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(Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (with an Emphasis on Obergefell v. Hodges)

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**(SAME) SEX, LIES, AND DEMOCRACY: TRADITION,
RELIGION, AND SUBSTANTIVE DUE PROCESS (WITH AN
EMPHASIS ON *OBERGEFELL V. HODGES*)**

Stephen M. Feldman*

ABSTRACT

Substantive due process issues implicitly concern voice. Whose voice will be heard? Although such issues often remain submerged, the Justices occasionally translate them into disputes over democratic participation and power. The Supreme Court’s most important substantive due process decision in years, *Obergefell v. Hodges*, entailed such a battle over democracy. The multiple dissenting opinions insisted that the decision demeaned the opponents of same-sex marriage, many of whom were inspired by traditional values and religious convictions. The majority explicitly disagreed, reasoning that the case resolved the rights of same-sex couples to marry and did not diminish the opponents’ voices. The dissenters were right—at least in part.

Obergefell necessarily demeaned traditional and religious opponents of same-sex marriage, but nevertheless, the Court reached the correct outcome. Judicial neutrality is impossible, so the Court’s decision inevitably would have privileged one voice or view over another. Although the dissenters further asserted that the majority impaired democracy, the opposite was true. Laws that discriminate against peripheral groups, such as gays and lesbians, undermine the democratic process. In a well-functioning democracy, certain issues must be off the table, beyond democratic debate. Treating gays and lesbians as full and equal citizens in good standing is one such issue, whether in regard to marriage or otherwise. The majority’s decision in *Obergefell* ultimately bolstered the democratic process.

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INTRODUCTION

Substantive due process issues implicitly concern voice. Whose voice will be heard?¹ Although such issues often remain submerged, the Justices occasionally

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¹ In fact, one could reasonably argue that all constitutional issues are ultimately about voice. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 17, 19 (1970) (emphasizing

translate them into disputes over democratic participation and power.² The Supreme Court's most important substantive due process decision in years, *Obergefell v. Hodges*,³ entailed such a battle over democracy.

In a five-to-four decision, *Obergefell* held that same-sex couples enjoy a constitutional right to marry.⁴ The moderately conservative Justice Kennedy joined the four progressive Justices—Ginsburg, Breyer, Sotomayor, and Kagan—to form a narrow majority, with Kennedy writing the Court's opinion.⁵ All the other conservatives—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—dissented, with each dissenter writing an opinion.⁶ Despite the multitude of opinions, the dissenters' respective criticisms of the majority overlapped considerably. Scalia and Thomas each joined the other's dissenting opinion, while both joined the dissents of Roberts and Alito.⁷

The majority and dissenters clashed over substantive due process doctrine, but such disagreement was predictable.⁸ Nevertheless, the multiple opinions in *Obergefell* were unusual because they magnified the subtext of voice in democracy. The dissenters insisted that *Obergefell* demeaned the opponents of same-sex marriage, many of whom were inspired by traditional values and religious convictions.⁹ The decision ostensibly sullied and disparaged their voices or views.¹⁰ The majority explicitly

voice as central to political action); Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1349 (2012) (exploring Hirschman's thesis); cf. Kay Lehman Schlozman et al., *Inequalities of Political Voice*, in *INEQUALITY AND AMERICAN DEMOCRACY* 19, 19–20 (Lawrence R. Jacobs & Theda Skocpol eds., 2005) (linking political voice with economic inequality).

² See, e.g., *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (criticizing majority for "judicial legislation"); *Griswold v. Connecticut*, 381 U.S. 479, 523 (1965) (Black, J., dissenting) (arguing Court should have deferred to legislature).

³ 135 S. Ct. 2584 (2015).

⁴ *Id.* at 2604–05.

⁵ *Id.* at 2591.

⁶ For discussions of various quantitative rankings of the Justices' political ideologies, see LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 106–16 (2013). This book compares its rankings with the Martin-Quinn scores (accounting for changes over time), MARTIN-QUINN SCORES, PROJECT DESCRIPTION, <http://www.mqscores.wustl.edu/index.php> [<http://perma.cc/93UF-XNGQ>], and the Segal-Cover scores (quantifying Court nominees' perceived political ideologies at the time of appointment), *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2012*, <http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf> [<http://perma.cc/A9E6-AVV6>] (data drawn from Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557–65 (1989); updated in LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 122–37 (2005)). For yet another ranking (a more flexible one across issues), see generally Benjamin E. Lauderdale & Tom S. Clark, *The Supreme Court's Many Median Justices*, 106 AM. POL. SCI. REV. 847 (2012).

⁷ *Obergefell*, 135 S. Ct. at 2585.

⁸ See *infra* Part I.

⁹ 135 S. Ct. at 2624–25 (Roberts, C.J., dissenting); *id.* at 2639 (Thomas, J., dissenting); *id.* at 2641–42 (Alito, J., dissenting).

¹⁰ See, e.g., *id.* at 2642 (Alito, J., dissenting) ("Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of

disagreed.¹¹ Kennedy's opinion reasoned that the decision resolved the rights of same-sex couples to marry and did not diminish the opponents' voices.¹²

The dissenters repudiated and even ridiculed Kennedy's claim about voice.¹³ "[W]hat really astounds," wrote Scalia, "is the hubris reflected in today's judicial Putsch."¹⁴ All of the dissenting opinions argued that the Court should have deferred the question of same-sex marriage to the democratic process.¹⁵ Let the advocates for same-sex marriage and their opponents, including the religiously faithful, battle against each other in the democratic arena.¹⁶ Let all voices be heard, not only those of the five Justices in the *Obergefell* majority.¹⁷ Many conservative commentators and politicians echoed the dissenters.¹⁸ They insisted that the decision affronted traditional values and religious liberty.¹⁹ Ken Paxton, the Attorney General of Texas, denounced *Obergefell* as a "lawless ruling."²⁰ He issued an advisory opinion stating that the decision did not compel government employees, including judges, justices of the peace, and county clerks, to facilitate same-sex marriages in violation of their religious beliefs and liberties.²¹ Jim Daly, of *Focus on the Family*, declared that

marriage. . . . [I]t will be used to vilify Americans who are unwilling to assent to the new orthodoxy."); *id.* at 2626 (Roberts, C.J., dissenting) ("Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate.").

¹¹ See, e.g., *id.* at 2594, 2605 (majority opinion).

¹² *Id.*

¹³ See, e.g., *id.* at 2625 (Roberts, C.J., dissenting); *id.* at 2629–30 (Scalia, J., dissenting); *id.* at 2631 (Thomas, J., dissenting).

¹⁴ *Id.* at 2629 (Scalia, J., dissenting).

¹⁵ *Id.* at 2611–12 (Roberts, C.J., dissenting); *id.* at 2626–27 (Scalia, J., dissenting); *id.* at 2631–32 (Thomas, J., dissenting); *id.* at 2642 (Alito, J., dissenting).

¹⁶ *Id.* at 2611–12 (Roberts, C.J., dissenting); *id.* at 2626–27 (Scalia, J., dissenting); *id.* at 2631–32 (Thomas, J., dissenting); *id.* at 2642 (Alito, J., dissenting).

¹⁷ See *id.* at 2611–12 (Roberts, C.J., dissenting).

¹⁸ See, e.g., Press Release, Attorney General of Texas, Ken Paxton, *Religious Liberties of Texas Public Officials Remain Constitutionally Protected After Obergefell v. Hodges* (June 28, 2015), <https://www.texasattorneygeneral.gov/static/5144.html> [<http://perma.cc/QUJ5-MF7E>].

¹⁹ See, e.g., Adam Freedman, *Obergefell's Threat to Religious Liberty*, CITY J. (July 1, 2015), <http://www.city-journal.org/2015/eon0701af.html> [<http://perma.cc/NXQ8-BJ2M>]. Even an editorial praising the decision added: "We find it worrisome that the majority opinion barely flicks at the conflicts between the newly affirmed constitutional right to same-sex marriage and the religious freedoms that have been enshrined in the charter for centuries." Editorial Board, Editorial, *Supreme Court Says 'Yes' to Marriage*, CHI. TRIB. (June 26, 2015), <http://www.chicagotribune.com/news/opinion/editorials/ct-samesex-marriage-scotus-edit-0628-20150626-story.html> [<http://perma.cc/G4Y2-59RN>].

²⁰ Press Release, *supra* note 18.

²¹ Att'y Gen. Ken Paxton, Opinion No. KP-0025 (June 28, 2015), <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf> [<http://perma.cc/6CMK-E2BT>]. The Fifth Circuit, however, soon followed with an opinion underscoring that *Obergefell* was the law of the land and must be followed. *De Leon v. Abbott*, 791 F.3d 619, 624–25 (5th Cir. 2015).

Obergefell not only “tramples on the democratic process” but also “will fan the flames of government hostility” against religious opponents of same-sex marriage.²²

The dissenters and their political supporters were right, at least in part. Despite Kennedy’s assertion that the Court’s decision did not demean traditional and religious opponents of same-sex marriage,²³ judicial neutrality is impossible. All substantive due process issues require the Court to decide about voice in democracy. After *Obergefell*, opponents can still express themselves, but they are democratically disempowered. They can no longer implement their viewpoints in government laws or policies.²⁴

Even so, the Court correctly decided *Obergefell*. If judicial neutrality is impossible, and if a judicial decision inevitably privileges one voice or view over another, then the Court’s disparaging of traditional and religious voices is beside the point. And although the dissenters asserted that the majority impaired democracy, the opposite was true. Laws that discriminate against peripheral groups, such as gays and lesbians, undermine the democratic process. In a well-functioning democracy, certain issues must be off the table and beyond democratic debate. Treating gays and lesbians as full and equal citizens in good standing is one such issue, whether with regard to marriage or otherwise.²⁵ Even if a supermajority of Americans were to support a law discriminating against gays and lesbians, such government action must be unconstitutional because it would relegate gays and lesbians to second-class democratic citizenship. Ultimately then, the *Obergefell* decision bolstered the democratic process.

