DIGNITY AND SOCIAL MEANING: *OBERGEFELL*, *WINDSOR*, AND *LAWRENCE* AS CONSTITUTIONAL DIALOGUE

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The U.S. Supreme Court's three most important gay and lesbian rights decisions—Obergefell v. Hodges*,* United States v. Windsor*, and* Lawrence v. Texas*—are united by the principle that gays and lesbians are entitled to dignity. Beyond their tangible consequences, the common constitutional evil of state bans on same-sex marriage, the federal Defense of Marriage Act, and sodomy laws was that they imposed dignitary harm.*

This Article explores how the gay and lesbian dignity cases exemplify the process by which constitutional law emerges from a social and cultural dialogue in which the Supreme Court actively participates. In doing so, it draws on the scholarly literatures on dialogic judicial review and the role of social meaning in constitutional law. It illuminates how the Supreme Court interprets democratic preferences and constructs social meaning in order to apply fundamental constitutional norms to emerging legal claims.

Contrary to the speculations of some commentators, "dignity" in these cases did not operate as some new form of constitutional right. Rather, the identification and protection of dignitary interests served as the unifying principle for a process, unfolding in three cases over thirteen years, through which constitutional law was brought into alignment with evolving public attitudes and policy preferences. The dignity decisions should be understood as majoritarian, not as acts of judicial will. They were broadly accepted because the Court's insights about the status of gays and lesbians in American society were consistent with dramatic and long-term changes in cultural and public attitudes. As culture and attitudes evolved, so did the social meaning of anti-gay laws. Sodomy laws and marriage restrictions, once accepted as presumptively constitutional protections of tradition and public morality, increasingly came to be understood as impositions of stigma and humiliation—the kind of expressive harms that the U.S. Constitution forbids.

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INTRODUCTION

In three cases decided over thirteen years, each dealing with a different legal question, the U.S. Supreme Court interpreted the U.S. Constitution's guarantees of liberty or equal protection to protect gays and lesbians against discrimination by the federal or state governments. *Lawrence v. Texas*[1] struck down sodomy laws in 2003. Ten years later in 2013, *United States v. Windsor*[2] invalidated the federal Defense of Marriage Act (DOMA), which prohibited federal recognition of same-sex marriages that were legal under state law. And in 2015, *Obergefell v. Hodges*[3] swept aside remaining state-level bans on same-sex marriage, which made marriage equality a reality nationwide.

The common thread in these decisions, all written by Justice Anthony M. Kennedy, was the centrality of the idea of "dignity." According to the Court, dignity attended the liberty that is inherent in making personal choices about love and sexuality;[4] the rights and public recognition that are bestowed by states in marriage;[5] and the principle of equal treatment in access to a

1. 539 U.S. 558 (2003).
2. 133 S. Ct. 2675 (2013).
3. 135 S. Ct. 2584 (2015).
4. *Lawrence*, 539 U.S. at 567 ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").
5. *Windsor*, 133 S. Ct. at 2692 (calling the status of marriage "a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages").

fundamental right.[6] And dignity was what was *lost* when a person could be targeted for criminal prosecution for intimacy with another adult;[7] when one's marriage could be disparaged by the federal government;[8] and when a legal marriage could be, in effect, summarily voided by one's own home state.[9] The majority opinions in these cases used the word "dignity" (or the variations "dignitary" or "indignity") three times in *Lawrence*,[10] ten times in *Windsor*,[11] and ten times in *Obergefell*.[12]

These decisions, especially *Obergefell*, have provoked speculation about whether there is a new constitutional "right to dignity." For example, Laurence Tribe, who embraces this idea, believes that "*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*."[13] Other commentators have suggested how new constitutional dignity-based arguments might apply to such controversies as transgender students' bathroom rights,[14] access to abortion,[15] and a right to "nonmarriage."[16] Still others have expressed skepticism toward dignity arguments in claims for constitutional rights.[17]

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6. *Obergefell*, 135 S. Ct. at 2608 ("[Petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

7. *Lawrence*, 539 U.S. at 575 (noting that, at the time, sodomy in Texas was "a criminal offense with all that imports for the dignity of the persons charged").

8. *Windsor*, 133 S. Ct. at 2693 ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

9. *Obergefell*, 135 S. Ct. at 2607 (observing that a home state's refusal to recognize a valid same-sex marriage procured in another state "inflict[s] substantial and continuing harm on same-sex couples").

10. *See Lawrence*, 539 U.S. at 567, 574–75.

11. *See Windsor*, 133 S. Ct. at 2681, 2689, 2692–94, 2696.

12. *See Obergefell*, 135 S. Ct. at 2594, 2595–97, 2599, 2603, 2606, 2608.

13. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) [hereinafter Tribe, *Equal Dignity*]. Similar themes are explored in Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1902–07 (2004) (describing the *Lawrence* Court's "synthesis" of equal protection and substantive due process).

14. Kristi L. Bowman, *A Counterfactual History of Transgender Students' Rights*, 20 U. PA. J. CONST. L. ONLINE 1, 28 (2018) (arguing that "current transgender rights cases have much to build on in Justice Kennedy's 'equal dignity' jurisprudence as they work their way through lower federal courts").

15. Erika Hanson, *Lighting the Way Towards Liberty: The Right to Abortion After* Obergefell *and* Whole Woman's Health, 45 HASTINGS CONST. L.Q. 93, 94 (2017) (arguing that *Obergefell* "illustrates how the core principles of autonomy, dignity, and equality strengthen all substantive due process rights, including the right to abortion").

16. Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 433 (2017) (describing how *Obergefell*, including its principles of dignity and anti-stigma, "can strengthen, rather than foreclose, a constitutional right to nonmarriage").

17. *See, e.g.*, Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity*,*'* ATLANTIC (Apr. 29, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/ [https://perma.cc/MJ4B-N3US] (warning that, "down the line, the right to dignity—now celebrated by liberals for what it means to gay rights—could ultimately produce other decisions in unrelated cases that they would not be so quick to celebrate").

Scholarly commentary about these cases has addressed this idea of dignity mostly as a matter of Fourteenth Amendment doctrine. That is, it has sought to understand how the principle of dignity might amplify or expand existing guarantees of equality and liberty, or whether a right to dignity can or should serve as the basis for claims by new groups, or in new contexts, about these constitutional rights.[18]

This Article builds on that work and extends it in a new direction. My primary focus is on constitutional interpretation, not doctrine. Rather than addressing dignity as a distinct constitutional right, this Article explores a topic previously unaddressed in scholarly commentary: how the identification and protection of dignitary interests in the gay and lesbian cases served as the unifying principle for a process, unfolding in three cases over thirteen years, through which constitutional law was brought into alignment with mainstream American social attitudes and policy preferences.

The gay and lesbian dignity cases, as I will refer to them, illustrate how new constitutional law can emerge from a social and cultural dialogue in which the Supreme Court actively participates. This trilogy of decisions provides a case study for understanding how constitutional law can evolve in response to developments in society and culture—specifically, how the Constitution's principles of equality and liberty were interpreted to encompass new legal claims that had come to enjoy widespread public support, even though the claims once would have been considered unthinkable.[19]

In exploring the role of dignity in *Lawrence*, *Windsor*, and *Obergefell*, this Article draws on two avenues of scholarship: one that explores how constitutional law takes cognizance of the social meaning of government laws and practices;[20] the other that explains judicial review and constitutional interpretation as a dialogic process, one that is shaped not only by precedent and doctrine, but also by the arguments of social movements, the views of other nonjudicial actors, and ultimately (to borrow Barry Friedman's phrase[21]), the "will of the people."[22] Reva B. Siegel has argued that these "pathways of responsiveness" among citizens and those who interpret the

18. *See, e.g.*, Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 20 (2015) ("It is possible that *Obergefell* and its dignity (anti-humiliation) approach to justice may have lasting power, not just for gay men and lesbians, but also more broadly. Indeed, if courts are inclined to recognize liberty-associated dignity concerns, it will be notably more difficult for defendants to legally justify discrimination.").

19. Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1248–49 (2010) (observing that when "[c]ircumstances and the evolving views of the American people" come to sympathize with a group's constitutional claims, "courts ultimately will ratify those understandings" and "the implausible becomes plausible").

20. *See infra* Part IV.

21. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

22. *See infra* Part III.

Constitution are "crucial to securing the Constitution's democratic authority."[23]

When it invoked the idea of dignity in these cases, the Court spoke in the vernacular, in a way that exposed "the social meaning and the expressive dimensions of" the anti-gay laws being challenged.[24] The Court recurred to the concept of dignity to explain how criminal sodomy laws and federal and state marriage restrictions, once assumed by most people to be legitimate and necessary for protecting tradition and public morality, had become repugnant to constitutional equality and liberty because their effects, as they had come to be understood by the larger society, were to demean and impose stigma.[25] Their harms and constitutional defects "result[ed] from the ideas or attitudes expressed" by these laws as much as or more than "the more tangible or material consequences" they imposed.[26] To say that a law imposes stigma merely describes an effect; to say that a law offends *dignity* incorporates assumptions about the group targeted by the stigma: that its members are entitled to the same high regard that government gives to the rest of its citizens.

The gay and lesbian dignity cases were products of constitutional dialogue between the Court and society at large. The decisions built upon one another, moving over the course of thirteen years from the least controversial issue (sodomy laws) to the most controversial (marriage equality in the states).[27] The decisions forthrightly embraced social change,[28] and they recognized that the social meaning of sodomy laws and marriage restrictions had changed as Americans' attitudes about these issues, and about the status of gays and lesbians generally, continued to evolve.[29] The decisions reflected how questions of sexual orientation had transitioned, as Martha Nussbaum has put it, from a "politics of disgust" to a "politics of humanity."[30]

The dialogic model of judicial review posits that courts, in Friedman's words, "do not stand aloof from society and declare rights," but instead "they interact on a daily basis with society, taking part in an interpretive

23. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1326 (2006).

24. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 726 (1998).

25. Obergefell v. Hodges, 135 S. Ct. 2584, 2602, 2608 (2015) (discussing that state marriage bans "impose stigma and injury of the kind prohibited by our basic charter," thus denying "equal dignity in the eyes of the law"); United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (explaining that DOMA's purpose and effect were to impose "stigma upon all who enter into same-sex marriages," and such "interference with the equal dignity of same-sex marriages" was its "essence"); Lawrence v. Texas, 539 U.S. 558, 575 (2003) (observing that a sodomy statute imposed "stigma" as a criminal offense "with all that imports for the dignity of the persons charged").

26. Pildes, *supra* note 24, at 755.

27. *See infra* Part V.B.

28. *See infra* Part V.C.

29. *See infra* Part IV.C.

30. MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW xix (2010).

dialogue."[31] In this process, "[p]opular politics and Court decisions, moving together sometimes in harmony and sometimes not, . . . shape[] the meaning of the Constitution."[32] Contrary to the understanding of constitutional law as a top-down enterprise conducted solely by judges, this model of judicial review recognizes that, as Robert Post has explained, "constitutional law and culture are locked in a dialectical relationship."[33]

Some critics, including the dissenting justices, have condemned these decisions as products of judicial hubris.[34] However, to the extent that the point of such criticism is that the Court was substituting its own judgment for that of the people, it is mistaken.[35] All of these decisions should be understood as majoritarian, not countermajoritarian, in that the Court was catching up with public attitudes and a constitutional culture[36] where steadily expanding numbers of Americans rejected the criminalization of gay sex and supported marriage equality.[37] A majority of Americans did not need to be browbeaten by the Court into the conclusion that sodomy laws demeaned same-sex relationships,[38] that DOMA worked gratuitous and harmful discrimination,[39] or that state constitutional amendments banning same-sex marriage imposed stigma[40] because those conclusions about social meaning and dignitary harm were consistent with a dramatic evolution in public attitudes and culture toward gays and lesbians that had taken place over more than forty years.[41]

Once these social meanings of sodomy laws and marriage restrictions are understood as offenses to dignity, the holdings of *Lawrence*, *Windsor*, and *Obergefell* can be understood as applications of a principle at the core of the Fourteenth Amendment: that government may not enact laws whose primary

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31. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 585 (1993).

32. Friedman, *supra* note 19, at 1235.

33. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

34. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (calling the majority decision "an act of will, not legal judgment"); Emily Buss, *The Divisive Supreme Court*, 2016 SUP. CT. REV. 25, 25 (describing *Obergefell* as being "widely perceived as the work of a partisan elite imposing its policy preferences on the American people" and arguing that the question should have remained longer with the lower courts); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004) (characterizing the *Lawrence* majority opinion as "a tissue of sophistries embroidered with a bit of sophomoric philosophizing").

35. *See infra* notes 331–33 and accompanying text.

36. For a discussion of the idea of "constitutional culture," see *infra* notes 188–98 and accompanying text.

37. A month before *Lawrence* was decided, 59 percent of Americans agreed that "gay or lesbian relations between consenting adults" should be legal, up from 33 percent in 1986. *Gay and Lesbian Rights*, GALLUP, http://news.gallup.com/poll/1651/rights.aspx [https://perma.cc/6UFQ-KFYE] (last visited Mar. 15, 2019). A month before *Obergefell* was decided, 60 percent said same-sex marriage should be legal, up from 27 percent in 1996. *Id.*

38. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

39. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (noting that DOMA's purpose and effect were to impose "stigma upon all who enter into same-sex marriages").

40. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (discussing the idea that state marriage bans "impose stigma and injury of the kind prohibited by our basic charter").

41. For a discussion of this history and the data on public attitudes, see *infra* Part II.

effect is to demean and stigmatize.[42] Because all three of these cases deploy dignity as an anti-stigma principle, they can be harmonized with well-established Fourteenth Amendment values[43] (or, in the case of *Windsor*, analogous values applied to the federal government through the Fifth Amendment's Due Process Clause).[44]

The gay and lesbian dignity cases thus illustrate the operation of a common-law, or "living," Constitution—that is, a Constitution whose fundamental principles of equality and liberty adapt and are applied to address new claims in new contexts. As Daniel Conkle has written,

> When the Supreme Court interprets the capacious language of the Due Process and Equal Protection Clauses, its task is art as much as science, judicial statesmanship as much as technical craft. The Court mediates past, present, and future, identifying individual rights that befit the evolving political morality of our society. By its very nature, the Fourteenth Amendment protects minority rights from state and local majoritarian oppression. But what rights, in particular, does the Amendment protect? In deciding this question, the Justices rely in part on precedent and in part on their own understandings of liberty and equality. At the same time, however, the Court generally acts, and properly so, in a manner that tracks the evolving values of the country as a whole.[45]

In *Lawrence*, *Windsor*, and *Obergefell*, the concept of dignity was the vehicle the Court used to translate the nation's "evolving political morality" about the status of gays and lesbians into holdings of constitutional law. To say that our political morality has evolved on matters like sodomy laws and marriage restrictions is to say that a majority of Americans have come to understand the social meaning of these forms of discrimination in a different way than they previously did—as matters of dignitary harm—and that that difference has constitutional significance.

This Article seeks to contribute to our understanding of how judicial review works not in *theory*, but in *practice*.[46] Regardless of one's attitudes about the appropriate methods of constitutional interpretation or the role of

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42. *See infra* Part IV.B.

43. *See infra* Part IV.C.

44. *Windsor* was decided under "the guarantee of equal protection . . . applied to the Federal Government through the Fifth Amendment." *Windsor*, 133 S. Ct. at 2683. This Article will not belabor that technical point.

45. Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 28 (2014); *see also* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 128–33 (2006) [hereinafter, Conkle, *Three Theories*] (advocating a substantive due process "theory of evolving national values"); Cass R. Sunstein, *The Supreme Court Follows Public Opinion*, *in* LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS 21, 23 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015) (observing that "the Court usually pays attention to an actual or emerging moral consensus, certainly with respect to fundamental rights," and that "[i]f most people have come to share a moral commitment, or if the arc of history is clearly on one side, then judges are likely to pay respectful attention").

46. *See* Friedman, *supra* note 19, at 1240 ("What scholars should not be asking is how to justify judicial review as a counter-majoritarian institution. Instead, they should be studying how it operates in differing circumstances, posing normative questions and suggestions for change in light of that reality.").

the Supreme Court in a democratic society, the dialogic model of judicial review provides a lens for understanding a specific yet momentous development: the extension of equality and liberty protections to a group—gays and lesbians—that was once despised by most of society, but that now is associated positively with three of the most consequential decisions in modern constitutional law.

This Article proceeds in five parts. Part I briefly examines human dignity as a constitutional principle. Part II sketches the impact of the LGBT social movement and the dramatic changes it produced in public attitudes on specific legal questions and the status of gays and lesbians in the larger culture. Part III develops necessary theoretical framing by explaining dialogic judicial review—the idea that constitutional law is shaped not by judges working in isolation, but by interaction among judicial interpretations, public understandings, and constitutional culture.

Part IV begins by explaining how the Court's exposition of a law's social meaning—that is, the expressive effect a law has acquired, whether intended or not—often has determined the outcome of constitutional cases, particularly in matters dealing with equality. It then argues that the trilogy of gay and lesbian dignity cases demonstrated a Supreme Court that was in dialogue with the society at large about the social meaning of government-imposed discrimination against gays and lesbians. The Court appropriately gave legal substance to this attitudinal and cultural change when it concluded that the social meaning of sodomy laws and marriage restrictions was now understood to be the imposition of dignitary harm—the kind of stigma and humiliation that is repugnant to the Fourteenth Amendment.

