Serious Disagreement: Same-Sex Marriage, Judicial Review, and the Quality of Debate

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Abstract
Both defenders and critics of strong judicial review have relied on claims about the quality of debate in courts: the former, such as Ronald Dworkin, have characterized it as more principled than legislative debate, while the later, such as Jeremy Waldron, have called it overly-focused on text and precedent, to the detriment of substantive moral argument. The question can and should be studied empirically. To begin to do so, I compare American legislative and judicial debates, on the federal and state levels, on same-sex marriage. While legislatures and courts often heard similar arguments, the marriage debate in the courts took place on a qualitatively higher level: it showed more engagement between opposing points of view, better reasoning, and more serious treatment of opposing claims about rights. This finding, while in need of further study, ought to strengthen our confidence in courts’ power to make binding decisions on questions of rights.

Introduction
Which institutions are better suited to be the final forum of rights in a democracy—legislatures or courts? Strong judicial review, as practiced in the United States, vests this power in the courts, authorizing them to strike down legislative acts on rights-related (among other) grounds. While defenders of judicial review often highlight the judiciary’s “insulation” from political pressure, critics of judicial review point to that very insulation as a sign of illegitimacy. In examining Jeremy Waldron’s

\footnote{Jeremy Waldron distinguishes “strong” from other, more advisory, forms of judicial review; but for the sake of brevity, I will use “judicial review” to refer to the strong, American version.}
argument against judicial review, and other arguments in favor, I find that a crucial disagreement has to do with the kind of debate that takes place in courts: is it conducted on a higher, more principled level than debate in legislatures—or is it, in fact, not that special? To begin to study this question empirically, I consider five debates, two legislative and three judicial, on the issue of same-sex marriage. I find that while legislatures and courts often drew from the same stock of arguments, the same-sex marriage debate in the courts was qualitatively more serious and better reasoned. This finding ought to strengthen our confidence in the judiciary’s respect for rights and in the practice of judicial review.

**Forum of Elitism or Forum of Principle?**

In Waldron’s argument against judicial review, rights are not a given whose definition precede the practice of self-government; rather, continually defining and setting the extent of rights is among the most important subjects of self-government. Democratic citizens disagree about rights in good faith; but advocates of judicial review, claiming that courts have better access to the “truth” about rights, would settle these disagreements by assigning them to judicious elites. Waldron’s argument hinges on the claim that those elites, notwithstanding their black robes and wordy opinions, in truth take rights no more seriously than the rest of us. There is, in this view, no final “truth” about rights—only the question of where to conduct our disagreement. Defenders of judicial review would like to conduct this disagreement “on the solemn plane of constitutional principle far from the hurly-burly of legislatures and political controversy and disreputable procedures like voting.” But in reality, “the judges disagree among themselves along exactly the same line as the citizens and representatives.” If judicial disagreement is substantively no different from legislative disagreement, then judicial review is revealed

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3 Id. at 15.
as a system that disenfranchises the majority from participation in the most foundational political debates, with no compensating benefits.

Waldron makes that argument in detail in “The Core of the Case Against Judicial Review.” He divides the case into “process-related” and “outcome-related” contentions: the former deals with the fairness of courts’ and legislatures’ respective decision procedures, and the latter with the seriousness with which the institutions take questions of rights. I have no disagreement with Waldron’s claim that legislatures maximize process-related criteria: they are ideally designed to reflect the will of the majority, while courts are specifically empowered to defy the majority.\(^4\) Rather than contesting the process criterion directly, many defenders of judicial review contend that courts’ political insulation is necessary to defend democracy in the deeper sense of respecting rights, ensuring equal concern for individuals, or protecting vulnerable minorities.

Do courts routinely outshine legislatures in that mission? Waldron argues that they do not: with the process-related contention tilted decisively in favor of legislatures, the outcome-related contention is, at best, a wash. Waldron criticizes the tendency to compare the ideal court (conceived of as a place of Socratic disputation) with all-too-human legislatures (conceived of as places of blind political power and special-interest logrolling)\(^5\). He reminds us that courts, too, have their moments of surrender to popular prejudice.

Waldron finds that the commonly claimed advantages of courts do not stand up to scrutiny. While defenders of judicial review point to courts’ distinctive engagement with individual cases, Waldron claims that argument on the appellate level is conducted almost entirely in the abstract, which makes it no different from legislative argument.\(^6\) While defenders of judicial review praise the American

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courts’ respect for a written Bill of Rights, Waldron argues that appellate judges too often put a “rigid textual formalism” ahead of serious engagement with moral issues, combing over texts and precedents rather than confronting the concrete issues at hand.\(^7\) Judges, in this view, spend far too much time parsing oracular phrases (such as “equal protection” or “free exercise”) in lieu of confronting substantive questions of rights: “The proportion of argument about theories of interpretation to direct argument about the moral issues is skewed in most judicial opinions in a way that no one who thinks the issues themselves are important can possibly regard as satisfactory.”\(^8\)

Perhaps the weightiest argument in favor of judicial review holds that judicial decisions are better-reasoned than legislative ones. Legislatures produce only a vote tally, subject to any amount of off-the-record deal making; individual legislators may produce statements in defense of their votes, but these do not match the high standard of judicial reasoning. Again, however, Waldron casts doubt on what he calls an idealization of the judiciary. Instead of turning on finely-wrought pieces of moral philosophy, he contends that judicial opinions are more likely to turn on “some antique piece of ill-thought-through eighteenth- or nineteenth-century prose…to construct desperate analogies or disanalogies between the present decision…and other decisions that happen to have come before…[and to contain] laborious discussion of precedent….The real issues at stake in the good faith disagreement about rights get pushed to the margins.”\(^9\) All of this takes place when courts are operating at their best, because courts are expected to behave legalistically, with close attention to text and precedent—a mode that is simply not appropriate to serious moral disagreement.