Part I of this Article explores the issue of voice in substantive due process disputes, particularly in *Obergefell*. Part I emphasizes the Justices’ disagreements about the nature and significance of tradition in substantive due process cases. Part II explores the relationship between voice and democracy and argues that the Court correctly decided *Obergefell* because of the democratic process. Part III explains and rejects the dissenters’ argument that the majority opinion resurrected the discredited approach of *Lochner v. New York*.²⁶

I. WHOSE VOICE MATTERS?

The dissenters repeatedly insisted that the majority’s *Obergefell* decision would suppress the voices or views of opponents of same-sex marriage.²⁷ “Perhaps the

²² Jim Daly, *Jim Daly Statement on Supreme Court Ruling on Marriage*, FOCUS ON FAMILY (June 26, 2015), http://www.focusonthefamily.com/about_us/news_room/news-releases/2015/20150626-jim-daly-statement-on-supreme-court-ruling-on-marriage.aspx [<http://perma.cc/YYU7-G7FL>].

²³ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2605 (2015).

²⁴ *Id.* at 2605.

²⁵ See JEREMY WALDRON, *THE HARM IN HATE SPEECH* 5, 61 (2012) (explaining how hate speech can undermine vulnerable minorities, causing groups to seek assurances that they are equal citizens in good standing).

²⁶ 198 U.S. 45 (1905).

²⁷ See, e.g., *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

most discouraging aspect of today's decision," Chief Justice Roberts wrote, "is the extent to which the majority feels compelled to sully those on the other side of the debate."²⁸ Roberts accused Justice Kennedy's opinion of piling "assaults on the character of fairminded people" who believe marriage must be only between a man and a woman.²⁹ The dissenters emphasized that *Obergefell* undermined tradition and demeaned the religiously faithful.³⁰ The *Obergefell* decision, Justice Alito concluded, "will be used to vilify Americans who are unwilling to assent to the new orthodoxy [protecting same-sex marriage]."³¹

Kennedy's majority opinion maintained that, contrary to the dissenters' arguments, the decision did not discredit religious and other traditional viewpoints.³² "Many who deem same-sex marriage to be wrong reach that conclusion," according to Kennedy, "based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."³³ The majority emphasized that traditionalists, including the religiously faithful, can still maintain and advocate for their positions against same-sex marriage.³⁴

[T]hose who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.³⁵

But crucially, the majority concluded that opposition to same-sex marriage can no longer be embodied in legislative actions or policies either prohibiting same-sex marriage or defining marriage as between a man and a woman.³⁶ After *Obergefell*,

²⁸ *Id.*

²⁹ *Id.*

³⁰ Justice Alito insisted that "the majority facilitates the marginalization of the many Americans who have traditional ideas," *id.* at 2643 (Alito, J., dissenting), while Justice Thomas proclaimed that "the majority's decision threatens the religious liberty our Nation has long sought to protect," *id.* at 2638 (Thomas, J., dissenting). *See also id.* at 2625–26 (Roberts, C.J., dissenting) (emphasizing "the traditional definition of marriage" and potential problems for "people of faith"); *id.* at 2642–43 (Alito, J., dissenting) (emphasizing rights of conscience).

³¹ *Id.* at 2642 (Alito, J., dissenting).

³² *Id.* at 2602, 2607 (majority opinion).

³³ *Id.* at 2602.

³⁴ *Id.* at 2607.

³⁵ *Id.*

³⁶ *Id.* at 2605–06.

same-sex couples are constitutionally guaranteed “marriage on the same terms as accorded to couples of the opposite sex.”³⁷

So, does *Obergefell* diminish the voices of traditionalists? On this point, the dissenters were right. When the Supreme Court held that governments cannot prohibit same-sex marriage, the voices of opponents of same-sex marriage were diminished. Kennedy’s majority opinion incorrectly reasoned that the decision did not demean religious and other traditional viewpoints. Kennedy implicitly asserted neutrality: that the Court favored no particular political outlook.³⁸ However, in *Obergefell*, as in most constitutional law cases, there is no neutrality.³⁹ The Court might claim neutrality, but one side always loses. When the Court invalidates a statute, including a statute prohibiting same-sex marriage, the supporters of the statute obviously have lost. Nonetheless, I mean more than this conspicuous point—that either the petitioners or respondents win the case while the other loses. Rather, in many cases, the Court’s decision has ramifications that reverberate through society.⁴⁰ The *Obergefell* decision privileged the views of same-sex marriage proponents over the views of traditionalists and the religiously faithful who oppose same-sex marriage. Such judicial privileging will influence many individuals who were not parties to the lawsuit. In *Obergefell*, Alito’s prediction about the future might be accurate: “[T]hose who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”⁴¹

This inherent lack of neutrality is one reason that the Justices frequently dispute the nature and significance of tradition in substantive due process cases.⁴² One group

³⁷ *Id.* at 2607. The majority added that denying same-sex couples equal access to marriage stigmatizes gays and lesbians. *Id.* at 2602.

³⁸ *See, e.g., id.* at 2597 (“Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on . . . neutral discussions, . . . courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider.”).

³⁹ *See* LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* 7–9 (2001) (arguing that the Constitution helps prevent political disputes from becoming too settled). One might reasonably conclude that every constitutional decision contains the trace of an “Other.” Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 *CONTEMP. POL. THEORY* 296, 307–08 (2005) (discussing justice and the Other); Stephen M. Feldman, *Made For Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 *PHIL. & SOC. CRITICISM* 51, 57–63 (2000) (discussing hermeneutics, deconstruction, and the Other).

⁴⁰ As I discuss below, however, I do not mean to suggest that the Court alone substantially changes society. Rather, I am arguing that the Court’s decision can influence society.

⁴¹ 135 S. Ct. at 2642–43 (Alito, J., dissenting).

⁴² On the difficulty of defining tradition and culture, see JOHN TOMLINSON, *CULTURAL IMPERIALISM* 96–97 (1991) (discussing the problem of defining culture); Sarah Song, *Majority Norms, Multiculturalism, and Gender Equality*, 99 *AM. POL. SCI. REV.* 473, 474–76 (2005)

of Justices—the conservative Justices, for the most part—are skeptical about the judicial recognition of substantive due process rights.⁴³ They seek to confine the scope of due process as much as possible. To do so, they maintain that due process protects only “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”⁴⁴ The prototypical majority opinion relying on this narrow approach to substantive due process is *Washington v. Glucksberg*, which refused to recognize a right to assisted suicide.⁴⁵ From this perspective, few rights are rooted deeply enough in American tradition to come within the compass of due process protection. Moreover, the meaning and scope of due process is static—fixed as an objective matter. Indeed, this narrow approach shrivels the *judicial* protection of substantive due process to near emptiness. After all, how often will a legislature pass a law contravening a right that the Court deems deeply rooted in American history?

Other Justices conceptualize the nature and significance of tradition in substantive due process cases differently. These Justices—the progressive and some moderately conservative Justices—view tradition as evolving.⁴⁶ Souter stated that “tradition is a living thing.”⁴⁷ In *Obergefell*, Kennedy’s majority opinion acknowledged the long tradition of marriage as being between a man and a woman.⁴⁸ However, Kennedy continued and argued that the institution of marriage “has not stood in isolation from

(discussing different ways to define culture). “Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs” CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973). Geertz added: “[C]ulture consists of socially established structures of meaning” *Id.* at 12; see DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* 129 (1979) (defining culture as “systems of communication, forms of expression and representation”). “The conception I work with is a definition of culture as a shared organization of ideas that includes the intellectual, moral, and aesthetic standards prevalent in a community and the meanings of communicative actions.” Robert A. LeVine, *Properties of Culture: An Ethnographic View*, in *CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION* 67, 67 (Richard A. Shweder & Robert A. LeVine eds., 1984). Gadamer elaborates on the concept of tradition within the context of hermeneutics. HANS-GEORG GADAMER, *TRUTH AND METHOD* xxi, 89, 137, 140, 144, 159, 164–65, 295, 309, 462, 477–91 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004). For discussions of Gadamer’s hermeneutics, see GEORGIA WARNKE, *GADAMER: HERMENEUTICS, TRADITION, AND REASON* (1987); JOEL C. WEINSHEIMER, *GADAMER’S HERMENEUTICS: A READING OF TRUTH AND METHOD* (1985).

⁴³ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

⁴⁴ *Id.*

⁴⁵ *Id.* at 735–36. For additional opinions using this narrow approach, see *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting); *id.* at 2640 (Alito, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that state could proscribe homosexual sodomy); *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

⁴⁶ See, e.g., *Obergefell*, 135 S. Ct. at 2595.

⁴⁷ *Glucksberg*, 521 U.S. at 765, 770 (Souter, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting)).

