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Outing the Majority: Gay Rights, Public Debate, and Polarization after Doe v. Reed

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OUTING THE MAJORITY: GAY RIGHTS, PUBLIC DEBATE, AND POLARIZATION AFTER *DOE V. REED*

Marc Allen*

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I. INTRODUCTION

2012 was a landmark year for the civil rights of lesbians and gay men in the United States. For the first time ever, three states approved same-sex marriage and one state voted down a constitutional ban through a popular vote. Same-sex marriage, and civil rights in general, have a tortured history in public referenda. Many scholars and advocates have correctly pointed out the structural problems with LGBT rights and direct democracy.¹ But recent developments in election law are changing the way that statewide public referenda work. Financial disclosure rules and electoral transparency law

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1. See, e.g., Paula Abrams, *The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process*, 87 OR. L. REV. 1025 (2008); Hans A. Linde, *When Initiative Lawmaking is Not “Republican Government”: The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); Kaitlyn Redfield-Ortiz, *Government by the People for the People? Representative Democracy, Direct Democracy, and the Unfinished Struggle for Gay Civil Rights*, 43 ARIZ. ST. L.J. 1367 (2011).

are shifting public votes from direct democracy by secret ballot to something more public and more in tune with some political theorists' ideal of democratic decision making.

In 2010, the United States Supreme Court ruled in *Doe v. Reed*² that Washington citizens who signed a petition to eliminate legal rights for LGBT couples did not have a right to keep their names secret. A year later, in *ProtectMarriage.com v. Bowen*,³ a district court in California partially relied on *Reed* to reject a similar request from groups who lobbied for California Proposition 8—a constitutional amendment that overturned the California Supreme Court's landmark 2008 gay marriage decision.⁴ These holdings are important to election law, feminist, and first amendment scholars for a number of reasons. First, they flip the traditional roles of the civil rights litigants from earlier cases, like *NAACP v. Alabama*.⁵ In those early cases, publicly persecuted groups sought protection from disclosure laws, but, here, the persecutors themselves are looking for help. Second, the *Doe v. Reed* opinion, and especially Justice Scalia's concurrence, articulate an age-old conception of republican citizenship, one supported by a number of modern and contemporary political theorists. Last, this conception of citizenship has interesting, and largely positive, implications for political polarization, especially in the context of LGBT rights. It facilitates the realization of the fruits of hard-fought public opinion victories by the LGBT community and their allies.

The *Reed* holding has the potential to help turn the ever-growing support for LGBT rights into concrete policies in the next decade. Marriage rights and employment protections for gays, lesbians, and transgender Americans have been put up for public referenda in a number of states. While the last few months have seen a number of key victories for the LGBT community, most states still have laws preventing gay and lesbian couples from marrying. Increased transparency might be good for LGBT legislative battles for a number of reasons.

I argue that the LGBT movement is at a place where embracing Scalia's combative public citizenship is a winning strategy. Justice Scalia has provided the LGBT community with a critical weapon in its fight for marriage equality. By examining political science literature and public opinion polling, I hope to show that making public ballot initiatives transparent will curb the trend of states taking away rights and privileges from their LGBT citizens. I share the concerns of commentators like Cass Sunstein, who fear

2. *Doe v. Reed*, 130 S. Ct. 2811 (2011).

3. *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914 (E.D. Cal. 2011).

4. *In re Marriage Cases*, 43 Cal. 4th 757 (2008).

5. *NAACP v. Alabama*, 357 U.S. 449 (1958).

the phenomenon of insular political communities moving to extremes. I also share the concerns of thinkers ranging from James Madison to Alexis de Tocqueville to modern day political scientists about political majorities targeting unpopular minorities in winner-take-all elections. The “brave citizen” of Scalia’s concurrence is a conception of deliberative democracy that serves the LGBT community well.

