

Judicial Review and Sexual Freedom

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I. INTRODUCTION

Judicial review—the power of an often unelected judiciary to declare acts of a usually elected legislative body, or even a product of direct democracy, void as unconstitutional—remains a divisive subject despite its reputation as a cornerstone of democratic constitutionalism. Stated in very basic terms, one perspective is that judicial review is necessary to curb the excesses of democracy which can lead to “mob rule” and the oppression of minorities or even statistical majorities who are less powerful.¹ Phrased equally reductively, the opposing view is that judicial review is an elitist and aristocratic notion that thwarts democracy, imposing the unchecked views of an appointed oligarchy on the people.²

Sexual rights, such as equality for women and sexual minorities, reproductive rights, the decriminalization of sexual practices, and family rights for sexual minorities, serve as contemporary flashpoints for controversies about judicial review. Recent political debates about the proper role of the judiciary in a democracy focus on matters of sexuality, especially same-sex marriage. For example, the Presidential State of the Union addresses in 2004, 2005, and 2006 each contained a reference to “activist judges” who were redefining marriage to include same-sex couples.³ Moreover, in the legal cases themselves there is often disagreement about the merits of judicial versus legislative decision.⁴

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¹ See discussion *infra* Part II.

² See discussion *infra* Part II.

³ See *infra* notes 61-64 and accompanying text.

⁴ See *infra* notes 45-57 and accompanying text.

Although the mainstream jurisprudential arguments regarding the “counter-majoritarian difficulty”⁵ certainly use specific cases as examples, at times they proceed in abstract or historical terms, as if judicial review is (or should be) unrelated to particular contemporary politics and devoid of women or sexual minorities. Indeed, in arguing against judicial review, legal theorist Jeremy Waldron posits that what is necessary is “some general understanding, uncontaminated by the cultural, historical, and political preoccupations of each society.”⁶ Also arguing against judicial review, Larry Kramer notes that “bigger issues are at stake” in debates about what he terms “judicial supremacy” than whether “the liberal Warren Court or the centrist Burger Court or the conservative Rehnquist Court should be judged good or bad or deserve praise or condemnation.”⁷

Further, even when jurisprudential theories would seem to be supportive of a case positively affecting women’s sexual freedom, the resulting analysis may be disappointing. The classic neo-liberal defense of judicial review, such as John Hart Ely’s representation-reinforcing theory of judicial review, posits that “courts should protect those who cannot protect themselves politically.”⁸ Such a theory has appeal for feminists and sexual minorities. The spectacular failure in the United States to democratically approve the Equal Rights Amendment⁹ continues to serve as a reminder of the limits of democracy even on behalf of a statistical majority. Recent referenda approving amendments to state constitutions in order to limit the rights of sexual minorities demonstrate a marked level of political powerlessness. Yet John Hart Ely nevertheless found *Roe v. Wade*¹⁰ “frightening” because he did not believe a right to abortion was “inferable from the language of the Constitution” or “the framers’ thinking respecting the specific problem in issue.”¹¹ His theory that the role of the judiciary was to correct the malfunctions of representative democracy by

⁵ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. 1986). Bickel notes “the essential reality that judicial review is a deviant institution in the American democracy” because it does not reflect the will of the popular majority. *Id.* at 18.

⁶ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1352 (2006). Interestingly, however, Waldron begins his piece with a discussion of the Massachusetts Supreme Judicial Court’s ruling that “the state’s marriage licensing laws violated state constitutional rights to due process and equal protection by implicitly limiting marriage to a union between a man and a woman.” *Id.* at 1348.

⁷ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 233 (2004).

⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 152 (1980) [hereinafter ELY, *JUDICIAL REVIEW*].

⁹ H.J. Res. 208, 86 Stat. 1523 (1972).

¹⁰ 410 U.S. 113 (1973).

¹¹ John Hart Ely, *The Wages Of Crying Wolf: A Comment On Roe v. Wade*, 82 *YALE L.J.* 920, 935-36 (1973) [hereinafter Ely, *Wolf*].

protecting those in the minority¹² did not extend to abortion as a constitutional right. He reasoned that fetuses were even more entitled to minority status than women,¹³ ultimately stating that: “Compared with men, very few women sit in our legislatures But *no* fetuses sit in our legislatures”¹⁴

As John Hart Ely’s argument illustrates, there has been a reflexive and extensive resort to textualism and originalism in the debates regarding judicial review. In the United States, this discussion can proceed with a marked “exceptionalism” premise, as if the United States is the only, or the only relevant, nation or even constitutional democracy worth considering.¹⁵ Additionally, even when the debates concerning judicial review are not abstract and specifically focus on cases concerning the sexual freedom of women and sexual minorities, the perspectives of other nations are glaringly absent. The well-established notion that excluded voices, especially those who are the objects of the legal discourse,¹⁶ need to be included remains an uncompleted project.

Thus, much of the existing debate regarding judicial review is deficient for at least one of three reasons. First, the debates regarding judicial review are abstracted from the controversy surrounding sexual freedom, and often imply that sexual freedom itself is of little, or less, consequence than the “larger” issues at stake. Second, the mainstream jurisprudential debates have mostly failed to incorporate the perspectives of feminist and queer legal theorists,

¹² See generally ELY, JUDICIAL REVIEW, *supra* note 8, at 136.

¹³ Ely, *Wolf*, *supra* note 11, at 934-35.

¹⁴ *Id.* at 933.

¹⁵ For a discussion of American exceptionalism, see Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003). As Koh notes, the phrase is often used “far too loosely and without meaningful nuance.” *Id.* at 1482. In seeking to untangle the meanings, Koh discusses an unpublished manuscript by the political scientist Michael Ignatieff. Koh discusses the three types of exceptionalism that Ignatieff mentions (“human-rights narcissism,” “judicial exceptionalism,” and “American exemptionalism”), then provides:

While this trichotomy is intriguing, I find it both under- and overinclusive. It lumps together certain distinct forms of exceptionalism and misses others. Instead, I prefer to distinguish among four somewhat different faces of American exceptionalism, which I call, in order of ascending opprobrium: distinctive rights, different labels, the “flying buttress” mentality, and double standards. In my view, the fourth face—double standards—presents the most dangerous and destructive form of American exceptionalism.

Id. at 1482-83 (footnotes omitted).

¹⁶ See, e.g., Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987) (arguing that the law should include the ideas and experiences of women and other excluded groups).

Importantly, this notion is not limited to legal scholarship or limited to single or even “representative” voices. As Jenny Rivera has noted in the context of combating intimate partner violence directed at Latinas, a variety of modes and organizations of community representation in the democratic processes are vital to fully reflect and address the priorities of persons affected by laws, even by laws aimed at “assisting” them such as the Violence Against Women Act. See Jenny Rivera, *Intimate Partner Violence Strategies: Models for Community Participation*, 50 ME. L. REV. 283 (1998).

even when such work has been directly relevant. Third, the debates in the United States regarding judicial review often proceed as if the United States is “exceptional” and *sui generis*, usually with a reflexive privileging of originalism and historical exegesis.

This article starts with the premise that sexual freedom, and most specifically lesbian sexual freedom, is a nonnegotiable goal of any legal process in any polity.¹⁷ With regard to judicial review, the ultimate question this article confronts is whether judicial review is advantageous for female and lesbian sexual freedom. The practical consequences of such a query leads to a determination of whether feminist and lesbian work toward sexual freedom in democracies should advocate for judicial review to be defended and to be included in constitutions of nations, such as the United States, in which sexual freedom is being assaulted. Engaging in such an inquiry necessitates consideration and inclusion of works of feminist and queer legal theorists and global perspectives.

The presence or absence of judicial review is not positively correlated to legal guarantees of sexual freedom. However, this does not mean that advocates of sexual freedom can eschew debates regarding judicial review. Such debates, even when cloaked in the rhetoric of judicial review and democracy, are often directly targeted at sexual freedom. Instead, we must participate in these debates, even as we seek to reimagine them. Most importantly, we must be mindful, and insist that others be mindful, of what is at stake for women and sexual minorities in particular debates regarding judicial review.

Part II of this article considers the theories and politics of judicial review, highlighting the controversies surrounding sexual freedoms. Part III analyzes feminist and other perspectives on judicial review. Part IV explores specific instances of sexual freedom and particular processes of legislative action or judicial review, focusing on California, the Netherlands, and South Africa. Finally, Part V offers an outline of a lesbian legal theory of judicial review focused on the goal of procuring sexual freedom for lesbians, other sexual minorities, and women.

II. POLITICS AND THEORIES OF JUDICIAL REVIEW

At first glance, judicial review seems to be an inherent feature of constitutional democracy. Out of 193 independent nations, 164 have some form of

¹⁷ There are numerous controversies regarding precise definitions of “sexual freedom” and its necessary preconditions, but for purposes of this article, the judicial declarations implicated would include judgments of the unconstitutionality of criminal sanctions for sexual practices, of restrictions on reproductive freedoms such as abortion, and of limitations in family recognition, including same-sex marriage. *Cf.* Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 *TEMPLE L. REV.* 709 (2002) (arguing that same-sex marriage will not guarantee sexual freedom for lesbians).

judicial review.¹⁸ New constitutions in new democracies, influenced by the United States, generally contain provisions for judicial review that give the judiciary the power to declare democratically promulgated laws void as unconstitutional. For example, under Afghanistan's new constitution, the "Supreme Court, upon request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law."¹⁹ Similarly, the new constitution of Iraq announces that the constitution is the "Supreme Law of the land,"²⁰ that any legal provision that conflicts with it is void,²¹ and grants the Federal Supreme Court original and exclusive jurisdiction to review claims that a law, regulation, or directive issued by the federal or regional governments is inconsistent with the constitution.²² Likewise, new constitutions for nations from the former Soviet Union and on the continent of Africa favor provisions for judicial review.²³ Indeed, judicial review has been called one of the United States' "chief contributions to world thought,"²⁴ and "one of the U.S.A.'s best-selling (and least remunerative) exports,"²⁵ even as "adopting" nations have chosen to institutionalize judicial review through the different mechanism of specialized and designated constitutional courts.²⁶

¹⁸ Francisco Ramos Romeu, *The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions*, 2 REV. L. & ECON. 103, 125 n.2 (2006).

¹⁹ AFG. CONST. ch. 7, art. 6. Under Afghanistan's constitution, judicial power is vested in a Supreme Court, High Courts and Appeal Courts. Chapter 7, article 5 also extends judicial authority to all lawsuits involving real parties ("real individuals or incorporeal including the state"). Thus, judicial review of Afghani law may arise in the context of individual litigation, or on the basis of judicially initiated action or executive requested review.

²⁰ THE PERMANENT CONSTITUTION OF THE REPUBLIC OF IRAQ, § I, art. 13.

²¹ *Id.*

²² *Id.* § 3, ch. 3, art. 90.

²³ See, e.g., Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 128 (2002) ("[S]ince the end of World War II, most new constitutions have included express provisions about judicial review, thereby ending the legal debate over its legitimacy."); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 715-16 (2001). New constitutions with entrenched bills of rights and judicial review have been a "universal phenomenon," including the constitutions of Poland (1986), Hungary (1990), Russia (1991), Bulgaria (1991), Czech Republic (1992), Slovak Republic (1992), Romania (1992), and Slovenia (1993), as well as most of the at least twenty new constitutions adopted among African countries since 1989. Gardbaum, *supra*, at 715-16.

²⁴ Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 53 (2001) (stating that "written constitutions, judicial review, and federalism" constitute America's "chief contributions to world thought").

²⁵ Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U.L. REV. 269, 269 (1993).

²⁶ Romeu, *supra* note 18, at 125 n.3 ("Out of the 164 countries that established the option of judicial review of legislation, 76 also created constitutional courts, while 90 did not.").

Meanwhile, in the United States, this very power of the judiciary is incessantly and continuously contested. Best selling books such as *Men in Black: How the Supreme Court is Destroying America*, stridently advance the thesis concisely articulated in the title.²⁷ The more historical and less conservative approaches of legal scholars such as Larry Kramer and Mark Tushnet similarly argue that “judicial supremacy” should yield to a “popular constitutionalism” in which “the Supreme Court is our servant and not our master.”²⁸ Legal scholar Jeremy Waldron takes a similar view, articulating his “opposition to American-style judicial review”²⁹ and presenting a case against “strong judicial review” in which judges can declare legislative acts unconstitutional.³⁰ Certainly such concerns are not new. James Thayer’s famous 1893 article sought to provide a guide to restrain courts from declaring acts unconstitutional.³¹ The two-hundredth anniversary of the United States Supreme Court’s 1803 opinion in *Marbury v. Madison*,³² which reputedly³³

Romeu notes that there are two different models of institutionalizing judicial review and analyzes their prevalence:

Theorists typically distinguish two basic models of judicial review: the American model, so-called because of its prevalent use on the American continent, which attributes the power of review of legislation to all ordinary judges; and the European model, adopted by most European countries, which assigns the exclusive power of review of legislation to a special constitutional court. Looking at the existence of constitutional courts as a salient feature distinguishing the two models, some interesting patterns arise. Longitudinally, all of the experiences of the 19th century follow the American model of *Marbury vs. Madison*. The European model, conceived in its present format by Hans Kelsen, was first adopted by the constitutions of the disappeared Czechoslovakia and Austria in 1920, and then by other countries all over the world. Cross-sectionally, the regions of the world also differ widely: in Europe, of the 42 countries that have in their history adopted some model of judicial review, 76% have at some point chosen constitutional courts; in Asia and Africa, 57% and 51% respectively have done so; but only 33% in the Middle East, 20% in America, or even 0% in Oceania.

Id. at 104 (footnotes omitted). On this view, Calabresi is incorrect that American-style judicial review is a *popular* export. *See supra* notes 24-25. *See also* John Ferejohn, *Constitutional Review In The Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 49 (2002-2003) (“The United States is virtually unique in having judicial review, if judicial review means a system in which ordinary judges can review and strike down legislation.”).

²⁷ MARK LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* (2005).

²⁸ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 227-48 (2004); *accord* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

²⁹ JEREMY WALDRON, *LAW AND DISAGREEMENT* 15 (1999).

³⁰ Waldron, *supra* note 6, at 1353.

³¹ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 129-56 (1893).

³² 5 U.S. (1 Cranch) 137 (1803).

³³ Some have argued that judicial review was established prior to *Marbury v. Madison*. *See, e.g.*, William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 457-58

established judicial review, occasioned several symposia issues of law reviews devoted to the problems of judicial review.³⁴

Abroad, Americans may not be promulgating judicial review as enthusiastically as it might appear. For example, regarding the drafting of the Iraqi constitution, at least one advisor from the George W. Bush administration argued that Iraq's constitution limit the power of judicial review, lest Iraq be faced with a situation of unacceptable judicial decisions comparable to those in the United States, such as those granting the right of abortion.³⁵ Further, the distrust of judicial review is not solely a preoccupation in the United States. Robert Martin's *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined Our Law and Our Democracy* differs in its details and doctrine, but not in its ultimate conclusions.³⁶

There does not seem to be a critic in the United States who has been as explicit as the Canadian professor who has argued that "feminists and feminist ideology have come to dominate" the legal system and the Canadian Supreme Court to the extent that there is a "matriarchy in charge."³⁷ Yet an anti-feminist perspective is apparent in the United States debates. The power of judicial review is most often and most virulently attacked in the context of sexual freedoms. As the Iraqi anecdote previously mentioned illustrates, there is a continued preoccupation with abortion in the criticisms of judicial review. Indeed, the Court's 1973 decision in *Roe v. Wade* has become a symbol of judicial activism, joining the previous paradigmatic example of judicial activism attributed to *Brown v. Board of Education*,³⁸ in which the Court in 1954 declared racial segregation and separatism, however "equal," unconstitutional. Interestingly, the scholarship and rhetoric castigating the Court are startlingly similar. Compare this statement:

(2005) (arguing that judicial review in the United States was well-established before *Marbury v. Madison* was decided in 1803 and examining "thirty-one cases in which a statute was invalidated and seven additional cases in which, although the statute was upheld, one judge concluded that the statute was unconstitutional").

