aspects of judicial minimalism, and endorsing the former while rejecting the latter).

[14] *See Obergefell*, 135 S. Ct. at 2594, 2602, 2607 (acknowledging that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises," which are protected by the First Amendment); Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 640 (2016) (explaining why *Obergefell* did not accuse traditionalists of bigotry).

for deliberative democratic theory and its accompanying judicial practice. First, the *Obergefell* opinion contains some notable limitations or shortcomings, which illustrate that the justification provided by a court for its decision is necessarily a matter of degree that potentially conflicts with other values of adjudication.[15] Courts have wide discretion regarding how they write their opinions, which raises larger questions about the scope of the judiciary's duty to provide reasoned explanations for its decisions. Second, the ongoing disagreement with *Obergefell* in some quarters, and the resulting efforts to limit or overrule the decision that are likely to follow, suggest that political and legal theorists must continue to work on developing a deeper understanding of the proper relationship between deliberative and agonistic democracy, which is both legitimate in theory and realistic or workable in practice. This Article concludes by providing some preliminary thoughts on these important questions.

I. THE MAJORITY'S DELIBERATIVE PRACTICE

In one of the most significant decisions of this generation, *Obergefell* held that state governments are constitutionally required to extend marital recognition to same-sex couples.[16] At first blush, the Court may have been on relatively thin ice in making this decision based on traditional sources of legal authority. The text of the Constitution does not explicitly provide a right to same-sex marriage, and previous efforts to establish such a right were summarily rejected.[17] Moreover, the generation that enacted the Fourteenth Amendment accepted the traditional definition of marriage, and those citizens would therefore not have understood its provisions to require the states to recognize same-sex marriage.[18] Thus, petitioners' claims seemed doomed based on a superficial application of originalism.[19]

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[15] *See infra* Section IV.A.

[16] *See Obergefell*, 135 S. Ct. at 2605 ("[T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.").

[17] *See* Baker v. Nelson, 409 U.S. 810, 810 (1972) (dismissing appeal from Minnesota Supreme Court arguing that state law that did not authorize same-sex marriage violated the Constitution).

[18] *See Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting).

[19] For examples of originalist arguments that significantly complicate this picture and undermine the validity of the state laws at issue, see Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 BYU L. REV. 1393, 1398 (rejecting the use of legislative history and congressional intent as a source for originalism and arguing that *Loving v. Virginia*, 388 U.S. 1, 1 (1967), was correctly decided based on "the semantic original public meaning of the enacted texts"); William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1084 (2015) ("An important purpose of the Fourteenth Amendment (and especially its Equal Protection Clause) was to provide a firm basis for congressional and federal judicial policing of state efforts to entrench social groups as inferior castes."); William N. Eskridge Jr., *The Marriage Equality Cases and Constitutional Theory*,

Yet the Court openly rejected a static version of originalism, and concluded that an evolving understanding of the Fourteenth Amendment's protections required the states to provide marital recognition to same-sex couples.[20] This Part claims that the Court reached this "revolutionary" conclusion by engaging in the practice of deliberative democracy, and by incorporating central tenets of deliberative democratic theory into its due process and equal protection jurisprudence.

A. *Liberty*

Before addressing the substance of petitioners' due process claim, the Court emphasized "the transcendent importance of marriage" throughout history and acknowledged its traditional definition.[21] The Court also recognized that the traditional view of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."[22] And while respondents argued that the traditional definition of marriage should doom petitioners' due process claim for the reasons described above, the Court accepted petitioners' plea to give serious consideration to their interests and perspectives, and to reach a reasoned decision on the merits.[23]

The Court provided several compelling narrative accounts of "the urgency of the petitioners' cause from their perspective," and described the fundamental ways in which marriage has already evolved.[24] The Court claimed that these changes "have strengthened, not weakened, the institution of marriage," and explained that "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[25] The Court described how this dynamic has played out "in the Nation's experiences with the rights of gays and lesbians," and recognized that it involved extensive discussions of issues involving same-sex couples and families, which were followed "by a shift in public attitudes toward greater tolerance."[26] The Court recognized that this shift

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2014-2015 CATO SUP. CT. REV. 111, 114-21 [hereinafter Eskridge, *The Marriage Equality Cases*] (claiming that the Justices' failure to grapple with these more sophisticated originalist arguments was "a missed opportunity" to lend credence to such methodologies).

[20] *See Obergefell*, 135 S. Ct. at 2598 ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment . . . entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.").

[21] *Id.* at 2594.

[22] *Id.*

[23] *See id.* ("The petitioners acknowledge this history but contend that these cases cannot end there.").

[24] *Id.*; *see also id.* at 2595-97 ("The history of marriage is one of both continuity and change.").

[25] *Id.* at 2596.

[26] *Id.*

in public attitudes soon resulted in questions about the rights of gays and lesbians reaching the courts, "where the issue could be discussed in the formal discourse of the law."[27] After briefly describing some of the pioneering legal decisions in this area, the Court recognized that an extensive legal dialogue has taken place in recent years on the issue of same-sex marriage as the relevant questions have percolated in the lower federal and state courts.[28] Finally, the Court praised the nature and scope of this legal dialogue, and suggested that the states had arrived at something of an impasse.[29]

The Court prefaced its discussion of the merits of petitioners' due process claim by addressing its role in identifying and protecting fundamental rights. The Court explained that this responsibility "is an enduring part of the judicial duty to interpret the Constitution," and it "has not been reduced to any formula."[30] On the contrary, "it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[31] While guided by history and tradition, these sources of interpretive guidance do not invariably establish the Constitution's "outer boundaries."[32] Rather, the Court emphasized that "[t]he nature of injustice is that we may not always see it in our own times."[33] Recognizing this would be the case, the Framers "entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[34] Accordingly, the Court concluded that "[w]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[35]

The Court proceeded to explain that marriage has long been recognized as a fundamental right under the Constitution. The Court also acknowledged, however, that "like many institutions," it "has made assumptions defined by the world and time of which it is a part."[36] Accordingly, the Court's prior

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[27] *Id.*

[28] *See id.* at 2596-97 (describing legal developments beginning with a Hawai'i Supreme Court decision in 1993, and continuing through state and federal lawsuits and legislation in 2015).

[29] *See id.* at 2597 ("After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage.").

[30] *Id.* at 2598 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)); *see also* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 149 (2015) (explaining that the Court declined to follow the "more closed-ended formulaic approach" of *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997), in favor of the "open-ended common law approach" of Justice Harlan's dissent in *Poe*).

[31] *Obergefell*, 135 S. Ct. at 2598.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

recognition of a fundamental right to marriage assumed that it would involve one woman and one man, and the Court summarily held that legal restrictions on same-sex marriage "did not present a substantial federal question."[37] Yet, the Court also contended that "there are other, more instructive precedents," and that "in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected."[38] The Court identified four underlying principles and traditions from its case law, which "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples," and therefore "compel[led] the conclusion that same-sex couples may exercise the right to marry."[39]

The four principles or traditions identified by the Court included (1) the fact that personal choices regarding marriage are central to individual autonomy and human dignity; (2) the profound importance of marriage to the committed individuals, including the intimate association that it facilitates or makes possible; (3) the recognition, stability, and predictability that marriage provides to families (and the stigma and harm that result to children when these benefits are arbitrarily denied); and (4) the centrality of marriage to our legal and social order (and how "[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society").[40] Significantly, the Court concluded that "[t]here is no difference between same- and opposite-sex couples with respect to [these] principle[s] . . . [and] [s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[41] With reference to the traditional definition of marriage, the Court recognized that,

> [t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[42]

In other words, given what we know and understand today, there is no legitimate, nonarbitrary justification for refusing to extend marital recognition to same-sex couples, particularly considering its importance to them as individuals, members of families, and citizens of this country.

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[37] *Id.* at 2598 (citing Baker v. Nelson, 409 U.S. 810, 810 (1972)).

[38] *Id.* at 2598-99.

[39] *Id.* at 2599.

[40] *Id.* at 2599-602 (describing the four principles, and noting they are derived from the Court's relevant precedent).

[41] *Id.* at 2601-02.

[42] *Id.* at 2602.

In response to the competing views of proponents of traditional marriage, the Court explained that fundamental rights do not derive solely from "ancient sources," but they also arise "from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[43] The Court explicitly proclaimed its desire to avoid "disparag[ing]" the competing views of those "who deem same-sex marriage to be wrong . . . based on decent and honorable religious or philosophical premises."[44] At the same time, however, the Court recognized that "when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[45] In other words, the Court suggested that the opponents of same-sex marriage cannot impose their religious or philosophical views on other people in the absence of a reasoned justification that nonadherents of their beliefs could reasonably be expected to accept. "Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."[46]

Several aspects of *Obergefell*'s due process analysis demonstrate that the Court was engaged in the practice of deliberative democracy. First, the Court emphasized the dynamic nature of constitutionally protected liberty, and that the Court should invoke the best contemporary understanding of a problem when it engages in constitutional interpretation.[47] Similarly, deliberative democratic theory seeks the most justifiable solutions to legal and policy questions based on the best available information, and emphasizes the importance of remaining open-minded and being willing to learn from new information or arguments.[48] Second, and relatedly, the Court emphasized the provisional nature of prior understandings of the Constitution, explicitly recognizing that "rights come not from ancient sources alone" but "[t]hey rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[49] Deliberative democracy likewise emphasizes the provisional nature of legal and policy choices, largely on the grounds that the

[43] *Id.* at 2602, 2630.

[44] *Id.* at 2602.

[45] *Id.*

[46] *Id.*

[47] *See id.* at 2598.

[48] *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3 (2004) ("[D]eliberative democracy affirms the need to justify decisions made by citizens and their representatives."); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1635-37 (1985) ("During the course of deliberation, people may discover both new information and new perspectives about what is at stake in the decision before them. This may lead individuals not only to modify their choice of means for achieving their ends, but perhaps to reconsider those ends.").

[49] *Obergefell*, 135 S. Ct. at 2602.

status quo should be reconsidered whenever new information or arguments cast doubt on the continued soundness of previous decisions.[50] Third, the Court emphasized the scope and value of the dialogue that has occurred in recent years on the rights of gays and lesbians in law and society, and in particular, on the continued validity of restrictions on the legal recognition of same-sex marriage.[51] While recognizing that a full consensus does not exist, the Court concluded that the competing arguments were sufficiently developed to allow the Court to reconsider the legal status quo at this time.[52] Such dialogue is, of course, central to deliberative democratic theory, and while a reasoned consensus is certainly desirable, deliberative democrats also recognize that legitimate decisions can be made in the absence of complete agreement, so long as each interest and perspective is adequately considered in the deliberative process and the resulting decision is supported by a reasoned justification.[53] Fourth, the Court explicitly and transparently overruled *Baker v. Nelson*[54] based on its contemporaneous view of the best understanding of liberty in this context, and mindfully extended the principles underlying *Lawrence v. Texas*[55] and other more pertinent precedent in justifying its decision.[56] As I explain in a parallel project, this treatment of precedent is fully consistent with a deliberative democratic theory of stare decisis.[57] Fifth, the Court was willing to examine whether there were legitimate, public-regarding reasons that would justify upholding the state laws at issue despite the importance of the legal recognition of marriage to petitioners.[58] By invalidating the challenged state laws because there was no persuasive justification for the states' refusal to provide legal recognition to same-sex marriages, particularly in light of the strength of petitioners' interests, the Court incorporated a civic republican understanding of liberty into its due process jurisprudence.[59] Finally, the Court sought to treat the views of the proponents of traditional marriage with equal respect in reaching

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[50] *See* GUTMANN & THOMPSON, *supra* note 48, at 6-7, 110-19.

[51] *See Obergefell*, 135 S. Ct. at 2605.

[52] *See id.* ("This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.").

[53] For a detailed discussion of deliberative democracy's treatment of moral conflict and political consensus, see GUTMANN & THOMPSON, *supra* note 48, at 64-94.

[54] 409 U.S. 810, 810 (1972).

[55] 539 U.S. 558, 578-79 (2003).

[56] *Obergefell*, 135 S. Ct. at 2598-605.

[57] *See* Glen Staszewski, A Deliberative Democratic Theory of Precedent 3 (unpublished manuscript) (on file with author) ("[I]nstead of viewing stare decisis as an unprincipled or incoherent legal doctrine that would necessarily benefit from greater uniformity or predictability, the use of precedent should be analyzed and calibrated through the lens of deliberative democratic theory.").

[58] *See Obergefell*, 135 S. Ct. at 2594, 2606-07.

[59] *See* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1037-43 (2006) (describing a civic republican conception of due process of law).

its decision, even though it ultimately rejected their position on the grounds that it could not reasonably be accepted as persuasive by citizens with fundamentally competing points of view.[60] While I will address the difficult questions that *Obergefell* raises regarding precisely what public officials owe to the opponents of their decisions as a practical matter in Part III, the Court's efforts were certainly consistent with central aspects of deliberative democratic theory.

B. *Equality*

Obergefell also held that "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[61] This aspect of the Court's opinion focused largely on the synergy between due process and equal protection, and the interrelated nature of these constitutional norms.[62] While the dissenters found the Court's equal protection analysis vacuous and superficial, partly because it was almost entirely devoid of standard doctrinal analysis,[63] the majority's treatment of equal protection is consistent with the practice of deliberative democracy and the Court's incorporation of this theory's underlying principles into its analysis of the relevant constitutional provisions.

While due process prohibits "arbitrary" governmental action,[64] and therefore raises constitutional concerns about any governmental action that does not advance a reasonable conception of the public interest,[65] the Equal Protection Clause embodies the "principle that similarly situated people should be treated alike and differently situated people should be treated differently."[66] In evaluating this principle in the context of legislation, the relevant similarities and differences must be assessed in relation to the public-regarding purposes that are capable of justifying the statute.[67] Accordingly, legislation must have a

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[60] *See* Ball, *supra* note 14, at 651 (claiming the Court did not "accuse marriage traditionalists of bigotry" because its "opinion did not mention, much less emphasize, considerations of intent"); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1289 (2009) ("[D]eliberative accountability is premised on a conviction that it is more productive to debate the merits of particular policy choices, rather than trying to ascertain or impugn the motives of those who have taken a position.").

[61] *Obergefell*, 135 S. Ct. at 2602.

[62] *Id*. at 2603.

[63] *Id*. at 2612.

[64] *E.g.*, Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Dent v. West Virginia, 129 U.S. 114, 123-24 (1889) (stating the intended effect of the Due Process Clause is "to secure the citizen against any arbitrary deprivation of his rights").

[65] *See* Staszewski, *supra* note 59, at 1037-40 ("The rational basis test itself reflects a constitutional norm that prohibits legislative restraints upon individual liberty in the absence of a rational justification.").

[66] *Id.* at 1029.

[67] *Id*. ("Whether persons are similarly or differently situated [for the purposes of equal protection] depends upon whether applying a statute to those persons will further the purposes

public-regarding purpose, and the classifications drawn by a statute must be rationally related to the public good that the statute is presumably designed to further.[68] These principles are based on a civic republican conception of the legislative process, whereby statutes must be justifiable as a rational means of promoting the public good, and they (or their classifications) cannot merely be the result of naked political preferences or interest group pressure.[69]

Obergefell essentially found that the states' refusal to provide legal recognition to same-sex marriage was not supported by a public-regarding purpose,[70] *and* that there was no persuasive justification for treating same-sex couples differently from opposite-sex couples in this context, particularly because all of the reasons that justify treating marriage as a fundamental right applied with full force to petitioners.[71] These findings suggested, in turn, that "[t]he imposition of this disability on gays and lesbians serves to disrespect and subordinate them."[72] Consistent with its due process analysis, the Court also emphasized the dynamic nature of equal protection norms and the importance of learning from new information and arguments.[73] And, consistent with its due process analysis, the Court resolved the petitioners' equal protection claim by engaging in the practice of deliberative democracy.

C. *Fraternity*

Before considering the contention that *Obergefell* was "deliberation-foreclosing" and therefore in tension with deliberative democratic theory, it is worthwhile to explore the significance of the Court's engagement with the practice of deliberative democracy. This requires a brief explanation of the point of reasoned deliberation from the perspective of deliberative democratic theory, and an examination of whether the Court's decision-making could satisfy the theory's conceptual criteria.[74] While deliberative democracy may be the "most

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of the legislation.").

[68] *Id.* at 1038.

[69] Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 131; Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 345-50 (1949) ("It would appear that the requirement that laws be equal rests upon a theory . . . which puts forward some conception of a 'general good' as the 'legitimate public purpose' at which legislation must aim, and according to which the triumph of private or group pressure marks the corruption of the legislative process.").

[70] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

[71] *Id.* at 2604.

[72] *Id.*

[73] *Id.* at 2603 ("[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.").

[74] For a skeptical answer, see Maya Sen, *Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 303 (2013) ("[T]he judiciary might in many ways be less deliberative than its sister

active area of political theory,"[75] there is no single understanding of the theory's content, and the principles advocated by its adherents are increasingly diverse.[76] There is widespread agreement, however, that deliberative democracy is fundamentally concerned with addressing the problem of how citizens can reach legitimate collective decisions in a state of disagreement.[77] Democratic deliberation, therefore, requires "[a] state of disagreement," which means that participants in the decision-making process should have diverse opinions and perspectives.[78] Moreover, democratic deliberation must result in "a collective decision" that is binding on everyone in the group regardless of whether they agree with the outcome.[79] Finally, when these "circumstances of deliberative democracy" are satisfied, the theory seeks to reach decisions that are legitimate.[80] Legitimacy, in turn, "prescribes the process by which . . . collective decisions can be morally justified to those who are bound by them," and "[i]t is the key defining element of deliberative democracy."[81] Given this emphasis on mutual justification, it is perhaps not surprising that "the core of all theories of deliberative democracy is what may be called a reason-giving requirement."[82] Public officials and citizens are expected to provide reasoned explanations for positions and choices that could reasonably be accepted by people with fundamentally competing views. While deliberative theorists vary substantially on the respective roles of ordinary citizens and elites, deliberative democracy

branches."). I tend to share Amy Gutmann and Dennis Thompson's view that "[d]eliberative democracy does not favor legislative over judicial deliberation or vice versa. Its principled defense of deliberation favors forums for deliberation wherever they can further the aim of resolving moral disagreements in a way that can be justified to the people who are bound by the resolutions." AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 47 (1996).

[75] *See* John S. Dryzek, *Theory, Evidence, and the Tasks of Deliberation*, *in* DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN? 237, 237 (Shawn W. Rosenberg ed., 2007).

[76] Sen, *supra* note 74, at 306 ("While the concept [of deliberative democracy] is simple and intuitive, there is no universally agreed-upon single definition of deliberative democracy."); Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 501 (2008) (observing that while empirical researchers in the area of deliberative democracy correctly acknowledge that deliberative theories "share a common core of values," there are "diverse concepts of deliberation" among different studies).

[77] *See* Thompson, *supra* note 76, at 497, 502 ("[T]he fundamental problem deliberative theory is intended to address [is]: In a state of disagreement, how can citizens reach a collective decision that is legitimate?").

[78] *Id.*

[79] *See id.* at 502-04.

[80] *See id*. at 502, 504.

[81] *Id.* at 502.

[82] *Id.* at 498.

does not require that binding collective choices be made directly by the people.[83] Indeed, John Rawls famously described the U.S. Supreme Court as an "exemplar of public reason."[84] Regardless of whether the Court typically merits such lofty praise, *Obergefell* is undoubtedly a binding decision that was rendered in circumstances of profound disagreement. Moreover, if the decision comports with principles of deliberative democracy, *Obergefell* would be legitimate from this theoretical perspective. The Court's decision could therefore not fairly be described as *undemocratic* to the extent that one accepts the tenets of deliberative democratic theory.