What, by contrast, do legislatures look like when they are operating at their best? Waldron cites the British Parliament’s 1966 debate over abortion rights, in which legislators on both sides “debated the

\(^7\) id. at 1381.
\(^8\) id.
\(^9\) id. at 1383.
questions passionately, but also thoroughly and honorably, with attention to the rights, principles, and pragmatic issues on both sides.”

Rather than burrowing into textual minutiae, a legislature brought real moral disagreement to the forefront and conducted that disagreement respectfully.

Debates like that, Waldron argues, are exactly why generations of activists risked so much to win the vote. They did so because they wanted to have a say in the most fundamental disagreements that a society can confront—not to have those disputes shunted aside to be resolved by a lawyerly elite. Defenders of judicial review might argue that courts’ advantage lies in that very elite’s dispassion and respect for minority views. “They will defend this as an empirical claim,” Waldron writes, but “it is entirely consonant with ancient prejudices about democratic decisionmaking.”

In a similar vein, Adrian Vermeule sees in the denigration of legislatures “a form of nirvana fallacy that uses rational argument to impeach the first-order rationalism of legislative institutions and processes, but that fails to apply its analysis evenhandedly to judicial institutions.” In fact, “the epistemic superiority of legislative lawmaking emerges under a broad range of conditions,” because legislatures’ diversity of views, larger number of members, and wider access to information contrasts favorably to “the relatively small number of judges on relevant courts, their limited informational base, their professional homogeneity, and their generalist rather than specialized skills.”

On the other side of the argument is a much more sanguine view of judicial reasoning and capabilities. One of the most influential statements of that view comes from Ronald Dworkin, who coined the description of the judiciary as “the forum of principle.” Where Waldron’s argument presumes a liberal society with a baseline of respect for individual rights, Dworkin contends that courts themselves play a crucial role in fostering this societal respect. Well-functioning courts act as defenders of the non-

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10 Id. at 1384.
11 Id. at 1405.
negotiable axioms that allow democracy to function, such as equal concern and respect for individuals. Courts do in fact raise public debate to a higher level, because they speak in the language of principle; they are the only branch of government regularly prepared to deal with rights rather than efficiency. As a result, judicial review “forces political debate to include argument over principle, not only when a case comes to the Court but also long before and long after.” For example, Dworkin claims that the Warren Court’s decisions on segregation helped galvanize a new national consensus on racial equality by forcing both sides of the debate to express themselves in explicitly principled terms—and by exposing one side’s arguments as bankrupt.

Far from taking moral reasoning out of the political sphere, judicial review creates a unique “legal and political culture”: the courts’ emphasis on rights sets the tone for a debate in which public officials, especially those with legal educations, treat the controversies they face with a gravity that extends beyond vote-counting and expediency. Where Waldron praises British parliamentarians for their seriousness in the absence of judicial review, Dworkin compares them unfavorably to their American counterparts, who can draw on a stronger tradition of argumentation over rights.

Several other critics of Waldron’s majoritarianism raise related points. Alon Harel disputes Waldron’s claim that higher courts act on an abstract level that effectively ignores individual grievances: he finds that courts, such as Israel’s High Court of Justice, regularly pay more attention to personalized claims than legislatures, and that even when these claims are debated in the abstract, courts’ “ceremonial concreteness” is an important demonstration of their respect for individual rights.

Other critics frankly defend the superiority of courts’ “expert” reasoning. As Aileen Kavanagh writes: “In cases where we do not have the relevant expertise or knowledge, we often hand over the

15 Id. at 70-1.
power to make decisions to those who have. That these are important decisions which affect us may be a strong reason in favour of allowing someone else to decide them.” And, contrary to Waldron, we can still criticize majoritarian decisions without denigrating individual dignity. Waldron may make an unjustified linkage between respect for the individual and respect for the outcomes of majority rule, a linkage that David Enoch wants to break:

[Respect for the individual] is perfectly consistent with our being stupid, morally corrupt, almost bound to act wrongly and imprudently, and perhaps most importantly—dangerous to ourselves and others….There is no contradiction—not even tension—in claiming that we—the folk—are worthy of Kantian respect because of what at our best we can be, and that we should be distrusted because of what—the evidence shows—we are very likely to do. 18

So the claim that judicial elites can outdo legislative majorities in respecting minority rights is not simply, as Waldron holds, a reflection of “ancient prejudice,” but a contention that can and ought to be studied empirically.

**Same-Sex Marriage and the Quality of Debate**

Which view of the courts hews closer to reality? Proponents of each can, as both Waldron and Dworkin do, pick individual cases that show legislatures and courts operating at their best and worst. But if we agree with Enoch, as I do, that courts’ relative respect for rights should be subject to empirical scrutiny, it is important to compare courts and legislatures more systematically.