³⁴ See, e.g., Symposium, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison*, 20 CONST. COMM. 205 (2003); James Crawford, *Marbury v. Madison at the International Level*, 36 GEO. WASH. INT'L L. REV. 505 (2003); Symposium, *Marbury v. Madison and Judicial Review: Legitimacy, Tyranny, and Democracy*, 37 JOHN MARSHALL LAW REV. 317 (2004); Symposium, *Marbury v. Madison: 200 Years of Judicial Review in America*, 71 TENN. L. REV. 241 (2004); Symposium, *Marbury v. Madison: A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003); Symposium, *Judicial Review: Blessing or Curse? Or Both? A Symposium in Commemoration of the Bicentennial of Marbury v. Madison*, 28 WAKE FOREST L. REV. 313 (2003).

³⁵ LARRY DIAMOND, *SQUANDERED VICTORY* 148 (2005).

³⁶ ROBERT IVAN MARTIN, *THE MOST DANGEROUS BRANCH: HOW THE SUPREME COURT OF CANADA HAS UNDERMINED OUR LAW AND OUR DEMOCRACY* (2003).

³⁷ *Id.* at 124.

³⁸ 347 U.S. 483 (1954).

[T]he Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land;

with this statement:

[T]he Supreme Court created a new right that is not inferable from the Constitution, in any values derived from provisions in it or in the intent of its Framers . . . never had their reasoning been so spurious, so lacking in careful scholarship, or so overtly based on a philosophy of relativism.

The first statement is from the Southern Manifesto, a statement by members of Congress³⁹ rejecting the Court's decision in *Brown v. Board of Education*, while the second is a statement by a United States Senator introducing a bill to amend the United States Constitution to provide that "a right to abortion is not secured by this Constitution."⁴⁰

The coupling of accusations of "judicial activism" with "intent of the Framers" is a hallmark of conservative rhetoric; the reference to "original intent" is meant to serve as the proper leash on the judiciary. This means that the equality and liberty interests articulated in the Fourteenth Amendment are "time-dated" at the year 1868, when the Amendment was passed.⁴¹

Or perhaps earlier. In a 2005 speech before the conservative Federalist Society, presidential advisor Karl Rove extolled the Founders who gathered "in the 1770s" as "the greatest assemblage of political philosophers since ancient Athens."⁴² This display of what Justice Kirby of Australia's High Court would label "ancestor worship,"⁴³ is joined to a lambaste of four recent court cases, two of which concern sexual matters.⁴⁴

³⁹ 102 CONG. REC. 4515-16 (1956) (signed March 1956 by nineteen Senators and eighty-one Representatives).

⁴⁰ 129 CONG. REC. 17326-27 (1983) (statement of Senator Hatfield, in support of Constitutional Amendment on Abortion).

⁴¹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 149 (1997).

⁴² KARL ROVE, *AGAINST JUDICIAL IMPERIALISM*, ADDRESS TO THE FEDERALIST SOCIETY (Nov. 11, 2005), available at <http://www.opinionjournal.com/extra/?id=110007537>.

⁴³ Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U.L. REV. 1 (2000).

⁴⁴ The first case regarding sexuality is *Goodridge v. Dep't of Public Health*, 798 N.E. 2d 941 (Mass. 2003), the same-sex marriage case decided by the Massachusetts Supreme Court. The second case undoubtedly refers to *United States v. Extreme Associates, Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005).

The third case, unnamed in Rove's speech, refers to *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002) (declaring "under God" in the Pledge unconstitutional), *rev'd on other grounds, sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). The fourth case, also unnamed, refers to *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that "'national consensus' prohibited the use of the death penalty for murderers committed under the age of 18").

Accusations of judicial activism, accompanied by references to the Constitution's silence and the intent of the framers, are voiced from within the judiciary itself. In the abortion cases, several Justices have argued that "abortion" is not in the text of the Constitution,⁴⁵ that it has been criminalized and therefore was not recognized by the framers as a protected right,⁴⁶ and that the issue should be left to the democratic process.⁴⁷

In *Lawrence v. Texas*,⁴⁸ the 2003 Supreme Court decision declaring a state statute criminalizing homosexual sodomy unconstitutional, Justice Scalia, dissenting, stated that "it is the premise of our system" that judgments regarding sexual and other types of morality are to be made through "normal democratic means" and not "imposed by a governing caste."⁴⁹ He argued that the state's choice to criminalize homosexual sodomy "is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change."⁵⁰ Justice Scalia seems to attribute the Court's impatience to the fact that the "Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."⁵¹ He views the Court as a "product of a law-profession culture" that has "largely signed on to the so-called homosexual agenda."⁵²

Several years earlier, Justice Scalia's dissenting opinion in *Romer v. Evans*⁵³ was equally rancorous. In *Romer*, the Court declared unconstitutional Colorado's Amendment Two, which had barred anti-discrimination laws that protected "homosexuals, lesbians, and bisexuals."⁵⁴ Justice Scalia again stressed the democratic quality of the state law, which in the case of Amendment Two might be viewed as democracy in its purest form because it resulted from a voter referendum rather than from a representative legislative

⁴⁵ *Roe v. Wade*, 410 U.S. 113, 221 (White, J., dissenting); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 521 (1990) (Scalia, J., concurring); *Gonzales v. Carhart*, 127 S.Ct. 1610, 1639 (2007) (Thomas, J., concurring).

⁴⁶ *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

⁴⁷ *See Webster v. Reprod. Health Services*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Roe*, 410 U.S. at 222 (White, J., dissenting).

⁴⁸ 539 U.S. 558 (2003).

⁴⁹ *Id.* at 603-04 (Scalia, J., dissenting).

⁵⁰ *Id.* at 603.

⁵¹ *Id.* at 602.

⁵² *Id.*

⁵³ 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

⁵⁴ *Id.* at 635. For some of the many discussions of Amendment Two, see Sharon E. Debbage Alexander, *Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON C.L. & C.R. 261 (2002); Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 365 (1997).

process.⁵⁵ In the dissenting opinion, Justice Scalia declared that because the Constitution of the United States is silent on the issue, “it is left to be resolved by normal democratic means” and the “Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected.”⁵⁶ That Amendment Two had resulted from the success of “homosexuals” on the local level using the democratic process to enact anti-discrimination laws was characterized by Justice Scalia as attributable to “the geographic concentration and the disproportionate political power of homosexuals.”⁵⁷ Importantly, these criticisms are not mere disagreements about the outcome, but impugn the power of the courts to decide the issue at all.

In the United States, the exercise of judicial review by the federal courts of democratically promulgated state legislation also implicates the problem of federalism and so-called “states rights.” In both *Lawrence v. Texas* and *Romer v. Evans*, the United States Supreme Court was reviewing democratic enactments by states. Yet the problem of federalism in the United States is not neatly mapped onto the judicial review landscape. For example, the decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*,⁵⁸ holding that the Commonwealth of Massachusetts may not “deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry,”⁵⁹ is the product of a state’s highest court reviewing its own state laws and applying its own state constitution.⁶⁰ Despite previously articulated preferences for states’ rights and local control, this decision was condemned by President Bush in his State of the Union Address in 2004 as a product of “[a]ctivist judges” who have “begun redefining marriage by court order, without regard for the will of the people and their elected representatives,” and who “insist on forcing their

⁵⁵ Cf. Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1491 n.176 (2000) (arguing that although the Court’s decision in *Romer v. Evans* was “more saliently counter-majoritarian than the typical exercise of judicial review,” it is the product of a “more deliberative decisionmaking process than the enactment of Amendment Two is likely to have been”).

⁵⁶ *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

⁵⁷ *Id.* at 647. Lest he be accused of criticizing democratic processes, he noted, “I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.” *Id.* at 646.

⁵⁸ 798 N.E.2d 941 (Mass. 2003).

⁵⁹ *Id.* at 948.

⁶⁰ As the Supreme Judicial Court of Massachusetts phrased it, “[t]he genius of our Federal system is that each State’s Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.” *Id.* at 967.

arbitrary will upon the people.”⁶¹ The support for a constitutional amendment which would define marriage as limited to one man and one woman is justified, by President Bush and others, as responsive to “[a]ctivist judges.”⁶² In his 2005 State of the Union Address, President Bush reiterated his position: “Because marriage is a sacred institution and the foundation of society, it should not be redefined by activist judges. For the good of families, children and society, I support a constitutional amendment to protect the institution of marriage.”⁶³ Again, in 2006, President Bush included “activist courts that try to redefine marriage,” as one of the major concerns facing Americans.⁶⁴ The judicial review in this scenario is accomplished by state court judges interpreting their own state constitution, yet the invocation of “judicial activism” cured through a constitutional amendment, trumps any fealty to states rights.⁶⁵ In 2007, President Bush’s State of the Union Address was considerably milder on the issue of judicial power.⁶⁶

In addition to this type of political inconsistency, judicial review preferences for “activism” or “restraint” are not consistent. Even those who argue against judicial review most stridently and most expressly, including Justice Scalia, are more accurately quarreling with the results in particular cases rather than judicial review generally. In the instance of Justice Scalia, such a conclusion is buoyed by his resort to judicial review to declare other democratically promulgated legislation unconstitutional. During the 1994-2000 terms, Justice Scalia voted to declare unconstitutional federal, state or local acts twenty-five times, a statistic that bears comparison to Justices Souter, Ginsburg, and

⁶¹ George W. Bush, President, United States of America, 2004 State of the Union Address (Jan. 20, 2004), in WASH. POST, Jan. 21, 2004, at A18.

⁶² *Id.* (“If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.”).

⁶³ George W. Bush, President, United States of America, 2005 State of the Union Address (Feb. 2, 2005), in WASH. POST, Feb. 3, 2005, at A14.

⁶⁴ George W. Bush, President, United States of America, 2006 State of the Union Address (Jan. 31, 2006), in WASH. POST, Feb. 1, 2006, at A14 (“Yet many Americans, especially parents . . . are concerned about unethical conduct by public officials and discouraged by activist courts that try to redefine marriage.”).

⁶⁵ See generally Joan Schaffner, *The Federal Marriage Amendment: To Protect The Sanctity Of Marriage Or Destroy Constitutional Democracy?*, 54 AM. U.L. REV. 1487 (2005); Edward Stein, *Past And Present Proposed Amendments To The United States Constitution Regarding Marriage*, 82 WASH. U.L.Q. 611 (2004).

⁶⁶ George W. Bush, President, United States of America, 2007 State of the Union Address (Jan. 23, 2007), in WASH. POST, Jan. 24, 2007, at A16 (“The lives of citizens across our nation are affected by the outcome of cases pending in our federal courts. And we have a shared obligation to ensure that the federal courts have enough judges to hear those cases and deliver timely rulings.”).

Breyer, with seventeen, fourteen, and fourteen votes respectively to declare legislation unconstitutional.⁶⁷

Certainly, it is a mistake to view judicial review as co-extensive with a progressive political agenda. One of the most prolonged and vigorous exercises of judicial review by the United States Supreme Court was directed at declaring unconstitutional federal and state statutes granting economic rights to workers. During the so-called *Lochner* era, derived from the 1905 case of *Lochner v. New York*,⁶⁸ the Court declared unconstitutional a New York statute limiting the working hours of bakers to sixty hours per week. The Court invalidated numerous other laws⁶⁹ that were part of the progressive effort to curb the excesses of capitalism. This era, now widely discredited,⁷⁰ ended with Franklin D. Roosevelt's "New Deal" and his threat to confront the power of the United States Supreme Court itself, through what has become known as his "court-packing plan" among other strategies.⁷¹

Moreover, the more recent Rehnquist Court, 1986-2005, is unarguably an activist Court, especially in relation to Congress, declaring almost twice as many Congressional statutes unconstitutional than the Warren Court, 1954-1969, and more than Burger Court, 1969-1986.⁷² The federal statutes voided by the Court included a federal law providing a civil remedy for violence against women,⁷³ two regulating the possession of guns,⁷⁴ and two prohibiting discrimination.⁷⁵ As legal scholars noted, the Rehnquist Court showed little deference, or perhaps even respect, for Congress.⁷⁶

⁶⁷ THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 251 (2004). This statistic is not an anomaly, and a comparison of Justice Scalia's decisions from his appointment to the Court in 1986, with other Justices, shows a similar pattern. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 588-90 tbl. 6-8 (3d ed. 2003). A manual review by the author of the cases decided in subsequent terms reveals a consistent result.

⁶⁸ 198 U.S. 45 (1905).

⁶⁹ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating child labor legislation); *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923) (invalidating minimum wage legislation for women and children).

⁷⁰ See Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); cf. David Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).

⁷¹ See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000), and William G. Ross, *When Did The "Switch In Time" Actually Occur? Re-Discovering The Supreme Court's "Forgotten" Decisions Of 1936-1937*, 37 ARIZ. ST. L.J. 1153 (2005), for a discussion of whether FDR's plan caused the demise of *Lochner*-era activism.

⁷² KECK, *supra* note 67, at 40.

⁷³ *United States v. Morrison*, 529 U.S. 598 (2000).

⁷⁴ *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995) (superseded by 18 U.S.C. §922(g)(2)(A)).

⁷⁵ *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

⁷⁶ See, e.g., Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001)

Regarding the enforcement of state laws and judgments, the Rehnquist Court, from 1986-2003, invalidated 128 state or local laws.⁷⁷ Such invalidations included two state anti-discrimination laws with protections for sexual minorities. In *Hurley v. Irish-American Gay Group*⁷⁸ and *Boy Scouts v. Dale*,⁷⁹ the Court concluded that state anti-discrimination laws were overridden by the First Amendment rights of private organizations that professed homophobia as a part of their claim. Certainly, an accurate or nuanced portrait of the practice of judicial review cannot be reduced to statistics. For instance, *Bush v. Gore*,⁸⁰ which effectively determined the outcome of the 2000 presidential election, did not result in any laws being declared unconstitutional. Further, the generally available statistics capture only a prevailing activist stance. One could calculate the times a Justice voted to declare a government act unconstitutional but was part of the minority dissent. Nevertheless, it is impossible to refute the fact that the Rehnquist Court has declared many federal and state statutes unconstitutional, which satisfies the basic definition of an activist court.⁸¹

Despite such realities, it remains true that in the political realm, “activism” is generally an accusation hurled at judges rendering liberal decisions and that liberals and neo-liberals tend to support judicial review in a strategy of defensiveness. “Ideological drift”⁸² and similar concepts attempt to explain the tendency of most progressives to continue to support judicial review. On this view, judicial review on the whole once benefited progressive causes such as racial equality and reproductive rights, symbolized by the cases of *Brown v. Board of Education* and *Roe v. Wade*. That era has long since ended, despite

(analyzing two methodologies employed by the Rehnquist Court that have resulted in growing disrespect for Congress: the “crystal ball” approach, which effectively penalizes the enacting Congress for failing to create a detailed legislative record, even though such a record requirement could not reasonably have been anticipated, and the “phantom legislative history,” which established and applied a legal standard for review that even a detailed legislative record could not possibly satisfy); Robert Post & Reva Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (stating that “[i]n a recent string of decisions invalidating federal civil rights legislation, the Supreme Court has repeated the simple but powerful message” that the “Constitution belongs to the courts”).