Part V considers how, in more general ways apart from their focus on stigma and social meaning, the gay and lesbian dignity decisions manifested constitutional dialogue: they accurately reflected majority attitudes, contributed to a dynamic process of attitudinal change and legal innovation, and expressly embraced social and cultural change regarding gays and lesbians while articulating an evolving conception of constitutional guarantees.

I. DIGNITY AS A CONSTITUTIONAL VALUE

Human dignity has been the subject of philosophical and religious thought for some 2500 years.[47] Its status as a constitutional value or constitutional right, and more broadly as a subject of human rights discourse, is a more modern phenomenon having emerged in the period immediately following World War II.[48]

The preamble to the U.N. Charter, enacted in 1945, expresses the United Nations's determination to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and

47. AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 15–16 (2015). For a bibliography of major sources about the concept of human dignity, see *id.* at 15 n.1.

48. *Id.* at 34.

women."[49] The Universal Declaration of Human Rights, approved by the U.N. General Assembly in 1948, says that "[a]ll human beings are born free and equal in dignity and rights."[50] And the German Basic Law, the constitution of postwar Germany, which took effect in 1949, declares, "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[51]

In the latter half of the twentieth century, dignity became a central concern of constitution writers, constitutional lawyers and scholars, and the international human rights community.[52] It is a cornerstone of several modern constitutions, where it is expressly guaranteed as a right.[53] Yet, the "precise definition" of constitutional dignity remains "elusive."[54] Professor Neomi Rao has observed that "the value of human dignity comes in part from its evolving and plastic nature—its appeal, as well as its difficulties, lies in its amorphous content."[55]

In the United States, the term "dignity" does not appear in the text of the Constitution, and the Supreme Court has never sought to define or recognize it as a right to which specific claims can be made.[56] Nor have the "content and scope of the social and constitutional value of human dignity . . . been sufficiently clarified" by the Supreme Court or "reached the level of importance that would allow it to be recognized as a constitutional right derived from one of the existing constitutional rights."[57]

Still, references to human or individual dignity as an ideal or value have appeared in many Supreme Court opinions, beginning in the 1940s "in dissenting opinions arguing for a more robust conception of individual liberties,"[58] and "[s]ince that time, the Supreme Court has increasingly relied on concepts of personal and human dignity to explain, develop, and broaden various constitutional protections."[59] By and large, the Court has "treated human dignity as a value underlying, or giving meaning to, existing

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49. U.N. Charter art. 16.

50. G.A. Res. 217 (III), at 72 (Dec. 10, 1948).

51. GRUNDGESETZ [GG] [BASIC LAW] art. I, § 1 (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0022 [https://perma.cc/6K7P-RTRR].

52. *See generally* MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012).

53. BARAK, *supra* note 47, at 139 (listing the constitutions of Germany, Colombia, Israel, Russia, South Africa, Poland, and Switzerland).

54. Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 205 (2008).

55. *Id.* Rao suggests that the use of the term "dignity" by constitutional courts around the world can be categorized around three general "concepts": the "inherent worth of each individual"; as grounds for enforcing various substantive values which "promote the public good and improve the lives of individuals"; and as a form of "recognition" which "requires esteem and respect for the particularity of each individual" and "creates a political demand for the state and other individuals to accept and approve of one's lifestyle and personal choices." Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 187, 222, 243 (2011).

56. Rao, *supra* note 54, at 202.

57. BARAK, *supra* note 47, at 188.

58. Rao, *supra* note 54, at 202 (footnote omitted).

59. *Id.* (footnote omitted).

constitutional rights and guarantees."[60] By one count published in 2011—before *Windsor* or *Obergefell*—the justices had used the word "dignity" in more than nine hundred opinions.[61]

Dignity has been discussed in majority or dissenting opinions as a value underlying claims arising under the First Amendment right to free speech,[62] the Fourth Amendment's protection against unreasonable searches and seizures,[63] the Fifth Amendment's protection against self-incrimination,[64] the Eighth Amendment's guarantee against cruel and unusual punishments,[65] and various lines of doctrine under the Fourteenth Amendment, including the right to privacy,[66] the ability to choose the timing and circumstances of one's own death when death is imminent,[67] and equal protection against racial discrimination in education and access to accommodations.[68] Indeed, the point that racial discrimination is incompatible with the dignity of a citizen in a free society continues to be a core theme of the Court's contemporary equal protection cases addressing race and ethnicity.[69] In the area of substantive due process, cases like *Lawrence* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[70] have emphasized the relationship between dignity and the liberty and autonomy principles of the Fifth and Fourteenth Amendments.[71] These cases capture an understanding of dignity roughly akin to what the comparative constitutional scholar and former Israeli Supreme Court jurist Aharon Barak has called the "freedom to write [one's own] life story."[72] Dissenting in *Bowers v. Hardwick*,[73] which upheld sodomy laws but was later overruled by *Lawrence*,[74] Justice John Paul Stevens invoked "our tradition of respect for the dignity of individual choice in matters of conscience"—the first use of the term "dignity" in a Supreme

60. Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 743 (2006).

61. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178–79 (2011).

62. *See* Goodman, *supra* note 60, at 786–89.

63. *Id.* at 767–72.

64. *Id.* at 765–67.

65. *Id.* at 772–78.

66. *Id.* at 759–62.

67. *Id.* at 779–83.

68. *Id.* at 762–65.

69. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

70. 505 U.S. 833 (1992).

71. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (holding that "intimate and personal choices . . . central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment" (quoting *Casey*, 505 U.S. at 851)).

72. BARAK, *supra* note 47, at 144; *see also* Washington v. Glucksberg, 521 U.S. 702, 746–47 (1997) (Stevens, J., concurring) (observing that allowing a terminally ill person, rather than the state, to make decisions about her quality of life "gives proper recognition to the individual's interest in choosing a final chapter that accords with her life story").

73. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

74. *Lawrence*, 539 U.S. at 578.

Court opinion dealing with gay and lesbian rights.[75] Even before the full trio of gay and lesbian dignity cases had been decided, scholars such as Reva B. Siegel were exploring the meaning of dignity for Fourteenth Amendment rights and liberties such as reproductive choice.[76]

The gay and lesbian dignity cases, especially *Obergefell*, have prompted scholarly commentary seeking to understand the significance of the Court's use of dignity and whether it carries enduring meaning for equality or substantive due process jurisprudence. For example, Laurence Tribe argues that "*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into the equal dignity doctrine."[77] This doctrine of equal dignity, Tribe says, is "the rubric under which fundamental rights should be evaluated going forward."[78] Tribe believes that *Obergefell*'s full meaning has yet to be realized: "Equal dignity, a concept with a robust doctrinal pedigree, does not simply look back to purposeful past subordination, but rather lays the groundwork for an ongoing constitutional dialogue about fundamental rights and the meaning of equality."[79]

A common thread in the post-*Obergefell* scholarship is the explanation of dignity's potential for advancing the rights of marginalized groups, including but not limited to gays and lesbians, and combatting discrimination. For example, Elizabeth B. Cooper suggests that *Obergefell* "reflects an acceptance of and respect for gay men and lesbians that," even beyond the question of marriage, "will profoundly change not only how the law treats LGBT individuals, but also how we are treated by others, as well as how we perceive ourselves."[80] *Obergefell*'s "dignity (and anti-humiliation) approach to justice may have lasting power," she says, "not just for gay men and lesbians, but also more broadly" as courts "recognize liberty-associated dignity concerns" and thus make it "notably more difficult for defendants to legally justify discrimination."[81] Luke A. Boso proposes that "equal dignity is one theory of Equal Protection that can explain when governmental stereotyping is unconstitutional" and that *Obergefell* unifies themes in the Court's Fourteenth Amendment jurisprudence of "anti-group subordination" and individual liberty.[82] Commentators have speculated about how dignity-based arguments stemming from the gay and lesbian rights cases might apply to such controversies as transgender students' bathroom rights, access to abortion, and a right to "nonmarriage."[83] In addition, one commentator has

75. *Bowers*, 478 U.S. at 217 (Stevens, J., dissenting) (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719–20 (7th Cir. 1975)).

76. *See generally* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008).

77. Tribe, *Equal Dignity*, *supra* note 13, at 17.

78. *Id.* at 20.

79. *Id.* at 17.

80. Cooper, *supra* note 18, at 5.

81. *Id.* at 20.

82. Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH L. REV. 1119, 1122 (2017).

83. *See supra* notes 14–16 and accompanying text.

suggested that the Supreme Court should rely on *Obergefell*'s references to human dignity to support a new fundamental right to food security.[84]

Not all commentators agree upon the future ramifications of the Court's use of dignity. Kenji Yoshino believes that, whereas cases such as *Lawrence*, *Casey*, and *Windsor* relied heavily on the notion of dignity, *Obergefell* gives more emphasis to liberty.[85] Jeffrey Rosen has warned that "constitutionalizing" the "injury" of same-sex marriage bans "with broad abstractions like dignity may lead to results in the future that liberals come to regret" because dignitary harm could be claimed by litigants challenging such things as gun regulations, smoking bans, or nondiscrimination laws that some conservative Christians see as violating their religious liberty.[86] Yuvraj Joshi criticizes *Obergefell* for shifting the constitutional meaning of dignity away from respect for intimate choices and the kind of personal autonomy that was extolled in *Casey* to a more conservative meaning, the "respectability of choices and choice makers."[87]

Dignity holds the potential to shape new constitutional doctrine, but how exactly that might happen remains largely undeveloped. The Court has continued to invoke dignity in constitutional cases: in a 2017 Sixth Amendment decision about juror racial bias, Justice Kennedy went so far as to declare broadly that the nation has a "commitment to the equal dignity of all persons."[88] But, the Court has yet to give any true independent substance to constitutional dignity. It has not engaged in the sort of synthesizing, clarifying analysis—historical, doctrinal, or comparative—that would be necessary to make dignity a distinct constitutional right in the conventional sense. And Justice Kennedy's retirement from the Court likely will result in fewer opinions in which dignity is a prominent theme.

As the remainder of this Article explains, dignity in *Obergefell*, *Windsor*, and *Lawrence* is best understood not as a new doctrine, but as a framework for understanding one particular set of developments. It is a principle which unites three cases in which the Court articulated the social meaning of anti-gay government discrimination and translated the nation's "evolving political morality" about the status of gays and lesbians into protections afforded by constitutional law against governmental discrimination.

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84. *See generally* Maxine D. Goodman, *The* Obergefell *Marriage Equality Decision, with Its Emphasis on Human Dignity, and a Fundamental Right to Food Security*, 13 HASTINGS RACE & POVERTY L.J. 149 (2016).

85. Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 170 (2015).

86. Rosen, *supra* note 17.

87. Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 CALIF. L. REV. CIRCUIT 117, 117 (2015). On this reading, "[t]he 'dignity' that *Obergefell* invokes expects same-sex couples to make choices regarding their relationships that are the same as the dominant culture." *Id.* at 122.

88. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017) (holding that where a juror makes a clear statement that indicates he or she relied on racial prejudice to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way to permit the trial court to consider the evidence and impact of the juror's statement).

II. "FROM OUTLAWS TO IN-LAWS": THE REVOLUTION IN AMERICAN ATTITUDES TOWARD GAYS AND LESBIANS

Writing in 1967 amid a political and cultural climate in which police could harass, persecute, and humiliate homosexuals with impunity, an editorial writer for the then-new magazine *Los Angeles Advocate*[89] wrote, "We do not ask for our rights on bended knee. We demand them, standing tall, as dignified human beings. We will not go away."[90] Writing in 1999—before *Lawrence*, before it was legal for gays and lesbians to marry in any state, and while political backlash against the same-sex marriage movement was still reaching its height—journalists Dudley Clendinen and Adam Nagourney nonetheless wrote that "the movement for gay identity and gay rights has come further and faster, in terms of change, than any other that has gone before it in this nation."[91]

In 2012, the year before *Windsor* and three years before *Obergefell*, social commentator E. J. Graff marveled,

> Fifty years ago, being gay put you beyond the social pale. You could be savagely beaten, kicked out of public spaces and private clubs, arrested, fired, expelled from your family, and scorned as a pariah. Today, lesbians and gay men are all but equal, with full marriage rights in view—supported by President Barack Obama in action and words. How did we win so much so fast?[92]

The dramatic changes in public attitudes and American culture that paved the way to *Lawrence*, *Windsor*, and *Obergefell* did not arise organically. They were the products of a half century of social-movement activism, public and private discourses, legal reform, legislative and political campaigns, and court decisions.[93] Writing a few days after the *Obergefell* decision, journalist Molly Ball observed, "What changed . . . wasn't the Constitution—it was the country. And what changed the country was a movement."[94] The Court's decision "wasn't solely or even primarily the work of the lawyers and plaintiffs who brought the case. It was the product of the decades of activism

89. Today, this national publication is known simply as the *Advocate*.

90. Editorial, *Harassment? Hell No!*, L.A. ADVOCATE, Oct. 1967, at 6.

91. DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 13 (1999).

92. E. J. Graff, *How the Gay-Rights Movement Won*, AM. PROSPECT (June 7, 2012), http://prospect.org/article/how-gay-rights-movement-won [https://perma.cc/Z9ND-5CER].

93. For in-depth treatments of the history of the gay and lesbian movement and the more recent movement for marriage equality, see generally JO BECKER, FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY (2014); CLENDINEN & NAGOURNEY, *supra* note 91; LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION—HOW A DESPISED MINORITY PUSHED BACK, BEAT DEATH, FOUND LOVE, AND CHANGED AMERICA FOR EVERYONE (2014); SUZANNA DANUTA WALTERS, ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA (2001); LONG ROAD TO FREEDOM: THE ADVOCATE HISTORY OF THE GAY AND LESBIAN MOVEMENT (Mark Thompson ed., 1994); THE NEW YORK TIMES TWENTIETH CENTURY IN REVIEW: THE GAY RIGHTS MOVEMENT (Vincent J. Samar ed., 2001); and Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC (July 1, 2015), https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/ [https://perma.cc/KWS8-J7U7].

94. Ball, *supra* note 93.

that made the idea of gay marriage seem plausible, desirable, and right."[95] As a result of these processes, the idea that gays and lesbians deserved the same legal rights and social status as everyone else slowly, with occasional setbacks, but inexorably, became the mainstream view. This evolution in attitudes made the Court's dignity decisions possible.

Beginning in the late 1980s and early 1990s, American attitudes toward homosexuality, and toward gays and lesbians as people, began to change both markedly and rapidly. As the pace accelerated over the next two decades, pollsters and scholars of public opinion would describe the changes as "unprecedented"[96] and a "sea change."[97] The change on the question of marriage equality was especially profound. As two political scientists have commented, the rate of attitudinal change about same-sex marriage was "simply stunning and defies typical patterns of public opinion."[98] One conservative commentator summed up the phenomenon this way: "The gay rights movement has made enormous strides over the past few decades, and the recent surge in public support for the once unthinkable concept of same-sex marriage reflects this quite radical shift in American culture."[99]

In 2000, three years before *Lawrence*, political scientists Kenneth Sherrill and Alan Yang documented changes in public attitudes toward gays and lesbians in an article aptly titled "From Outlaws to In-Laws: Anti-Gay Attitudes Thaw."[100] The article highlighted positive trends in attitudes toward gays and lesbians as expressed through such measures as the "feeling thermometer" used by National Election Studies, support for employment nondiscrimination laws, and support for hate crimes laws.[101] Sherrill and Yang found it especially significant that a large majority—76 percent—supported a federal law to increase the penalty for bias-motivated crimes against gays and lesbians. "This statistic," they wrote, "suggests that the lesbian and gay movement has at least partially succeeded in transforming lesbians and gays into an intelligibly recognized minority group."[102]

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95. *Id.*

96. Chris Cillizza, *How Unbelievably Quickly Public Opinion Changed on Gay Marriage, in 5 Charts*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/how-unbelievably-quickly-public-opinion-changed-on-gay-marriage-in-6-charts/ [https://perma.cc/NSD8-HJY2].

97. Shankar Vedantam, *Shift in Gay Marriage Support Mirrors a Changing America*, NPR (Mar. 25, 2013, 3:14 AM), https://www.npr.org/2013/03/25/174989702/shift-in-gay-marriage-support-mirrors-a-changing-america [https://perma.cc/5USV-4BS3].

98. BRIAN F. HARRISON & MELISSA R. MICHELSON, LISTEN, WE NEED TO TALK: HOW TO CHANGE ATTITUDES ABOUT LGBT RIGHTS 1 (2017).

99. David Lampo, *Why Gay Rights Are Civil Rights—and Simply Right*, AM. CONSERVATIVE (July 8, 2013), http://www.theamericanconservative.com/articles/why-gay-rights-are-civil-rights-and-simply-right/ [https://perma.cc/EV4F-DTAA].

100. Kenneth Sherrill & Alan Yang, *From Outlaws to In-Laws: Anti-Gay Attitudes Thaw*, 11 PUB. PERSP. 20, 20–23 (2000).

101. *Id.* at 21, 23.

102. *Id.* at 23.

Even if Americans were not ready to see marriage equality extended to gays and lesbians,[103] by the early 2000s public attitudes were moving steadily in a direction that was increasingly difficult to reconcile with the purpose of sodomy laws: to express moral disapproval of gays and lesbians by making their sexual activity a crime. It is instructive, then, to look at what was happening outside the Court in the years before *Lawrence*.

