

If a Constitution Is Easy to Amend, Can Judges Be Less Restrained? Rights, Social Change, and Proposition 8

Conor O'Mahony*

To what extent does the counter-majoritarian difficulty become less of a concern when a majoritarian response to an unpopular court decision is readily available? Scholars have long debated the potential threat posed to democracy by court decisions that strike down legislation by reference to vague rights provisions, but this debate has largely taken place within a paradigm that assumes the extreme difficulty of amending the U.S. Constitution to overrule a decision of which the people disapprove. Far less attention has been given to the question of whether courts—whether at the state level in the United States or at a national level elsewhere—might justifiably adopt a more active and aggressive posture toward rights protection in jurisdictions where the constitution is easier to amend, and where a majoritarian response is a more realistic prospect in the event of a genuinely counter-majoritarian court decision. This Article will explore this question through the lens of the case law preceding and following the enactment of Proposition 8, which constitutionally prohibited same-sex marriage in California. The Proposition 8 cases are particularly suited to this task because they involve the resolution of one of the foremost constitutional rights controversies of our time in two very different systems: the U.S. federal system, where the Constitution is extremely difficult to amend, and California, where the constitution is extremely easy to amend. Drawing on the work of Alexander Bickel, this Article argues that as a constitution becomes easier to amend but still exhibits a reasonable level of entrenchment, some of the key arguments for judicial restraint in the interpretation of constitutional rights become less compelling. However, when an issue is the subject of intense political controversy and it is unclear whether a decision will be accepted by the

* B.C.L., LL.M. (National University of Ireland), Ph.D. (University of Wales, Aberystwyth); Lecturer in Constitutional Law, University College Cork. I am grateful for the hospitality I received at Emory University School of Law, Temple University James E. Beasley School of Law, and Brooklyn Law School while researching this Article in Spring 2012. In particular, I would like to thank Martha Fineman, Michael Perry, Barbara Bennett Woodhouse, Theresa Glennon, Jeffrey Dunoff, Nancy Knauer, Robert Reinstein, Stacy Caplow, Jason Mazzone, Nelson Tebbe, Susan Herman, and William Araiza for their time, generosity, and insight.

people, a point is reached where extreme ease of amendment is itself a reason to favor judicial restraint.

INTRODUCTION

In *West Virginia State Board of Education v. Barnette*, Justice Jackson famously said that “fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”¹ This portrayal of fundamental rights as being immune from political definition or redefinition is attractive, particularly to minorities and constitutional lawyers. Yet, in many of the cases that implicate fundamental human rights, it is unclear whether Jackson’s portrayal is an accurate reflection of how controversies over constitutional rights are settled over time. Disputes regarding the interpretation or application of rights protected by the U.S. Constitution may not be subject to direct votes of the people, but an increasing number of prominent scholars argue that developments in Supreme Court rights jurisprudence are strongly influenced by developments in electoral politics.² Moreover, in many countries around the world, as well as in many individual states in the United States—of which California is the foremost example—controversies over constitutional rights are referable directly to the people for their resolution, whether by way of initiative or referendum.³

The most controversial constitutional rights cases, on issues such as abortion, the death penalty, and same-sex marriage, often involve deep disagreement about the scope—or even the very existence—of the right in question, and this disagreement is as much political as it is legal.⁴ Justice Jackson may have felt that certain issues are too important to be decided by a popular vote, but in cases where such deep-seated disagreement over rights exists, others have argued that the controversy is too important to *not* be decided by the people—whether directly by popular vote, or indirectly

1. 319 U.S. 624, 638 (1943).

2. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (providing an in-depth discussion of Balkin’s theories of constitutional interpretation, which broadly argue that popular opinion as expressed through elections, legislation, and judicial appointments influences the Supreme Court’s interpretation of the U.S. Constitution over time); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007) (arguing that the interpretation of the Constitution is shaped over time by political movements that bring about landmark statutes and “superprecedents”).

3. The term “initiative” is used here to describe a proposition put on a ballot by way of signed petitions without any legislative involvement. “Referendum” describes propositions referred to a direct vote of the people by legislative resolution.

4. See generally MICHAEL J. PERRY, *CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT* (2009) (examining the scope for reasonable disagreement in the context of these three debates, and arguing that the Supreme Court should only invalidate a law if there is a reasonable argument for its unconstitutionality and no reasonable counterclaim for its constitutionality). Perry describes these three issues as being at the epicenter of the country’s culture wars. *Id.* at 48.

through elected representatives.⁵ One version of this argument is that where society is deeply divided on an issue, and the U.S. Constitution contains no clear answer, it is harmful rather than helpful for the Supreme Court to have the last say. Consider Justice Scalia's closing remarks in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

{B}y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.⁶

As this passage suggests, the question of who gets to decide on major constitutional rights controversies is arguably as important as what is decided. The recent debate on marriage equality has provided ample illustration of this. Across the United States⁷ and other democratic societies,⁸ the debate over whether same-sex couples have the right to marry has been played out in legislatures, courts, and popular votes. In what Nancy Knauer has described as a game of “paper, scissors, rock,”⁹ opponents have endlessly sought to trump each other in the forum they feel is most amenable to their cause. This has led to an intense power struggle between courts and voters: court decisions in same-sex marriage cases in Hawaii,¹⁰ Alaska,¹¹ and Massachusetts¹² led voters in thirty states to amend their state constitutions to preclude state courts from ruling in favor of same-sex marriage.¹³ In California, voters thought that they had decided the issue not once, but twice, only to see the courts strike down directly enacted laws on each occasion.¹⁴

5. See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (2001) (arguing that where reasonable disagreement exists, rights disputes should be resolved by the people through democratic means rather than through judicial interpretation of entrenched constitutional rights).

6. 505 U.S. 833, 1002 (1992).

7. See generally MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013) (discussing the history of the debate around gay rights in general, and same-sex marriage in particular, from World War II to 2012).

8. See generally MAN YEE KAREN LEE, *EQUALITY, DIGNITY, AND SAME-SEX MARRIAGE: A RIGHTS DISAGREEMENT IN DEMOCRATIC SOCIETIES* (2010) (describing the same-sex marriage debate in a number of western states, including Denmark, the Netherlands, South Africa, Canada, and the United Kingdom).

9. Nancy Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 55 (2006).

10. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

11. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998).

12. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

13. See KLARMAN, *supra* note 7, at 122. In 2012, North Carolina became the thirtieth state to pass a marriage amendment to its constitution. Campbell Robertson, *North Carolina Voters Pass Same-Sex Marriage Ban*, N.Y. TIMES (May 8, 2012), http://www.nytimes.com/2012/05/09/us/north-carolina-voters-pass-same-sex-marriage-ban.html?_r=0; see also N.C. CONST. art. XIV, § 6.

14. Proposition 22—initiative legislation providing that only marriages consisting of one man and one woman are valid or recognized in California—was struck down by the California Supreme Court in

The debate over who gets to decide has concrete implications for courts faced with litigation on rights controversies such as same-sex marriage; it feeds into the calculation of how restrained a role the court should take. This, in turn, may shape the substantive outcome of a case: a court may reject plaintiffs' rights-based arguments not because it necessarily disagrees with the existence or scope of the right in question, but rather because it feels that the decision should be properly made through the democratic process. Justice Scalia in *Casey* made clear that a defining feature of his argument for restraint by the Supreme Court is that the difficulty of amending the U.S. Constitution effectively means that a Supreme Court decision is the last word, unless and until a later Court alters or reverses its position.¹⁵ Judicial decision making on major rights controversies is thus portrayed as illegitimate because it imposes the decisions of an unelected elite, precluding the possibility of a democratic decision by elected representatives or by voters. Accordingly, those who share Justice Scalia's view argue that a court interpreting constitutional rights should adopt a highly restrained and deferential posture that leaves the greatest possible wiggle room on the issue for the political branches of government.¹⁶

This Article poses the question of how the argument for restraint might change when a court interprets vague rights provisions in a constitution that is easier to amend than the U.S. Constitution, such that the issue is not effectively banished from the political forum by a Supreme Court decision.¹⁷ Drawing on the work of Alexander Bickel¹⁸ as a theoretical founda-

In re Marriage Cases as a breach of the California Constitution. 43 Cal. 4th 757 (Cal. 2008). When Proposition 8—an initiative constitutional amendment—amended the California Constitution to reverse this, it was struck down by the district court in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). An appeal against this ruling by the official proponents of Proposition 8 was dismissed by the Court of Appeals for the Ninth Circuit in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). The Supreme Court granted certiorari in the case, but ultimately held that the official proponents of Proposition 8 lacked standing to invoke the jurisdiction of the federal courts. *Hollingsworth v. Perry*, 133 S. Ct 2652, 2668 (2013).

15. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 1002 (1992). But see Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1293 (2004) [hereinafter Friedman, *Being Positive*] (arguing that a Supreme Court decision is not the final say, but part of a dialogue in which the Court fulfills the function of focusing and sustaining a debate, couching it in constitutional terms, and synthesizing the views of society on the matter at hand); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 643–53 (1993) [hereinafter Friedman, *Dialogue*]. Over time, the views of society will influence Court rulings on the matter and a state of equilibrium between the Court's position and that of society will be reached. *Id.* at 660–68. For the purposes of this Article, Friedman's argument calls into question whether a Supreme Court decision is the "last" word—but not that it is the Supreme Court, rather than the people or their elected representatives, that stipulates how the dispute is to be settled, even if only for the time being.

16. See discussion *infra* Part IV.

17. Even in easily amended constitutions, which tend to be more detailed than deeply entrenched ones and thus leave less room for judicial interpretation, provisions on fundamental rights still tend to be quite vague and open-textured. See discussion *infra* Part IV.

18. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1st ed. 1962). While Bickel's book focused on the Supreme Court, its theoretical approach also sheds light on the role of judicial restraint in other federal courts and state supreme courts.

tion, the Article explores how the case for judicial restraint is affected by the availability of a majoritarian response to a counter-majoritarian court decision. This question is explored through a case study of the same-sex marriage litigation in California that first triggered the enactment of a constitutional ban on same-sex marriage in Proposition 8, before litigants subsequently challenged the constitutionality of the ban in federal court. These cases have called on the courts to interpret two constitutions that enjoy very different levels of entrenchment: the deeply entrenched U.S. Constitution and the easily amended California Constitution. This Article considers decisions of the California Supreme Court in *In re Marriage Cases*, as well as the U.S. District Court for the Northern District of California, the Court of Appeals for the Ninth Circuit, and the Supreme Court in *Hollingsworth v. Perry*, locating them within current theoretical debates on judicial review. The analysis considers whether the relative ease of constitutional amendment in response to a court decision is a factor that should be taken into account by courts when determining the level of restraint that they should exercise when deciding a controversial question of constitutional rights, and, if so, whether greater ease of amendment calls for more or less restraint on the part of the court.

Part I begins by considering the entrenchment of constitutions, and the relationship between the depth of entrenchment and the depth of society's commitment to constitutional principles. This section addresses whether courts that strike down legislation for violating constitutional rights are actually behaving in a counter-majoritarian fashion, or whether they are simply giving effect to the people's fundamental commitments over their shallow ones. Nevertheless, because it is not always apparent what the people's fundamental commitments are on a particular rights issue, particularly when they are in a state of flux, it is necessary to ask whether courts are well-placed to construct those commitments. Part II outlines the history of the struggle for marriage equality before going on to examine how the California Supreme Court and the U.S. federal courts have attempted to balance judicial restraint with an acknowledgment of social change when applying constitutional rights provisions to laws banning same-sex marriage.

Part III explores two of Bickel's arguments related to rights and social change: 1) that courts should aim to make decisions that are capable of gaining acceptance in the immediate foreseeable future¹⁹ and exercise the passive virtues (e.g., certiorari, standing, and desuetude) in cases where this seems unlikely,²⁰ and 2) that the ultimate legitimacy of judicial review is maintained by the residual power of the people to amend a constitution to overrule a decision that they deeply disagree with.²¹ Part IV applies this theory to the Proposition 8 cases in federal courts, and considers the impli-

19. *Id.* at 239.

20. *Id.* at 64–71.

21. *Id.* at 258.

cations of the depth of entrenchment for the level of judicial restraint that is appropriate for courts when adjudicating on constitutional rights controversies like same-sex marriage.

Because Bickel was largely concerned with the timing of controversial decisions,²² it is necessary to go beyond the prevailing structural mechanism for amending a constitution to consider the prevailing political climate surrounding the issue before the court. Part V considers this point, and argues that the treatment of Proposition 8 by both the Ninth Circuit and the Supreme Court in *Perry* offers a classic illustration of Bickel's theory in operation. A major flaw of this approach is that the true motivation underpinning the decision may be obscured behind a doctrinal smokescreen that creates a gap between what the court is saying and what the court is doing. This section considers whether a more transparent approach is available to allow courts to expressly reference the political climate as a factor informing their decisions without creating a heckler's veto in the process.

I. DEPTH OF CONSTITUTIONAL ENTRENCHMENT AND POLITICAL COMMITMENT

A. *Depth of Entrenchment*

A key function of a written constitution is to entrench certain key principles—particularly the fundamental rights of citizens—so that they cannot be overridden in the ordinary course of politics; a constitution allows for abrogation or abolition of these rights only through an extraordinary political act.²³ This act does not have to take any particular form, but must include some minimum effort above the ordinary legislative process. When comparing the depth of entrenchment of different constitutions, it is necessary to examine both the formal legal mechanisms for amendment and the political environment. Political culture is less clearly ascertained than formal legal requirements but is nonetheless ascertainable within limits.

There are many shapes that formal legal requirements for amendment might take. A legislative vote may be required, and it may be necessary that it be affirmed in successive sessions; a referendum may further be required.²⁴ Within these processes, simple majority votes may be sufficient, as in Iowa²⁵ and Ireland,²⁶ or a supermajority may be required, as in Vermont.²⁷ A federal constitutional amendment may require ratification in

22. See discussion *infra* Part III.

23. See, e.g., MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 18–20 (1994).

24. IOWA CONST. art. X, § 1; MASS. CONST. art. XLVIII; VT. CONST. ch. II, § 72.

25. IOWA CONST. art. X.

26. IR. CONST., 1937, arts. 46, 47.

27. VT. CONST. ch. II, § 72 (requiring a two-thirds majority in the Senate and a simple majority in the House and in the referendum).

subunits of a country like state legislatures, as in the United States,²⁸ or local majorities within a national referendum, as in Australia.²⁹ Legislative involvement may be entirely avoided in jurisdictions with initiative processes, as in California³⁰ and Switzerland.³¹ Further variables exist within such systems, such as the number of signatures necessary to qualify a ballot petition.

Due to this variation, attempts to establish relative entrenchment are not straightforward. If one constitution can be amended by a two-thirds majority in the legislature, it is clearly less deeply entrenched than a constitution that requires a three-quarters majority, but it cannot be directly compared to a constitution that requires a simple majority vote in the legislature followed by a simple majority of voters in a referendum. Adding further complication, formal amendment rules only tell half the story.

Political culture is another important factor that determines how deeply a constitution is entrenched. A constitution might be much easier to amend than it looks on paper, for instance, if regular amendments generate familiarity with the amendment process. In jurisdictions where amendments involve direct democracy, interest groups might choose to direct much of their effort toward an initiative process rather than legislative lobbying. The amendment process might even become professionalized, as in California, with consultants collecting signatures for ballot petitions and negotiating the bureaucratic obstacles, thus increasing the accessibility of the process.³² Conversely, a constitution that is already difficult to amend may become effectively impossible to amend because of the political environment. The rigorous demands of Article V of the U.S. Constitution coupled with the polarized state of U.S. politics, as well as the ever-increasing reliance on judicial appointments and other constitutional politics to bring about constitutional change, is a case in point.³³

Measuring the level of entrenchment is thus a difficult task.³⁴ Nonetheless, a spectrum exists, ranging from constitutional provisions that are not

28. U.S. CONST. art. V.

29. In Australia, a proposal to amend the Constitution must be approved by both Houses of Parliament, followed by a referendum in which it must be approved by both a majority of voters nationwide, as well as a majority of voters in each state. See AUSTRALIAN CONSTITUTION s 128.

30. CAL. CONST. art. XVIII, §§ 3, 4.

31. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 139.

32. See Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 20 (1997) (discussing the development of an “initiative industry”).

33. See Ackerman, *supra* note 2, at 1741–42.

34. Political scientist Donald Lutz has suggested a formula for measuring both strength of entrenchment and rate of amendment. See Donald S. Lutz, *Towards a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 237–74 (Sanford Levinson ed., 1995) [hereinafter RESPONDING TO IMPERFECTION]. However, while Lutz’s approach may account for formal mechanisms, it cannot claim to accurately capture the impact of political culture on difficulty of amendment, as his calculation of difficulty of amendment focuses entirely on formal legal obstacles. See *id.* at 258–59.

amendable, such as Articles 1 and 20 of the German Constitution³⁵ at one end of the spectrum, to provisions that are not entrenched at all, such as the various elements of the unwritten U.K. Constitution, at the other. While distinguishing between constitutions that occupy similar spaces on that spectrum might be difficult, it is possible to say with reasonable certainty when constitutions are far apart on the spectrum.