In this Note I look at the likely impact of *Doe v. Reed* on the politics of the fight for LGBT rights. In Part II I examine *Reed* and *ProtectMarriage.com*. In Part III I look at a specific concept from these cases, which I label Scalia’s “civic courage” from the phrase he used at oral argument and in his concurrence. Part IV looks at polarization, first by examining theories of polarization and then by looking at research on attitudes toward the LGBT community. Lastly, in Part V I argue that transparency and Scalia’s civic courage are welcome additions to public referenda dealing with gay rights.

II. THE CASES

A. *Doe v. Reed*—*Petition Signatures*

In May 2009, Washington Governor Christine Gregoire signed Senate Bill 5688 into law. The bill, colloquially called an everything-but-marriage law, provided a number of rights for same sex partners.⁶ The bill’s preamble made its goals clear: “[i]t is the intent of the legislature that for all purposes under state law, state registered domestic partners shall be treated the same as married spouses. . . . The provisions of this act shall be liberally construed to achieve equal treatment . . . of state registered domestic partners and married spouses.”⁷ While the legislation passed the Washington House and Senate by wide margins, it garnered energetic opposition among a portion of the Washington electorate.

Washington’s constitution allows “referendum measures” wherein a group of citizens can collect signatures and put a recently passed law up for a popular vote.⁸ A group known as Protect Marriage Washington immediately began gathering signatures to repeal the act. Washington citizens in favor of putting the bill on the ballot gave Protect Marriage their names and addresses. The group succeeded in collecting the requisite amount of signatures but ultimately failed at overruling the legislation. Their efforts, which

6. Lornet Turnbull, Janet Tu & Susan Kelleher, ‘*Everything But Marriage*’ Backers Smelling Victory, THE SEATTLE TIMES, Nov. 3, 2009, at A1.

7. S.B. 5688, 61st Leg., Reg. Sess. (Wash. 2009), available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/5688.pdf>.

8. WASH. CONST. art. II, § 1(b)–(d).

would become Washington Referendum 71, lost the public referendum by a respectable six-point margin. 53% of Washington voters supported the legislature's grant of rights to LGBT couples and 47% opposed. The same-sex partnerships remained in place. But the story did not end there.

Gay rights groups petitioned under Washington's freedom of information laws to have the names of the petition's signatories released to the public. The groups planned on publishing the names online in a searchable database.⁹ Protect Marriage Washington claimed that the signatories were expressing core political speech and that their privacy should be protected.¹⁰

On April 28, 2010 the Supreme Court heard oral arguments. The pro-gay marriage groups offered two state interests that would justify the disclosures: "(1) preserving the integrity of the electoral process by combating fraud and promoting transparency and (2) providing information to the electorate about who supports the petition."¹¹ The Justices voted 8–1 to allow the signatures to be made public.

Justice Sotomayor's concurrence cautioned courts to be "deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process."¹²

Justice Scalia concurred in the judgment but refused to find any First Amendment right implicated. After reiterating his continued opposition to *McIntyre v. Ohio Elections Comm'n*¹³ (a case in which the court found a right to anonymous political speech), Justice Scalia combed through U.S. election history from colonial town meetings to the adoption of the secret ballot by many states at the end of the 19th century. "The long history of public legislating and voting," wrote Scalia, "conflicts with plaintiff's claim that disclosure of petition signature having legislative effect violates the First Amendment."¹⁴

The First Amendment argument was enough to support Justice Scalia's concurrence where he argued that without a protected right, there was no reason to question Washington's policy. But Scalia went even further. He concluded with a stirring ode to public deliberation:

And it may even be a bad idea to keep petition signatures secret. There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have tradi-

9. *Doe v. Reed*, 130 S. Ct. 2811, 2816 (2011).

10. *Reed*, 130 S. Ct. at 2816–17.

11. *Reed*, 130 S. Ct. at 2819.

12. *Reed*, 130 S. Ct. at 2829.

13. *McIntyre v. Ohio Elect. Comm'n*, 514 U.S. 334 (1995).