In November 1985, a few months before the Court upheld sodomy laws in *Bowers v. Hardwick*,[104] 44 percent of Americans said they thought "gay or lesbian relations between consenting adults should . . . be legal," while 47 percent thought they should not be.[105] But by the time *Lawrence* was decided in 2003, the official moral condemnation that was the purpose of sodomy laws had become inconsistent with Americans' evolving attitudes toward gays and lesbians.

First, support had rapidly declined for criminalizing gay sex. In early May 2003 (a few weeks before *Lawrence* was announced), the number of Americans agreeing that gay sex should be legal had reached a high of 60 percent, with only 35 percent saying it should be illegal.[106] The last time a plurality of Americans had said gay and lesbian relations should be illegal was 1996, and the last time a majority had registered that view was 1988.[107]

Beyond sodomy laws, attitudes about gays and lesbians more generally also were evolving. The same Gallup poll in May 2003 showed that 54 percent agreed that "homosexuality should be considered an acceptable alternative lifestyle," up from 34 percent in 1982.[108] Increasing numbers of Americans said that they thought "being gay or lesbian" was "something a person is born with."[109] Eighty-eight percent agreed that "homosexuals should . . . have equal rights in terms of job opportunities."[110] Seventy-nine percent would accept a gay or lesbian person as a member of the president's cabinet (up from 54 percent in 1992), and 61 percent would accept them as an elementary school teacher (up from 41 percent in 1992).[111]

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103. *Id.* at 22–23 (observing that "[i]nclusion and equality in . . . marriage and the family . . . might be seen as different in kind when compared to inclusion and equality in the polity or sectors of the economy," and that forces including "centuries of moral disapprobation" and "natural-law based assumptions of legitimate family and relational arrangements" worked "in tandem with existing social, political and economic arrangements that reproduce heterosexuality (and heterosexual family forms), to reinforce existing *ideas* about what constitutes a legitimate marriage and family" (emphasis added)).

104. 478 U.S. 186 (1986).

105. *Gay and Lesbian Rights*, *supra* note 37.

106. *Id.*; *see also* ANDREW R. FLORES, WILLIAMS INST., NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES 18 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/POP-natl-trends-nov-2014.pdf [https://perma.cc/EU3Y-XVUK] (observing that "[s]upport for sodomy laws decreased throughout the 1990s, and the public entered the 2000s with a strong majority supportive of legalizing same-sex sexual relations").

107. *Gay and Lesbian Rights*, *supra* note 37.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

Evolving public attitudes supported legal reform in the states. The Model Penal Code had taken the view since 1955—almost a half century before *Lawrence*—that states should not provide for "criminal penalties for consensual sexual relations conducted in private."[112] Although sodomy laws were once widespread—all fifty states had them until 1961, when Illinois repealed its sodomy statute[113]—by the time of *Lawrence* all but thirteen states had eliminated them through legislative reform or state judicial decision,[114] and only four applied them exclusively to gay sex.[115] By 1998, the year that John Lawrence and Tyrone Garner were arrested in Lawrence's Houston home, sodomy laws had become essentially relics that were "arbitrarily enforced"[116] and, as a practical matter, had fallen into desuetude.[117] Even when sodomy laws were more common, they typically were not "enforced against consenting adults acting in private."[118] Even as Texas defended its sodomy law by telling the Court that the "prohibition of homosexual conduct . . . represents the reasoned judgment of the Texas Legislature that such conduct is immoral and should be deterred,"[119] it admitted that "the statute is unlikely to deter many individuals with an exclusively homosexual orientation."[120]

A month after *Lawrence*, Gallup found that 32 percent of Americans said that their "attitudes toward gays and lesbians" had "become . . . more accepting" over the "past few years," compared with only 8 percent who said they had become less accepting.[121] And more than half of respondents—56 percent—said they had friends, relatives, or coworkers who had come out to them as gay or lesbian, more than twice the number in 1985.[122]

Americans were becoming personally more familiar with gays and lesbians because large numbers of them were coming out each year. The rising visibility of gays and lesbians in daily life was arguably the single greatest factor in the rapid transformation of American society and culture toward opposition to sodomy laws and support for marriage equality. As political scientist Jeremiah J. Garretson has written, "it is this increased

112. MODEL PENAL CODE § 213.2 cmt., at 372 (AM. LAW INST. 1980).
113. Lawrence v. Texas, 539 U.S. 558, 572 (2003).
114. *Id.* at 573.
115. *See id.*
116. *Id.* at 572.
117. *See* State v. Morales, 869 S.W.2d 941, 943 (Tex. 1994) (observing that the Texas sodomy law "has not been, and in all probability will not be, enforced against private consensual conduct between adults").
118. *Lawrence*, 539 U.S. at 569. The Court discussed legal treatises and scholarship indicating that sodomy prosecutions often involved sex with minors (of either sex) or other persons who were legally incapable of providing consent, and the "infrequency" of prosecutions made it "difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults." *Id.* at 569–70.
119. Respondent's Brief, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 470184, at *48.
120. *Id.* at *48 n.31. The state speculated that the law might still be "effective to some degree in deterring the remaining population (i.e., persons with a heterosexual or bisexual orientation) from detrimentally experimenting in homosexual conduct." *Id.*
121. *Gay and Lesbian Rights*, *supra* note 37.
122. *Id.*

exposure—in the form of interpersonal and mediated contact with lesbians and gays—that has largely defined the most prominent features of opinion change on gay issues: its broadness, its durability, its rapidity, and its concentration among the millennial generation."[123] When the Pew Research Center asked Americans in 2013 what had caused them to change their minds in support of same-sex marriage, the largest single answer was that they "know someone . . . who is homosexual."[124] All this suggests that these attitudinal changes were not simply shifts in abstract political preferences, but were driven by an appreciation for the dignity of gays and lesbians as people and by an appreciation for the dignitary harms that anti-gay laws imposed on gay family members, friends, neighbors, or coworkers.

To be sure, the advancements being made by gays and lesbians generated political resistance. No state expressly defined marriage as a union between a man and a woman before Maryland did so in 1973 "in an apparent response to attempts by same-sex couples to obtain marriage licenses."[125] Two decades later, in 1993, a decision of the Hawaii Supreme Court in *Baehr v. Lewin*[126] looked as though it might make Hawaii the first state to allow legal same-sex marriage. Same-sex marriage ultimately was not legalized in Hawaii due to a constitutional amendment approved by the state's voters.[127] *Baehr* set off a rapid series of "backlash measures" that became a "mainstay of the [same-sex marriage] controversy."[128] In 1996, Congress enacted DOMA, which, according to its lead sponsor, was "designed to thwart the then-nascent move in a few state courts and legislatures to afford partial or full recognition to same-sex couples."[129] DOMA's legislative history was characterized by blunt anti-gay bigotry of a kind that would be nearly impossible to imagine coming from any legislative body today.[130] States also

123. JEREMIAH J. GARRETSON, THE PATH TO GAY RIGHTS: HOW ACTIVISM AND COMING OUT CHANGED PUBLIC OPINION 7 (2018); *see also* HARRISON & MICHELSON, *supra* note 98, at 2 (positing that "the rapid change in opinion on marriage equality occurred because over time, individuals were nudged by members and leaders of their social groups to reconsider their existing opinions").

124. *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RES. CTR. (Mar. 20, 2013) [hereinafter *Growing Support for Gay Marriage*], http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/ [https://perma.cc/7ELX-LBLM].

125. Kevin Rector, *Md. Attorney General Says Supreme Court Must Overturn Same-Sex Marriage Bans Nationwide*, BALT. SUN (Mar. 9, 2015, 4:00 PM), http://www.baltimoresun.com/features/gay-in-maryland/gay-matters/bs-gm-attorney-general-issues-report-calling-samesex-marriage-bans-20150309-story.html [https://perma.cc/M9WP-GT64] (quoting Maryland Attorney General Brian E. Frosh).

126. 852 P.2d 44 (Haw. 1993).

127. WILLIAM B. RUBENSTEIN ET AL., CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 612 (3d ed. 2008).

128. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1154 (2009).

129. Bob Barr, *No Defending the Defense of Marriage Act*, L.A. TIMES (Jan. 5, 2009, 12:00 AM), http://www.latimes.com/la-oe-barr5-2009jan05-story.html [https://perma.cc/4A5X-RT6C].

130. DOMA's stated official purposes were "rife with unconcealed animus." Steve Sanders, *Making It Up: Lessons for Equal Protection Doctrine from the Use and Abuse of Hypothesized Purposes in the Marriage Equality Litigation*, 68 HASTINGS L.J. 657, 700

began approving statutes, constitutional amendments, or both banning same-sex marriage (commonly referred to as "mini-DOMAs").[131] The anti-marriage-equality movement intensified after the Massachusetts Supreme Judicial Court in 2003 made that state the first to legalize same-sex marriage.[132] By 2012, some forty states banned same-sex marriage, thirty-one of these by state constitutional amendment.[133]

In retrospect, these measures must be understood as products of an intense but transitory period of backlash and adaptation.[134] The measures were sponsored and promoted by religious-conservative activists and Republican politicians who exploited public uncertainty about the meaning and implications of same-sex marriage coupled with greater rights and visibility for gays and lesbians. At the time, some saw these measures as serious setbacks for the cause of marriage equality.[135] Yet remarkably, even after the enactment of the federal DOMA and throughout the era of the mini-DOMAs, national public support for same-sex marriage continued its steady, long-term upward trend.[136]

During the ten years between *Lawrence* and *Windsor,* trends in public attitudes toward gays and lesbians continued in this positive direction. A study published by the Russell Sage Foundation found that in 2010,

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(2017). The House committee report setting forth the rationales for DOMA portrayed the then-emergent movement for legal same-sex marriage as a dangerous and radical threat from which traditional heterosexual marriage needed to be defended. H.R. REP. NO. 104-664, at 2–16 (1996). For example, the report stated that "[c]ivil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality." *Id.* at 15. It continued, "This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.* at 15–16. Allowing same-sex marriage would "'trivialize[] the legitimate status of marriage and demean[] it by putting a stamp of approval . . . on a union that many people . . . think is immoral.'" *Id.* at 16 (quoting Henry Hyde, Chairman of the Judiciary Committee). The report referred to the political and legal movement in support of marriage equality as an "assault against traditional heterosexual marriage laws" and referred to same-sex marriage as "a truly radical proposal that would fundamentally alter the institution of marriage." *Id.* at 4, 12.

131. Information about the history of each state's ban is available at *Winning in the States*, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/winning-in-the-states [https://perma.cc/22TU-883B] (last visited Mar. 15, 2019).

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

133. Steve Sanders, *Same-Sex Marriage Symposium: Gay Marriage, Democracy, and Judicial Review*, SCOTUSBLOG (Sept. 18, 2012, 10:30 AM), http://www.scotusblog.com/2012/09/same-sex-marriage-symposium-gay-marriage-democracy-and-judicial-review/ [https://perma.cc/37D8-EHMP].

134. For treatment of this history, see generally MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013).

135. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 355–419 (2d ed. 2008).

136. Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What It Means*, N.Y. TIMES: FIVETHIRTYEIGHT (Mar. 26, 2013, 10:10 AM), https://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/ [https://perma.cc/7Q9F-ABZ6] (presenting data demonstrating the rise of marriage equality beginning in 1996 at an average rate of 2 percent per year, and observing that "this seems to reflect a steady gain in support for same-sex marriage rather than there having been any one inflection point").

68 percent of Americans said that gay men or lesbians living with children fit within their definition of "family," up more than 10 percent from 2003.[137] Over the same period, the number of Americans reporting that they did not have any gay friends or family members decreased from 58 percent to 40 percent, and in 2010 only 18 percent said they did not know anyone who was gay.[138]

Three months before *Windsor* was decided in 2013, the Pew Research Center reported that "[t]he rise in support for same-sex marriage over the past decade is among the largest changes in opinion on any policy issue over this time period."[139] The "long-term shift" in attitudes toward marriage equality was "unambiguous."[140] In the months leading up to *Windsor*, a number of media and polling companies reported that support for same-sex marriage had moved above 50 percent.[141] Gallup found that 53 percent of Americans thought "marriages between same-sex couples should . . . be recognized by the law as valid, with the same rights as traditional marriages"—a number that had been steadily increasing from 27 percent in 1996.[142] Pew found that 66 percent agreed that "same-sex couples should have the same legal rights as heterosexual couples"[143]—which, of course, was inconsistent with DOMA, as DOMA denied married same-sex couples all the federal rights that opposite-sex couples received. A poll in early 2013 specifically about DOMA found that 59 percent of Americans opposed allowing the federal government to deny benefits and protections to legally married same-sex couples, and 62 percent agreed that doing so was a form of "discrimination."[144]

Opinion polling tells only part of the story. Polls measure attitudes, which both respond and contribute to changes in the larger culture. In the decades leading to the marriage decisions, the status of gays and lesbians in that larger culture had changed dramatically. Gays and lesbians had become visible in media and popular culture.[145] Their support was sought by political parties and politicians, including a presidential candidate as early as 1991, Bill Clinton, who told a crowd of gay and lesbian advocates, "I have a vision of America, and you are part of it."[146] Congress had voted to lift the ban on

137. BRIAN POWELL ET AL., COUNTED OUT: SAME-SEX RELATIONS AND AMERICANS' DEFINITIONS OF FAMILY 5 (2010).

138. *Id.*

139. *Growing Support for Gay Marriage*, *supra* note 124.

140. *Id.*

141. *See* Silver, *supra* note 136.

142. *Gay and Lesbian Rights*, *supra* note 37.

143. *Growing Support for Gay Marriage*, *supra* note 124.

144. Joseph Patrick McCormick, *Poll: 59% of Americans Oppose the Defense of Marriage Act*, PINKNEWS (Feb. 20, 2013), http://www.pinknews.co.uk/2013/02/20/poll-59-of-americans-oppose-the-defense-of-marriage-act/ [https://perma.cc/M6QY-9XT6].

145. WALTERS, *supra* note 93, at 13 ("Visibility is . . . necessary for equality. It is part of the trajectory of any movement for inclusion and social change.").

146. John M. Broder, *Gay and Lesbian Group Offers Thanks to Clinton*, N.Y. TIMES (Oct. 4, 1999), http://www.nytimes.com/1999/10/04/us/gay-and-lesbian-group-offers-thanks-to-clinton.html [https://perma.cc/72R6-4N3X] (quoting Governor Bill Clinton's address at the Palace Theater).

gays serving openly in the U.S. military.[147] Many religious denominations had become more welcoming.[148] The Boy Scouts had lifted their ban on gay members and were moving toward also lifting their ban on gay adult leaders.[149] Dozens of openly gay politicians were winning elections in every cycle, in offices ranging from city council to U.S. Senate.[150] More and more same-sex couples were adopting and raising children.[151] A president in 2012, Barack Obama, endorsed marriage equality,[152] and a majority of U.S. senators also supported it.[153] Also in 2012, voters in four statewide referenda—in Maine, Maryland, Minnesota, and Washington—legalized same-sex marriage, which broke a string of more than thirty previous defeats around the country.[154] By the day *Windsor* was decided, nine states and the District of Columbia had legalized same-sex marriage by legislative vote, popular referendum, or state judicial decision.[155]

By the time of *Obergefell* two years later, majority support for same-sex marriage had become unambiguous, and the steady long-term upward trend line demonstrated that this was not an ephemeral or transitory state of affairs. Several polling sources reported that support was at "record" highs of 60 percent or more.[156] Much of the change was driven by generational

147. Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES (July 22, 2011), http://www.nytimes.com/2011/07/23/us/23military.html [https://perma.cc/4N2E-8UB8].

148. *See, e.g.*, David Masci, *National Congregations Study Finds More Church Acceptance of Gays and Lesbians*, PEW RES. CTR. (Sept. 25, 2014), http://www.pewresearch.org/fact-tank/2014/09/25/new-study-finds-a-greater-church-acceptance-of-gays-and-lesbians-2/ [https://perma.cc/N5FD-FKUD].

149. Erik Eckholm, *Boy Scouts Move to Lift Ban on Gay Youth Members*, N.Y. TIMES (Apr. 19, 2013), http://www.nytimes.com/2013/04/20/us/boy-scouts-move-to-lift-ban-on-gay-members.html [https://perma.cc/JKU8-4HEM].

150. *See Our History*, VICTORY FUND, https://victoryfund.org/about/history/ [https://perma.cc/6ULF-C4XX] (last visited Mar. 15, 2019).

151. Lucas Grindley, *Gayby Boom? Census Shows Rise in Adoptions*, ADVOCATE (June 14, 2011, 10:10 AM), https://www.advocate.com/news/daily-news/2011/06/14/gayby-boom-found-us-census-figures [https://perma.cc/6JPR-VC6V] (reporting that, in 2010, 19 percent of same-sex couples reported having adopted a child, up from 8 percent in 2000).

152. Peter Wallsten & Scott Wilson, *Obama Endorses Gay Marriage, Says Same-Sex Couples Should Have Right to Wed*, WASH. POST. (May 9, 2012), https://www.washingtonpost.com/politics/2012/05/09/gIQAivsWDU_story.html [http://perma.cc/AL9D-EEBT].

153. Elspeth Reeve & Philip Bump, *A Map Showing the Country's Sudden Move Towards Marriage Equality*, ATLANTIC (Apr. 11, 2013), https://www.theatlantic.com/politics/archive/2013/04/gay-rights-marriage-map-gif/315435/ [https://perma.cc/C86T-F2U5].