In the United States, the U.S. Constitution is far more deeply entrenched than the California Constitution, and political culture has deepened that entrenchment. As outlined by Article V of the U.S. Constitution, proposed amendments must be approved by a two-thirds majority of both houses of Congress and subsequently ratified by the legislatures of three-quarters of the fifty states.³⁶ From a political perspective, there is near universal consensus that Article V is effectively defunct.³⁷ In California, by contrast, constitutional amendments can be passed by a simple majority of voters in an initiative process without any legislative involvement,³⁸ and the political culture has further eased the amendment process to a point that some have described as “hyper-amendability.”³⁹ Between these two ends of the entrenchment spectrum are states with reasonably entrenched constitutions, such as Massachusetts, Vermont, and Iowa, where amending the constitution requires legislative votes in successive sessions followed by a referendum.⁴⁰

B. *Depth of Commitment*

The reason why certain legal principles are entrenched in a written constitution—rather than expressed through ordinary legislation or other laws—relates to the question of how deeply the electorate is committed to a particular principle or right. In any society, there are certain commitments that are shallow, short-term commitments; the people are committed to them today but might not be tomorrow. They want laws based on these shallow commitments to be easy to change, so they express them through legislation or regulations. Deep, long-term commitments about the kind of

35. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 79, § 3 (providing that certain fundamental principles relating to human rights and democracy set out in Articles 1 and 20 can never be changed); see generally Virgílio Afonso da Silva, *A Fossilised Constitution?*, 17 *RATIO JURIS* 454 (2004) (discussing the extent to which the “essential core” of rights in the constitutions of Germany, Italy, Portugal, France, and Brazil are immune to change).

36. U.S. CONST. art. V.

37. See Ackerman, *supra* note 2, at 1741–42.

38. CAL. CONST. art. XVIII, §§ 3, 4.

39. See, e.g., Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 *TEX. L. REV.* 1517, 1521–25 (2009); Bruce Cain et al., *Constitutional Change: Is It Too Easy to Amend Our State Constitution?*, in *CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE* 265, 265–90 (Bruce E. Cain & Roger G. Noll eds., 1995).

40. IOWA CONST. art. X; MASS. CONST. art. XLVIII; VT. CONST. ch. II, § 72.

society the people want to live in are more fundamental in nature.⁴¹ Laws based on these fundamental commitments are made more difficult to change to ensure that any amendments to them are also based on long-term commitments. Fundamental commitments are therefore expressed in the durable form of deeply entrenched constitutional provisions, such as the Bill of Rights contained in the U.S. Constitution.

Conflict inevitably arises between fundamental commitments lurking in the background and more shallow commitments that may nevertheless seem more pressing at a given time. Politicians' concerns with reelection might cause legislative or executive action that seeks to give priority to shallow commitments at the expense of rights that the people are deeply committed to in the long term, such as the enactment of populist laws that increase the likelihood of criminal convictions at the expense of constitutionally protected due process rights. Judicial review aims to prevent this from happening and ensure that fundamental commitments prevail.⁴² A politically insulated and independent judiciary is better placed than an elected assembly to act on its best construction of the people's fundamental commitments rather than an expedient reaction to shallow commitments.⁴³ Hence, in a conflict between the elected branches and the judiciary over the meaning or scope of constitutional rights, the judiciary is given the decisive say. This is, in essence, the view advanced by Bickel in *The Least Dangerous Branch*:

It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values [C]ourts have certain capacities for dealing with matters of prin-

41. Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 10 (Greenberg et al. eds., 1993) (“[A] constitution may serve as a binding statement of a people’s aspirations for themselves as a nation. A text may silhouette the sort of community its authors/subjects are or would like to become: not only their governmental structures, procedures, and basic rights but also their goals, ideals, and the moral standards by which they want others, including their own posterity, to judge the community. In short, a constitutional text may guide as well as express a people’s hopes for themselves as a society.”).

42. See, e.g., CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 5 (2001) (“People have views about how they ought to behave, and views about what they want or desire. These views sometimes tug in different directions. Our interests are not always in harmony with our values: we sometimes desire things we ought not to have Congress and the president, because they must please voters to get re-elected, are likely to represent people’s interests. But Supreme Court justices, because they have both a democratic pedigree and the freedom to behave disinterestedly, are better positioned to represent the people’s convictions about what is right.”).

43. See MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 147 (1988) (“By virtue of its political insularity, the federal judiciary has the institutional capacity to engage in the pursuit of political-moral knowledge . . . in a relatively disinterested manner that has sometimes seemed to be beyond the reach of the electorally accountable branches of government, for many of whose members the cardinal value is ‘incumbency.’”).

ciple that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government Another advantage that courts have is that questions of principle never carry the same aspect for them as they did for the legislature or the executive. Statutes, after all, deal typically with abstract or dimly foreseen problems. The courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone's view. It also provides an extremely salutary proving ground for all abstractions Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.⁴⁴

Bickel's work is most famous for his identification of what he famously called the "counter majoritarian difficulty"⁴⁵ with judicial review—the potential inherent in judicial review for the judiciary to frustrate the will of the majority. While this phrase has often been used to attack court decisions as undemocratic, commentators increasingly argue that, over time, the Supreme Court does not actually act in a counter-majoritarian manner because its decisions tend to broadly track public opinion.⁴⁶ Although it is not clear that Bickel would agree, viewing judicial review as a process of constructing the fundamental commitments of the people lends further weight to the argument that it is not actually counter-majoritarian: it may seem so in the short term, but over the long term, the court is actually giving expression to the will of the people.

Because fundamental commitments are necessarily expressed at a high level of generality in constitutions,⁴⁷ judicial review calls upon judges to perform the difficult task of determining whether, for instance, fundamental commitments to liberty, personal autonomy, and equality require recognition of same-sex marriage. This task is made even more difficult when constitutional commitments pull in opposite directions with no clear indication of which is to prevail in conflict, such as how the right to life interacts with personal autonomy in the context of a pregnant woman who desires an abortion or a terminally ill patient who desires assisted suicide.

If the court accurately constructs how the people's fundamental commitments should apply in a given context and strikes down legislation in the

44. BICKEL, *supra* note 18, at 24–26.

45. *Id.* at 16.

46. See, e.g., Robert A. Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. POL. 279 (1957); William Mishler & Reginald Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Opinions*, 87 AM. POL. SCI. REV. 87 (1993); Friedman, *Dialogue*, *supra* note 15; Ackerman, *supra* note 2; BALKIN, *supra* note 2.

47. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 94 (1993) [hereinafter SUNSTEIN, *PARTIAL CONSTITUTION*] (“[T]he words of the Constitution tell us much less than we need to know.”).

process, this seems counter-majoritarian in the short term but not in the long term. However, it is conceivable that the courts may misread the people's fundamental commitments in the context of a particular issue. In cases where a court strikes down a law on the basis of its construction of the people's fundamental commitments, and that construction proves to be mistaken, the decision may prove to be counter-majoritarian over the long term as well as the short term. This danger was eloquently expressed by John Hart Ely, who argued that "by viewing society's values through one's own spectacles . . . one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported."⁴⁸ Ely was particularly skeptical of decisions that claim a comparative advantage for courts in asserting the views and wishes of the people.⁴⁹ His point shows the need for courts to be cautious in such cases, but fails to adequately recognize the important distinction between shallow and fundamental commitments. Legislatures are arguably only better suited to reflect consensus with respect to the former; but the entrenchment of judicially enforceable constitutional rights is, as Bickel argued above, based on the premise that the political insulation of the judiciary gives them a comparative advantage in prioritizing the latter.⁵⁰

C. *Social Change: Commitments in Flux*

The task facing judges when constructing the fundamental commitments of the people is complicated by the reality that even these commitments are not immutable; at times, they will go through periods of transition and flux. This has occurred over the past century with respect to equal treatment in the contexts of gender, race, and, most recently, sexual orientation. Accordingly, Bickel confidently rejected an originalist theory of constitutional interpretation:

The Framers knew . . . that nothing but disaster could result for government under a written constitution if it were generally accepted that the specific intent of a constitutional provision is ascertainable and is forever and specifically binding, subject only to the cumbersome process of amendment.⁵¹

This view was inspired by Charles Curtis's argument that what the Framers wrote

comes down to us more like chapter headings than anything else. They put it up to us, their successors, to write the text. And why not? We are better equipped and better able than they to deal

48. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 67 (1980).

49. *Id.* at 68 (describing such a notion as "ludicrous").

50. Text accompanying *supra* note 44.

51. BICKEL, *supra* note 18, at 106.

with their future, which is our present. At that, we are older and more experienced than they. They died in a younger world.⁵²

This concept of a living constitution calls on judges to reinterpret rights provisions to reflect changing conditions and opinions in society.⁵³ While there has been significant debate over the legitimacy of such interpretation,⁵⁴ the Supreme Court has often engaged in it, gradually expanding the scope of provisions such as the Fourth,⁵⁵ Eighth,⁵⁶ and Fourteenth⁵⁷ Amendments so as to strike down laws previously thought to be constitutional, at times even overruling its own previous decisions in the process. This type of interpretation, sometimes referred to as “evolutive interpretation” of rights provisions, is commonly practiced in other courts: the European Court of Human Rights (“ECtHR”) is a prime example, and there are similarities between its approach and that of the Supreme Court.⁵⁸ The

52. Charles P. Curtis, *A Modern Supreme Court in a Modern World*, 4 VAND. L. REV. 427, 428 (1951); see CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS* 83 (2009) [hereinafter SUNSTEIN, *OF MANY MINDS*].

53. Although there are a number of possible understandings of a living constitution, see William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976) (describing the phrase as having “a teasing imprecision that makes it a coat of many colors”), the one used here broadly accords with Bickel’s work, as well as the definitions offered by a number of other commentators, including those who favor the concept and those who oppose it, see, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997); Aileen Kavanagh, *The Idea of a Living Constitution*, 16 CAN. J.L. & JURISPRUDENCE 55, 87–89 (2003).

54. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); SCALIA, *supra* note 53; BALKIN, *supra* note 2; Ackerman, *supra* note 2; Richard S. Kay, *Originalist Values and Constitutional Interpretation*, 19 HARV. J.L. & PUB. POL’Y 335 (1996); Rehnquist, *supra* note 53; Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1999); Lee J. Strang, *Originalism and Legitimacy*, 11 KAN. J.L. & PUB. POL’Y 657 (2002); Kavanagh, *supra* note 53; Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353 (2007); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007).

55. The prohibition on unreasonable searches and seizures under the Fourth Amendment never anticipated wiretapping or electronic surveillance, which existed only in the realm of science fiction at the time of its enactment. Nonetheless, the Supreme Court has decided that these activities fall within the scope of what the amendment is designed to prohibit in a number of cases. E.g., *Katz v. United States*, 389 U.S. 347 (1967) (holding that the Unreasonable Search and Seizure Clause of the Fourth Amendment applies to wiretapping because physical intrusion is not necessary to constitute a violation); *Berger v. New York*, 388 U.S. 41 (1967) (holding that a New York statute violated the Fourth Amendment as the statute authorized electronic eavesdropping without required procedural safeguards).

56. In *Trop v. Dulles*, 356 U.S. 86 (1958), Justice Earl Warren famously stated that the concept of what constitutes a cruel and unusual punishment under the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” *id.* at 101. Accordingly, the Supreme Court has gradually evolved its interpretation of the Eighth Amendment so as to strike down an increasing range of laws providing for the death penalty for certain categories of offenders. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (rapists); *Enmund v. Florida*, 458 U.S. 782 (1982) (mere participants in robberies involving fatalities); *Roper v. Simmons*, 543 U.S. 551 (2005) (minors); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (the “mentally retarded”).

57. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding that a Texas statute criminalizing sodomy violated the liberty interest protected by the Due Process Clause of the Fourteenth Amendment).

58. See generally Kanstantsin Dzehtsiarou & Conor O’Mahony, *Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court*, 44 COLUM. HUM.

ECtHR tries to avoid ruling on rights issues that are the subject of significant controversy and contrasting approaches in the laws of Council of Europe member states, affording states a “margin of appreciation” in their interpretation of the European Convention on Human Rights (“ECHR”).⁵⁹ This approach serves the dual purpose of grounding the interpretation of the Convention in opinion across the member states, as well as minimizing the possibility of the court’s legitimacy being undermined through refusals of member states to implement its rulings.⁶⁰ Over time, however, as consensus emerges on how a right should be defined and protected, the ECtHR narrows the margin of appreciation and finds that the laws of recalcitrant states violate the ECHR according to an evolved interpretation.⁶¹

This is similar to how commentators such as Jack Balkin and Michael Klarman have portrayed the jurisprudence of the Supreme Court, particularly with respect to the evolution of its interpretation of the Bill of Rights. Balkin describes a process whereby the Court waits until a national majority

RTS. L. REV. 309 (2013) (discussing the way in which the Supreme Court and the ECtHR have expanded the scope of rights provisions through interpretation based on consensus in society).

59. See HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 13 (1995) (defining the margin of appreciation in the ECHR context as “the freedom to act; maneuvering, breathing or ‘elbow’ room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention’s substantive guarantees”); see also Aaron A. Ostrovsky, *What’s So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights Within Cultural Diversity and Legitimises International Human Rights Tribunals*, HANSE L. REV. 47, 48 (2005) (“The doctrine [of margin of appreciation] has since evolved . . . within the European system, into one of the ECtHR’s primary tools for accommodating diversity within Europe, national sovereignty, and the will of domestic majorities, while still effectively enforcing the rights elucidated within the ECHR.”).

60. See Dzehtsiarou & O’Mahony, *supra* note 58, at 328.

61. Perhaps the best known example of this approach has been in the series of cases concerning the absence of any mechanism in U.K. law for recognizing the reassigning gender of postoperative transsexuals. In *Rees v. United Kingdom*, App. No. 9532/81, 9 Eur. H.R. Rep. 56 (1986), the ECtHR declined to find that the applicant’s right to respect for private life was violated and held instead that the United Kingdom had a “wide margin of appreciation,” citing the fact that “there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage,” *id.* at 64. However, the ECtHR did issue a reminder that the ECHR was to be interpreted in light of changing circumstances, and called on the United Kingdom to keep the relevant laws under review. *Id.* at 67–68. Four years later, the ECtHR again declined to find a violation in *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622 (1990), by the rather narrower majority of ten to eight. The majority noted that there had been “certain developments since 1986” in the laws of some contracting states, but the diversity of practice was such that a margin of appreciation was still to be afforded to the United Kingdom. *Id.* at 641. Again, the ECtHR called for the law to be kept under review. *Id.* In *Sheffield v. United Kingdom*, App. Nos. 22885/93 and 23390/94, 27 Eur. H.R. Rep. 163 (1998), the ECtHR again did not find a violation of the ECHR and reiterated that the United Kingdom should review the relevant law, *id.* at 193–94. Finally, in *Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. H.R. Rep. 18 (2002), the ECtHR pointed to “clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals” in unanimously holding that the right to respect for private life under article 8 created a positive obligation on the United Kingdom to legislate to the same effect; the court also found a violation of the right to marry and found a family under article 12, *id.* at paras. 85, 104.

emerges, and then imposes the values of that national majority over the objections of local or regional majorities.⁶² Klarman describes the same process as the suppression of resisting outliers.⁶³ Notably, however, the willingness of the Supreme Court to engage in evolutive interpretation can vary significantly over time; the Court has gone through different phases of being more or less active in this regard.⁶⁴ This willingness also varies significantly in other jurisdictions. Some courts are known to have a tradition of being in the vanguard of social change; for instance, the California Supreme Court was the first U.S. state high court to strike down a law prohibiting interracial marriage, and the second to strike down a law prohibiting same-sex marriage.⁶⁵

Public opinion on marriage equality has undergone a radical transformation in a relatively short period of time. Legal recognition of the right of same-sex couples to marry in the United States has moved from being unthinkable just a generation ago to being viewed by some scholars today as inevitable.⁶⁶ For the time being, however, the issue remains the subject of intense political disagreement along geographic and demographic divides.⁶⁷ In same-sex marriage cases, some state high courts have preferred to risk appearing counter-majoritarian in the long term,⁶⁸ whereas others have preferred to risk appearing counter-majoritarian in the short term.⁶⁹ Clearly, there are good reasons relating to comparative institutional competence as to why judges should hesitate before asserting that their reading of the people's fundamental commitments is more accurate than that of the

62. BALKIN, *supra* note 2, at 571.

63. KLARMAN, *supra* note 7, at 69, 205, 207.

64. The period generally considered as the Court's most active in this regard is the tenure of Chief Justice Earl Warren from 1953 to 1969. See SUNSTEIN, OF MANY MINDS, *supra* note 52, at 142 (arguing that "[f]or all its aggressiveness, the Warren Court can itself be seen, most of the time, as reflecting rather than spurring social change"); see generally THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark Tushnet ed., 1993) (considering the Warren Court's jurisprudence and legacy).

65. See *In re Marriage Cases*, 43 Cal. 4th 757, 781, 811, 813, 818–22 (Cal. 2008) (citing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948)).

66. See KLARMAN, *supra* note 7, at 196–97 (“If any social change seems inevitable, it is the growing acceptance of gay equality generally and gay marriage specifically.”).

67. *Id.*

68. *E.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006) (declining to recognize a constitutional right to same-sex marriage, explaining that “[t]he dissenters assert confidently that ‘future generations’ will agree with their view of this case. We do not predict what the people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives.”).