II. THE DISSENTERS' PROPOSED DEFERENCE TO (ALLEGEDLY) DELIBERATIVE POLITICAL PROCESSES

In contrast to the majority, which sought to render a democratically legitimate decision *by engaging in the practice of deliberative democracy*, the dissenters criticized the Court for cutting off deliberation in the ordinary political process and state courts.[85] From the dissenters' perspective, a fundamental right can only legitimately be established by the Constitution's text or perhaps an objectively ascertainable tradition.[86] The Constitution does not explicitly provide a right to the legal recognition of same-sex marriage. Moreover, virtually everyone understood marriage as the legal union of one man and one woman when the Fourteenth Amendment was enacted, and the Court had previously rejected the notion that there is a federal constitutional right to same-sex marriage.[87] Accordingly, the Due Process and Equal Protection Clauses could not possibly provide a right to same-sex marriage.[88] If the people or their elected representatives were persuaded that a state should be required to extend marital recognition to same-sex couples, its laws could be amended through the requisite

[83] *See* Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 912 (2006) (explaining that "there are some deliberative democrats who are elitists," who principally "urge for deliberation among elites (judges, legislators, interest groups)," and some who are populists, who believe deliberation must be pursued through popular institutions and take place between lay citizens).

[84] JOHN RAWLS, POLITICAL LIBERALISM 231 (1993).

[85] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2624-25 (2015) (Roberts, C.J., dissenting).

[86] *See id.* at 2618 ("Our precedents have required that implied fundamental rights be 'objectively, deeply rooted in this Nation's history and tradition . . . .'" (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1996))); Yoshino, *supra* note 30, at 151-62 (describing the restrictive approach to substantive due process articulated in *Glucksberg*).

[87] *See Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting) ("This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning."); Baker v. Nelson, 409 U.S. 810, 810 (1972).

[88] *Cf.* Burnham v. Superior Court, 495 U.S. 604, 611 (1990) (plurality opinion) (suggesting that "transient jurisdiction" cannot violate due process because the challenged practice was universally accepted when the Fourteenth Amendment was enacted).

procedures to achieve this result.[89] Similarly, if the American people and their elected representatives were persuaded that the legal recognition of same-sex marriage should be recognized as a fundamental right, the Constitution could be amended to achieve this result. In the absence of this latter result, there simply is *no law* that requires each state to recognize the marriages of same-sex couples, and this issue must continue to be debated by the people of each state through the ordinary political processes.[90]

Partly because the preceding analysis seemed so cut-and-dried from a superficial originalist perspective,[91] the dissenters focused primarily on criticizing the Court for abusing its authority by substituting the majority's policy preferences for the nation's highest law, thereby rendering a fundamentally undemocratic decision.[92] Given the legal analysis described above (and knowing something about the views on democracy of the dissenting Justices), one could easily read the dissenters' opinions as a call for judicial deference to majoritarian democracy.[93] Nonetheless, the dissenting opinions also emphasized that the people and their elected representatives were engaging in serious deliberation on the issue of marriage equality, and that the Court

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[89] *See Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting).

[90] *See, e.g.*, *id.* at 2626 (Roberts, C.J., dissenting) (claiming that "the Constitution . . . had nothing to do with" the Court's decision); *id.* at 2631 (Scalia, J., dissenting) ("With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court—we move one step closer to being reminded of our impotence.").

[91] For more nuanced originalist analyses that cast doubt on the dissenters' conclusions, see *supra* note 19 and accompanying text.

[92] *See Obergefell*, 135 S. Ct. at 2624 (Roberts, C.J., dissenting) ("Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage."); *id.* at 2626 (Scalia, J., dissenting) ("I write separately to call attention to this Court's threat to American democracy."); *id.* at 2629 ("A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."); *id.* at 2642-43 (Alito, J., dissenting) ("Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage . . . [and] shows that decades of attempts to restrain this Court's abuse of its authority have failed."); *id.* at 2643 (claiming that the Court's decision "evidences . . . the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation," and that "all Americans, whatever their thinking on [the issue of same-sex marriage], should worry about what the majority's claim of power portends").

[93] *See* Staszewski, *supra* note 60, at 1314-15 (explaining that from the perspective of majoritarian democracy, "the federal judiciary would plainly have no business interfering with the legitimate policy choices of the people and their elected representatives to prohibit the legal recognition of same-sex marriage"). For a stark example of this view, see *Obergefell*, 135 S. Ct. at 2637 (Thomas, J., dissenting) ("As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated.").

should never have ended this debate and imposed its own policy views on the sovereign people.[94]

Setting aside the disrespectful tone of certain aspects of their opinions,[95] the dissenting Justices sounded positively like deliberative democrats. Thus, for example, Chief Justice Roberts ominously explained:

> Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.[96]

This passage incorporates several basic principles of deliberative democratic theory, which Roberts further developed in the final part of his opinion. First, he questioned the wisdom of ending the democratic debate that was taking place on the issue of same-sex marriage, and thereby embraced the fundamentally provisional nature of policy decisions in a deliberative democracy: "[i]n our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will."[97] Second, he expressed confidence in the deliberative capacity of the people and their elected representatives,[98] and he praised the nature, tone, and value of the debates that

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[94] *See Obergefell*, 135 S. Ct. at 2624 (Roberts, C.J., dissenting).

[95] *See, e.g.*, *id.* at 2630 n.22 (Scalia, J., dissenting) ("If, even as the price to be paid for a fifth vote, I ever joined an opinion . . . that began [with the first sentence of the majority's decision], I would hide my head in a bag. The Supreme Court . . . has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."). For criticism of the tone of Justice Scalia's opinion in particular, see, for example, Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 118 ("In the entire history of the Supreme Court, there is nothing that rivals it for petulance, name calling, and disrespect.").

[96] *Obergefell*, 135 S. Ct. at 2611-12 (Roberts, C.J., dissenting); *see also id.* at 2612 (claiming that the majority "seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question"); *id.* at 2615 (endorsing the view of the court of appeals, which "acknowledged the democratic momentum in favor of expand[ing] the definition of marriage to include gay couples, but concluded that petitioners had not made the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters" (internal citation and quotation marks omitted)); *id.* at 2619 (acknowledging that "the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry," but claiming that "the sincerity of petitioners' wishes is not [legally] relevant").

[97] *Id.* at 2624.

[98] *See id.* ("It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." (quoting Schuette v.

were taking place on this issue in many venues.[99] Roberts also emphasized that the results of a deliberative process of this nature are entitled to enhanced legitimacy, and reiterated the importance of their provisionality,[100] before suggesting that this judicial victory would ultimately come at a grave and unfortunate cost to the petitioners and their supporters.[101] Specifically, Roberts claimed that "[p]eople denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide," and that proponents of marriage equality have forever lost "the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause."[102] This happened, moreover, "just when the winds of change were freshening at their backs."[103] In other words, the dissenters argued that the Court should have engaged in the practice of "judicial minimalism," and thereby allowed democratic deliberation on the issue of same-sex marriage to continue in the political process.

Cass Sunstein is the leading academic proponent of a minimalistic approach to judicial review.[104] He has argued that because of limitations on the federal judiciary's democratic credentials and decision-making capacities, courts should generally limit their interpretive ambitions and render narrow and shallow decisions, rather than decisions that are broad or deep.[105] Accordingly, judges should seek to issue opinions that only "decide the case at hand" rather than also deciding other cases, and they should "try to avoid issues of basic principle" in making their decisions in favor of forging "incompletely theorized agreements."[106]

Sunstein contends that judicial minimalism has the virtue of promoting the principles of deliberative democracy that underlie the American constitutional design.[107] This conclusion is premised, in turn, on the notion that "the principle vehicle" of "the aspiration to deliberative democracy" in the American

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BAMN, 134 S. Ct. 1623, 1637 (2014))).

[99] *See id.* at 2624-25; *id*. at 2627 (Scalia, J., dissenting) ("Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best.").

[100] *See id.* at 2625 (Roberts, C.J., dissenting) (noting that when the democratic process is used to decide an issue, each side of the debate has the benefit of knowing that the decision reached was the result of a "fair and honest debate," and the losing side can "gear up to raise the issue later, hoping to persuade enough on the winning side to think again").

[101] *Id.* at 2624.

[102] *Id.*

[103] *Id.*

[104] *See* Peters, *supra* note 13, at 1460 (describing Sunstein as "the leading figure of the new minimalism"). *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-8 (1999).

[105] SUNSTEIN, *supra* note 104, at 8-14; *see also* Peters, *supra* note 13, at 1460-69.

[106] SUNSTEIN, *supra* note 104, at 10-11.

[107] *Id.* at 24-28.

constitutional system "is the legislature, not the judiciary."[108] Accordingly, courts can promote deliberative democracy by declining to exercise judicial review or by upholding the validity of legislative judgments, and thereby "simply allowing the political process to function unimpeded by interference from the Court."[109] Alternatively, courts can promote deliberative democracy by using techniques that aim "to trigger or improve processes of democratic deliberation,"[110] such as the void for vagueness doctrine or other nondelegation canons, which effectively remand constitutionally problematic statutes to the legislature for further deliberation.[111] While Sunstein acknowledges that judicial minimalism would be inappropriate in some circumstances, he claims that "[t]he case for minimalism is especially strong when the area [of substantive law] involves a highly contentious question now receiving sustained democratic attention."[112] Rather than acting like philosopher kings and making wide and deep decisions based on their own reasoned judgment regarding the best resolution of contentious social problems, the Court should decide each case on the narrowest possible grounds and allow further deliberation to continue in the ordinary political process. Therefore, the Court should presumably decline to recognize a fundamental constitutional right to same-sex marriage throughout the country based on its "new insight" regarding the requisites of "liberty"—a decision that Sunstein would characterize as "democracy-foreclosing."[113]

Thus, while the majority opinion in *Obergefell* engaged in the practice of deliberative democracy and concluded that the best understanding of liberty and equality required states to recognize the marriages of same-sex couples, the dissenters claimed that the Court should decline to mandate this result and should instead allow deliberation to continue in the ordinary political process. The dissenters advocated a form of judicial minimalism that leading scholars have defended as a means of promoting deliberative democracy. The next Part argues that *Obergefell* is democratically legitimate based on the best understanding of the relevant principles of deliberative democracy.[114] Indeed, while the timing of the decision and the best available remedy were reasonably debatable based on valid procedural aspects of judicial minimalism, rejecting petitioners' claim on the merits would have been fundamentally undemocratic

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[108] *Id.* at 27 n.5.

[109] Peters, *supra* note 13, at 1463.

[110] SUNSTEIN, *supra* note 104, at 27.

[111] Significantly for present purposes, one of the potential democracy-promoting canons that Sunstein identifies is the enforcement of a requirement that "all decisions [be] supported by public-regarding justifications rather than power and self-interest." *Id.*

[112] *Id.* at 59.

[113] *See id.* at 26-27.

[114] Sunstein acknowledges "[t]he ideals of deliberative democracy are themselves contentious," and "[d]emocracy-promoting maximalism is an easily imaginable project." *Id.* at 25-26. My claim is that while *Obergefell* can easily be characterized as a "maximalist" judicial decision, it is one that legitimately promotes principles of deliberative democracy.

and therefore inconsistent with the best understanding of the rule of law in a constitutional republic.

III. *OBERGEFELL*'S DEMOCRATIC LEGITIMACY

All of the opinions in *Obergefell* purport to pay homage to principles of deliberative democracy. The majority opinion does so by engaging in the practice of deliberative democracy. Meanwhile, the dissenters argued in favor of judicial minimalism, so that deliberation could continue in the ordinary political process. This Part evaluates the competing positions of the Justices from the perspective of deliberative democratic theory, and argues that the majority's decision was democratically legitimate. Indeed, once the Court reached the merits, the refusal to recognize that marriage equality is required by the Constitution would have been affirmatively undemocratic.

A. *Civic Republican Conceptions of Liberty and Equality*

In assessing the legitimacy of a judicial decision, several considerations are potentially relevant. Richard Fallon has explained that the concept of legitimacy has legal, sociological, and moral dimensions, which are sometimes difficult to disentangle.[115] This is particularly true of the concept of democratic legitimacy, which seems primarily moral in nature from a deliberative perspective, but may also have legal and sociological dimensions. In this regard, the democratic legitimacy of a judicial decision would appear to be strengthened by a plausible legal argument in its favor, even if "legality" is not necessary or sufficient, standing alone, to establish its democratic legitimacy. Similarly, a decision's democratic legitimacy would be strengthened by its popular acceptance (especially in the long run), even if sociological legitimacy is not necessary or sufficient to establish that a particular decision is democratically legitimate.

The dissenters in *Obergefell* argued that the Court abused its authority because there was no legal justification for its decision.[116] This argument was premised on the lack of a clear textual mandate for the states to recognize same-sex marriage, and the fact that such a right was not contemplated when the Fourteenth Amendment was adopted.[117] There were, however, arguably originalist justifications for the *Obergefell* decision, which were not seriously discussed or evaluated by any of the Justices.[118] Moreover, the Court does not

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[115] Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1793 (2005) ("Realistic discourse about constitutional legitimacy must reckon with the snarled interconnections among constitutional law, its diverse sociological foundations, and the felt imperatives of practical exigency and moral right.").

[116] Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

[117] *See id.* at 2611.

[118] *See, e.g.*, Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 649 (2014) (concluding that there is an originalist argument for the right to same-sex marriage, because "the Equal Protection Clause safeguards a right to same-sex marriage [that] grows out of the original history of equality guarantees");

consistently follow textualist or originalist methods of constitutional interpretation, and many of its prior landmark decisions were not supported by text or tradition.[119] Accordingly, the Court has a tradition of periodically recognizing new, unenumerated rights in sufficiently compelling circumstances.[120] Of course, these cases, such as *Brown v. Board of Education*[121] or *Bolling v. Sharpe*,[122] tend to turn more heavily on moral considerations than on formal legal criteria.[123]

Nonetheless, the majority's decision in *Obergefell* was supported by valid legal justifications from the perspective of deliberative democratic theory. First, the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[124] The Court has frequently declared that "arbitrary" governmental action is prohibited by the Due Process Clause.[125] Justice Harlan's celebrated dissent in *Poe v. Ullman*[126] declared that "the liberty guaranteed" by this provision "includes a freedom from all substantial arbitrary impositions and purposeless restraints."[127] This principle is consistent with the civic republican conception of "liberty as non-domination" that was arguably adopted by the Framers.[128] Simply put, when the government imposes a burden or denies a benefit without a rational justification, the government is acting "arbitrarily" and thereby infringing upon the liberty that is protected by due process.[129] Even when the government has a valid reason for what it does, it can still violate due process if the public-regarding purposes that are served by its actions are outweighed by the countervailing interests of adversely affected individuals.[130]

Eskridge, *The Marriage Equality Cases*, *supra* note 19, at 112 (explaining that the Court missed an opportunity to root *Obergefell* in the Constitution's original public meaning).

[119] *See* Seidman, *supra* note 95, at 112, 116.

[120] *See id.* at 117.

[121] 347 U.S. 483 (1954).

[122] 347 U.S. 497 (1954).

[123] *See* Fallon, *supra* note 115, at 1835-36.

[124] U.S. CONST. amend. XIV, § 1.

[125] *See supra* note 64 and accompanying text.

[126] 367 U.S. 497 (1961).

[127] *Id.* at 543; *see* Yoshino, *supra* note 30, at 149 (recognizing that *Obergefell* was inspired by the approach to substantive due process taken by Harlan's dissent in *Poe*).

[128] *See generally* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

[129] This principle is not always fully enforced by the judiciary for institutional reasons. *See* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212 (1978); Staszewski, *supra* note 59, at 1040-43 (explaining that the rational basis test, which is typically employed to evaluate whether legislative action is consistent with due process, "reflects a constitutional norm that prohibits legislative restraints upon individual liberty in the absence of a rational justification").

[130] Staszewski, *supra* note 59, at 1042 ("Even if legitimate state interests would be

As explained above, *Obergefell* effectively adopted a civic republican understanding of due process, and held that there was no persuasive justification for a state to refuse to recognize the same-sex marriages sought by petitioners. In reaching this conclusion, the Court evidently refused to credit the religious or religiously motivated moral or philosophical beliefs of traditionalists on the grounds that those views could not reasonably be expected to be persuasive to citizens with fundamentally competing perspectives. Moreover, the Court evidently agreed with the vast majority of lower courts that had recently found the other proffered reasons for refusing to recognize same-sex marriage unreasonable.[131] Meanwhile, the Court emphasized the fundamental importance of the legal recognition of same-sex marriage to the petitioners and the stigma and injury (or domination) that has resulted from denying them access to this institution. While the Court could undoubtedly have done a better job of explaining its conclusions, this is precisely the type of analysis that would be countenanced by deliberative democratic theory, which seeks the most justifiable decision on the merits under the circumstances based on the best available information.

The Constitution also provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[132] Consistent with a civic republican understanding of this provision,[133] *Obergefell* emphasized the fundamental importance of marriage to the couples involved (which helps explain why the states would recognize it), described the tangible benefits that are provided to married couples by the federal government and the states, and recognized the fundamental importance that the states have ascribed to the institution of marriage. The Court also emphasized that "[t]here is no difference between same- and opposite-sex couples" with respect to the principles underlying the institution of marriage, as "[s]ame-sex couples, too, may aspire

advanced to some degree by applying plain statutory language, due process norms could be violated if there were overwhelming countervailing interests pointing in the opposite direction."). A balancing of interests is inherent to the due process analysis. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990); *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

[131] *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir.) ("[T]he governments of Indiana and Wisconsin have given us no reason to think they have a 'reasonable basis' for forbidding same-sex marriage."), *cert. denied*, 135 S. Ct. 316 (2014). Significantly, it was Judge Posner who wrote the opinion in *Baskin*, reflecting the evolution of his own thinking on the issue of same-sex marriage. *Compare id.*, *with* Richard A. Posner, *Should There Be Homosexual Marriage? And if so, Who Should Decide?*, 95 MICH. L. REV. 1578, 1587 (1997) (reviewing WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996)) ("The country is not ready for Eskridge's proposal, and this must give pause to any impulse within an unelected judiciary to impose it on the country in the name of the Constitution.").

[132] U.S. CONST. amend. XIV, § 1.

[133] *See* Staszewski, *supra* note 59, at 1029-37 (describing a civic republican conception of equal protection); *supra* notes 64-69.

to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[134] Finally, the Court relied on a variety of precedents to demonstrate that, much like its assessment of the scope of constitutionally protected liberty, the Court's application of the Equal Protection Clause has been dynamic,[135] and it further emphasized the stigma and harm that has resulted from the government's historical disapproval of same-sex relationships.[136] The Court therefore concluded that "the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right."[137] The Court recognized that this infringement of the fundamental right to marry was "unjustified," and declared that "the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[138]

Because the Court concluded that the refusal to recognize petitioners' same-sex marriages would not serve a publicly regarding purpose, and would simultaneously interfere with a fundamentally important right, the due process and equal protection violations identified in *Obergefell* overlapped, precisely as the Court (somewhat cryptically) explained.[139] This conclusion was bolstered by the fact that the decision would help to limit the subordination of LGBT couples and their children,[140] and would thereby promote the civic republican vision of freedom as non-domination.[141]

While the dissenters obviously disagreed with the Court's legal analysis, it is simply not true that "[the Constitution] had nothing to do with"[142] the majority's decision. On the contrary, the Court adopted a republican conception of the Due Process and Equal Protection Clauses, and persuasively concluded that the states' refusal to recognize same-sex marriage violated the Fourteenth Amendment. *Obergefell* was therefore entirely legitimate based on the relevant legal considerations from the perspective of deliberative democratic theory.