14. *Reed*, 130 S. Ct. at 2836.

tionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.¹⁵

Justice Scalia expressed similar sentiments two years earlier in his dissent in *Washington State Grange v. Washington State Republican Party*.¹⁶ There, Washington adopted a primary system wherein candidates were allowed to identify themselves with whatever party they desired (rather than the party picking the candidates). The top two vote getters then advanced to a general election.¹⁷ In his dissent, he found no other state interest behind such an election reform law “except the Washington Legislature’s dislike for bright-colors partisanship, and its desire to blunt the ability of political parties with noncentrist views to endorse and advocate their own candidates.”¹⁸ This interest, for Justice Scalia, was not enough.

The two opinions side-by-side show Justice Scalia’s preference for a vigorous and open conception of democratic citizenship. For him, states have no place watering down partisan politics or shielding people from (legal) reactions to their political actions. He sees partisanship and public discussion as virtues of American democracy, not problems, and he approached both attempts to water-down raucous debates with skepticism. I will explore this idea more in Part III.

B. *ProtectMarriage.com v. Bowen—Campaign Contributions*

A year after *Doe v. Reed*, a federal district court in California reviewed an as-applied challenge to campaign finance disclosure requirements in the state. In *ProtectMarriage.com v. Bowen*,¹⁹ two groups, The National Organization for Marriage and ProtectMarriage.com, challenged California’s public disclosure requirements in relation to the ongoing Proposition 8 controversy.²⁰ They argued that certain parts of the statute were unconstitu-

15. *Reed*, 130 S. Ct. at 2837.

16. *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442 (2008).

17. *Grange*, 552 U.S. at 447.

18. *Grange*, 552 U.S. at 470 (Scalia, J., dissenting).

19. *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914 (E.D. Cal. 2011).

20. California Proposition 8 amended the state constitution by banning same-sex marriages, overturning an earlier state Supreme Court decision granting gay and lesbian

tional as written and that the disclosure requirements were unconstitutional as applied to them.²¹

The plaintiffs relied on the exceptions to the disclosure requirements that were carved out in *Buckley v. Valeo*.²² In *Buckley*, the Supreme Court upheld parts of a campaign finance law that required parties to disclose certain donors. An exception could be made, however, if a party could show a "reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisal from either government officials or private parties."²³ The court found such an exception in a case called *Brown v. Socialist Workers*.²⁴ There, the Socialist Workers Party provided the court with evidence of police harassment and surveillance by local, state, and federal law enforcement.²⁵

The plaintiffs in *ProtectMarriage.com* argued that they, like the Socialist Workers Party, would suffer greatly if their names were made public. As evidence, they offered up a long, repetitive list of incidents ranging from silly to shocking. The plaintiffs alleged a number of harms. Some seemed to stretch the idea of legal harm to its limit, for example: the backlash Miss California suffered after speaking out against gay marriage at the Miss USA pageant; comedienne Margaret Cho's derogatory song written about the Mormon Church; the bad reviews posted online for an ice cream shop owner who supported Prop 8; Apple withdrawing two iPhone apps that were deemed anti-gay; and a group of students at UC-Davis being hit with water balloons.²⁶ The complaint also listed more substantive incidents, including a public school teacher harassing a student, several legitimate accounts of vandalism, and unsolicited emails and phone calls to supporters.²⁷

The district court did not buy the comparison. It found categorical differences between the plaintiffs and the groups that had been granted exemptions in the past.²⁸ The plaintiffs further argued that the Supreme Court in *Reed* implied that large, similarly situated organizations were enti-

Californians the right to marry. See *Timeline: Proposition 8*, LA TIMES, June 23, 2010, <http://www.latimes.com/news/local/la-prop8-timeline,0,5904222,full.story>.

21. *ProtectMarriage.com*, 830 F. Supp. 2d at 917.

22. *ProtectMarriage.com*, 830 F. Supp. 2d at 925, (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

23. *Buckley*, 424 U.S. at 74.