69. *E.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 876 (Iowa 2009) (“Our responsibility . . . is to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time. The framers of the Iowa Constitution knew, as did the drafters of the United States Constitution, that ‘times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress,’ and as our constitution ‘endures, persons in every generation can invoke its principles in their own search for greater freedom’ and equality.” (quoting *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003)).

elected branches of government.⁷⁰ Yet how much restraint should be exercised by courts, and what form it should take, is a matter of significant controversy and debate.⁷¹ Is it appropriate for the degree of judicial restraint in any given constitutional structure to vary in response to the depth of entrenchment of the constitution in question? The remainder of this Article explores this question through an application of Bickel's work on judicial restraint and the passive virtues to the case law surrounding same-sex marriage in California.

II. SAME-SEX MARRIAGE LAWS IN FLUX

A. Comparative Approaches

Under international human rights law, the right to marry is protected by instruments such as the Universal Declaration of Human Rights ("UDHR")⁷² and the ECHR,⁷³ although—as a half-century passed before a single country recognized same-sex marriage⁷⁴—such a right was likely not originally envisioned as encompassing same-sex marriage. Nevertheless, the language used in the relevant provisions is sufficiently ambiguous that the right to marry under international human rights law could be interpreted as applying to same-sex couples, particularly if the laws of an individual state so contemplate. For example, the ECtHR has thus far declined to extend the right to marry under the ECHR to same-sex couples, but has left open the possibility of doing so in the future should consensus among member states of the Council of Europe move in that direction.⁷⁵ As of February 2014, sixteen countries and many subnational jurisdictions and territories

70. See ELY, *supra* note 48, at 67; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1376–95 (2006).

71. See generally Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 537 (1999).

72. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), art. 16(1) ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.").

73. See European Convention on Human Rights art. 12, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.").

74. The first country to legalize same-sex marriage was the Netherlands, where the relevant legislation was passed in 2000 and came into effect on April 1, 2001. See Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIP: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437, 437–64 (Mads Andenaes & Robert Wintemute eds., 2001).

75. Schalk v. Austria, No. 30141/04 (Eur. Ct. H.R. June 24, 2010), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605>, *archived at* <http://perma.cc/6UQB-RUPB?type=image> (finding that there was no consensus across Council of Europe member states on the question of whether the right to marry should extend to same-sex couples; therefore, states are to be afforded a margin of appreciation as to the form of recognition given to same-sex family life, and to differentiate between same-sex and opposite-sex families).

in other countries have extended the right to marry to same-sex couples.⁷⁶ In light of the increasing pace of change, and the reform processes and debates that are underway elsewhere, this figure looks set to increase significantly in the short to medium term.⁷⁷

In some countries, such as Spain and France, marriage equality has been brought about through legislative reform that survived constitutionality challenges.⁷⁸ In other countries, such as Ireland, the debate has predominantly taken place at a constitutional level, with reform proposals focusing on amending the Irish Constitution to expressly provide for a right to marry for same-sex couples.⁷⁹ The latter approach has the advantage of being more permanent, immune from court challenge or legislative reversal, but the disadvantage of requiring a more sustained political effort so as to achieve the necessary threshold for a constitutional amendment. Of course, the same result may be achieved through litigation—without the necessity for a constitutional amendment—should a national court interpret existing

76. These countries include: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom (excluding Northern Ireland), and Uruguay.

77. Debates on same-sex marriage are at an advanced stage in a number of other countries. For example, in 2013 Australian Prime Minister Kevin Rudd announced his support of same-sex marriage. See Dennis Shanahan & Paul Kelly, *Kevin Rudd Rests Case on Gay Marriage*, AUSTRALIAN (Sept. 7, 2013), <http://www.theaustralian.com.au/national-affairs/election-2013/kevin-rudd-rests-case-on-gay-marriage/story-fn9qr68y-1226713839013#>, archived at <http://perma.cc/U5QM-4ZA8>. In Ireland, a Constitutional Convention in April 2013 voted 78% in favor of holding a referendum to amend the Irish Constitution to include a right to marry for same-sex couples, and the government announced in November 2013 that this referendum will be held in 2015. See Stephen Collins & Genevieve Carbery, *Referendum on Same-Sex Marriage to be Held in 2015*, IRISH TIMES (Nov. 5, 2013, 9:11 PM), <http://www.irishtimes.com/news/politics/referendum-on-same-sex-marriage-to-be-held-in-2015-1.1584350>, archived at <http://perma.cc/GD76-D4HW>; Ruadhán Mac Cormaic, *Constitutional Convention Backs Extension of Marriage Rights to Same-Sex Couples*, IRISH TIMES (Apr. 15, 2013, 10:56 AM), <http://www.irishtimes.com/news/social-affairs/constitutional-convention-backs-extension-of-marriage-rights-to-same-sex-couples-1.1359910>, archived at <http://perma.cc/JEX7-54ZM>. Other examples include Finland, where a citizen's initiative to put a marriage equality bill to Parliament gathered more than triple the fifty thousand required signatures and is currently pending, see *Finland: Gay Marriage Initiative Proceeds to Parliament with 162,000 Backers*, EUR. HUMANIST FED'N (Sept. 19, 2013, 1:51 PM), <http://humanistfederation.eu/finland-gay-marriage-initiative-proceeds-to-parliament-with-162000-backers/>, archived at <http://perma.cc/0rffUaboy8W/>, and Germany, see Timothy Potenz, *Weakening Opposition to Same-Sex Marriage*, MUNICH EYE (Mar. 25, 2013), <http://www.themunicheye.com/news/Weakening-Op> position-to-Same-Sex-Marriage—2513, archived at <http://perma.cc/0Y3tguEDFeV>.

78. See Christina M. Akrivopoulou, *The Spanish Constitutional Tribunal's Same-Sex Marriage Decision*, I-CONNECT (July 19, 2013), <http://www.iconnectblog.com/2013/07/the-spanish-constitutional-tribunals-same-sex-marriage-decision>, archived at <http://perma.cc/0j5eKiMjbx2/>; *Des associations anti-mariage homosexuel saisissent le Conseil d'Etat* [Anti-Same-Sex Marriage Groups Seize the State Council], LE MONDE (Aug. 13, 2013, 4:11 PM), http://www.lemonde.fr/societe/article/2013/08/13/des-associations-anti-mariage-homosexuel-saisissent-le-conseil-d-etat_3460998_3224.html, archived at <http://perma.cc/0RRS-CB1aYYp>.

79. See Conor O'Mahony, *Principled Expediency: How the Irish Courts Can Compromise on Same-Sex Marriage*, 35 DUBLIN U. L.J. 199, 214–17 (discussing the debate over whether the provisions of the Irish Constitution obliging the state to protect the institution of marriage permit the recognition of same-sex marriage, and the related debate over whether the Constitution should be amended to expressly do so); Mac Cormaic, *supra* note 77.

constitutional provisions as guaranteeing a right to marry to same-sex couples. This is what occurred in South Africa.⁸⁰

B. Same-Sex Marriage in the United States

In the United States, the right to marry is a complex legal issue, involving layers of overlapping and interlocking federal and state laws and engaging multiple provisions of federal and state constitutions. The U.S. Constitution does not mention marriage at any point. Marriage licenses are issued at the state rather than federal level, and state law therefore determines access to marriage. However, state laws regulating marriage—whether contained in legislation or state constitutions—must comply with the general guarantees of the U.S. Constitution,⁸¹ and on a number of occasions, the Supreme Court has found state marriage laws wanting in this respect. Most famously, in *Loving v. Virginia*, a legislative prohibition of interracial marriage was struck down as a violation of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.⁸² *Loving*, along with other decisions such as *Meyer v. Nebraska*,⁸³ *Zablocki v. Redhail*,⁸⁴ and *Turner v. Safley*,⁸⁵ stands for the proposition that the right to marry is recognized as a fundamental right under the Fourteenth Amendment, although confusion remains regarding whether the right is a freestanding fundamental right under the Due Process Clause or merely a fundamental right for the purpose of triggering heightened scrutiny under the Equal Protection Clause.⁸⁶

80. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 569 (ruling that the provisions on equal protection and the explicit prohibition of discrimination—including on the basis of sexual orientation—contained in S. AFR. CONST., 1996, § 9, gave rise to a constitutional right to marry for same-sex couples).

81. See U.S. CONST. art. VI.

82. 388 U.S. 1, 11–12 (1967).

83. 262 U.S. 390, 399 (1923) (holding that marriage is a fundamental right essential to the pursuit of happiness under the Due Process Clause of the Fourteenth Amendment).

84. 434 U.S. 374, 390–91 (1978) (striking down a Wisconsin statute that required noncustodial parents to apply for a court order before obtaining a marriage license, which could only be granted if the parent was not in arrears on his or her child support).

85. 482 U.S. 78, 81 (1987) (striking down a Missouri prison regulation providing that inmates were not permitted to marry without the permission of the warden).

86. Chief Justice Warren's opinion for the Court in *Loving* largely focused on finding that the Virginia statute violated the Equal Protection Clause, but the Court also held—in a passage less than a page long at the end of the opinion—that it violated the Due Process Clause. See 388 U.S. at 12. In so holding, however, the Court mixed the language of due process with that of equal protection: “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.” *Id.* But see Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 2088–89, 2096–97 (2004) [hereinafter Sunstein, *The Right to Marry*] (arguing that the more convincing approach would be to confine recognition of a right to marry to being a fundamental right for the purposes of triggering strict scrutiny under the Due Process Clause); Nelson Tebbe & Deborah Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1412–21 (2010) (arguing the same).

Today, same-sex marriage occupies some of the most contested ground in U.S. law and politics, and has been described as being at the epicenter of the country's culture wars.⁸⁷ At the state level, battles over same-sex marriage have been fought in legislatures, where statutes either recognizing or prohibiting same-sex marriage have been debated; in executive branches, where the veto power has been used to block several such statutes; in referendum and initiative processes, where legislation and constitutional amendments on the subject have been voted on; and in courts, where constitutional challenges to same-sex marriage bans have been heard.⁸⁸

Although the earliest litigation concerning the right of same-sex couples to marry occurred in the 1970s,⁸⁹ marriage equality did not become a priority of the gay rights movement until quite recently. Activists were far more concerned with more basic equality measures such as the decriminalization of sodomy and the enactment of antidiscrimination and anti-hate-crime laws.⁹⁰ The beginning of the modern struggle for marriage equality can be traced to Hawaii in 1993, when the state supreme court ruled that the state law limiting marriage to opposite-sex couples should be subjected to strict scrutiny, requiring a compelling state interest justifying the law.⁹¹ On remand, the trial court found no such interest, and although it stayed its decision pending appeal, most commentators predicted that the liberal Hawaii Supreme Court would reject any such appeal.⁹² Seeing this, the state legislature proposed a constitutional amendment that was approved by voters in a referendum in 1998, giving the legislature the "power to reserve marriage to opposite-sex couples."⁹³ The Hawaii Supreme Court subsequently ruled that the effect of this amendment was to take the relevant legislation out of the ambit of the equal protection clause of the Hawaii Constitution.⁹⁴

These events in Hawaii, coupled with a similar sequence of events in Alaska in 1998,⁹⁵ served as a catalyst for the enactment of the Defense of

87. PERRY, *supra* note 4, at 48.

88. For a comprehensive account of the history of the same-sex marriage debate across the United States, see generally KLARMAN, *supra* note 7.

89. The first attempt to win recognition of same-sex marriage through the courts was *Baker v. Nelson*, 409 U.S. 810 (1972), in which the Court dismissed the appeal "for want of a substantial federal question," *id.* at 810.

90. KLARMAN, *supra* note 7, at 16–73.

91. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

92. KLARMAN, *supra* note 7, at 63–65.

93. HAW. CONST. art. I, § 23.

94. *Baehr v. Miike*, Civ. No. 91-1394-05 (Haw. Dec. 9, 1999), available at <http://www.state.hi.us/jud/20371.pdf>, archived at <http://perma.cc/4WPX-L7NV>.

95. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) (ruling that the state law restricting marriage to opposite-sex couples was based on a suspect classification and was therefore subject to strict scrutiny, and remanding the case to the trial court). Before the *Brause* proceedings were complete, article 1, § 25 was added to the Alaska Constitution, providing that "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman," ALASKA CONST. art. I, § 25, rendering the superior court's decision moot.

Marriage Act (“DOMA”) in 1996.⁹⁶ DOMA reserved federal recognition of marriage and its accompanying benefits to marriages between one man and one woman, irrespective of whether a couple was regarded as married under state law.⁹⁷ Moreover, it provided that no state would be required to recognize a same-sex marriage that was treated as a marriage under the laws of another state.⁹⁸ A constitutional amendment to similar effect was twice proposed but failed to secure sufficient support on either occasion.⁹⁹ Around the same time, two other states, Nebraska¹⁰⁰ and Nevada,¹⁰¹ amended their constitutions in a manner designed to preclude court decisions extending the right to marry to same-sex couples.

The catalyst for the dozens of other state-level constitutional bans on same-sex marriage over the past decade was a 2003 decision of the Massachusetts Supreme Judicial Court. *Goodridge v. Department of Public Health*¹⁰² was the first decision in which a state law prohibiting same-sex marriage was struck down, leading to the first legally recognized same-sex marriages solemnized in the United States on May 17, 2004.¹⁰³ *Goodridge* can be viewed as a major step forward for gay rights and marriage equality, but it also provoked a furious backlash across the country, galvanizing opponents of marriage equality and politicizing the issue to an extraordinary degree.¹⁰⁴ Gay rights activists and their supporters found that constitutional litigation in pursuit of a fundamental right was a limited strategy when faced with largely hostile public opinion.¹⁰⁵ Although a small number of other states—mostly on the northeastern seaboard—gradually followed the lead of Massachusetts, the majority of states viewed *Goodridge* as a symbol of

96. See KLARMAN, *supra* note 7, at 61 (“Republican lawmakers repeatedly referred to developments in Hawaii to justify [DOMA].”).

97. DEFENSE OF MARRIAGE ACT, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

98. See *id.*

99. H.R.J. Res. 106, 108th Congress (2004), entitled “Proposing an amendment to the Constitution of the United States relating to marriage,” was introduced in the House on September 23, 2004, and proposed to add an amendment to the U.S. Constitution providing, “Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman,” *id.* § 2. Although it secured a majority of 227 to 186 in the House, this fell a significant distance short of the two-thirds requirement of Article V of the U.S. Constitution. Subsequently, on June 6, 2006, H.R.J. Res. 88, 109th Congress (2006), entitled “Proposing an amendment to the Constitution of the United States relating to marriage,” was introduced in the House, proposing an identical amendment. Although it secured a slightly larger majority of 236 to 187, it was still far short of the necessary 290 votes. See KLARMAN, *supra* note 7, at 105, 115–16.

100. See NEB. CONST. art. I, § 29.

101. See NEV. CONST. art. I, § 21.

102. 798 N.E.2d 941 (Mass. 2003).

103. Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES (May 17, 2004), <http://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html?pagewanted=all&src=pm>, *archived at* <http://perma.cc/0TupGc16jU5>.

104. KLARMAN, *supra* note 7, at 89–118.

105. *Id.*

what their judges might do if left to their own devices. Prompted by *Goodridge*, thirteen states passed amendments against same-sex marriage to their constitutions in 2004, and an additional thirteen states had followed suit by 2008.¹⁰⁶

C. California

The battle over the right of same-sex couples to marry in California has been the ultimate tug of war between the voters and the courts since 2000, when voters in California approved Proposition 22, a ballot initiative measure enacting legislation that limited the recognition of marriage to those consisting of one man and one woman.¹⁰⁷ This extended the existing ban on same-sex marriages in California to additionally preclude the recognition of same-sex marriages solemnized elsewhere.

1. State Proceedings

In its judgment in *In re Marriage Cases* in 2008, the California Supreme Court struck down the statutory provisions limiting marriage to opposite-sex couples as violations of the state's constitutional guarantees of equality and the right to marry.¹⁰⁸ The court held that the right to marry was protected under both the due process and right to privacy clauses of the California Constitution,¹⁰⁹ this protection extended to same-sex couples,¹¹⁰ and allowing same-sex couples access to domestic partnership but not to marriage potentially impinged on their right to marry.¹¹¹ Importantly, the court held that differential treatment on grounds of sexual orientation was a suspect classification.¹¹² Because the challenged statutory provisions failed to satisfy the strict scrutiny test, they were struck down as unconstitutional.¹¹³

The nature of California's particularly strong brand of direct democracy is such that the issue was never likely to rest there. The supporters of Proposition 22 immediately sought to overturn the decision of the California

106. *Id.*

107. CAL. FAM. CODE §§ 300, 308.5 (Deering 2013).

108. 43 Cal. 4th 757, 810 (Cal. 2008).

109. *Id.*; see CAL. CONST. art. I, §§ 1, 7.

110. *In re Marriage Cases*, 43 Cal. 4th at 829.

111. *Id.* at 831. The California Supreme Court's analysis seems to suggest that its decision to strike down the law was based on equal protection analysis only, and that there was no independent finding of a violation of the right to marry under the due process clause. The relevance of the due process right to marry to the decision was simply to establish that a fundamental right was being impinged on, thereby triggering strict scrutiny. What was less clear was whether the court was of the view that a right could only be deemed "fundamental" for the purposes of triggering strict scrutiny in equal protection analysis if it is independently protected under the due process clause. It has been argued in the context of the U.S. Constitution that this is not necessary, and that a right can be deemed fundamental for the purposes of equal protection analysis without being recognised as such under the Due Process Clause. See Tebbe & Widiss, *supra* note 86, at 1412–21.