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[134] Obergefell v. Hodges, 135 S. Ct. 2584, 2601-02 (2015).

[135] *See id.* at 2603 ("Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.").

[136] *See id.* at 2602.

[137] *Id.* at 2604.

[138] *Id.* at 2605.

[139] *See id.* at 2602-05 ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws.").

[140] *See* Yoshino, *supra* note 30, at 171-75.

[141] *See generally* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163-64 (Ian Shapiro & Casiano Hacker-Cardón eds., 1999).

[142] *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

B. *The Substantive Dimension of Deliberative Democracy*

While the previous Section claims that *Obergefell* was legitimate based on legal considerations, this Section explains that the majority's decision was also legitimate from the perspective of deliberative democratic theory based on moral or ethical considerations. In this regard, it is important to understand that the most compelling versions of deliberative democracy have both substantive and procedural dimensions.[143] The *Obergefell* dissenters, in contrast, focused solely on the procedural dimension of deliberative democracy and argued that the issue of same-sex marriage should be resolved through the political process. The dissenters also suggested that the results of the political process should be accepted regardless of their substantive merits, and that the deliberation that was occurring in the states met their standards for deference. The dissenters adopted a purely procedural understanding of democratic legitimacy, and they viewed the relevant political processes as democratically legitimate. This position maps onto one of the primary critiques of including substantive principles within a theory of deliberative democracy, which posits that political authority "should be exercised not through hypothetical theoretical reasoning but through actual democratic decision-making," and maintains that "[a] theory that contains substantive principles unduly constrains the democratic decision-making process, including the process of deliberation itself."[144]

There are, however, crucial reasons for including substantive principles within a theory of deliberative democracy. Most fundamentally, leading theorists have pointed out that "mere procedures, such as majority rule, cannot justify outcomes that are unjust according to substantive principles."[145] A central principle of deliberative democratic theory is the requirement of "reciprocity," which "holds that citizens owe one another justifications for the mutually binding laws and public policies they collectively enact."[146] Reciprocity is designed "to help people seek political agreement on the basis of principles that can be justified to others who share the aim of reaching such an agreement."[147] Deliberative democratic theory requires public officials and citizens to provide public-regarding reasons for their decisions because collective policy choices in a democracy cannot be justified solely on the basis of self-interest or other reasons that could not reasonably be accepted by people with fundamentally

143 *See* GUTMANN & THOMPSON, *supra* note 48, at 95-124 (arguing that any complete theory of deliberative democracy must necessarily include a substantive component because any kind of separation between the two dimensions is ultimately unsustainable).

144 *Id.* at 96. For an insightful critique of Gutmann's and Thompson's work that is based on this concern, see Emily Hauptmann, *Deliberation = Legitimacy = Democracy*, 27 POL. THEORY 857, 862-66 (1999).

145 GUTMANN & THOMPSON, *supra* note 48, at 96.

146 *Id.* at 98. Gutmann and Thompson further explain that while reciprocity is a "core principle" of many democratic theories, "most theories do not give it the central role that deliberative democracy does." *Id.*

147 *Id.* at 98-99.

competing perspectives.[148] Legitimate reasons must therefore "constitute *a justification* for imposing binding laws" on those subject to them.[149] As Amy Gutmann and Dennis Thompson explain, "[w]hat reasons count as such a justification is inescapably a substantive question."[150] Accordingly, "[m]utual justification" in a deliberative democracy "requires reference to substantive values."[151] Because deliberative democratic theory incorporates substantive values, it also has the related virtue, where necessary, of being able to say "that what the majority decides, even after full deliberation, is wrong."[152] Unlike purely procedural theories of democracy, deliberative democratic theory is capable of promoting justice.

While the *Obergefell* dissenters advocated deference to ongoing deliberations in the political process based on a purely procedural conception of democracy, the Court rejected that approach and embraced the substantive dimension of deliberative democracy. In particular, the Court implicitly recognized that the states' refusal to recognize same-sex marriage needed to be justified on the merits under the principle of reciprocity. Although the Court acknowledged that many people sincerely oppose same-sex marriage based on their religious views or related philosophical or moral beliefs, the Court refused to uphold the challenged laws on those grounds, presumably because such reasons could not reasonably be accepted by citizens with fundamentally competing perspectives.[153] For similar reasons, the Court refused to uphold the challenged laws based solely on tradition.[154] And, of course, the Court has long held that "a

[148] *See* Staszewski, *supra* note 60, at 1279 (explaining that this "reason-giving" requirement functions as a way to hold decision makers "deliberatively accountable" in a democracy).

[149] GUTMANN & THOMPSON, *supra* note 48, at 99 (emphasis added).

[150] *Id.* (explaining further that mere "formal standards for mutual justification" alone are insufficient).

[151] *Id.*

[152] *Id.* at 105-06 (explaining that this allows individuals to object to laws that violate basic principles of liberty, such as bodily integrity, without abandoning their commitment to principles of deliberative democracy).

[153] Courts have made even more explicit statements to this effect. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571 (2003) (recognizing that "[t]he condemnation [of homosexuality] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family," but concluding that the majority may not "use the power of the State to enforce these views on the whole society through operation of the criminal law"); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 930-31 (N.D. Cal. 2010) (recognizing that "[a] state's interest in an enactment must of course be secular in nature," and citing *Lawrence* for the proposition that "[t]he state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose").

[154] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."); Baskin v. Bogan, 766 F.3d 648, 666 (7th Cir.) (claiming that "[t]radition per se has no positive or negative

bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest," and that state action that merely reflects animus against disfavored groups is therefore unconstitutional.[155] The foregoing reasons for prohibitions on same-sex marriage all failed for substantive reasons based on deliberative theory's principle of reciprocity because those reasons could not reasonably have been accepted by citizens with fundamentally competing views or perspectives, including LGBT persons who were being deprived of the right to marry the partners of their choice by the challenged state laws. While the foregoing reasons were probably also the *true reasons* for the states' refusal to recognize same-sex marriage,[156] the states actually emphasized a variety of secular justifications for the challenged laws, including the alleged need to promote stable families and to protect the interests of children.[157] Consistent with recent decisions by lower federal courts, the *Obergefell* majority also found these justifications unavailing, presumably because they were implausible or unsupported by reliable empirical evidence.[158] Meanwhile, the Court recognized the considerable harm that was caused by the states' refusal to recognize same-sex marriage, both in terms of the wide range of foregone benefits that are provided to married couples under state and federal law, and the structural stigma associated with the official legal position that committed same-sex relationships are inferior to analogous heterosexual relationships.[159] While the *Obergefell* opinion did not focus directly on the issue, the latter rationale also explains why the Court deemed the willingness of some states to recognize civil

significance," and concluding that it "therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition"), *cert. denied*, 135 S. Ct. 316 (2014).

[155] Romer v. Evans, 517 U.S. 620, 634-35 (1996) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[156] *See* Seidman, *supra* note 95, at 133-34 (claiming that by refusing to credit moral opposition to same-sex marriage as a legitimate justification, the Court forced the states to rely on relatively weak or pretextual justifications for the challenged laws).

[157] *Cf. Baskin*, 766 F.3d at 660, 666 (examining the State of Indiana's argument that its only purpose in recognizing marriage of any kind is to promote child welfare, and the attempt by attorneys representing the State of Wisconsin to analogize same-sex marriage to no-fault divorce in that they both "make[] marriage fragile and unreliable"); *Perry*, 704 F. Supp. 2d at 998-1002 (examining a variety of state interests proffered by the proponents of California's Proposition 8 to defend the law, including seven specific contentions related to families and child development).

[158] *See, e.g.*, *Baskin*, 766 F.3d at 671 (explaining that "more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and important interest of a state is necessary to justify discrimination on the basis of sexual orientation," and concluding that "the grounds advanced by [the states] for their discriminatory policies are not only conjectural; they are totally implausible"); *Perry*, 704 F. Supp. 2d at 997-1003 ("The evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples.").

[159] *Obergefell*, 135 S. Ct. at 2600-02.

unions or domestic partnerships an inadequate substitute for same-sex marriage.[160] In a related vein, some lower courts have explicitly held that the discomfort or disgust that legal recognition of same-sex marriage would cause for some traditionalists is not a valid reason for withholding this right from LGBT couples.[161]

The Court persuasively found that the principle of reciprocity, and related substantive values, leads inescapably to the conclusion that the states' refusal to recognize same-sex marriage was unjustified on the merits at this time, even if the challenged laws were adopted pursuant to a deliberative process. Accordingly, the Court's decision was democratically legitimate based on moral considerations from the perspective of deliberative democratic theory regardless of the adequacy of the political process. The dissenters' call for further political deliberation was therefore unnecessary because deliberative democracy "has no problem with asserting that what the majority decides, even after full deliberation, is wrong."[162] Even if additional states would eventually have been persuaded to come around to the most justifiable decision on the merits, the Court did not necessarily need to wait to render a legitimate constitutional decision.[163]

This conclusion is bolstered by the relevant analysis that has been provided by Gutmann and Thompson, two of the most prominent deliberative democratic

[160] *See, e.g.*, *Baskin*, 766 F.3d at 670 (recognizing that if this solution were proposed in the context of interracial marriage, it "would be considered deeply offensive, and, having no justification other than bigotry, would be invalidated as a denial of equal protection"); *Perry*, 704 F. Supp. 2d at 970-75 (rejecting civil unions as an adequate alternative).

[161] *See Baskin*, 766 F.3d at 669-70 (invoking John Stuart Mill's argument that, to be the proper focus of legal concern, "the harm must be tangible, secular, material—physical or financial, or, if emotional, focused and direct—rather than moral or spiritual"). In previous work, I argued that a state's refusal to provide a meaningful form of legal recognition for same-sex couples was illegitimate from the perspective of deliberative democracy for many of the reasons described above. Staszewski, *supra* note 60, at 1313-20. I remained open to the possibility, however, that civil unions or domestic partnerships would provide an adequate substitute for same-sex marriage at that time, partly out of respect for the deep-seated anxiety that recognition of same-sex marriage would cause for some traditionalists. *See id.* at 1320-25. After giving further thought to this issue and with the benefit of hindsight, six more years of dialogue and associated legal and cultural developments, and the judicial opinions described above, I am firmly convinced that these alternative relationships are no longer adequate substitutes for the legal recognition of same-sex marriage. As explained below, one of the central principles of deliberative democratic theory is the "provisionality" of legal and policy judgments, and the idea that citizens and public officials should be open-minded and willing to change their minds or revise their positions based on new information or arguments. *See infra* note 227. I am therefore pleased to have been persuaded to take a different position on this issue at this time, in the spirit of deliberative democracy.

[162] GUTMANN & THOMPSON, *supra* note 48, at 105.

[163] Whether it may have been prudent to do so is given further consideration below. *See infra* Section III.D.

theorists. They distinguish between two kinds of higher-order principles in explaining how they would determine which disagreements should be removed from the political agenda and resolved pursuant to constitutional law, and which controversies should be subject to political resolution. First, Gutmann and Thompson describe "principles of preclusion," which disqualify certain reasons for policies from being given moral force in the political process, and thus compel the conclusion that a position is not a legitimate subject for legislation.[164] Second, they describe "principles of accommodation," which govern the manner in which moral disagreement should be handled on issues that reach the political agenda.[165]

Gutmann and Thompson claim that their principles of preclusion have a relatively narrow scope in comparison to most liberal theories of democracy, and their work therefore focuses primarily on the requisite nature of reasoned deliberation in the ordinary political process.[166] They argue, however, that some positions on legal or policy issues should be denied "moral status" in a deliberative democracy, and that those issues should therefore be precluded from the political agenda pursuant to constitutional law.[167] They claim, for example, that "the defense of racial discrimination is not a moral position at all" based on a variety of considerations, and this position could therefore not be legitimately adopted through the political process.[168] They further identify several basic requirements that are essential for a position to count as a moral one.[169] First, they contend that "the argument for the position must presuppose a disinterested perspective that could be adopted by any member of a society, whatever his or her other particular circumstances (such as class, race, or sex)."[170] This requirement mirrors their principle of reciprocity, and "distinguishes a moral position from one that is merely prudential or self-regarding."[171] Gutmann and Thompson explain that a person whose position satisfies this requirement in effect declares that she is "prepared to enter into a moral discussion."[172] Second, they contend that "any premises in the argument that depend on empirical evidence or logical inference should in principle be open to challenge by generally accepted methods of inquiry."[173] Third, they claim that "premises for which empirical evidence or logical inference is not appropriate" should not be

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[164] *See* GUTMANN & THOMPSON, *supra* note 48, at 65-78.

[165] *See id.* at 65, 79-90.

[166] *See id.* at 65.

[167] *Id.* at 72.

[168] *Id.* at 70-72 (claiming that a policy favoring racial discrimination "is not an option that legislatures or citizens should seriously consider, and if they were to do so, we would expect courts to prevent its adoption").

[169] *Id.* at 72-73.

[170] *Id.* at 72.

[171] *Id.*

[172] *Id.*

[173] *Id.*

based on "radically implausible beliefs" that would effectively "require the rejection of an extensive set of better established beliefs that are widely shared in the society."[174] While recognizing that reasonable people may disagree "about what should count as a moral position," they contend that the foregoing principles of preclusion improve the likelihood that debates regarding which issues should be resolved as a matter of constitutional law will be "susceptible to rational resolution" and provide "the only basis on which we can hope to arrive at reasonable resolutions of substantive moral conflicts in the future."[175]

Gutmann and Thompson apply their principles of preclusion to several contemporary political controversies, and conclude that while the defense of racial discrimination is not a moral position, and should therefore be precluded from the political agenda, the proper legal treatment of abortion and capital punishment are true moral conflicts that should be placed on the political agenda.[176] Significantly, however, they argue that "[l]aws against homosexuality and other policies that discriminate on the basis of sexual orientation resemble the case of racial discrimination," and they conclude that "[t]he basis for such policies fails the test of a moral position."[177] While acknowledging that the advocates of such policies "sometimes adopt a disinterested point of view," they point out that there is no reliable empirical evidence that homosexual conduct is harmful, and they contend that the position that homosexuality is "unnatural" is implausible.[178] And, of course, people with fundamentally competing views could not reasonably accept many of the arguments in favor of discrimination against gays and lesbians, and those arguments therefore do not "presuppose a disinterested perspective." Accordingly, Gutmann and Thompson conclude that even though "many people regard opposition to homosexual sex as part of *sexual morality*," the adoption of laws or policies that discriminate against gays and lesbians "cannot be supported with the kinds of reasons required for *a moral position*."[179] This means that legislatures and citizens should not seriously consider the adoption of such laws, and if they were to do so, we should expect courts to intervene and invalidate those laws under the Constitution.

Gutmann and Thompson recognize that what counts as a moral position will change over time as a result of collective moral deliberation, and that judicial review under the Constitution should therefore also be dynamic.[180] In this regard, they acknowledge that the conclusion that the arguments in favor of discriminatory laws against gays and lesbians fail the test of a moral position is stronger today than one hundred years ago. The proponents of such laws in the

[174] *See id.* at 72-73.

[175] *Id.* at 73.

[176] *See id.* at 73-77.

[177] *Id.* at 77.

[178] *Id.*

[179] *Id.* (emphases added).

[180] *See id.* at 78 (noting that changes in both social and political attitudes may impact preclusion principles).

past "may not have had an adequate opportunity to explore the full implications of their arguments" given "the nature of social practices and the relative lack of public debate about the subject."[181] Meanwhile, "those who morally opposed discrimination" in the old days "could not themselves be so confident of their position, until they had tested their moral views over time in various circumstances and subjected them to the experience and evidence that is now more widely available."[182] Nowadays, however, the proponents of equal treatment for gays and lesbians "come to see that, after ample opportunity for argument, the defenders of discrimination offer little more than expressions of personal preference."[183] Gutmann and Thompson therefore conclude that "[e]ven if there is nothing inherent in a moral view itself that renders it beyond the pale of moral discourse, it may be disqualified, as discrimination against homosexuals is coming to be disqualified, by our common recognition of the moral vacuity of the case for it."[184]

While substantive principles of deliberative democracy suggest that discrimination against LGBT persons is not a "moral position" that belongs on the political agenda, it is also important to recognize that the *Obergefell* dissenters unduly romanticized the quality of the political deliberations on the issue of same-sex marriage, and that this debate was falling far short of the ideal requirements of deliberative democratic theory in many instances. The challenged laws, in other words, were generally not adopted pursuant to a legitimate deliberative process and were therefore not necessarily entitled to substantial deference from the perspective of deliberative democratic theory. This may be particularly true of state laws prohibiting same-sex marriage that were adopted pursuant to the ballot initiative process.[185] While such laws may be consistent with purely majoritarian conceptions of democracy, there is little reason to think they were adopted pursuant to a process that satisfied the procedural requirements of deliberative democracy. The dissenting opinions in *Obergefell* should therefore be read with skepticism when they confidently

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 938 (N.D. Cal. 2010) (making a series of troubling findings regarding the advertising campaign in favor of Proposition 8, and concluding that the evidence overwhelmingly demonstrated that the constitutional amendment was supported only by "moral disapprobation" of gays and lesbians); Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 21-32 (describing misleading behavior by initiative proponents and other deliberative problems with the constitutional amendment prohibiting same-sex marriage in Michigan); Karen Grigsby Bates, *In Calif., Prop 8 Debate Tests Limits of Tolerance,* NAT'L PUB. RADIO (Dec. 6, 2010, 12:00 AM), http://www.npr.org/2010/12/06/131792123/in-calif-prop-8-debate-tests-limits-of-tolerance [https://perma.cc/PT29-PZ8N] (claiming that "the tone and tenor of the debate" precluded "much rational discussion between the parties").

assert that voters are capable of "deciding an issue of this sensitivity on decent and rational grounds,"[186] characterize the political processes as "serious and thoughtful,"[187] or suggest that voters and other public officials were "carefully considering"[188] the relevant issues and "sometimes changing their minds"[189] as a "result of a fair and honest debate"[190] that exemplifies "exactly how our system of government is supposed to work."[191] While significant progress was being made, and the foregoing description would certainly be apt for an impressive number of Americans, that does not mean that the relevant lawmaking processes as a whole comported with the procedural requirements of deliberative democracy or that continued opposition to same-sex marriage qualified as a moral position. Just because an issue is subject to extensive political debate does not mean that the resulting decision constitutes a legitimate collective judgment from the perspective of deliberative democratic theory.

C. *The Provisional Nature of Legal and Policy Decisions*

While the substantive dimension of deliberative theory precludes some positions from legitimately appearing on the political agenda, the theory also contemplates that legal and policy decisions will be the result of actual public debate. Deliberative democracy is distinct from academic discussion or philosophical reflection because decisions must be made, and the resulting decisions should be a product of reasoned deliberation by public officials and interested members of the public.[192] The goal, after all, is for legal and policy decisions to reflect the collective judgment of the people. It is therefore potentially problematic for legal or policy choices to be made by unelected judges, even if they engage in reasoned deliberation and make the most justifiable decisions on the merits. This may be particularly true when the resulting decisions are rejected during the course of political deliberations. One response to this concern is that deliberative democratic theory incorporates substantive principles that provide a legitimate basis for rejecting the results of the ordinary political process in appropriate circumstances. The previous Section argued that prohibitions on same-sex marriage were unjustifiable based on the requirement of reciprocity and related substantive principles and that the

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[186] Obergefell v. Hodges, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting) (quoting Schuette v. BAMN, 134 S. Ct. 1623, 1637 (2014)).

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.* at 2625.

[191] *Id.* at 2627 (Scalia, J., dissenting) ("Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote."); *id.* at 2631 (Thomas, J., dissenting); *id.* at 2640 (Alito, J., dissenting).