⁴⁸ 135 S. Ct. at 2594.

developments in law and society.”⁴⁹ “The history of marriage is one of both continuity and change.”⁵⁰ Most cultures today still honor the institution of marriage, yet unlike in the past, parents rarely arrange marriages for their children.⁵¹ Furthermore, women who marry are no longer subject to the common law of coverture, under which women lost their independent legal identities and rights.⁵² The *Obergefell* approach understands tradition as neither static nor objective. Moreover, an inquiry into tradition is not the be-all and end-all of a substantive due process inquiry.⁵³ The Justices respect and learn from history “without allowing the past alone to rule the present.”⁵⁴

The Justices’ dispute over the nature or definition of tradition and its significance to substantive due process manifests the constant struggle over voice in constitutional law.⁵⁵ When the due process skeptics limit fundamental rights to those deeply rooted in American tradition, they do not imagine tradition from a multicultural perspective. These Justices are mostly the same ones who advocate for and follow originalist methods of constitutional interpretation.⁵⁶ They believe constitutional meaning is objective and fixed at the time of framing or ratification.⁵⁷ To be blunt, when they analyze the original meaning of due process in the Fifth and Fourteenth Amendments, they do not inquire into the cultural traditions of African American slaves, women, recent immigrants, or gays and lesbians. Deeply rooted traditions, for these Justices, equate with the traditions of the mainstream, the culturally dominant—namely, through most of American history, white Protestant heterosexual men. When these Justices contemplated same-sex marriage in *Obergefell*, they cared about protecting the mainstream

⁴⁹ *Id.* at 2595.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2589 (“History and tradition guide and discipline [a due process analysis] but do not set its outer boundaries.”).

⁵⁴ *Id.* at 2598. Prior opinions articulating and following this conceptualization of tradition include the following: *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 765, 770 (1997) (Souter, J., concurring); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁵⁵ “Individual freedom requires having options from which to choose, and it is cultures [or traditions] that provide and give meaning to these options.” Song, *supra* note 42, at 473; see also GEERTZ, *supra* note 42, at 27 (“Without men, no culture, certainly; but equally, and more significantly, without culture, no men.”).

⁵⁶ On the Roberts Court, Scalia and Thomas are avowed originalists, but the other conservative Justices also invoke originalist arguments and join originalist opinions. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576–626 (2008) (relying on originalism to interpret the Second Amendment). See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (advocating for originalism).

⁵⁷ Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 660 (2009); see Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011) (emphasizing the “fixation thesis” of originalism). For a critique of originalism, see Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283 (2014).

voices of American tradition rather than the voices emanating from the subcultures and traditions of homosexual communities.⁵⁸

The *Obergefell* majority's approach to substantive due process is more flexible and more likely to encompass the voices or views of peripheral and emerging societal groups.⁵⁹ Under this flexible approach, the voices of peripheral groups matter even though they are not necessarily deeply rooted in mainstream American tradition. Because tradition grows, the Justices might reason that a peripheral group, previously excluded from deeply rooted traditions, narrowly defined, should now be understood as within an evolving American cultural milieu.⁶⁰ Tradition, from this standpoint, is dynamic rather than static. Hence, in *Obergefell*, the majority opinion not only traced the changing societal conceptions of marriage but also the evolution of attitudes toward homosexuality. Given these cultural changes, several states had already implemented judicial or legislative processes to legalize same-sex marriages.⁶¹

The Justices who follow the flexible approach also consider potential substantive due process rights derived through means other than the analysis of tradition, narrow or otherwise.⁶² Typically, these Justices analyze whether government action infringes one of two interests: an interest in making important personal decisions or an interest in intimate associations.⁶³ These interests frequently overlap, so the Justices might emphasize that a case involves personal decisions concerning intimacy.⁶⁴ If the government has infringed one or both of these interests, then the Court will find an abridgment of substantive due process.⁶⁵ In many cases, the Court allows the government

⁵⁸ Scalia explicitly discussed the original meaning of the Fourteenth Amendment and due process, while emphasizing the "long tradition" of limiting marriage to same-sex couples. *Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting); see *id.* at 2637 (Thomas, J., dissenting) (invoking "the original meaning of liberty").

⁵⁹ *Id.* at 2590 (majority opinion) (noting that "new insights and societal understanding can reveal unjustified inequality . . . that once passed unnoticed and unchallenged").

⁶⁰ See GADAMER, *supra* note 42, at 282, 293 (discussing how traditions change); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 536 (2004) (explaining how background beliefs change).

⁶¹ *Obergefell*, 135 S. Ct. at 2597.

⁶² *Id.* at 2602 (explaining that fundamental rights can also arise from "a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era").

⁶³ *Roe v. Wade*, 410 U.S. 113, 153 (1973) (reasoning that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Griswold v. Connecticut*, 381 U.S. 479, 482–86 (1965) (emphasizing association and intimate relationship of marriage).

⁶⁴ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (emphasizing choice to enter intimate relationship involving homosexual conduct); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (emphasizing in abortion case "intimate and personal choices" related to marriage, procreation, and so on).

⁶⁵ See, e.g., *Casey*, 505 U.S. at 851 (declaring that decisions "involving the most intimate and personal choices a person may make in a lifetime . . . are central to the liberty protected by the Fourteenth Amendment").

to attempt to justify such abridgment.⁶⁶ For instance, if the government can satisfy strict scrutiny by showing that its action is narrowly tailored to achieve a compelling purpose, then the Court would uphold the government action.⁶⁷ Rarely, though, can the government satisfy strict scrutiny.⁶⁸

In sum, when the Justices battle over the definition and significance of tradition, they struggle over whose voice will matter. The skeptical *Obergefell* dissenters' narrow concept of tradition⁶⁹ magnifies the importance of mainstream and old-stock Americans. The *Obergefell* majority's flexible notion of tradition creates more space for the voices of peripheral and historically suppressed groups.⁷⁰ The Justices on both sides of the debate understand that tradition is a powerful force. It is dynamic, but it also has inertia.⁷¹ In most instances, it does not change easily or quickly. Alito's *Obergefell* dissent brooded about the negative consequences of the decision for traditionalists and the religiously faithful.⁷² Their views, he worried, would be demeaned.⁷³ But we should not forget that many of those same traditionalists and faithful—those “fairminded people” that Roberts fretted about—will continue to denounce homosexuality as abhorrent or sinful or both.⁷⁴ *Obergefell*, standing alone, will not terminate

⁶⁶ *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) (explaining that in cases subject to strict scrutiny, it is the government's burden to prove that the law in question is “unquestionably legitimate”).

⁶⁷ *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (explaining that certain laws are constitutional “only if they are narrowly tailored to further compelling governmental interests”).

⁶⁸ *E.g.*, *Roe*, 410 U.S. at 152–64 (inquiring whether state anti-abortion law was necessary to achieve compelling purpose). In abortion cases, specifically, the Court has switched to an undue burden test. *Casey*, 505 U.S. at 874. To a large degree, Kennedy's majority opinion in *Obergefell* followed this framework of analysis. Once Kennedy emphasized that the majority would not be straitjacketed by the *Glucksberg* approach to tradition and due process, he analyzed whether the denial of marriage to same-sex couples infringed the couples' interests in making important personal decisions and intimate associations. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599–2600 (2015). Kennedy invoked, for instance, a “right to personal choice regarding marriage [as] inherent in the concept of individual autonomy.” *Id.* at 2599. Kennedy did not extensively discuss strict scrutiny or a similar framework of analysis; he briefly dismissed the claim that same-sex marriage will interfere with the institution of opposite-sex marriage. *Id.* at 2606–07.

⁶⁹ *Id.* at 2613 (Roberts, C.J., dissenting) (noting that until recently, marriage had been perceived as a union between a man and a woman, and this is reflected in human history. Also explaining that marriage arose to meet “a vital need: ensuring that children are conceived by a mother and a father committed to raising them in the stable conditions of a lifelong relationship”).

⁷⁰ *Id.* at 2590 (majority opinion) (explaining that “the Nation's traditions make clear that marriage is a keystone of the Nation's social order. . . . There is no difference between same- and opposite-sex couples with respect to this principle”).

⁷¹ Gadamer's concept of the hermeneutic circle suggests this dual nature of tradition. GADAMER, *supra* note 42, at 281.

⁷² *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).

⁷³ *Id.*

⁷⁴ *Id.* at 2626 (Roberts, C.J., dissenting).

a deeply rooted tradition of bias and antipathy toward gays and lesbians. Likewise, *Obergefell*, standing alone, will not lead to the widespread condemnation of traditional and religious opponents of same-sex marriage. Supreme Court decisions, including *Obergefell*, do not wield sufficient power to change society independently of other societal and cultural forces.⁷⁵

This discussion of voice and suppression raises an additional question. If, as I argue, the dissenters were right—if *Obergefell* diminishes the voices of opponents of same-sex marriage—then was the decision incorrect?

II. DEMOCRACY AND *OBERGEFELL*

An assessment of the *Obergefell* result requires a discussion of democracy. Every dissenter in *Obergefell* accused the majority of undermining democratic processes.⁷⁶ “Today’s decision,” wrote Alito, “usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.”⁷⁷ By failing to exercise judicial restraint, the majority invaded the legislative sphere.⁷⁸ “[T]his Court is not a legislature,” explained Roberts.⁷⁹ “Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not.”⁸⁰ The Court, according to this view, should have deferred to the legislative power of the people and allowed each state to determine how to define marriage.⁸¹ As Scalia put it, “This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government.”⁸²

Predictably, this line of attack on a substantive due process decision such as *Obergefell* led the dissenters to drag out the hoary ghost of *Lochner*.⁸³ “[T]he majority’s

⁷⁵ See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996) (explaining why “the myth of the heroically countermajoritarian Court” persists despite “consistently contravening evidence”). See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing that courts can rarely generate social reform).