24. *Brown v. Socialist Workers*, 459 U.S. 87, 102 (1982).

25. *Brown*, 459 U.S. at 100.

26. *ProtectMarriage.com*, 830 F. Supp. 2d at 919–22.

27. *ProtectMarriage.com*, 830 F. Supp. 2d at 917–22.

28. *ProtectMarriage.com*, 830 F. Supp. 2d at 931 ("Plaintiffs do not, *indeed cannot*, allege that the movement to recognize marriage in California as existing only between a man and a woman is vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP.") (emphasis added).

tled to as-applied exceptions. Again, the court disagreed. “Justice Alito was the only Justice that even alluded to the possibility that the Washington plaintiffs might succeed in their as-applied challenge,” the judge wrote, “and his sweeping assertions as to the strength of Plaintiffs case are premature given the posture of the case before that court.”²⁹ The district court went on to find that nothing in *Reed* overrode any of the analysis developed by *Buckley* and *Brown*, which indicate that “exemptions were primarily intended to combat harms suffered by small, persecuted groups.”³⁰

III. SCALIA’S CIVIC COURAGE AND DEMOCRATIC CITIZENSHIP

In both *Reed* and *ProtectMarriage.com*, courts found that states’ interests in the integrity of their elections outweighed any privacy or associational interests tied up in anonymity. Justice Sotomayor’s concurrence in *Reed* suggested that political transparency was a constitutional good in itself.³¹ Justice Scalia’s concurrence in *Reed* stressed that Americans have traditionally tolerated a certain amount of public controversy in the name of republican government.³² Judge England in *ProtectMarriage.com* refused to grant an exemption to groups that were not the target of intense private and government harassment. Though neither of the cases actually ruled on the state of Washington’s second rationale in *Reed*—that providing information to the public about who supports proposed measures is an important interest in itself—both cases have the effect of making public referenda more transparent. Both the petition signatures and the sources of campaign financing are now accessible to the interested voter. The rulings make voters in referenda own their votes and interact with the democratic process in a way that many democratic theorists argue makes for a healthier democracy.

A. Civic Courage in Democratic Theory

Each of these jurists endorses a robust vision of civic republicanism—a conception of democratic citizenship characterized by, as Scalia put it, civic courage.³³ This understanding can be traced from republicans like James

29. *ProtectMarriage.com*, 830 F. Supp. 2d at 931.

30. *ProtectMarriage.com*, 830 F. Supp. 2d at 931.

31. *Doe v. Reed*, 130 S. Ct. 2811, 2829 (2011) (Sotomayor, J., concurring) (“[C]ourts . . . should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking . . .”).

32. *Reed*, 130 S. Ct. at 2837 (Scalia, J., concurring) (“[A]nd harsh criticism, short of unlawful action, is a price our people have been traditionally willing to pay for self-governance.”).

33. Justice Scalia also used the phrase during oral arguments. In a back and forth with counsel for the petitioners, Justice Scalia said:

Madison, Alexander Hamilton, and John Stuart Mill to contemporary theorists like Hannah Arendt and John Rawls.³⁴

Modern thinkers have looked at civic courage as an essential component of an effective democracy. John Stuart Mill argued, "the duty of voting, like any other public duty, should be performed under the eye and criticism of the public" as a means of keeping people honest and public-minded.³⁵ Mill recognized that the power of the vote was the power over fellow citizens, and was therefore willing to extend his rationale even to votes for representatives.³⁶ He acknowledged that secrecy was sometimes necessary, but on issues of fundamental importance, the value of transparency outweighed the benefits of anonymity.³⁷ One can see an echo of this idea in Sotomayor's *Reed* concurrence, where she encouraged lower courts to put a thumb on the scale in favor of disclosure.³⁸