[192] *See* GUTMANN & THOMPSON, *supra* note 74, at 3.

challenged state laws likely resulted from flawed deliberative processes.[193] The Court therefore legitimately invalidated the challenged prohibitions on same-sex marriage from the perspective of deliberative democracy. These conclusions do not necessarily establish, however, that marriage equality is supported by the principle of popular sovereignty.

Deliberative democratic theory responds to this residual aspect of the countermajoritarian difficulty by emphasizing the *provisionality* of legal and policy decisions.[194] Binding legal and policy choices should be morally provisional from this perspective in the sense that citizens and public officials should be open-minded and willing to consider revising their positions based on new information or arguments.[195] Binding legal and policy choices should also be politically provisional from this perspective in the sense that there should be reasonable opportunities for dissenters to contest the status quo and for prior decisions to be subject to reconsideration.[196] "Deliberative democracy thus expresses a dynamic conception of political justification, in which provisionality—openness to change over time—is an essential feature of any justifiable principles."[197]

At first glance, *Obergefell* seems like a decidedly mixed bag from the standpoint of provisionality. The Court explicitly overruled *Baker v. Nelson* and held for the first time that state laws that exclude same-sex couples from civil marriage are unconstitutional.[198] This was a dramatic departure from *Bowers v. Hardwick*,[199] which upheld state laws criminalizing the private consensual sexual activity of gays and lesbians as recently as 1986.[200] Of course, the Court also decided *Lawrence v. Texas*[201] in the interim, which overruled *Bowers*, holding that states may not prohibit private consensual sexual activity between consenting adults of the same sex.[202] Significantly, *Lawrence* also suggested that moral opposition to homosexuality was not a valid justification for the state law at issue.[203] *Lawrence* therefore paved the way for *Obergefell*, and facilitated the Court's ability to reconsider *Baker* and otherwise engage in the practice of deliberative democracy. Not only did *Obergefell* acknowledge its departure

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[193] *See supra* Section III.B.

[194] *See* GUTMANN & THOMPSON, *supra* note 48, at 110 ("How is it possible for a theory to propose substantive principles to assess laws while regarding citizens as the final moral judges of the laws they make? The key to deliberative democracy's answer lies in the provisional status of its principles.").

[195] *See id.* at 110-16.

[196] *See id.* at 116-19.

[197] *Id.* at 111.

[198] Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

[199] 478 U.S. 186 (1986).

[200] *Id.* at 196.

[201] 539 U.S. 558 (2003).

[202] *Id.* at 560.

[203] *See supra* note 153 and accompanying text.

from the traditional views of the past, but the Court also affirmatively emphasized the evolving nature of the liberty and equality that is protected by the Constitution.[204] The Court plainly embraced the notion that legal and policy decisions should be understood as provisional when it explicitly overruled binding precedent based on a dynamic conception of the relevant constitutional principles.

The caveat, of course, is that *Obergefell* will be extraordinarily difficult to change and the decision may not be subject to reconsideration as a practical matter. Thus, while the Court recognized the importance of provisionality in reaching its decision, *Obergefell* arguably violated this very principle by reaching a seemingly final decision on the proper treatment of same-sex marriage under the Constitution. Not surprisingly, the dissenters did not shy away from accusing the Court of acting undemocratically by reaching a final decision on this question and thereby removing the issue from further consideration in the ordinary political process.[205] And, indeed, "deliberative theory emphasizes, more than other democratic theories, what happens before the decision and—even more to the point of provisionality—what happens after."[206] If the Court's decision is really and truly final, that could be a major strike against it from the perspective of deliberative democracy.

There are several reasons, however, why it would be a mistake to jump to this conclusion. First, and most important, one should not underestimate or lose sight of the significance of the dramatic changes that occurred before the decision in this particular context. As the Court recognized, "same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law."[207] Moreover, homosexuality was classified as a mental illness by the American Psychiatric Association until 1973—a designation that was admittedly based on "social stigma rather than empirical research findings" and has since been repudiated.[208] These views contributed to a long and shameful history of widespread discrimination and animus towards LGBT persons in this country, including: harassment by law enforcement, censorship, constraints on freedom of association, exclusion from the military, discrimination in the workplace by the federal government and other employers,

[204] *See supra* Sections I.A, II.B.

[205] *See supra* notes 92-103 and accompanying text.

[206] GUTMANN & THOMPSON, *supra* note 48, at 117-18.

[207] Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015); s*ee also* Brief of the Organization of American Historians as *Amicus Curiae* in Support of Petitioners at 3, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (reporting that "[u]ntil the 1960s, all states outlawed sexual intimacy between men," and claiming that "[t]hese policies worked to create and reinforce the belief that gay men and lesbians comprised an inferior class of people to be shunned by other Americans").

[208] Brief of the American Psychological Association et al., as *Amici Curiae* in Support of Petitioners at 7-8, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

unfavorable immigration laws, opposition to gay or lesbian parenting, hate crimes, and the propagation of "demonic stereotypes of homosexuals as child molesters intent on recruiting the young into their way of life."[209] As the amicus brief of the Organization of American Historians pointed out, "[c]ensorship, government-sanctioned discrimination, and the fear of both made it difficult for gay people to organize and speak on their own behalf."[210] Even today, LGBT persons lack protection from discrimination in "schools, employment, housing, and public accommodations" in most jurisdictions, and state laws that affirmatively discriminate against them "remain on the books."[211] In this environment, it is not particularly surprising that the Court upheld criminal prohibitions of homosexual conduct in 1986,[212] or that it summarily rejected efforts to secure a constitutional right to marital recognition for same-sex couples in the early 1970s.[213] The idea that the Court would recognize a constitutional right to same-sex marriage was simply inconceivable during my childhood.[214]

The fact that this claim went from seemingly inconceivable to seemingly inevitable in less than half a century is undoubtedly a testament to the courageous efforts of countless LGBT individuals and couples and the work of the social movements that advocated on their behalf. It is also a testament to the power of reasoned deliberation and the importance of provisionality in a deliberative democracy. Since the idea of same-sex marriage first reached the public consciousness beginning with the decision of the Supreme Court of Hawai'i in 1993 in *Baehr v. Lewin*,[215] there has indeed been a great deal of discussion and debate about the proper treatment of this issue in a wide range of venues.[216] While this debate was not always conducted in a manner that accords with ideal deliberative theory, and while political opposition and backlash meant that progress was gradual, intermittent, and halting, there can be no doubt that it produced profound social, cultural, and legal change. Most fundamentally, "[b]y increasing LGBT visibility and humanizing same-sex relationships, the marriage equality movement has forced politicians and voters to think about their LGBT

[209] Brief of Organization of American Historians, *supra* note 207, at 6-28.

[210] *Id.* at 15.

[211] *Id.* at 4.

[212] Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding the sodomy laws of over twenty-five states), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[213] Baker v. Nelson, 409 U.S. 810, 810 (1972) (summarily dismissing an appeal challenging the denial of marriage licenses to same-sex couples).

[214] I was born in 1970, and graduated from a public high school near Milwaukee in 1989.

[215] 852 P.2d 44, 68 (1993) (holding that a state statute restricting marriage licenses to opposite-sex couples is subject to strict scrutiny in an equal protection challenge).

[216] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2596-97, 2605-06 (2015); Michael D. Sant'Ambrogio & Sylvia A. Law, Baehr v. Lewin *and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 720-741 (2011) (describing the national landscape of the same-sex marriage debate after the *Baehr* decision).

neighbors and how far they are willing to extend the promise of equality."[217] Even before *Obergefell*, this led to super-majoritarian public support for civil unions and substantial support for same-sex marriage, shifting the public debate in many parts of the country "from whether to recognize same-sex relationships to how to recognize them."[218] Litigation over same-sex marriage also improved the nature of public deliberation because adjudication characteristically requires participants to provide *reciprocal reasons* for their positions whereas the political process generally does not. The recognition of same-sex marriage in several states also provided concrete precedent to undermine the claim that this course of action would have serious harmful consequences.[219] Once it became sufficiently clear over time that there was no publicly regarding justification for a state's refusal to recognize same-sex marriage (and perhaps that a significant percentage of the public was beginning to accept this position), the Obama Administration and other public officials began to endorse the official recognition of same-sex marriage.[220] Legal impediments to marriage equality also started to fall like dominoes in lower federal and state courts.[221] Meanwhile, the Court invalidated the federal Defense of Marriage Act ("DOMA") in *United States v. Windsor*,[222] and signaled that recognition of a constitutional right to same-sex marriage was likely on the horizon. This truly was a claim that began "in pleas or protests," before it was seriously "considered in the political sphere and the judicial process,"[223] and ultimately proved sufficiently compelling to persuade the Court to recognize a new fundamental right under the Constitution. A deliberative democratic process succeeded in completely reversing a position that had been deeply entrenched for most of American history, thereby demonstrating the provisionality of the relevant constitutional norms.[224]

Second, many of the legal prohibitions on same-sex marriage were still deeply entrenched as a political matter, and they would therefore have been very difficult to eliminate without federal judicial intervention, even with majoritarian support for same-sex marriage. This was clearly true of the federal DOMA,[225] which helped to justify judicial intervention in that case. It may also

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[217] Sant'Ambrogio & Law, *supra* note 216, at 747-48.

[218] *Id.* at 746-47 (reporting that in 2011, sixty-six percent of Americans supported same-sex marriage or civil unions).

[219] *Id.* at 749-50.

[220] *See* Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage*, *Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

[221] *See* Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, 200, 209 (2013) (describing the Obama Administration's likely influence on lower courts).

[222] 133 S. Ct. 2675, 2696 (2013).

[223] Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).

[224] *Cf.* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 349-86 (2010) (describing "the antihomosexual constitution and its dis-entrenchment").

[225] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *invalidated in*

have been true in many states that amended their constitutions to define marriage as a union of one man and one woman because of the exceptional difficulty of enacting subsequent constitutional amendments.[226] Moreover, if the Court were confident that there was no public-regarding justification for a state's refusal to recognize same-sex marriages, there would be little reason to defer to the political processes of the states where the traditional definition of marriage was still deeply entrenched. Federal judicial intervention may have been needed to promote national constitutional norms precisely because the political processes of numerous states were violating deliberative democratic principles, including the requirements of provisionality. Those states were unwilling or unable to change their laws in response to new information or arguments, and they were not acting in a sufficiently deliberative fashion.

Finally, while *Obergefell* was a broad and deep decision in that it definitively (and perhaps finally) established a constitutional right to same-sex marriage, the decision was also narrow and shallow (and, thus, minimalistic) regarding its potential implications for other civil rights involving LGBT persons or their traditionalist opponents. Partly because the Court declined to apply three-tiered scrutiny or otherwise adhere to a formal doctrinal structure, *Obergefell* left a great deal of room for subsequent deliberations regarding the proper treatment of related issues. This strategy ensures that both the proper scope of other LGBT civil rights and religious freedom, and the best understanding and treatment of the family will continue to be the subject of reasoned deliberation in the public and private spheres.

Deliberative democratic theorists have compared binding legal or policy decisions to "hypotheses" that should be subject to ongoing evaluation or testing and periodic reconsideration.[227] They have also recognized, however, that some principles or conclusions may prove sufficiently compelling that they should legitimately be regarded as settled (at least for the time being).[228] Deliberative

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part by Windsor, 113 S. Ct. 2675.

[226] *See* Brief of Elected Officials and Former Officeholders of Michigan, Ohio, Kentucky, and Tennessee et al., as Amici Curiae at 4-5, 25-29, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) ("[T]he challenged laws are constitutional amendments, which makes them unusually difficult to reverse through democratic action—indeed, that was the very point of enacting them."); Sant'Ambrogio & Law, *supra* note 216, at 751 ("[I]t is unlikely that courts or legislatures in many of these states will be receptive to marriage equality arguments in the near future.").

[227] *See* GUTMANN & THOMPSON, *supra* note 48, at 122 ("The conclusions that deliberative democrats reach about substantive and procedural principles should be understood as normative hypotheses about political morality."); *see also id.* at 101 (comparing the requirements of democratic deliberation to the norms of scientific inquiry).

[228] *See id.* at 117 ("The extent to which any law is subject to actual reconsideration should depend on the strength of the available moral reasons and empirical evidence (and any other morally relevant considerations) supporting it, which often change over time."); *see also id.* at 101 ("Just as repeated replication is unnecessary once the truth of a [scientific] finding (such as the law of gravity) has been amply confirmed, so repeated deliberation is unnecessary

democratic theory does not maintain that more deliberation is always warranted. Rather, the extent to which further deliberation is necessary or appropriate is properly the subject of reasoned deliberation.[229] Thus, if the Court is confident that (1) all of the competing interests and perspectives have been aired, and (2) one side of the debate has not articulated a viable moral position, then it is legitimate for the Court to preclude an unjustifiable position from the political agenda from a deliberative democratic perspective. For reasons explained above, *Obergefell*'s "hypothesis" that a state's refusal to recognize same-sex marriage on the same terms and conditions as opposite-sex marriage was unjustifiable seems unassailable from the perspective of deliberative democratic theory. It was therefore legitimate for the Court to incorporate this position into the prevailing understanding of the Constitution at this time. Moreover, unless new information or arguments are developed that satisfy the principle of reciprocity and justify the conclusion that the recognition of same-sex marriage is not in the public interest, the Court's decision should be entrenched for the foreseeable future.

This means, of course, that the legitimacy of a decision and the need for further deliberation will both turn, to a significant extent, on the substantive merits of the prevailing status quo from the perspective of deliberative democratic theory. While this may be a disappointing or even alarming proposition for those who are engaged in a perpetual search for the elusive neutral principles of constitutional law,[230] it follows naturally from a theory of democracy that seeks, above all, to ensure that each law is justified to the citizens who are bound by it.[231] Contrary to what advocates of neutral principles seem to want, the democratic legitimacy of judicial decisions cannot be separated from their justifiability, nor can the justifiability of judicial decisions be separated from their merits. All of us should recognize that we could be wrong about our conclusions,[232] and we should always be open to reconsidering our views based on new information or arguments. That is really all the principle of provisionality ultimately requires from the perspective of deliberative democratic theory, as long as there is a structural mechanism to institute this

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once a precept of justice (such as equal protection under the laws) has been extensively debated.").

[229] Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 906 (2012) (stating that additional deliberation does not always improve the decision-making process and is therefore not always beneficial).

[230] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959); *cf.* Seidman, *supra* note 95, at 143 (expressing regretful acceptance of *Obergefell* because of agreement with its substantive conclusions).

[231] *See* GUTMANN & THOMPSON, *supra* note 48, at 114-15 ("Deliberative democrats can welcome criticism of any of their principles, including reciprocity, but they cannot accept a general rejection of the requirement that binding political decisions must be justified by moral reasons.").

[232] *Id.* at 106.

change should it appear necessary.[233] This does not mean that it should not be easier to amend the Constitution—or that innovations like "legislative overrides" do not merit serious consideration[234]—but it does suggest that the Court's decision to make binding law on the question of same-sex marriage at this time was not democratically illegitimate from the perspective of deliberative democratic theory.

D. *The Potential Role of Judicial Minimalism*

Thus far, this Part has argued that *Obergefell* was legitimate from the perspective of deliberative democratic theory on legal and moral grounds, but that does not necessarily mean that the Court's decision was *smart*. While this Section recognizes that a decision could be so problematic based on pragmatic or sociological considerations that it crosses a line and becomes democratically illegitimate, this was probably not the case with respect to a constitutional mandate to recognize same-sex marriage. Rather, the Court made seemingly reasonable judgment calls regarding the timing of its decision and the appropriate remedy. Although the Court could reasonably have waited to resolve the constitutional questions or remanded certain remedial problems to the states, it would have been illegitimate for the Court to uphold the refusal to provide legal recognition to the relationships of same-sex couples. This Section, therefore, maintains that deliberative democratic theory should embrace certain procedural aspects of the theory of judicial minimalism, while firmly rejecting its substantive dimensions, and that *Obergefell* was entirely consistent with this perspective.

1. The Argument for Minimalism

The *Obergefell* dissenters suggested that the Court's decision undermined deliberative democracy in several important ways.[235] First, by holding that the Fourteenth Amendment required the states to recognize same-sex marriage on the same terms and conditions as opposite-sex marriage, the Court removed the issue from the political process and thereby terminated the deliberative process. Second, the Court precluded further deliberation on the issue precisely when it

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[233] The Court could conceivably reconsider its decision at some point based on new information and arguments, and it could theoretically overrule *Obergefell* and return the issue to the political process. This is unlikely to happen, partly because stare decisis places substantial weight on reliance interests and the perceived legitimacy of judicial behavior, which would both be severely undermined by a decision that retracted the constitutional right to same-sex marriage. The decision is also likely to become firmly entrenched in the long run because of the strength of the Court's decision on the merits.

[234] *See* Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L L. & FOREIGN AFF. 250, 253 (2005) (discussing the "legislative override" models used by the Canadian and Israeli governments and positing that these systems protect fundamental rights while allowing for democratic expression on constitutional issues).

[235] *See supra* Part II.

was receiving a great deal of active attention in state courts and political venues throughout the country. Moreover, the Court put an end to political deliberation on the issue at a time when LGBT couples and their allies were making substantial political progress. Third, by resolving the issue as a matter of constitutional law, the Court deprived same-sex marriages of the enhanced legitimacy that would likely have been conferred by the enactment of this reform through the ordinary political process from the perspective of both the winners and the losers of the debate. Finally, as discussed above, the Court's removal of the issue from the ordinary political process could effectively be permanent in the absence of a judicial reversal or the enactment of a constitutional amendment. In short, the dissenters criticized the Court for engaging in precisely the sort of "[d]eliberation-ending judicial review" that poses existential dangers to deliberative democracy.[236]

These arguments could potentially be dismissed merely as convenient or strategic rhetoric by conservative Justices who are personally opposed to the legal recognition of same-sex marriage.[237] However, similar points have been made by prominent legal scholars who are significantly more receptive to claims of equal treatment by LGBT persons (as well as to principles of deliberative democracy).[238] Thus, Cass Sunstein advocates judicial minimalism based on the politically unaccountable status of federal courts and limitations on their decision-making capacities, which typically augur in favor of narrow and shallow decisions rather than decisions that are broad or deep.[239] Significantly for present purposes, Sunstein claims that "[t]he case for minimalism is especially strong when the area [of substantive law] involves a highly contentious question now receiving sustained democratic attention."[240] His proposed approach is designed to promote deliberative democracy by avoiding "democracy-foreclosing" decisions by courts, and by encouraging legislative

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[236] *Cf.* William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1285 (2009) ("Deliberation-ending judicial review is a danger to democracy itself; groups told they have no prospect of prevailing in political deliberation become radicalized and may drop out of normal politics.").

[237] Justice Scalia, for example, is not particularly convincing when he opens his opinion by claiming that "[t]he substance of today's decree is not of immense personal importance to me." Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting); c*f.* Richard A. Posner & Eric J. Segall, Op-Ed, *Scalia's Majoritarian Theocracy*, N.Y. TIMES, Op-Ed Contributions, Dec. 3, 2015, at 35 ("Obergefell seems to obsess him.").

[238] *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 123-82 (1996) (arguing that state bars to same-sex marriage are unconstitutional as a matter of formal equal protection doctrine); SUNSTEIN, *supra* note 104, at 160 ("Simply as a matter of abstract constitutional theory, the anticaste principle draws discrimination on the basis of sexual orientation into considerable doubt." (citation omitted)).

[239] *See supra* notes 105-06 and accompanying text.