112. *In re Marriage Cases*, 43 Cal. 4th at 844.

113. *Id.* at 855–56.

Supreme Court by way of Proposition 8, an initiative constitutional amendment designed to insert the definition of marriage as a union of one man and one woman into the text of the California Constitution. The following November, after a campaign in which total spending was estimated to be between seventy million¹¹⁴ and eight-five million dollars¹¹⁵ (over ten times the average spending on a California initiative campaign¹¹⁶), Proposition 8 was approved by California voters.¹¹⁷

Still, the matter did not end there; opponents of Proposition 8 challenged the validity of the amendment itself in *Strauss v. Horton* in 2009.¹¹⁸ At issue was the California Constitution's distinction between constitutional amendments and constitutional revisions, and the provision that the initiative process may only be used for amendments.¹¹⁹ Opponents argued that Proposition 8 effected such a fundamental change that it constituted a revision, and was therefore an illegitimate use of the initiative process.¹²⁰ The Attorney General for California raised the additional argument that Proposition 8 was not a valid amendment because the California Constitution describes the rights that it guarantees as being "inalienable"¹²¹—that is, rights that cannot be taken away—and yet Proposition 8 took away the right to marry from gays and lesbians.¹²² The California Supreme Court rejected both of these arguments, holding that Proposition 8 was a valid amendment and the last word in California state law.¹²³ Simultaneously, however, it held that Proposition 8 did not have the effect of invalidating the approximately 18,000 same-sex marriages that had been solemnized in California during the six months between *In re Marriage Cases* and Proposition 8.¹²⁴

114. William N. Eskridge, Jr., *The California Proposition 8 Case: What Is a Constitution For?*, 98 CAL. L. REV. 1235, 1237 (2010) [hereinafter Eskridge, *What Is a Constitution For?*].

115. KLARMAN, *supra* note 7, at 122 (describing Proposition 8 as "the most expensive ballot contest in American history"). Klarman states that roughly half of the funding for the proponents (fifteen to twenty million dollars) was donated by the Mormon Church, while major corporations including Apple and Google provided funding to the opponents. *Id.*

116. A study of 137 citizen-qualified initiative campaigns in California from 1976 to 2004 estimates that, adjusted for inflation, the average total campaign spending was \$6 million, with an average of \$3.6 million in support and \$2.4 million in opposition. See John M. de Figueiredo et al., *Financing Direct Democracy: Revisiting the Research on Campaign Spending and Citizen Initiatives*, 27 J.L. ECON. & ORG. 485, 490 (2011).

117. Proposition 8 became CAL. CONST. art. I, § 7.5, *repealed by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

118. 46 Cal. 4th 364 (Cal. 2009).

119. See CAL. CONST. art. 18.

120. *Strauss*, 46 Cal. 4th at 386 (citing CAL. CONST. art. XVIII); see also William N. Eskridge, *The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CAL. L. REV. 1785, 1835–38 (2009) [hereinafter Eskridge, *The Marriage Cases*].

121. CAL. CONST. art. I, § 1.

122. *Strauss*, 46 Cal. 4th at 390 (citing CAL. CONST. art. I, § 1).

123. *Id.* at 457, 466–69.

124. *Id.* at 470–74.

2. Federal Proceedings

Strauss v. Horton may have been the last word under California state law, but the California Constitution remains subject to judicial review under the U.S. Constitution.¹²⁵ The saga continued when Proposition 8 was challenged in federal court. In 2010, in *Perry v. Schwarzenegger*, the District Court for the Northern District of California ruled that Proposition 8 was unconstitutional as a violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹²⁶ In one respect, the decision was arguably broader than that of the California Supreme Court in *In re Marriage Cases*, in that it clearly included an independent finding of a violation of the Due Process Clause.¹²⁷ Unlike in *In re Marriage Cases*, *Perry v. Schwarzenegger*'s reliance on the Due Process Clause was not confined to establishing whether the right to marry was a fundamental right that triggered strict scrutiny under the Equal Protection Clause.¹²⁸ The district court held that Proposition 8 placed an unconstitutional burden on the right to marry by denying that right to same-sex couples without a legitimate—let alone compelling—reason.¹²⁹ Yet, in another crucial respect, the reasoning was somewhat narrower: unlike the California Supreme Court, the district court did not apply strict scrutiny to Proposition 8 on the basis of sexual orientation being a suspect classification for the purposes of equal protection analysis.¹³⁰ Instead, the court held that the differential treatment involved in restricting same-sex couples to a culturally inferior institution of domestic partnership failed to survive even the more deferential rational basis standard of review, as it was not rationally connected to a legitimate state interest.¹³¹

A critical twist came when the California executive branch elected not to appeal the district court's ruling in *Perry v. Schwarzenegger*. The official proponents of Proposition 8 sought to appeal the decision in the executive's stead, and when the case was heard by the Ninth Circuit as *Perry v. Brown*, the question arose of whether they had standing to do so.¹³² The Ninth Circuit certified a question to the California Supreme Court, asking whether the proponents of Proposition 8 had authority to assert the state's interest in defending the constitutionality of the initiative when public officials had refused to do so.¹³³ The California Supreme Court replied in the

125. Cf. U.S. CONST. art. VI, cl. 2.

126. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

127. See *id.* at 991 (describing the claims based on the Due Process Clause and Equal Protection Clause as "independently meritorious").

128. For an analysis of the relationship between the Due Process Clause and the Equal Protection Clause in the context of the right to marry, see generally Tebbe & Widiss, *supra* note 86, at 1412–21.

129. 704 F. Supp. 2d, at 995.

130. See *id.* at 997.

131. *Id.* at 997–1002.

132. 671 F.3d 1052 (9th Cir. 2012).

133. See *id.* at 1070.

affirmative, holding that under California law, official proponents of directly enacted laws are entitled to assert the state's interest in their validity.¹³⁴ The Ninth Circuit agreed,¹³⁵ stating, "California's conferral upon proponents of the authority to represent the People's interest in the initiative measure they sponsored is consistent with that state's unparalleled commitment to the authority of the electorate."¹³⁶

With the standing question resolved, the appeal proceeded on two grounds. Along with the substantive argument relating to whether Proposition 8 violates the U.S. Constitution, another ground of appeal was that the author of the district court's opinion, Judge Vaughan Walker, was openly gay and in a long-term relationship with another man. The proponents of Proposition 8 argued that this gave him a personal interest in the outcome of the case and that he should have recused himself.¹³⁷ The Ninth Circuit had little difficulty unanimously disposing of the complaint about Judge Walker.¹³⁸

On the core question of whether Proposition 8 violated the U.S. Constitution, the court split two to one, with the majority dismissing the appeal and upholding the district court's finding that Proposition 8 was unconstitutional.¹³⁹ However, the majority opinion further narrowed the grounds of the decision, focusing on the fact that the right to marry had been constitutionally guaranteed to same-sex couples in California after *In re Marriage Cases* and was then taken away by Proposition 8 in a very deliberate and targeted way.¹⁴⁰ The court thus avoided addressing the questions of whether same-sex couples have the right to marry under the Due Process Clause of the U.S. Constitution or whether legislation prohibiting same-sex couples from marrying violates the Equal Protection Clause. What mattered, according to the majority, was that Proposition 8 had taken away from one group a right previously enjoyed on an equal basis as everyone else (after *In re Marriage Cases*) without a legitimate justification.¹⁴¹ The majority analogized Proposition 8 to the law at issue in *Romer v. Evans*,¹⁴² in which the Supreme Court struck down an initiative constitutional amendment in Colorado that had been designed to invalidate a range of municipal legislative provisions enacted to protect gays and lesbians against discrimination.¹⁴³ The court understood *Romer* to stand for the proposition that a right en-

134. See *Perry v. Brown*, 52 Cal. 4th 1116, 1165 (Cal. 2011).

135. See *Perry v. Brown*, 671 F.3d 1052, 1071 (9th Cir. 2012) (citing *Karcher v. May*, 484 U.S. 72 (1987)).

136. *Id.* at 1072–73.

137. See *id.* at 1095.

138. See *id.* at 1095–96.

139. *Id.* at 1095.

140. See *id.* at 1076–80.

141. See *id.* at 1080–81.

142. See *id.* at 1080–82 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

143. *Romer*, 517 U.S. at 635–36.

joyed on an equal basis, once granted, cannot be taken from a particular class of citizens in a targeted way without legitimate justification.¹⁴⁴

Proposition 8 effectively violated the principle of non-retrogression¹⁴⁵ as it could not have been rationally connected to the legitimate interests claimed by its proponents—namely, furthering the state’s interest in responsible procreation and optimal parenting—because California’s domestic partnership laws treated same-sex couples identically to opposite-sex couples in every respect, including parenting and adoption, other than the title bestowed on them.¹⁴⁶ Accordingly, Judge Reinhardt, writing for the majority, stated that “Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.”¹⁴⁷ A subsequent application seeking en banc review by the Ninth Circuit was rejected,¹⁴⁸ and proponents of Proposition 8 petitioned the Supreme Court for a writ of certiorari.¹⁴⁹ Importantly, the Ninth Circuit’s narrowing of the grounds of decision may have been calculated to eliminate any substantial federal question, thereby reducing the likelihood of Supreme Court review.¹⁵⁰

While the Supreme Court granted certiorari in *Hollingsworth v. Perry*,¹⁵¹ it effectively declined to decide the case with a 5-4 ruling that the petitioners, proponents of Proposition 8, lacked standing to invoke the power of a federal court once the California executive had declined to do so.¹⁵² The majority disagreed with the approach taken by the Ninth Circuit, holding instead that the interest of official proponents of a directly enacted law in that law ends with its enactment.¹⁵³ As Proposition 8’s proponents had not been ordered to do or refrain from doing anything, they had no interest in its enforcement beyond a “generalized grievance,” and this grievance was insufficient to confer standing.¹⁵⁴ The Ninth Circuit ruling was vacated, and the case was remanded with instructions to dismiss the appeal, leaving

144. See *Perry*, 671 F.3d at 1080–86.

145. *Id.* at 1080–89. For analysis of the non-retrogression principle as previously applied by the Supreme Court, see generally John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211 (1988).

146. 671 F.3d at 1086–89.

147. *Id.* at 1063–64.

148. Ethan Bronner, *Same-Sex Marriage Issue Moves Closer to Justices*, N.Y. TIMES (June 5, 2012), http://www.nytimes.com/2012/06/06/us/court-wont-revisit-ruling-on-gay-unions.html?_r=0, archived at <http://perma.cc/G3XP-NLBG>.

149. *California: Justices Are Asked to Rule on Marriage Ban*, N.Y. TIMES (July 31, 2012), <http://www.nytimes.com/2012/08/01/us/california-justices-are-asked-to-rule-on-marriage-ban.html>, archived at <http://perma.cc/J6Q3-BQDW>.

150. See discussion *infra* Part III.

151. Adam Liptak, *Justices to Hear Two Challenges on Gay Marriage*, N.Y. TIMES (Dec. 7, 2012), <http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html>, archived at <http://perma.cc/BL2H-A7JD>.

152. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

153. See *id.* at 2662–63.

154. *Id.* at 2662.

the district court's decision intact¹⁵⁵ and lifting the stay on same-sex marriages taking place in California.¹⁵⁶

On the same day—two years after the Obama Administration expressed the view that DOMA was unconstitutional and declined to defend it in court while continuing to enforce it for administrative purposes¹⁵⁷—the Supreme Court struck down DOMA's restriction of federal benefits to heterosexual couples as a violation of the Due Process Clause of the Fifth Amendment.¹⁵⁸ However, this decision did not disrupt *Hollingsworth v. Perry*'s silence on the question of whether the U.S. Constitution requires states to recognize same-sex marriage.

III. CONSTITUTIONAL AMENDMENT, JUDICIAL RESTRAINT, AND ALEXANDER BICKEL

The same-sex marriage litigation in California and the Proposition 8 cases in the federal courts provide an illustration of two different models of how controversies over rights are resolved. In California, the people have the opportunity to very directly influence rights controversies through the initiative process, and can quite easily reverse a court decision of which they disapprove (within the limits imposed by the U.S. Constitution, and subject to review by the federal courts).¹⁵⁹ By contrast, at the federal level, the Supreme Court will tend to have the final say over rights controversies in cases where it chooses to enter the fray.¹⁶⁰ In this context, it is worth recalling the argument set out above as to why judges should exercise restraint in cases of this sort: that judges are less well-placed than the elected branches of government to construct the people's opinions on controversial rights issues.¹⁶¹ Accordingly, if the people's fundamental commitments on a morally controversial issue are unclear, or where those commitments are in a state of flux, judges should avoid banishing the issue from the political forum by substituting their views for that of the elected organs. If it is unclear what the people's fundamental commitments are on the issue of same-sex marriage, or if those commitments are in a state of flux, it should be left to the political process to work this out; judges should avoid declar-

155. *Id.* at 2668.

156. See Malia Wollan, *California Couples Line Up to Marry After Stay on Same-Sex Marriage Is Lifted*, N.Y. TIMES (June 29, 2013), <http://www.nytimes.com/2013/06/30/us/california-couples-line-up-to-marry-after-stay-on-same-sex-marriage-is-lifted.html>, archived at <http://perma.cc/Z6LC-GPQG>.

157. U.S. Dep't of Justice Office of Pub. Affairs, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>, archived at <http://perma.cc/0AoeXmadoR8/>.

158. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

159. U.S. CONST. art. VI, cl. 2.

160. This "final" say may be revisited in the future, but realistically, this will happen in another Supreme Court decision rather than by way of constitutional amendment. See *supra* note 15.

161. See, e.g., ELY, *supra* note 48, at 67.

ing one or another fundamental commitment as a principle of constitutional law.

However, the idea that declaring a commitment as a principle of constitutional law banishes that issue from the political forum is premised on the assumption that it is difficult, if not impossible, to reverse that decision by democratic means. This assumption, though, does not always hold true: given the varying depths of entrenchment of the respective constitutions, the same-sex marriage litigation in California and in the U.S. federal courts provides much insight on the question of whether the availability of a majoritarian response to counter-majoritarian judicial review justifies a less restrained posture on the part of courts interpreting rights provisions. As a theoretical foundation for this analysis, an ideal starting point is Bickel's classic work that famously characterized judicial review as having a "counter-majoritarian difficulty."¹⁶² This elegant phrase is often quoted in isolation, without regard to the reality that a full reading of *The Least Dangerous Branch* shows that Bickel actually advocated some degree of controversial decision making, even where a majority of citizens might not yet be supportive of those decisions. Nonetheless, Bickel was sensitive to the importance of ultimate public acceptance of a decision, taking inspiration from Abraham Lincoln's view on slavery that one could be firmly committed to a particular principle while simultaneously realizing that it would be impractical to immediately impose that principle on a majority that currently rejects it.¹⁶³ Bickel's theory suggests that a judge might sincerely believe that laws prohibiting same-sex marriage are unconstitutional, but should nonetheless decline to strike them down if that ruling seemed unlikely to gain the acceptance of a majority of the public.

For the purposes of this discussion, the key element of Bickel's work is his focus on the effect of the timing of controversial decisions on constitutional rights. He argued that the Supreme Court should avoid addressing major constitutional controversies of the day at the first invitation, but rather exercise judicial restraint through the passive virtues—devices such as certiorari, standing, and desuetude.¹⁶⁴ In this way, the political branches are invited to act instead, until it becomes clear to the court that such action will not be forthcoming:

[T]he moment of ultimate judgment need not come either suddenly or haphazardly. Its timing and circumstances can be controlled. On the way to it, both the Court and the country travel the paths of the many lesser doctrines, passive and constitutional Over time, as a problem is lived with, the Court does not work in isolation to divine the answer that is right. It has the

162. BICKEL, *supra* note 18, at 16.

163. *See id.* at 65–69.

164. *Id.* at 64–71.

means to elicit partial answers and reactions from the other institutions, and to try tentative answers itself. When at last the Court decides that “judgment cannot be escaped—the judgment of this Court,” the answer is likely to be a proposition “to which widespread acceptance may fairly be attributed,” because in the course of a continuing colloquy with the political institutions and with society at large, the Court has shaped and reduced the question, and perhaps because it has rendered the answer familiar if not obvious.¹⁶⁵

It is noteworthy that one of the illustrations provided by Bickel of an appropriate use of this approach concerns the right to marry—specifically, the case law surrounding bans on interracial marriage. In *Naim v. Naim*, the Supreme Court declined to grant review of a decision of the Supreme Court of Virginia upholding such legislation,¹⁶⁶ even though it seemed to clearly contravene the principles that were at the heart of the Court’s decision in *Brown v. Board of Education* in 1954.¹⁶⁷ While others have disagreed,¹⁶⁸ Bickel argued that this was entirely appropriate, on the basis that the degree of southern opposition to *Brown*’s school desegregation ruling—and the emphasis placed in that opposition on the question of racial “purity”—made a paradigm shift on interracial marriage unwise at that time.¹⁶⁹ In any event, segregation was invalidated in a variety of other fora, such as public transport and civic amenities, before the Supreme Court eventually struck down the legislation challenged in *Naim* in *Loving v. Virginia* in 1967.¹⁷⁰ The potential parallels with same-sex marriage litigation are striking.¹⁷¹

Bickel’s position was not that the federal judiciary should slavishly follow public opinion. He emphasized the importance of principle, but argued that “[n]o good society can be unprincipled; and no viable society can be principle-ridden . . . and as often as not in matters of the widest and deepest concern . . . both requirements exist most imperatively side by side: guiding principle and expedient compromise.”¹⁷² Thus, in controversial cases where political sensitivities might prevent the federal judiciary from hand-

165. *Id.* at 240.