⁷⁶ *Obergefell*, 135 S. Ct. at 2611–12 (Roberts, C.J., dissenting); *id.* at 2627 (Scalia, J., dissenting); *id.* at 2631–32 (Thomas, J., dissenting); *id.* at 2640–41 (Alito, J., dissenting).

⁷⁷ *Id.* at 2642 (Alito, J., dissenting).

⁷⁸ *Id.* at 2611 (Roberts, C.J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 2640 (Alito, J., dissenting). “By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority.” *Id.* at 2631 (Thomas, J., dissenting); see *id.* at 2629 (Scalia, J., dissenting) (denigrating the decision as a “judicial Putsch”).

⁸² *Id.* at 2629 (Scalia, J., dissenting).

⁸³ *Lochner v. New York*, 198 U.S. 45 (1905). Roberts’s dissent is the only one to discuss *Lochner* explicitly, but Scalia and Thomas joined Roberts’s opinion. *Obergefell*, 135 S. Ct. at 2611–12, 2616–22 (Roberts, C.J., dissenting) (discussing *Lochner* repeatedly).

approach has no basis in principle or tradition,” wrote Roberts, “except for the unprincipled tradition of judicial policy-making that characterized discredited decisions such as *Lochner v. New York*.”⁸⁴ As Roberts traced in detail, *Lochner* exemplified an era in Supreme Court adjudication running from the late nineteenth century to approximately 1937.⁸⁵ *Lochner* itself invalidated a state law that limited the number of hours employees could work in bakeries (ten hours per day and sixty hours per week) as violating substantive due process.⁸⁶ Although Justice Holmes’s famous *Lochner* dissent maintained that the Court should have deferred to the state legislature,⁸⁷ the Court continued throughout the *Lochner* era to invalidate numerous economic regulations, numbering nearly two hundred state and federal laws (the Court also upheld many laws).⁸⁸ But, as Roberts emphasized, the Court eventually repudiated its *Lochner* approach and, for decades, showed greater deference to the democratic process.⁸⁹ In *Obergefell*, however, “the majority casts caution aside and revives the grave errors of [the *Lochner*] period”—at least according to Roberts.⁹⁰

If the dissenters were partly right about voice and suppression, as I argue above, then are they also right about democracy and the resurrection of *Lochner*? That is, did the Court wrongly decide *Obergefell* by not deferring to the legislature by not allowing the people to decide whether to allow same-sex marriage? In fact, Roberts explicitly related democracy to voice and suppression.⁹¹ “There will be consequences to shutting down the political process on an issue of such profound public significance,” he warned.⁹² “Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.”⁹³ He even added that proponents of same-sex marriage have also lost, missing an opportunity for democratic victory, “to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause.”⁹⁴

But Roberts and the other dissenters were wrong about the *Obergefell* result. The Court decided the case correctly. As the dissenters suggested, democracy provided

⁸⁴ *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

⁸⁵ *Id.* at 2617.

⁸⁶ *Lochner*, 198 U.S. at 53 (proclaiming that the New York statute which placed restrictions on employment of bakers violated the liberty guaranteed to citizens by the Fourteenth Amendment).

⁸⁷ *Id.* at 75 (Holmes, J., dissenting); *id.* at 73 (Harlan, J., dissenting) (recommending deference to legislature).

⁸⁸ See, e.g., *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525 (1923) (invalidating minimum wage law); see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 632 (4th ed. 2011) (discussing number of laws invalidated during *Lochner* era); KAREN ORREN, *BELATED FEUDALISM* 111–17 (1991) (same).

⁸⁹ *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting).

⁹⁰ *Id.* at 2621.

⁹¹ *Id.* at 2625.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

the key to the case, but their concept of democracy was too simplistic. At least since the 1930s, American democracy has rested on process rather than on the identification and pursuit of a specific substantive goal, such as the common good.⁹⁵ As articulated by constitutional and political theorists during and after World War II,⁹⁶ post-1930s (pluralist) democracy required the institutionalization of a process that would determine which interests would be at least temporarily enshrined as communal goals.⁹⁷ Robert Dahl, more so than any other theorist, analyzed the conditions or prerequisites necessary for a proper pluralist democratic process.⁹⁸ Dahl reasoned, for example, that each citizen's vote must be identically weighed and that the option or choice receiving the greatest number of votes must be accepted and implemented.⁹⁹ But the most foundational element of the process, Dahl concluded, is "effective participation."¹⁰⁰ Citizens must have "adequate" and "equal" opportunities "for expressing their preferences . . . for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another."¹⁰¹

Democracy, according to this analysis, contains inherent limits. If the crux of the democratic process is effective participation, then a legislature cannot enact a law that would abridge citizens' abilities and opportunities to participate—even if a supermajority of citizens and legislators favored the enactment. Any such law would undermine the democratic process itself and would necessarily be unconstitutional.¹⁰² Claims to democratic legitimacy would be hollow and specious. For instance, if a state legislature passes a law denying the right to vote to a segment of citizens—say, citizens of a particular race or ethnicity—that voting restriction and all subsequent legislative actions would be illegitimate.¹⁰³ Rights embodied by these inherent limits

⁹⁵ See STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* 291–348 (2008) (discussing the transition from republican democracy, focusing on the common good, to pluralist democracy).

⁹⁶ Robert Dahl was the leading theorist of democracy during this era. See generally ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989) [hereinafter DAHL, *DEMOCRACY*]; ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956) [hereinafter DAHL, *PREFACE*]. Other leading theorists include the following: WILFRED E. BINKLEY & MALCOLM C. MOOS, *A GRAMMAR OF AMERICAN POLITICS* (2d ed. 1952); V.O. KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* (2d ed. 1950); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951).

⁹⁷ DAHL, *DEMOCRACY*, *supra* note 96, at 83, 106; DAHL, *PREFACE*, *supra* note 96, at 67–71.

⁹⁸ DAHL, *DEMOCRACY*, *supra* note 96, at 108–15 (explaining that the five criteria for a proper democratic process are effective participation, voting equality at the decisive stage, enlightened understanding, control of the agenda, and equal opportunity).

⁹⁹ *Id.* at 109–11; DAHL, *PREFACE*, *supra* note 96, at 67.

¹⁰⁰ DAHL, *DEMOCRACY*, *supra* note 96, at 109.

¹⁰¹ *Id.*

¹⁰² See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (reasoning that deference to the legislature would be inappropriate if legislation either would likely cause or had resulted from defective democratic processes); DAHL, *DEMOCRACY*, *supra* note 96, at 170.

¹⁰³ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 116–24 (1980) (emphasizing the need for judicial protection of the right to vote). Subsequent legislative actions would be illegitimate

of democracy can be labeled as procedural or substantive, or as bridging both process and substance. Free expression, to give one example, can be considered a procedural or substantive right—the label is unimportant. However, if a legislative enactment denies or restricts the right to speak about political issues, then democracy no longer exists.¹⁰⁴ Therefore, a law denying to gays and lesbians (or any other members of the LGBT community, for that matter) the right to vote or the right to political speech would contravene democracy and be unconstitutional.

But what about a law (or other government action) that otherwise discriminates against a discrete societal group or treats that group unequally or differently from other similar groups in society? Or more precisely, what about a law that discriminates against gays and lesbians by prohibiting same-sex marriage? Although such a discriminatory law does not contravene democracy as overtly as does a law denying the vote or political speech, it still undermines democracy and should be unconstitutional. A discriminatory law treats an individual group member differently (or unequally) from other citizens exactly because he or she belongs to the designated group—gays and lesbians in this case—and the group is denigrated precisely because it is different from the mainstream.¹⁰⁵ Some component of the group's identity ostensibly justifies treating gays and lesbians as less than full and equal citizens in good standing.¹⁰⁶ A discriminatory law sends a message that gays and lesbians should not get too comfortable because many other Americans would gladly mistreat them or cast them out altogether. In such a social and political environment, gays and lesbians cannot possibly participate in democratic negotiations, coalitions, or compromises on an equal basis with other citizens. The political strength of gays and lesbians is diminished before the democratic process even gets underway. Discriminatory laws mute the voices of gays and lesbians, thus allowing other citizens to readily discredit or ignore their values and interests.¹⁰⁷

In *Plessy v. Ferguson*,¹⁰⁸ decided in 1896, Justice Harlan's dissent emphasized that a racially discriminatory law has ramifications far beyond the specifics of the statute.¹⁰⁹ The Court upheld a Louisiana statute that required railroad companies to provide

because the legislature would be unrepresentative, as members of the racial or ethnic group were unable to vote for representatives. *See id.* at 116, 120–21.

¹⁰⁴ ALEXANDER MEIKLEJOHN, *FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT* 18, 26 (1948). The need to protect free expression as part of the democratic process is sometimes referred to as the self-governance rationale. *See* FELDMAN, *supra* note 95, at 396–401 (explaining the growing importance of the self-governance rationale).

¹⁰⁵ *See* WALDRON, *supra* note 25, at 61 (discussing how hate speech denigrates a group).

¹⁰⁶ *See id.* at 5 (discussing hate speech and being treated “as a member of society in good standing”).

¹⁰⁷ *See* ELY, *supra* note 103, at 135–79 (discussing how courts can facilitate the representation of minorities).