[240] SUNSTEIN, *supra* note 104, at 59.

deliberations on social problems.[241] Sunstein worries, moreover, that overly ambitious judicial decision-making on contentious social issues can lead to public outrage and a resulting backlash that damages the perceived legitimacy of the Court and potentially harms the interests the Court is seeking to promote.[242] In the context of same-sex marriage, such backlash could include galvanization of opposition to the Court's decision, a weakening of the antidiscrimination movement, and even increased hostility or violence against LGBT persons.[243] Accordingly, Sunstein emphasizes that issues of timing can be critical, and that it is sometimes prudent to distinguish the most justifiable ends from the most sensible or appropriate means to achieve them, especially when one's preferred ends are inconsistent with the "feeling" of the great mass of the people.[244]

Sunstein therefore argued in 1999 that "[a]t a minimum, it seems plausible to suggest that courts should generally use their discretion over their docket in order to limit the timing of relevant intrusions into the political process," and that "courts should be reluctant to vindicate even good principles when the vindication would compromise other interests, at least if those interests include, ultimately, the principles themselves."[245] Moreover, he predicted that if the Court "accepted the view that all states must authorize same-sex marriages in 2001, or even 2003, we might well expect a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying of hatred of homosexuals, a constitutional amendment overturning the Court's decision, and much more."[246] Because "[a]ny Court should hesitate in the face of such prospects," Sunstein concluded that "[i]t would be far better for the Court to do nothing—or better still, to start cautiously and to proceed incrementally."[247] For example, Sunstein suggested that the Court could invalidate particular state laws on the grounds that "the government cannot rationally discriminate against people of homosexual orientation, without showing that those people have engaged in acts that harm some legitimate government interest."[248] Such decisions would remand the challenged laws to legislative bodies to consider whether there was a legitimate governmental interest at stake, and would thereby facilitate further "public discussion and debate before obtaining a centralized national ruling that preempts ordinary political process."[249]

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[241] *See id.* at 24-28.

[242] *See* Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 158-59 (2007).

[243] SUNSTEIN, *supra* note 104, at 160-61.

[244] *Id.*

[245] *Id.* at 161.

[246] *Id.*

[247] *Id.*

[248] *Id.* at 162.

[249] *Id.*

Bill Eskridge has likewise argued that courts should seek to avoid resolving contentious legal issues in ways that could undermine pluralistic or deliberative democracy. He agrees that under the Constitution, "[d]eliberation by elected legislators is more reliable and more legitimate in solving problems and accommodating groups than deliberation by unelected judges."[250] Eskridge therefore claims that federal courts can facilitate pluralistic democracy by enforcing neutral rules that promote broad participation in the political process, refusing to sanction efforts to treat unpopular groups as outcasts and steering the political process away from appeals to prejudice and stereotypes, and helping emergent social movements participate effectively in the political process by clearing away obsolete laws that discriminate against them and hinder their integration as full members of society.[251] The latter two goals, in particular, can be served by a variety of doctrines or techniques, such as using the avoidance canon to narrowly construe constitutionally problematic statutes, invalidating dubious statutes on the grounds that they are unconstitutionally vague, or invalidating seemingly obsolete statutes on the grounds that they were adopted as a result of outmoded prejudice or stereotypes.[252] These doctrines have the virtue of remanding issues to the political process for potential reconsideration. As a result, they promote rather than preclude subsequent deliberation, particularly in a federal system where different states can experiment with different approaches to the underlying problems.[253] Eskridge therefore endorses the use of such doctrines and claims that they have the salutary effect of "lowering the stakes of politics."[254]

In contrast, Eskridge contends that federal courts should avoid "raising the stakes of politics" by making decisions that prematurely remove culture war issues from the political process or deny a group of people "the protection of a neutral rule of law."[255] Eskridge claims that such decisions "pose huge risks for the polity" because they can result in counterproductive backlashes against successful minorities, prompt members of losing groups to drop out of the political system, and increase the likelihood that "political contests will become dirtier and more bitter."[256] Eskridge warns that "[w]hen the stakes of politics get high, and especially when they involve primordial loyalties," such as in the areas of abortion rights or same-sex marriage, "warring groups are more likely to engage in games of chicken, where the goal of each group becomes imposing harm or status denigration on the other."[257] Not only does this behavior

[250] William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1281 (2005).

[251] *Id.* at 1283, 1293-1310.

[252] *See id.* at 1309-11.

[253] *See id.* at 1318.

[254] *Id.*

[255] *Id.* at 1282-83, 1310-17.

[256] *Id.* at 1299.

[257] *Id.* at 1300.

undermine the point of the state, but Eskridge points out that "the result can be worse, because the state itself becomes the enemy from the perspective of the persecuted group."[258] Eskridge claims that *Roe v. Wade*[259] and *Bowers* were both serious mistakes from the perspective of promoting pluralistic democracy based on concerns of this nature.[260] He also relies on the backlash that resulted from the Hawai'i Supreme Court's decision in *Baehr* and his assessment of the existing political terrain to conclude that "a final pronouncement by the U.S. Supreme Court requiring nationwide recognition of same-sex marriage would repeat the error of *Roe v. Wade*."[261] While recognizing that the different approaches taken by state supreme courts in the relatively gay-friendly states of Vermont and Massachusetts were promising,[262] Eskridge suggested that "a pluralism-facilitating theory would urge that the Supreme Court say as little as possible for as long as possible" on this question because most of the country was not ready for same-sex marriage and because a definitive ruling against marriage equality would be severely problematic.[263] Because any ruling on the merits would present the Court with a catch-22, Eskridge advised that the Court should stay out of the issue of same-sex marriage for the time being and defer instead to the ongoing democratic deliberation and experimentation that was occurring in the states.[264] Consistent with the *Obergefell* dissents, Eskridge warned that a decision that mandated marriage equality prematurely could be "a pluralism nightmare" because it would likely generate "intense anger" from traditionalists who "would be furious that gay marriage was a constitutional right," as well as from other Americans who "would be unhappy that an important policy issue had been resolved by unelected Justices."[265]

Eskridge has also teamed with John Ferejohn to present a "horticultural theory" of judicial review that is explicitly based on deliberative democratic theory rather than interest-group pluralism.[266] In contrast to engineering or architectural metaphors for constitutionalism that tend to focus on the implementation of an original design, Eskridge and Ferejohn explain that horticultural metaphors "invite subsequent cultivators to carry out the shared

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[258] *Id.*

[259] 410 U.S. 113 (1973).

[260] Eskridge, *supra* note 250, at 1312-15.

[261] *Id.* at 1324-25. *But cf.* Sant'Ambrogio & Law, *supra* note 216, at 741-53 (arguing that, notwithstanding any immediate political backlash, *Baehr* opened a dialogue that made possible the success of the marriage equality movement that followed).

[262] *See* Eskridge, *supra* note 250, at 1325-26 (comparing the Vermont Supreme Court's remand of power to the state legislature to remedy same-sex partners' constitutional injury with the Massachusetts Supreme Judicial Court's issuing of a judicial remedy).

[263] *Id.* at 1326.

[264] *Id.* at 1326-27.

[265] *Id.* at 1328.

[266] *See* ESKRIDGE & FEREJOHN, *supra* note 224, at 457-62; Eskridge & Ferejohn, *supra* note 236, at 1275.

project in a way that allows it to flourish and contribute to the larger public interest."[267] They further contend, however, that "[i]n the world of politics," this means that constitutional courts should "listen to and respect other institutions—to be deliberation-respecting."[268] The premise of judicial review "is that most constitutional horticulture should proceed through deliberation among legislators, executive officials, and voters,"[269] and that legislation and administrative law typically provide the most legitimate ways for the constitutional norms of a society to evolve.[270] Eskridge and Ferejohn assert that "[t]he role of judges must be to facilitate and, occasionally, to guide the work of the [people]."[271] Accordingly, "judicial review should avoid closing off democratic deliberation, should respect the products of such deliberation, and should create constitutional floors only when supported by deliberation among a wide array of represented interests."[272] A deliberation-respecting theory of judicial review that relies on the work of the ordinary political process to gradually revise the constitutional norms of a society would presumably endorse Eskridge's conclusions about how to facilitate pluralistic democracy. In short, the Court should leave the issue of marriage equality alone for the time being, and defer to the results of the ordinary political processes within the states.

Sunstein's judicial minimalism and Eskridge's respective forms of democracy-promoting judicial review both recognize a potential distinction between a judge's view of the best resolution of a case on the merits (taking into account, perhaps, both legal and moral considerations), and whether the judge should actually render that decision based on its likely consequences. The relevant consequences would include the likely impact of a decision on the political process—for example, whether it would promote or inhibit political participation and reasoned deliberation, and whether lawmakers could realistically change the new judicially established status quo—as well as the decision's broader policy impact. The broader policy impact would include the possibility that the Court's decision could prove futile or perverse, or that the decision would ultimately cause more harm than good in light of all of the relevant considerations.[273] Finally, the relevant consequences would include the likely impact of a decision on the judiciary's perceived legitimacy, and the Court's potential interest in protecting itself as an institution.

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[267] Eskridge & Ferejohn, *supra* note 236, at 1274.

[268] *Id.* at 1275.

[269] *Id.*

[270] *See id*. at 1281.

[271] *Id.*

[272] *Id.*

[273] *See* Sunstein, *supra* note 242, at 170-71 (describing futile decisions as those that may "simply be ignored," perverse decisions as decisions that "might produce consequences that are the opposite of those intended," and overall harmful decisions as those that produce a broad harm outweighing their benefits, such as "when the Court vindicates a constitutional principle in such a way as to endanger national security").

While Sunstein and Eskridge recognize that it may be difficult to foresee the likely consequences of judicial decisions with great precision, they seem to agree that sophisticated observers can make reasonably accurate predictions in highly salient cases based in part on an assessment of how related issues have been treated over time in the legislative and administrative processes.[274] In any event, Sunstein and Eskridge suggest that whether the Court should embark on a major constitutional change should turn on a two-part inquiry, which asks (1) whether a particular decision comports with the best understanding of the Constitution, and (2) whether great caution is warranted based on the potentially negative consequences of making a broad and deep decision.[275] If the Court concludes that great caution is warranted, it could avoid making a decision by denying certiorari or invoking the passive virtues, or it could render a minimalistic or democracy-promoting decision that simultaneously reaches an acceptable result in the case at hand while remanding the larger issue to the political process for further consideration. While Eskridge seems to resist the idea that the Justices could legitimately rule against their own constitutional principles, Sunstein suggests at times that the Court could even properly uphold governmental action that violates its best understanding of the Constitution to avoid sufficiently grave harm.[276]

2. Evaluating Minimalism's Potential Application

The Court has almost complete discretionary control over its docket,[277] and it was therefore not required to address the constitutionality of the states' refusal to recognize same-sex marriage in 2015. Moreover, even after it granted certiorari, the Court could conceivably have invoked the passive virtues—as it did in *Hollingsworth v. Perry*[278]—to avoid resolving the issue, or it could have rendered a more minimalistic decision. In reaching its decision on the merits, the Court made several moves that were responsive to explicit calls for minimalism by the court of appeals, respondents, and dissenters.[279] First, as explained above,

[274] *See* Eskridge, *supra* note 250, at 1326-27; Sunstein, *supra* note 242, at 211.

[275] *Cf.* Eskridge, *supra* note 250, at 1326 (applying this framework in analyzing the societal impact of *Goodridge v. Department of Public Health*); Sunstein, *supra* note 242, at 212 (discussing the role of "constitutional interpretation" and "public outrage" in judicial assessment of the consequences of an action).

[276] Sunstein, *supra* note 242, at 175 (explaining that "use of the passive virtues, or of minimalism, will sometimes be the right response to the prospect of public outrage," and claiming that "in some cases" a consequentialist judge "might even be willing to defer to the political process so as to avoid especially bad consequences").

[277] *See* SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS 12 (1986).

[278] 133 S. Ct. 2652 (2013) (holding that initiative proponents lacked standing to challenge the district court's decision to invalidate their ballot measure outlawing same-sex marriage on federal constitutional grounds).

[279] *See* DeBoer v. Snyder, 772 F.3d 388, 403, 420-21 (6th Cir. 2014) (claiming that "the

the Court declined to invoke the three tiers of scrutiny that ordinarily apply in due process and equal protection cases and otherwise eschewed the use of formal doctrinal rules, which preserved more room for reasoned deliberation regarding the proper treatment of related issues in subsequent cases.[280] Second, the Court discussed the evolution of the legal treatment of marriage and LGBT rights,[281] and pointed out that most lower federal courts to have considered the issue in recent years had recognized a right to same-sex marriage under the Constitution.[282] The progressive direction of these changes supported the Court's evolving understanding of the Fourteenth Amendment, and also suggested that a constitutional right to same-sex marriage was consistent with emerging legal and social norms, compelled by the most persuasive arguments that have emerged from extensive legal and social debates, and would not harm (but would instead promote) the institution of marriage and the best interests of children and families. Finally, the Court acknowledged that "[t]here may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate."[283] The Court responded by emphasizing that (1) further discussions would not be particularly helpful because the extensive deliberations that had already taken place fully developed the competing positions; (2) justice delayed would be justice denied to petitioners who were being deprived of their fundamental constitutional rights; and (3) the Court's decision would not be the final word on same-sex marriage or related questions.[284] The Court thereby suggested that its obligation to provide petitioners with an opportunity to contest the validity of their treatment by the government—and, of course, to remedy any resulting constitutional violations—outweighed the value of allowing the issue to continue to percolate in the lower courts and political process under the circumstances.[285]

The question, then, is how we should evaluate the Court's decision to proceed in a relatively "maximalist" fashion from the perspective of deliberative democratic theory. My overall conclusion is that the Court's explanation for granting certiorari and resolving the issues in a relatively aggressive fashion was consistent with, if not necessarily mandated by, principles of deliberative democracy. First, it seems clear that a ruling against the plaintiffs would have been illegitimate for reasons explained by the Court, which is also consistent with Eskridge's position that "it would be a mistake of *Bowers*-like proportions

definition of marriage" should remain "in the hands of state voters"); Brief for the Respondents at 12, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (No. 14-571) ("[A]bsent a radical change in this Court's jurisprudence, the Constitution leaves it to the people of each state to choose a philosophy of marriage."); *supra* Part II (describing the dissenting opinions).

[280] *See supra* notes 226-27 and accompanying text.

[281] Obergefell v. Hodges, 135 S. Ct. 2584, 2595-97 (2015).

[282] *Id.* at 2597, 2603.

[283] *Id.* at 2605.

[284] *Id.* at 2605-07.

[285] *See id.* at 2606.

to definitively rule that the state owes no equality obligations to lesbian and gay couples."[286] Nonetheless, it may have been prudent for the Court to wait a few more years to address the issue of same-sex marriage on the merits. Such a delay would have allowed the deliberative process to continue in the states, and would have provided more empirical information about the experiences of states that had recently begun to provide legal recognition to same-sex marriages. Yet, the Court's position that justice delayed would be justice denied for the plaintiffs warrants serious consideration.[287] The theory of judicial minimalism, which focuses primarily on institutional considerations and systemic effects, tends to underestimate the importance of adjudication to the parties and the extent to which judicial review facilitates the contestatory dimension of republic democracy by providing crucial opportunities for individuals and groups to challenge the validity of governmental authority.[288] An assessment of the timing of the Court's decision would therefore turn on difficult judgments regarding the likely consequences of the decision, as well as the proper balance between the pragmatic concerns raised by judicial minimalism and the importance of providing opportunities for contestatory democracy in the Supreme Court.

The Court was undoubtedly correct that the trend in American law and society has been toward the liberalization of marriage and greater recognition of the right to equal treatment for gays and lesbians. Part of the reason for the latter trend, as Justice Roberts pointed out in his dissent, is the compelling "policy arguments" for recognizing same-sex marriage on the same terms and conditions as opposite-sex marriage.[289] These trends tend to suggest that public support or acceptance of same-sex marriage will continue to increase, and that the Court's decision will either be accepted or applauded. Therefore, the decision will likely neither lead to significant backlash against LGBT persons or the Court, nor severely undermine the political process. Of course, such predictions could prove wrong, and the Court's decision could backfire in a variety of ways. It may, therefore, have been wise for the Court to have exercised greater patience, but it seems like a stretch to call its chosen timing unreasonable or illegitimate, particularly if the Court was confident in the strength and urgency of its constitutional principles. Deliberative democratic theory recognizes, after all, that at some point, judicial minimalism becomes the functional equivalent of majoritarian or aggregative democracy, and that federal courts have an obligation to protect the constitutional rights of minorities, as *Obergefell* correctly pointed out.[290]

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[286] Eskridge, *supra* note 250, at 1326.

[287] *See Obergefell*, 135 S. Ct. at 2605-06.

[288] For a discussion of the distinction between the electoral and contestatory dimensions of republican democracy, and the importance of providing structural mechanisms to facilitate the latter dimension, see generally Pettit, *supra* note 141.

[289] *See Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

[290] *See id.* at 2605-06 (majority opinion).

The Court could, perhaps, have split the difference and decided in favor of the plaintiffs on narrower grounds. For example, the Court could have invalidated the state laws that prohibited same-sex marriage on the grounds that they were not supported by public-regarding justifications, and then remanded the issue for the states to fashion an appropriate remedy.[291] The states could then have addressed the problem through the ordinary political process, and chosen to grant marriage licenses to same-sex couples, recognize the validity of same-sex marriages performed in other jurisdictions, provide same-sex couples with an alternative legal status, such as domestic partnerships or civil unions, or perhaps even reenact their legal prohibitions on same-sex marriage after further consideration. The states would have been obligated, moreover, to provide more persuasive justifications for refusing to recognize same-sex marriages (as opposed to, say, civil unions) than they had provided to date. And, while the Court could still subsequently have invalidated those options that fell short of the full recognition of same-sex marriage, it would have been proceeding more incrementally in a way that would have facilitated further political deliberation and potentially taken advantage of the information provided by the experimentation of the states, in addition to buying more time. The eventual decision to invalidate the refusal of the remaining states to recognize same-sex marriage on constitutional grounds would therefore arguably have been safer and more democratically legitimate from the perspective of deliberative democratic theory.

In several respects, proceeding in a more minimalistic or incremental fashion would have been preferable to waiting to address the issue from a deliberative democratic perspective. First, and most obviously, this course of action would have facilitated more deliberation about the proper legal treatment of same-sex marriage and the relevant constitutional principles in the Court, as well as in the political process. Second, by granting certiorari, listening to plaintiffs' arguments, and invalidating existing legal prohibitions on the recognition of same-sex marriage in their home states, the Court would have been promoting the contestatory dimension of republican democracy in a way that merely denying certiorari would not. Subsequent action in the political process would have involved further democratic contestation, as well as opportunities for the general public to express its will, and could therefore have provided a healthy mix of contestatory and electoral considerations.[292] The deliberative benefits of this course of action could have been maximized if the Court had strongly signaled that anything short of full recognition of same-sex marriage seemingly lacked a public-regarding justification and was therefore constitutionally problematic, which would have shifted the burden of inertia to opponents of same-sex marriage and potentially steered subsequent political deliberations in more public-regarding directions. Finally, this approach would have left the Court with substantially more room for backtracking if public-regarding

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[291] *See supra* notes 247-49 and accompanying text.

[292] *Cf.* Pettit, *supra* note 141, at 173-78.

justifications for certain options short of the full recognition of same-sex marriage somehow emerged, or if the experiences of the states or the operation of their political processes suggested that a Supreme Court decision mandating same-sex marriage throughout the country would likely have extremely negative or perhaps even disastrous consequences. Because the likely consequences of *Obergefell* seem predictably difficult to predict, a more minimalistic or incremental approach may in fact have been a very prudent option.