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We can conduct a “quasi-experiment” of this sort by studying a contentious issue of rights that has been taken up by both courts and legislatures: the legality of same-sex marriage. As same-sex marriage has emerged as one of America’s most controversial social issues, legislatures have debated both legalizing and banning it, and the constitutionality of bans has been argued in both state and federal courts. Here, I compare five such debates: in 2006, the United States Senate voted down an amendment to the federal constitution banning same-sex marriage; in 2009, the New York State Senate voted down a bill legalizing same-sex marriage; in 2008, the Supreme Court of California struck down statutory bans on same-sex marriage \textit{In re Marriage Cases}; also in 2008, the Supreme Court of Connecticut found the separate category of same-sex civil unions unconstitutional in \textit{Kerrigan v. Commissioner of Public Health}; and in 2010, United States District Court for the Northern District of California held a trial, \textit{Perry v. Schwarzenegger}, challenging the constitutionality of a same-sex marriage ban added to the California constitution by ballot proposition.\textsuperscript{19}

I consider these cases a representative sample of the same-sex marriage debate on both the federal and state levels. The 2006 Senate debate marks the only time that the U.S. federal government has considered a same-sex marriage amendment, and \textit{Perry} is the only federal trial to consider an equal-protection challenge to same-sex marriage bans. New York was one of seven states, and the District of Columbia, to consider legalizing same-sex marriage by legislative action, and arguably the state in which the outcome was most in doubt at the time of the debate.\textsuperscript{20} And \textit{In re Marriage Cases} and

\textsuperscript{19} While Waldron focuses his criticism on appellate courts’ published opinions rather than the proceedings of trials, I find it worthwhile to consider the District Court’s \textit{Perry} trial, as well. It was one of the most comprehensive and public airings of the arguments on both sides of the issue in recent memory; it demonstrates the extent to which the participants in the judicial branch, judges and lawyers, approach questions of rights differently than elected legislators; and its arguments are eventually expected to be recapitulated on the appellate level, possibly before the U.S. Supreme Court.

Kerrigan represent two of the four American state supreme court decisions in favor of same-sex marriage.

The purpose of this comparison is not to ask whether the courts or legislatures have arrived at a correct outcome. Given that Waldron’s argument presumes good-faith disagreement over the extent of rights, holding courts and legislatures up to the standard of a predetermined “right answer” would be begging the question.

What I am interested in is what I will call the quality of debate. The quality of debate is not a question of rhetorical flourish, but of the extent to which judges and legislators give intelligible reasons for their decisions, offer a variety of reasons, and support those reasons with evidence. Do judges take the moral stakes seriously, or do they, as Waldron alleges, spend more time parsing texts? Do legislators make sustained arguments, or do they resort to slogans? Do both sides engage one another’s arguments, or ignore them? Do opponents of same-sex marriage adhere to the questions of marriage at hand, or do they veer into broad, *ad hominem* disparagement of gays? If so, is this disparagement challenged, or allowed to stand?

Why is the quality of debate important? For one, it is a measure of the extent to which courts and legislatures take seriously individual rights and disagreements over their scope. Further, much of the disagreement between Waldron and Dworkin hinges on the kind of discourse that goes on in courts and legislatures. If judges argue over the same issues in essentially the same way as the rest of us, then the case against judicial review is significantly strengthened. If, on the other hand, judicial discourse really happens on a more reasonable, more overtly principled level, then the case is weakened.

Before I move on to the comparison, I want to note two ways in which it is necessarily limited. First, we can draw only limited conclusions from a look at just one controversy in a handful of forums; but a look at the way such a contentious issue is debated is worthwhile in itself, as well as an attempt to
show that systematic comparisons between courts and legislatures are possible and fruitful for a variety of issues. Given the possibility that courts and legislatures behave differently on the issue of same-sex marriage than on other issues, that range of comparisons will be necessary before we can take a position on judicial review with complete confidence.

Second, my experiment lacks a “control group”: the legislative debates I examine are conducted not in a vacuum, but in a country that already uses judicial review. Whether the existence of judicial review leads legislators to take rights more seriously, through the trickle-down effect of principle, or less seriously, because “legislators rely on the courts to bail them out if they make a constitutional mistake,” both sides of the argument agree that judicial review affects legislative behavior.\(^{21}\) Lacking two countries that are identical in everything but the existence of judicial review, the strength of my conclusion will have to be tempered by this effect.

**The Debate in the Legislatures**

*U.S. Senate.* On June 7, 2006, the Senate debated adding the Federal Marriage Amendment, a same-sex marriage ban endorsed by President Bush, to the United States Constitution. Though the amendment won a plurality of votes, 49 to 48, it fell far short of the two-thirds required to be sent to the states for ratification.