⁷⁷ KECK, *supra* note 67, at 41. For comparison, this is less than the “activist” Warren Court, in which 186 state and local laws were invalidated, and significantly less than the “moderate” Burger Court, in which 309 state and local laws were invalidated. *Id.*

⁷⁸ 515 U.S. 557 (1995).

⁷⁹ 530 U.S. 640 (2000).

⁸⁰ 531 U.S. 98 (2000).

⁸¹ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 320 (1996) (defining judicial activism as courts “acting contrary to the will of the other branches of government”).

⁸² J. M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870 (1993).

some successes to convince one that the trend persists.⁸³ One might intellectually realize that theories of constitutional interpretation including judicial review “do not have a fixed normative or political valence”⁸⁴ but vary over time, yet might be stuck in the past remaining comfortable with old positions,⁸⁵ or convinced that the underlying structure is sound despite a superficial “tilt on the surface.”⁸⁶

In this light, the search for “neutral principles” seems warranted, although the neutral principles themselves are outcome-driven, or, as the legal philosopher John Rawls might term it, “substantive.”⁸⁷ Ronald Dworkin, interpreting and extending Rawls, argues that the basic political liberties which must be maintained are themselves quasi-instrumental, in that they are necessary for the development of “moral powers,” such as the power to form and to act on conceptions of “justice” and “the good.”⁸⁸ Yet as almost all legal philosophers agree, there are sincere and profound disagreements over what constitutes “justice” or “the good,” or what should happen if conceptions of “justice” and “the good” conflict with each other. To remove such controversies from “the people” and place them in the courts, even when such controversies involve constitutional issues, is asserted to be making the courts “our master” rather than more appropriately “our servant.”⁸⁹

As Jeremy Waldron makes explicit, his “core” case against judicial review rests upon four assumptions regarding democratic processes.⁹⁰ His first assumption is that there is “a broadly democratic political system with universal adult suffrage, and it has a representative legislature, to which elections are held on a fair and regular basis.”⁹¹ Second, that there is “a well-established and politically independent judiciary,” that is “mostly *not* an

⁸³ *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring the Texas sodomy statute unconstitutional).

⁸⁴ Balkin, *supra* note 82, at 870.

⁸⁵ TUSHNET, *supra* note 28, at 131.

⁸⁶ *Id.* at 132.

⁸⁷ In his posthumously published “restatement,” Rawls confronts the “long-standing objection to liberalism” that it “favors the values of autonomy and individuality and opposes those of community and of associational allegiance.” JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 153 (2001). He states that “[j]ustice as fairness is not procedurally neutral. Clearly, its principles are substantive and express far more than procedural values, as does its political conceptions of society and person . . .” *Id.* at 153 n.27. He additionally clarifies that “any reasonable political conception must impose restrictions on permissible comprehensive views,” and that “social influences favoring some doctrines over others cannot be avoided on any view of political justice.” *Id.* at 153-54.

⁸⁸ RONALD DWORKIN, *JUSTICE IN ROBES* 255 (2006).

⁸⁹ *See, e.g.*, KRAMER, *supra* note 7, at 248 (arguing that “we” should insist “that the Supreme Court is our servant and not our master”).

⁹⁰ Waldron, *supra* note 6.

⁹¹ *Id.* at 1361.

elective or representative institution . . . permeated with an ethos of elections, representation, and electoral accountability in the way that the legislature is.”⁹² Third, he assumes that “there is a strong commitment on the part of most members of the society . . . to the idea of individual and minority rights,” so that people “take rights seriously.”⁹³ Fourth, Waldron assumes that “the consensus about rights is not exempt from the incidence of general disagreement about all major political issues.”⁹⁴

Waldron concedes that these assumptions are “demanding.”⁹⁵ Indeed, although Waldron does not confront them, there are strong arguments that the first three of these assumptions do not hold in the case of the United States. For example, “universal adult suffrage” does not obtain, as persons are denied the right to vote based upon previous criminal convictions,⁹⁶ citizenship status,⁹⁷ or residency.⁹⁸ Further, there continue to be serious questions about

⁹² *Id.* at 1363 (emphasis added).

⁹³ *Id.* at 1364 (“They [the people] care about [individual and minority rights], they keep their own and others’ views on rights under constant consideration and lively debate, and they are alert to issues of rights in regard to all the social decisions that are canvassed or discussed in their midst.”).

⁹⁴ *Id.* at 1366.

⁹⁵ *Id.* at 1401.

⁹⁶ MARC MAUER & TUSHAR KANSAL, THE SENTENCING PROJECT, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES (2005), available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>. Mauer and Kansal report:

An estimated 4.7 million Americans are not eligible to vote as a result of felony disenfranchisement laws that apply in 48 states and the District of Columbia. Election laws are determined by each state, and so disenfranchisement laws vary significantly across the country In all 14 states, some or all persons convicted of a felony can be considered to be permanently disenfranchised. In some states, for example, this can include an 18-year old convicted of a first-time non-violent offense and sentenced to probation.

The only means by which these persons can have their voting rights restored is through action by the state, variously by a pardon or restoration of rights from the governor or board or pardons, or by legislative action.

Id. at 3.

See also Leonard E. Birdsong, *Drug Decriminalization and Felony Disenfranchisement: The New Civil Rights Causes*, 2 BARRY L. REV. 73 (2001) (arguing that the decriminalization of nonviolent possession of illegal drugs and an end of disenfranchisement for concomitant felony convictions must become a twenty-first century civil rights issue); Eric J. Miller, *Foundering Democracy: Felony Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT’L BLACK L.J. 32 (2005) (arguing that felony disenfranchisement is a “national scandal,” and that “felony disenfranchisement is a form of elitism that reserves political participation for a privileged social and intellectual class”); Jessie Allen, *Symposium on Race, Crime, and Voting: Social, Political, and Philosophical Perspectives on Felony Disenfranchisement in America*, 36 COLUM. HUM. RTS. L. REV. 1 (2004) (exploring various perspectives on felony disenfranchisement).

⁹⁷ See generally Gabriela Evia, Note, *Consent by All the Governed: Refranchising Noncitizens as Partners in America’s Democracy*, 77 S. CAL. L. REV. 151 (2003); Virginia

the accuracy of voting counts⁹⁹ and the reality of representation given practices of redistricting¹⁰⁰ and campaign finance.¹⁰¹ Regarding Waldron's second assumption, members of the judiciary are often elected,¹⁰² and an electioneering

Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (2000); Tara Kini, *Sharing The Vote: Noncitizen Voting Rights In Local School Board Elections*, 93 CAL. L. REV. 271 (2005); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093-1100 (1977).

⁹⁸ For example, citizens of the U.S. territories of Puerto Rico and the U.S. Virgin Islands cannot vote in presidential elections. See *Igartúa de la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000) (reversing a District Court for the District of Puerto Rico decision that U.S. citizens residing in Puerto Rico had the right to vote in Presidential elections); *Romeu v. Cohen*, 265 F.3d 118 (2nd Cir. 2001) (upholding the denial of an absentee ballot to U.S. citizen who had previously voted in New York but then moved to Puerto Rico, even though had he moved to a foreign nation he would have been entitled to an absentee ballot); Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315 (1995); Aaron E. Price, Comment, *Civil Rights in the 21st Century: A Representative Democracy: An Unfulfilled Ideal for Citizens of the District of Columbia*, 7 UDC/DCSLL REV. 77 (2003) (residents of the District of Columbia, also citizens, cannot vote in presidential elections); Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39 (1999).

⁹⁹ See, e.g., Michael A. Carrier, *Vote Counting, Technology, and Unintended Consequences*, 79 ST. JOHN'S L. REV. 645, 627 (2005) (examining direct recording electronic devices and vote counting flaws in the 2004 presidential election, "including machine breakdowns, vote totals that exceeded or underrepresented the number of voters who cast ballots, and incidents in which the machines switched votes from one candidate to another," with ninety-eight of ninety-nine reported incidents involving switches favoring George Bush); Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 627 (2002) (analyzing the Florida election system of the 2000 presidential election and concluding that "the deployment of election technologies created a voting-technology divide in Florida" where "technological differences guaranteed unequal access to voting"); Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAML REV. 1711, 1716-17 (2005) (arguing that "election reform [can] no longer be thought of as a once-in-a-generation occurrence" and urging scholars to "consider the improvement of voting systems an ongoing process, one in which the judicial, legislative, executive, and administrative components of government all have important responsibilities"); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1207 (2005) (asserting that "the process now commonly referred to as 'election reform' contributed to the problems that emerged in the 2004 election," and noting that "the exceptionally broad discretion permitted under some states' challenge procedures led to the prospect of racially discriminatory challenges").

¹⁰⁰ See *League of United Latin Am. Citizens v. Perry*, ___ U.S. ___, 126 S. Ct. 2594 (2006) (considering the notorious Texas redistricting plans, holding that it could not formulate reliable judicial standards for impermissible political gerrymandering, but holding the redistricting plan violated the minority dilution provisions of the Voting Rights Act).

¹⁰¹ See *Randall v. Sorrell*, 548 U.S. 230 (2006).

¹⁰² A majority of all cases in the United States are decided by judges whose continued tenure is contingent upon elections. This fact is attributable to another: most judgeships in the United

ethos has prompted some judges to challenge ethics rules regarding their campaigns.¹⁰³

Waldron's assumption that there is a strong commitment to minority rights, especially in the context of sexual minorities, is problematic. In this regard, Waldron takes up the "representation-reinforcement" defense of judicial review¹⁰⁴ and links it to the famous footnote four of *United States v. Carolene Products Co.* that questioned whether "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."¹⁰⁵ Waldron warns, however, that "not every minority deserves this special treatment," for a discrete and insular minority is a minority that "exists apart from political decisionmaking" and "whose members are isolated from the rest of the community in the sense that they do not share many interests with non-members that would enable them to build a series of coalitions to promote their interests."¹⁰⁶ Moreover, he clarifies "prejudice" in a way that provides an escape hatch for any arguable application to sexual minorities:

It is important also to distinguish between prejudices and views held strongly on religious or ethical grounds. We should not regard the views of pro-life advocates as prejudices simply because we do not share the religious convictions that support them. Almost all views about rights—including pro-choice views—

States are elective offices. More than surprising, these two facts are curious, even anomalous, for judges are elected on a similar scale in no other constitutional democracy in the world. In thirty-nine of our fifty states, judges must face the electorate in some form, either through competitive or retention elections. Of the nation's more than 1200 state appellate judges, forty-seven percent are appointed, forty percent face partisan elections, and thirteen percent face non-partisan elections. Of nearly 8500 state trial court judges in courts of general jurisdiction, just twenty-four percent are appointed, with forty-three percent facing partisan elections and thirty-three percent involved in non-partisan elections.

See generally Torres v. New York State Bd. of Elections, 462 F.3d 161 (2d Cir. 2006) (declaring New York City's system for electing judges unconstitutional), *rev'd* No. 06-766, 2008 WL 140755 (U.S. Jan. 16, 2008); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City, 1977-2002*, 37 U. MICH. J.L. REFORM 791, 791-92 (2004) (footnotes omitted); *see also* Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. Tex. L. Rev. 1197, 1226 (2000); Stephen Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 Alb. L. Rev. 713 (2005).

¹⁰³ Republican Party of Minn. v. White, 536 U.S. 765 (2002) (holding that a provision of the code of judicial conduct, which prohibited a candidate for judicial office in an election from announcing his or her views on disputed legal or political subjects, violated the First Amendment).

¹⁰⁴ Waldron, *supra* note 6, at 1402-04.

¹⁰⁵ 304 U.S. 144, 153 n.4 (1938).

¹⁰⁶ Waldron, *supra* note 6, at 1403-04.

are deeply felt and rest in the final analysis on firm and deep-seated convictions of value.¹⁰⁷

With such reasoning, sexual minorities are not worthy or “real” minorities meriting consideration in a democracy. This eviscerates Waldron’s otherwise promising, and outcome-driven, penultimate point that the aim should not be to defend or attack judicial review but to do “whatever best secures the rights of the minorities affected.”¹⁰⁸

That the judiciary might not “best” secure the rights of minorities, including sexual minorities and statistical but disempowered majorities such as women, is by now a safe assertion. Waldron, however, argues that contentions that the judiciary is better suited to protect such rights than democratic processes is based on a belief that “elites” are more sympathetic to minority rights.¹⁰⁹ Other theorists extend their analysis of those who advocate judicial review into a diagnosis of a personality disorder: a preference for judicial review arises from a “sensibility”¹¹⁰ of paternalism, elitism, and a mistrust of the masses who are “emotional, ignorant, fuzzy-headed, and simple-minded,”¹¹¹ even if one would prefer these traits be described with “kinder, gentler adjectives.”¹¹²

Yet this theorizing itself might be described with any number of “kinder, gentler adjectives” that portray it as “elitist” with a “sensibility” of “paternalism” evincing mistrust of the “emotional.” By failing to incorporate the articulations of the “minorities affected,” mainstream critiques of judicial review replicate the criticisms they offer. Instead, it is important to explore the views of feminist and queer theorists regarding the protection of their rights in any discussion of the merits of judicial review.

III. FEMINIST AND QUEER INTERVENTIONS

In 1993, feminist legal scholar Mary Becker sought to “start a discussion within the feminist community about the extent to which we should continue to focus on the Supreme Court and binding judicial review.”¹¹³ Becker argued that women must be considered in any deliberation of judicial review and democratic legitimacy,¹¹⁴ a point which continues to be ignored. Her

¹⁰⁷ *Id.* at 1404 n.141.

¹⁰⁸ *Id.* at 1406.

¹⁰⁹ *Id.* at 1405.

¹¹⁰ RICHARD PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* (1994).

¹¹¹ KRAMER, *supra* note 7, at 242.

¹¹² *Id.* at 243.

¹¹³ Mary Becker, *Conservative Free Speech and the Uneasy Case For Judicial Review*, 64 U. COLO. L. REV. 975, 979 (1993).

¹¹⁴ *Id.* at 985.

consideration of women in the United States led her to conclude that the “uneasy case” for judicial review in a constitutional democracy becomes “even uneasier.”¹¹⁵ Much of Becker’s analysis rests upon her view of women as a “majority group,” excluded from the process that produced the United States Constitution, and never “achiev[ing] its share of democratic or judicial power.”¹¹⁶

Becker identifies four problems with judicial review in the constitutional democracy of the United States from the perspective of women, using the jurisprudence of sex equality, free speech, and abortion as examples. First, she points to the overwhelmingly male bias in the judiciary given its gender-skewed composition.¹¹⁷ Becker insightfully notes that more female judges is not necessarily a solution because “deference to precedent would give an overwhelming edge to the men for a considerable time to come.”¹¹⁸ She contrasts this to legislatures, which although also primarily composed of men, are subject to direct pressure from women and do not operate in a system bound by past precedent.¹¹⁹

Second, and somewhat more abstractly, Becker argues that judicial review prevents needed “experimentation” and imposes “top-down theories” in the form of judicial standards, even if such standards are inappropriate.¹²⁰ While Becker does not specifically connect this critique to feminist theories, she seems not to simply be arguing that such a structure is undemocratic, but that it might also be unfeminist. Third, Becker contends that judicial review interferes with democratic deliberations, emphasizing again that women are a majority.¹²¹ Becker views judicial review as serving to legitimate the status quo, removing important issues from the democratic process, and interfering with political movements such as feminism. For Becker, this is true even if the outcome of a litigation is successful. Thus, it seems as if seeking judicial review to secure rights can be an infantilizing process, like asking “Daddy” for a dispensation. She also points to the tendency of favorable judicial decisions, such as *Roe v. Wade*, to mobilize the opposition. Moreover, she contends that the process of litigation can interfere with coalition building.¹²²

Fourth and finally, Becker identifies “futility” as a problem.¹²³ She argues that the courts are not capable of accepting “real social change,” contending

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 976.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 987.