Hannah Arendt also called for a heavily public notion of political life. Writing a century after John Stuart Mill, against the backdrop of a modern American society, she looked to a classical understanding of a good political life. Her writings emphasized speech and action as the primary way people in a political body interact.³⁹ For Arendt a conception of democracy that consisted of private individuals voting separately and anonymously would be insufficient.⁴⁰ She would have individuals meet, as humans and citizens, in a public political space. That way, citizens can use their shared exper-

And in light of the fact that for the first century of our existence, even voting was public—you either did it raising your hand or by voice, or later, you had a ballot that was very visibly red or blue so that people knew which party you were voting for—the fact is that running a democracy takes a certain amount of civic courage. And the First Amendment does not protect you from criticism or even nasty phone calls when you exercise your political rights to legislate or to take part in the legislative process.

Transcript of Oral Argument at 23, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559) (emphasis added).

34. For a good summary of the development and current state of theories of civic republicanism, see Will Kymlicka, *Citizenship Theory*, in CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (2d ed. 2002).
35. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 355 (John Gray ed., 1991).
36. *Id.* at 354 ("[T]he exercise of any political function, either as an elector or as a representative, is power over others.").
37. *Id.* at 353 ("Nor can it be reasonably maintained that no cases are conceivable, in which secret voting is preferable to public. But I must contend that these cases, in affairs of a political character, are the exception, not the rule.").
38. *Reed*, 130 S. Ct. at 2829.
39. HANNAH ARENDT, THE HUMAN CONDITION 176 (1958); see also James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 939 (2011).
40. Maurizio Passerin d'Entrevies, *Hannah Arendt*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jul 27, 2006), <http://plato.stanford.edu/entries/arendt/#CitPubSph>.

iences as well as their differences as raw material in a democratic decision making process.⁴¹

John Rawls also saw the benefit of public accountability and action when dealing with fundamental rights. "Citizens," Rawls wrote, "must be able . . . to present to one another publicly acceptable reasons for their political views in cases raising fundamental political questions . . . we must justify our use of our corporate and coercive political power, where those essential matters are at stake, in the light of public reason."⁴² Public reasoning, for Rawls, was a common space that citizens with different ideologies and religions could use to make decisions about civic issues. The floor of the Senate (at least in some romantic conceptions) is an example of a site of public reasoning at work. Rawls was focused on fundamental questions of how to organize society, rather than day-to-day appropriations bills. Public referenda about the rights of minorities would fall under the former category, and would therefore be sites where public reasoning and justifications are paramount.

Contemporary democratic theorists like Amy Gutmann have also identified publicity as a fundamental requirement of deliberative democracy.⁴³ In these theorists' ideal democracies, citizens are expected to participate in the public sphere, and their actions are expected to be sincere, independent, and public-minded.⁴⁴

The idea of civic courage also occasionally appears in Supreme Court opinions—most notably Justices Brandeis and Holmes' dissents in a string of First Amendment cases in the early twentieth century. In the First Amendment context, Brandeis and Holmes were championing the tolerance of radical political speech in the name of democratic decision making. Brandeis, in his dissent in *Whitney v. California*, wrote what one legal scholar called the most important words ever written about the First Amendment.⁴⁵ In the dissent, Brandeis, like Scalia, points out that Americans have had a high tolerance for dissent and even disorder in the name of liberty.⁴⁶ Bran-

41. *Id.*

42. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 91 (Erin Kelly ed., 2001).

43. AMY GUTMANN & FRANK THOMPSON, *DEMOCRACY AND DISAGREEMENT* 95 (1996) ("The reasons that officials and citizens give to justify political actions, and the information necessary to assess those reasons, should be public.").

44. For a good discussion of republicanism and the problems of anonymity, see Gardner, *supra* note 39. Sherman Clark also provides a useful evaluation of the effect of this same issue on the citizen voter. Sherman J. Clark, *Ennobling Direct Democracy*, 78 U. COLO. L. REV. 1341, 1343–44 (2007); Sherman J. Clark, *The Character of Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 1341 (2004).

45. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (1988).