Rather than addressing the merits of same-sex marriage directly, most opponents of the amendment relied heavily on two procedural claims: first, that the Constitution was not the right place to resolve the issue of same-sex marriage; and second, that the entire issue was raised by Republicans as a politically-motivated distraction. The first argument was exemplified by Sen. Richard Durbin (D-Ill.): “One of the first things a Member of the Senate should learn is humility, humility when it comes to

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some of the documents that guide our Nation….I think it is bold of some of my colleagues to believe that their handiwork, their words, could stand the test of time.”22 The “distraction” argument was put forward by then-Sen. Barack Obama (D-Ill.): “We are here…because it is an election year—because the party in power has decided that the best way to get voters to the polls is not by talking about Iraq or health care or energy or education but about a constitutional ban on same-sex marriage.”23 In fact, as amendment supporter Sen. Sam Brownback (R-Kan.), observed, “I have heard very little debate against the amendment. I have heard a lot of people complaining that we ought to take up something else.”24

When the substance of same-sex marriage was discussed, it was usually in general terms of opposition to “discrimination and divisiveness.” Sen. Patrick Leahy (D-Vt.) urged his fellow senators to “recognize the dignity and worth of others.”25 Sen. Russell Feingold (D-Wisc.) questioned how the marriage of gay Americans threatened heterosexuals: “Gay Americans are our neighbors, our friends, or family members, and our colleagues….Let’s not use them as scapegoats for perceived social problems.”26

On the other side of the debate, Republican senators frequently asserted, in the words of the amendment’s sponsor, Sen. Wayne Allard (R-Col.), that “marriage is the union of a man and a woman.”27 Nearly every Republican speaker claimed that a national consensus was being thwarted by what Sen. Michael Enzi (R-Wyo.) called “some rogue local officials and activist judges who wish to push their agenda onto the majority of Americans.”28

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22 152 CONGRESSIONAL RECORD-Senate S5519 (2006).
23 Id. at S5524.
24 Id. at S5518.
25 Id. at S5529.
26 Id. at S5518.
27 Id. at S5519.
28 Id. at S5519.
Two arguments were made against same-sex marriage on the merits. First, rather than being
discriminatory, a same-sex marriage ban was necessary to preserve the American family structure. Sen.
Brownback said, “The best situation for our children to be raised is in a home with a mother and
father.”

Sen. James Inhofe (R-Okla.) cited anthropologist and commentator Stanley Kurtz to argue that
legalization of same-sex marriage leads to the decline of marriage as a whole and an increase in out-of-
wedlock births.

Second, Sen. Rick Santorum (R-Penn.) made the case that legalization of same-sex
marriage harms religious liberty by discriminating against religious organizations that refuse to
recognize gay relationships. Sen. Santorum cited several examples of alleged discrimination against
conservative religious organizations, raised hypotheticals of future discrimination, and quoted from a
range of legal experts.

However, several Republican statements came uncomfortably close to anti-gay animus. Sen.
Inhofe said, “The homosexual marriage lobby, as well as the polygamous lobby…are paving the way for
legal protection of such practices as homosexual marriage and unrestricted sexual conduct between
adults and children, group marriage, incest, and, you know: if it feels good, do it.”

If courts legalize same-sex marriage, Sen. Santorum asked, “Will a minister be able to preach from I Corinthians 6:9 that
the unjust and immoral such as adulterers, prostitutes and sodomites will not inherit the earth?”

And Sen. Brownback spoke at length on the loving commitment of his wife’s parents, “two old trees leaning
against each other, holding each other up,” while implying that similar commitment is not possible in
gay relationships. These arguments stand out as uniquely different from the Republican claims cited
above. Sen. Inhofe connected same-sex marriage, without justification, to such universally-abhorred

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29 Id. at S5518.
30 Id. at S5523.
31 Id. at S5527-8.
32 Id. at S5522.
33 Id. at S5528.
34 Id. at S5519.
practices as pederasty and incest. Sen. Santorum seemed to write off all gays as “unjust and immoral.” And Sen. Brownback, in singling out heterosexual relationships for their long-term love, seemed to paint gay couples as incapable of selfless commitment into old age. In contrast to specific arguments about the role of same-sex marriage, these were derogatory claims about an entire minority.

New York State Senate. On December 2, 2009, the New York State Senate debated and voted on “An Act to Amend the Domestic Relations Law,” which would have made New York the fourth state to legalize same-sex marriage by legislative action. Unusually for the State Senate, the outcome was not known in advance when the bill came to the floor for debate.35

The bill’s advocates spelled out the benefits of same-sex marriage, both concrete and symbolic. Sen. Kevin Parker (D) pointed out that dozens of state and federal benefits are denied to couples that are not legally married; Sen. Pedro Espada (D) argued that public recognition of gay relationships would reduce prejudice and help stop “children in schoolyards beating each other up because one may look too effeminate.”36 Sen. Jeffrey Klein (D) cited a report from New York City’s comptroller that same-sex weddings would bring the city $200 million over three years.37

A handful of senators spent time addressing common arguments against same-sex marriage. Sen. Eric Schneiderman (D) said: “For better or worse, our [heterosexual] rights to marry stay the same….They’ve had marriage equality for five years in Massachusetts, and we know what happens when you pass it. No religious institution is affected.”38

But by far the most common theme struck by supporters of the bill cast it as part of America’s long-term expansion of individual rights and equality. Several senators compared bans on same-sex marriage to the bans on interracial marriage that were struck down by the Supreme Court in Loving v.

35 Peters, “New York Senate Rejects Gay Marriage Bill.”
36 NEW YORK STATE SENATE EXTRAORDINARY SESSION TRANSCRIPT 7662 (2009).
37 Id. at 7646.
38 Id. at 7634.
Virginia. As Sen. Schneiderman put it, the bill “recognizes that we’re not better than Senator Duane [a gay colleague]. He is our equal. We’re not better than any of our gay brothers or sisters.”