154. Walter Olson, *Republicans Helped Same-Sex Marriage Win at the Polls*, WASH. POST. (Nov. 30, 2012), https://www.washingtonpost.com/opinions/republicans-helped-same-sex-marriage-win-at-the-polls/2012/11/30/7db4e37c-3a45-11e2-8a97-363b0f9a0ab3_story.html [https://perma.cc/F3JR-U3MK].

155. *See* L.A. Times Staff, *Timeline: Gay Marriage Chronology*, L.A. TIMES (June 26, 2015), http://graphics.latimes.com/usmap-gay-marriage-chronology/ [https://perma.cc/H5YV-2NGV].

156. Scott Clement & Robert Barnes, *Poll: Gay-Marriage Support at Record High*, WASH. POST (Apr. 23, 2015), https://www.washingtonpost.com/politics/courts_law/poll-gay-marriage-support-at-record-high/2015/04/22/f6548332-e92a-11e4-aae1-d642717d8afa_story.html [https://perma.cc/H9KL-DDH3] (reporting 61 percent support); Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015),

replacement—much larger shares of younger Americans than older Americans supported same-sex marriage.[157] But it was also clear that Americans of all generations, races, religions, and party affiliations were increasing their support for same-sex marriage.[158]

This change was evident even in the arguments states used in federal litigation to defend their same-sex marriage bans. The campaigns to enact the mini-DOMAs had sought to arouse negative attitudes toward gays and lesbians,[159] and "many of those who defended a traditional understanding of marriage repeatedly challenged the notion that same-sex relationships were as good (or as loving or as committed) as different sex ones."[160] Yet in federal court, the states took pains not to argue that the bans were justified because gays and lesbians were immoral or in some way unfit for marriage. For example, Michigan claimed that "[b]y reaffirming the definition of marriage that has always existed in Michigan, Michigan's voters did not disparage other relationships or deny the obvious point that same-sex couples can provide loving homes."[161] Instead, the states argued that the bans advanced their government interest in promoting "responsible procreation."[162] That the states felt it necessary to build their defenses around an hypothesized purpose that struck many observers as absurd—the Court in *Obergefell* would dismiss the responsible procreation theory as "counterintuitive"[163] and "wholly illogical"[164]—was in itself powerful evidence of how much had changed in American attitudes and culture.

III. DIALOGIC JUDICIAL REVIEW

This Part turns to the theoretical framing that is necessary to my overall thesis that *Lawrence*, *Windsor*, and *Obergefell* should be understood collectively as illustrating the process of dialogic judicial review.[165] My point of departure is Barry Friedman's work on "dialogue and judicial

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http://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx [https://perma.cc/P6ER-SKZN] (reporting 60 percent support).

157. *See Growing Support for Gay Marriage*, *supra* note 124 (reporting that 70 percent of "Millennials" supported same-sex marriage, as opposed to 31 percent of those born between 1928 and 1945).

158. Vedantam, *supra* note 97 (citing the view of a sociologist who had tracked attitudes toward same-sex marriage over two decades that "the national change was less about older Americans dying and leaving behind a more liberal America, and more about the fact that many Americans who once opposed gay marriage have changed their minds or softened their opposition").

159. Sanders, *supra* note 130, at 679–81.

160. Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 654 (2016).

161. Brief for Michigan Defendants-Appellants at 4, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341), 2014 WL 1998573, at *4.

162. Jeffrey Rosen, *The Laughable Argument Against Gay Marriage*, NEW REPUBLIC (Mar. 26, 2013), https://newrepublic.com/article/112778/supreme-court-gay-marriage-case-2013-laughable-argument [https://perma.cc/44FK-FG55].

163. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

164. *Id.* (quoting Kitchen v. Herbert, 755 F.3d 1193, 1223 (10th Cir. 2014)).

165. This term has been used by scholars to describe a number of related but distinct ideas about constitutional interpretation. *See* Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205, 205 (2008).

review,"[166] which argues that the Constitution "is interpreted on a daily basis through an elaborate dialogue as to its meaning" that involves the courts, political actors such as legislatures, and the people generally.[167] Through this process, constitutional law emerges from a larger social and cultural dialogue in which the Court participates and to which it responds.

In this dialogic model, courts "do not stand aloof from society and declare rights. Rather, they interact on a daily basis with society, taking part in an interpretive dialogue."[168] As a result of this process, Friedman writes in *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, the Supreme Court's decisions "hew rather closely to the mainstream of popular judgment about the meaning of the Constitution" and "tend to converge with the considered judgment of the American people."[169] In this process, "[p]opular politics and Court decisions, moving together sometimes in harmony and sometimes not, have shaped the meaning of the Constitution."[170] Other constitutional scholars and historians have "converg[ed] around a similar set of ideas and understandings."[171] Harry Kalven seemed to have something like this in mind when he described the Court's First Amendment jurisprudence as "a sort of Socratic dialogue . . . between the Court and the society as to the meaning of freedom of speech."[172]

Friedman's work fits within a larger line of commentary, going back to a seminal 1957 article by Robert Dahl,[173] which states that the Court "generally stays within bounds that the American people will tolerate"[174] and

166. *See generally* Friedman, *supra* note 31.

167. *Id.* at 580–81.

168. *Id.*

169. FRIEDMAN, *supra* note 21, at 14. For commentary and critiques of Friedman's theory of the Supreme Court's work more generally, see, for example, Jenna Bednar, *The Dialogic Theory of Judicial Review: A New Social Science Research Agenda*, 78 GEO. WASH. L. REV. 1178 (2010); William E. Forbath, *The Will of the People? Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191 (2010); and Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207 (2010).

170. Friedman, *supra* note 19, at 1235.

171. *Id.* (explaining that the interplay of ordinary politics, interactions between the executive and legislative branches, and social culture shapes how Americans interpret the Constitution); *see also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5 (2004) (arguing that "judicial decision making involves a combination of legal and political factors"); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 303 (2001) (stating that in times of "constitutional mobilization, citizens make claims about the Constitution's meaning in a wide variety of social settings," which plays an important role in shaping how both courts and the general population interpret the text).

172. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 23 (1988).

173. Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279 (1957). Dahl described the Court as "inevitably a part of the dominant national [governing] alliance" and "an essential part of the political leadership" whose legitimacy came from decisions that are consistent with the dominant alliance. *Id.* at 293.

174. Primus, *supra* note 169, at 1212.

that it is, in practice, more often than not a "majoritarian" institution.[175] Research in political science also has found that the Supreme Court tends to be responsive to public preferences. One study based on Court decisions from 1953 to 1996 concluded that "the Court's policy outcomes are indeed affected by public opinion . . . to a degree far greater than previously documented."[176]

The idea of dialogic judicial review goes beyond just the principle that the Court's decisions tend to align with public preferences. Under the dialogic model, not only does the Court listen and respond to public attitudes, its decisions also contribute to shaping public attitudes or perceptions about an issue, a proposition for which there is empirical support in social science literature.[177] According to Friedman, "Constitutional change occurs as public understandings of constitutional meaning and judicial interpretations of the Constitution interact with one another."[178] As a result, "judicial meanings shift in response to changing public understandings, and judicial decisions provoke the public to consider what the Constitution ought to mean. Through this interaction, the Constitution changes."[179] Such a process necessarily is "open-ended . . . and so the process must go on with another and yet another question being put."[180] Judicial determinations about the Constitution's meaning are rarely final, and public resistance or backlash to particular decisions (such as *Roe v. Wade*[181] with abortion or *Furman v. Georgia*[182] with the death penalty)[183] will cause the Court to trim its sails in later decisions and sometimes to reverse itself altogether.[184]

The idea of dialogic judicial review puts in perspective the role of the judiciary as a so-called "countermajoritarian" institution. The starting point in this line of commentary is Alexander Bickel's now-classic 1962 work *The Least Dangerous Branch*, in which Bickel coined the term "countermajoritarian difficulty" to describe the question of why an unelected judiciary should have the power to decide important issues in a way that the

175. Richard H. Pildes, *Is the Supreme Court a 'Majoritarian' Institution?*, 2010 SUP. CT. REV. 103, 103; *see also* Joseph Landau, *New Majoritarian Constitutionalism*, 103 IOWA L. REV. 1033, 1045–60 (2018) (discussing three models of "new majoritarian" constitutional decision-making by the Court).

176. Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1033 (2004).

177. *See, e.g.*, Margaret E. Tankard & Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28 PSYCHOL. SCI. 1334, 1341 (2017) (finding an increase in perceived social norms in support of gay marriage after the *Obergefell* ruling).

178. Friedman, *supra* note 19, at 1236.

179. *Id.* (footnote omitted).

180. *See* KALVEN, *supra* note 172, at 23.

181. 410 U.S. 113 (1973).

182. 408 U.S. 238 (1972).

183. *See* FRIEDMAN, *supra* note 21, at 287–88, 297–99 (discussing how the Court reacted in response to the negative public reactions to *Furman* and *Roe*).

184. *See* Friedman, *supra* note 19, at 1237–38.

states or political branches have no direct power to override.[185] While not diminishing the importance of the question Bickel presented or the fact that some of the Court's decisions truly have been countermajoritarian (flag burning comes to mind[186]), dialogic judicial review demonstrates that the problem is far from pervasive in constitutional law because most decisions are (or shortly become) consistent with consensus, or at least majority, views about the Constitution's meaning.[187]

In a related vein of scholarship to Friedman's work on dialogue and judicial review, Robert Post, Reva B. Siegel, and other scholars have explained how constitutional law is shaped by courts' interaction with nonjudicial actors. Post distinguishes between "constitutional law"—that is, "constitutional law as it is made from the perspective of the judiciary"—and "constitutional culture," which embraces "the beliefs and values of nonjudicial actors . . . that encompass[] extrajudicial beliefs about the substance of the Constitution."[188] Post argues that "constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture."[189] The constitutional law that emerges from this "dialectic between constitutional culture and the institutional practices of constitutional adjudication" is, Post explains, "neither autonomous nor fixed."[190] Because constitutional law does not exist independent of culture, "constitutional law properly evolves as culture evolves."[191] Because "culture is always dynamic and contested, constitutional law will necessarily also be dynamic and contested."[192] Social movements play a role in this dialectic process of constitutional culture by developing a constitutional language for their own claims,[193] as do the cause lawyers who "aim to change the law in ways that restructure dominant social configurations that marginalize or oppress certain groups."[194]

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185. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962).

186. *See* Texas v. Johnson, 491 U.S. 397, 419–20 (1989) (invalidating prohibitions on flag desecration that were enforced in forty-eight of the fifty states).

187. Friedman has said he wrote *The Will of the People* "to change the nature of the conversation about judicial review, from the overly simplistic premises of the countermajoritarian difficulty, to a more nuanced and accurate view that sees judicial decisionmaking as symbiotic with other aspects of constitutional democracy." Friedman, *supra* note 19, at 1254.

188. Post, *supra* note 33, at 8.

189. *Id.*

190. *Id.* at 11.

191. *Id.* at 83.

192. *Id.* (footnote omitted).

193. *See, e.g.*, Friedman, *supra* note 19, at 1245 & n.84; *see also* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1980–2020 (2003); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 201–36 (2008); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–76 (2002).

194. Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 84, 92 (Austin Sarat & Stuart A. Scheingold eds., 2006).

Siegel has defined "constitutional culture" as "the network of understandings and practices that structure our constitutional tradition, including those that shape law but would not be recognized as 'lawmaking' according to the legal system's own formal criteria"[195] and as "the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution's meaning."[196] Constitutional culture "mediates the relation of law and politics" and "supplies understandings of role and practices of argument through which citizens and officials can propose new ways of enacting the society's defining commitments."[197] It also "enables [social] movements to negotiate the law/politics distinction and propose (or resist) alternative understandings of the constitutional tradition."[198]

This understanding of constitutional culture shares common themes with Larry Kramer's work on "popular constitutionalism," which advocates a return to the founding generation's view of the Constitution as "a special form of popular law, law made by the people to bind their governors, and so subject to rules and considerations that made it qualitatively different from (and not just superior to) statutory or common law."[199] Rejecting "judicial supremacy" as inconsistent with the model the framers intended, Kramer argues that "[w]e need processes, formal and informal, by which our constitutional understandings and commitments can be challenged, reinterpreted, and renewed."[200] Kramer has lauded work by Siegel and others that seeks to understand the "external" influences on constitutional law, calling it "the new center of academic work in constitutional theory."[201]

The views of elites, including judges on state and federal courts, also play a role in shaping how constitutional ideas move from being "off the wall" to "on the wall," as Jack M. Balkin has described the phenomenon. "Arguments move from off the wall to on the wall," he writes, "because people and institutions are willing to put their reputations on the line and state that an argument formerly thought beyond the pale is not crazy at all, but is actually a pretty good legal argument."[202] Further, "it matters greatly *who* vouches for the argument—whether they are well-respected, powerful and influential,

195. Siegel, *supra* note 171, at 303.

196. Siegel, *supra* note 23, at 1325. Siegel distinguishes this definition from a different understanding of constitutional culture as "social values relevant to matters of constitutional law that an official engaged in responsive interpretation incorporates into the fabric of constitutional law." *Id.*

197. *Id.* at 1327.

198. *Id.* at 1329.

199. Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 10 (2001).

200. *Id.* at 15.

201. Larry Kramer, *Generating Constitutional Meaning*, 94 CALIF. L. REV. 1439, 1441 (2006).

202. Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/ [https://perma.cc/P24U-QRWT].

and how they are situated in institutions with professional authority or in institutions like politics or the media that shape public opinion."[203]

The work of David Strauss, who is perhaps best known for his exposition of the idea of a "living constitution,"[204] also fits within the dialogic model as I am broadly defining it in this Article. The gay and lesbian dignity cases provide useful examples of what Strauss has called "common law constitutional interpretation."[205] The common-law approach "rejects the notion that law must be derived from some authoritative source," such as constitutional text alone, "and finds it instead in understandings that evolve over time."[206] Strauss has written that much of modern judicial review "looks to the future, not the past" and "tries to bring laws up to date, rather than deferring to tradition."[207] Such judicial review "anticipates and accommodates, rather than limits, developments in popular opinion."[208] One way that courts engage in the modernizing form of judicial review is to "strike down a statute if it no longer reflects popular opinion or if the trends in popular opinion are running against it. Modernization tries to anticipate developments in the law, invalidating laws that would not be enacted today or that will soon lose popular support."[209] Strauss suggests that this form of judicial review has emerged in response to the criticism of judicial review as antidemocratic. The approach of "anticipating changes that have majority support" gives judicial review "a more comfortable place in democratic government."[210]

Of course, there are differences in approach among all these scholars whose work I include within the dialogic model as I am describing it in this Article. But they all contrast starkly with scholars and jurists who take exception to the idea that constitutional law should be understood as something malleable that may be shaped according to public attitudes, culture, or social change. For example, the late Justice Antonin Scalia, one of the best-known proponents of originalism as an alternative to the living constitution, frequently argued that "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."[211] Yet despite the proliferation of academic commentary that originalism has created, it would be difficult to argue, as an

203. *Id.*

204. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

205. *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

206. *Id.* at 879.

207. David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 860 (2009).

208. *Id.*

209. *Id.* at 861.

210. *Id.*; *see also* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV 549, 563 (2009) (arguing that courts work in cooperation with "the dominant national political coalition" and invalidate "statutes passed by older regimes that are inconsistent with the current coalition's values").

211. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 81 (2012) (quoting South Carolina v. United States, 199 U.S. 437, 448 (1905)).

empirical matter, that the Supreme Court does not regularly adapt the Constitution's "majestic generalities,"[212] such as liberty and equal protection, to fit modern circumstances. Dialogic judicial review, as I have described it above, attempts to explain the legitimacy of that enterprise. My goal in the remainder of this Article is to demonstrate that the gay and lesbian dignity cases, considered collectively, provide a useful illustration of how it works.

IV. THE LAWFULNESS OF THE DIGNITY DECISIONS

In the previous two Parts I sketched the rapid and dramatic changes achieved by the social movement for gay and lesbian equality and described dialogic constitutional interpretation. In this Part, I bring those discussions together to describe how the trilogy of gay and lesbian dignity cases demonstrates a Supreme Court in dialogue with the larger society on the question of how the Constitution should account for the changing social meaning of particular forms of government-imposed discrimination against gays and lesbians.

This Part's argument can be sketched as follows. The social meaning of government discrimination has long played an important role in constitutional decisions involving equality and the treatment of minority groups.[213] In particular, laws that are commonly understood to demean and impose stigma are repugnant to the Fourteenth Amendment, in both its original and contemporary understandings.[214] Using this anti-stigma principle, the Supreme Court condemned criminal sodomy laws and federal and state marriage restrictions.[215] As American attitudes and culture evolved concerning the status of gays and lesbians, so did the social meaning of government anti-gay discrimination.[216] By invoking the idea of "dignity" in these decisions, the Court was both interpreting and helping to further construct social meaning. The bedrock principles of these decisions, that gays and lesbians had "a just claim to dignity" and "dignity in their own distinct identity,"[217] which most Americans once would have rejected, were now consistent with mainstream public attitudes and culture. The Court gave legal substance to this attitudinal and cultural change when it concluded that the social meaning of sodomy laws and marriage restrictions was now understood to be the imposition of dignitary harm—that is, the kind of stigma and humiliation that could be reached by the Fourteenth Amendment. This Part concludes with some observations about the additional dignitary harms engendered by the countermajoritarian nature of the state marriage bans.[218]

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212. William J. Brennan, Jr., Speech at the Georgetown University Text and Teaching Symposium (Oct. 12, 1985), https://www.thirteen.org/wnet/supremecourt/democracy/sources_document7.html [https://perma.cc/ZU4M-V9PC] (last visited Mar. 15, 2019).