166. *Naim v. Naim*, 350 U.S. 891, 891 (1955) (per curiam), *appeal dismissed* 350 U.S. 985 (1956) (per curiam).

167. 347 U.S. 483 (1954).

168. See generally, e.g., Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964); Richard Delgado, *Naim v. Naim*, 12 NEV. L.J. 525 (2012).

169. BICKEL, *supra* note 18, at 174.

170. 388 U.S. 1 (1967).

171. See William N. Eskridge, Jr., *The Ninth Circuit’s Perry Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93, 96–97 (2012) [hereinafter Eskridge, *Perry Decision*].

172. BICKEL, *supra* note 18, at 64. This kind of expedient compromise and pragmatism has been described by Eskridge as “practical reasoning,” whereby a court can sometimes determine what is right in a specific case even without a universal theory of what is right. Eskridge, *What Is a Constitution For?*, *supra* note 114, at 1244–47. Eskridge uses this label to characterize the decision of the California Supreme Court in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), which rejected a challenge to Proposition

ing down a bright-line decision on a point of principle, he advocated the value of proceeding “through phases of compromise and expedient muddling-through.”¹⁷³ He accepted that “[t]he Court is a leader of opinion, not a mere register of it,” but stressed that “it must lead opinion, not merely impose its own.”¹⁷⁴ Accordingly, the heart of his argument for our purposes is that “the Court’s principles are required to gain assent, not necessarily to have it;”¹⁷⁵ this assent must be forthcoming “in a rather immediate foreseeable future.”¹⁷⁶ Various commentators have taken a similar normative stance on controversial cases in the realm of constitutional theory,¹⁷⁷ public choice theory,¹⁷⁸ and gay rights scholarship.¹⁷⁹

Bickel’s theory requires courts to aim to make decisions on constitutional rights that are capable of gaining acceptance and that avoid sparking backlash. In this way, his insistence that courts rule on principled grounds, but with one eye to expediency, has been criticized for effectively sacrificing principle for expediency. For instance, Gerald Gunther stated that Bickel’s theory consisted of “100% insistence on principle, 20% of the time.”¹⁸⁰ Gunther argued that if bans on interracial marriage conflicted with constitutional principle, the Supreme Court should have so ruled in *Naim v. Naim*, and that there was no justification for declining to do so.¹⁸¹ Moreover, Gunther pointed out that while Bickel criticized judicial reasoning that obscures the true motivation underlying a decision, the passive virtues

8’s validity as an amendment to the California Constitution, *see id.* at 63–64. The label might be equally applied to the federal courts’ treatment of the Proposition 8 litigation. *See infra* Part V.

173. BICKEL, *supra* note 18, at 65.

174. *Id.* at 239.

175. *Id.* at 251; *cf.* Ackerman, *supra* note 2, at 1789–93 (arguing that *Brown* only received “canonization” as a “superprecedent” retroactively).

176. BICKEL, *supra* note 18, at 239; *see also* Friedman, *Dialogue*, *supra* note 15, at 599 (arguing that although courts need not simply reflect the existing views of society, they know that they need to persuade the majority if their decision is to gain acceptance, which imposes a majoritarian constraint on judicial review).

177. Sunstein argues that for prudential reasons, judges should avoid making decisions that risk provoking extreme public backlash, and that same-sex marriage is possibly one such case. Sunstein, *The Right to Marry*, *supra* note 86, at 2113–14; SUNSTEIN, *OF MANY MINDS*, *supra* note 52, at 125–39.

178. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 146–52 (1991) (praising the cautious approach taken to the invalidation of contraception laws, where challenges were rejected in *Tilston v. Ullman*, 318 U.S. 44 (1943), and *Poe v. Ullman*, 367 U.S. 497 (1961), before being upheld in *Griswold v. Connecticut*, 381 U.S. 479 (1965)). Farber and Frickey argue:

The Court was properly hesitant, we think, to decide whether the legislature of Connecticut had the power to forbid the use of contraceptives when such great doubt existed about whether the people of Connecticut really wanted to do so . . . [P]articlarized attention to political detail, coupled with the avoidance tactics that Bickel termed “passive virtues,” ought to be part of the judicial arsenal.

Id. at 148. They further argue that a similar course should have been adopted in *Roe v. Wade*, 410 U.S. 113 (1973). *Id.* at 146–52.

179. *See, e.g.*, Eskridge, *The Marriage Cases*, *supra* note 120, at 1839–40; Eskridge, *Perry Decision*, *supra* note 171, at 96–97.

180. Gunther, *supra* note 168, at 3.

181. *Id.* at 12–13, 23–24.

fall into the very same trap.¹⁸² The reason for this is that Bickel's prescription that judges should avoid sparking backlash created a major difficulty for his theory: judges who explicitly state that they are declining to rule on an issue to avoid backlash risk creating a heckler's veto on decisions involving major rights controversies.¹⁸³ The more willing that courts appear to be to factor backlash into their decisions, the more incentive there is for the hecklers to heckle and to do so loudly and intemperately. Bickel sought to avoid supporting a heckler's veto by failing to measure up to his own call for judicial candor; under his theory of the passive virtues, courts would nevertheless obscure their reasoning behind a doctrinal smokescreen. The decisions of the Ninth Circuit in *Perry v. Brown*¹⁸⁴ and the Supreme Court in *Hollingsworth v. Perry*¹⁸⁵ were arguably a classic instance of a court doing just that. These cases correctly balanced principle with expediency, in line with Bickel, but the reasoning employed suffered from a lack of transparency, along the lines criticized by Gunther.

Bickel argued that if assent to a decision did not materialize in the "rather immediate foreseeable future,"¹⁸⁶ the residual power of the people to reverse a constitutional interpretation with which they disagree "is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only."¹⁸⁷ Thus, to Bickel, the conundrum presented by the counter-majoritarian difficulty could ultimately be overcome by way of constitutional amendment.¹⁸⁸ His approach is compatible with the framework of shallow commitments and fundamental commitments set out above: decisions that frustrate a shallow commitment in defense of a fundamental commitment to a constitutional right are not really counter-majoritarian—they just seem so temporarily. Decisions that frustrate a deep, long-term commitment are counter-majoritarian, but the overall democratic legiti-

182. *Id.* at 14.

183. The term "heckler's veto" was originally coined by Harry Kalven, Jr. to describe a situation where a person's First Amendment right to free speech could be vetoed by others who create a public disturbance that forces the silencing of the speaker to uphold public order. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140 (1965). In this context, it has been used to describe a situation whereby attempts are made to prevent the Supreme Court from deciding a case a particular way through vociferous public opposition to that outcome. See, e.g., SUNSTEIN, *OF MANY MINDS*, *supra* note 52, at 158; Eskridge, *Perry Decision*, *supra* note 171, at 97. See *infra* Part V.

184. 671 F.3d 1052 (2012).

185. 133 S. Ct. 2652 (2013).

186. BICKEL, *supra* note 18, at 239.

187. *Id.* at 258.

188. See also Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto"*, 22 HASTINGS CONST. L.Q. 325, 342 (1994–1995) ("The judicial branch can alter constitutional understandings through interpretation, but the principle that the Supreme Court is subject to the checks and balances of constitutional amendments is demonstrated beyond peradventure by the six amendments ratified to reverse Supreme Court holdings."). But see Ruth Bader Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. ARK. LITTLE ROCK L.J. 677, 679 (1989–1990) (putting the number of amendments ratified to reverse Supreme Court rulings at just four).

macy of judicial review is preserved if the people can reassert their fundamental commitments through the amendment process, a factor which also mitigates concerns around the institutional competence of judges to construct or predict the fundamental commitments of the people. Where fundamental commitments are in a state of flux, Bickel argued that judges should attempt to predict the direction and pace of change. If the direction of change cannot be predicted or is too far in the future, the federal judiciary should refrain from decisively ruling either way by making use of the passive virtues.

In the decades since *The Least Dangerous Branch* was written, it has become increasingly clear that constitutional amendments in response to decisions of the Supreme Court are more of a theoretical possibility than a practical one. As long ago as 1985, Stephen Carter argued that the amendment process of Article V was “very nearly a dead letter. The contention that it provides a realistic check on judicial activity is at best wishful thinking, certainly somewhat naïve, and at worst disingenuous.”¹⁸⁹ Bruce Ackerman has written at length about how constitutional change is now achieved almost entirely through political movements and transformative judicial appointments, observing that this strategy is employed by Republicans as well as Democrats, notwithstanding the former’s avowed preference for originalism.¹⁹⁰ He cautions, “Whatever the future may hold, don’t expect big changes through formal amendments. We the People can’t seem to crank out messages in the way described by Article V of our Constitution.”¹⁹¹ Thus, while Bickel saw a limited role for aggressive court decisions, a key plank of his justification of such decisions loses force in the present day.

This political reality fuels the argument that the federal judiciary should refrain from adjudicating on rights issues that are the subject of intense political controversy. The virtual impossibility of amending the Constitution effectively makes a Supreme Court ruling the final say on an issue if there is no readily available majoritarian response to counter-majoritarian judicial review. Of course, apart from Article V, constitutional politics can be used to push back against an unpopular court decision in the hope of achieving a modification or reversal of it by a later court. Elements of constitutional politics include presidential and congressional elections, which can in turn generate judicial appointments and legislation that tests the limits of court decisions.¹⁹² However, this process takes a sustained effort

189. Steven L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 842 (1985).

190. Ackerman, *supra* note 2, at 1741–42.

191. *Id.* at 1742–43.

192. See, e.g., Friedman, *Dialogue*, *supra* note 15, at 580–81 (arguing that constitutional interpretation involves all three branches of government, and that the Constitution is interpreted “through an elaborate dialogue” between the branches as to its meaning); *id.* at 662–63 (describing how *Roe v. Wade* “was followed by an onslaught of legislation aimed at abortion rights, running the gamut from open

over an extended period of time, and for the duration of that period, the counter-majoritarian nature of the decision and the seeming inability of the people to overturn it through democratic means can generate vocal criticism of the legitimacy of judicial review and equally vocal calls for greater judicial restraint. All of this combines to strengthen the case for the federal courts to adopt a highly restrained and deferential posture.

However, not every constitution is as difficult to amend as the U.S. Constitution. In many jurisdictions, a democratic, majoritarian response to a court decision is more readily available—indeed, in some jurisdictions, such as California, it is quite readily available. This raises the question of whether the argument for judicial restraint is as strong in jurisdictions where the amendment process offers a readily accessible external constraint on judges who are seen as having usurped the democratic process. This is not to suggest that judges in such jurisdictions need not feel any need for restraint. Rather, it is to question the extent to which the optimal level of judicial restraint could be proportional to the level of constitutional entrenchment as defined by amendment mechanisms. In other words, where entrenchment is less deep and amendment is more readily available, can judges feel more comfortable about deciding a question of fundamental rights by reference to purely principled considerations and worry less about judicial restraint or political expediency? Answering this question requires a consideration of the relative strength of both constitutional entrenchment, discussed in Part IV, and political climate, discussed in Part V.

IV. CONSTITUTIONAL ENTRENCHMENT

In considering whether relative ease of amendment might justify a less restrained role for courts, the first factor to explore is the level of constitutional entrenchment as defined by structural mechanisms for amendment and the political culture—which may include democratic defects—in which they operate.

A. *Easier Amendment, Greater Restraint?*

Numerous scholars have observed that the more difficult a constitution is to change, the less detailed it can realistically be; the easier it is to change, the more detailed it can be, and the more it can resemble ordinary legislation, both in content and in the way it is regarded.¹⁹³ The constitutions under consideration bear out this generalization: the deeply entrenched U.S.

challenge to optimistic subterfuge”); *see also* Ackerman, *supra* note 2 (arguing that the interpretation of the Constitution is shaped over time by political movements that bring about landmark statutes and “superprecedents”); BALKIN, *supra* note 2 (arguing that the interpretation of the Constitution by the Supreme Court is influenced over time by popular opinion as expressed through elections, legislation, and judicial appointments).

193. *See generally* Lutz, *supra* note 34; EISGRUBER, *supra* note 42, at 17, 35.

Constitution runs to just 7,400 words, while the extremely easily amended California Constitution falls just short of a staggering 70,000 words. Additionally, it is natural that where a constitution is easier to amend, the power of amendment tends to be utilized with greater frequency.¹⁹⁴

At a basic level, under a more detailed and more easily amended constitution, opportunities for judicial activism are less likely to arise; the detail in the text is such that controversies as to constitutional meaning will be less frequent. However, even relatively detailed constitutions still contain open-textured language that leaves significant room for judicial interpretation, especially in provisions setting out fundamental rights. For all of their detail, the due process and equal protection clauses of the California Constitution¹⁹⁵ are no clearer on the question of a right to marry than their counterparts in the Fourteenth Amendment to the U.S. Constitution. Indeed, some analogous marriage cases in these two jurisdictions have reached largely similar conclusions.¹⁹⁶

Because more easily amended constitutions will still contain some vague provisions whose meaning will be disputed, the key objection to a less restrained role for courts channels the political question doctrine: where the amendment process is relatively accessible, it has the capacity to provide political solutions to major rights controversies such as same-sex marriage. If the constitutional position is unclear, and society is divided on what it should be, it could be argued that courts in systems with relative ease of amendment should be inclined to step back and leave it to the amendment process to resolve such controversies, keeping the constitution in step with social change. On this view, greater ease of amendment might be a factor militating in favor of judicial restraint rather than justifying less restraint, and the California Supreme Court in *In re Marriage Cases* perhaps should have told the plaintiffs that the appropriate forum for them to press their claim to a right to marry was the initiative process and not the courts.

However, the dynamics of constitutional change are not necessarily so straightforward; constitutional entrenchment is defined not only by formal amendment requirements, but also by democratic defects that impact the political culture of entrenchment.¹⁹⁷ Just as the people may have greater experience with the amendment process in some jurisdictions, there are times when the amendment process has a built-in inertia, and consequently it is not realistic to expect it to be capable of providing a satisfactory political solution. When courts are reviewing the constitutionality of legislation,

194. See Lutz, *supra* note 34, at 262.

195. CAL. CONST. art. I, § 7.

196. Compare *Turner v. Safley*, 482 U.S. 78 (1987) (striking down a Missouri prison regulation providing that inmates were not permitted to marry without the permission of the warden), with *In re Carrafa*, 77 Cal. App. 3d 788 (1978) (directing the issuance of a writ of habeas corpus directing the California Department of Corrections to permit an inmate at Folsom Prison to marry, after permission had been denied for security reasons).

197. See *supra* Part I.A.

a less restrained role might be warranted in certain categories of cases where the democratic process is characterized by significant defects. Two main categories of cases are relevant here: cases involving the protection of minority rights, and cases involving controversial issues which the political organs consciously prefer not to address.

The first category of cases in which constitutional amendment is inherently more difficult than usual, and thus not a realistic alternative to judicial exposition of constitutional meaning, is when minorities are seeking protection of their rights. Same-sex couples seeking the right to marry are a prime example. As the famous *Carolene Products* footnote four reminds us, members of discrete and insular minorities are particularly susceptible to having their interests disregarded by the elected branches of government, either through neglect or oppression.¹⁹⁸ While John Hart Ely—who built his theory around this footnote—generally advocated judicial restraint in constitutional interpretation, he conceded that deferring to the political process is not an effective vehicle for the protection of minority rights.¹⁹⁹ Similarly, Cass Sunstein has argued that in the context of permanent minority groups like gays and lesbians, who face “obstacles to organization or pervasive prejudice or hostility . . . it would be wrong to indulge the ordinary presumption in favor of democratic outcomes.”²⁰⁰ If courts have an important role to play in protecting minority rights, a court would not fulfill this role by telling minorities that they should pursue a political solution to their situation, thus requiring them to successfully negotiate an inherently majoritarian amendment process.

Similarly, whenever a constitutional amendment requires the involvement of the elected branches of government, a significant danger arises that reform on certain issues will be consciously avoided. In cases likely to generate a polarized reaction, which consequently tend to be deliberately avoided by the elected branches, difficult decisions are often left to a politically insular judiciary, who may face the wrath of the electorate in the media but generally not at the ballot boxes.²⁰¹ Mark Graber has observed such legislative deference to the judiciary on major rights controversies—particularly over moral issues such as abortion—not just in the United States, but in virtually every western democracy.²⁰² Graber argued that only politicians at extreme ends of such debates wish to politicize them; the vast majority,

198. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

199. ELY, *supra* note 48, at 69.

200. SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 47, at 143; *see also* PERRY, *supra* note 23, at 194.

201. An obvious exception is where judges face retention elections. For example, in Iowa, three of the judges who ruled in favor of same-sex marriage in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), were voted out of office in the next election in 2010. *See* KLARMAN, *supra* note 7, at 151–53.