Opposing the bill, Sen. Reubén Díaz (D) appealed for Republican votes:

It has been the Republican Party with their moral values, and it has been the Republican Party with their family values that for years and years has kept these values in the whole nation alive. Now they are being asked to throw away their values, to throw away whatever they have been doing in the whole nation and whole world to keep family values and moral values, traditional values.

Sen. Díaz claimed that “all the major religions in the world also oppose” same-sex marriage and that the majority of states have voted against it, except when “some politicians or some judges” impose it.

Sen. Díaz was the only member of the body to speak in opposition to the bill. Nevertheless, 37 of his colleagues joined him in defeating the bill, by a vote of 38 to 24.

The Debate in the Courts

California Supreme Court. In re Marriage Cases, decided on May 15, 2008, was the consolidation of six actions in the California courts challenging state statutes restricting marriage to one man and one woman (the most recent of which was passed by ballot initiative in 2000). In a 4-3 ruling, the California Supreme Court found that sexual orientation was a suspect class under the state constitution’s Equal Protection Clause, that the state’s policy of offering only “domestic partnerships” to gay couples violated a right to marry, and that this policy failed both the strict scrutiny and rational basis standards. As a result, the statutory same-sex marriage ban was found unconstitutional.

39 Id. at 7635.
40 Id. at 7625-6.
The Supreme Court acknowledged lower courts’ argument that marriage has historically been defined as heterosexual, but pointed to its lifting of interracial marriage bans as evidence that historical understandings of marriage have sometimes been rightly overturned. The Court drew on precedent tying marriage to essential rights of liberty and autonomy and further argued that sexual orientation, as a fundamental identity like race or gender, should not impinge on an individual’s ability to enjoy those rights. As a result, the Court dismissed lower courts’ claims that the right to marry was upheld by permitting all individuals to enter into opposite-sex marriages.

While California’s Attorney General argued that gay couples’ rights were satisfied through the availability of domestic partnerships with identical state benefits, Chief Justice Ronald George’s majority opinion argued that “reserving the historic designation of ‘marriage’ exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples…equal dignity and respect.” The state’s interest in preserving the traditional definition of marriage did not outweigh the harm done in declaring gay Californians “second-class citizens.”

In dissents, Justices Marvin Baxter and Carol Corrigan weighed the alleged harms to gay couples differently: because marriage and domestic partnerships were substantively identical, the state was not seriously threatening gay citizens’ rights. Rather, the harm came from the Court’s overturning of the longstanding definition of marriage and the vote of the majority of Californians. As Justice Baxter put it, “If there is to be a further sea change in the social and legal understanding of marriage itself, that evolution should occur by…democratic means.” Justice Corrigan agreed that the Court took its power of judicial review too far: “In a democracy, the people should be given a fair chance to set the pace of

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41 In re Marriage Cases, 43 Cal.4th 757, 183 P.3d 384, 400 (2008).
42 Id. at 402.
43 Id. at 456.
change without judicial interference….But when ideas are imposed, opposition hardens and progress may be hampered.”

Connecticut Supreme Court. In 2004, eight gay couples who had been denied Connecticut marriage licenses challenged the state’s restriction of marriage to opposite-sex partners, with the category of civil unions set aside for gays. On October 10, 2008, in *Kerrigan v. Commissioner of Public Health*, the state Supreme Court found in their favor in a 4-3 ruling, concluding that the exclusion of gays from marriage violated the state constitution’s equal protection guarantee.

As in California, the state argued that it met its constitutional burden by providing a legally-indistinguishable designation for same-sex relationships. But the Court ruled that this was enough to consign gays to second-class citizenship. As Justice Richard Palmer wrote in the majority opinion, marriage and civil unions “are by no means ‘equal.’…The former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not. [This] differential treatment…is no less real than more tangible forms of discrimination.”

Such unequal treatment was unconstitutional, the Court found, because gays as a group should fall under the state constitution’s guarantee of equal protection. Justice Palmer came to this conclusion on several grounds: gays have historically been victims of discrimination; persons’ same-sex attraction “bears no logical relationship to their ability to perform in society”; “sexual orientation is…an essential component of personhood”; and gays are “a small and insular minority,” whose representation in elite roles remains limited.

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44 Id. at 471.
46 Id. at 434-54. The description of gays as a “small and insular minority” connects the *Kerrigan* ruling to the tradition of equal-protection jurisprudence originating with Justice Harlan Stone’s famous “Carolene Products footnote.” See *United States v. Carolene Products Co.*, 304 U.S. 144, fn. 4 (1938).
York Times observed that the majority opinion “often rose above the legal landscape into realms of social justice for a new century.”

In his dissent, Justice David Borden challenged Justice Palmer’s conclusion on civil unions as a theoretical assumption with little basis in fact: “At this point in our state’s history…and without any appropriate fact-finding on the issue, I am unable to say that [a civil union] is widely considered to be less than or inferior to marriage, or that it does not bring with it the same social recognition as marriage. It is simply too early to know.” And in a separate dissent, Justice Peter Zarella stressed the connection of marriage to procreation, arguing that the state had a legitimate interest in restricting marriage: “The ancient definition of marriage as the union of one man and one woman has its basis in biology, not bigotry. If the state no longer has an interest in the regulation of procreation, then that is a decision for the legislature or the people of the state.”