213. *See infra* Part IV.A.

214. *See infra* Part IV.B.

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

216. *See infra* Part IV.C.

217. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).

218. *See infra* Part IV.D.

The fact that the Court's holdings in the gay and lesbian dignity cases aligned with the American majority's preferred policy outcomes would merely make them *majoritarian*. But the fact that the Court reached those holdings by interpreting and helping to construct the social meaning of the laws at issue in these cases made them *dialogic*. In other words, these cases were more than simply examples of the Court following public opinion. And the fact that they ultimately rested on well-established constitutional norms made them legitimate and lawful.

A. Social Meaning in Constitutional Law

"Social meaning" refers to "the semiotic content attached to various actions, or inactions, or statuses, within a particular context."[219] Lawrence Lessig has said that social meanings are "frameworks of understanding within which individuals live; a way to describe what they *take* or *understand* various actions, or inactions, or statuses to be."[220] Social meaning is another way of referring to a law's expressive effect. As Lessig observes, "[I]f an action creates a stigma, that stigma is a social meaning."[221]

The Court's equality decisions often have articulated and exposed the social meaning of particular forms of government discrimination by providing candid descriptions of how the discrimination was experienced by the targeted group and by providing candid discussion of the denigrating message this discrimination communicated about the group's standing in the political community. For example, social meaning has been a prominent focus of many of the Court's racial equal protection cases. In one of the first cases applying the Fourteenth Amendment to laws discriminating on the basis of race, *Strauder v. West Virginia*,[222] which invalidated a state law excluding blacks from serving as trial jurors, the Court called the statute "practically a brand upon [blacks], affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[223] This is a classic statement about social meaning.

An example of the Court attempting to impose a reading of social meaning that did not ring true even at the time it was written came in *Plessy v. Ferguson.*[224] Examining a law that required separate accommodations for white and black railroad passengers, the Court denied that the law had the same social meaning—that is, the same stigmatic effect and dignitary harm—as the jury law in *Strauder*. The constitutionality of the railroad law in *Plessy* turned on this supposed difference in social meaning. "Laws permitting, and even requiring" the physical separation of blacks and whites "do not

219. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995) (footnote omitted).
220. *Id.* at 952.
221. *Id.* at 951.
222. 100 U.S. 303 (1879).
223. *Id.* at 308.
224. 163 U.S. 537 (1896).

necessarily imply the inferiority of either race to the other," the Court maintained.[225]

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[226]

The Court's refusal to acknowledge the obvious social meaning of enforced segregation is a primary reason why *Plessy* is regarded today as not only flawed but disingenuous.

The social meaning of racial discrimination also was central to *Brown v. Board of Education*,[227] where the Court observed, without the need to cite any authority, that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[228] This blunt statement of social meaning was essential to the Court's further conclusion, which was supported with citations to social science research,[229] that "[t]o separate [black children] from others . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[230]

In a famous article titled "The Lawfulness of the Segregation Decisions," Charles Black observed, about the critics of *Brown*,

> It seems that what is being said [by such critics] is that, while no actual doubt exists as to what segregation is for and what kind of societal pattern it supports and implements, there is no ritually sanctioned way in which the Court, as a Court, can permissibly learn what is obvious to everybody else and to the Justices as individuals.[231]

Black scoffed at the need for "[*e*]*legantia juris* and conceptual algebra" in evaluating the harms of government-enforced segregation.[232] To find for purposes of constitutional adjudication that mandatory school segregation offended the Constitution, it was sufficient to articulate its social meaning, as the Court had done. "[T]he fact that the Court has assumed as true a matter of common knowledge in regard to broad societal patterns, is (to say the very least) pretty far down the list of things to protest against."[233]

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225. *Id.* at 544.
226. *Id.* at 551.
227. 347 U.S. 483 (1954).
228. *Id.* at 494.
229. *See id.* at 494 n.11.
230. *Id.* at 494.
231. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).
232. *Id.* at 429.
233. *Id.* at 428. In later civil rights era cases, articulation of social meaning allowed the Court to candidly expose the machinations of southern racists. In *Anderson v. Martin*, 375 U.S. 399 (1964), for example, the Court struck down a Louisiana election law that required a candidate's race to be specified on the ballot. Ostensibly, the law treated blacks and whites alike. But the Court recognized that, in the context of Louisiana racial politics in the 1960s, such a law "furnishes a vehicle by which racial prejudice may be so aroused as to operate

Through laws and policies, governments contribute to the creation of social meaning.[234] Laws and public policies "act to construct the social structures, or social norms . . . the *social meanings* that surround us. For these social meanings *are* what is orthodox. They constitute what is authority for a particular society, or particular culture."[235] The social meaning of a law is not necessarily the same thing as the government's purpose or intent, or the lawmakers' motives.[236] Thus, it is possible to conclude that a law has the *operation and effect* of imposing stigma on a group without concluding that it was the government's *purpose* to do so.[237]

Courts also interpret, construct, and reinforce social meaning through judicial review. Deborah L. Brake writes that "[e]quality claims are largely about challenges to existing social meaning and the reconstruction of social relationships based on changes in social meaning."[238] Equality claims "challenge[] existing status hierarchies and the social meanings that have held them in place."[239] Richard H. Pildes has argued that, rather than thinking about constitutional rights as trumps, which is how constitutional theory and political philosophy tend to understand them, we should understand rights as "tools courts use to evaluate the social meaning and expressive dimensions of government action"[240] and that "[i]ncorporating a theory of social meaning and the expressive dimensions of state action into

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against one group because of race and for another." *Id.* at 402. The social meaning of a requirement that race be listed in the ballot was clear: the law placed "the power of the State behind a racial classification that induces racial prejudice at the polls." *Id.*

234. Social meanings are a part of everyday life as "the collection of understandings or expectations shared by some group at a particular time," understandings or expectations that are "*taken for granted* by those within the group at issue." Lessig, *supra* note 219, at 958. For example, "A man announces that he is a Nazi. His announcement is a text. This text (in post-World War II Western culture) stigmatizes him." *Id.* at 959.

235. *Id.* at 947.

236. *Id.* at 953; *see also* Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 582 (2004) ("The expressive meaning of an action is not necessarily a function of the actor's intent; rather, it is the socially constructed meaning that is recognizable by the community, exercising interpretive judgment." (footnote omitted)).

237. For example, as Carlos Ball has written, the Court in *Obergefell*

> did not claim, as it had in striking down the Defense of Marriage Act in *United States v. Windsor*, that the marriage bans were the result of animus against lesbians and gay men. Instead, the Court in *Obergefell* emphasized the harmful, demeaning, and stigmatizing *consequences* of denying same-sex couples the opportunity to marry. Rather than focusing on the intent or motivations behind the bans, the Court focused on their impact.

Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 639–40 (2016) (footnotes omitted).

238. Brake, *supra* note 236, at 573.

239. *Id.* at 574.

240. Pildes, *supra* note 24, at 725. Pildes argues that "American constitutional law provides a more expansive conception of harm because it is more attuned than conventional rights theory appreciates to the social meanings of state action. Expressive harms, no less than material harms to these kind of individual interests, ground constitutional doctrine in many areas." *Id.* at 762.

constitutional analysis can reconnect constitutional theory to constitutional practice."[241]

The Court's exposition of social meaning has shaped equality doctrine by helping to define the forms of discrimination the Constitution forbids. Elizabeth Anderson and Pildes have argued that "[t]he most conventional expressive concerns with equal protection doctrine involve issues of stigma and second-class citizenship."[242] Michael Dorf writes that "expressivist notions" of harm are "deeply embedded" in American constitutional doctrine[243] and that "a cross-ideological consensus holds that some government expressions of second-class citizenship offend equal protection precisely because of their social meaning."[244] Expressive harm, Pildes says, "results from the ideas or attitudes expressed through a governmental action rather than from the more tangible or material consequences the action brings about."[245] Accordingly, "the meaning of a governmental action is just as important as what that action does. Public policies can violate the Constitution not only because they bring about concrete costs but because the meaning they convey expresses inappropriate respect for relevant constitutional norms."[246] On this understanding, constitutional law is less about identifying and protecting certain individual rights and more about "secur[ing] a common good," and "judicial interpretation of that common good, not an atomistic conception of rights," is what "propels constitutional law."[247]

The Court's decisions both identify and help to further construct social meaning. Its use of social meaning may be both descriptive, in that it captures current attitudes, and normative, in that it seeks to educate and persuade those who are not yet part of the majority. Many of the Court's

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241. *Id.* at 726.

242. Elizabeth Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1537 (2000); *see also* Ball, *supra* note 237, at 640 (observing that it is "not unusual for the Supreme Court, in assessing the constitutionality of laws, to address their effects on those subject to their regulation" (footnote omitted)).

243. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1276 (2011).

244. *Id.* at 1298; *see also* Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 733 (2001) ("The social meaning of government action has always been understood to be relevant to the determination of whether a law denies to some 'the equal protection of the laws.'" (quoting U.S. CONST. amend. XIV)).

245. Pildes, *supra* note 24, at 755.

246. *Id.*; *see also* Natasha J. Silber, Note, *Unscrambling the Egg: Social Constructionism and the Antireification Principle in Constitutional Law*, 88 N.Y.U. L. REV. 1873, 1907 (2013) (arguing that "an important function of constitutional law is to regulate social meaning in accordance with the view that social categories like race are mere constructs").

247. Pildes, *supra* note 24, at 750. This principle does not just apply to constitutional norms concerning equality. For example, "[i]f state action 'conveys a message' of religious endorsement, it is invalid," regardless of whether there are "material burdens to individual interests." *Id.* In *Lynch v. Donnelly*, for example, the Court observed that whether a particular religious display constitutes an endorsement of religion is a question "to be answered on the basis of judicial interpretation of social facts." 465 U.S. 668, 694 (1984). For additional discussions of social meaning in constitutional law beyond the context of equality claims, see, for example, Neal Devins, *Social Meaning and School Vouchers*, 42 WM. & MARY L. REV. 919 (2001).

decisions on seemingly controversial subjects are majoritarian.[248] Yet, to say a decision is "majoritarian" is not necessarily to say that it yet reflects a widely shared *consensus* or what Bickel called "general assent."[249] Social meaning can also be contestable.[250] And so the Court's decisions also seek to lead, teach, and persuade. This, too, is consistent with the dialogic model of judicial review.[251] The Court's intervention can become part of the process by which social meaning is constructed, including by reinforcing emerging and, in some cases, majoritarian attitudes and values.[252]

B. Stigma as a Constitutional Injury

The previous section focused on social meaning in constitutional law generally. But one particular form of social meaning has been central to Fourteenth Amendment law, including the gay and lesbian dignity cases: the imposition of stigma. Laws that demean or inflict stigma without a legitimate public-regarding purpose have long been understood to be repugnant to the Fourteenth Amendment.[253] This principle goes back to the drafting and ratification of the Fourteenth Amendment itself. As Christopher A. Bracey writes, "Dignitary and stigmatic harms were the hallmark of the slavery regime" and the Reconstruction Amendments "directly repudiated Justice Taney's declaration in *Dred Scott* that blacks could not be citizens because

248. *See supra* notes 173–76 and accompanying text.

249. BICKEL, *supra* note 185, at 239.

250. *See* Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1102 (1995) (observing that, where social meaning is contested, judges may have the difficulty of justifying a decision "negating all other interpretive possibilities save the particular one that it chooses to privilege"); *see also* Diamond & Koppelman, *supra* note 244, at 736 ("Sometimes . . . a single social meaning is so predominant that the existence of idiosyncratic views doesn't matter. In other cases, there will be a variety of widely held views."). An example where the social meaning of government discrimination remains contested is the so-called "colorblind" understanding of racial equal protection. The colorblind understanding of racial equal protection does not distinguish between invidious uses of race based on demeaning stereotypes and benign uses of race intended to advance principles of antisubordination and remedy past discrimination. For example, in *City of Richmond v. J.A. Croson Co.* the Court said a city's minority set-aside program for city construction contracts "denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race" and therefore, "[t]o whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated." 488 U.S. 469, 493 (1989). Justice Stevens memorably differed from this approach by invoking his own vivid comparison of social meanings: "The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat." Adarand Constructors Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

251. Friedman, *supra* note 19, at 1236 (arguing that "judicial meanings shift in response to changing public understandings, and judicial decisions provoke the public to consider what the Constitution ought to mean").

252. Lessig, *supra* note 219, at 962 (explaining that social meanings are constructed when "the contexts within which they exist are changed," either through intervention or evolution).

253. Anderson & Pildes, *supra* note 242, at 1537 ("The most conventional expressive concerns with equal protection doctrine involve issues of stigma and second-class citizenship.").

they were widely regarded by whites as 'beings of an inferior order, and altogether unfit to associate with the white race.'"[254]

Appeals to dignity were used in popular political dialogue not only to attack slavery but to also attack practices of racial subordination more generally. Rebecca J. Scott writes that "[t]he late nineteenth-century popular campaign against legally mandated racial segregation . . . drew upon a language of dignity, sometimes echoing the uses in earlier French radical thought of the term *dignité*."[255] Whereas supporters of government-imposed segregation portrayed such laws as "aimed merely at maintaining familiar customs, public comfort, and public order," opponents "saw an intentional dignitary offense, precisely because of the ways in which legally mandated segregation reproduced forms of humiliation practiced against free persons of colour under slavery."[256] This treatment implicated social meaning. "The meaning—and the marking—involved in the practice of forced separation could, in their view, best be understood with reference to the slaveholding past, as constituting a project of white supremacy for the post-emancipation future."[257]

Similarly, even if modern cases like *Brown* and *Loving v. Virginia*[258] (which invalidated restrictions on interracial marriage) do not actually use the word "dignity," these cases plainly address the dignitary harms that are imposed by laws whose social meaning was well understood to be racial subordination.[259]

The Fourteenth Amendment was, of course, intended to address the inequality of the newly freed slaves in the wake of the Civil War. But its drafters and supporters "just as clearly intended its beneficial effects to extend beyond" race to also reach "class legislation" and "caste systems."[260] Consistent with this understanding, *Romer v. Evans*,[261] the Court's first significant gay rights case, opened by quoting the first Justice John Marshall Harlan's declaration that "the Constitution 'neither knows nor tolerates classes among citizens'"[262] and ended with the conclusion that the Colorado law at issue was unconstitutional because it "classifies homosexuals not to

254. Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 687, 689 (2005) (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857)).

255. Rebecca J. Scott, Dignité/Dignidade*: Organizing Against Threats to Dignity in Societies after Slavery*, *in* UNDERSTANDING HUMAN DIGNITY 61, 62 (Christopher McCrudden ed., 2013).

256. *Id.*

257. *Id.*

258. 388 U.S. 1 (1967).

259. *See id.* at 11 (observing that antimiscegenation laws must be struck down because they served "no legitimate overriding purpose independent of invidious racial discrimination" and were designed only "to maintain White Supremacy"); *supra* notes 228–30 and accompanying text (discussing *Brown*).

260. WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 19 (2017); *see also* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 686–87 (2016).

261. 517 U.S. 620 (1996).

262. *Id.* at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

further a proper legislative end but to make them unequal to everyone else."[263] In recent years—*Romer* and *Windsor* both figure into the relevant line of cases—the Court has made clear that a law's expression of "animus" toward a social group is not a legitimate government purpose. This "prohibition on animus reflects a core constitutional commitment, one that is most forcefully expressed in the [Fourteenth Amendment]."[264]

The anti-caste, anti-stigma understanding of the Fourteenth Amendment is closely related to the principle of "anti-humiliation" that Bruce Ackerman has identified as the core of *Brown* and the Court's other racial equal protection cases of the Second Reconstruction.[265] Ackerman has written that the "master insight" of *Brown* was "the Court's emphasis on the distinctive wrongness of institutionalized humiliation."[266] Ackerman links this anti-humiliation principle to the idea of dignity both in constitutional law and in the political discourse around civil rights, which suggests that the anti-humiliation principle may give the "notoriously protean" idea of dignity a more "distinctive shape."[267]

In an op-ed written after *Windsor* but before *Obergefell*, Ackerman elaborated on this idea, suggesting that the "constitutional legacy" of the dignity principles "hammered out during the civil rights revolution of the 1960s . . . would strongly support any future Supreme Court decision extending Justice Kennedy's reasoning to state statutes discriminating against gay marriage."[268] Kenji Yoshino amplified this point by arguing that the anti-humiliation principle informed the Court's invocations of dignity in both *Windsor* and *Lawrence*.[269] "The gay rights domain," he suggests, "may provide a particularly sympathetic context from which dignitary claims would arise, given that gay rights have always been plagued by a politics of shame."[270] Moreover, "the fact that gay individuals are dispersed throughout families and institutions across the United States may make their claims to dignity more intelligible than the traditional 'discrete and insular minority.'"[271]

263. *Id.* at 635.

264. ARAIZA, *supra* note 260, at 3.

265. 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 128–29 (2014).

266. *Id.* at 128. Ackerman writes that *Brown*'s "commonsense prose helped anchor the next decade's constitutional debate" and that "the anti-humiliation theme played a central role as congressional leaders made their case for the Civil Rights Act in 1964." *Id.* at 134, 136. Speaking about the act, Senator Hubert Humphrey described the "monstrous humiliations" that discrimination imposed on African Americans and said that "freedom from indignity" should be added to Franklin Roosevelt's "four freedoms," along with freedom of speech, freedom of conscience, freedom from fear, and freedom from want. *Id.* at 136–37.