¹¹⁹ *Id.* at 989.

¹²⁰ *Id.* at 990.

¹²¹ *Id.* at 992.

¹²² *Id.* at 992-97.

¹²³ *Id.* at 998.

that even successful outcomes are generally trivial victories which forestall more meaningful change.¹²⁴ In this, Becker seems to accept the divide between positive rights and negative rights, assuming that the courts have limited power to make systemic change. Yet part of Becker's critique here is more of a criticism of the Constitution rather than judicial review: "[T]he rights enshrined in the Bill of Rights are conservative; they are most valuable to the powerful, and often buttress . . . the power of those who hold them."¹²⁵

Becker's work remains one of the few feminist interventions into the problem of judicial review in a constitutional democracy and the sole argument unequivocally against judicial review. A few years after Becker's piece appeared, feminist legal scholar Tracy Higgins published an article *Democracy and Feminism*, a mitigated defense of democratic constitutionalism in the United States as it includes judicial review.¹²⁶ Higgins refracts her theorizing through the case of *United States v. Virginia (VMI)*,¹²⁷ in which a majority of the Court, in an opinion authored by Justice Ruth Bader Ginsburg, held unconstitutional the military academy's all-male admissions policy. Higgins implicitly refutes Becker's preference for democratic interventions by using the arguments of Justice Scalia dissenting in *VMI*. As Higgins accurately relates, Justice Scalia "excoriated the Court for reading into the Constitution the biases of our age and thereby limiting the scope of democratic evolution of social norms,"¹²⁸ a strategy of argument Scalia had similarly employed in cases involving sexual minorities such as *Romer v. Evans* and *Lawrence v. Texas*.¹²⁹ In *VMI*, Scalia "championed the workings of democracy and noted that women, in fact, are in a position to exercise considerable power," and reasoned that the continued state support for VMI's all-male admissions policy "must be presumed to reflect" women's democratic power.¹³⁰ Thus, Scalia's refusal to find a constitutional right for women to be admitted into a state educational institution becomes "a matter of respecting women's rights as citizens" in a democracy.¹³¹

Yet Higgins concludes that women are failed both by "fundamental rights" (as Constitutional rights to be guaranteed through judicial review) and by "democracy."¹³² She argues that if judicial construction of the Constitution does not protect women's rights, then women are lesser citizens than men in

¹²⁴ *Id.* at 998-1010, 1048.

¹²⁵ *Id.* at 1000.

¹²⁶ Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997).

¹²⁷ 518 U.S. 515 (1996).

¹²⁸ Higgins, *supra* note 126, at 1681.

¹²⁹ See *supra* note 57 and accompanying text.

¹³⁰ Higgins, *supra* note 126, at 1681.

¹³¹ *Id.*

¹³² *Id.*

the democracy, and therefore “less capable of protecting their interests through the democratic process.”¹³³ More specifically, Higgins argues that “existing inequality shapes democratic choices.”¹³⁴ Using empirical data, Ilya Somin has demonstrated that the political knowledge base of women, necessary for participating in democratic processes in any meaningful way, is substantially less than that of men, even on issues of particular interest to women such as abortion and the identity of female government officials.¹³⁵

Feminist legal theorist Robin West has integrated her analysis of judicial review into her project of “progressive constitutionalism” which focuses on the Fourteenth Amendment, arguing that its history, language, logic, and spirit demand a more expansive interpretation including positive rights.¹³⁶ West argues that the “adjudicated Constitution,” by which she means the “Constitution [as it] has been construed and applied by the courts,” has “proven to be a markedly conservative foundational document.”¹³⁷ Consistent with Mary Becker, and to some extent Tracy Higgins, Robin West observes that although judicial review of constitutional issues has “from time to time been used to effectuate progressive gains and to solidify progressive victories, those moments have been rare, anomalous, and often fleeting,” and are quickly “soured by [the] near instantaneous conservative reconstruction.”¹³⁸ West addresses the problem of positive versus negative rights in judicial review, seeming to agree with Becker that federal courts in the United States logically protect only negative rights since their role in the constitutional democratic scheme is to constrain and limit the other branches of government.¹³⁹ This leads West to the conclusion that the institution of Congress is defined by a goal of more distributive justice, which would allow Congress to read the Constitution as “requiring, not simply permitting, quite different, and far more progressive, interpretations of our constitutional guarantees than those reached by the Court.”¹⁴⁰

Writing from critical queer and race legal theory perspectives, Darren Lenard Hutchinson expresses similar concerns to those of feminist legal scholars such as Becker, Higgins, and West. Hutchinson challenges the conception that the judicial review is counter-majoritarian and anti-democratic,

¹³³ *Id.*

¹³⁴ *Id.* at 1701.

¹³⁵ Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1357-59 (2004).

¹³⁶ ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 2-3 (Rodney A. Smolla & Neal Devins eds., Duke Univ. Press 1994).

¹³⁷ *Id.* at 296.

¹³⁸ *Id.* at 297 (footnote omitted).

¹³⁹ *Id.* at 315.

¹⁴⁰ *Id.*

instead arguing that the courts reflect majoritarian views.¹⁴¹ Hutchinson roots his theorizing in the so-called liberal successes of the United State's Supreme Court 2003 term, including *Lawrence v. Texas*¹⁴² and *Grutter v. Bollinger*,¹⁴³ concluding that these decisions "fortify, rather than aim to dismantle, social hierarchies of race, sexuality, class, and gender."¹⁴⁴ While many other progressive legal scholars have criticized these seemingly positive decisions,¹⁴⁵ Hutchinson uses them not only to demonstrate the limits of judicial review but also to argue that both legal theorists and social movement activists need to "free themselves from efforts to legitimize judicial review in a 'democracy' and make their claims about the law more normative."¹⁴⁶ As others have done, Hutchinson points out that outcomes of judicial review are shaped by many

¹⁴¹ Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 4 (2005).

¹⁴² 539 U.S. 558 (2003).

¹⁴³ 539 U.S. 306 (2003).

¹⁴⁴ Hutchinson, *supra* note 141, at 4.

¹⁴⁵ Various authors have critiqued *Lawrence*. See, e.g., Belkys Garcia, *Reimagining The Right To Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, 9 N.Y. CITY L. REV. 161 (2005) (arguing that the Court's argument for bodily integrity and privacy limited the rights of "homosexual" people in traditionally recognized relationships, and that by invoking the language of rational basis review and having an exclusionary paragraph, the Court limited the reach of the opinion); Berta E. Hernández-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151, 1242, 1244, 1246 (2004) (critiquing the sameness approach taken by the majority in *Lawrence* as "promoting the idea that [homosexual sexual conduct] is acceptable so long as it is mimetic of [heterosexual sexual conduct]" and thus "reinforces heteronormativity as the status quo, and both normalizes and perpetuates the destructive in/justice paradox").

Grutter has been criticized as well. See, e.g., Bryan K. Fair, *Re(Caste)ing Equality Theory: Will Grutter Survive Itself by 2028?*, 7 U. PA. J. CONST. L. 721, 727-28 (2005) (critiquing the *Grutter* promise "in light of the anticaste principle [and] explaining why it will not likely effect much change in educational caste" by "postpon[ing] for another day the taking of racial caste seriously"); Cecil Hunt II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 525 (2006) (taking a critical view of O'Connor's opinion in *Grutter*, which "suggests that the primary unifying characteristics of the members of the non-favored racial group are their Whiteness, innocence, and victimization from race-conscious affirmative action programs"); Rhonda V. Magee Andrews, *Affirmative Action After Grutter: Reflections on a Tortured Death, Imagining a Humanity-Affirming Reincarnation*, 63 LA. L. REV. 705, 706-07 (2003) (arguing "that the standard 'diversity' rationale for affirmative action, though of obvious appeal, is not a remedial or corrective justice-based rationale, and hence, fails to address the central concerns of traditionally disadvantaged groups" and therefore must be "revised and broadened"); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 194 (2004) (arguing that the Court's timetable for eliminating race-conscious affirmative action, as delineated in the *Grutter* opinion, is unrealistic and critiquing the decision as "provid[ing] little material benefit for communities of color [yet] materially and symbolically privileg[ing] white interests [by] prioritiz[ing] the interests of white students in breaking down their stereotypes about minorities and in adding diverse perspectives to classroom conversations").

¹⁴⁶ Hutchinson, *supra* note 141, at 82.

forces outside the law;¹⁴⁷ as the adage has it: “th’ supreme court follows th’ ilection returns.”¹⁴⁸ He argues that because majoritarian views influence specific outcomes when judicial review is exercised, progressive social movements should engage in coalition politics to enhance their political voice.¹⁴⁹ The majoritarian solution available to women as advanced by Mary Becker¹⁵⁰ is implicitly adapted by Hutchinson for groups, unlike women, who are not a statistical majority. In short, Hutchinson argues that by forming coalitions, sexual and racial minorities could become majorities, or at least influence the outcomes of judicial review through social and democratic processes.

Lesbian legal scholar Nancy Knauer adds an important dimension to any debate that constructs judicial review and democratic processes as oppositional choices.¹⁵¹ Relying on and refining comparative institutional analysis theory,¹⁵² which adds the “market” to the judicial and political processes as important and rejects “the conceit of single institutionalism,” given that each institutional process is limited by design and therefore imperfect,¹⁵³ Knauer takes up the topic of legal recognition of same-sex relationships.¹⁵⁴ She argues that advocates, unlike theorists, strategize how to achieve their goals not by simply identifying the optimal institution, but by simultaneously pursuing the goals in “a variety of complementary institutional settings.”¹⁵⁵ Yet in assessing the likelihood that an institution will be amenable to the achievement of one’s goals, Knauer correctly includes the non-institutional oppositional forces, such as the “traditional values movement” which opposes legal recognition for same-sex relationships specifically, and sexual freedom more generally.¹⁵⁶ In

¹⁴⁷ *Id.*

¹⁴⁸ FINLEY PETER DUNNE, *The Supreme Court's Decisions, in MR. DOOLEY'S OPINIONS* 19, 26 (1900).

¹⁴⁹ Hutchinson, *supra* note 141, at 90.

¹⁵⁰ See *supra* notes 113-125 and accompanying text.

¹⁵¹ Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23 (2005).

¹⁵² See generally NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

¹⁵³ Knauer, *supra* note 151, at 23-24.

¹⁵⁴ *Id.* at 24-25 (arguing that a specific controversy is much more necessarily considered than “vague exogenous conceptions of the good, such as equality, strong property rights, or resource allocation efficiency”).

¹⁵⁵ *Id.* at 25.

¹⁵⁶ *Id.* at 54-55. Although Knauer does not use the term “sexual freedom,” she notes that the “traditional values movement considers homosexuality, along with abortion, no-fault divorce, and the separation of church and state, as symptomatic of a general decline in morals which threatens the health of the nation.” *Id.* at 54.

so doing, she elucidates an important rationale for the conservative attack on judicial review in the arena of sexual freedom.¹⁵⁷

Although Knauer stresses market forces throughout her essay, even stating that “arguably” some of the “greatest gains in the recognition of same-sex relationships have come from the market,”¹⁵⁸ she ultimately concludes that the path to “minority recognition does not lie in deciphering the best institutional alternative or mounting a flawless litigation strategy,” but with “atomistic forces that drive the institutions,” such as a neighbor across the street.¹⁵⁹

As Knauer notes, and is implicit in most of the theorizing regarding judicial review, the power of the judicial decisions to shape social change, and not merely respond to it, is an important consideration.¹⁶⁰ The work of feminist social theorists has demonstrated that *Roe v. Wade* had a “galvaniz[ing]” effect

¹⁵⁷ Knauer states:

The traditional values movement typically does not have standing to challenge the individual unscripted victories that occur from time to time when same-sex partners demand recognition in the courts In these individual cases, the traditional values movement is consigned to comment from the sidelines, occasionally making an appearance as amici. . . .

The lack of standing to challenge individual cases underscores a puzzling feature of the traditional values movement. Unlike same-sex couples who have an obvious personal stake in the debate, it is not clear what motivates the core participants in the traditional value movement. It is one thing for an individual to work toward formal and social recognition of her family, but it is quite a different thing to work toward the erasure of a stranger's family. Therefore, as a practical matter, it makes sense that the movement concentrates its efforts on legislative action or constitutional amendments that can undo or forestall the individual court victory or grant of benefits. Locating its demand in the political process or direct democracy may be necessary because the benefits of participation are arguably so diffuse, and success depends on reaching the broadest possible base.

Id. at 56-57 (footnotes omitted).

¹⁵⁸ *Id.* at 26.

¹⁵⁹ *Id.* at 80.

¹⁶⁰ The view that courts cannot produce social change was most effectively argued in GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). Rosenberg recently applied his thesis to the Massachusetts Supreme Court's decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). Rosenberg concluded that the result of this (and similar) judicial victories have been “nothing short of disastrous”:

Same-sex marriage proponents had not built a successful movement that could persuade their fellow citizens to support their cause and pressure political leaders to change the law. Without such a movement behind them, winning these court cases sparked an enormous backlash. They confused a judicial pronouncement of rights with the attainment of those rights.

Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 812-13 (2006).

leading to the creation of the so-called “right to life” movement,¹⁶¹ yet the judicial enforcement of sexual rights for women has also had many positive consequences. “Backlash” and “positive change” are not mutually exclusive. Likewise, in the area of sexual minority issues, the role of the courts in social change is not capable of simplistic equations.¹⁶²

Thus, although there are certainly differences amongst the feminist and sexual minority perspectives elucidated above, there are several similarities that would seem to underlie queer and feminist legal theories of judicial review. First, unlike many of the other legal theories interrogating judicial review, the emphasis is on current controversies rather than historical problems and pronouncements. The framers of the Constitution, *Marbury v. Madison* “establishing” judicial review,¹⁶³ and previous practices of judicial review are not subject to the type of scriptural exegesis prominent in liberal, progressive, and conservative discourse. Second, again unlike non-feminist legal theories of judicial review, the conclusions are much less likely to firmly defend judicial review or to argue for its demise in favor of popular democracy. Even in the work of Mary Becker, the feminist legal scholar arguing most strenuously against judicial review, her arguments are qualified and nuanced.¹⁶⁴

Lastly, and most importantly, feminist theorizing about judicial review is refreshingly instrumental and utilitarian, as such terms are more commonly and less philosophically understood. Specifically, feminist legal theorizing presumes that the purpose of any interrogation of judicial review in a constitutional democracy is focused on achieving the “liberation” of women and others, whether it is phrased in terms of equality, citizenship, or as this

¹⁶¹ See, e.g., Christopher P. Keleher, *Double Standards: The Suppression of Abortion Protesters’ Free Speech Rights*, 51 DEPAUL L. REV. 825, 838 (2002) (summarizing news articles in the weeks immediately following the *Roe v. Wade* decision and finding that the decision did not discourage the pro-life movement but instead “actually galvanized the pro-life movement”).

¹⁶² As Jane Schacter recently noted:

The question whether courts can, or do, produce social change on sexual orientation issues is a question that is, on closer analysis, too crude to be all that useful. I will suggest that rather than staking out broad claims or pursuing unbroken causal arrows, scholars ought to bring into focus the variability, contingency, and complexity that presents itself as we try to map the relationship between courts and social change in the area of gay rights. True, any romanticized picture of judges as countermajoritarian revolutionaries, single-handedly making public policy more progressive, is empirically unsustainable. But we should not replace one piece of mythology with another. The notion that the institutional properties of courts disable them from ever driving social change in a significant way has its own caricatured qualities.

Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 863 (2006).

¹⁶³ 5 U.S. (1 Cranch) 137 (1803). See *supra* notes 32-34 and accompanying text.

¹⁶⁴ See *supra* notes 113-125 and accompanying text.

piece is attempting, sexual freedom. This is a stark contrast to some of the legal theorizing about judicial review which adopts a pose of neutrality.

Although Tracy Higgins observes that “mainstream constitutional theory rests on a conception of citizenship but lacks a critique of power, [while] feminist legal theory presents a critique of power but lacks an affirmative conception of citizenship,”¹⁶⁵ it must be remembered that judicial review in a constitutional democracy is specifically about power and the allocation of power. The framers of the Constitution were not engaged in an abstract enterprise, but were concerned about particular issues, although women’s sexual freedom barely surfaced as a concern¹⁶⁶ and human slavery had been accommodated.¹⁶⁷ Thus, feminist interventions into the counter-majoritarian difficulty of judicial review in a democracy are grounded, and should be, in exercises of power regarding the lives of women.

From that perspective, neither judicial review nor democratic processes are sufficient to secure rights for women. As Mary Becker points out, the institution of judicial review is overwhelmingly implemented by men and bound to conservative precedent constructed by men of previous generations.¹⁶⁸ Further, even when judicial review results in a successful outcome for women, it is circumscribed,¹⁶⁹ perhaps unavoidably so, given the Constitution’s limita-

¹⁶⁵ Higgins, *supra* note 126, at 1670.

¹⁶⁶ Abigail Adams famously wrote to her husband, “founding father” John Adams, to consider rights for women: “[I]n the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors.” Letter from Abigail Adams to John Adams (Mar. 31, 1776), in *1 ADAMS FAMILY CORRESPONDENCE* 370 (L.H. Butterfield et al. eds., 1963). Despite this, the Constitution was silent about gender until the Fourteenth Amendment, which introduced the word “male” into the Constitution. See U.S. CONST. amend. XIV, § 2. The Constitution did not include an explicit recognition of rights for women until the Nineteenth Amendment, which prohibits using sex as a basis for depriving the right to vote. See U.S. CONST. amend. XIX.

¹⁶⁷ *E.g.*, U.S. CONST. art. I, § 9, cl. 1.

Accommodation of slavery appears in the Constitutional text in the so-called importation clause:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person[.]

Id.

The accommodation also appears in the “fugitive slave” clause:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Id. art. IV, § 2, cl. 3.

¹⁶⁸ See *supra* notes 117-18 and accompanying text.

¹⁶⁹ *Id.* at 992-97.

tion to addressing negative rights.¹⁷⁰ On the other hand, democratic processes are shaped by inequality,¹⁷¹ especially given that women continue to be less politically aware.¹⁷²

Yet an understanding that neither judicial review nor democratic processes are necessary or capable of securing freedom for women in the constitutional democracy of the United States does not provide guidance about whether feminist or lesbian legal theorists should promote or eschew judicial review as part of a constitutional democracy. This is an important and immediate issue for those involved in drafting constitutions in new democracies or transnational entities, in constitutional revision, and in political debates.

IV. GLOBAL PERSPECTIVES

Within the United States and globally, sexual freedom for lesbians, other sexual minorities, and women has been procured both through judicial review and through democratic processes, and both processes have yielded disappointments. In order to explore specifically some of the controversial issues and relationships between judicial review and the legislative process, this section analyzes three jurisdictions that are generally considered to be at the forefront of sexual freedom: California, the Netherlands, and South Africa.

A. California

The situation in California confounds much of the conservative rhetoric blaming “activist judges” for subverting the legislative democratic process in the area of same-sex marriage. On September 7, 2005, the California legislature passed a bill that provided that “marriage is a personal relation arising out of a civil contract between two persons,”¹⁷³ thus allowing same-sex marriage. California Governor Schwarzenegger vetoed the bill, saying that the “matter should not be determined by legislative action,” but by “court decision” or a direct vote of the people.¹⁷⁴ Certainly, the governor’s action is complicated by the fact that there had been a successful ballot initiative restricting marriage to opposite sex couples in 2000,¹⁷⁵ that the initiative had

¹⁷⁰ See WEST, *supra* note 136, at 315.

¹⁷¹ Higgins, *supra* note 126, at 1701.

¹⁷² Somin, *supra* note 135, at 1357-59.

¹⁷³ Religious Freedom and Civil Marriage Protection Act, Assemb. B. 849, 2005-2006 Sess. (Cal. 2005) (as amended June 28, 2005).

¹⁷⁴ Dean E. Murphy, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES, September 8, 2005, at A18 (quoting Schwarzenegger’s spokeswoman, Margita Thompson).

¹⁷⁵ California Proposition 22, Limit on Marriages (2000), codified at CAL. FAM. CODE §§ 300, 308 (West 2007).

been declared unconstitutional by a lower California court,¹⁷⁶ and was (and currently is) making its way through the California judicial courts.¹⁷⁷ The veto demonstrates the contradictory positions regarding judicial review amongst those who do not advocate same-sex marriage.¹⁷⁸ As one conservative opined, the California law sought to impose same-sex marriage by “legislative snub,” comparable to the Massachusetts court’s “judicial fiat,” as well as to the “executive decree” of mayors performing same-sex marriages in San Francisco and New York.¹⁷⁹ Such rhetoric seems to suggest that no governmental entity can decide the issue.

In late 2006, a California appellate court issued a lengthy opinion holding that the state’s failure to recognize same-sex marriages is constitutional,¹⁸⁰ a decision the California Supreme Court has decided to review.¹⁸¹ Like other recent decisions in New York and Washington, the California appellate court stressed that the decision was one for the legislature rather than the judicial branch.¹⁸² In July 2006, New York’s highest court held that “the New York Constitution does not compel recognition of marriages between members of the same sex,” and in the opinion’s second sentence proclaimed that “whether such marriages should be recognized is a question to be addressed by the Legislature.”¹⁸³ Later that same month, the Supreme Court of Washington reached the same conclusion, again stressing that the court has a “limited role” and should thus defer to the legislative branch.¹⁸⁴ The court went on to say that “personal views must not interfere with a judge’s responsibility to decide

¹⁷⁶ Marriage Cases, Case No. CJC-04-004365 (San Francisco Super. Ct. 2005) (coordination proceeding consolidating six cases concerning whether California Family Code provisions limiting state recognition to opposite-sex marriages violates the state constitution: *Woo/Martin v. California* (San Francisco Super. Ct. No. 504038); *City & County of San Francisco v. California* (San Francisco Super. Ct. No. 429539); *Clinton v. California* (San Francisco Super. Ct. No.); *Proposition 22 Legal Defense and Education Fund v. City & County of San Francisco* (San Francisco Super. Ct. No. 503943); *Thomasson v. Newsom* (San Francisco Super. Ct. No. 428794); *Tyler v. County of Los Angeles* (Los Angeles Super. Ct. No. 088506)).

¹⁷⁷ *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (2006).

¹⁷⁸ Press Release, Statement by Gubernatorial Press Secretary Margita Thompson on AB 849 (Sept. 7, 2005), available at <http://gov.ca.gov/index.php?/press-release/1443/>. The Press Release, however, began: “In Governor Schwarzenegger’s personal life and work in public service, he has considered no undertaking more noble than the cause of civil rights. He believes that gay couples are entitled to full protection under the law and should not be discriminated against based upon their relationship.” *Id.*

¹⁷⁹ Jeff Jacoby, *The People’s Voice on Gay Marriage*, BOSTON GLOBE, Oct. 5, 2005, at A19.

¹⁸⁰ *In re Marriage Cases*, 49 Cal. Rptr. 3d 675.

¹⁸¹ *In re Marriage Cases*, 149 P.3d 737 (Cal. 2006).

¹⁸² *In re Marriage Cases*, 49 Cal. Rptr. 3d at 726.

¹⁸³ *Hernandez v. Robles*, 855 N.E.2d 1, 1 (N.Y. 2006).

¹⁸⁴ *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

cases as a judge and not as a legislator.”¹⁸⁵ However, the California appellate court had to consider a more complicated legislative and executive landscape¹⁸⁶ that directly implicates the proper role of the judiciary to protect minority rights in a democracy. After noting that “of course” majoritarian wishes, whims or prejudices are not necessarily conclusive on the question of constitutionality,¹⁸⁷ the court attempted to refute any possible arguments based upon the lack of a legislative remedy in the context of the governor’s veto.¹⁸⁸

¹⁸⁵ *Id.* at 968.

¹⁸⁶ The court discussed the legislative domestic partnership act, but then added:

Our review of domestic partnership laws would not be complete without a discussion of the Legislature’s recent attempt to extend marriage rights to same-sex couples. In 2005, Assemblyman Mark Leno introduced a bill to enact the Religious Freedom and Civil Marriage Protection Act. Assembly Bill No. 849 recited legislative findings that (1) gender-specific language added by the 1977 amendments to the marriage laws discriminates against same-sex couples; (2) the exclusion of same-sex couples from marriage violates the rights of gays and lesbians under the California Constitution; (3) California’s same-sex couples are harmed in various ways by their exclusion from marriage; and (4) “[t]he Legislature has an interest in encouraging stable relationships regardless of the gender or sexual orientation of the partners. The benefits that accrue to the general community when couples undertake the mutual obligations of marriage accrue regardless of the gender or sexual orientation of the partners.” With a declared intent to “correct the constitutional infirmities” of the marriage laws, the bill would have amended Family Code, sections 300 through 302 to remove all gender-specific terms. Recognizing its inability to correct any such problems in Family Code, section 308.5, due to its enactment by initiative, the Legislature declared Assembly Bill No. 849 was not intended to alter or amend the prohibition in section 308.5 against recognizing same-sex marriages entered outside California. Finally, the bill provided that no clergy or religious official would be required to solemnize a marriage in violation of his or her constitutional right to free exercise of religion.

Although Assembly Bill No. 849 passed both houses of the Legislature in September 2005, it was vetoed by the Governor. In his veto message, Governor Schwarzenegger explained that while he supported domestic partnerships for gay and lesbian couples, he did not believe the Legislature could amend Family Code, section 308.5 without submitting the provision for voter approval. Moreover, because the constitutionality of the marriage laws was pending before this appellate court at the time, the Governor believed Assembly Bill No. 849 would add “confusion” to the constitutional issues under review. He remarked, “If the ban of same-sex marriage is unconstitutional, this bill is not necessary. If the ban is constitutional, this bill is ineffective.”

In re Marriage Cases, 49 Cal. Rptr. 3d at 696-97 (internal citations omitted).

¹⁸⁷ *Id.* at 724.

¹⁸⁸ The court stated:

[O]ne should not oversimplify what the Governor’s veto message [of Assembly Bill No. 849] actually said. In exercising his veto power, the Governor expressed doubts about the Legislature’s ability to amend Family Code section 308.5 without submitting the matter to voters, because section 308.5 was enacted by initiative, and appropriately urged restraint while constitutional issues concerning same-sex marriage were determined by the courts. As his press release explained, the proposed legislation risked adding

Without specifically invoking *Romer v. Evans*¹⁸⁹ or theorist Jeremy Waldron's "exceptions"¹⁹⁰ in this context, the majority nevertheless demonstrates its cognizance of the importance of the option of resort to democratic action by those seeking judicial action.

For the dissenting judge Anthony Kline, however, the specificities of the California legislative process are not important in the context of protecting the rights of sexual minorities.¹⁹¹ Furthermore, the role of the referendum is equally irrelevant: "[V]oters may no more violate the Constitution" than a "legislative body" may violate the constitution.¹⁹² Quoting dissenting Judge Saxe in the New York opinion, Judge Kline states that one cannot "expect" the legislature which "represent[s] majoritarian interests, to act to protect the rights of the homosexual minority."¹⁹³

The California Supreme Court has accepted review of the appellate court decision, with an opinion likely in late 2007.¹⁹⁴ To decide the case, the court will grapple with questions of judicial review, probably making pronouncements on its own legitimacy in the California constitutional and political landscape. Certainly, it will be cognizant of not only California, but of the upheavals in sister states.¹⁹⁵

B. The Netherlands

The Netherlands, well known for its sexual and other freedoms, has been called a "kind of Berkeley [California] writ large."¹⁹⁶ The Netherlands has been in the vanguard of providing legal protections for sexual minorities, and

confusion to the issues on appeal and, depending on the appeal's outcome, could have proven unnecessary.

Id. at 726 n.35 (citing Governor's veto message to Assem. on Assem. Bill No. 849 (Sept. 29, 2005) Recess J. No. 4 (2005-206 Reg. Sess.) 3737-38).

¹⁸⁹ 517 U.S. 620 (1996). *See supra* notes 53-57 and accompanying text.

¹⁹⁰ *See supra* notes 90-95 and accompanying text.

¹⁹¹ *In re Marriage Cases*, 49 Cal. Rptr. 3d at 731 (Kline, J., dissenting in part).

¹⁹² *Id.* at 750 n.8 (quoting *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981)).

¹⁹³ *Id.* at 750 (quoting *Hernandez v. Robles*, 805 N.Y.S.2d 354, 383 (N.Y. App. Div. 2005) (Saxe, J., dissenting)).

¹⁹⁴ *In re Marriage Cases*, 149 P.3d 737 (Cal. 2006).

¹⁹⁵ Any state court considering the issue of same-sex marriage occurs in the shadow of the early 1990s Hawai'i experience, which erupted into a political dispute between the court and the legislature, and resulted in an amendment to the state constitution that gave the power to decide on the issue to the state legislature. For further discussion of the controversies in Hawai'i, as well as elsewhere, see Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMPLE L. REV. 709, 737-45 (2002).

¹⁹⁶ Ian Buruma, *Final Cut: After a Filmmaker's Murder, the Dutch Creed of Tolerance Has Come Under Siege*, THE NEW YORKER, Jan. 3, 2005, at 26.

it is a nation in which the judiciary does not have the power of judicial review.¹⁹⁷

The Constitution of the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Nederlanden*) specifically limits judicial power over legislative acts: Article 120 provides that “[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.”¹⁹⁸ The Constitution, however, does specify rights, including positive rights and rights as against private parties. Article 1 states that “[a]ll persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted.”¹⁹⁹ Subsequent articles provide for rights of expression, association, privacy, “inviolability of the person,” work, aid from the government for subsistence, health, and education.²⁰⁰ Thus, although the rights enumerated and entrenched in the Netherlands Constitution are expansive, they are judicially unenforceable. Given this structure, it is predictable that any advancement for sexual minorities has not been accomplished through the judicial branch.

Because Netherlands’ Constitution also provides for a monarchy,²⁰¹ any advances have also been given the imprimatur of the reigning royal head of state. In late 2000, when Netherlands became the first nation to provide for same-sex marriage, Queen Beatrix signed what is usually translated as the “Act on the Opening Up of Marriage.” The Act amended the marriage laws to provide that “[a] marriage can be contracted by two persons of different sex or of the same sex.”²⁰² Thus, as scholar Nancy Maxwell makes clear, the Dutch legislation “does not create a parallel relationship with heterosexual marriage, but changes the definition of marriage to include same-gender couples.”²⁰³ Companion acts amended language in other laws to change the

¹⁹⁷ See discussion *infra*.

¹⁹⁸ GW. art. 120.

¹⁹⁹ *Id.* at art. 1.