Federal District Court. In response to the California Supreme Court’s ruling In re Marriage Cases, same-sex marriage opponents placed on California’s 2008 general election ballot Proposition 8, designed to add the definition of marriage as the union of one man and one woman to the state constitution. Proposition 8 succeeded, but it was subsequently challenged on federal equal protection grounds. In Perry v. Schwarzenegger, Federal District Court Judge Vaughn Walker heard arguments on Proposition 8’s constitutionality. The evidence phase of the trial concluded on January 27, 2010, and the closing arguments on June 16, 2010, though Judge Walker has yet to issue a ruling.

From the beginning, Judge Walker was an active participant in the trial, frequently interjecting to challenge counsels’ arguments and evidence. For instance, when plaintiffs’ counsel Theodore Olson reiterated the state Supreme Court’s argument that the institution of domestic partnerships resembled

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48 Kerrigan v. Commissioner, 486.
49 Id. at 516.
“separate but equal” segregation, Judge Walker interrupted: “Are those differences of a legal nature? That is, are these differences…the product of state action, or is that simply societal acceptance?” Olson responded: “The two are so closely interwoven, they cannot be extracted…. [The state] has labeled a separate relationship…as a unique and special relationship reserved for opposite-sex couples.”

Similarly, Charles Cooper, counsel for Proposition 8’s supporters, was frequently challenged by Judge Walker. When Judge Walker asked Cooper how he could appeal to the historical understanding of marriage when interracial marriage bans were also part of marriage history, Cooper argued that the definition of marriage as heterosexual, unlike interracial marriage bans, is universal and fundamental. Judge Walker also asked Cooper to justify the defense’s claim that legalizing same-sex marriage would damage marriage as a whole: “In your proposed findings…extending marriage to same-sex couples would, and I quote, ‘radically alter the institution of marriage.’ Okay. What’s the evidence going to show?” Cooper replied that procreation and two-parent child-rearing are inherent to marriage.

In the evidence phase of the trial, the plaintiffs called more than a dozen witnesses. These included the two plaintiff couples, who spoke at length about the perceived stigma of domestic partnerships; civil rights scholar Helen Zia, also described what she called the degrading experience of applying with her partner at an “all-purpose postal window…where I think they issued dog licenses as well as domestic partnership licenses.” A range of expert witnesses, most of them university scholars, testified for the plaintiffs over ten days. Among the claims advanced were the following: the definition of marriage has changed dramatically throughout history, and has often been restricted “punitive” to target minority groups; the campaign for Proposition 8 demonized gays and charged that they wanted to “legalize having sex with children”; same-sex marriage bans spread social stigma and violence against

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50 *Perry v. Schwarzenegger*, N.D.Cal. (NO. C 09-2292) (2010), trial transcript, 22.
51 *Id.* at 58-62.
52 *Id.* at 236.
gays; marriage confers important psychological benefits; developmental psychologists agree that children raised by gay and heterosexual parents are equally well-adjusted; and individuals and cities would benefit economically from the expansion of marriage.

All of these expert witnesses were challenged at length on cross-examination: for instance, defense counsels asked if gays truly lacked access to the political process that resulted in the passage of Proposition 8, given their prominence in popular culture and California politics. The plaintiffs’ psychological experts were challenged on their contentions that same-sex relationships were indistinguishable in stability and child-rearing from heterosexual relationships, and the accuracy of the plaintiff’s economic witness was also scrutinized.

The defense called two expert witnesses. Kenneth Miller, a professor of government, claimed that gays had strong political influence in California, and that the campaign for Proposition 8 was not based on animus; plaintiffs’ counsels confronted him with his writings criticizing the ballot initiative process, especially for its tendency to target minority groups. Author and think-tank president David Blankenhorn argued that marriage is inherently procreative, that children suffer when they are not raised by two biological parents, and that permitting gays to marry would increase the rates of divorce and out-of-wedlock births. Plaintiffs questioned Blankenhorn’s academic credentials and claimed that his assertions on the decline of marriage lacked evidence.

**Comparison**

Which side of the judicial review argument does this evidence tend to support? Advocates on both sides of the argument speak of the benefits of “personalization,” or allowing concrete, personal rights claims to be heard in the public forum, as a way of strengthening and dramatizing the state’s concern for the individual. While some of New York’s legislators told stories of gay friends or relatives at second hand,
only Senator Dunne spoke of being denied the right to marry as a gay man. In the judiciary, Perry stood out for giving four plaintiffs—who did not hold political office—a long and respectful hearing to tell their own stories. On the other hand, the unique details of those stories may fade by the time the case reaches the appellate level. At least in the cases I considered, the question hinges on whether Harel’s “ceremonial concreteness” makes a difference in the judiciary’s respect for rights. For the most part, however, the cases I considered do not contradict Waldron’s claim that individuals are mostly absent from appellate decisions.

These debates also lend credence to Waldron’s claim that “the judges disagree among themselves along exactly the same line as the citizens and representatives.” Very few arguments were unique to either the legislature or the judiciary: advocates in both forums were drawing from essentially the same list of points on either side. That shouldn’t surprise us—especially in such a long-running, high-profile controversy, it would be rare for anyone to stumble on an entirely new argument.