267. *Id.* at 137.

268. Bruce Ackerman, *Dignity Is a Constitutional Principle*, N.Y. TIMES (Mar. 29, 2014), https://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html [https://perma.cc/MR7U-WPLA].

269. Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3082–87 (2014).

270. *Id.* at 3087.

271. *Id.* (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 154 n.4 (1938)).

C. Dignity and the Evolving Social Meaning of Sodomy Laws and Marriage Restrictions

As the gay and lesbian social movement generated changes in American culture and as public attitudes evolved, sodomy laws and marriage restrictions came to be rejected by growing majorities of Americans.[272] The Court's role as a participant in the national legal and political dialogue over the status of gays and lesbians was to translate this evolution of public attitudes and culture into conclusions about social meaning and stigma, and it used the language of dignity to do so.

When government power acts on a person in some way, the implications for dignity are a function of social mores and shared understandings.[273] In *Lawrence*, *Windsor*, and *Obergefell*, the Court was interpreting how Americans had come to understand the status of gays and lesbians in society and contributing to the construction of how the social meaning of criminal sodomy laws and federal and state marriage restrictions had changed. The central dignitary problem with criminal sodomy laws and federal and state marriage restrictions was that they inflicted "stigma."[274] Their effects were to "demean" gays and lesbians.[275] Once widely understood as necessary to protect public morality, such laws were now increasingly understood, the Court told us, as denials of dignity. This interpretive work was an important aspect of the Court's contribution to the dialogue over gay and lesbian rights and dignity and another sign that it was not merely following public opinion, but also helping to shape it.

The social and cultural change documented in Part II, together with the lack of any widespread public backlash to these decisions,[276] suggest that the Court faithfully captured the social meaning of sodomy laws and marriage restrictions. By the time the Court suggested in *Obergefell* that gays and lesbians had a "just claim" to "dignity in their own distinct identity,"[277] and were thus entitled to "equal dignity" under law,[278] a majority of Americans had already formed attitudes that were consistent with that principle.

These decisions were not "the work of a partisan elite" scorning popular morality and "imposing its policy preferences on the American people," as one academic critic of *Obergefell* has written.[279] Rather, they were the work

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272. *See supra* Part II.

273. *See* Brake, *supra* note 236, at 582 (observing that the "expressive meaning of an action . . . is the socially constructed meaning that is recognizable by the community, exercising interpretive judgment").

274. *See supra* note 25 and accompanying text (identifying discussions of stigma in the three dignity cases).

275. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society."); United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (noting that DOMA's imposition of inequality "demeans the couple"); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (noting that sodomy laws "demean" the existence of homosexuals).

276. *See infra* notes 361–78 and accompanying text.

277. *Obergefell*, 135 S. Ct. at 2596.

278. *Id.* at 2608.

279. *See* Buss, *supra* note 34, at 25.

of a Court that was aware of a tectonic shift in public attitudes and culture and that was shaping these changes into a legal principle—that the Constitution neither knows nor tolerates classes or castes among citizens—that was anchored in the purpose and values of the Fourteenth Amendment. The kinds of laws that violate constitutional norms may evolve, but the fundamental norms remain constant.

This approach to evaluating the constitutionality of laws was consistent with the ideas that "government expressions of second-class citizenship" can be repugnant to the Constitution "precisely because of their social meaning"[280] and that "[p]ublic policies can violate the Constitution not only because they bring about concrete costs but because the meaning they convey expresses inappropriate respect for relevant constitutional norms."[281] As Shari Seidman Diamond and Andrew Koppelman have written, "The social meaning of government action has always been understood to be relevant to the determination of whether a law denies to some 'the equal protection of the laws.'"[282] Stephen G. Calabresi has written that the Fourteenth Amendment's anti-caste principle justified the Court's decision in *Obergefell* to strike down state bans on same-sex marriage because the effect of such discrimination was that it led gays and lesbians to be "treated as outcasts."[283]

The word "dignity" captures a basic idea about how government should treat citizens. Dignity is about "the status of a person within the community."[284] As Ronald Dworkin explains, human dignity "supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust."[285]

The dignity of *Lawrence*, *Windsor*, and *Obergefell* is striking for its accessibility. It is the dignity of human beings as the idea is understood by ordinary people. It is a dignity that captures intuitions about what it means to be a free and autonomous human being who expects to be treated with respect, both by one's fellow citizens and by the government. The Court applied dignity as legal concept, but it spoke about dignity almost entirely in the vernacular.

For Justice Kennedy, dignity served more as a dialogic device than a component of formal doctrine. Tribe has written that "Justice Kennedy's

280. Dorf, *supra* note 243, at 1298; *see also* Pildes, *supra* note 24, at 762 (arguing that "[e]xpressive harms, no less than material harms to these kind of individual interests, ground constitutional doctrine in many areas").

281. Pildes, *supra* note 24, at 755.

282. Diamond & Koppelman, *supra* note 244, at 733.

283. Calabresi & Begley, *supra* note 260, at 702. Other scholars have made similar arguments based on the original understanding of the Fourteenth Amendment. Orin Kerr, *Is There an Originalist Case for a Right to Same-Sex Marriage?*, WASH. POST (Jan. 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/is-there-an-originalist-case-for-a-right-to-same-sex-marriage/ [http://perma.cc/XGK6-Y29V] (reviewing the arguments of various scholars for invalidating anti-marriage-equality laws based on original understandings of the Fourteenth Amendment).

284. BARAK, *supra* note 47, at 17 (footnote omitted).

285. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198 (1978).

rhetoric of equal dignity, particularly in his series of gay-rights decisions, has always been fundamentally rooted in the importance of fostering dialogue among ordinary citizens."[286] Justice Kennedy once observed to an audience of law students that "[j]udges are teachers. By our opinions, we teach."[287] Tribe believes that Justice Kennedy's approach in *Obergefell*, particularly his invocations of dignity, reflects his "view of the Court's role in helping to structure and stimulate public debate regarding the rights that should be afforded to LGBT individuals and to same-sex couples, as well as the evolving character of marriage as an institution."[288]

It is not just their use of dignity in a vernacular idiom that makes the gay and lesbian dignity decisions dialogic. It is also their portrayals of gays and lesbians as real persons, and their candid descriptions of *why* and *how* anti-gay government discrimination had come to acquire the social meaning of stigma and humiliation. In this way, the decisions provide a nice illustration of Jack M. Balkin's argument that "behind every constitutional interpretation there lies a narrative, sometimes hidden and sometimes overt, a story about how things came to be . . . things we still have to do, things that we learned from past experience, things that we will never let happen again."[289]

The focus on gays and lesbians as human beings worthy of dignity becomes clearer with each decision, part of a dialogic evolution. In an earlier gay-rights decision, *Romer*, the Court struck down a Colorado state constitutional amendment that invalidated any state or local law that protected gays and lesbians from discrimination and imposed onerous political-process burdens to prevent future enactment or reenactment of such laws. *Romer* did not invoke the dignity of gays and lesbians or speak about them in a personalized way. It essentially spoke about them as a political interest group.[290]

By contrast, *Lawrence* addressed gays and lesbians as human beings who engage in intimate relationships—certainly a dramatic about-face from *Bowers* only seventeen years earlier, which had painted the social meaning of homosexuality as dark, if not menacing.[291] According to *Lawrence*, gays

286. Tribe, *Equal Dignity*, *supra* note 13, at 23.

287. *Id.* at 23 n.57.

288. *Id.* at 24.

289. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 3 (2011).

290. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) ("Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or . . . by trying to pass helpful laws of general applicability.").

291. The *Bowers* majority opinion practically sneered that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). If a state decided to criminalize gay sex based on nothing more than its view that homosexuality was immoral, that, the Court said, was sufficient under the Constitution. *Id.* at 196. *Bowers* also was notable for the marked homophobia of the concurrence by Chief Justice Warren Burger. *See id.* at 196–97 (Burger, C.J., concurring) (quoting Blackstone's characterization of gay sex as "the infamous crime against nature" and "an offense of 'deeper malignity' than rape").

and lesbians were entitled to make the same personal choices about sexuality that were "central to personal dignity and autonomy"[292] as heterosexuals, and they were entitled to maintain sexual relationships "in the confines of their homes and their own private lives and still retain their dignity as free persons,"[293] a dignity that would be lost if such conduct could be criminalized. Sodomy laws operated as "punishment and . . . state-sponsored condemnation"[294] by imposing "stigma" and carrying significant "imports for the dignity of the persons charged."[295] They served only to "demean" the "existence" of gays and lesbians.[296] Such laws "control" the person's relationship choices and seek to "define the meaning of [a] relationship,"[297] thereby costing gays and lesbians "their dignity as free persons."[298]

Although the Court in *Lawrence* spoke of gay and lesbian sexuality in terms of human relationships that were entitled to dignity, it said nothing about the petitioners or their particular relationship. In *Windsor*, Justice Kennedy's majority opinion began with a warm and empathetic recounting of the relationship between the respondent, Edith Windsor, and her wife, Thea Spyer.[299] Justice Kennedy described them as having "longed to marry"[300] and spoke approvingly of the social change that had led New York to recognize their marriage.[301] In electing to confer legal marriage on same-sex couples, states were seeking to give same-sex couples "recognition, dignity, and protection . . . in their own community," not only with legally defined sets of "incidents, benefits, and obligations," but with a "status of immense import."[302]

The opinion then shifted tone to condemn the harm imposed by DOMA, focusing on its social meaning and expressive effects. DOMA's "avowed purpose and practical effect" were to impose "a disadvantage," "a separate status," and "a stigma";[303] to "disparage," "humiliate," and "injure."[304] DOMA tells same-sex couples "and all the world[] that their otherwise valid marriages are unworthy of federal recognition."[305] It "instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."[306]

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292. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
293. *Id.* at 567.
294. *Id.* at 576.
295. *Id.* at 575.
296. *Id.* at 578.
297. *Id.* at 567.
298. *Id.*
299. *See* United States v. Windsor, 133 S. Ct. 2675, 2683, 2689 (2013).
300. *Id.* at 2689.
301. *See infra* notes 426–30 and accompanying text.
302. *Windsor*, 133 S. Ct. at 2692.
303. *Id.* at 2693.
304. *Id.* at 2694, 2696.
305. *Id.* at 2694.
306. *Id.* at 2696.

As *Windsor* had opened with sympathetic words about Windsor and Spyer, *Obergefell* described the circumstances of plaintiffs from three of the underlying cases to illustrate "the urgency of the petitioners' cause."[307] The descriptions are deeply respectful, emphasizing the plaintiffs' earnest struggles in the face of the indignities of state-sponsored discrimination.

The first plaintiff was James Obergefell himself, who was seeking not the right to marry but merely the right to be listed as legal spouse on his recently deceased husband's death certificate.[308] "By statute, they must remain strangers even in death," the Court observed, "a state-imposed separation Obergefell deems 'hurtful for the rest of time.'"[309] The second set of plaintiffs were a pair of nurses, April DeBoer and Jayne Rowse, who were raising adopted children with serious health issues and sought "relief from the continuing uncertainty their unmarried status creates in their lives" and those of their children.[310] The third set of plaintiffs were an Army Reserve sergeant and his husband whose "lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines."[311] The Court noted that the reservist, Ijpe DeKoe, had to endure this "substantial burden" even though he had "served this Nation to preserve the freedom the Constitution protects."[312]

After recounting these human stories, the Court used plain, accessible language to describe the social meaning of the state marriage bans as dignitary harms—they "impose stigma and injury of the kind prohibited by our basic charter."[313] When the opposition of legislators or citizens to same-sex marriage "becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is denied."[314] And "[e]specially against a long history of disapproval of their relationships," to "impos[e] . . . this disability on gays and lesbians serves to disrespect and subordinate them" and "works a grave and continuing harm."[315] Being denied the benefits of marriage consigns same-sex couples "to an instability many opposite-sex couples would deem intolerable in their own lives."[316] Exclusion from the right to marry "has the effect of teaching that gays and lesbians are unequal in important respects."[317]

A simple comparison will underscore this Article's point about social meaning and the Court's vernacular use of dignity. In *Obergefell*, the Court forcefully condemned the state marriage bans as demeaning, stigmatizing,

307. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).
308. *Id.*
309. *Id.* at 2594–95 (quoting the record).
310. *Id.* at 2595.
311. *Id.*
312. *Id.*
313. *Id.* at 2602.
314. *Id.*
315. *Id.* at 2604.
316. *Id.* at 2601.
317. *Id.* at 2602.

and a denial of dignity.[318] Now, imagine if the Court had said the same thing in the course of striking down bans on plural marriage. Obviously, such a decision would have been met with outrage, disbelief, and resistance.

This comparison demonstrates why Chief Justice Roberts missed the point when he claimed in his *Obergefell* dissent that "much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage" and that "[i]f a same-sex couple has the constitutional right to marry because their children would otherwise 'suffer the stigma of knowing their families are somehow lesser,' . . . why wouldn't the same reasoning apply to a family of three or more persons raising children?"[319]

The answer is that bans on plural marriage do not have the same negative, invidious social meaning for most Americans as the bans on same-sex marriage. A 2017 Gallup poll found that only 17 percent of Americans thought polygamy was "morally acceptable."[320] The Court's use of dignity in the gay and lesbian cases referred not to an abstract legal right, but to Americans' evolved understanding about how their gay and lesbian fellow citizens should be treated. *Obergefell* resonated with most Americans; a decision striking down bans on plural marriage would not. As the *Washington Post* noted in an article after *Obergefell*, polygamists seeking legal recognition for a right to marry "will always be at a disadvantage compared to the LGBT community" because "[u]nlike sexual orientation, polygamy isn't something most people will ever confront in their daily lives, nor is [it] thought of as a trait someone is born with."[321] Leaving aside whether it could be justified doctrinally, a decision striking down plural marriage *would* have been a top-down imposition of judicial will. *Obergefell*, with its dialogic pedigree and its reliance on social meaning, was not.

D. Dignity and the "Democratic Process"

This Part concludes by briefly considering a separate but related dignity issue: the dignitary harm imposed on a group when the ordinary political process is unresponsive to its claims, even though those claims have majority support. Sometimes, it turns out, courts are more responsive to public preferences than bodies of elected representatives. This section primarily focuses on *Obergefell* because most of the state marriage bans, unlike sodomy laws or the federal DOMA, had been the subject of voter referenda, and thus *Obergefell* raised the most salient concerns about the Court's relationship to the democratic process.

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318. *Id.*

319. *Id.* at 2621–22 (Roberts, C.J., dissenting) (quoting *id.* at 2600 (majority opinion)).

320. Andrew Dugan, *Moral Acceptance of Polygamy at Record High—but Why?*, GALLUP (July 28, 2017), https://news.gallup.com/opinion/polling-matters/214601/moral-acceptance-polygamy-record-high-why.aspx [https://perma.cc/2872-3NHG].

321. Hunter Schwarz, *Support for Polygamy Is Rising. But It's Not the New Gay Marriage.*, WASH. POST (July 2, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/02/support-for-polygamy-is-rising-but-its-not-the-new-gay-marriage/ [https://perma.cc/HA2F-ZUDH].

Critics of the Court's gay and lesbian dignity decisions have accused the Court of "judicial hubris"[322] (*Lawrence*) and misusing its power to "put fear into the hearts of anyone who does not share the belief that homosexuality is morally neutral, or morally good" (*Windsor*).[323] Opponents of *Obergefell* have insisted that the decision, in the words of one religious-conservative activist, "usurped the authority of the people, working through the democratic process, to define marriage."[324]

This line of criticism also was a core theme in the *Obergefell* dissents. Chief Justice Roberts said Americans were "in the midst of a serious and thoughtful public debate on the issue of same-sex marriage"[325] and that change on such a matter should only come through the "democratic process."[326] Justice Scalia scorched the majority for perpetrating a "judicial Putsch" through "a naked judicial claim to legislative—indeed, *super*-legislative—power."[327] The court below in *Obergefell*, in holding that state marriage bans did not violate the Constitution, also cast much of its opinion as a homily about the virtues of leaving decisions on a controversial question like same-sex marriage to "state democratic processes."[328]

It is necessary to untangle two different issues in the criticism of *Obergefell*: the argument implied by some of its critics that it was countermajoritarian,[329] and the complaint that, whatever the public's views, the Court had usurped a question that should, as a matter of principle, be left to political decision-making.[330]

The first criticism is plainly incorrect. "The majority of the [C]ourt has simply replaced the people's opinion about what marriage is with its own," wrote one critic.[331] But as I have already demonstrated, the Court did no such thing. Its decision in *Obergefell* (as with *Lawrence* and *Windsor*), was consistent with solid and growing majority opinion among Americans, in this case about the legality of same-sex marriage.[332] One might still object, as a matter of respect for federalism, that marriage equality did not enjoy majority support in every state. But considering the steady upward trend of support for same-sex marriage among Americans in the aggregate—60 percent and

322. Lund & McGinnis, *supra* note 34.

323. Rod Dreher, *Scalia: "Open Season on Marriage Traditionalists,"* AM. CONSERVATIVE (June 26, 2013), https://www.theamericanconservative.com/dreher/scalia-doma-open-season/ [https://perma.cc/HMU4-PZVF].

324. RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM 1 (2015).

325. Obergefell v. Hodges, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting).

326. *Id.* at 2622.

327. *Id.* at 2629 (Scalia, J., dissenting).

328. DeBoer v. Snyder, 772 F.3d 388, 396 (6th Cir. 2014), *rev'd*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

329. *See, e.g.*, Buss, *supra* note 34, at 25 (criticizing *Obergefell* as "the work of a partisan elite imposing its policy preferences on the American people").

330. *See supra* notes 324–26.

331. ANDERSON, *supra* note 324, at 60.

332. *See supra* note 37. *See generally supra* Part II.

growing at the time of the decision[333]—*Obergefell* plainly was not countermajoritarian.

The other criticism goes to the Court's role vis-à-vis the process of democratic decision-making. It is about who should decide: the courts or the people. The *Obergefell* majority opinion addressed that criticism with the principle that "fundamental rights" like marriage "may not be submitted to a vote; they depend on the outcome of no elections."[334] Those who deny that same-sex marriage should be encompassed within this fundamental right will not be satisfied by that answer. But consider another justification for the Court's intervention: the fact that many of the state marriage bans were themselves countermajoritarian—indeed, they had been intentionally designed to be virtually immune to change through the ordinary democratic process.

As previously discussed by this author at greater length elsewhere,[335] the majority of the state marriage bans enacted between the 1990s and 2012 were in the form of state constitutional amendments. Whereas ordinary laws can be changed by simple legislative majorities responding to changes in their constituents' policy preferences, these amendments were "intended to freeze marriage discrimination in place and put it beyond the reach of ordinary democratic deliberation, future legislative reconsideration, and state judicial review."[336]

The result was that although attitudes rapidly evolved, state laws did not. In March 2014, thirty-three states prohibited same-sex marriage, yet in those states collectively, the public supported marriage equality by a margin of 53 to 40 percent.[337] The four states whose laws were before the Court in *Obergefell*—Kentucky, Michigan, Ohio, and Tennessee—all banned same-sex marriage by state constitutional amendment. By early 2015, a few months before *Obergefell*, popular majorities in Michigan and Ohio favored marriage equality.[338] In Kentucky and Tennessee, support for same-sex marriage had been rising at an estimated rate of more than 2 percent per year as of 2012.[339] Yet, had proponents in any of those states managed to

333. *Gay and Lesbian Rights*, *supra* note 37.

334. Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

335. Steve Sanders, *Mini-DOMAS as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12 (2014).

336. *Id.* at 14.

337. Peyton M. Craighill & Scott Clement, *Support for Same-Sex Marriage Hits New High; Half Say Constitution Guarantees Right*, WASH. POST (Mar. 4, 2014), http://www.washingtonpost.com/ politics/support-for-same-sexmarriage-hits-new-high-half-say-constitution-guarantees-right/2014/03/04/f737e87e-a3e5-11e3-a5fa-55f0c77bf39c _story.html [https://perma.cc/ALU2-TWAM].

338. Joanna Piacenza, *State of the States on Same-Sex Marriage*, PUB. RELIGION RES. INST. (Feb. 11, 2015), https://www.prri.org/spotlight/state-of-the-states-on-gay-marriage/ [https://perma.cc/G33P-5BG7].

339. Joshua Tucker, *If Same-Sex Marriage Is So Popular, Why Does It Always Lose at the Ballot Box?*, MONKEY CAGE (May 15, 2012), http://themonkeycage.org/2012/05/if-same-sex-marriage-is-so-popular-why-does-it-always-lose-at-the-ballot-box-includes-state-level-data-on-support-and-legislation/ [https://perma.cc/Q8K5-FLSZ].

persuade their state legislatures and governors to support marriage equality, nothing would have happened. Even when a social group enjoys emerging support for its claims about legal rights, the group may not have the resources and political muscle that are necessary to defeat or reverse a constitutional amendment. The large number of successful mini-DOMA campaigns—no mini-DOMA proposal was ever defeated until 2012[340]—underscores this point.

Some commentators, even if they endorse the idea of a Constitution that evolves alongside national values, argue that patterns of enacted state laws are a better barometer of national values than public opinion surveys or "more general evidence of an American societal consensus."[341] But what happens when ordinary state lawmaking processes are systematically unresponsive to public preferences? Under most versions of democratic theory, a well-functioning democracy "requires some minimal matching of government choice to citizen preference."[342] Yet, that often fails to happen for a variety of reasons.[343] One reason is interest group capture. A 2009 study by two political scientists of state policies affecting gays and lesbians found that on questions of gay rights, the preferences of "[p]owerful conservative religious interest groups" usually were "overrepresented," which resulted in policies that were sometimes incongruent with overall public attitudes.[344]

The phenomenon of courts sometimes vindicating majority preferences when representative institutions fail to do so has become so familiar that one commentator has labeled it "upside-down judicial review."[345] Sometimes, writes Corinna Barrett Lain, "[t]he branches most majoritarian in theory are least majoritarian in practice, and vice versa" and "a Supreme Court ruling may just *look* countermajoritarian because the base line against which it is judged—the ostensibly majoritarian stance of the legislative and executive branches—is not majoritarian after all. Sometimes in a representative democracy, the representative branches *aren't*."[346] Other scholars have explored this same phenomenon.[347]

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340. *See supra* note 154 and accompanying text.

341. *See, e.g.*, Conkle, *Three Theories*, *supra* note 45, at 135.

342. Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 367 (2009).

343. THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 5 (1989) (criticizing the "assumption that the policies of the popularly elected branches necessarily represent a nationwide public opinion majority").

344. Lax & Phillips, *supra* note 342, at 383.

345. *See generally* Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113 (2012).

346. *Id.* at 116 (footnote omitted).

347. *See, e.g.*, JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 4 (2006) ("How did we get to this odd moment in American history where unelected Supreme Court justices sometimes express the views of popular majorities more faithfully than the people's elected representatives?"); Strauss, *supra* note 207, at 861 (arguing that an appropriate function of judicial review is to invalidate "laws that would not be enacted today or that will soon lose popular support").

A full discussion of how and why lawmakers sometimes fail to give Americans the policies they want is beyond the scope of this Article and is the subject of a large literature in public-choice theory. But the topic deserves some attention here because it responds to criticisms that *Obergefell* inappropriately cut short the operation of the democratic process around marriage equality,[348] it provides an additional perspective on the potential merits of dialogic judicial review, and it highlights an additional dignity issue—the indignity that comes when the democratic process is unresponsive to a minority group's claims and when it has been engineered through political mechanisms like constitutional amendments to *remain* unresponsive.

In sum, *Lawrence*, *Windsor*, and *Obergefell* are properly understood as dialogic because their holdings—invalidating sodomy laws, DOMA, and state marriage bans—squarely confronted the demeaning and stigmatizing social meaning of these laws, social meaning that was informed by public attitudes, social-movement activism, and other developments in constitutional culture. Rapid and inexorable change in the direction of greater personal and civic dignity for gays and lesbians made it possible for the Supreme Court to interpret and help construct the changing social meaning of sodomy laws and marriage restrictions, confident that Americans would accept its characterization of these laws as dignitary harms that were incompatible with constitutional norms of equality and liberty. Each decision built upon the one before, and the Court's rulings also helped to inform public attitudes. Through these decisions, the Court was bringing constitutional law into alignment with the "considered judgment of the American people."[349] But the Constitution did not change in its fundamental principles. The Court used "dignity" in a way that bridged its legal and vernacular meanings and that advanced a principle that is well-established under constitutional guarantees of equal protection and due process: that government may not demean and impose stigma on certain groups through class legislation. *Obergefell*, in particular, illustrates how the dialogic process of judicial review can respond to public preferences in a way the ordinary democratic process may not.

V. THE DIGNITY DECISIONS AS MODELS OF DIALOGUE

The previous Part demonstrated how dialogic judicial review in the gay and lesbian dignity cases was driven by the Court's awareness and articulation of the changing social meaning of government anti-gay discrimination. This Part expands upon that discussion to explain how these cases fit well within the dialogic model of judicial review in more general ways: the decisions accurately captured majority attitudes, contributed to the advancement of changes in law and public attitudes, and forthrightly

348. It also helps rebut what Carlos A. Ball has called the "revisionist and sanitized version of the same-sex marriage debates" provided by the *Obergefell* dissents. Ball, *supra* note 237, at 654.

349. FRIEDMAN, *supra* note 21, at 14.

embraced social and cultural change while articulating an evolving conception of constitutional equal protection and due process.

A. The Decisions Reflected Majority Preferences

At the most basic level, dialogic judicial review is premised on the idea that when the people speak, the Court listens.[350] It follows that one way we can know that a decision is consistent with this dialogic process is if it is supported by a stable majority of the people at the time or if it accurately anticipates the clear direction in which public attitudes are moving. "Majoritarian" is not the same thing as "dialogic,"[351] but a decision cannot be said to reflect the "will of the people" if it does not at least eventually come to command majority assent.

There is room for debate about how large the majority support for a decision should be under the dialogic model—is 51 percent enough? Sixty? Eighty? It is possible to argue that constitutional law should only be based on something closer to a "consensus" than a majority.[352] Bickel referred to a standard of "general assent."[353] Setting aside the difficulty of defining "consensus" or "general assent," that question is beyond the scope of this Article because it goes to a related but separate question: the democratic legitimacy of any particular decision. Dialogic judicial review is not a standard—it is a process. It is possible to conclude that the Court is listening and interacting with the public but that it still disagrees about how strong public sentiment should be before a decision becomes legitimate "constitutional authority."[354]

The data and discussion presented in Part II demonstrate that *Lawrence*, *Windsor*, and *Obergefell* were all majoritarian decisions in that their holdings produced results—eliminating the criminalization of gay sex, invalidating DOMA, and removing state-imposed impediments to legal same-sex marriage—that were consistent with the policy preferences of growing majorities.[355] At the time of *Lawrence*, 59 percent of Americans agreed that "gay or lesbian relations between consenting adults" should be legal, up from 33 percent in 1986.[356] The number rose to 72 percent by 2017.[357] At the time of *Windsor*, strong majorities opposed DOMA's policy of nonrecognition of valid same-sex marriages.[358] At the time of *Obergefell*,

350. Bednar, *supra* note 169, at 1179 ("According to [Barry Friedman's] thesis, the Court and the public not only speak to one another, they *listen* to each other, with the Court deferring to the public when they disagree.").
351. *See supra* notes 177–84 and accompanying text.
352. *See* Primus, *supra* note 169, at 1218.
353. BICKEL, *supra* note 185, at 239.
354. Primus, *supra* note 169, at 1219.
355. *See supra* Part II.
356. *Gay and Lesbian Rights*, *supra* note 37.
357. *Id.*
358. *See supra* notes 140–44 and accompanying text.

60 percent said same-sex marriage should be legal, up from 27 percent in 1996.[359] The number would rise to 67 percent in 2018.[360]

Perhaps the best evidence that the Court correctly read and described the nation's understanding of the social meaning of the laws in these cases was the lack of any significant backlash. To be sure, the decisions have been criticized as unconventional in their legal reasoning,[361] and some commentators have attempted to create a misleading narrative of the Court substituting its judgment for that of the people.[362] But it is obvious that most of the public accepted them.

For example, *Lawrence*, although momentous in its meaning for the equality and dignity of gays and lesbians, was not controversial. Shortly after the decision, conservative legal scholars Nelson Lund and John O. McGinnis observed that, compared to an enduringly controversial decision like *Roe v. Wade*, "[o]ne can hardly foresee a similar passion for overturning a judicial decision that merely eliminates a few haphazard prosecutions for private conduct that has no immediate effect on any third parties."[363] Lund and McGinnis correctly predicted that "most of the public can be counted on to respond to the immediate consequences of *Lawrence* with a yawn."[364]

Similarly, *Windsor* provoked little negative reaction—again, not surprising, since a majority of Americans at the time of the decision already opposed DOMA and supported marriage equality.[365] Immediately following the decision, *Time* reported that the ruling was consistent with "public opinion trends. The most recent polls suggest about 58% of Americans want to legalize gay marriage. That marks a huge swing over the last few decades."[366] The same article also noted that, on the day of the decision, "[i]f you type the word 'gay' into Google, your search box turns rainbow."[367] The *New York Times* observed that *Windsor* showed "just how rapidly much of the country had moved beyond the [C]ourt."[368] A decision that "just three years ago would have loomed as polarizing and even stunning instead served

359. *Gay and Lesbian Rights*, *supra* note 37.

360. *Id.*

361. *See, e.g.*, Lund & McGinnis, *supra* note 34, at 1557 (calling the *Lawrence* majority opinion "a tissue of sophistries embroidered with a bit of sophomoric philosophizing"); Andrew Koppelman, *The Supreme Court Made the Right Call on Marriage Equality—but They Did It the Wrong Way*, SALON (June 29, 2015, 7:15 PM), https://www.salon.com/2015/06/29/the_supreme_court_made_the_right_call_on_marriage_equality_%E2%80%94_but_they_did_it_the_wrong_way/ [https://perma.cc/6JZC-STCH] (criticizing *Obergefell* for its "remarkably weak reasoning").

362. *See supra* notes 329–34 and accompanying text.

363. Lund & McGinnis, *supra* note 34, at 1556.

364. *Id.*

365. *See supra* notes 140–44 and accompanying text.

366. Dave Pell, *Next Draft: Everybody Must Get Stonewalled*, TIME (June 26, 2013), http://newsfeed.time.com/2013/06/26/how-the-supreme-courts-doma-ruling-reflects-public-opinion/ [https://perma.cc/AQS4-RSYF].

367. *Id.*

368. Adam Nagourney, *Court Follows Nation's Lead*, N.Y. TIMES (June 26, 2013), http://www.nytimes.com/2013/06/27/us/politics/with-gay-marriage-a-tide-of-public-opinion-that-swept-past-the-court.html [https://perma.cc/YZ37-JNLZ].

to underscore and ratify vast political changes that have taken place across much of the country."[369] In contrast to the widespread negative attitudes toward homosexuality only a few decades earlier, by 2013

> [w]ord that a celebrity wants to marry someone of the same sex, whether Neil Patrick Harris or Ellen DeGeneres, is treated as celebratory news in People magazine rather than scandalous in The National Enquirer. And as the court surely noted in its deliberations, public sentiment on the issue has flipped.[370]

These observations were confirmed by the public acceptance two years later of the *Obergefell* decision and the lack of significant backlash to the legalization of same-sex marriage nationwide. The acceptance of *Obergefell* was all the more remarkable given the intense backlash that the marriage equality movement had encountered between the mid-1990s and the late 2000s.[371] A CNN poll immediately following the decision found that 63 percent of Americans approved of *Obergefell*.[372] One journalist who chronicled the history of the marriage equality movement observed that "[t]he country got out ahead of the Supreme Court so that the Supreme Court only seemed to be ratifying public opinion that was already there."[373] Support for same-sex marriage in general continued its steady upward trajectory after the decision and reached 64 percent in 2017.[374]

Efforts by same-sex marriage opponents to organize backlash against *Obergefell* mostly flopped. Any negative reaction discernible to the general public was limited to a few high-profile incidents of disobedience by civil servants such as Kentucky County Clerk Kim Davis[375]—disobedience that most Americans found unjustified.[376] Claims for religious exemptions from civil rights laws protecting gays and lesbians seeking wedding-related products and services generally have failed in the courts. Alabama Chief Justice Roy Moore was suspended by the state's Court of the Judiciary for

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369. *Id.*

370. *Id.*

371. *See supra* notes 125–36 and accompanying text.

372. Jennifer Agiesta, *Poll: Majorities Back Supreme Court Rulings on Marriage, Obamacare*, CNN (June 30, 2015), http://www.cnn.com/2015/06/30/politics/supreme-court-gay-marriage-obamacare-poll/index.html [https://perma.cc/FV8S-UJBR].

373. John King, *How Did the Same-Sex Marriage Revolution Sweep the Nation So Quickly?*, CNN (June 30, 2015, 3:05 PM), https://www.cnn.com/2015/06/28/politics/inside-politics-same-sex-marriage-revolution/index.html [https://perma.cc/7CG6-QNJD] (quoting journalist Molly Ball).

374. *Gay and Lesbian Rights*, *supra* note 37.

375. Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), https://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html [https://perma.cc/FH8T-FRNV].