¹⁰⁸ 163 U.S. 537 (1896).

¹⁰⁹ *Id.* at 557–58 (Harlan, J., dissenting).

separate but equal accommodations for African American and white passengers.¹¹⁰ The majority opinion rejected “the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.”¹¹¹ Harlan disagreed:

The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the [Reconstruction] amendments of the Constitution. . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.¹¹²

Subsequent history unfortunately proved that Harlan was correct.¹¹³ African Americans suffered through decades of second-class citizenship (and continue to suffer from the effects of discrimination).¹¹⁴

Likewise, in *Obergefell*, Kennedy’s majority opinion rightly characterized how legislative prohibitions on same-sex marriage detrimentally affect gays and lesbians.¹¹⁵

¹¹⁰ *Id.* at 550–51 (majority opinion).

¹¹¹ *Id.* at 551.

¹¹² *Id.* at 560 (Harlan, J., dissenting).

¹¹³ *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 11 (rejecting the notion that the racial classification at issue applied equally to whites because the purpose of the law was to “maintain White Supremacy”). *See generally* DONNIE WILLIAMS WITH WAYNE GREENHAW, *THE THUNDER OF ANGELS* 45–84 (2006) (explaining that the civil disobedience of African Americans regarding their refusal to comply with racially discriminatory laws and standards for bus transportation ultimately led to the first major event of the civil rights movement: the Montgomery Bus Boycott).

¹¹⁴ DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 373 (2d ed. 1980) (detailing discrimination in public schools). There are many helpful histories describing African American experiences during the twentieth century. *See, e.g.,* JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, *FROM SLAVERY TO FREEDOM* (9th ed. 2011); IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* (2005); RICHARD KLUGER, *SIMPLE JUSTICE* (1975); MANNING MARABLE, *MALCOLM X: A LIFE OF REINVENTION* (2011); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY* (2008); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS* (1996).

¹¹⁵ 135 S. Ct. 2584, 2590–91 (2015) (explaining that laws prohibiting same-sex marriage burden the liberty of same-sex couples, are inherently unequal, and “disrespect and subordinate gays and lesbians”).

“[E]xclusion from [marriage] has the effect of teaching that gays and lesbians are unequal in important respects,” Kennedy wrote.¹¹⁶ When the government denies same-sex couples equal access to marriage, “a central institution of the Nation’s society,”¹¹⁷ the government stigmatizes and “demeans gays and lesbians.”¹¹⁸ Legislative prohibitions “disparage their choices and diminish their personhood.”¹¹⁹

Any individual who is a full and equal citizen in good standing should be “entitled to the same liberties, protections, and powers” that all other citizens enjoy.¹²⁰ Each individual, regardless of whether he or she is gay or lesbian, should be able “to walk down the street without fear of insult or humiliation, to find the shops and exchanges open to him, and to proceed with an implicit assurance of being able to interact with others without being treated as a pariah.”¹²¹ If the government discriminates against gays and lesbians by treating them as less than full and equal citizens, then democracy is necessarily stunted.

Yet, traditional and religious opponents of same-sex marriage also deserve to be treated as full and equal citizens in the democratic process. The First Amendment explicitly protects religious freedom.¹²² But all full and equal citizens—including traditionalists and the religiously faithful—must have diminished democratic power if and when they advocate for the discriminatory or unequal treatment of a societal group, such as gays and lesbians, based on that group’s ascriptive qualities or differences from the mainstream. History is filled with persecutions of peripheral group members justified ostensibly because of religious beliefs, and such persecutions often were implemented through democratic channels.¹²³ During and before the Civil War, to take one example, numerous Southerners defended slavery as harmonious with or even mandated by Christianity and the Bible.¹²⁴ In the introduction to *Cotton Is King*, published in 1860, E.N. Elliott explained: “We understand the nature of the negro race; and in the relation in which the providence of God has placed them to us, they are happy and useful members of society”¹²⁵ Albert Taylor Bledsoe, a professor

¹¹⁶ *Id.* at 2602.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ WALDRON, *supra* note 25, at 219–20.

¹²¹ *Id.* at 220.

¹²² U.S. CONST. amend. I (including Free Exercise and Establishment Clauses).

¹²³ *See infra* notes 124–27 and accompanying text.

¹²⁴ *See* Drew Gilpin Faust, *A Southern Stewardship: The Intellectual and the Proslavery Argument*, reprinted in PROSLAVERY THOUGHT, IDEOLOGY, AND POLITICS 129, 137–39 (Paul Finkelman ed., 1989) (emphasizing pro-slavery reliance on Bible and Christianity); Ferenc M. Szasz, *Antebellum Appeals to the “Higher Law,” 1830–1860*, 110 ESSEX INST. HIST. COLLECTIONS 33, 37–41 (1974) (same).

¹²⁵ E.N. Elliott, *Introduction to COTTON IS KING, AND PRO-SLAVERY ARGUMENTS* ix (E.N. Elliott ed., Augusta: Pritchard, Abbot & Loomis 1860); *see* Thornton Stringfellow, *A Scriptural*

at the University of Virginia, explained that “the institution of slavery, as it exists among us at the South, is founded in political justice, is in accordance with the will of God and the designs of his providence, and is conducive to the highest, purest, best interests of mankind.”¹²⁶ Meanwhile, at least through the early nineteenth century, religious minorities were subject to prosecutions for blasphemy if they repudiated mainstream Protestantism.¹²⁷ In 1837, a Delaware court stated that it had “been long perfectly settled by the common law, that blasphemy against the Deity in general, or a malicious and wanton attack against the christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable.”¹²⁸ If we properly understand the democratic process, however, then religious tenets should never justify such discriminatory government actions.¹²⁹

In a well-functioning democracy, some issues must be off the table. For instance, we should no longer debate whether racial minorities are entitled to full and equal participation in the democratic process. The *Obergefell* dissenters insisted otherwise, though. They insisted that the issue of discrimination against gays and lesbians, as manifested in prohibitions of same-sex marriage, should be subject to further and continuing debate in the democratic arena.¹³⁰ The dissenters, in effect, declared: let the proponents of same-sex marriage and the opponents, including the religiously faithful, battle against each other on a level democratic field.¹³¹ According to the

View of Slavery, reprinted in SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH 86, 86–98 (Eric L. McKittrick ed., 1963) (drawing on the Bible to advocate for slavery).

¹²⁶ Albert Taylor Bledsoe, *Liberty and Slavery: Or, Slavery in the Light of Moral and Political Philosophy*, in COTTON IS KING, AND PRO-SLAVERY ARGUMENTS 271, 273 (E.N. Elliott ed., Augusta: Pritchard, Abbot & Loomis 1860). “American Slavery is not only not a sin, but especially commanded by God through Moses, and approved by Christ through his apostles.” J.H. Hammond, *Hammond’s Letters on Slavery* (Jan. 28, 1845), in THE PRO-SLAVERY ARGUMENT: AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES 99, 108 (Charleston: Walker, Richards & Co. 1852).

¹²⁷ LEONARD W. LEVY, BLASPHEMY 400–23 (1993) (discussing early nineteenth-century blasphemy convictions in state courts); cf. NAOMI W. COHEN, JEWS IN CHRISTIAN AMERICA 38–39 (1992) (discussing mission societies’ consignment of Jews to second class citizenship in the early nineteenth century). For examples of blasphemy convictions, see the following: *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206 (1838); *People v. Ruggles*, 8 Johns. 290 (N.Y. 1811); *City Council of Charleston v. Benjamin*, 33 S.C.L. (2 Strob.) 508 (1848).

¹²⁸ *State v. Chandler*, 2 Del. (2 Harr.) 553, 555 (1837); see also *Bradwell v. Illinois*, 84 U.S. (16 Wall.) 130, 141–42 (1872) (Bradley, J., concurring) (upholding law prohibiting women from practicing law because consistent with “the law of the Creator”).

¹²⁹ Thus, for instance, antimiscegenation laws are unconstitutional, regardless of the traditional or religious motivations of proponents of such laws. *Loving v. Virginia*, 388 U.S. 1 (1967).

¹³⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–12 (2015) (Roberts, C.J., dissenting); *id.* at 2626–27 (Scalia, J., dissenting); *id.* at 2637–39 (Thomas, J., dissenting).

¹³¹ *Id.* at 2611–12 (Roberts, C.J., dissenting); *id.* at 2626–27 (Scalia, J., dissenting); *id.* at 2637–39 (Thomas, J., dissenting).

dissenters, the Court should have remained neutral, treating the two sides or viewpoints consistently.¹³² Let the people, rather than the Justices, decide.

However, the *Obergefell* Court had to decide: neutrality was impossible. The Justices would either uphold or invalidate laws prohibiting same-sex marriage. And crucially, the two sides in the dispute were not equal or the same. True, both sides sought or intended to implement their own respective views of marriage, but only one side rooted its intent in discriminatory motivations. One side, the proponents of same-sex marriage, sought to enjoy equal rights and liberties with all others, while the other side, the opponents, sought to prevent them from doing so.¹³³ As Justice Stevens stated in his dissent in *Adarand Constructors v. Peña*,¹³⁴ an affirmative action case, “An interest in ‘consistency’ does not justify treating differences as though they were similarities.”¹³⁵ And gays and lesbians have not historically enjoyed the same legal and social rights as have traditionalists and the religiously faithful. Thus, despite the dissenters’ calls for judicial neutrality and further democratic debate, the Court correctly treated full and equal citizenship for gays and lesbians as among the “settled features of the social environment to which we are visibly and pervasively committed.”¹³⁶ The fact that opponents of same-sex marriage drew inspiration from tradition or religion was beside the point. Further democratic debate would necessarily appear to legitimate continued discrimination against gays and lesbians, and such discrimination would in turn diminish their full and equal ability to participate in the democratic process.¹³⁷ The *Obergefell* majority reached the proper conclusion: traditionalists

¹³² *Id.* at 2611–12 (Roberts, C.J., dissenting); *id.* at 2626–27 (Scalia, J., dissenting); *id.* at 2637–39 (Thomas, J., dissenting).