202. Graber noted that in such cases only politicians at extreme ends of the debate wish to politicize the issue through a vote; the vast majority of those in the middle prefer to avoid it altogether. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 53–58 (1993).

taking more moderate views, prefer to avoid them altogether and allow the judiciary to take the political heat for resolving them.²⁰³ While Graber cautioned that judicial resolution of rights controversies tends to be less accommodating of compromise than political solutions, and thus more polarizing of opinion on what are already deeply divisive questions,²⁰⁴ he concludes that when political solutions are clearly not forthcoming, “democratic values are better promoted by having some conflicts resolved by justices appointed and confirmed by elected officials when the practical alternative is not having those conflicts resolved at all.”²⁰⁵ Similarly, where a constitutional amendment requires the involvement of the elected branches of government, there is a significant danger that reform on certain issues will be consciously avoided. Where a history of this tendency can be discerned, the case for judges refraining from adjudicating on the issue in question on the basis that political solutions are more appropriate than judicial ones is less strong. Ultimately, the political solutions rationale for greater restraint is overcome by the need to protect minority rights and account for defects in the democratic process.

B. *Easier Amendment, Less Restraint?*

Several of the key arguments for restraint by the Supreme Court are less persuasive in the context of a court interpreting a constitution that is less entrenched than the U.S. Constitution. These include: 1) that certain issues should be left to the political process, 2) that the political process will be undermined if interest groups turn to litigation rather than lobbying, and 3) that the costs of error are high.

The first argument recalls Justice Scalia’s concern in *Casey* that the difficulty of amending the U.S. Constitution is such that a Supreme Court decision on any given issue is—for a long time, at least—effectively the last word.²⁰⁶ Judicial decision making on major rights controversies is arguably illegitimate because it imposes the decision of an unelected elite while precluding the possibility of a democratic decision by the electorate or their representatives. To this end, Jeremy Waldron noted that where reasonable people disagree, it makes no sense to permanently elevate one side of the debate over the other rather than leave the dispute to majoritarian politics.²⁰⁷ While this is an argument against the very existence of judicial review, within the context of judicial review it implies that judges should

203. *Id.* at 58.

204. *Id.* at 66; see also Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKE FOREST L. REV. 451, 459–65 (2003).

205. Graber, *supra* note 202, at 73.

206. 505 U.S. 833, 1002 (1992). *But see supra* note 15.

207. See generally Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 O.J.L.S. 18 (1993).

narrowly interpret the scope and enforceability of rights, taking a highly restrained and deferential approach in controversial cases.

The second argument is closely related to the first, and is generally attributed to James Bradley Thayer's theory that undue creativity on the part of judges acts as an incentive for people to turn to the courts rather than to the elected organs for solutions to their problems.²⁰⁸ This leads to disengagement from politics, weakening and undermining the democratic process; for that reason, judges should be slow to resolve controversial political disputes.

Finally, it can be argued that where a court interpreting a deeply entrenched constitution claims to speak for the fundamental commitments of society, but misjudges what those commitments are in the context of a particular issue, the costs of error are high.²⁰⁹ An error by the Supreme Court is extremely difficult to rectify.²¹⁰ At this level, a constitutional interpretation that claims to speak for the values of the American people but finds that the American people do not actually share those values is nearly impossible to undo.²¹¹ Opponents of the decision may need to influence a series of consecutive elections, and thus judicial appointments, to alter the ideological composition of the Court.²¹²

208. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

209. See KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 29, 156 (2006) (pointing out that, comparatively speaking, it is much easier to change a law that is not struck down than to reverse a constitutional decision declaring that same law unconstitutional; thus, a decision based on a mistaken reading of consensus carries the cost that it takes the issue away from the democratic process).

210. See discussion *supra* Part III.

211. ELY, *supra* note 48, at 45 ("It may be true that the Court cannot *permanently* thwart the will of a solid majority, but it can certainly delay its implementation for decades . . . and to the people affected, that's likely to be forever." (emphasis in original)).

212. The appointment of a Supreme Court justice requires nomination by the President and confirmation by the Senate. See U.S. CONST. art. II, § 2, cl. 2. Opponents of a Supreme Court decision who wish to bring about its reversal through judicial appointments may thus need to exercise significant influence over both presidential and Senate elections. Because opinions on certain issues (such as abortion, gun control, and same-sex marriage) broadly divide along Democrat and Republican party lines, using judicial appointments to secure the reversal of a Supreme Court decision is an elusive goal. Only once since World War II has either party controlled the presidency for more than two terms—and even then, during the presidencies of Ronald Reagan and George H.W. Bush, the Republicans failed to appoint a Supreme Court majority disposed toward overturning *Roe v. Wade*, 410 U.S. 113 (1973)). Neither party has had a majority in the Senate for longer than eight years since 1981. See generally Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 302, 305, 323–24 (1994) [hereinafter Devins, *Through the Looking Glass*] (discussing the use of judicial appointments to influence constitutional interpretation, particularly in the context of abortion); Bruce Ackerman, *Higher Lawmaking*, in RESPONDING TO IMPERFECTION, *supra* note 34, at 63, 82–84; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381 (2007). Of course, judicial appointments are not the only way to influence the interpretation of the Constitution. But see Ackerman, *supra* note 2, at 1810–11 (observing that the staggering of terms of office for the various branches of government—"two for the House, four for the President, six for the Senate, and life for the Supreme Court"—"makes it almost impossible for a movement-party to gain control over all the levers of power at a single moment, and imposes a more deliberate pace on constitutional revision").

Each of these arguments loses a significant amount of force in a structure where a constitutional amendment in response to a court decision is relatively accessible. Jeffrey Goldsworthy has argued that the existence of a mechanism that allows the majority to override a court's constitutional interpretation offers a way to overcome concerns about democratic legitimacy²¹³ and the political process.²¹⁴ The fact that citizens of California were able to vote on whether to accept the decision of the California Supreme Court in *In re Marriage Cases* at the very next election provides a clear illustration of this point.

Similarly, if a constitutional amendment is a realistic possibility in response to a controversial decision, opposing sides of a dispute have to remain engaged with the political process. When a high court decision is not the last word, people have an incentive to concurrently pursue their cause through political and legal means, because a purely legal strategy is vulnerable to experiencing only short-lived victories. Again, the reversal of *In re Marriage Cases* at the very next election demonstrates the necessity for advocates of same-sex marriage in California to remain engaged with political as well as legal advocacy of their cause. After Proposition 8 was passed, gay rights activists in California seriously considered mounting a campaign to put the issue of marriage equality back on the ballot in 2010.²¹⁵

Finally, as Sunstein argues, where amendments are readily available in response to unpopular court decisions, the costs of error are much lower:

Constitutional change always requires significant effort, as does a legislative override, and judges might not want to force citizens and officials to make that effort if they are unsure that they are right. Anticipating intense public opposition, and humble about their own judgments, courts might hesitate to invalidate legislation even [where amendments are readily available]. But it is clear that they need not hesitate nearly so much if the public has a simple mechanism for response.²¹⁶

Thus, as William Eskridge argues, the judgment in *In re Marriage Cases* may have been possible in part because moderate judges like California

213. See generally Goldsworthy, *supra* note 204 (discussing Section 33 of the Canadian Charter of Rights and Freedoms, which enables legislation to apply “notwithstanding” a judicial decision on the Canadian Charter of Rights and Freedoms).

214. William N. Eskridge, Jr. has observed that the ready availability of a democratic response to *Goodridge* meant that the risk taken by the court there was legitimate because “same-sex marriage [was] not . . . taken out of politics.” William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279, 1328 (2005) [hereinafter Eskridge, *Pluralism and Distrust*].

215. See KLARMAN, *supra* note 7, at 134.

216. SUNSTEIN, *OF MANY MINDS*, *supra* note 52, at 138.

Chief Justice Ronald George knew that the decision could be overturned if it was seriously out of line with the values of the people of California.²¹⁷

How do these arguments square with the previous argument that built-in inertia undermines the case for judicial restraint on certain issues for which the amendment process is unlikely to provide a satisfactory resolution?²¹⁸ It is not always the case that the amendment process is unlikely to be capable of providing a disgruntled electorate with an adequate response to an unpopular court decision. When minority rights issues are involved, the burden of built-in inertia falls disproportionately on the minority group in question. While an unpopular minority is unlikely to be able to bring about a successful constitutional amendment, a majority that genuinely wishes to reverse a court decision will most likely succeed in doing so. However, courts can fulfill an important role that Eskridge calls “reversing the burden of inertia” so that it falls on the politically more powerful group.²¹⁹ The effect of *In re Marriage Cases* was to place the burden on opponents of same-sex marriage, and as it happened, they successfully discharged this burden in passing Proposition 8. In the case of issues that the political branches are avoiding, a controversial court decision can serve the valuable purpose of forcing the issue onto the political agenda; once on that agenda, the built-in inertia has been overcome, and again, a genuine majority opposed to a decision will most likely succeed in passing an amendment reversing it. In this way, courts help to focus and sustain dialogue about constitutional meaning.²²⁰ In this sense, a less restrained role on the part of the court serves to strengthen rather than to undermine the political process.

Taking all of this into account, and tying it into Bickel’s theory in *The Least Dangerous Branch*, it can be argued that, prima facie, the need for a court to adopt a restrained posture in controversial rights cases diminishes as a constitution becomes easier to amend, especially in cases involving minority rights or political avoidance. However, a state court interpreting a

217. Eskridge, *What is a Constitution For?*, *supra* note 114, at 1247. Contrast Eskridge’s argument with Neal Devins’s view that judges are more likely to take the lead on issues such as same-sex marriage in states where constitutions are more difficult to amend. See Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1676–78 (2010) [hereinafter Devins, *State-Centered Constitutionalism*]; Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 491–94 (2010). Devins observes that only two of the seven states where courts ruled in favor of either same-sex marriage or civil partnership have an initiative procedure, and the other five have comparatively deeply entrenched constitutions with low rates of amendment. Devins, *State-Centered Constitutionalism*, *supra*, at 1676–78. As Devins notes, however, these states also have more politically insulated judges that do not have to stand in contested elections, or, if they do, incumbent judges usually gain re-election. See *id.* at 1678. The evidence presented by Devins supporting the link between political insularity and less restrained decision making is arguably stronger than the evidence supporting the link between deeper constitutional entrenchment and less restrained decision making.

218. See discussion *supra* Part IV.A.

219. See generally Eskridge, *The Marriage Cases*, *supra* note 120.

220. See Friedman, *Being Positive*, *supra* note 15, at 1295–96; Friedman, *Dialogue*, *supra* note 15, at 668–71.

constitution that is easier to amend than the U.S. Constitution can afford to hesitate less than the Supreme Court before making a decision that same-sex marriage legislation goes against the people's fundamental commitment to equality, because that judgment can be corrected by democratic means if it proves to be incorrect. A court can be more willing to rule based on pure principle without being as concerned about political expediency once it realizes that its decision carries lower costs of error and will not banish the issue from the political forum or undermine the democratic process. *Prima facie*, therefore, the decision of the California Supreme Court in *In re Marriage Cases* gives rise to fewer concerns regarding the appropriate exercise of the power of judicial review than an equivalent decision of the Supreme Court would. However, this is only part of the story. There may still be some cases in which state courts should be less confident in making a ruling based on pure principle; these will be explored in Part V.

Again, this is not intended to suggest that there is *no* need for restraint where constitutions are relatively easy to amend. Concerns relating to democratic legitimacy²²¹ and institutional competence²²² suggest that courts should always exercise at least some restraint when claiming that their constructions of the fundamental commitments of the people are superior to those of the legislature. The limited argument being offered here is that there is *less* need for restraint; as a constitution shifts along a spectrum of entrenchment toward greater ease of amendment, a court can shift along a spectrum of restraint toward a less restrained posture that allows for more aggressive decisions. In Bickel's language, a court can focus more on making a principled decision and less on political expediency.²²³

V. POLITICAL CLIMATE

There is, of course, a difference between saying that a court could legitimately make a certain decision and saying that it should make that decision. Indeed, Bickel was less concerned with the general question of the legitimacy of judicial review than he was with the question of whether a particular court decision would be likely to generate public approval or significant backlash in the "rather immediate foreseeable future."²²⁴ Applying this to California, where the constitution is relatively easy to amend,

221. See, e.g., Waldron, *supra* note 207, at 42–43 ("On any account of the activity of the US Supreme Court over the past century or so, the inescapable duty to interpret the law has been taken as the occasion for serious and radical revision. There may not be anything wrong with that, but there is something wrong in conjoining it with an insistence that the very rights which the judges are interpreting and revising are to be put beyond the reach of *democratic* revision and reinterpretation. In the end, either we believe in the need for a cumbersome amendment process or we do not." (emphasis in original)).

222. See, e.g., ELY, *supra* note 48, at 67.

223. See generally BICKEL, *supra* note 18, at 64.

224. *Id.* at 239.

state judges should be particularly confident that their decisions are capable of gaining assent. If they lack this confidence, they run the risk of an immediate reversal. Few judges are likely to be happy with such an outcome—it may render their decision futile and undermine their authority and credibility.

Building on Bickel's work, Sunstein argues that there are two main grounds on which public opinion should matter to judges: the consequentialist ground and the epistemic ground.²²⁵ The first holds that where public opinion is strongly opposed to a particular decision, bad consequences may follow from that decision and the courts should avoid making it.²²⁶ The second holds that where a majority of people disagree with the court, this may provide a clue that the court is wrong, and thus a reason for the court to hesitate.²²⁷ Sunstein concludes that the epistemic ground is often "quite fragile," but that the consequentialist ground carries force in rare but important cases.²²⁸ One such case is where a ruling would be futile or even counterproductive by sparking a constitutional amendment overruling it.²²⁹ This consequentialist argument is highly persuasive where the constitution is easy to amend.

Thus, the state of public opinion *should* matter, even to an independent judiciary. More recently, scholars such as Klarman²³⁰ and Friedman²³¹ have persuasively argued that—descriptively speaking—public opinion does matter to the Supreme Court and plays a key role in influencing the outcome of its decisions on major rights controversies. To be sure, not all Supreme Court justices would accept that public opinion is a factor influencing their decision, and some have positively denied that it does or that it should.²³² However, some years after *Brown v. Board of Education*,²³³

225. See Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007) [hereinafter Sunstein, *Should Judges Care?*]; Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213 (2007) (criticizing Sunstein's account on the ground that assessing whether judges should care about popular reactions to their decisions depends upon consideration of deeper commitments that Sunstein deliberately avoids); Cass R. Sunstein, *On Avoiding Foundational Questions: A Reply to Andrew Coan*, 60 STAN. L. REV. 241 (2007) (defending the avoidance of foundational questions in assessing whether judges should care about public reactions to their decisions).

226. Sunstein, *Should Judges Care?*, *supra* note 225, at 170–82.

227. *Id.* at 183–95.

228. *Id.* at 211–12; see also Devins & Mansker, *supra* note 217, at 476–77 (arguing that at the state level backlash is only likely to be an issue in a small number of politically salient cases, as the public are unaware of the majority of state supreme court decisions which do not concern divisive social issues such as abortion, the death penalty, and same-sex marriage).

229. See Sunstein, *Should Judges Care?*, *supra* note 225, at 165.

230. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 446–52 (2005).

231. Friedman, *Dialogue*, *supra* note 15, at 596–600; Friedman, *Being Positive*, *supra* note 15, at 1273–82.

232. This was a major theme in the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865–66 (1992) ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures . . . [T]he

Justice Felix Frankfurter admitted that he would have voted to uphold school segregation in the 1940s because “public opinion had not then crystallized against it,”²³⁴ and in a recent speech, Justice Ruth Bader Ginsburg said that the error of *Roe v. Wade*²³⁵ was one of timing rather than of substance.²³⁶

Friedman has emphasized the need for the Supreme Court to be able to persuade a majority of the public of the correctness of its constitutional interpretation, arguing that this places a majoritarian constraint on the process of judicial review.²³⁷ Klarman has gone further, arguing that the “seismic shift” over time in the status of *Brown v. Board of Education*,²³⁸ “from a much-criticized ruling that divided public opinion to a sacrosanct decision that is well-nigh universally applauded . . . may suggest that the Court’s legitimacy flows less from the soundness of its legal reasoning than from its ability to predict future trends in public opinion.”²³⁹ All of this suggests that, in addition to the possibility of constitutional amendment, the focus on timing and public acceptance of a decision in Bickel’s theory constitutes a second built-in remedy to the counter-majoritarian difficulty. This normative argument has the added attraction of being descriptively accurate, and therefore demonstrably workable in practice.

On the specific issue of same-sex marriage, a federal judge could conceivably decide to take a risk and predict a future where the majority of society supports same-sex marriage. While some have criticized the entire notion of courts predicting the future,²⁴⁰ others have argued that some predictions are safer than others, and that simple demographics make future support for

Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”) They particularly stressed the need for Supreme Court decisions that overrule previous Court decisions to be based on sound legal precedent rather than being nothing more than a reaction to political pressure, arguing that the latter approach “would subvert the Court’s legitimacy beyond any serious question.” *Id.* at 867.

233. 347 U.S. 483 (1954).

234. Klarman, *supra* note 230, at 443.

235. 410 U.S. 113 (1973).