376. *See, e.g.*, Peyton M. Craighill & Sandhya Somashekhar, *Post-ABC Poll: Most Say Kim Davis Should Issue Marriage Licenses to Gay Couples*, WASH. POST (Sept. 15, 2015), https://www.washingtonpost.com/national/poll-most-say-kim-davis-should-issue-marriage-licenses-to-gay-couples/2015/09/14/684e6d62-5b0a-11e5-b38e-06883aacba64_story.html [https://perma.cc/3RTY-F4J6] (reporting that "[n]early three-quarters of those surveyed say it is more important to treat everyone equally than to accommodate someone's religious beliefs when the two principles conflict" and that 45 percent supported jailing Davis for contempt of court).

ordering the state's probate judges to defy federal orders issued pursuant to *Obergefell*.[377] Two years after *Obergefell*, political scientists Kimberly Martin and Chris Tecklenburg cataloged 147 "backlash" bills introduced in state legislatures in reaction to *Obergefell*, mostly measures that were described as protecting, in one way or another, the religious liberty of same-sex marriage opponents.[378] Only nine of these were enacted, and most did not even get a hearing.[379]

B. The Decisions Contributed to a Dynamic Process of Attitudinal Change and Legal Innovation

Although dialogic judicial review implies that a decision will be supported by a stable majority of the people at the time or accurately anticipates the clear direction in which public attitudes are moving, dialogic judicial review is not just a matter of the Court's decisions aligning with majoritarian preferences. It is a continuing conversation. In an area where there is ongoing litigation (as with gay and lesbian rights), decisions often build on one another: the Court's decisions may be final in a legal sense as to the question they decide, but they are also part of a constitutional culture that remains dynamic.[380] Because the process "moves in fits and starts and along several tracks at once . . . it is ungainly and difficult to model."[381] But the public, social movements, courts, and politics all play a role in shaping the constitutional culture that informs the Court's decisions,[382] and these decisions in turn provoke further consideration and debate.[383]

The gay and lesbian dignity trilogy followed this model. *Lawrence* first introduced the ideas of dignity and concern for stigmatic harm against gays and lesbians that would be at the center of *Windsor* and *Obergefell*.[384] *Lawrence* also ruled out morality as a sufficient purpose for discriminatory laws when it was unaccompanied by any concrete objective harm.[385] But the

377. Kent Faulk, *Alabama Supreme Court Chief Justice Roy Moore Suspended for Rest of Term*, AL.COM (Sept. 30, 2016), https://www.al.com/news/birmingham/2016/09/alabama_supreme_court_chief_ju.html [https://perma.cc/ZJ5K-LR9X].

378. These data appeared in a paper presented at the 2017 annual meeting of the American Political Science Association, which is on file with the author of this Article.

379. *See supra* note 378.

380. Post, *supra* note 33, at 83 (observing that because constitutional law does not exist independent of culture, "constitutional law properly evolves as culture evolves," and because "culture is always dynamic and contested, constitutional law will necessarily also be dynamic and contested").

381. Friedman, *supra* note 19, at 1236 (footnotes omitted).

382. Siegel, *supra* note 23, at 1350 (defining constitutional culture as including "the institutions in which members of the polity argue over the Constitution's meaning—including institutions of civil society, the political and juridical dimensions of federated government, and much more").

383. Friedman, *supra* note 19, at 1236 (arguing that "judicial meanings shift in response to changing public understandings, and judicial decisions provoke the public to consider what the Constitution ought to mean").

384. *See supra* notes 292–98 and accompanying text.

385. Lawrence v. Texas, 539 U.S. 558, 571 (2003) (observing that a political majority may not "use the power of the State to enforce . . . [moral] views on the whole society through operation of the criminal law").

effects of *Lawrence* on both law and culture could not have been foreseen at the time. Writing in the decision's immediate wake, Robert Post characterized it as "the opening bid in a conversation that the Court expects to hold with the American public."[386] Although *Lawrence* "advanced a powerful and passionate statement that is plainly designed to influence the ongoing national debate about the constitutional status of homosexuality," Post believed that the Court had not yet "committed itself to the full consequences of its position. It has crafted its opinion so as to allow itself flexibly to respond to the unfolding nature of public discussion."[387] The legal principles articulated in *Lawrence* would be clarified by the Court "in the context of changes in constitutional culture produced by the popular debate provoked by *Lawrence*."[388]

Similarly, David Strauss characterized *Lawrence* as an example of the "modernizing mission" of judicial review.[389] Criminalizing gay sex had "little support in current sentiment."[390] Yet, by leaving other issues about gays and lesbians undecided and expressly disclaiming any notion that it was deciding the issue of marriage, the Court "left the door open for the political branches to tell it that popular sentiment will not support any extension of *Lawrence*."[391]

Nonetheless, *Lawrence*'s impact quickly became apparent. It was cited a few months later by the Massachusetts Supreme Judicial Court in the first court decision legalizing same-sex marriage in any state.[392] It was also cited by the Iowa Supreme Court, in the second such state judicial decision, for the principle that the meanings of constitutional guarantees evolve with the times.[393] Back in the U.S. Supreme Court, *Lawrence* was cited in *Windsor* for the principle that the Constitution protects the "moral and sexual choices" of same-sex couples.[394] And *Lawrence* was cited in *Obergefell* for the principle that "[h]istory and tradition guide and discipline" constitutional analysis "but do not set its outer boundaries," a flexibility that "respects our history and learns from it without allowing the past alone to rule the present."[395]

Dialogic judicial review also implies that the Court is sensitive to just how much leeway it has with the public. On the same day it struck down the federal DOMA in *Windsor* in 2013, it declined to take the more dramatic step in *Hollingsworth v. Perry*[396] of declaring state anti-gay marriage laws unconstitutional. It avoided the question on jurisdictional grounds. Nonetheless, the effect was to allow a district court decision striking down

386. Post, *supra* note 33, at 104.
387. *Id.* at 104–05.
388. *Id.* at 108.
389. Strauss, *supra* note 207, at 886.
390. *Id.*
391. *Id.* at 887.
392. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948, 953, 959 (Mass. 2003).
393. *See* Varnum v. Brien, 763 N.W.2d 862, 876 (Iowa 2009).
394. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).
395. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).
396. 133 S. Ct. 2652 (2013).

California's Proposition 8 to go into effect, thus legalizing marriage equality in the nation's most populous state. This prudent, one-step-at-time approach also was consistent with dialogic judicial review. DOMA had long been unpopular—even its leading congressional sponsor had repudiated it[397]—but most states still outlawed same-sex marriage, and federal courts applying the federal Constitution had only recently begun adjudicating challenges to state marriage laws.

Yet, legalizing same-sex marriage in the nation's largest state would further normalize marriage equality and contribute to its increased public acceptance. Political science research suggests that a minority group's legal and political advancements can affect perceived social norms and lead to more positive public attitudes (or at least fewer negative attitudes) toward the group.[398] "Institutional decisions in particular reinforce the idea that society's norms are trending in a certain direction and indicate to many people that a norm is on the right side of history, that it will be viewed favorably in the future."[399] And, of course, more positive public attitudes help make possible further legal and political innovation.

Windsor—with its admonitions about "disadvantage," "separate status," and "stigma"—triggered an uptick in the pace of marriage litigation in the federal courts and provided something of a guide to arguments that could be made against the state marriage bans as well. The result was that "the rich debate among the American people on the issue of same-sex marriage . . . continued to occur through the federal litigation in the district courts."[400] As Emily Buss has written:

> While the federal district judges shifted the analysis to federal law, they did so in a role firmly grounded in local politics and culture. In an area of law in which popular attitudes were shifting, not only about whether same-sex marriage should be permitted, but also whether it should be understood as a civil right, the federal district judges played an important role as state-affiliated interpreters of the federal Constitution.[401]

By the time the question of state same-sex marriage laws finally reached the Supreme Court in *Obergefell*, public support for marriage equality had risen to 60 percent, having steadily increased from 27 percent in 1996, to 42 percent in 2004 (the year after *Lawrence*), to 54 percent the month after *Windsor*.[402] Support continued to increase after *Obergefell*,[403] as did

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397. Barr, *supra* note 129.

398. Andrew R. Flores & Scott Barclay, *Backlash, Consensus, Legitimacy, or Polarization: The Effect of Same-Sex Marriage Policy on Mass Attitudes*, 69 POL. RES. Q. 43, 52 (2016).

399. *Supreme Court Ruling on Gay Marriage Changed Perception of Norms, Despite Stable Personal Beliefs*, ASS'N FOR PSYCHOL. SCI. (Aug. 10, 2017), https://www.psychologicalscience.org/publications/observer/obsonline/supreme-court-ruling-on-gay-marriage-changed-perception-of-norms-despite-stable-personal-beliefs.html [https://perma.cc/7UVS-46GH].

400. Buss, *supra* note 34, at 59.

401. *Id.* at 38.

402. *Gay and Lesbian Rights*, *supra* note 37.

403. *See id.*

Americans' perceptions about social norms (that is, what they believe *other* people think) concerning same-sex marriage.[404]

C. The Decisions Expressly Embraced Social and Cultural Change

Dialogic judicial review is premised on the idea that "judicial decisions and public understandings swim in a current together and influence one another."[405] To an extent that has been underappreciated in other commentary about these decisions, the Court in the gay and lesbian dignity cases acknowledged—and signaled its approval toward—the changes in public understanding and American culture described in Part II.[406] To be sure, the Court did not expressly characterize its decisions as mere responses to social change. But its awareness of how the nation's attitudes toward gays and lesbians had rapidly evolved—and were continuing to do so—is unmistakable, and this awareness contributes to the narrative of the Court's reasoning in each decision.

Lawrence characterized the invalidation of sodomy laws as a product of "emerging awareness" about sexual autonomy in general and the sexual choices of gays and lesbians in particular.[407] Emphasizing the relevance of "our laws and traditions in the past half century,"[408] the Court documented the downfall of sodomy laws that began in 1955 with the Model Penal Code and continued through the post-*Bowers* period, in which six more states got rid of their own sodomy laws through state judicial decision or legislative action.[409] The Court confessed its own error in *Bowers* in "fail[ing] to appreciate the extent of the liberty at stake"[410] and failing to understand the "emerging recognition" that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[411]

Lawrence implicitly rejected the static "history and tradition" approach to substantive due process of *Washington v. Glucksberg*.[412] Instead, *Lawrence* underscored that constitutional protections evolve alongside social change:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution

404. Tankard & Paluck, *supra* note 177, at 1341.
405. Friedman, *supra* note 19, at 1237.
406. *See supra* Part II.
407. Lawrence v. Texas, 539 U.S. 558, 572 (2003).
408. *Id.* at 571.
409. *Id.* at 576.
410. *Id.* at 567.
411. *Id.* at 572.
412. 521 U.S. 702, 720–21 (1997).

> endures, persons in every generation can invoke its principles in their own search for greater freedom.[413]

The distance that both the nation and the Court had traveled in their attitudes toward gays and lesbians and their relationships was reflected by Justice Sandra Day O'Connor—a justice who was so often seen as a barometer of moderation and of the legal and political mainstream[414]—in her *Lawrence* concurrence.[415] Justice O'Connor had joined the majority opinion in *Bowers*, whose language conveyed a harsh and dismissive attitude toward homosexuals.[416] In *Lawrence*, Justice O'Connor disagreed with the majority's use of substantive due process as the basis for invalidating the Texas sodomy law.[417] She would have upheld sodomy laws that applied to everyone but used the Equal Protection Clause to invalidate those like Texas's that only targeted gays and lesbians.[418] But her opinion demonstrated a far different understanding of homosexuality and anti-gay government discrimination than the *Bowers* court.

Justice O'Connor acknowledged that sodomy laws "inhibit[] personal relationships."[419] She also agreed that the Texas law "makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction"[420] and that the consequences of a conviction under the law were serious: "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."[421]

Justice O'Connor maintained that "*Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished."[422] This is a questionable reading. Although the Georgia sodomy law was not limited to homosexuals, the Court made clear its view that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was a sufficient rational basis to uphold the law.[423] At any rate, by 2003, Justice O'Connor had come to

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413. *Lawrence*, 539 U.S. at 578–79.

414. *See, e.g.*, Marci Hamilton, *The Remarkable Legacy of Justice Sandra Day O'Connor*, FINDLAW (July 14, 2005), http://supreme.findlaw.com/legal-commentary/the-remarkable-legacy-of-justice-sandra-day-oconnor.html [https://perma.cc/E6MQ-SKQF] (commenting on Justice O'Connor's frequent role as a swing vote and observing that "[s]he—consistent, wise, and prudent—has remained in the reasonable, moderate position she had staked out, even as others have tried to polarize the Court").

415. *See Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

416. *See supra* note 291.

417. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

418. *Id.*

419. *Id.* at 580.

420. *Id.* at 581.

421. *Id.*

422. *Id.* at 582.

423. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) ("[R]espondent . . . insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis."), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

believe that "[a] law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review."[424]

While *Lawrence* spoke to social change mostly by discussing legal reform in the United States and other countries,[425] not public attitudes, *Windsor* spoke freely and approvingly about the direction in which American society was moving on same-sex marriage. The Court positioned itself as protector of the states that had decided to extend marriage equality to gays and lesbians against the interference of a hostile Congress. The decision by some states, including Edith Windsor's home state of New York, to extend marriage to gay and lesbian couples reflected "the community's . . . evolving understanding of the meaning of equality."[426] The dawning of legal same-sex marriage beginning in 2004 was made possible by "the beginnings of a new perspective, a new insight."[427] The exclusion of gays and lesbians from marriage "came to be seen in New York and certain other States as an unjust exclusion."[428] When New York legalized same-sex marriage, it was moving "to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."[429] The state was "responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.'"[430]

Obergefell similarly spoke approvingly about evolving public attitudes and developments in the larger culture and did even more to characterize the national debate over same-sex marriage as an ongoing dialogue involving the public, lawmaking, and the courts. These observations about dialogue, social change, and the evolving meaning of constitutional guarantees serve not just as background facts or dicta. They are integral to the majority's reasoning about why the constitutional right to marry should be extended to same-sex couples and why their exclusion from marriage was a dignitary harm.

Obergefell begins by observing that the history of marriage itself "is one of both continuity and change" and that marriage is an institution that "has evolved over time."[431] The Court then ties this phenomenon of cultural change directly to both the lawmaking process and judicial review: the changed understandings about marriage "are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[432]

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424. *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).
425. *See id.* at 576–77.
426. United States v. Windsor, 133 S. Ct. 2675, 2692–93 (2013).
427. *Id.* at 2689.
428. *Id.*
429. *Id.*
430. *Id.* at 2692 (alteration in original) (quoting Bond v. United States, 564 U.S. 211, 221 (2011)).
431. Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015).
432. *Id.* at 2596.

The Court provides an extended and sympathetic discussion of the history of "the Nation's experiences with the rights of gays and lesbians,"[433] one that underscores the idea of an ongoing dialogue between courts and culture. Until the mid-twentieth century, gays and their intimacies were condemned and criminalized: "many persons did not deem homosexuals to have dignity in their own distinct identity," and "the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions."[434] But "[i]n the late twentieth century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families."[435] There followed "a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance."[436]

Soon, gay rights questions "reached the courts, where the issue could be discussed in the formal discourse of the law."[437] Despite the passage of DOMA in 1996, a "new and widespread discussion" of marriage equality led some states to legalize same-sex marriage beginning in 2003 through legislative action or state judicial decisions.[438] By the time the question reached the Court a little more than a decade later, there had been "referenda, legislative debates, and grassroots campaigns . . .[,] countless studies, papers, books, and other popular and scholarly writings," as well as "extensive litigation in state and federal courts."[439] Federal and state judicial opinions addressing marriage equality—of which there had been ninety-five by the time of *Obergefell*[440]—reflected "the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades."[441]

While *Obergefell* notes the state and federal litigation over marriage equality that had been unfolding for more than a decade, the opinion is striking for its lack of reference to amicus briefs, expert testimony in the lower courts, or similar authorities. It is as though the Court had so internalized the forces of social and attitudinal change, and the political and legal discourses that had accompanied it, that these became an organic part of its decision.

Acknowledging that in 1972 it had dismissed a same-sex marriage case with a one-line summary disposition because it did not present "a substantial federal question,"[442] the Court confessed in *Obergefell* that it, "like many institutions, has made assumptions defined by the world and time of which it is a part."[443] In interpreting the meaning of constitutional guarantees, "the

433. *Id.*
434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.*
438. *Id.* at 2597.
439. *Id.* at 2605.
440. *Id.* at 2608–10 (listing these decisions in an appendix to the majority opinion).
441. *Id.* at 2605.
442. Baker v. Nelson, 409 U.S. 810, 810 (1972) (mem.).
443. *Obergefell*, 135 S. Ct. at 2598.

Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[444]

Finally, *Obergefell* expressly invokes principles of a living Constitution. The Court describes the Constitution as "a charter protecting the right of all persons to enjoy liberty as we learn its meaning," one that is open to "new insight [that] reveals discord between the Constitution's central protections and a received legal stricture."[445] Constitutional rights "come not from ancient sources alone" but "from a better informed understanding" of liberty's contemporary meaning.[446]

CONCLUSION

The nation's evolution—more accurately, *revolution*—in attitudes toward gays and lesbians contributed directly to a series of landmark decisions, one building upon the other, in which the Supreme Court expanded the meaning of the Constitution's guarantees of equality and liberty. The guiding principle of "dignity" provided harmony and discipline across these decisions. *Lawrence*, *Windsor*, and *Obergefell* are best understood as a trilogy which provides insight into how the Supreme Court listens to the public, interprets the nation's constitutional culture, and moves constitutional law forward in a way that remains sensitive and responsive to "the will of the people."

This Article has sought to illuminate one particularly dramatic and innovative example of dialogic judicial review, but in doing so, it suggests important questions for the ongoing scholarly dialogue about judicial review and the role of a constitutional court in a democratic society. Do we necessarily *want* constitutional law to be "majoritarian"? If so, how big, or how enduring, should the majority be in order to qualify as constitutional authority? Should we trust the Supreme Court to interpret public attitudes and construct social meaning? How does dialogic judicial review relate to more conventional tests and modes of constitutional analysis that lower courts must apply to questions of equality and liberty?

Justice Felix Frankfurter famously observed that "[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[447] Striking the appropriate balance between fundamental constitutional principle and Americans' lived experience remains the Supreme Court's most profound challenge.

444. *Id.* at 2603.
445. *Id.* at 2598.
446. *Id.* at 2602.
447. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).