Yet, the Court may justifiably have had great confidence in its assessment of the merits of plaintiffs' claims. It may also have been fully persuaded that the Constitution required states to grant marriage licenses to same-sex couples, and that domestic partnerships or civil unions would be a cheap (and demeaning) substitute for the legal recognition of same-sex marriage. The Court may also have believed that relevant trends in law and society provided a strong basis for confidence that elected officials and the public would ultimately embrace or accept its more ambitious decision, and that the benefits of its chosen course of action would therefore outweigh any negative consequences. Finally, the Court almost certainly believed that all of the significant views and perspectives on the issue of same-sex marriage had already been fleshed out, and that remanding the issue to the political process would not have served a useful purpose. Indeed, the Court may legitimately have worried that a remand to the states would have been counterproductive or harmful. Recognizing that the dissenters overstated and unduly romanticized the nature of the previous deliberations on this issue in the political process,[293] it is important to be realistic about the nature of the political deliberations that would likely have occurred after the Court invalidated respondents' prohibitions on same-sex marriage and suggested that every state law of this nature was constitutionally problematic. The Court had good reason to question whether the political response in states most dogmatically opposed to LGBT rights or same-sex marriage would have approximated a deliberative ideal. In other words, legislative remands may have affirmatively facilitated political backlash more severe and difficult to contain than anything that has or will result from the Court's more aggressive decision. These considerations suggest that the Court's decision to forego judicial minimalism and issue a broad and deep decision may have been a debatable judgment call, but it was hardly unreasonable or illegitimate for the Court to have taken this approach from the perspective of deliberative democracy based on the information that was available to the Justices at the time of their decision.

In any event, the *Obergefell* dissenters may have lacked "judicial standing" to complain about the majority's refusal to follow more minimalistic methods because they did not think that the principle of marriage equality was entitled to any credence under the Constitution. The theory of judicial minimalism generally assumes that a majority of the Court agrees that the Constitution could plausibly be understood to recognize the alleged constitutional right at issue, or

[293] *See supra* notes 185-91 and accompanying text.

is at least potentially sympathetic to the underlying constitutional claim.[294] The issue, then, is whether the Court should fully enforce the relevant constitutional norms or handle the problem more cautiously based on institutional concerns or the risk of overwhelmingly negative consequences. Judicial minimalism is based on the understanding that the Court could fully endorse certain ends, and still be properly cautious about the best (or most efficacious) means of achieving them. In effect, the minimalist judge thinks (or says), "I would like to do this (or, at least, I would seriously consider doing this), but upon careful consideration I probably should not." This theory certainly leaves room for opponents of an alleged constitutional right to agree not to hear a case, and perhaps even to compromise on a result that they believe is the lesser of two evils—such as signing onto a decision that results in a legislative remand rather than the facial invalidation of a challenged constitutional practice. The opponents of an alleged constitutional right lack credibility, however, when they chastise the Court for removing an issue from the ordinary political process based on principles of deliberative democracy, *and* when they are not truly open to the possibility that the alleged right could potentially merit constitutional protection. The opponents' position in this situation amounts to a claim that the issue should be resolved through majoritarian politics, and "the Constitution . . . ha[s] nothing to do with it."[295] Moreover, the practical effect of this position is to reject the alleged constitutional right at issue in deference to majoritarian democracy. When one believes that the alleged constitutional right has potential substantive merit that should be taken seriously, however, this approach conflicts with both the theory of judicial minimalism and with principles of deliberative democracy. Accordingly, when the *Obergefell* dissenters advocated deference to a romanticized vision of the deliberation that was taking place in the ordinary political process, they were superficially (and perhaps strategically) invoking the rhetoric of judicial minimalism and deliberative democratic theory. They were, however, most assuredly not *engaging in* judicial minimalism or the practice of deliberative democracy.

[294] *See* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1586 (1985) (explaining that Bickel's theory contemplated that the Court would sometimes take gradual and tentative steps to implement "a strategy of slow persuasion designed to advance ideas that the Court has already articulated to itself in finished form," but recognizing that "it is quite often the case that the Court itself is doubtful as to what the controlling principle is or ought to be, and postponing the moment of final judgment allows it to test its own evolving sense of the matter against the concrete facts of a series of specific cases—'an extremely salutary proving ground for all abstractions'—and to assess the public and governmental reactions that its provisional formulations provoke" (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 26 (1962))).

[295] *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

E. *Respecting Fundamentally Competing Views and Economizing on Moral Disagreement*

In addition to recognizing certain "principles of preclusion" that can be used to identify legal or policy positions that should be removed from the political agenda because they fail to meet the test of a "moral position,"[296] deliberative democracy recognizes various "principles of accommodation," which "govern the relations among citizens who hold morally legitimate though fundamentally opposed positions on public policy."[297] Gutmann and Thompson explain that these principles of accommodation, which essentially dictate how citizens and public officials should be expected to justify their positions in the political process, "are best conceived as expressing a virtue that lies at the core of moral deliberation in a democracy—mutual respect."[298]

Because mutual respect is a reciprocal virtue, the principles of accommodation "require that citizens affirm the moral status of their own position and acknowledge the moral status of their opponents' position."[299] The former requirement involves the possession or cultivation of a form of "moral or characterological integrity," which can be demonstrated, for example, by (1) maintaining one's position consistently regardless of the circumstances in which one speaks (and thereby demonstrating sincerity as opposed to political opportunism); (2) maintaining consistency between one's speech and one's actions; and (3) accepting the broader implications of one's moral positions with respect to the proper treatment of related issues.[300] The latter requirement, which also aims to promote relevant aspects of democratic character, focuses in an outward direction on one's attitude toward others and should therefore be understood to entail certain "forms of magnanimity."[301] Acknowledging the moral status of the position of one's opponents "requires, at a minimum, that one treat it as a moral rather than a purely political, economic, or other kind of nonmoral view."[302] This means that one should treat a position held by one's political opponents with respect by acknowledging the moral nature of the controversy and the possibility of reasonable disagreement, as well as by providing "moral reasons for rejecting the position" rather than seeking to impugn their motivations.[303] Because treating one's political opponents with respect also involves "joining with them in serious and sustained moral discussion on the issue in question and on other issues that divide us," and giving thoughtful consideration to responses to one's objections, deliberative

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[296] *See supra* notes 164-75 and accompanying text.

[297] GUTMANN & THOMPSON, *supra* note 48, at 79.

[298] *Id.*

[299] *Id.* at 81.

[300] *Id.* at 81-82.

[301] *Id.* at 82-83.

[302] *Id.* at 83.

[303] *Id.* at 83-84.

democratic theory also requires citizens and public officials to be open-minded and willing to change their minds based on new information or arguments.[304] This does not mean, however, that deliberative democrats should avoid adhering to firm moral principles. Rather, Gutmann and Thompson explain that "[w]e should be seeking a balance between holding firm convictions and being prepared to change them if we encounter objections that upon reflection we cannot answer."[305] Finally, acknowledging the moral status of the position of one's opponents involves efforts to find common ground (or avoid unnecessarily exacerbating differences of opinion) where possible, which means that "in justifying policies on moral grounds, we should seek the rationale that minimizes rejection of the position we oppose."[306] This "economy of moral disagreement" could also involve efforts to pursue related policies that both sides should agree upon, even if those policies might otherwise be given lower priority.[307] Once again, however, this principle "does not ask us to compromise our moral understandings in the interest of agreement but rather to search for significant points of convergence between our own understandings and those of citizens whose positions, taken in their more comprehensive form, we must reject."[308]

Besides reaching a decision that was consistent with substantive and procedural elements of deliberative theory, *Obergefell* further engaged in the practice of deliberative democracy by adhering to these principles. The Court thereby demonstrated integrity and treated the opponents of same-sex marriage with respect. The primary mechanism used by the Court to demonstrate integrity involved the use of precedent. While the Court had previously issued a one-line summary decision holding that the exclusion of same-sex couples from marriage did not present a substantial federal question, the Court would not have demonstrated a great deal of integrity by following a precedent that it was persuaded was unjustifiable on the merits. The Court therefore explicitly overruled *Baker*, and engaged in the mindful extension of the principles set forth in "more instructive precedents," such as *Loving v. Virginia*,[309] *Lawrence*, and *Windsor*.[310] The Court emphasized that "[i]n assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect . . . *why* the right to marry has been long protected."[311] This purposive application of precedent allowed the Court to affirm the moral status of its own position by accepting the broader implications of its positions for the proper treatment of

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[304] *Id.* at 84.

[305] *Id.*

[306] *Id.* at 85.

[307] *See id.* at 88-89.

[308] *Id.* at 86.

[309] 388 U.S. 1, 12 (1967).

[310] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2598-605 (2015) (discussing the relevant precedent).

[311] *Id.* at 2599 (emphasis added).

related issues.[312] In other words, if prohibitions on interracial marriage and consensual homosexual conduct have properly been invalidated, there is no persuasive justification for refusing to invalidate state laws that refuse to recognize same-sex marriage. "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[313] The characterological integrity countenanced by deliberative democracy suggests that the Court should not hesitate (without good reason) to take the next logical step. The Court also affirmed the moral status of its own position in a more substantive fashion by emphasizing the dignitary aspects of the right to same-sex marriage, and recognizing that its decision would promote freedom as nondomination. Thus, when the Court recognized that "[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society,"[314] and that the laws at issue "harm and humiliate" their children,[315] the Court was acknowledging the moral status of its own position and suggesting that any other result would be unprincipled, and hence, unjustifiable.

As explained above, Gutmann and Thompson argue that support for laws that discriminate against gays and lesbians *is not a moral position*, and they suggest at times that views of this nature may be excluded from their principles of accommodation.[316] Indeed, they preface their discussion of these principles by explaining that they "govern the relations among citizens who hold *morally legitimate* though fundamentally opposed positions on public policy."[317] Moreover, when discussing the need to treat the position of one's opponent *as a moral position*, Gutmann and Thompson add the proviso that the position must meet "the preclusion conditions for reaching the political agenda,"[318] thereby suggesting that positions that would violate the best understanding of the Constitution do not necessarily merit respect. Similarly, they explain that "[i]n a deliberative process characterized by mutual respect, participants recognize the moral merit in their opponents' claims (*insofar as they have merit*)."[319] They also explain that participants in the political process should economize on moral disagreement "by justifying the policies that they find most morally defensible, in a way that minimizes rejection of *the reasonable positions* that they

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[312] *See id.* ("The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.").

[313] *Id.* at 2600.

[314] *Id.* at 2602; *see also id.* at 2604 ("The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.").

[315] *Id.* at 2590.

[316] *See* GUTMANN & THOMPSON, *supra* note 74, at 3 ("When a disagreement is not deliberative (for example, about a policy to legalize discrimination against blacks and women), citizens do not have any obligations of mutual respect toward their opponents.").

[317] GUTMANN & THOMPSON, *supra* note 48, at 79 (emphasis added).

[318] *Id.* at 83.

[319] *Id.* at 153 (emphasis added).

nonetheless oppose on moral grounds."[320] And, indeed, it would make perfect logical sense to refuse to treat something that is not a moral position as a moral position in political deliberations, and to decline to economize on moral disagreement when an opponent's position is untenable from a deliberative perspective.

Yet, if we abstract away from a particular issue and think about deliberative democracy in a more systemic fashion, it could very well be counterproductive (and not particularly magnanimous) to refuse to apply principles of accommodation to nonmoral positions in some way. Moreover, Gutmann and Thompson explicitly recognize that the economy of moral disagreement could play a significant role even when one side takes an unreasonable position, because the parties could continue to engage in reasoned deliberation on other issues and work together to enact policies on which their competing perspectives converge.[321] The answer, I think, must be to distinguish between one's treatment of a legal or policy position and one's treatment of the individuals or groups who take that position in a legal or policy dispute. In other words, a legal or policy position that fails to qualify as a moral position is not entitled to mutual respect on the merits, and the opponents of that view should take a firm moral stand against it. Meanwhile, however, the opponents of the view at issue should continue to treat the individuals or groups who hold that position in a respectful fashion in the political process, and should continue to practice the economy of moral disagreement by continuing to work with their adversaries on other issues where both sides hold moral views or where their interests or perspectives converge. This distinction also helps to explain how mutual respect can entail both an obligation to minimize rejection of the reasonable positions that one opposes on moral grounds, without requiring us "to compromise our moral understandings in the interest of agreement."[322]

This seems, moreover, like precisely the approach taken by the Court in *Obergefell*. First, the Court treated advocates of traditional marriage with respect by recognizing the sincerity and good faith of their religious, moral, or philosophical convictions.[323] Meanwhile, however, the Court firmly rejected their position on the merits, and concluded that it no longer satisfied the test of a moral position (using Gutmann and Thompson's nomenclature). Thus, the Court held that the Constitution required the states to recognize same-sex marriage on the same terms and conditions as opposite-sex marriage, and thereby precluded this issue from the ordinary political agenda. Second, the Court practiced the economy of moral disagreement by recognizing that its decision was limited to the legal treatment of civil marriage, and that religious

[320] *Id.* at 134 (emphasis added).

[321] *See supra* notes 305-07 and accompanying text.

[322] GUTMANN & THOMPSON, *supra* note 48, at 86.

[323] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) (acknowledging that the traditional view of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world").

institutions could continue to reach their own private judgments on whether to recognize same-sex marriages.[324] The Court therefore recognized that reasoned deliberation on the issue of same-sex marriage will continue to take place in the private sphere. Moreover, while other potentially difficult legal or policy issues will almost certainly result from *Obergefell*, the Court further economized on moral disagreement by recognizing that it need not resolve those issues at this time.

The dissenters criticized the Court for gratuitously insulting advocates of traditional marriage and allegedly treating them with disrespect.[325] This criticism is unwarranted, however, from the perspective of deliberative democracy based on this proposed distinction. As explained above, the Court expressed respect for people who sincerely believe that marriage is, by definition, a union of one man and one woman. Yet the Court also concluded that *their position* failed to qualify as a moral one because it discriminates against the ability of same-sex couples to exercise a fundamental right without a legitimate justification, and thereby "demeans gays and lesbians" and "serves to disrespect and subordinate them."[326] Moreover, consistent with deliberative theory, the Court focused on the consequences of the challenged laws and provided moral reasons for rejecting them, rather than impugning the motivations of those who adhere to the traditional definition of marriage.[327] The Court took a firm moral (and legal) stand against the traditionalists' position, while making a conscious effort to treat the people who hold that position with respect.[328] While traditionalists could understandably be dismayed, and perhaps even offended, by the Court's conclusion that their position was unjustifiable and thus violated the Constitution, that does not mean that the Court erred by taking a firm stand on the issue, or that the Court failed to treat them with due respect under principles of deliberative democracy. As Gutmann and Thompson have recognized, "[t]he politics of mutual respect is not always pretty," and "[b]y

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[324] While the Court did not have much choice on this matter because of the absence of state action, one could understand this doctrine as a mechanism for incorporating the economy of moral disagreement into constitutional law. *Cf.* ESKRIDGE & FEREJOHN, *supra* note 224, at 4-6 (recognizing that the state action doctrine leaves many small-c constitutional issues to be resolved pursuant to statutory and administrative law).

[325] *See Obergefell*, 135 S. Ct. at 2625-26 (Roberts, C.J., dissenting) ("It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's 'better informed understanding' as bigoted."); *id.* at 2642-43 (Alito, J., dissenting).

[326] *Id.* at 2602, 2604 (majority opinion).

[327] *See* Ball, *supra* note 14, at 639-40 (explaining how the Court's rationale relied on the harmful consequences of marriage inequality, rather than on the particular motivations underlying same-sex marriage bans); *supra* note 14 and accompanying text.

[328] *See supra* note 323 and accompanying text.

thus raising the moral stakes of politics, it may, at least in the short run, increase moral conflict in politics."[329]

Gutmann and Thompson have also emphasized that "economizing on moral disagreement does not eliminate it,"[330] and *Obergefell* corresponds remarkably closely to their proposed treatment of "the debate on homosexual unions" from the perspective of deliberative democracy.[331] While they conclude that discrimination against gays and lesbians does not qualify as a moral position and should therefore be precluded from the political agenda, they also contend that in an ideal deliberative democracy "the state would seek a compromise" in "the spirit" of economizing on moral disagreement.[332] Their description of this deliberative compromise over a decade ago was as follows:

> [The state] would grant legal recognition to both homosexual and heterosexual unions, giving the same legal rights to partners of both kinds of union[s]. This recognition would respect the principles of nondiscrimination and civic equality. At the same time, the state would not require religious associations to recognize either homosexual or heterosexual unions. Such tolerance would respect freedom of religious association as well as the right to argue, whether on a religious basis or not, that marriage should be a union of only men and women and that homosexual acts are sinful. Some citizens would want the law to require that *all* associations not discriminate. Others would continue to defend the freedom of private associations to discriminate, although they themselves might not oppose homosexual unions. And still others would insist that the state should legally recognize homosexual unions as marriages in every respect including by name.[333]

The Court went slightly further than this proposed compromise, of course, by affirmatively requiring the states to recognize same-sex marriage by name, based in part on a more crystallized conviction that denying this aspect of the relationship to gays and lesbians would be demeaning.[334] It should be clear, however, that the Court engaged in the practice of deliberative democracy when it decided *Obergefell* based on the relevant principles of accommodation.

IV. DELIBERATIVE DEMOCRATIC THEORY AND JUDICIAL PRACTICE

The Supreme Court engaged in the practice of deliberative democracy when it rendered the *Obergefell* decision. While the dissenters advocated a minimalistic approach that would have left more room for further deliberation

[329] GUTMANN & THOMPSON, *supra* note 48, at 89.

[330] *Id.* at 28-29.

[331] *Id.* at 28.

[332] *Id.*

[333] *Id.* at 28-29.

[334] *Cf. supra* note 160 and accompanying text (discussing lower court decisions that found civil unions an inadequate substitute for same-sex marriage).

in the ordinary political process, the majority's decision was entirely legitimate from the perspective of deliberative democratic theory. This conclusion holds true, moreover, even though the timing of the decision was debatable, and even though the Court acted boldly in declaring a nationwide constitutional right to same-sex marriage. *Obergefell* and deliberative democracy therefore tell us something important about each other. There are, however, still open questions about the role of the Court in practicing deliberative democracy, particularly when its opinions are subject to substantial criticism (even from people who agree with the results), and when there are people who simply do not accept the Court's constitutional vision. This Part therefore concludes by addressing the scope of the Court's duty to provide reasoned explanations for its decisions, and the respective ways in which deliberative democracy and agonistic democracy are both facilitated by the work of the nation's highest Court—and, thus, how these ostensibly competing democratic theories can be understood to work together within the American political and legal systems.

A. *The Scope of the Duty of Reasoned Explanation*

While the Court's practice of deliberative democracy rendered *Obergefell* a legitimate decision, this does not necessarily mean that the Court performed as an "exemplar of public reason."[335] The Court could fairly be criticized for declining to address or glossing over a variety of arguments or considerations that are relevant to the question of whether the Constitution is best understood as requiring the states to recognize same-sex marriages. Meanwhile, the Court has been criticized for allegedly treating unmarried individuals with disrespect,[336] and for failing to discuss the implications of its decision for polygamous or polyamorous relationships.[337] In other words, the Court did not fully develop the rationale for its decision in every conceivable way, and portions of its opinion could be interpreted in unfavorable ways. Was the Court's reasoning therefore inadequate from a deliberative perspective, and, if so, was the Court's decision illegitimate?

The recent scholarly literature on reason-giving would suggest that an affirmative answer to the foregoing questions may be a bit too quick and overly simplistic. Scholars have, of course, argued that the legitimacy of governmental

[335] *See* RAWLS, *supra* note 84, at 231. For an analysis of the role that public reason played in the opinions of Chief Justice Roberts and Justice Kennedy, see generally Robert Katz, *The Role of Public Reason in* Obergefell v. Hodges, 11 FIU L. REV. 177 (2015).