¹³³ As I argued in Part I, however, *Obergefell* diminished the voices of opponents of same-sex marriage.

¹³⁴ 515 U.S. 200 (1995).

¹³⁵ *Id.* at 245 (Stevens, J., dissenting). Stevens’s further analysis of the *Adarand* Court’s notion of consistency and equality is apropos to understanding the same-sex marriage dispute.

The Court’s concept of “consistency” assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government’s constitutional obligation to “govern impartially,” should ignore this distinction.

Id. at 243 (citations omitted).

¹³⁶ WALDRON, *supra* note 25, at 95.

¹³⁷ See *id.* at 95–96 (arguing that the constitutionality of hate speech should not be evaluated pursuant to doctrinal tests, which would tend to legitimate debate over hate speech).

and the faithful should be entitled to their views, whether religious or otherwise, but they should not be constitutionally empowered to transform those views into discriminatory public policy or law.¹³⁸

III. *LOCHNER* REDUX?

The dissenters' call for more democracy, combined with their related accusation that the majority was resurrecting *Lochner*, bordered on the surreal. Justices and scholars typically characterize the Court's approach during the *Lochner* era as animated by three themes.¹³⁹ First, strongly influenced by laissez-faire ideology, the Court favored business and protected the economic marketplace from government regulation.¹⁴⁰ Second, the Court did not exercise judicial restraint.¹⁴¹ Instead, the Court repeatedly (though not always) invalidated national and state legislative actions.¹⁴² Third, the Court often reached decisions protecting the marketplace from legislative power by reasoning pursuant to an a priori formalism.¹⁴³ The Justices claimed to discern the existence, content, and boundaries of certain preexisting categories of activities without inquiring into the consequences of the activities.¹⁴⁴ Often, the Justices eschewed empirical evidence while relying on their own intuitive grasps of social reality.¹⁴⁵ For example, the Court deemed manufacturing an inherently local rather than national activity, regardless of the product manufactured, the resources used, or the social effects of the manufacturing.¹⁴⁶

¹³⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

¹³⁹ See *infra* notes 140–46 and accompanying text.

¹⁴⁰ Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 538–39 (2015) (discussing the view of the *Lochner* Court as basing its opinions on laissez-faire politics); see, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935).

¹⁴¹ See Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 50 (1989) (discussing *Lochner* era Court's "aggressively" striking down federal and state statutes).

¹⁴² *Id.*; see, e.g., *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525 (1923) (invalidating minimum wage law), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). For an example of the Court upholding a law during the *Lochner* era, see *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding constitutionality of maximum hours law for women), *superseded by statute*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964).

¹⁴³ FELDMAN, *supra* note 95, at 352 (discussing *Lochner* era Court's formalist approach and absence of concern for real-world consequences of its decisions).

¹⁴⁴ *Id.* at 352.

¹⁴⁵ *Id.*

¹⁴⁶ *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). In *Lochner*, the majority concluded, despite contrary evidence, that the job of a baker was not "unhealthy" to "the common understanding." *Lochner v. New York*, 198 U.S. 45, 59 (1905). A crucial, but often overlooked, component of *Lochner*-era adjudication was the Court's focus on the definition of the common good. The Court would invalidate actions that were deemed class legislation or pursuits of

The conservative dissenters in *Obergefell* correctly observed that the Court repudiated *Lochner* around 1937.¹⁴⁷ But then the dissenters turned the world on its head: for years now, the conservative Justices themselves have been resurrecting aspects of *Lochner* while undermining democratic government. First, empirical studies show that the Roberts Court is the most pro-business Supreme Court since World War II.¹⁴⁸ Five of the current Justices, including the four *Obergefell* dissenters, rank among the top ten Justices most favorable to business during that time.¹⁴⁹ Alito and Roberts are first and second on the list.¹⁵⁰ The evidence also suggests that the pro-business Justices shape the Court's docket in accord with their interests.¹⁵¹ A study focusing on the period from May 19, 2009, to August 15, 2012, concluded that the U.S. Chamber of Commerce, representing businesses, filed more certiorari-stage amicus briefs than any other organization.¹⁵² Unsurprisingly, the Chamber had the second highest success rate.¹⁵³

partial or private interests. The Court would uphold only government actions in pursuit of the common good. *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act as class legislation); see also HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (discussing the *Lochner* era). After 1937, the Court largely stopped reviewing government actions for consistency with the common good. FELDMAN, *supra* note 95, at 354–58. For this reason, comparisons between *Lochner*-era and more recent substantive due process cases, such as *Obergefell* and *Roe v. Wade*, are tenuous. Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47, 47–50 (2006).

¹⁴⁷ Numerous books have described this judicial transition. See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* (1995).

¹⁴⁸ Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013) (quantitative study of all post-war business-related cases); see Corey Ciocchetti, *The Constitution, the Roberts Court, and Business*, 4 WM. & MARY BUS. L. REV. 385 (2013) (emphasizing how strongly the Roberts Court supported business in the 2011–2012 term).

¹⁴⁹ Epstein et al., *supra* note 148, at 1449–51, 1472–73.

¹⁵⁰ *Id.* at 1449. Some conservatives have argued the Roberts Court is not conservative enough, that it is not truly pro-business. Ramesh Ponnuru, *Supreme Court Isn't Pro-Business, But Should Be*, BLOOMBERG (July 5, 2011), <http://www.bloombergview.com/articles/2011-07-05/supreme-court-isn-t-pro-business-but-should-be-ramesh-ponnuru> [<http://perma.cc/Z5Q4-M73Z>]; see also Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009); Eric Posner, *Is the Supreme Court Biased in Favor of Business?*, SLATE: CONVICTIONS (March 17, 2008), http://www.slate.com/blogs/convictions/2008/03/17/is_the_supreme_court_biased_in_favor_of_business.html [<http://perma.cc/K9R9-9MJJ>]. But empirical studies have persuasively shown otherwise. MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 213 (2013); see *id.* at 187–214 (discussing the evidence).

¹⁵¹ Adam Chandler, *Cert.-Stage Amicus "All Stars": Where Are They Now?*, SCOTUSBLOG (Apr. 4, 2013), <http://www.scotusblog.com/2013/04/cert-stage-amicus-all-stars-where-are-they-now/> [<http://perma.cc/87KQ-VN8E>].

¹⁵² *Id.*

¹⁵³ *Id.*

Second, the conservative Justices are generally hostile toward the exercise of legislative power.¹⁵⁴ Indeed, the Rehnquist and Roberts Courts have engaged in one of the “most notable binges of congressional-law striking in history.”¹⁵⁵ The Rehnquist Court, including Scalia, Thomas, and Kennedy, invalidated more congressional acts than had any previous Court.¹⁵⁶ From 1995 to 2001 alone, the Court struck down thirty federal laws, more than the Warren Court invalidated from 1953 to 1969.¹⁵⁷ Statistically, compared with the Rehnquist Court, the Roberts Court has slowed the pace, invalidating fewer laws proportionally.¹⁵⁸ Yet, the current conservative Justices have reached aggressively to strike progressive laws that are inconsistent with the contemporary conservative political agenda—particularly laws regulating the economic marketplace.¹⁵⁹ Indeed, one can reasonably characterize the conservative Justices as market fundamentalists: they have protected corporations and the marketplace from government regulation in case after case.¹⁶⁰

¹⁵⁴ See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (invalidating a section of the Voting Rights Act); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (invalidating part of the Affordable Care Act); *Citizens United v. FEC*, 558 U.S. 310 (2010) (invalidating provisions of the Bipartisan Campaign Reform Act of 2002). Thomas Keck has compiled a list of federal statutes invalidated by the Court from 1981 to 2013. Thomas Keck, *Why Does the Supreme Court Invalidate Federal Statutes?*, http://faculty.maxwell.syr.edu/tmkeck/Book_1/federal_statutes.htm [<http://perma.cc/NR3L-N674>].

¹⁵⁵ Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 161 (2004).

¹⁵⁶ See DAVID M. O’BRIEN, *STORM CENTER* 31 (8th ed. 2008).

¹⁵⁷ THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 2 (2004).

¹⁵⁸ From 2005 to 2013, the Roberts Court struck down only fifteen federal laws. Keck, *supra* note 154.

¹⁵⁹ See ALL FOR JUSTICE, *THE ROBERTS COURT AND JUDICIAL OVERREACH* (2013); Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737, 737–38 (2012); Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2219–20 (2014).

What of the Roberts Justices? Though it may be too soon to say much about Alito and Roberts . . . , they conform to the basic ideological pattern. Both are significantly more likely to uphold conservative laws and invalidate left-leaning policy. The ideological effect is even starker for the more extreme conservatives, Scalia and Thomas.

Epstein & Martin, *supra*, at 756.