²⁰⁰ *Id.* at arts. 7, 8, 10, 11, 19, 22, 23.

²⁰¹ *Id.* at arts. 24-49.

²⁰² For discussions of the Act in English, refer to Nancy Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT’L & COMP. L. 142 (2001) [hereinafter Maxwell, *Opening Civil Marriage*] and Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569 (2004).

Like many other scholars not fluent in Dutch, the author relies on the expert translations and work of Dutch legal scholar Kees Waaldijk of the Universiteit Leiden in the Netherlands. See Universiteit Leiden, Text of Dutch law, <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=86> (last visited Oct. 15, 2007) (providing a translation of the Act).

²⁰³ Maxwell, *Opening Civil Marriage*, *supra* note 202, at 155.

adoption laws,²⁰⁴ to address presumptions of parenthood when a child is born to a same-sex couple,²⁰⁵ and to replace gender-specific language in other laws referencing marital relations.²⁰⁶

These acts of parliament followed a previous pattern in which the Netherlands had enacted a series of laws recognizing non-married partners, notably with a tenancy protection law in 1979²⁰⁷ and thereafter with a registered partnership scheme that had gradually become more similar to marriage.²⁰⁸

In the nonmarital realm, the Dutch Parliament had enacted the General Equal Treatment Act in 1994, which protected both sexual orientation and marital status.²⁰⁹ Sodomy had been decriminalized since 1811.²¹⁰ Addition-

²⁰⁴ Act of 21 December 2000 amending of Book 1 of the Civil Code (adoption by persons of the same sex). Stb. 1002, nr.10, 2001, nr. 10 (11 January). See Universiteit Leiden, Text of Dutch law, <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=87> (last visited Oct. 15, 2007). For those fluent in Dutch, Waaldijk cites the original version in Dutch. Overheid.nl, <http://wetten.overheid.nl> (last visited Oct. 15, 2007). See Nancy Maxwell & Caroline Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood*, 38 FAM.L.Q. 623, 638-40 (2004); Waaldijk, *supra* note 202, at 573.

²⁰⁵ Waaldijk, *supra* note 202, at 573-74 (citing Stb. 2001, 468).

²⁰⁶ *Id.* at 573 (citing Stb. 2001, 128).

²⁰⁷ *Id.* at 570 n.2. (citing Stb. 1979, 330). As Waaldijk explicates, this legislative provision allowed a tenant's partner to become a co-tenant after two years of cohabitation in a "lasting joint household." *Id.*

Compare this to a New York case decided a decade later. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 50 (N.Y. 1989) (holding that Miguel Braschi was not excluded as a matter of law from seeking noneviction protection through a regulation that ensured that landlords, upon the death of a rent-control tenant, would not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant"). The court interpreted the word "family" expansively:

Family members, whether or not related by blood, or law who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant, thereby furthering the Legislature's goals of preventing dislocation and preserving family units which might otherwise be broken apart upon eviction. This approach will foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates or newly discovered relatives hoping to inherit the rent-controlled apartment after the existing tenant's death.

Id. at 54 (citations omitted). An important point of comparison is not only the decade difference, but also the Dutch legislation and the American judicial action in state court.

²⁰⁸ See Waaldijk, *supra* note 202, at 578-80 (citing Stb. 1994, 230); Maxwell, *Opening Civil Marriage*, *supra* note 202, at 149-52 (discussing process of legislation).

²⁰⁹ See Waaldijk, *supra* note 202, at 578 (citing Stb. 1997, 324).

²¹⁰ See *id.* at 578.

ally, other activities have been decriminalized, such as prostitution (although pimping continues to be criminalized),²¹¹ some drug use,²¹² and euthanasia.²¹³

From such a portrait, it might seem that the legislative process has not only been paramount, but exclusive. However, there has been some invocation of judicial power. The Dutch Supreme Court, the Hoge Raad, heard a case regarding same-sex marriage in 1990, as did a lower court in Amsterdam.²¹⁴ The Court declined to protect same-sex marriage.²¹⁵ Scholar Nancy Maxwell

²¹¹ See Jessica Drexler, Note, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L. L. 201 (1996) (discussing prostitution in the Netherlands).

²¹² For discussions of Dutch drug policies, see C. W. Maris, *The Disasters of War: American Repression Versus Dutch Tolerance in Drug Policy*, 29 J. DRUG ISSUES 493 (1999); Tim Boekhout van Solinge, *Dutch Drug Policy in a European Context*, 29 J. DRUG ISSUES 511 (1999); Henk Jan VanViliet, *Separation of Drug Markets and the Normalization of Drug Problems in the Netherlands: An Example for Other Nations?* 20 J. DRUG ISSUES 463 (1990).

²¹³ For discussions of euthanasia in the Netherlands, refer to Ubaldus deVries, *A Dutch Perspective: The Limits of Lawful Euthanasia*, 13 ANNALS HEALTH L. 365 (2004), and Neil M. Gorus, *The Legalization of Assisted Suicide and the Law of Unintended Consequences: A Review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change*, 2004 WISC. L. REV. 1347, 1353-70 (2004).

Interestingly, the Supreme Court discussed the "Dutch experience" in *Washington v. Glucksberg*, 521 U.S. 702, 732, 734 (1997), to support its holding that a terminally ill patient does not have a constitutionally recognized right to euthanasia. Specifically, the Court referenced a Dutch report finding that:

[D]espite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia.

Id. at 734. The Court used this Dutch report to support its own finding that the state had a legitimate interest in protecting vulnerable persons. *Id.*

²¹⁴ See Maxwell, *Opening Civil Marriage*, *supra* note 202, at 142-48.

²¹⁵ The petitioners argued that the court could interpret the law to include same-sex partners, an argument rejected by the courts based on interpretations of legislative intent. *Id.* at 143. The petitioners also made several right-based arguments. One was based upon the equality clause of the Netherlands Constitution, article I. The Netherlands Supreme Court rejected the claim, holding that the Constitution "cannot change" the legislative intent of the statute. Maxwell, *Opening Civil Marriage*, *supra* note 202, at 145 & n.20 (citing HR 19 oktober 1990, NJ 1992, 192, m.nt. EAAL en EAA (homohuwelijk; trans. Duck Obbink)). The petitioners based their other arguments on provisions of the European Convention on Human Rights, the International Covenant on Civil and Political Rights. See also *id.* at 143-47. Although the Court did seem to understand it had the power under the international instruments to invalidate an act of Parliament, it reasoned that it was limited by precedents of international judicial bodies, and also interpreted marriage in a manner that limited relief. The Court did, however, note that the "benefits" of marriage, as opposed to marriage itself, might raise a valid claim, but again deferred to the legislature. *Id.* at 147 (citing HR 19 oktober 1990, NJ 1992, 192, m.nt. EAAL en EAA (homohuwelijk; trans. Caroline Forder)).

astutely points out that the Netherlands Supreme Court did not make a pronouncement that Parliament should address any inequalities as it had several years earlier in cases involving the unequal treatment of married and unmarried parents.²¹⁶ Nevertheless, the legislative body of the Netherlands would institute such reforms shortly thereafter.

The groundbreaking role of the Dutch Parliament in promoting sexual freedoms, including same-sex marriage, prompts explanations. A typical account might begin with a description of Dutch culture as liberal, tolerant, and secular, and its elective representatives being responsive.²¹⁷ More sophisticated explanations stress the incremental nature of the changes²¹⁸ (though certainly that strategy has not been uniformly successful in other nations)²¹⁹ and the particular political configurations and relationships.²²⁰ The lack—or apparent lack—of religious conservatism in the Netherlands is often highlighted.²²¹ Indeed, the Netherlands might be argued to be an exemplary example of theorist Jeremy Waldron's four assumptions necessary to sustain

²¹⁶ *Id.* at 148 n.28. Maxwell states: "For example, the Netherlands Supreme Court instructed the Parliament to remedy the unequal treatment involving the exercise of joint parental authority, because the legislation was not treating divorced and unmarried parents the same as married parents." *Id.*; see HR 4 mei 1984, NJ 1985, 510 (involving the unequal treatment of divorced parents); HR 21 maart 1986, NJ 1986, 585 (involving unmarried parents).

²¹⁷ *E.g.*, Marilyn Sanchez-Osorio, *The Road to Recognition and Application of the Fundamental Constitutional Right to Marry of Sexual Minorities in the United States, The Netherlands, and Hungary: A Comparative Legal Study*, 8 ILSA J. INT'L & COMP. L. 131 (2001). Sanchez-Osorio states:

The Dutch Parliament, has proven time and again how the intense social conscience that prevails in the Netherlands on the subject of minority rights, non-discriminatory legislation in the area of sexual orientation, equal rights for same-sex partners, and general human rights laws, will find fertile ground in a legal system that works to fully reflect the society it represents and not only the personal and conservative views of a few of its members.

Id. at 141.

²¹⁸ Kees Waaldijk, *Standard Sequences in the Legal Recognition of Homosexuality: Europe's Past, Present and Future*, 4 AUSTRALASIAN GAY & LESBIAN L.J. 50-52 (1994).

²¹⁹ See Jason Montgomery, *An Examination of Same-Sex Marriage and the Ramifications of Lawrence v. Texas*, 14 KAN. J.L. & PUB. POL'Y 687, 697-98 (2005) (critiquing the incremental approach in the United States).

²²⁰ See, *e.g.*, Cece Cox, *To Have and to Hold—Or Not: The Influence of the Christian Right on Gay Marriage Laws in The Netherlands, Canada, and The United States*, 14 L. & SEXUALITY 1, 9 (2005) (noting that when the same-sex marriage legislation was passed, it was "the first time in more than eighty years" that the Christian Democrats, the leading political party opposing same-sex marriage, were not part of the government coalition).

²²¹ See, *e.g.*, *id.* at 7 (discussing the absence of any significant Christian right movement within the Netherlands as a usual explanation for the recognition of full marriage rights for sexual minorities).

his case against judicial review, including most especially a commitment by the populace to “the idea of individual and minority rights.”²²²

However, events subsequent to the passage of the 2000 Opening Up of Marriage Act²²³ complicate the picture of the Netherlands as a tolerant society with no need for any political institution such as the judiciary to protect minorities from majoritarian impulses. At first, the rise of openly gay politician Pim Fortuyn seems consistent with the depiction of Dutch politics as tolerant and progressive.²²⁴ Yet Pim Fortuyn, running for Parliament and poised to become Prime Minister,²²⁵ famously argued that “he would not mind abolishing the prohibition to discriminate as embedded in article I of the Dutch constitution”²²⁶ in favor of the unrestricted freedom of expression,²²⁷ because the Dutch “culture of political correctness had resulted in a hush-up of the problems caused by immigration.”²²⁸ By “immigration,” Fortuyn undoubtedly meant the predominantly Muslim immigrants and their descendants from nations such as Morocco, Turkey, and the former Dutch colony of Surinam.²²⁹ The Netherlands is the most densely populated nation in Europe,²³⁰ and

²²² Waldron, *supra* note 6, at 1364. *See supra* notes 90-94 and accompanying text.

²²³ *See supra* note 202 and accompanying text.

²²⁴ Several excellent sources discuss Dutch politics post 2001 and the life and death of Pim Fortuyn. *See* IAN BURUMA, MURDER IN AMSTERDAM: THE DEATH OF THEO VAN GOGH AND THE LIMITS OF TOLERANCE (2006); Tjitske Akkerman, *Anti-immigration Parties and the Defence of Liberal Values: The Exceptional Case of the List Pim Fortuyn*, 10 J. POL. IDEOLOGIES 337 (2005); Elizabeth Kolbert, *Beyond Tolerance: What Did the Dutch See in Pim Fortuyn?*, THE NEW YORKER, Sept. 9, 2002, at 106; Wim Lunsing, *Islam Versus Homosexuality?: Some Reflections on the Assassination of Pim Fortuyn*, 19 ANTHROPOLOGY TODAY 19 (2003); Joop Van Holsteyn and Galen Irwin, *Never a Dull Moment: Pim Fortuyn and the Dutch Parliamentary Election of 2002*, 26 WEST EUROPEAN POL. 41 (2003); Peter van der Veer, *Pim Fortuyn, Theo van Gogh, and the Politics of Tolerance in the Netherlands*, 18 PUB. CULTURE 111 (2006).

²²⁵ *See* Marlise Simons, *Proudly Gay, and Marching the Dutch to the Right*, N.Y. TIMES, Mar. 22, 2002, at A4 [hereinafter Simons, *Proudly Gay*] (discussing Pim’s chances of becoming prime minister, published several weeks before his death).

²²⁶ *See* Gw. art. 1; Akkerman, *supra* note 224, at 349.

²²⁷ Akkerman, *supra* note 224, at 349. The freedom of “speech” to which Fortuyn referred is presumably contained in Article 7 of the constitution, which prohibits requiring prior permission to publish thoughts or opinions through the press. *See* Gw. art. 7.

²²⁸ Akkerman, *supra* note 224, at 349.

²²⁹ *See* BURUMA, *supra* note 224, at 18-23 (discussing the recent history of immigration to the Netherlands). Such “non-native Dutch” comprised almost fifty percent of the population of Amsterdam. *Id.* at 23. That population comprised forty-five percent of the Netherlands’ second largest city, Rotterdam. Simons, *Proudly Gay*, *supra* note 225, at A4. Percentages increased in smaller cities and more rural locations. BURUMA, *supra* note 224, at 118-19.

²³⁰ Marlise Simons, *More Dutch Plan to Emigrate As Muslim Influx Tips Scales*, N.Y. TIMES, Feb. 27, 2005, at 16 [hereinafter Simons, *More Dutch Plan to Emigrate*] (describing the Netherlands as “Europe’s most densely populated nation, where 16.3 million people live in an area roughly the size of Maryland”).

Fortuyn pronounced the Netherlands “full up.”²³¹ But Fortuyn’s complaints were not primarily spatial. Instead, Fortuyn decried the Muslim immigrants for their lack of tolerance for tolerance.²³²

As a very outspoken gay man with a “flamboyant”²³³ and charismatic²³⁴ media presence, Fortuyn was well-positioned to articulate “a form of xenophobia ideally suited to a nation that prides itself on its tolerance.”²³⁵ The national culture of tolerance needed defense because it was not inherent, but hard-won. It is the “popular narrative” of Dutch history that during the “silent revolution” of the 1960s, Dutch cultural politics freed itself from the restrictions of the religious twin pillars of Catholicism and Calvinism.²³⁶ For Fortuyn, Islam presented the threat of a return to moral strictures.²³⁷

Fortuyn’s assassination in May 2002, the first political assassination in the Netherlands in several hundred years,²³⁸ was committed by an animal rights

²³¹ Simons, *Proudly Gay*, *supra* note 225.

²³² Fortuyn was often quoted for his statement that “Islam is backward,” which relied upon his construction of the religion’s attitudes toward women and sexual minorities. In addition to “values,” however, Fortuyn’s views included “anti-welfare” and “pro-law and order.” See Simons, *Proudly Gay*, *supra* note 225, at A4.

²³³ See, e.g., BURUMA, *supra* note 224, at 39, 54 (describing Fortuyn as “proudly, even flamboyantly, homosexual,” and stating “Fortuyn was often described as a *relnicht*, a ‘screaming queen’”); van der Veer, *supra* note 224, at 114 (describing Fortuyn’s “flamboyant media performance,” his dress as a “dandy,” and comparing his performance to that of popular “[c]lampy, extroverted gay entertainers”).

²³⁴ See Paul Lucardie, *Populism, Polder and Prairie: The Rapid Rise and Fall of Pim Fortuyn*, 15 INROADS: A J. OPINION 55 (2004).