But if the debates were similar in outline, I argue that they were qualitatively very different. One factor stands out the most: in the judiciary, opponents directly engaged with one another’s arguments. In federal district court, Judge Walker consistently demanded explanations and evidence from attorneys on both sides, and expert witnesses were subjected to long and aggressive cross-examination; in the California Supreme Court, justices respectfully recapitulated opponents’ arguments before refuting them; in the Connecticut Supreme Court, justices had a direct confrontation on whether the same-sex marriage ban was a true denial of equal protection. In the legislatures, by contrast, the debate was much more disjointed. Though legislators occasionally mentioned opposing positions, they often did so in caricatured, truncated form. An especially telling instance was the dispute over the proper role of judicial review: compare Republican senators’ shallow treatment of “activist judges” to the thoughtful discussions of the judiciary’s role in a time of changing social norms written by Justices Baxter and
Corrigan (both Republican appointees). Most strikingly, many legislators were able to ignore the other side altogether. In the U.S. Senate, Democrats spent more energy calling the Republicans’ amendment a political distraction than arguing against it. And in New York, every senator opposed to same-sex marriage, but one, refused to explain his or her vote, with the result that their reasons were exposed to an absolute minimum of public scrutiny.

In the debates considered, I may not have captured courts and legislatures acting ideally—but I believe, particularly on the issue of engagement, that I have found them acting characteristically. While the nature of the ideal court or legislature is subject to a wide range of conflicting interpretations, we can more reliably settle on a shared idea of characteristic behavior, both by empirical study and by considering the nature of the incentives that these institutions face. Courts’ majority and dissenting opinions are explicitly written as a dialogue, or at least as paired statements in response to one another; if a dissent ignores the majority’s argument, or vice-versa, it would count as a severe concession. On the other hand, legislators’ incentives are different: they naturally place a higher priority on putting their views on the record than on directly responding to opponents’ views. Especially on a politically-sensitive issue, there is little to gain, and potentially much to lose, from an uncaricatured acknowledgement of an opponent’s position, or even from a detailed statement of one’s own position. That dynamic played out in the U.S. Senate: with enough votes to block the adoption of the marriage amendment, Democrats had no political incentive to confront the issue on its merits, and so they rarely did. But the courts’ incentives, and their political insulation, pointed toward a more substantive debate.

But if the judicial arguments were more truly a debate, were they a text-obsessed debate over minutiae, as Waldron charges? To be sure, judges did frequently deploy terms of art, such as “equal protection” or “rational basis.” But I did not find that the use of these terms distorted the argumentation as much as Waldron suggests. For one, a term like “equal protection” may indeed have a long and
convoluted history of legal precedent and doctrine behind it. But it is not simply, as Waldron claims, “an antique piece of ill-thought-through eighteenth- or nineteenth-century prose.” It is also an extremely broad umbrella under which any amount of diverse moral reasoning can find shelter; if it is, in part, defined by precedent, judges (especially on the highest appellate levels) are not bound to any fixed relationship with precedent, as we see whenever decisions are overturned. “Equal protection” also expresses an essential moral principle in its own right. In the U.S. Constitution, that principle of equality goes under the name “equal protection of the laws”; but if the text were different, and the principle went under a different name, would the legal reasoning that derives from it be fundamentally different? In fact, the use of legal terms of art did not prevent the opinions I examined from addressing wide-ranging moral themes, including dignity, societal discrimination, and alternative conceptions of marriage’s purpose; the use of terms of art did not stop Justice Palmer from discussing sexuality as “an essential component of personhood,” a line of argument that would seem equally at home in a philosophy seminar. Indeed, the New York Times explicitly noted the degree to which Connecticut’s majority decision departed from the realm of legalism. Whether or not a conservative critic would be pleased with that outcome, it seems to be exactly the kind of outcome that Waldron considers unlikely.

But if legal terms of art allow for broad moral argumentation, why use them at all? An answer may lie in the tendency of the judicial arguments I considered to proceed by logical steps. The pressure to structure their arguments around accepted terms and precedents lent the judicial decisions a discipline that the legislators’ more disjointed, less comprehensive arguments lacked. For instance, the tradition of reasoning that derives from the Carolene Products footnote gives judges a structured way to think about the criteria for equal protection, rather than simply picking and choosing protected classes on a whim. Of course, judges have a difficult balance to strike between ungrounded, free-form rulings, on one hand, and obsessive textualism, on the other hand—but isn’t that the same balance that has to be struck by all
moral arguments? To my mind, the line between legal argument and supposedly-unfettered moral
disagreement is not as bright as Waldron considers it. Moral arguments have their own terms of art: one
could refer to “the good,” or “utility,” or “fair equality of opportunity” in isolation, but one might also
take into account that each of those terms has decades, or even centuries, of dispute and attempts at
definition behind it; in fact, one’s own usage of such a term, whether one knows it or not, is likely to be
shaped by those years of previous usage. Just like legal arguments, moral disagreements have their own
lines of precedent (imagine a serious book without citations), and the challenge of balancing between
overreliance and underreliance on precedent is not unique to the judiciary. Waldron could argue for less
reliance on precedents, rather than an end to strong judicial review altogether; but I question whether he
has shown that the “legalism” he criticizes is uniquely legal.