¹⁶⁰ E.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1426 (2013) (interpreting Federal Rules of Civil Procedure to limit class actions against a corporation); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (invalidating a state law restricting corporate sale of medical data); *Citizens United v. FEC*, 558 U.S. 310 (2010) (invalidating restriction on corporate campaign expenditures); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (limiting punitive damage awards against corporations); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (imposing restrictive time bar for employment discrimination lawsuits against corporations), *superseded by statute*, *Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, 123 Stat. 5 (2009);

Third, the conservative Justices have used formalist methodology to protect the economic marketplace and invalidate legislation.¹⁶¹ This judicial return to formalism began with the conservative Justices on the Rehnquist Court in the early 1990s and has continued with the Roberts Court.¹⁶² In the landmark commerce-power decision, *United States v. Lopez*,¹⁶³ decided in 1995, the Court held that Congress had exceeded its power when it enacted the Gun-Free School Zones Act, a generally applicable law that proscribed the possession of firearms at school.¹⁶⁴ Rehnquist's majority opinion, joined by Scalia, Thomas, Kennedy, and O'Connor, stated that Congress can regulate commerce in three realms: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; (3) and activities substantially affecting interstate commerce.¹⁶⁵ The Court focused on the final realm, but interpreted it in accord with a priori formalism. Rehnquist's majority opinion distinguished between economic and non-economic activities.¹⁶⁶ Gun possession at schools, Rehnquist wrote, is a non-economic enterprise that "has nothing to do with 'commerce.'"¹⁶⁷ Then Rehnquist distinguished between national and local concerns.¹⁶⁸ Gun possession at schools, he reasoned, is a local rather than a national matter and thus falls outside Congress's commerce power.¹⁶⁹ Rehnquist's terminology, dividing "what is truly national and what is truly local,"¹⁷⁰ resembled the Court's pre-1937 language separating "a purely federal matter"¹⁷¹ from "a matter purely local in its character."¹⁷² By parsing congressional power pursuant to these formalist categories, the Court concluded that Congress had exceeded its commerce power.¹⁷³

see also FRED BLOCK & MARGARET R. SOMERS, *THE POWER OF MARKET FUNDAMENTALISM* 3 (2014) (explaining market fundamentalism). A recent decision undermining congressional action has uncertain ramifications for the future. *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419 (2015). The Court held that a government restriction on the sale of raisins, based on a 1937 statute, was a taking and required just compensation. *Id.* at 2431–32.

¹⁶¹ Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343, 344–47 (2014).

¹⁶² *Id.* (discussing the formalism of the Roberts Court). Joshua A. Klein, *Commerce Clause Questions After Morrison: Some Observations on the New Formalism and the New Realism*, 55 STAN. L. REV. 571, 573–74 (2002) (discussing the formalism of the Rehnquist Court).

¹⁶³ 514 U.S. 549 (1995).

¹⁶⁴ *Id.* at 551.

¹⁶⁵ *Id.* at 558–59.

¹⁶⁶ *Id.* at 561.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 567.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 567–68.

¹⁷¹ *Hammer v. Dagenhart*, 247 U.S. 251, 274 (1918).

¹⁷² *Id.* at 276.

¹⁷³ *Lopez*, 514 U.S. at 567–68. In two prior post-1937 cases invalidating exercises of congressional power, the Court focused on limits imposed by the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that Congress has the power to regulate the disposal of radioactive waste per the Commerce Clause, but that power is limited

The Roberts Court has followed *Lopez* and extended its formalist methodology, most notably in *National Federation of Independent Business v. Sebelius*,¹⁷⁴ which invalidated part of the Affordable Care Act (ACA).¹⁷⁵ The Court evaluated the ACA's individual mandate pursuant to Congress's commerce power.¹⁷⁶ The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage.¹⁷⁷ Individuals who fail to comply with the mandate must pay a "penalty" to the Internal Revenue Service.¹⁷⁸ When applying the *Lopez* doctrine to this provision, Roberts's opinion articulated and applied two new formalist distinctions.¹⁷⁹ First, Roberts distinguished action from inaction.¹⁸⁰ Congress, he reasoned, can regulate activity but not inactivity pursuant to its commerce power.¹⁸¹ The individual mandate would force individuals to buy health insurance even when they did not want to do so.¹⁸² Congress therefore overstepped its commerce power, according to Roberts, because the mandate would compel inactive individuals to enter or become active in the health insurance market.¹⁸³ Second, Roberts distinguished regulation from creation.¹⁸⁴ Congress can regulate but not create commerce.¹⁸⁵ With the individual mandate, Roberts reasoned, Congress exceeded its power by attempting to create commercial activity where none previously existed.¹⁸⁶ Roberts followed similar formalist reasoning in concluding that Congress had surpassed its spending power in the ACA provisions that expanded the Medicaid program.¹⁸⁷

by the Tenth Amendment, thus prohibiting Congress from regulating state regulation); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 854–55 (1976) (holding that Congress does not have the authority to wield its commerce power in such a way that impairs a state's ability to structure its government employer-employee relationships), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹⁷⁴ 132 S. Ct. 2566 (2012).

¹⁷⁵ *Id.* at 2591.

¹⁷⁶ U.S. CONST. art. I, § 8, cl. 3 (The Congress shall have power "[t]o regulate Commerce with foreign Nations, and amongst the several States.").

¹⁷⁷ 26 U.S.C. § 5000A(a) (2012).

¹⁷⁸ *Id.* § 5000A(c), (g)(1).

¹⁷⁹ *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2587.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2587–89.

¹⁸² *Id.* at 2589.

¹⁸³ *Id.* at 2587. The other conservative Justices (the joint dissenters) completely agreed with Roberts on this point, even though they did not join his opinion. *Id.* at 2644, 2648–49 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

¹⁸⁴ *Id.* at 2585–86 (majority opinion).

¹⁸⁵ *Id.* at 2586.

¹⁸⁶ Again, the other conservative Justices completely agreed with Roberts on this point. *Id.* at 2644 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). Roberts nonetheless upheld the individual mandate pursuant to Congress's taxing power. *Id.* at 2599–600 (majority opinion).

¹⁸⁷ Roberts distinguished congressional "pressure" from congressional "compulsion." *Id.* at 2602. Congress can provide financial incentives that pressure or encourage states to take certain actions, but Congress cannot compel or coerce state governmental actions. With the ACA Medicaid expansion, Roberts concluded, Congress had crossed the line from encouragement

Given that the conservative Roberts Court Justices are pro-business, readily invalidate legislation (particularly progressive economic legislation), and use formalist methodology, their claim that the *Obergefell* majority was resurrecting *Lochner* was more than a little strange. Their related call for more democracy was equally bewildering. Reading their dissenting opinions in *Obergefell*, one might surmise that they regularly celebrate democratic decision-making. That would be a mistake.

The conservative Justices generally follow conservative scholars who, for many years, have been attacking democratic law-making as irrational.¹⁸⁸ These scholars often are skeptical of government actions, particularly regulations of the economic marketplace, and rue the Court's rejection of the *Lochner* approach in 1937.¹⁸⁹ The renowned economist Milton Friedman is one of the leading antigovernment scholars.¹⁹⁰ Friedman maintains that the economic marketplace is a wondrous device because of the invisible hand.¹⁹¹ From this perspective, the market operates so that "the voluntary actions of millions of individuals can be coordinated through a price system without central direction."¹⁹² Each individual's interests and knowledge lead him or her to pursue desired goals and, simultaneously, lead society as a whole to pursue appropriate goals.¹⁹³ But the government operates like a backward reflection of the marketplace, according to Friedman.¹⁹⁴ There is an "invisible hand in politics [that] is as potent a force for harm as the invisible hand in economics is for good."¹⁹⁵ Government actors might have the best of intentions, yet they cannot help but pursue harmful goals.¹⁹⁶ "In politics, men who intend only to promote the public interest, as they conceive it, are

to coercion. *Id.* at 2604. The joint dissenters again agreed with Roberts on this point. *Id.* at 2662 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

¹⁸⁸ For instance, public choice theorists apply economic analysis to public decision-making to show that majority voting, as in democracy, is frequently an irrational means for making group decisions. According to public choice, when the government legislates, the legislative decisions do not rest on a rational calculation of costs and benefits. They arise instead from interest group machinations. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 1–11, 38–62 (1991). See generally WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* (1982) (arguing social choice theory calls democracy into question).

¹⁸⁹ For criticisms of congressional power and defenses of *Lochner*, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Douglas H. Ginsburg, *Delegation Running Riot*, 1995 REGULATION 1, 83–84 (1995) (arguing that, post-1937, the true Constitution has been in exile). For a response to the revisionist defenses of *Lochner*, see Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009).

¹⁹⁰ See, e.g., Milton Friedman, *Adam Smith's Relevance for 1976*, in *SELECTED PAPERS* no. 50.

¹⁹¹ *Id.* at 15–16.

¹⁹² *Id.* at 15.

¹⁹³ *Id.* at 16–17.

¹⁹⁴ *Id.* at 18–19.

¹⁹⁵ *Id.* at 18.

¹⁹⁶ *Id.*

‘led by an invisible hand to promote an end which was no part of’ their intention. They become the front-men for special interests they would never knowingly serve.’¹⁹⁷ Private interests necessarily manipulate democratic processes in ways that cannot arise in market transactions.