236. David Crary, *Ruth Bader Ginsburg Questions Timing of Roe v. Wade, Gives Hint on Same-Sex Marriage Issue*, HUFFINGTON POST (Feb. 10, 2012), http://www.huffingtonpost.com/2012/02/10/ruth-bader-ginsburg-roe-v-wade-gay-marriage_n_1269399.html, archived at <http://perma.cc/TH8B-L9MP>.

237. Friedman, *Dialogue*, *supra* note 15, at 599; see also Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186 (1992) (“[T]he effective judge . . . strives to persuade, and not to pontificate. She speaks in ‘a moderate and restrained’ voice, engaging in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues.”); William J. Brennan, Jr., *Why Have a Bill of Rights?*, 9 O.J.L.S. 425, 435 (1989) (“High court judges interpreting a bill of rights may at times lead public opinion; but in a democratic society they cannot do so often, or by very much.”); BICKEL, *supra* note 18, at 239 (“The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own.”).

238. 347 U.S. 483 (1954).

239. Klarman, *supra* note 230, at 488.

240. See generally ELY, *supra* note 48, at 69–70 (arguing that by handing down decisions based on predictions of the future, the courts would inevitably shape that future, which he criticised as, among other things, inherently antidemocratic).

same-sex marriage inevitable.²⁴¹ It is conceivable that this is true, but in Bickel's framework the timing of a decision is as important as the accuracy of such a prediction, because the decision must be able to gain assent in the near future. This is where the real doubt on same-sex marriage currently arises from for the Supreme Court, and it is for this reason that prominent scholars such as Sunstein²⁴² and Eskridge,²⁴³ who both believe that legislative prohibitions on same-sex marriage are unconstitutional, nonetheless argue that the Supreme Court should refrain from so ruling for the time being.

Sunstein argues that even though bans on same-sex marriage are difficult to defend from a constitutional perspective, the Supreme Court should be humble in the face of widespread and deep commitment to them and of significant controversy on the issue. For prudential reasons, the Court should avoid seeking to settle the debate so early, and leave room for local experimentation.²⁴⁴ Similarly, Eskridge observes that "the issue is far from ripe at the national level" at a time when states that recognize same-sex marriage are in a clear minority.²⁴⁵ Accordingly, Eskridge argues that a Supreme Court decision in favor of same-sex marriage in the near future "would be unwise" and "risk a ferocious backlash."²⁴⁶ This would be an instance of what Eskridge calls "raising the stakes" of the politics surrounding the issue at hand; he argues that courts should work to prevent this from happening and avoid causing it to happen.²⁴⁷

The theories of Bickel and commentators who have built on his work can be seen in action in the decisions of both the Ninth Circuit in *Perry v.*

241. See, e.g., KLARMAN, *supra* note 7, at 196 ("In 2003–4, Americans opposed gay marriage by roughly two to one. In the summer of 2010, for the first time ever, a national poll showed a majority of Americans supporting gay marriage, by 52 percent to 46 percent. Several subsequent polls corroborated this finding."); *id.* at 202 ("[Nate] Silver finds that by 2012 or 2013, a majority of people in a majority of states will support gay marriage. By 2016, only the states of the Deep South will still resist it. By 2024, even the last holdout, Mississippi, will have a majority in favor of gay marriage." (citing Nate Silver, *Will Iowans Uphold Gay Marriage?*, FIVETHIRTYEIGHT (Apr. 3, 2009), <http://www.fivethirtyeight.com/2009/04/will-iowans-uphold-gay-marriage.html>, archived at <http://perma.cc/3GYN-ZQNK>; Nate Silver, *Analysis: Gay Marriage Ban is Underdog in Maine*, FIVETHIRTYEIGHT (Oct. 1, 2009), <http://www.fivethirtyeight.com/2009/10/analysis-gay-marriage-ban-is-underdog.html>, archived at <http://perma.cc/E6E7-6KRC>; Nate Silver, *The Future of Same-Sex Marriage Ballot Measures*, N.Y. TIMES (June 29, 2011, 10:35 AM), <http://fivethirtyeight.blogs.nytimes.com/2011/06/29/the-future-of-same-sex-marriage-ballot-measures/>, archived at <http://perma.cc/4WTB-ZW6X>)); see also Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What It Means*, N.Y. TIMES (Mar. 26, 2013, 10:10 AM), <http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/>, archived at <http://www.perma.cc/0kzcdEA6GXX>.

242. Sunstein, *The Right to Marry*, *supra* note 86, at 2113–14.

243. Eskridge, *The Marriage Cases*, *supra* note 120, at 1839–40.

244. Sunstein, *The Right to Marry*, *supra* note 86, at 2113–14. Sunstein distinguishes bans on same-sex marriage from the ban on sodomy struck down in *Lawrence v. Texas*, 539 U.S. 558 (2003), on the basis that unlike bans on same-sex marriage, the people were no longer committed to sodomy bans—it was effectively a case of desuetude.

245. Eskridge, *The Marriage Cases*, *supra* note 120, at 1839.

246. *Id.* at 1839–40.

247. Eskridge, *Pluralism and Distrust*, *supra* note 214, at 1324–27.

*Brown*²⁴⁸ and the Supreme Court in *Hollingsworth v. Perry*.²⁴⁹ *Perry v. Brown* might seem to be an unusual example to cite of a court exercising Bickel's passive virtues given that the court ultimately held Proposition 8 to be unconstitutional. However, the court went out of its way to try and prompt the Supreme Court to exercise the passive virtues and disguised this motivation behind a doctrinal smokescreen. The majority on the Ninth Circuit very deliberately narrowed the grounds of the decision from the reasoning put forward in the previous decisions in the California Supreme Court and the district court to avoid the broader due process and equal protection arguments.²⁵⁰

*In re Marriage Cases*²⁵¹ had recognized sexual orientation as a suspect classification triggering strict scrutiny review. The district court decision in *Perry v. Schwarzenegger*²⁵² narrowed the grounds of that decision by declining to recognize sexual orientation as a suspect classification and relying instead on rational basis review. The Ninth Circuit further narrowed the grounds, eschewing any reliance on the Due Process Clause and focusing in its equal protection analysis on specific facts particular to California:²⁵³ 1) Proposition 8 took away a right to marry that same-sex couples previously had,²⁵⁴ and 2) domestic partnership law in California is identical to marriage in all but name.²⁵⁵ Indeed, within days of the decision, a number of commentators strongly criticized the reasoning's artificial nature²⁵⁶ as an attempt to avoid Supreme Court review by not passing judgment on the constitutionality of legislative prohibitions on same-sex marriage in other states.²⁵⁷

Perhaps this was a cynical attempt by the majority to ensure that its decision would be the last word on the matter and would not be overturned by the Supreme Court. However, a more forgiving assessment is that this was a classic case of a court attempting to control the "timing and circum-

248. 671 F.3d 1052 (9th Cir. 2012).

249. 133 S. Ct. 2652 (2013).

250. 671 F.3d at 1076.

251. 43 Cal. 4th 757, 855–56 (Cal. 2008).

252. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

253. It might be questioned whether the situation pertaining in California is really unique, as both Hawaii and Alaska have enacted constitutional amendments that effectively reversed a state court decision in favor of same-sex marriage. However, a key distinction can be drawn between those two states and California: the right to marry never became operable for same-sex couples in either Hawaii or Alaska.

254. 671 F.3d at 1079–80.

255. *Id.* at 1065, 1076–78.

256. See, e.g., Vikram Amar, *Revisiting Standing: Proposition 8 in the Ninth Circuit*, JURIST (Feb. 16, 2012), <http://www.jurist.org/forum/2012/02/vikram-amar-marriage-standing.php>, archived at <http://perma.cc/4SES-DPQA>; Editorial Board, *Proposition 8 Ruling Was Just But Wobbly*, WASH. POST (Feb. 9, 2012), http://www.washingtonpost.com/opinions/proposition-8-decision-was-just-but-wobbly/2012/02/08/gIQApOh1zQ_story.html, archived at <http://perma.cc/9XLV-GEEN>; Jason Mazzone, *Marriage and the Ninth Circuit: Thumbs Down*, BALKINIZATION (Feb. 7, 2012, 7:18 PM), <http://balkin.blogspot.com/2012/02/marriage-and-ninth-circuit-thumbs-down.html>, archived at <http://www.perma.cc/0qT4-waivD7c>.

257. Nan D. Hunter, *Animus Thick and Thin: The Broader Impact of the Ninth Circuit Decision in Perry v. Brown*, 64 STAN. L. REV. ONLINE 111, 111–12 (2012).

stances” of the “moment of ultimate judgment.”²⁵⁸ The majority on the Ninth Circuit may have been certain that Proposition 8 was unconstitutional while doubting whether the American public was ready for a blanket ruling in favor of same-sex marriage. To use Bickel’s language from *The Least Dangerous Branch*, the Ninth Circuit’s substantive decision could be described as a “tentative answer.”²⁵⁹

In the meantime, courts and legislatures in other states appear set to gradually rule in favor of same-sex marriage. Thus, “in the course of a continuing colloquy with the political institutions and with society at large, the Court has shaped and reduced the question, and . . . has rendered the answer familiar if not obvious,”²⁶⁰ so that when the Supreme Court does issue a ruling in favor of same-sex marriage, it will be one “to which widespread acceptance may fairly be attributed.”²⁶¹ As Eskridge notes, “the court got it right, as a matter of law and as a matter of constitutional politics.”²⁶²

The Supreme Court granted certiorari in *Hollingsworth v. Perry* but effectively arrived at the same destination apparently intended by the Ninth Circuit. By holding that the official proponents of Proposition 8 lacked standing to invoke the jurisdiction of appellate courts to review the district court’s ruling in *Perry v. Schwarzenegger*, the Court preserved the finding that Proposition 8 was unconstitutional while avoiding implications beyond California. Thus, the twenty-nine other states with constitutional prohibitions of same-sex marriage, as well as states with legislative prohibitions, are free to maintain and enforce such laws for the time being. Notwithstanding the fact that the actual effect of the Supreme Court decision was to invalidate rather than uphold Proposition 8, a clearer case of the passive virtues being exercised would be hard to find. Alexander Bickel would be proud.

If the difficulty of amending the U.S. Constitution, combined with the uncertain political climate surrounding the issue of same-sex marriage, means that it was appropriate for the federal courts to exercise the passive virtues in these cases, what about the California Supreme Court?²⁶³ The argument that ease of amendment justifies less restraint requires significant qualification when account is taken of Sunstein’s consequentialist argument. Bickel’s concern for timing²⁶⁴ remains a pertinent consideration where a constitutional amendment is readily available in response to an unpopular decision; indeed, it may become more pertinent as a constitution becomes easier to amend. *In re Marriage Cases* may have been intended to

258. *Id.*

259. BICKEL, *supra* note 18, at 240.

260. *Id.*

261. *Id.*

262. See discussion *infra* Part IV.

263. Eskridge, *The Marriage Cases*, *supra* note 120, at 1801.

264. See BICKEL, *supra* note 18, at 239–40.

further the cause of a minority right, but the end result of the case was to set back that cause by provoking a counterproductive constitutional amendment. The enactment of Proposition 8 in response to *In re Marriage Cases* stands in contrast to the manner in which backlash against court decisions on same-sex marriage manifested itself in other states such as Vermont,²⁶⁵ Massachusetts,²⁶⁶ and Iowa.²⁶⁷ Courts in these states ruled in favor of same-sex marriage (or, in Vermont's case, either marriage or civil unions) before public opinion had come around to supporting it. Backlash was ignited by these decisions, and efforts were made to amend the respective state constitutions to overturn them. In each case, however, the state constitution—while less deeply entrenched than the U.S. Constitution—was still relatively difficult to amend, requiring majority legislative votes in successive sessions followed by a referendum.²⁶⁸ *Baker v. State*, *Goodridge v. Department of Public Health*, and *Varnum v. Brien* are classic illustrations of court decisions that, as contemplated by Bickel, did not have public support at the time but were capable of gaining it.

A key common denominator in these cases is the period of reflection that is forced by a more burdensome amendment process, which allows time for backlash to subside. A court decision that runs even marginally against public opinion invariably risks becoming a *cause célèbre* and a focal point of opposition.²⁶⁹ In Vermont, for example, the decision in *Baker* and the subsequent enactment of civil union legislation provoked backlash at the next election, triggering a divisive political movement called “Take Back Vermont.”²⁷⁰ Nonetheless, while this backlash was enough to tip the balance of power in the state legislature from Democrats to Republicans, the level of entrenchment of the Vermont Constitution was not sufficiently intense to lead to a constitutional amendment precluding same-sex marriage.²⁷¹ Had the court ruled in favor of marriage equality, such an amendment may very well have passed, making future reform quite difficult. Instead, the compromise decision made by the court was capable of gaining assent in the “rather immediate foreseeable future.”²⁷² Not only were civil unions accepted quite quickly, but the legislature also recognized full same-sex marriage just ten years later in 2009, which would not have been possible had a

265. See *Baker v. State*, 744 A.2d 864 (Vt. 1999).

266. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

267. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

268. Cf. IOWA CONST. art. X, §1; MASS. CONST. art. XLVIII; VT. CONST. ch II, § 72.

269. See Klarman, *supra* note 230, at 473–82; Friedman, *Being Positive*, *supra* note 15, at 1292.

270. See David Ross and Heather Rider, *A Note from the Editors: A Vermont Law Review Milestone, A Landmark Case, and a Vermont Election*, 25 VT. L. REV. 1, 2 (2000).

271. See Devins, *State-Centered Constitutionalism*, *supra* note 217, at 1686 (“After state lawmakers heeded the call to enact legislation, state voters made clear that they vehemently disagreed with the court’s ruling (suggesting that a more sweeping ruling might have triggered an intense backlash). The fall 2000 elections were ‘conducted in significant part as a referendum on civil unions’ and sixteen incumbent legislators who backed civil unions were unseated, shifting control of the state house from Democrats to Republicans.” (quoting *Baker v. State*, 744 A.2d 864, 866–67 (Vt. 1999)).

272. BICKEL, *supra* note 18, at 239.

constitutional amendment been passed after *Baker*.²⁷³ In this way, *Baker* was a principled but expedient compromise that was sensitive to timing, avoided the pitfall of sparking a counterproductive backlash, and encouraged the political organs to resolve the issue. It is plausible that the outcome would have been rather different had the constitution been easier to amend.

In Massachusetts²⁷⁴ and Iowa,²⁷⁵ the courts were able to go one step further and constitutionally mandate recognition of same-sex marriage without provoking amendments overturning their decisions. To be sure, there was backlash. A sustained but ultimately unsuccessful effort to enact such an amendment was made in Massachusetts. The measure secured a majority in 2004 but failed to pass in a successive session in 2006; several subsequent attempts to force a referendum failed.²⁷⁶ A few months after *Goodridge*, polls showed that 50% of Massachusetts residents felt that the court had overstepped its bounds; 52% thought marriage should be between a man and a woman; and 69% felt voters should be given the chance to resolve the issue.²⁷⁷ Within two years, this sentiment had subsided, and polls showed 56% support for marriage equality.²⁷⁸

In Iowa, backlash was initially directed into judicial retention elections; three of the justices who decided *Varnum* were voted out of office at the next election in 2010 (the first time that this had ever happened to supreme court justices in Iowa),²⁷⁹ and a fourth narrowly survived a retention election in 2012.²⁸⁰ A 2011 vote to place a constitutional amendment on the ballot for 2013 passed in the House,²⁸¹ but the Senate majority leader blocked a floor vote in a Senate narrowly controlled by Democrats by 26 seats to 24.²⁸² Although another effort to force a referendum was made in 2013, public opinion had begun drifting in the other direction. In February 2012, one poll showed that 56% of Iowans were opposed to a constitutional amendment overturning *Varnum*, and by October 2012, support for marriage equality in Iowa was at 49% (up from 41% just a year before).²⁸³

273. See An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, S. 115, 2009–2010 Leg. Sess. (Vt. 2009) (codified as VT. STAT. ANN. tit. 8, § 4501(10) (2009)) (amending VT. STAT. ANN. tit.15, §§ 8, 1202(2) (2002)).

274. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

275. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

276. KLARMAN, *supra* note 7, at 89–97.

277. *Id.* at 92.

278. *Id.* at 96.

279. *Id.* at 151–53.

280. See H. JOURNAL, 97-198, 16th Sess., at 199–201 (Iowa 2011), available at <https://www.legis.iowa.gov/DOCS/Pubs/hjweb/PDF2/2011/02-01-2011.pdf>, archived at <http://perma.cc/8R24-MXRX>.

281. See *id.*

282. KLARMAN, *supra* note 7, at 154.

283. Nova Safo, *In Iowa, More Support After 4 Years of Gay Marriage*, CNN (Mar. 11, 2013), <http://cnradio.cnn.com/2013/03/11/in-iowa-more-support-after-4-years-of-gay-marriage/>, archived at <http://www.perma.cc/08mA2qoQw3L>.

Another poll in 2013 showed support for marriage equality outweighing opposition by 46% to 43%.²⁸⁴ Thus, like Vermont, Massachusetts and Iowa show that a constitutional amendment mechanism that is more readily available than Article V of the U.S. Constitution provides an outlet for political disagreement with a court decision, but a reasonable depth of entrenchment allows for a period of reflection during which backlash to an unpopular court decision may well subside so that the decision can gain the assent of the people.