²³⁵ Kolbert, *supra* note 224. A similar sentiment is phrased by Peter van der Veer: “Fortuyn was vocal especially in the defense of individual sexual freedom, and his public gay identity enabled him perfectly to take up the defense of Dutch progressive politics against Islamic traditions.” van der Veer, *supra* note 224, at 115. Indeed, Fortuyn’s retort to accusations of racism was to state that he did not hate Arab men because he had sexual relations with them. *Id.* at 120.

²³⁶ van der Veer, *supra* note 224, at 118. The Dutch notion of “pillars” is that different groups, such as Catholics, Calvinists, and secularists, can live separately together, each group tolerating the others but coming together only when necessary, as in Parliament. See Jane Kramer, *The Dutch Model: Multiculturalism and Muslim Immigrants*, THE NEW YORKER, April 3, 2006, at 63.

²³⁷ BURUMA, *supra* note 224, at 56-57 (quoting Fortuyn as responding to a reporter who asked him why he felt so strongly about Islam by saying: “I have no desire, to have to go through the emancipation of women and homosexuals all over again”). Peter van der Veer argues that the strict Muslim mores about sexuality remind the Dutch of the strict Christian mores of sexuality that the Dutch “have so recently left behind.” van der Veer, *supra* note 224, at 119.

²³⁸ BURUMA, *supra* note 224, at 38 (describing Fortuyn’s assassination as the most sensational political murder in the Netherlands since 1672, when the brothers Jan and Cornelius de Witt were literally ripped to pieces by a lynch mob in The Hague); Kolbert, *supra* note 224; Lucardie, *supra* note 234.

activist.²³⁹ The murder only increased Fortuyn's popularity,²⁴⁰ resulting in an outpouring of public emotion²⁴¹ and the electoral success of his namesake political party, the List Pim Fortuyn.²⁴² Fortuyn's assassination is also linked to the November 2004 murder of Theo van Gogh, Fortuyn's friend and sometime collaborator, who was finishing a film about Pim Fortuyn at the time.²⁴³

Both of these crimes resulted in findings of guilt and sentencings.²⁴⁴ Yet there was little role for the judiciary in the underlying contentious questions raised by Pim Fortuyn about sexual freedom and minority rights. Even a cursory examination of a "populist"²⁴⁵ politician such as Pim Fortuyn complicates assertions that the "Opening Up of Marriage Act"²⁴⁶ rests on an idyllic atmosphere of liberal tolerance particular to the Netherlands in which protections for minorities are not necessary.

²³⁹ At his sentencing, Mr. van der Graaf stated that Fortuyn was a dangerous man "who abused democracy by picking on vulnerable groups" and who had awful ideas "about immigrants, asylum seekers, Muslims, animals and the environment." Marlise Simons, *Dutch Court Sentences Killer of Politician to 18 Year Term*, N.Y. TIMES, April 16, 2003, at A3 [hereinafter Simons, *Dutch Court Sentences Killer*]. See also Kolbert, *supra* note 224; Lunsig, *supra* note 224, at 20-21 (noting that Fortuyn's pro-business stance included an end to restrictions on the production and trade in fur, which "Fortuyn loved to wear," and that Fortuyn had alienated environmentalists by "provocatively wearing fur and through his cynical denigration of their arguments").

²⁴⁰ A few weeks after Fortuyn's murder, Fortuyn took top honors in a television poll to determine the greatest figure in Dutch history, exceeding Rembrandt, Erasmus, Spinoza, and William the Silent. BURUMA, *supra* note 224, at 45.

²⁴¹ See, e.g., *id.* at 43-45, 64-65 (describing, among other things, "tens of thousands cheering and throwing flowers at funeral cortege" and stating that the funeral has been compared to that of Princess Diana); van der Veer, *supra* note 224, at 113 (characterizing the response to Fortuyn's death "not unlike the public outpouring of grief at Princess Diana's violent death"). See also Palazzo Di Pietro, <http://www.palazzodipietro.nl/html/site.html> (last visited Oct. 15, 2007) (documenting flowers, the grave, and Fortuyn's life).

²⁴² See Van Holsteyn & Irwin, *supra* note 224, for an extended discussion of the post-assassination election.

²⁴³ For a description of van Gogh's film, *06/05*, a conspiracy thriller about the assassination of Fortuyn, and a description of their relationship, see BURUMA, *supra* note 224, at 37-39. The twenty-six-year-old Muslim man convicted of murdering van Gogh was reported to have shot him several times, slashed his throat, and knife-pinned his body with an "open letter" written in Dutch and calling for a holy war against unbelievers. *Id.* at 1-5.

²⁴⁴ See Simons, *Dutch Court Sentences Killer*, *supra* note 239 (Volkert van der Graaf received a sentence of eighteen years for the murder of Pim Fortuyn); Gregory Crouch, *Van Gogh Killer Jailed for Life*, N.Y. TIMES, July 27, 2005, at A8 (Muhammad Bouyeri received life in prison without possibility of parole, the harshest sentence possible).

²⁴⁵ For a trenchant discussion of Fortuyn as a populist and the relationship to right-wing ideologies, see Akkerman, *supra* note 224, at 338-40.

²⁴⁶ See *supra* note 202 and accompanying text.

C. South Africa

The Netherlands and South Africa are linked historically²⁴⁷ and legally,²⁴⁸ but unlike the Dutch Constitution, the South Africa Constitution, adopted in its final form in 1996,²⁴⁹ provides for a robust judicial review. Supremacy of the constitution is proclaimed as a value of the democratic state of South Africa in the first section of the Constitution.²⁵⁰ Section 167 of the Constitution establishes the Constitutional Court, which “makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional,”²⁵¹ and even “decide[s] on the constitutionality of any amendment to the Constitution” and “decide[s] that Parliament or the President has failed to fulfill a constitutional obligation.”²⁵²

The Constitutional Court enforces a vigorous Bill of Rights, similar to that of the Dutch Constitution but much more expansive.²⁵³ The South Africa Constitution specifically guarantees equality to sexual minorities. Section 9, entitled “Equality,” provides that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”²⁵⁴ These protections extend to private conduct, and the Constitution further imposes a duty on the national government to enact legislation to “prevent or prohibit unfair discrimination.”²⁵⁵

Several cases have come before the Constitutional Court of South Africa relating to sexual freedom. In 1998, the Court ruled the crime of sodomy (which applied only to males), the common law crime of unnatural sexual acts, and an array of accompanying criminal laws unconstitutional as inconsistent

²⁴⁷ See generally FRANK WELSH, A HISTORY OF SOUTH AFRICA (2000) (discussing the Dutch colonization of South Africa and continuing Dutch influence).

²⁴⁸ See, e.g., Derek van der Merwe, *Roman-Dutch Law: From Virtual Reality to Constitutional Resource*, 1998 ACTA JURIDICA 117 (1998) (discussing the history of Roman-Dutch law in South Africa and arguing for its constituted relevance in the new constitutional era).

²⁴⁹ S. AFR. CONST. 1996. See THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW (Penelope Andrews & Stephen Ellman eds., 2001), for discussions regarding the South Africa Constitution.

²⁵⁰ S. AFR. CONST. 1996 ch. 1, § 1. This is in addition to “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms,” “[n]on-racialism and non-sexism,” and universal adult suffrage. *Id.*

²⁵¹ *Id.* at ch. 8, § 167(5).

²⁵² *Id.* at ch. 8, § 167(4)(d)-(e).

²⁵³ *Id.* at ch. 2; see generally Gw. arts. 7, 8, 10, 11, 19, 22, 23.

²⁵⁴ S. AFR. CONST. 1996 ch. 2, § 9(3).

²⁵⁵ *Id.* at ch. 2, § 9(4). Moreover, under subsection 2, such legislation may be in the form of positive promotion of equality, or as it is generally known in the United States, “affirmative action.” *Id.* at ch. 2, § 9(2).

with the Constitution's equality sections.²⁵⁶ The Constitutional Court has also applied the equality provisions protecting sexual orientation to require that same-sex partners be accorded equal treatment in the consideration of residence permits,²⁵⁷ in the award of benefits provided to married partners under the Judges Remuneration Act,²⁵⁸ by allowing same-sex couples to adopt as joint parents,²⁵⁹ and by allowing same-sex couples to both be named as parents in cases of "artificial insemination."²⁶⁰

Undoubtedly, judicial review in South Africa, coupled with the inclusion of "sexual orientation" in the Constitution's Bill of Rights, has furthered the legal protection of sexual freedom in the nation. Yet the Constitutional Court has not been a solitary force. Indeed, in most of the cases mentioned above, the Constitutional Court has been affirming judgments of other courts, and importantly, these judgments have been largely unopposed by the executive branch members named as opposing parties. Moreover, legislative action has provided protections for sexual minorities in areas such as employment, medical benefits, rental housing, and domestic violence.²⁶¹

In such a context, perhaps it was not surprising that the Constitutional Court of South Africa invoked the legislative branch when it rendered its decision in December 2005 in the consolidated same-sex marriage cases, *Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others*.²⁶² After finding

²⁵⁶ National Coalition for Gay and Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC) (S. Afr.).

²⁵⁷ National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs 2000 (2) SA 1 (CC) (S. Afr.).

²⁵⁸ Satchwell v. President of South Africa and the Minister of Justice 2002 (6) SA 1 (CC) (S. Afr.).

²⁵⁹ Du Toit and De Vos v. Minister for Welfare and Population Development 2003 (2) SA 198 (CC) (S. Afr.).

²⁶⁰ J and B v. Director General of the Department of Home Affairs 2003 (5) SA 621 (CC) (S. Afr.).

²⁶¹ Employment Equity Act 55 of 1998 ch. 2 § 6 (1), available at <http://www.info.gov.za/gazette/acts/1998/a55-98.pdf>; Medical Schemes Act 131 of 1998 ch.4 (24)(2)(e), available at <http://www.info.gov.za/gazette/acts/1998/a131-98.pdf>; Rental Housing Act 50 of 1999 ch.3 § 4 (1), available at <http://www.info.gov.za/gazette/acts/1999/a50-99.pdf>; Domestic Violence Act 116 of 1998 § 1 (vii), available at <http://www.info.gov.za/gazette/acts/1998/a116-98.pdf>.

The Parliament promulgated The Choice on Termination of Pregnancy Act of 1996 which provides a trimester scheme in which a woman may terminate a pregnancy in the first 12 weeks, may terminate only with the advice of a doctor from weeks 13 until 20, and afterwards only if there is risk to the woman or the fetus. The Choice on Termination of Pregnancy Act 92 of 1996 § 2 (1), available at <http://www.info.gov.za/acts/1996/a92-96.pdf>.

²⁶² 2005 (___) SA ___, 2006 (3) BCLR 355 (CC) (S. Afr.). See Beth Goldblatt, Note, *Same-Sex Marriage in South Africa—The Constitutional Court's Judgment*, 14 FEMINIST LEG. STUD. 261 (2006) (providing an excellent discussion of *Minister of Home Affairs*).

that the limitation of marriage to opposite sex couples violated South Africa's Constitution, Justice Albie Sachs, writing for the Court, noted that "[o]rdinarily a successful litigant should receive at least some practical relief," but that this "is not an absolute rule."²⁶³ In supporting the Court's conclusion to allow Parliament "to cure the defect within twelve months,"²⁶⁴ the Court relied upon the need for security for a "section of society that has known protracted and bitter oppression."²⁶⁵ Justice Sachs reasoned that Parliament might later choose a remedy other than a simple "reading-in of the words 'or spouse'" in legislation which was sex-specific, as the Court would do,²⁶⁶ and the Court's "temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution."²⁶⁷ This somewhat cooperative model is similar to the process that occurred in Vermont, which resulted in the legislature passing a civil union statute available only for same-sex couples,²⁶⁸ a regime which has been criticized.²⁶⁹ Interestingly, however, the South Africa Constitutional Court maintained judicial supremacy, holding that should the South Africa Parliament fail to remedy the situation within twelve months, the Court's remedy would be instated.²⁷⁰ Furthermore, before Parliament acted, the Constitutional Court decided another case regarding the legal rights of same-sex partners, *Gory v. Klover*, and held that intestate succession cannot constitutionally exclude same-sex partners.²⁷¹

The sole dissenting opinion in the same-sex marriage consolidated cases of *Minister of Home Affairs and Another v. Fourie and Another; Lesbian and*

²⁶³ *Minister of Home Affairs*, 2005 (___) SA ___, 2006 (3) BCLR 355 (CC) ¶ 133 (S. Afr.).

²⁶⁴ *Id.* ¶ 161.

²⁶⁵ *Id.* ¶ 136.

²⁶⁶ *Id.* ¶ 135.

²⁶⁷ *Id.* ¶ 136.

²⁶⁸ In *Baker v. State*, 744 A.2d 864 (Vt. 1999), Vermont's highest court held that the state marriage laws excluding same-sex couples violated the state constitution yet noted that the remedy should be fashioned by the state legislature. The decision in *Baker* thus led to the passage of Vermont's Civil Union statute. See VT. STAT. ANN. tit. 15, §§ 1201-06 (2002). The statute reserves marriage to "one man and one woman," but provides for a "civil union" in which "two eligible persons" may establish a relationship to "receive the benefits and protections and be subject to the responsibilities of spouses." *Id.* To be "eligible" under the act, the parties must be of the same sex and "therefore excluded from the marriage laws of this state." *Id.*

²⁶⁹ See, e.g., Barbara Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 132-33 (2000).

²⁷⁰ *Minister of Home Affairs v. Fourie and Another*, 2005 (___) SA ___, 2006 (3) BCLR ___, ¶ 2(e).

²⁷¹ *Gory v. Klover No and Others* 2007 (___) SA ___, 2007 (3) BCLR 249 (CC) (S. Afr.) (declaring section 1(1) of the Intestate Succession Act 81 of 1987 to be unconstitutional insofar as it does not provide for a permanent same-sex life partner to inherit automatically, as a spouse would, when the other partner dies without a will).

Gay Equality Project and Others v. Minister of Home Affairs and Others implicates the problem of judicial review. Justice O'Regan wrote separately to disagree with the choice to "leave it to Parliament" and to craft a remedy within the limited "range of options."²⁷² Justice O'Regan stressed that the definition of marriage as a "rule of common law developed by the courts," "lies, in the first place, with the courts."²⁷³ Further, she emphasized the Constitutional duties of the court to provide appropriate relief that is just and equitable.²⁷⁴ Addressing the argument that an act of Parliament might "carry greater democratic legitimacy" than an order by the Court, O'Regan opined that the legitimacy of a Court order "does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution."²⁷⁵

The role of the courts in South Africa's constitutional scheme, and the constitutional scheme itself, occur in the shadow of South Africa's recent apartheid past. The Truth and Reconciliation Commission ("TRC") was part of the effort to achieve "national unity and reconciliation" and to "bridge the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights."²⁷⁶ Much of the work of the TRC predictably concerned human rights abuses involving violence, but the TRC also concerned the role of the judiciary and the legal profession in maintaining apartheid. In its voluminous report,²⁷⁷ the TRC concluded that the courts "connived in the legislative and executive pursuit of injustice."²⁷⁸ The TRC specifically rejected the assertion some judges made in the written submissions to the TRC²⁷⁹ that the judiciary had a

²⁷² 2005 (___) SA ___, 2006 (3) BCLR ___, ¶¶ 163-68 (O'Regan, J., concurring in part and dissenting in part).

²⁷³ *Id.* ¶ 167.