The conservative Justices, in numerous cases, have manifested similar skepticism toward democratic decision-making.¹⁹⁸ The Rehnquist Court began displaying such skepticism in *Lopez* and other congressional power cases.¹⁹⁹ The Court, for instance, started questioning whether Congress had made sufficient findings of fact to support its legislative actions.²⁰⁰ In these cases, the conservative Justices showed no respect for congressional expertise in the legislative realm.²⁰¹ Instead, the Court suggested that Congress needed to deliberate and make more thorough and precise findings so as to avoid committing so many egregious errors.²⁰² This judicial request for congressional findings reinstated another dormant doctrinal mechanism from the *Lochner* era.²⁰³ In a 1922 decision, to take one example, the Court invalidated a statute partly because Congress had failed to find specific facts showing that the regulated activity burdened interstate commerce.²⁰⁴

The conservative Justices on the Roberts Court have continued to press for congressional findings.²⁰⁵ In *Shelby County v. Holder*, a five-to-four decision, the Court invalidated a provision of the Voting Rights Act, passed pursuant to Congress’s power under the Fifteenth Amendment.²⁰⁶ The coverage provision of the Act specified which jurisdictions needed special government approval or pre-clearance before they could change their voting laws.²⁰⁷ The Court, in an opinion by Roberts,

¹⁹⁷ *Id.*; see also F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 94–95 (Ronald Hamowy ed., 2011) (arguing against government planning because of the complexity of social reality).

¹⁹⁸ See *infra* note 199.

¹⁹⁹ *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 527 (1997) (invalidating the Religious Freedom Restoration Act of 1993); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act).

²⁰⁰ See, e.g., *infra* note 202.

²⁰¹ See *infra* note 202.

²⁰² *City of Boerne*, 521 U.S. at 530; *Lopez*, 514 U.S. at 562–63; see also *Morrison*, 529 U.S. at 615 (acknowledging congressional findings but dismissing them as inadequate).

²⁰³ See A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 356 (2001) (describing “rigorous review of the legislative record” as characteristic of pre-1937 Supreme Court decision-making).

²⁰⁴ *Hill v. Wallace*, 259 U.S. 44, 68–69 (1922); see also *Bd. of Trade v. Olsen*, 262 U.S. 1, 31–38 (1923) (upholding statute similar to the one invalidated in *Hill* partly because Congress made sufficient findings).

²⁰⁵ See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (noting that congressional findings did not support the pre-clearance provision of the Voting Rights Act of 1965).

²⁰⁶ *Id.* at 2630–31.

²⁰⁷ Voting Rights Act of 1965, Pub. L. No. 89-110, 1965 U.S.C. (79 Stat.) 438 § 4(b) (1965), *invalidated in part by Shelby Cty.*, 133 S. Ct. at 2630–31 (2013).

acknowledged that the coverage provision was sensible in 1965, when Congress first enacted the statute.²⁰⁸ Congress, though, had reauthorized the Act several times over the years,²⁰⁹ and the Court concluded that the coverage provision did not fit the nation's current circumstances.²¹⁰ "Coverage today is based on decades-old data and eradicated practices."²¹¹ Roberts's opinion suggested that Congress left the Court with no choice but to invalidate the statutory provision.²¹² The Court, as Roberts explained, had sidestepped a similar constitutional challenge to the Act several years earlier and had encouraged Congress to update the coverage formula.²¹³ "Its failure to act leaves us today with no choice but to declare [the provision] unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance."²¹⁴

When one reads Ginsburg's *Shelby County* dissent, however, the case appears remarkably different. Ginsburg pointed to extensive and detailed congressional findings.²¹⁵

Congress determined, based on a voluminous record, that the scourge of [voting] discrimination was not yet extirpated. . . . With overwhelming support in both Houses, Congress concluded that, for two prime reasons, [the Act] should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress' province to make and should elicit this Court's unstinting approbation.²¹⁶

Ginsburg's dissent revealed the conservative majority's disdain for Congress and its democratic processes.²¹⁷ The Court did not merely ask Congress to make more

²⁰⁸ *Shelby Cty.*, 133 S. Ct. at 2625.

²⁰⁹ *Id.* at 2620–21.

²¹⁰ *Id.* at 2628 ("In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.")

²¹¹ *Id.* at 2627.

²¹² *Id.* ("As we explained, a statute's 'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.' The coverage formula met that test in 1965, but no longer does so." (citations omitted)).

²¹³ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (holding that the Supreme Court would apply the principle of constitutional avoidance to the question of the constitutionality of pre-clearance requirements).

²¹⁴ *Shelby Cty.*, 133 S. Ct. at 2631. "Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." *Id.*

²¹⁵ *Id.* at 2635–36, 2642–43 (Ginsburg, J., dissenting).

²¹⁶ *Id.* at 2632–33.

²¹⁷ *Id.* at 2644.

specific findings. Rather, the Court demanded that Congress make different findings. In short, it is unclear whether any congressional findings would have satisfied the conservative Justices, given that they apparently did not approve of Congress's action.

One should not miss the significance of the *Shelby County* decision. The Court not only demeaned Congress's democratic law-making, but also facilitated further discriminatory attacks on the democratic process. In recent years, more than thirty-one states have enacted laws restricting voting.²¹⁸ For instance, the Voter Information Verification Act of North Carolina not only requires voters to present government-issued photo identification at the polls but also shortens the early voting period, ends pre-registration for sixteen- and seventeen-year-olds, and eliminates same-day voter registration.²¹⁹ Under the Texas Voter Identification law, an individual who presents a concealed-gun permit can vote, but an individual with a student photo ID cannot.²²⁰ A Pew Center study discovered that "at least 51 million eligible U.S. citizens are unregistered, or more than 24% of the eligible population."²²¹ For purposes of comparison, more than 93% of eligible voters in Canada are registered.²²² To be clear, many American citizens do not participate because they are purposefully discouraged or prevented from doing so, not because they are apathetic. The new disenfranchisement laws tend to discriminate especially against those lacking money, leisure time, and bureaucratic know-how.²²³

²¹⁸ *Voting Laws Roundup 2015*, BRENNAN CTR. FOR JUST. (June 3, 2015), <https://www.brennancenter.org/analysis/voting-laws-roundup-2015> [<http://perma.cc/49LW-S77J>].

²¹⁹ *Summary of Voter ID Laws Passed Since 2011*, BRENNAN CTR. FOR JUST. (Nov. 12, 2013) [*hereinafter Summary of Voter ID Laws*], <https://www.brennancenter.org/analysis/voter-id-laws-passed-2011> [<http://perma.cc/WA3H-47GV>]; Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, WASH. POST (Aug. 12, 2013), <http://www.washingtonpost.com/news/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/> [<http://perma.cc/9M23-2ART>].

²²⁰ *Summary of Voter ID Laws*, *supra* note 219, at 13–14; Rick Lyman, *Texas' Stringent Voter ID Law Makes a Dent at Polls*, N.Y. TIMES (Nov. 6, 2013), http://www.nytimes.com/2013/11/07/us/politics/texas-stringent-voter-id-law-makes-a-dent-at-polls.html?_r=0. The Fifth Circuit held that this law violated the Voting Rights Act in part but did not constitute an unconstitutional poll tax. *Veasey v. Abbott*, No. 14-41127, 2015 WL 4645642 (5th Cir. 2015).

²²¹ PEW CTR. ON THE STATES, *INACCURATE, COSTLY, AND INEFFICIENT: EVIDENCE THAT AMERICA'S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE 1* (Feb. 14, 2012).

²²² *Id.* at 8.

²²³ See JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 163 (2012 ed.); Walter Dean Burnham, *Democracy in Peril: The American Turnout Problem and the Path to Plutocracy* 2–11, 25 (The Roosevelt Inst., Working Paper No. 5, 2010) (comparing voting franchise and turnout over the past century in the United States with that of European countries to demonstrate how elites have "gamed the machinery of elections"); Alexander Keyssar, *The Squeeze on Voting*, INT'L HERALD TRIB., Feb. 15, 2012 (noting that new voter laws have a disproportionate impact on immigrants, blue-collar workers, and the poor). The conservative Justices might claim that they have sought to protect state sovereignty from federal overreaching. In other words, according to this federalism outlook, they are not hostile to democratic government; they are hostile to national power. This claim, however, is difficult to square with the

CONCLUSION

Obergefell neither manifests a judicial attack on democracy nor a resurrection of *Lochner*. Contrary to the dissenters' arguments, the Justices who have been undermining democratic law-making and reinstating *Lochner*-era judicial themes are the four conservative dissenters themselves (often joined by Kennedy). Regardless, as the dissenters suggested, *Obergefell* crystallized a dispute over voice. The Court had to decide between the proponents of same-sex marriage and the opponents, inspired by traditional values and religious convictions. The loser's voice necessarily would be diminished.

The Court decided correctly. Discrimination against gays and lesbians should no longer be open to debate. Discriminatory laws, whether with regard to marriage or otherwise, necessarily undermine the democratic process. Thus, by preventing unequal treatment of gays and lesbians in marriage, *Obergefell* ultimately bolstered rather than harmed democracy.

broad negative ramifications for democracy of *Shelby County*. Plus, this claim is in tension with the numerous cases in which the Court has invalidated state and local government actions. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (invalidating state law restricting corporate political campaign expenditures); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (invalidating state law prohibiting the sale or rental of violent video games to minors); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (invalidating state law restricting the sale of medical data); *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (invalidating urban school districts' affirmative action programs); *see Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (emphasizing that state affirmative action program must be evaluated pursuant to strict scrutiny).