In contrast, in a state like California at the less entrenched end of the spectrum, there is less room for backlash to subside and for a decision to gain the assent of the people. In such circumstances, the importance of timing becomes more acute, and the argument that judges can be less restrained no longer holds true—even, or perhaps especially, on matters concerning unpopular minorities. A judge might deeply believe that a ban on same-sex marriage is unconstitutional, but in a jurisdiction where the constitution is extremely easy to amend, a judge that so rules before public opinion is ready for the ruling might provoke a constitutional amendment that cements the direct opposite result. This is precisely what happened in California with Proposition 8. In such circumstances, a mistimed decision and the backlash it ignites might make it possible to pass an amendment that might not otherwise have passed, which in turn acts as a barrier to reform that might otherwise have occurred. In fact, a mistimed decision in a jurisdiction with a very easily amended constitution risks having the effect that Eskridge argues should be avoided at the federal level in the United States: raising the stakes in the dialogue.²⁸⁵ This is precisely the type of counterproductive outcome that Sunstein has argued should give courts pause to consider the possibility of backlash to their decisions.²⁸⁶

On this point, the distinction between shallow commitments and fundamental commitments, discussed in Part I, is of central importance. Ordinarily, constitutional change can only be brought about on foot of a particularly serious political effort—one that is based on fundamental commitments. The nature of the effort involved makes it clear to everyone that the decision that is being made is a particularly serious one, and sets it apart

284. Natalie Williams, *Gay Marriage Threatened*, IOWA ST. DAILY (Mar. 7, 2013, 12:00 AM), http://www.iowastatedaily.com/news/article_350c5390-86a7-11e2-83a7-0019bb2963f4.html, archived at <http://perma.cc/6NVL-DUVJ>.

285. See Eskridge, *Pluralism and Distrust*, *supra* note 214; see also Devins, *State-Centered Constitutionalism*, *supra* note 217, at 1688 (commenting that the way in which *Goodridge* sparked a series of constitutional amendments in other states and became a major issue in the 2004 elections “was a visible signal to other state courts that constitutionalizing same-sex marriage was a high-stakes gambit”); KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 221 (2009) (“[B]ecause California has a hybrid constitutional system with a strong form of direct democracy and an activist judicial power, the legislature lost its authority to resolve the controversy as the issue shifted to the courts, through rights-based litigation, and to the electorate, through the initiative process. These competing arenas promised one side or the other a more definitive victory than the legislature could offer. But, pursuing the issue in these venues marginalized the legislature and polarized the debate.”).

286. Sunstein, *Should Judges Care?*, *supra* note 225, at 165.

from ordinary politics.²⁸⁷ However, as a constitution becomes easier to amend, the distinction between constitutional politics and ordinary politics becomes less clear. The easier it is to amend a constitution, the easier it is for backlash to be translated very directly and immediately into constitutional law in cases where shallow commitments are frustrated by courts.

If conditions are such that there is a risk of backlash to generate a constitutional amendment based on shallow commitments, a court in a jurisdiction with relative ease of amendment should hesitate in the face of intense public opposition to a decision. The easier it is to amend a constitution, the quicker this point will be reached, and the less intense the backlash in question will need to be. Unless exceedingly confident that a decision would be accepted by the people, a prudent judge might view the kind of extreme ease of amendment available in California as a reason to temper principle with expediency and exercise a restrained approach, such as the passive virtues or narrow, minimalist rulings.²⁸⁸ Bickel's argument was that a decision need not have immediate public support, but must be able to gain assent in the rather immediate foreseeable future.²⁸⁹ If the decision is reversed by constitutional amendment before this assent is gained, then the exercise has been futile or even counterproductive, minority rights causes might be undermined instead of advanced. Thus, a court interpreting a constitution that is extremely easily amended arguably has as much cause to have regard to public opinion and the risk of backlash as a court interpreting a constitution that is very deeply entrenched; the former to ensure that shallow commitments are not allowed to take precedence over fundamental ones, and the latter to avoid potential costs of error and damage to the political process. Therefore, the courts in Vermont, Massachusetts, and Iowa were appropriately aggressive in the protection of minority rights, whereas the California Supreme Court arguably overreached, given the prevailing structural amendment mechanism and political climate.

The above argument carries one major qualification: a court interpreting a state constitution in a federal system is faced with a rather different task than is a court interpreting a federal constitution. The fact that there is a federal constitution—one that is far more deeply entrenched, and takes precedence over the state constitution in cases of conflict between the two—superimposed over the state constitution cements at least some fundamental commitments in a more durable form. For this reason, it could be argued that there is less need to worry about knee-jerk constitutional amendments

287. See Friedman, *Being Positive*, *supra* note 15, at 1297 (“The benefit of the process of constitutional change is that it serves the separating function, of helping to determine and distinguish between immediate political preference and deeper commitments.”); Lutz, *supra* note 34, at 240.

288. While Bickel focuses his analysis on the passive virtues, Sunstein sees these as just one way in which a court can avoid ruling in such a way as to provoke outrage, citing narrow rulings and deference to elected officials as alternative approaches. See Sunstein, *Should Judges Care?*, *supra* note 225, at 163, 177–78.

289. See BICKEL, *supra* note 18, at 239.

based on shallow commitments at the state level; judges there can look beyond the public response at the state level and toward the possible permutations at the federal level. A California judge asked to strike down a law like Proposition 22 arguably need not be as worried about the possibility of a response like Proposition 8, knowing that there remains the possibility of that response being challenged and struck down under the U.S. Constitution, as ultimately happened to Proposition 8.²⁹⁰ This effectively makes the California Constitution a little more difficult to amend than it might seem on its face, because the U.S. Constitution imposes limits on what sort of changes can be made. A fuller consideration of this issue of federalism is outside the scope of this Article.

Critics might argue that courts are inherently unsuited to assess the state of public opinion, and that they should thus confine themselves to matters of legal principle rather than political expediency. However, the assessment of public opinion advocated for here is a rather limited one: judges need only make a rough estimate of whether a particular decision is capable of gaining assent, and if they have strong doubts, they should rule in a cautious way. This does not require a precise, scientific analysis of public opinion, and the variety of materials available to judges is sufficient to allow them to meet this challenge. At the state level, the size of the jurisdiction makes it what Neal Devins has described as a “knowable political unit” which judges are likely to be quite familiar with through systematic exposure to institutions, politicians, and interest groups.²⁹¹ A range of specific source materials may also be available, such as opinion polls, election manifestos, public statements and other policy positions of politicians, and amicus briefs submitted by interest groups in the course of litigation. Moreover, a state supreme court can learn from the experience of other state supreme courts that have ruled on the same issue.²⁹²

Admittedly, things are a good deal more complicated for the Supreme Court because of the size and diversity of the nation. Attempts by the Court to assess whether a decision will be accepted have been described as “a shot in the dark.”²⁹³ However, the federal nature of the jurisdiction gives the Supreme Court an alternative vein of source material that can assist its assessment. The Court could assess public opinion through consensus analysis²⁹⁴ or polling,²⁹⁵ which involves analyzing the relevant state-level legal provisions with a view toward establishing whether any consensus exists on the matter at hand. Consensus analysis is already commonplace in the juris-

290. See Hunter, *supra* note 257, at 116.

291. Devins, *State-Centered Constitutionalism*, *supra* note 217, at 1669–70.

292. *Id.* at 1686–90.

293. Sunstein, *Should Judges Care?*, *supra* note 225, at 176.

294. See generally Dzehtsiarou & O’Mahony, *supra* note 58.

295. Friedman, *Dialogue*, *supra* note 15, at 597.

prudence of the Court surrounding both the Sixth²⁹⁶ and Eighth²⁹⁷ Amendments and featured in substantive due process analysis in *Lawrence v. Texas*.²⁹⁸ The Eighth Amendment death penalty case law in particular shows how the Supreme Court has examined not just the number of states, but also the pace and direction of change over time in the breakdown of that count, as a way of assessing and predicting current and future public opinion on a particular issue.²⁹⁹ Where wide consensus exists on a particular interpretation of fundamental rights, or a clear trend in state law making can be identified, the Court is far more able to accurately predict whether a decision is likely to gain assent expeditiously or spark a strong backlash. Indeed, where the number of states that have laws similar to those being challenged reaches the structural amendment threshold, the possibility of a constitutional amendment reversing a decision to strike down the law is no longer out of the question.

On issues like same-sex marriage, where the fundamental commitments of the people evolve over time, more extensive use of consensus analysis could potentially bring a dual benefit to the case law of the Supreme Court. In addition to reducing concerns about the institutional competence of the judiciary to accurately assess the state of public opinion and the risk of backlash,³⁰⁰ consensus analysis mitigates the danger of creating a heckler's veto.³⁰¹ By only paying attention to opinions that have successfully negotiated the legislative process and been translated into legal provisions, consensus analysis filters out the hecklers that heckle loudly through protests and media but do not necessarily enjoy the support of a majority of the population.

It seems likely—even though it did not expressly feature in the judgments—that consensus analysis played a role in the Supreme Court's analysis of the marriage cases discussed in this Article. The number of states that prohibited interracial marriages changed from a comfortable majority of 60% when the Court avoided the issue in *Naim v. Naim*³⁰² to a clear minority of 32% when the Court struck down the legislation challenged in *Loving*

296. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 535–36 (1975); *Baldwin v. New York*, 399 U.S. 66, 69–72 (1970); *Williams v. Florida*, 399 U.S. 78, 103 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968).

297. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 432–34 (2008); *Roper v. Simmons*, 543 U.S. 551, 564–66 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002); *Stanford v. Kentucky*, 492 U.S. 361, 371 (1989); *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989).

298. 539 U.S. 558, 571–72 (2003).

299. See, e.g., *Roper*, 543 U.S. at 565–66; *Atkins*, 536 U.S. at 314–16.

300. See Sunstein, *Should Judges Care?*, *supra* note 225, at 176 (describing assessments by the Supreme Court of backlash risks as a “shot in the dark”). Consensus analysis sheds light on the risk of backlash by relying on objective indicia of public opinion; the state of relevant laws across the states, when combined with evidence of clear and consistent trends in law reform, seems reasonably likely to provide a sound guide to the state of public opinion across the nation.

301. See, e.g., SUNSTEIN, *OF MANY MINDS*, *supra* note 52, at 158.

302. 350 U.S. 985 (1956).

v. Virginia.³⁰³ It is simply not realistic to suggest that the Supreme Court justices in *Naim* were unaware of this, or that their successors in *Hollingsworth v. Perry*³⁰⁴ were not aware that at the time of their ruling, thirty-eight states prohibited same-sex marriage—thirty by way of an amendment to their state constitutions, almost all of which were passed in the aftermath of *Goodridge*.³⁰⁵ Eskridge praises the approach taken by the Ninth Circuit in *Perry v. Brown* for not turning a blind eye to these realities:

Americans are evenly divided on the issue, and partisans on both sides have heated feelings. Under these circumstances, the federal judicial branch ought not to issue broad rulings that pretend to decide the issue once and for all. This was a lesson of *Roe v. Wade*, a prematurely sweeping decision. For this reason, the Supreme Court would be wise to deny review for the Ninth Circuit's decision or to go along with Judge Reinhardt's narrow ruling. California is ready for marriage equality in ways most of the rest of the country is not Does that mean the Ninth Circuit and the Supreme Court should cower behind a constitutional heckler's veto? Of course not. But when the hecklers are the bulk of the audience, the constitutional speaker needs to tread more carefully. Courts can help put an issue on the public law agenda, and they can channel discourse into productive directions. They can also help create conditions for falsification of stereotypes and prejudice-driven arguments, such as the canard that gay marriage will undermine "traditional" marriage. But courts cannot create a national consensus on an issue about which "We the People" are not at rest.³⁰⁶

In declining to review Proposition 8 for lack of standing,³⁰⁷ the Supreme Court has done precisely what Eskridge suggested, and while the decision was presented as being one made on technical grounds, it seems likely that consensus analysis played a role in guiding the Court. Klarman has projected that this will continue to be the case, saying that the Court is "almost certain" to eventually rule in favor of same-sex marriage: "[o]nce public opinion has shifted overwhelmingly in favor and many states have enacted gay marriage, the Court will constitutionalize the emerging consensus and suppress resisting outliers. That is simply how constitutional

303. 388 U.S. 1, 6 (1967). Chief Justice Warren, writing for a unanimous Court, acknowledged that Virginia was one of sixteen states that still prohibited interracial marriage. *Id.*

304. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

305. *The History of Same-Sex Marriage in the US, from 1970 to Now*, BOSTON GLOBE (Feb. 13, 2014), <http://www.bostonglobe.com/2013/07/30/same-sex-marriage-over-time/mbVFMQPyxZCpM2eSQMU5ZK/story.html>, archived at <http://perma.cc/7437-MFZZ?type=image>.

306. Eskridge, *Perry Decision*, *supra* note 171, at 97–98; see also Eskridge, *The Marriage Cases*, *supra* note 120, at 1838–40; Eskridge, *Pluralism and Distrust*, *supra* note 214, at 1324–27.

307. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

law works in the United States.”³⁰⁸ If that is how constitutional law works, then perhaps it is appropriate for the justices to be more candid in admitting the role that consensus analysis plays in key decisions.

CONCLUSION

The controversy over same-sex marriage, and the litigation surrounding Proposition 8 in particular, brings into focus the undeniable but often ignored link between the depth of entrenchment of a constitution and the degree of restraint that judges should exercise when interpreting the rights guaranteed by it. Bickel saw the possibility of constitutional amendment as the ultimate way of resolving the counter-majoritarian difficulty but sought to avoid recourse to it by prescribing that courts should aim to make decisions capable of gaining assent in the immediate foreseeable future. His theory of the passive virtues offered one way in which this could be achieved, albeit at the cost of creating a lack of transparency in judicial reasoning. This lack of transparency was certainly evident in the decisions of both the Ninth Circuit and the Supreme Court in the *Perry* litigation; the courts seem to have judged the political waters correctly but also seem to have gone out of their way to obscure the thought process leading to their decisions. The question of whether greater use of consensus analysis in the future might offer a way around this difficulty deserves further study.

There are many good reasons why the great difficulty in amending the U.S. Constitution should point the federal courts toward a restrained and deferential approach when interpreting the scope of constitutional rights. When society's fundamental commitments are unclear or in flux, the federal judiciary is not in the best position to assess how those commitments should be construed and applied to a deeply controversial issue of constitutional rights. If the Supreme Court gets it wrong, it is exceptionally difficult to overturn its decision, and significant costs of error accrue in the meantime, both to the individuals affected by the ruling and to the political process in general. Public opinion is thus an important consideration for the federal courts. Where federal judges are exceedingly confident of the mood of the country because consensus analysis shows a clear majority of states in agreement and a consistent trend in opinion, they may feel safe in ruling accordingly. However, where public opinion is difficult to read, passions are inflamed, and short-term commitments are rising to the surface, or opinion is in a state of flux, the virtual impossibility of a direct constitutional response to a court decision points strongly in the direction of avoiding the question. On this view, the Ninth Circuit took the correct path in *Perry v. Brown* by seeking to confine its decision to California and to keep the issue out of the Supreme Court. The Supreme Court also took the cor-

308. KLARMAN, *supra* note 7, at 207.

rect path in *Hollingsworth v. Perry* by dismissing the case for lack of standing and leaving the constitutionality of state-level same-sex marriage bans an open question.

Bickel's competing goals of principle and expediency play out differently where the constitution is easier to amend in response to an unpopular court decision—at least in the initial stages of movement along the spectrum of entrenchment. As a constitution becomes easier to amend, a court ruling based on a misreading of the people's fundamental commitments carries lower costs of error and less risk of damaging the political process. Thus, the argument for judicial restraint is less strong, and the court can feel more confident in making a principled ruling based on its best construction of the relevant constitutional principles, safe in the knowledge that a safety valve exists should the people wish to reassert their fundamental commitments through relatively accessible political means. The same-sex marriage cases in Vermont, Massachusetts, and Iowa provide illustrations of how courts can take an active role in the protection of minority rights without banishing such matters from the political forum or provoking counterproductive backlash. However, where a constitutional amendment overturning a particular court decision seems probable rather than possible, a court would arguably do well to avoid making that decision.

The argument that the need for restraint decreases as a constitution becomes easier to amend only holds as long as the amendment mechanism is sufficiently burdensome that its use demands the type of extraordinary political effort associated with fundamental commitments. As the movement along the spectrum continues and a constitution becomes extremely easy to amend, such as in California, the distinction between ordinary and constitutional politics begins to blur. In such a jurisdiction, the risk emerges that a controversial court decision becomes a *cause célèbre* that sparks backlash based on shallow commitments, which can then be translated very directly into state constitutional law. Thus, in a jurisdiction with extreme ease of amendment, unless the court is exceedingly confident in its reading of public opinion, Bickel's prescription of expediency, by aiming to make decisions capable of gaining assent, again provides valuable instruction. On this view, the California Supreme Court arguably somewhat overreached in *In re Marriage Cases*. The decision could be characterized as part of a dialogue, but the political circumstances, combined with the ease of amendment of the California Constitution, made it a very high stakes dialogue in which the court raised rather than lowered the stakes. Admittedly, the court made its decision safe in the knowledge that if it was reversed by amendment, there would be a further round of litigation at the federal level. A national court interpreting a constitution with similar ease of amendment would have no such luxury.