²⁷⁴ *Id.* ¶ 170, n.5-6 (quoting sections 38 and 172 of the South Africa Constitution).

²⁷⁵ *Id.* ¶ 171.

²⁷⁶ S. AFR. (Interim) CONST. 1993 § 255 (postscript). See Promotion of National Unity and Reconciliation Bill, 1995, Bill 30 (1993) (establishing the Truth and Reconciliation Commission).

²⁷⁷ 4 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT ch. 4 (1998) [hereinafter TRCREPORT], available at http://www.doj.gov.za/trc/trc_frameset.htm (follow "the TRC report" hyperlink).

²⁷⁸ *Id.* ¶ 33.

²⁷⁹ See, e.g., *The Truth and Reconciliation Commission, and the Bench, Legal Practitioners and Legal Academics: The Written Presentations*, 115 S. AFR. L.J. 15-106 (1998). Those judges who made presentations included: M.M. Corbett, Chief Justice of South Africa, judges Chasklason, Mohamed, Langa, vanHeerden & MM Corbett, P Langa, Justice of the Constitutional Court, members of the Supreme Court of Appeal (the highest court prior to the post-apartheid constitutions), Justices Smalberger, Howie, Marais, and Scott, Justice Schutz of the Supreme Court of Appeal, Justice Ackerman of the Constitutional Court, Justice Goldstone of the Constitutional Court, G. Friedman, Judge President of the Cape High Court, Justice C F Eloff, Judge President of the Transvaal High Court, and Justice White regarding the judiciary

role limited by the doctrine of parliamentary sovereignty,²⁸⁰ noting that the South Africa Parliament had been far from representative.²⁸¹ Yet the TRC's assessment of the judiciary does not rest solely on judicial duties in light of a defect in democracy. Indeed, the TRC criticized judges who "too easily made sense of the illogical and unjust in legislative language,"²⁸² and "unthinkingly allowed judicial policy to be influenced by executive dictate or white male prejudice"²⁸³ and was intent on "maintaining the status quo."²⁸⁴ Such an assessment flows from the first issue that the TRC had invited respondents to address: "the relationship between law and justice,"²⁸⁵ a relationship about which the TRC proffered its own opinion distinguishing "promulgated rules

in the Republic of Transkei. *Id.* at 17-67.

The submission of Edwin Cameron, inadvertently omitted from the original section, appears in another publication. See 115 S. AFR. L.J. 436-38 (1998).

²⁸⁰ TRC REPORT, *supra* note 277, ¶ 41. A typical example might be:

Prior to the coming into effect of the Interim Constitution on 27 April 1994, Parliament was supreme. For practical purposes, it could pass any law it liked; and it did so. The courts had no power to question the validity of the laws Parliament made. Still less could they declare them invalid. The courts had no option but to apply the law as they found it, however unjust it may appear to be.

Id. (quoting M. M. Corbett, Chief Justice of South Africa, *The Truth and Reconciliation Commission, and the Bench, Legal Practitioners and Legal Academics: The Written Presentations*, 115 S. AFR. L.J. at 18 ¶ 15).

²⁸¹ As the Truth and Reconciliation Report noted:

Much was made . . . of their relative impotence in the face of the exercise of legislative power by a sovereign Parliament. . . . As argued so impressively by Dicey more than a century ago, parliamentary sovereignty and the rule of law work hand in hand and are premised on a political system that is fundamentally representative of all the people subject to that Parliament. This situation never applied in South Africa: not only was representative (and responsible) government conferred effectively only on the white inhabitants of the Union in 1910 (at maximum less than 20 per cent of the population), but South African political and legal life was never characterised by that unwritten sense of 'fair play' which is so much a part of the native Westminster tradition.

In other words, it is not enough for South African lawyers to parade the sovereignty of Parliament as if that alone explained (and excused) their conduct. The social contract which has for so long been the foundation for such sovereignty in the United Kingdom . . . was absent in South Africa, therefore requiring something more by way of response . . . from the judiciary and the legal profession. The point has been made that judges had a choice, and it has been suggested that it was feasible for them to have heightened their alertness as to government abuse of powers in the power vacuum created by the partially-representative legislature and the absence of basic fairness in the citizen-state relationship.

TRC REPORT, *supra* note 277, ¶¶ 41-42.

²⁸² *Id.* ¶ 33(h).

²⁸³ *Id.* ¶ 34(i).

²⁸⁴ *Id.* ¶ 33(i).

²⁸⁵ *Id.* ¶ 3(a).

of law [from] justice.”²⁸⁶ It is inescapable from the TRC’s findings that the judiciary in particular and the legal system as a whole (including academia) were complicit in maintaining apartheid. Such a conclusion, although perhaps not intended to “imply the ascription of guilt,”²⁸⁷ predictably proved painful, controversial, and divisive, generating much commentary.²⁸⁸ Thus, the role of the Constitutional Court and of all individual justices and judges at every level has been shaped by recent discussions that highlight the role of the judiciary.

In the instance of same-sex marriage, the Constitutional Court’s deferral of the matter to the South Africa Parliament provoked relatively little conflict regarding the relative roles of the judiciary and the legislature. The South Africa Parliament duly passed the Civil Union Act of 2006, signed by the President.²⁸⁹ The Act provides for civil unions “of two persons who are both 18 years of age or older” to be “solemnized and registered by way of either a marriage or a civil partnership.”²⁹⁰ Its preamble quotes the South Africa

²⁸⁶ *Id.* ¶ 30. The TRC Report stated:

Law and justice are by no means co-extensive although, at a fundamental level, their interests and constituent elements are likely to coincide, and although the ultimate objective of a legal system (to endure) must be a quest for justice. An uncritical acceptance of promulgated rules of law is unlikely to contribute to the achievement of justice in any more than a formal sense.

Id.

²⁸⁷ *Id.* ¶ 31.

²⁸⁸ Compare DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES* 1 (1998) (presenting an account of the three days of hearings of the Truth and Reconciliation Commission, looking into “the legal order during the apartheid order and those who sustained it”), with David Zeffertt, *Book Review*, 116 S. AFR. J. 665, 670, 676-78 (1999) (criticizing Dyzenhaus’s books for being “flawed in some instances by over-emotionality,” engaging in “insulting, and possibly defamatory” statement about judges with whom the author disagreed, “bludgeoning of people who think differently from him,” and using a “selective eye”). Zeffertt’s review prompted a response by South African Judge Dennis Davis, in which Davis describes his own “increasing amazement” as he “worked his way through the unbridled anger that exploded from every page” of Zeffertt’s review. Dennis Davis, *Looking Back in Anger: A Reply to David Zeffertt*, 117 S. AFR. L.J. 125, 125 (2000).

The most well-balanced review can be found in Penelope Andrews, *A Grand Exercise in Forgiveness, or Justice Held Hostage to Truth? South Africa’s Truth and Reconciliation Commission*, 24 MELB. U. L. REV. 236, 237 (2000).

As is apparent from these texts, several issues cause special discomfort. First is the comparison of the South Africa regime to the Nazi regime. Second, there are the respective positions of those who stayed in South Africa and those who left, as did Dyzenhaus, who states that he may be judged harshly for leaving and now writing a book in judgment “from the comfort of Toronto.” DYZENHAUS, *supra*, at xiv. Third, there are evident loyalties and relationships amongst people who know each other quite well.

²⁸⁹ CIVIL UNION ACT 17 of 2006.

²⁹⁰ *Id.* § 1.

Constitution's prohibition against discrimination on the grounds of sexual orientation as well as the inherent right to dignity.²⁹¹

D. Comparative Conclusions

Comparing the legal schemes governing sexual freedoms in South Africa, the Netherlands, and California, even in a cursory manner, warrants several conclusions.

First, it is clear that specific legal protection of sexual freedom does not require it be achieved solely by either judicial review or representative democratic processes. Further, even in legal systems with definite positions on judicial review, there is interplay with the supposedly non-dominant branches of government. Moreover, the achievements of legal guarantees for sexual freedom are exceedingly contextual, and provisions for judicial review are only one of the conditions. For example, the status of the Netherlands in the vanguard of sexual freedoms is often linked to its secularism and the lack of organized religious fundamentalism. On the other hand, the status of South Africa as a vanguard in rights generally and the inclusion of sexual minority rights specifically is often explained by historical contingencies and coalition work, accomplished despite organized religious and cultural fundamentalism largely attributable to the abiding influence amongst the now minority Afrikaners of the Dutch Reformed Church, as well as the popular portrayal of homosexuality as un-African.²⁹²

Further, even if from the perspective of the United States the legal protections appear relatively positive, there remain gaps and lacunae. For example, in South Africa, the Civil Union Act includes an "opt-out" clause for marriage officers who "object[] on the ground of conscience, religion, and belief to solemnising a civil union between persons of the same sex,"²⁹³ and the Constitutional Court has not extended protections to either sex-workers²⁹⁴ or unmarried heterosexual cohabitants.²⁹⁵ In the Netherlands, the status of sexual minority parents is convoluted and not necessarily equal.²⁹⁶

²⁹¹ *Id.* at Preamble.

²⁹² See CARL F. STYCHIN, A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS 52-88 (1998).

²⁹³ CIVIL UNION ACT 17 of 2006 s. 6.

²⁹⁴ See *Jordan v. State* 2002 (6) SA 642 (CC) (S. Afr.). See Nicole Fritz, *Crossing Jordan: Constitutional Space for (Un)Civil Sex*, 20 S. AFR. J. HUM. RTS. 230 (2004), for an excellent commentary on this case.

²⁹⁵ See *Volks NO v. Robinson and Others* 2005 ___ SA ___, (5) BCLR 446 (CC) (S. Afr.) (upholding the constitutionality of the exclusion of permanent life partners in the Maintenance of Surviving Spouses Act 27 of 1990 because the distinction between married and unmarried people is not unfair discrimination and does not violate dignity).

²⁹⁶ See Maxwell & Forder, *supra* note 204, at 635-49.

Lastly, and perhaps more implicitly, an examination of the legal structures provides a partial and superficial portrait of sexual freedom and the realities of sexual minorities and women in the respective societies. It is important to remember that however liberatory, neither a high court opinion nor a legislative act is sufficient to guarantee sexual freedom to individual members of sexual minorities. Nevertheless, the law remains an important site of such struggles.

V. CONCLUSIONS: TOWARD A LESBIAN LEGAL THEORY OF JUDICIAL REVIEW

It is tempting to succumb to an unbounded contextualism admitting of no general principles regarding the place of judicial review in lesbian, feminist, or queer legal theories with a goal of achieving sexual freedom. Legal structures, civil societies, and cultural conditions might be simply too diverse to support any sort of general theorizing. In the United States, neither the history of judicial review nor contemporary practices provide clear conclusions. Comparing the two nations that have been in the forefront of the protection of sexual freedom, the Netherlands and South Africa, reveals two constitutional democracies with very distinct approaches toward judicial review.

Yet I continue to believe that specifically lesbian legal theorizing is necessary to ensure the particular sexual freedom of lesbians, although certainly such an enterprise occurs in coalition with queer and feminist projects. Judicial review must be an important aspect of that enterprise. Without developing theories about judicial review, we are sidelined in the vociferous debates around sexual freedom, including the rights of sexual minorities, the rights regarding reproductive choices, and even the criminalization of sexual practices. Further, we are marginalized in other controversies regarding equality, including racial and economic equalities, in which feminists must participate. These controversies occur in an arena that includes the judiciary. The example from the Netherlands, in which there was a resort to judicial review even when it was presumably precluded, illustrates the necessity of not simply disregarding judicial review.

Thus it is important to articulate a few principles which might shape a continuing inquiry regarding feminist, queer and lesbian theorizing regarding judicial review in constitutional democracies.

First, it is important to reaffirm that our legal theorizing about judicial review in constitutional democracies includes among its primary goals the realization of sexual freedom for women and sexual minorities. This is not merely a desirable outcome, but one of the underpinnings of democratic and political institutions.

Second, and relatedly, it is necessary to debunk the neutral stance assumed by conservatives arguing against sexual freedom, whether such principles are

advanced as “judicial activism” or “legislative snub.” The argument regarding judicial review in constitutional democracies is not abstractable from the specific controversies at stake.

Third, although our theorizing should not surrender to infinite contextualizing, context is a dominant consideration. The provision of judicial review in the Iraqi and Afghanistan constitutions does not appear to be likely to secure sexual freedom for lesbians in light of other political and cultural conditions, but the voiced concern of a conservative American advisor that it should be omitted lest it engender reproductive freedom for women does give one pause. Certainly, those participating in constitution drafting in the “new democracies” are in the best position to make such judgments. The problem, however, is that the framers of such constitutions may not privilege, or even consider, sexual freedom for lesbians, other sexual minorities, and women as a valuable goal.

In the context of the United States, not only must appeals to neutrality be confronted, so must the resort to original intent as an interpretative mandate for the judiciary. The United States was not founded on universal suffrage, principles of inclusion for women and sexual minorities, or positive rights to be secured by the government. The recourse to the framers, all white, all presumptively heterosexual, all propertied, and all male, should be unequivocally opposed.

Fourth, it is vital to assert that framing judicial review in contrast to democracy presents a false dichotomy. It remains true that the judiciary is informed by popular will and sentiment and by actions of various types and levels of legislatures. It is also true that popular sentiment is informed by judicial pronouncements. This does not occur only as a “backlash,” but can be a positive acceptance of declarations of rights.

Fifth, neither judicial review nor unbridled democracy alone is sufficient to procure sexual freedom. Both have severe shortcomings, especially given the entrenchment of biases against sexual minorities and women, and the ability of such biases to be manipulated by powerful interests. As Mary Becker correctly notes, the judiciary in the United States is predominantly male, and this is the case in virtually every nation. Additionally, as Becker also points out, the principle of *stare decisis* requiring in most cases an adherence to precedent operates to enshrine historical prejudices. Yet Becker’s faith in majority rule may be overly optimistic. Inequality is part of popular opinion and women remain more politically uninformed, even apart from the problems such as essentialism and identity politics. Moreover, even if Becker’s claims to majoritarian supremacy were true in the case of women, sexual minorities can make no claim to majoritarian status.

Sixth, even if it is true that feminist legal theory has been better at presenting critiques of power than of citizenship,²⁹⁷ an understanding of power is integral to debates about judicial review in a constitutional democracy. Feminist critiques of power not only combat the pretenses to neutrality but also address the accusations regarding elitism and counter-majoritarian impositions of will. The dissection of private as well as state power has been a hallmark of feminist legal theorizing, and it is pertinent to glorifications of direct democracy. Regarding judicial review, feminist critiques of power can provide principles to bind judicial predilections and impositions of mere formal equality.

Finally, imaginative interventions are necessary. If there is an “ideological drift”²⁹⁸ that might explain continued support by progressives for judicial review, there is also an educational “drift” for legal theorists educated in the United States under a regime that valorizes both judicial review and direct democracy. At one time, feminist and lesbian theorists dreamed that we might “invent” a world of sexual freedom.²⁹⁹ Working within the frameworks of constitutional democracies should not hobble such desires.

²⁹⁷ Higgins, *supra* note 126, at 1670.

²⁹⁸ Balkin, *supra* note 82, at 870.

²⁹⁹ See, e.g., NICOLE BROSSARD, *THE AERIAL LETTER* 136 (Malene Wildeman trans., 1985) (“[A] lesbian who does not reinvent the world is a lesbian in the process of disappearing.”).

Note also the famous instruction to “[m]ake an effort to remember. Or, failing that, invent.” MONIQUE WITTIG, *LES GUÉRILLERÈS* 89 (David LeVay trans., Viking Press 1971) (1969).