[336] *See, e.g.*, Seidman, *supra* note 95, at 136 ("At the beginning of the opinion, we learn that 'marriage is essential to our most profound hopes and aspirations,' apparently leaving the unmarried hopeless and without aspirations . . . ." (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015))).

[337] *See Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (claiming that "[i]t is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage," and pointing out that petitioners did not identify relevant differences).

authority depends upon public officials providing reasoned explanations for their decisions, which are responsive to the interests and perspectives of adversely affected individuals or groups.[338] This is especially true of federal judges and agency officials, who cannot be held politically accountable for their decisions pursuant to candidate elections.[339] Lon Fuller famously argued that courts must be sufficiently responsive to the arguments of the parties to engage in legitimate adjudication.[340] Deliberative democracy similarly conditions the legitimacy of governmental authority on reason-giving of this nature, and frequently considers the judiciary (and, in particular, the Supreme Court) as an "exemplar of public reason."[341] Conventional wisdom would suggest, moreover, that the reasoned explanations provided by judges should generally be sincere and candid.[342] A failure to respond in a reasoned fashion to the arguments of the parties or to address other relevant considerations would therefore seriously undermine the legitimacy of a judicial decision.

Some scholars have pointed out, however, that a fully comprehensive or all-encompassing duty of reasoned explanation would be unrealistic and perhaps even counterproductive. For example, Mathilde Cohen has recently argued that while reason-giving is important, it potentially conflicts with other competing values of the judicial process.[343] She therefore claims that judges often have "reasons not to give reasons," such as when doing so would foster disagreement with a decision and undermine the perceived legitimacy of the courts, when cognitive limitations inhibit judges from accurately reporting the underlying rationale for their decisions, or when providing a thorough explanation would be unduly time-consuming or burdensome.[344] Cohen and other scholars have also recognized that the proper understanding of sincerity and candor is hardly straightforward and should be understood to depend on the institutional

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[338] *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 18 (Alan Hamlin & Philip Pettit eds., 1989); Staszewski, *supra* note 60, at 1255.

[339] *See* John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 53-54 (2002) (contrasting the political accountability of elected officials with the deliberative accountability of courts).

[340] *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 396 (1978).

[341] *See* RAWLS, *supra* note 84, at 276 ("[I]n a constitutional regime with judicial review, public reason is the reason of its supreme court.").

[342] *E.g.*, Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1310 (1995) (describing "the pro-candor position" as "the conventional wisdom"); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 740 (1987) (discussing the trend of "a greater respect for openness, and disdain for apparent dissembling" regarding judicial decision-making).

[343] *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 489-90 (2015).

[344] *Id.* at 514-25.

context.[345] These scholars have argued that judges cannot and perhaps should not always discuss all of the motivations for their decisions, and that it is sometimes preferable for courts to be less than completely forthcoming.[346] Indeed, the theory of judicial minimalism is based largely on the same insights; it is sometimes better for courts to say less and to leave more room for subsequent deliberation and decision-making. Reason-giving is therefore typically a matter of degree, and precisely how to go about justifying a decision is necessarily a matter of judicial discretion based largely on institutional considerations. Courts routinely balance the legitimacy-enhancing and other benefits of sincere and candid reason-giving against the value of more circumspect opinions and the potential problems that could be caused by saying "too much" or perhaps being "too honest."[347] One factor that limits the Court's ability to provide comprehensive explanations that candidly describe all of the motives for its decisions is that the Court is a collective body and the author of an opinion needs to secure the assent of her colleagues, which may require compromise and facilitate incompletely theorized agreements.[348] Another important variable, which may have been significant in *Obergefell*, is the relevant audience for a judicial decision.[349] The Court might legitimately prefer to write a different opinion based on valid normative and consequential considerations, depending upon whether its primary target audience is (1) the parties to the case; (2) attorneys, scholars, and other experts in the field; (3) other public officials with authority over the matter; or (4) the general public. The open questions for deliberative democratic theory are how courts should go about striking this balance, and how those decisions should be evaluated.

One conclusion that seems clear enough is that the form and content of a reasoned explanation cannot be the subject of rigid rules, but will necessarily depend upon the characteristics of the decision-making institution and the circumstances presented in a particular case. In other words, the explanation provided by the Court for any particular decision will necessarily be a matter of practical reasoning or prudence, much like its decisions regarding whether to

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[345] Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1092-93 (2010); Idleman, *supra* note 342, at 1314-34 (proposing that one must examine the elements of the judicial process and their respective functions, and then consider whether a candor requirement would apply to each).

[346] *See* Cohen, *supra* note 345, at 1131-38 (arguing that a complete recitation of reasons would be both impossible and unwanted); Idleman, *supra* note 342, at 1381-95 ("[T]he notion that judges ought to be subject to some type of general obligation of candor, even as a theoretical matter, is at best limited . . . .").

[347] *See* Idleman, *supra* note 342, at 1400.

[348] *See* Cohen, *supra* note 343, at 514-15; Cohen, *supra* note 345, at 1144-48 ("[C]ollective decision makers typically need to satisfy demands for collegiality and majority-building, while individuals do not.").

[349] *See* Cohen, *supra* note 343, at 510-11; Cohen, *supra* note 345, at 1149-50 ("The need for more or less sincere reasons may differ depending on the characteristics of the recipient.").

grant certiorari or exercise the passive virtues and whether to render a narrow and shallow or broad and deep decision on the merits.

Deliberative democratic theory would, however, provide the Court with several guiding principles to follow when writing its opinions and explaining the rationale for its decisions. First, the Court should be as responsive as possible to the arguments of the parties, so that judicial review functions as a mechanism of contestatory democracy and the people are protected from the possibility of domination by the state. Second, the reasons provided by the Court should be sufficiently robust that the people and their elected representatives can understand and evaluate its decisions, and make informed judgments regarding whether to accept the Court's understanding of the Constitution or whether to contest the prevailing status quo through the mechanisms provided by the political or legal processes. In other words, the justifications that are provided by the Court should be "contestable" on the merits. Third, the Court should not pretend that "the law" forced the Justices to reach any particular decision, but it should candidly acknowledge the scope of its discretionary lawmaking authority and take responsibility for its understanding of the Constitution.[350] Fourth, the reasons provided by the Court for its decisions should comport with the principles of reciprocity and accommodation. This means, among other things, that the Court's decisions should be based on reliable empirical evidence; its reasoning should be capable of being accepted by people with fundamentally competing interests and perspectives; and the Court should treat opposing views (or their proponents)[351] with respect and practice the economy of moral disagreement. Although the Court should obviously not feel compelled to address every conceivable argument or resolve every potential issue, it should avoid lying or deliberately misleading the people or their representatives, because such action would fail to treat the collective sovereign with due respect and would instead facilitate arbitrary domination by the state.

Perhaps not surprisingly, the Court's opinion in *Obergefell* was something of a mixed bag when assessed against these principles. On one hand, the Court's decision comported with the principles of reciprocity and accommodation as a substantive matter.[352] On the other hand, the Court could have invoked these principles of deliberative democracy more explicitly, which would likely have resulted in a more forceful and better reasoned explanation for rejecting the respondents' arguments that were based solely on tradition and religious morality. This approach would also have allowed the Court to provide an affirmative justification for declining to apply the three tiers of scrutiny, because

[350] *Cf.* Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 303 (2013) ("[I]t is only when courts take responsibility for their own legal or policy choices and seek to justify their decisions in public-regarding terms that the judiciary can be held more fully accountable for the exercise of lawmaking discretion that is inevitable when they interpret statutes in the modern regulatory state.").

[351] *See supra* notes 299-308 and accompanying text.

[352] *See supra* Part III.

it could more clearly have held that the refusal to recognize same-sex marriage was not supported by a legitimate public purpose.[353] Finally, the explicit invocation of principles of reciprocity and accommodation would have counseled in favor of a more rigorous treatment of the empirical evidence regarding the impact of same-sex marriage on children, marriage, and families, because a desire to prevent serious tangible harm to these people or entities could provide a public-regarding reason for prohibitions on same-sex marriage.[354]

The greatest strength of the Court's opinion, from a deliberative perspective, may have been its candid acknowledgment that the decision was based on a dynamic understanding of the proper applications of the principles of liberty and equality to its assessment of the constitutionality of state laws that prohibit the recognition of same-sex marriage. As the dissenters were quick to complain, the Court did not claim that "the law" forced them to adopt this interpretation, but rather the Justices plainly took personal responsibility for their decision.[355] If anything, the Court could potentially have done a better job of tying its decision to the original understandings of due process or equal protection.[356] While the Court declined to address or glossed over other seemingly relevant arguments or considerations, elected representatives and members of the general public could almost certainly evaluate the opinion and decide whether to accept or continue to contest the Court's decision.

The weakest aspect of the Court's decision, from a deliberative perspective, may have been its failure fully to engage with some of the arguments presented by the parties or amici.[357] In evaluating the Court's performance in this regard, however, it may be appropriate to distinguish the role of the Court from that of the lower courts, and to make some adjustments for the exceptional nature of this case.[358] First, as the manager of the federal judicial system, which issues

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[353] *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 656 (7th Cir.) ("The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny, which is why we can largely elide the more complex analysis found in more closely balanced equal-protection cases."), *cert. denied*, 135 S. Ct. 316 (2014); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994-1003 (N.D. Cal. 2010) (concluding that Proposition 8 was unconstitutional under any standard of review).

[354] For a useful summary of this evidence, which was presented to the Court, see generally Brief of the American Psychological Association et al., *supra* note 208 (explaining that same-sex couples are similar to heterosexual couples in most essential respects).

[355] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2631 (2015) (Scalia, J., dissenting).

[356] *See supra* notes 19, 118 and accompanying text (discussing originalist justifications for the *Obergefell* decision).

[357] *Cf.* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 180 (2005) (claiming that under leading theories of adjudication, intermediate appellate courts "must—at a minimum—decide the claims presented in a weakly responsive fashion," and recognizing that there is also "a preference for strong responsiveness" to the arguments of the parties that can be overcome by "other ends of adjudication, such as fulfillment of the lawmaking function").

[358] *See generally* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a*

decisions in constitutional cases that establish binding precedent for all of the lower federal and state courts, the Court may need to be more selective than the lower courts regarding the arguments that it addresses and resolves. Accordingly, the Court may also have somewhat less of an obligation than lower courts to be responsive to the arguments of the parties. This does not mean that the Court should ignore arguments that are central to a party's position or are outcome determinative in the case, but it does mean that the Court should generally have more leeway than lower courts when it comes to "leaving things undecided." Second, the nature of the issue that was resolved in *Obergefell* may have presented the Court with a quandary in assessing how to write its opinion. The proper treatment of same-sex marriage under the Constitution was the subject of a huge debate in the political process, lower courts, and civil society. It would have been impossible to fully canvass or comprehensively address all of the major arguments that have been articulated on this question in one reasonably concise opinion, even if the Court focused solely on the arguments presented by the parties and amici.[359] Partly for this reason, it may have been more appropriate for the Court to accept or reject arguments that have commonly circulated on this question in other venues through shorthand comments or "by reference" than would ordinarily be the case.[360] Moreover, as a seminal decision on the meaning of liberty and equality that recognized a new constitutional right, it may have been advantageous for the Court to rely more heavily on abstract statements of principle than on more detailed factual or empirical arguments that could more quickly have become outdated or been easier to nitpick and criticize. This could be true both for purposes of securing a majority coalition of the Court, as well as for purposes of persuading "the people" to accept its decision. Indeed, the Court may plausibly have understood its primary target audience in this case to be the people (as opposed to the states or their lawyers), and it may therefore

Statute in a Lower Court, 97 CORNELL L. REV. 433 (2012) (claiming that it may be appropriate for lower and higher courts to take different approaches to statutory interpretation based on a variety of institutional considerations).

[359] *See* Ruthann Robson, *Guide to the Amicus Briefs in* Obergefell v. Hodges*: The Same-Sex Marriage Cases*, LAW PROFESSOR BLOGS (Apr. 16, 2015), http://lawprofessors.typepad.com/conlaw/2015/04/guide-to-amicus-briefs-in-obergefell-v-hodges-the-same-sex-marriage-cases.html [https://perma.cc/3KFJ-EQRZ] (reporting the filing of 149 amicus briefs, and claiming this "seems to be a record number").

[360] *See, e.g.*, *Obergefell*, 135 S. Ct. at 2600 ("As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted."); *id.* at 2601 ("In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate."); *id.* at 2602 (rejecting a justification based solely on tradition because "[i]f rights were defined [solely] by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied"). For a detailed analysis of the significance of procreative capacity for the arguments against same-sex marriage, see generally Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431.

have written its opinion accordingly.[361] Justice Kennedy was likely pleased—but perhaps not surprised—when the closing paragraph of his opinion was shared with countless people throughout the world on social media on the very day *Obergefell* was decided.[362]

In my view, the biggest shortcomings of the Court's opinion from a deliberative perspective were: (1) the failure to provide reasons to justify the conclusion that a state's recognition of civil unions or domestic partnerships was insufficient to satisfy its constitutional obligations, and (2) the refusal to explain why the Court declined to invalidate the state laws at issue on narrower grounds and remanded the problem to the states for remedial action through the ordinary political process. The Court definitively rejected these alternatives, which were effectively outcome determinative in the case, without providing a reasoned explanation, even though there were plausible competing arguments for taking a different approach.[363] While the Court could have justified its chosen approach from a deliberative perspective, its failure to do so undermined its accountability for these particular aspects of its decision.

It is important to keep in mind, however, that the Court cannot ordinarily provide fully comprehensive explanations for its decisions, and that it typically needs to balance the importance of giving reasons against other judicial values.[364] Reason-giving is necessarily a matter of degree, and even a "maximalist" decision like *Obergefell* could properly be "minimalistic" in some respects. Moreover, the Court must exercise discretion in making these determinations on the basis of prudence or practical reasoning, as opposed to the application of hard-and-fast rules. Deliberative democracy can, however, provide the Court with useful guidance in making these determinations. The Court's opinion in *Obergefell* was hardly perfect from a deliberative perspective, but that does not mean that the Court abused its discretion or acted illegitimately in deciding precisely how to justify its decision. While the Court's opinion was democratically legitimate from a deliberative perspective, the extent to which it was persuasive is ultimately for each of us to decide.

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[361] *See* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16, 23-27 (2015) (describing the pedagogical role of constitutional law, and suggesting that Justice Kennedy deliberately selected "universally accessible, nontechnical prose" and provided minimal citations because his primary audience was "the people" rather than lawyers or legal scholars).

[362] *See* James Armstrong, *Final Paragraph of SCOTUS Same-Sex Marriage Decision Goes Viral*, GLOBAL NEWS (June 26, 2015, 2:51 PM), http://globalnews.ca/news/2078095/final-paragraph-of-scotus-same-sex-marriage-decision-goes-viral/ [https://perma.cc/R6TC-5TML].

[363] *See supra* notes 160-61 and accompanying text.

[364] Cohen, *supra* note 343, at 489-90.

B. *The Relationship Between Deliberative and Agonistic Democracy*

This Article has argued that *Obergefell* was democratically legitimate based on principles of deliberative democratic theory. There was no public-regarding justification for declining to recognize same-sex marriages, and the Court provided a reasoned explanation for its decision that could reasonably be accepted by people with fundamentally competing perspectives. While one could plausibly question the prudence of creating a national right to same-sex marriage at this time, the timing of the decision and the Court's remedial approach were reasonable in light of all of the relevant considerations. The Court's explanation for its decision also seems adequate, even though it glossed over some seemingly relevant considerations. Accordingly, if rationality guaranteed acceptance, then this country would eventually reach a broad consensus that the United States Constitution guarantees same-sex couples the right to marital recognition.

Of course, it is quite possible that this will not happen (at least in the short run), and some people will undoubtedly reject the Court's decision even if same-sex marriage becomes widely accepted. The reality of ongoing disagreement and irresolvable moral conflict reflects an inherent limitation of deliberative democratic theory in practice. That is, even if reasonable people *could* (or should) agree that a decision is justified on the merits, some people *will not* actually accept the decision as legitimate. This means that as much as deliberative democratic theory would like to facilitate collective decisions that are the product of a rational consensus, the practice of deliberative democracy will necessarily be coercive.[365] Deliberative democracy is both distinctive and normatively attractive because such coercion must, by definition, be reasonably justified and hence nonarbitrary in nature, but the theory could not realistically purport to dispense with the use of force in practice.[366] Jane Mansbridge has therefore brilliantly explained that "[r]ecognizing the need for coercion, and recognizing too that no coercion can be either incontestably fair or predictably just, democracies must find ways of fighting, while they use it, the very coercion that they need."[367]

A small group of political theorists have seized on the inability of rational discussion to eliminate fundamental moral disagreement and conflict in politics as the basis for criticizing deliberative democracy and advocating an agonistic

[365] *See* Hauptmann, *supra* note 144, at 863-66 ("For Gutmann and Thompson, deliberative democratic theory justifies imposing decisions that satisfy deliberative criteria on dissenters as much as it outlines the principles that ought to govern the practice of resolving moral disagreement.").

[366] Deliberative democracy is therefore best understood as defining freedom as "non-domination," rather than as "non-interference." *See* Pettit, *supra* note 141, at 164-65 (explaining this distinction and claiming that civic republican theory also adopts this view).

[367] Jane Mansbridge, *Using Power/Fighting Power: The Polity*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 46, 46-47 (Seyla Benhabib ed., 1996).

theory of democracy.[368] Agonistic democratic theorists, such as Chantal Mouffe, contend that the "individualistic, universalistic, and rationalistic framework" of deliberative democracy "erases the dimension of the political and impedes envisaging in an adequate manner the nature of a pluralistic democratic public sphere."[369] Mouffe claims that "[b]y postulating the availability of [a] public sphere where power and antagonism would have been eliminated and where a rational consensus would have been realized," deliberative democratic theory "denies the central role in politics of the conflictual dimension and its crucial role in the formation of collective identities."[370] While deliberative democracy focuses on how reasoned deliberation can lead to legitimate collective choices, agonistic democracy emphasizes that people in power ultimately make those decisions, and there are inevitably "losers" when those decisions are made:

> Politics aims at the creation of unity in a context of conflict and diversity; it is always concerned with the creation of an "us" by the determination of a "them." The novelty of democratic politics is not the overcoming of this us/them distinction—which is what a consensus without exclusion pretends to achieve—but the different way in which [it] is established. What is at stake is how to establish the us/them discrimination in a way that is compatible with pluralist democracy.[371]

Mouffe contends that democratic politics "presupposes that the 'other' is no longer seen as an enemy to be destroyed, but as an 'adversary,' i.e., somebody with whose ideas we are going to struggle but whose right to defend those ideas we will not put into question."[372] Unlike mortal enemies, "[a]n adversary is a legitimate enemy, an enemy with whom we have in common a shared adhesion to the ethico-political principles of democracy."[373] Mouffe believes that viewing our political opponents as adversaries is not automatic or natural, and that it requires "a radical change in political identity" that "has more of a quality of a conversion than of rational persuasion."[374] That does not mean, however, that adversaries can resolve their fundamental moral disagreements through a process of reasoned deliberation or rational discussion. Adversaries may be able to reach compromises as part of the political process, but those agreements should merely be viewed "as temporary respites in an ongoing confrontation."[375]

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[368] *See generally* LAW AND AGONISTIC POLITICS (Andrew Schaap ed., 2009); CHANTAL MOUFFE, THE DEMOCRATIC PARADOX (2000); Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RES. 745 (1999) [hereinafter Mouffe, *Deliberative Democracy*].