Further, did legislators, free from textual obsessions, show a more serious and direct approach to
moral questions? At least in the cases I considered, there were more instances of unsubstantiated
assertion—such as Senator Díaz’s claim that only heterosexual marriage represents “moral values”—
and fewer sustained discussions of, say, the changing (or unchanging) historical role of marriage.
Legislators are certainly free to adopt judges’ more disciplined style of argument from precedent; but
given the political incentives in play, it is reasonable to ask why they would.

Finally, as we saw, Republican senators compared homosexuality to pederasty, prostitution, and
incest—and while Democrats spoke against “discrimination” in general terms, they did not criticize the
derogatory statements made in their hearing. The court cases, on the other hand, were free of those
terms—except when expert witnesses in Perry explicitly criticized expressions of disgust against
homosexuals from the Proposition 8 campaign.

In all, I find that same-sex marriage was debated in the judiciary on a higher level: that the
arguments conducted in the courts proceeded in a more engaged, evidence-based, and respectful way.
Conclusion: Does Any of This Matter?

I ask the question in three senses. First, even if it could be shown conclusively that courts come to their decisions through higher-level debate, should that make us more trusting of the practice of judicial review? Waldron might not agree:

Machiavelli warned us, almost five hundred years ago, not to be fooled into thinking that calmness and solemnity are the mark of a good polity, and noise and conflict a symptom of political pathology. “Good laws,” he said, may arise “from those tumults that many inconsiderately damn.”

But I find it absolutely reasonable to listen to what debate sounds like. In fact, what we saw in these legislative debates was almost the opposite of “tumult.” Compared to the judiciary—with its two-sided debate and demand for evidence—we saw almost an unwillingness to argue. And even though the debate in the judiciary was conducted by a cast of elites, I saw in the legislatures a more dangerous form of elitism in practice—the recurring temptation to merely pronounce one’s own view, as if that settled the matter.

But, Waldron might respond, the legislative debates did not really settle the matter: they were only the last and most superficial stage of a process of accountability that included interest-group pressure, private deal-making, and elections. I would simply answer that the way decisions are publically justified matters. For one, debates in public forums influence society’s broader debates: anyone observing the U.S. Senate debate same-sex marriage saw the equation of homosexuality and incest go unchallenged, while anyone observing Perry v. Schwarzenegger saw similar assertions challenged at length. Dworkin rightly argued that the Supreme Court’s debates exposed segregationist

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53 Waldron, The Dignity of Legislation 34.
arguments as significantly lacking. Similarly, the court cases I considered exposed both sides’ arguments to the toughest scrutiny, an especially important benefit when it comes to politically-sensitive issues like same-sex marriage, which encourage legislative silence or evasiveness.

Second, should the evidence I have considered matter for our opinion of strong—as opposed to weak, or advisory—judicial review? Even if courts have more substantive debates, would that fact entitle them to make binding decisions on questions of rights? I believe that it would, for a number of reasons. For one, Waldron seems to agree, placing great emphasis on the quality of judicial reasoning; if that reasoning is stronger and more respectful of rights than he thinks, then his argument is weakened. Further, I find a clear connection between the quality of debate and respect for rights. In fact, the quality of debate could be considered a proxy for respect for rights—a relatively neutral way to evaluate the degree to which legislatures and courts take rights seriously, without assuming ideal outcomes. I make that connection because I consider the quality of debate not a function of the eloquence or intelligence of the participants, but a question of their priorities. The choice to subject claims to long and reasoned argument, and to weigh one’s own views against the opposition’s best case, demonstrates the seriousness with which one takes competing rights-claims and the burdens of weighing them—the seriousness we ought to prize in decisionmakers. On the other hand, how much serious consideration can we infer from a legislative majority, as in New York’s Senate, that chooses to remain nearly silent?

It is not far-fetched to see a strong correlation (though, of course, not a perfect one) between the quality of debate and the quality of outcomes. If we presume good faith on both sides, as Waldron does, the encounter of opposing points of view, rather than their mutual avoidance, should lead to the testing of assumptions, the weeding-out of unjustified claims, and ultimately, sounder conclusions. As idealistic as that conception of public argument may sound, something like it underlies the relationship between debate and legitimacy in liberal democracies. It is the reason why we expect decision-makers to give
reasons at all, and the reason why we would question the legitimacy of a body that consistently kept silence, except when pronouncing decisions. If the public airing of reasons and arguments is a necessary condition for the legitimacy of legislatures and courts alike, wouldn’t we believe the body that shows a wider range of inputs and a more thorough sifting of evidence to be more trustworthy in its decisionmaking?

Third and finally, does it matter that the kind of evidence I have considered—if confirmed by further empirical study—strengthens our confidence in the courts as a forum for rights? As even Waldron points out, judicial review is well-established in America. But the question of whether courts, by their nature, conduct a more serious debate on rights has great relevance for countries like the United Kingdom and Israel, which have recently considered expanding the role of judicial review.

And in the United States, the claim that courts debate rights more seriously is a relevant response to critics of “judicial activism.” Those accused of taking their case before activist judges instead of the people’s representatives might respond that the proper question is not who considers a controversy, but how it is considered. They might point to what goes on in the courts before a decision is reached. In sum, on the strength of this comparison and others like it, they could claim that it is in the courts that a more fair and rigorous disagreement over rights is conducted, and that the quality of this disagreement ought to give us more confidence in its outcome.