[369] Mouffe, *Deliberative Democracy*, *supra* note 368, at 745.

[370] *Id.* at 752.

[371] *Id.* at 755.

[372] *Id.*

[373] *Id.*

[374] *Id.*

[375] *Id.*

Agonistic democratic theory emphasizes the importance of distinguishing between "*antagonism* between enemies" and "*agonism* between adversaries," and claims "that the aim of democratic politics is to transform an 'antagonism' into an 'agonism.'"[376] Agonistic democracy essentially seeks to create a political environment where political opponents will treat each other as "frenemies," while agreeing to disagree on fundamental moral issues.

While agonistic democratic theory has not received substantial attention from legal scholars, it has influenced the work of Robert Post, including his recent efforts to theorize disagreement and reconceive "the relationship between law and politics."[377] Post considers the extent to which "technical legal craft" can properly be joined with a form of "judicial statesmanship" that considers the political consequences of judicial decisions and their impact on the perceived legitimacy of courts.[378] He dispenses with prominent theories of jurisprudence that deny a role or need for judicial statesmanship on the grounds that the idea of "neutral principles" of law is "empirically false and theoretically misguided,"[379] while legal process theory unrealistically ignores the reality of unresolved political disagreement.[380] He points out that many scholars have therefore recently "sought to offer an account of politics that accepts the persistence of vigorous, irreconcilable disagreement without reducing politics to a process of preference aggregation."[381] Post relies on the work of Mouffe and others to recognize that disagreement is vital to politics, but that politics is also more than a mere aggregation of preferences because it depends on the existence of an agreement by the members of a polity to join together in a political association to make collective decisions.[382] Post recognizes the surprising fragility of this conception of politics, which survives "between war and law":

> If our disagreement becomes too intense, if we wish to exterminate each other rather than peaceably to live together, we cannot engage in the practice of politics. Alternatively, if we agree too much, if we cease normatively to value disagreement because we expect all to concur on common remedies for common problems, we also cannot engage in the practice of politics. "[I]f ever there was a natural unanimity of opinion in any society on all great issues, politics would, indeed, be unnecessary." In

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[376] *Id.*

[377] *See* Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1319 (2010).

[378] *Id.* at 1319.

[379] *See id.* at 1319-32.

[380] *See id.* at 1323, 1332-36 ("Legal process jurisprudence cannot justify judicial statesmanship because legal process jurisprudence does not respect the unreasonable controversies that pervade politics.").

[381] *Id.* at 1336.

[382] *Id*. at 1337.

> politics, we strive for agreement under conditions in which we expect and protect the persistence of disagreement.[383]

In short, Post views the political arena "as a distinct form of social order in which persons might live together in peace and social solidarity within a single polity and yet preserve the possibility of ongoing contestation about what actions the polity might take," and he suggests "that we conceive of law in roughly analogous terms—as a specific social practice expected to promote social solidarity in a particular way."[384] In describing the relationship between law and politics, Post recognizes that both law and politics involve agreement and disagreement. Nonetheless, politics is a venue that is characterized by persistent disagreement, whereas law is a venue in which agreement is presumed. Political issues are turned into law when the authoritative decision makers conclude that there is sufficient value in treating such issues as if they are the subjects of widespread social agreement.[385] Because the relationship between politics and law is ongoing, dialectical, and interactive, and because the boundaries between law and politics can always be contested, courts may need to supplement judicial craft with judicial statesmanship to ensure that their efforts to entrench legal norms will be accepted; particularly when the judiciary is using law to redefine our nation's constitutional identity.[386] Post therefore approvingly quotes Alexander Bickel's observation that "[t]he Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed."[387] From this perspective, the Court issued *Obergefell* to treat the issue of same-sex marriage as settled and to declare that marriage equality is part of our nation's constitutional identity, and the decision will undoubtedly be subject to resistance in the political process by those with a competing constitutional vision.

If the Court's decision was democratically legitimate from a deliberative democratic perspective, and certain forms of political resistance are inevitable and should be welcomed from the perspective of agonistic democracy, this suggests a need to synthesize the principles of deliberative and agonistic democracy. While the concrete implications of agonistic democracy for questions of institutional design are notoriously undeveloped,[388] the theory places an overarching value on several features of democratic governance that are compatible with a proper understanding of deliberative democracy. For example, Mansbridge has argued that deliberative democracies should "foster and value informal deliberative enclaves of resistance in which those who lose"

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[383] *Id.* at 1339-40 (quoting BERNARD CRICK, IN DEFENSE OF POLITICS 64 (4th ed. 1992)).

[384] *Id.* at 1340.

[385] *See id.* at 1343.

[386] *See id.* at 1345-47.

[387] *Id.* at 1348 (quoting BICKEL, *supra* note 294, at 239).

[388] *See* Daniel E. Walters, An Agonistic Defense of American Administrative Law 22 (unpublished manuscript) (on file with author).

in the political or legal process "can rework their strategies, gathering their forces and deciding in a more protected space in what way or whether to continue the battle."[389] This would suggest, for example, that proponents of traditional marriage should be encouraged to have their own private spaces to discuss their reactions to *Obergefell* and to formulate a desired response. While "enclaves of oppositional discourse" are unlikely to operate in an ideal deliberative fashion, and they may in some ways undermine deliberative democratic ideals,[390] Mansbridge argues that the development of oppositional discourses is essential to fight the power that democracy needs and to provide resources against the possibility of domination by the state in the event that our best considered judgments turn out to be procedurally unfair or substantively unjust.[391]

Mansbridge's argument for encouraging the development of oppositional discourses highlights several of the most central features of agonistic democratic theory. These include recognition of the need for and value of vigorous dissent, the necessity of providing a variety of mechanisms for individuals and groups to challenge the validity of public decisions, and an understanding that all legal and policy decisions should be viewed as provisional. These principles are fully compatible with the best understanding of deliberative democracy. First, as Mansbridge explains, deliberative democratic theory needs coercion in the absence of unanimity, and there is always a possibility that deliberative democratic decisions could be wrong.[392] The vigorous dissent that is generated by the preservation of enclaves of oppositional discourse may be necessary to produce the new information or arguments that are ultimately required to persuade other citizens and public officials to change their minds.[393] Second, Philip Pettit has persuasively argued that republican democracy must be deliberative for its contestatory dimension to be effective.[394] Deliberative democracy must, in turn, be contestatory to ensure that relevant information and arguments are presented and considered, and to avoid the possibility of arbitrary decision-making by the state.[395] For similar reasons, Gutmann and Thompson

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[389] Mansbridge, *supra* note 367, at 47, 56-60.

[390] *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 75-76 (2000) (discussing the phenomenon of "group polarization" and reporting that it is heightened when groups have a shared sense of identity and are exposed only to similar points of view).

[391] *See* Mansbridge, *supra* note 367, at 54-60; Sunstein, *supra* note 390, at 105-06 ("A certain measure of isolation will, in some cases, be crucial to the development of ideas and approaches that would not otherwise emerge and that deserve a social hearing.").

[392] *See* Mansbridge, *supra* note 367, at 46-47.

[393] *See id.* at 60.

[394] *See* Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268, 281-83 (2001) (arguing that in order to ensure the contestability of government action, democratic bodies must "operate in a deliberative mode").

[395] *See id.* at 283 ("The contestability argument for deliberative democracy ought to have

have repeatedly emphasized the importance of provisionality in deliberative democratic theory.[396]

Deliberative democratic theory seeks to harness and identify the latent agreement that exists in the political process and to provide the tools to ascertain if and when significant changes to our society's constitutional identity are justifiable, whereas agonistic democracy emphasizes the coercive aspects of deliberative democracy and seeks to preserve outlets for conflict and ongoing moral disagreement. Aside from these basic differences in emphasis, the primary distinction between deliberative and agonistic democracy is that the latter theory largely rejects the principles of reciprocity and accommodation. Deliberative democratic theory also recognizes, however, that those principles need not be satisfied in every discussion that takes place within a democracy. This is particularly true of the most recent versions of deliberative democratic theory, which tend to be more systemic in nature.[397] Systemic theories of deliberative democracy recognize that some institutions will be more deliberative than others, and that the proper goal of institutional design is to provide the ideal mix of deliberative and non-deliberative venues within a society, while seeking to ensure that sufficient spaces exist for reasoned deliberation to occur before coercive authority is exercised.[398] Such theories tend to take a relatively "long view" that emphasizes the importance of how legal and policy issues are treated over time, rather than focusing solely on whether every decision was the product of ideal democratic deliberations.[399] Systemic theories of deliberative democracy may therefore be converging towards a synthesis with the most important insights of agonistic democratic theory. Those theories suggest that agonistic democracy has a place within deliberative democratic theory, without abandoning their commitment to deliberative democratic principles.[400] While

persuasive force, quite apart from its connection with republican theory . . . ." (citation omitted)).

[396] *See, e.g.*, GUTMANN & THOMPSON, *supra* note 48, at 110-19.

[397] *See* Jane Mansbridge et al., *A Systemic Approach to Deliberative Democracy*, *in* THEORIES OF INSTITUTIONAL DESIGN: DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE 1, 1-26 (John Parkinson & Jane Mansbridge eds., 2012) (recognizing that while one element of a system may not contribute to deliberative ideals, it may be important or necessary for an "overall deliberative system").

[398] *See id.* at 2-3 ("A systematic approach allows us to think productively and creatively about this question. It expands the scale of analysis beyond the individual site and allows us to think about deliberations that develop among and between the sites over time.").

[399] *See* Thompson, *supra* note 76, at 513-16.

[400] *See* Mansbridge et al., *supra* note 397, at 7 (recognizing that "[a]ctivist interactions in social movement enclaves are often highly partisan, closed to opposing ideas, and disrespectful of opponents," but pointing out that "the intensity of interaction and even the exclusion of opposing ideas in such enclaves create the fertile, protected hothouses sometimes necessary to generate counter-hegemonic ideas . . . [that] may play powerful roles in the broader deliberative system, substantively improving an eventual democratic decision").

the institutional implications of such a synthesis could be wide-ranging,[401] we might conclude, for example, that political activists should have more freedom to be agonistic whereas public officials should ordinarily behave in a more deliberative fashion. Similarly, public officials should have more freedom to be agonistic during political campaigns, while they should behave in a more deliberative fashion when engaging in governance.[402] Finally, judges may properly have freedom to be relatively agonistic about their fundamental jurisprudential and methodological commitments, but they should behave in a deliberative fashion when they decide individual cases.[403]

Constitutional theorists who advocate "dialogic" approaches to judicial review have already begun the crucial project of synthesizing the principles of deliberative and agonistic democratic theory. Such theorists recognize "that constitutional meaning is the result of an ongoing dialogue between and among governmental officials and interested members of the public."[404] For example, Barry Friedman claims that "[w]hat matters most about judicial review . . . is not the Supreme Court's role in the process, but how *the public reacts* to those decisions."[405] He argues that "it is through the dialogic process of 'judicial decision—popular response—judicial re-decision' that the Constitution takes on the meaning it has."[406] While Eskridge and Ferejohn focus on how statutes and the work of administrative agencies and state courts help to shape the meaning of the Constitution, they likewise emphasize that "the dialogic feature of republican deliberation" that characterizes their theory "requires differently situated participants and institutions to provide inputs that reflect their comparative advantages."[407] Robert Post and Reva Siegel primarily emphasize the role of social movements, and they similarly agree that constitutional

[401] *See id.* at 18 ("A full systemic theory of deliberation would require an elaborated [defense] of where to draw the line between persuasion and pressure, particularly in light of the standard for democratic deliberation that only the force of the better argument should prevail.").

[402] *See* AMY GUTMANN & DENNIS THOMPSON, THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT 144-52 (2012) (arguing that agonism serves the needs of campaigning better than deliberation).

[403] *See* Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1593 (2014) (arguing that judges should not be required to follow a single methodological approach that may conflict with their fundamental jurisprudential and methodological commitments); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 247 (2015) (arguing that when federal courts interpret statutes they should "engag[e] in reasoned deliberation on the best course of action under the circumstances").

[404] Glen Staszewski, *Constitutional Dialogue in a Republic of Statutes*, 2010 MICH. ST. L. REV. 837, 865-66.

[405] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 381 (2009).

[406] *Id.* at 382.

[407] ESKRIDGE & FEREJOHN, *supra* note 224, at 15.

meaning is shaped by "complex patterns of exchange" between citizens and public officials over time in a variety of institutional settings.[408]

While the foregoing theories differ in their emphases and particulars, dialogic theorists tend to square judicial review with democracy by identifying the avenues that are available for public officials and citizens to influence the meaning of the Constitution. Such theories share several other common characteristics that are significant for present purposes. First, they are deliberative theories of constitutional meaning, in the sense that they recognize the Court's obligation to reach the best decision on the merits based on the persuasiveness of the competing legal arguments. They are also deliberative, however, in the sense that they recognize that the Court may take into account other prudential considerations, such as the perceived legitimacy of its decisions and the likely impact of alternative courses of action on the political process. Both aspects of the Court's deliberative decision-making are likely to be provisional in nature. Second, dialogic theories of judicial review tend to embrace the central elements of agonistic democracy because they welcome dissent from the Court's constitutional vision, and they recognize that citizens should be provided with a wide range of meaningful opportunities to contest the status quo in the political and legal processes. For example, Post and Siegel explicitly claim that their theory of "[d]emocratic constitutionalism views interpretive disagreement as a normal condition for the development of constitutional law."[409] By emphasizing the vital role of social movements in facilitating the requisite dialogue, these theories also recognize the value of providing space for "enclaves of oppositional discourse" to facilitate contestatory democracy.[410] Dialogic theories of judicial review therefore tend to recognize the constructive role that can be played by backlash.[411]

Finally, dialogic theories tend to suggest that the Court should be responsive to the considered judgment of the American people and their elected representatives, which ultimately emerges from ongoing debates over constitutional meaning that are partly agonistic and partly deliberative in nature. All of these scholars recognize, of course, that the Court's decisions have a substantial impact on constitutional meaning, and that they have a high probability of being dispositive. At the same time, they also recognize that "[n]o court, including the Supreme Court, has the capacity to rule a controversial issue

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[408] Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (emphasizing that judicial decisions do not foreclose political discussion of controversial issues).

[409] *Id.*

[410] *See* Mansbridge, *supra* note 367, at 56-59.

[411] *See* FRIEDMAN, *supra* note 405, at 383 ("One of the most valuable things that occurs in response to a Supreme Court decision is backlash."); Post & Siegel, *supra* note 408, at 373-74; Sant'Ambrogio & Law, *supra* note 216, at 748-53 (recognizing the productive role of backlash in facilitating constitutional dialogue about marriage equality).

'off-limits to politics.'"[412] The "stickiness" of the Court's constitutional decisions means that any efforts to persuade the Court to move in a different direction or to overrule its prior decisions will typically require a sustained political and legal commitment.[413] The Court's decisions are therefore frequently accepted by political officials and their constituents without a great deal of resistance, and almost everyone moves on to other problems. When the Court's decisions provide the foundation for subsequent actions by public officials, including former opponents who may have been persuaded that their earlier position was misguided or wrong, the Court's decisions tend to become deeply entrenched as a positive and normative matter.[414]

Nonetheless, when the Court's decisions are the subject of sustained political and legal resistance by social movements and their allies, and when their oppositional views eventually become persuasive to authoritative decision makers, the meaning of the Constitution has a tendency to change.[415] Indeed, previously entrenched understandings of the Constitution, such as the acceptable definition of marriage, can become unsettled and eventually transformed pursuant to this process. The stickiness of the Court's decisions creates the functional equivalent of a strong presumption that its understanding of the Constitution is correct, but that presumption can be overcome by widespread and concerted political or legal efforts over an extended period of time, which could eventually persuade the Court to change direction or reconsider its previous decisions. This dialogic process should be understood as American constitutional law's relatively organic way of leveraging aroused public opinion to balance the virtues of deliberative and agonistic democracy. For this process to be effective, however, the systemic constitutional dialogue must be sufficiently deliberative, and any resulting conflict must be "agonistic" rather than "antagonistic." Indeed, the most vital project for American governance today may very well be to continue to think about and develop the best possible ways of simultaneously achieving both of these crucial goals.

Returning to *Obergefell* and the constitutional treatment of same-sex marriage, this analysis suggests that strident criticisms of the Court are only

[412] Post & Siegel, *supra* note 408, at 403 (emphasis omitted).

[413] *See* FRIEDMAN, *supra* note 405, at 383 ("When a decision is put on constitutional grounds, it takes greater mobilization, and often more time, to develop the political will to change it.").

[414] *See* ESKRIDGE & FEREJOHN, *supra* note 224, at 13 (explaining that norms or practices ultimately become entrenched based on "a popular consensus that the norm or practice is a good thing to believe or do"); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1207-10 (2006) (describing a similar process by which certain judicial precedent becomes deeply entrenched).

[415] *See* ESKRIDGE & FEREJOHN, *supra* note 224, at 303-86 (providing detailed examples, including the dis-entrenchment of the anti-homosexual constitution). *See generally* Jack M. Balkin & Reva B. Siegel, Essay, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (describing mechanisms by which social movements facilitate legal change).

natural, and that some acts of civil disobedience in refusing to comply with the decision could be viewed as acceptable forms of agonistic democracy. Moreover, the opponents of same-sex marriage could continue to press their views in the political and legal processes, and the Court could in theory eventually change its mind. This strikes me as unlikely, but there is little doubt that the competing positions on same-sex marriage will inform the political and legal debates that are being generated on related issues, such as the proper scope of religious exemptions from generally applicable laws requiring nondiscrimination in public accommodations.[416] It also seems probable that *Obergefell* will lead to other fundamental debates regarding the legal treatment of marriage and families, the proper treatment of unmarried individuals or partners, and the scope of LGBT civil rights in other areas.[417] Decisions regarding same-sex marriage will also continue to take place within religious institutions and elsewhere in the private sphere. Because the boundaries between the political and legal can always be contested, whether *Obergefell* will be successful in changing our constitutional identity (and precisely how our constitutional identity will be changed) remains to be seen, but whatever happens will ultimately be the result of interactions among the deliberative and agonistic elements of American constitutional democracy.

CONCLUSION

The opinions in *Obergefell* presented competing conceptions of the Court's role in a democracy. While both sides emphasized the importance of meaningful deliberation for democratic decision-making, the majority engaged in the practice of deliberative democracy, whereas the dissenters claimed that the Court abused its authority by refusing to defer to ongoing deliberations in the ordinary political process. This Article has argued that while the Court could reasonably have waited to resolve the constitutional question or invalidated the state laws at issue on narrower grounds, the Court's decision was democratically legitimate from the perspective of deliberative democracy. The charge that *Obergefell* was undemocratic is therefore unmeritorious. The Article has also provided preliminary thoughts on important open questions that *Obergefell* raises for deliberative democratic theory and judicial practice, including the scope of the judiciary's duty to provide reasoned explanations for its decisions and the relationship between deliberative and agonistic democracy within the

[416] For an interesting discussion of this issue, which suggests the possibility of some common ground between LGBT rights advocates and religious fundamentalists, see generally Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015).

[417] *See, e.g.*, Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 42 (2015) ("My conclusion in what follows is that, notwithstanding much rhetoric in the opinion, states have some room to rethink marriage in light of marriage equality."); Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 126-27 (2015).

American constitutional system. The Article suggests that dialogic theories of judicial review are on the right track in striking the latter balance, but we must continue to think about the best ways to ensure that the entire constitutional system is sufficiently deliberative and that fundamental moral conflict is addressed by people who view each other as legitimate adversaries rather than as mortal enemies, and who treat each other accordingly.