46. *Whitney v. California*, 274 U.S. 357 (1927).

deis' reading of the First Amendment is one in which, "fear of serious injury cannot alone justify suppression of free speech and assembly. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced."⁴⁷ Serious evil, for Brandeis, translated into an exceptionally high standard, one in which the fate of the state itself was implicated. Like Mill and unlike Gutmann, Brandeis saw civic courage in this instance as a prerequisite for free society, rather than a tool for coming to the right public policy decisions.⁴⁸

Legal commentators have also discussed the complicated relationship between anonymity and democratic institutions. James A. Gardner notes that anonymity functions in a variety of nuanced and context-dependent ways in the political arena.⁴⁹ In some instances, anonymity might allow voters to express deeply held convictions, even if they are unpopular. Honesty and diversity are certainly virtues in a democratic institution. But in the context of minority rights, anonymity can be problematic. Anonymity can provide cover for prejudices and biases. And for a committed civic republican it can muddy up the electoral process, blinding voters to certain political realities. Gardner points out that, "anonymity frames issues by erecting a barrier between individuals and the objects of their attention; it invites the anonymous to think of themselves as distinct from others who their behavior might affect."⁵⁰ He cites research by psychologists, who label the phenomenon "deindividuation" and link it to the type of antisocial behavior exhibited by mobs.⁵¹ In this context, voters might feel more comfortable expressing homophobia.

The observations of these theorists and jurists have found support in empirical studies. An important parallel can be seen in the so-called Bradley effect (also known as the Wilder effect), where African Americans receive more support in polls than they do at actual elections. Though there is some

47. *Whitney*, 274 U.S. at 376.

48. Blasi, *supra* note 45, at 675.

Brandeis was an idealist, but he was not a perfectionist. When he speaks of the benefits of political participation, his major concern is with the preservation of freedom. He does not claim that participatory democracy produces the wisest policies on a day-to-day basis. Nor does he assert, though he may well have believed, that regular and active political participation is a necessary feature of a personally fulfilling life. To Brandeis, public discussion is a "duty." It is a duty because political liberty is a fragile condition, easily lost when its institutions and traditions fall into the hands of inert people.

Id. (citation omitted).

49. Gardner, *supra* note 39, at 930.

50. Gardner, *supra* note 39, at 954.

51. *Id.* at 954 n.140.

debate about the continued existence of the effect, political scientists have identified a number of elections where the phenomenon clearly occurred.⁵² The discrepancy between a voter's public representations and private prejudices is exactly the kind of problem that concerned Mill, Arendt, Rawls, and Gutmann. In the theorists' terms, citizens are less prone to infecting public decision making with private prejudices when they are bravely arguing face to face than when they are anonymously legislating as a mob.

B. Civic Courage at Work in the Cases

While *Reed* and *ProtectMarriage.com* deal with ballot initiatives and donor disclosures rather than voting itself, they still encourage civic courage in the democratic process. Both cases limit the level of anonymity citizens can claim when acting on important political issues.

The respondents in *Reed* argued that one of the state's interests was to provide the electorate with information. The state's argument was that disclosure would offer "insight into whether support for holding a vote comes predominantly from particular interest groups" and would "[allow] Washington voters to engage in discussion of referred measures with persons whose acts secured the election and suspension of state law."⁵³ Justice Scalia did not address this argument explicitly, but his concurrence pointed to a long of history public accountability. He cited figures like Justice Story praising the transparency of legislative action.⁵⁴ Justice Scalia also sang the praises of civic courage, both at oral argument and in his opinion.

Only Justice Alito, in concurrence, and Justice Thomas, in dissent, addressed the validity of a state interest in providing information about petition signers, and both found it unpersuasive. Justice Thomas wrote, "People are intelligent enough to evaluate the merits of a referendum without knowing who supported it. Thus, just as this informational interest did not justify the Ohio law in *McIntyre*, it does not justify applying the PRA to referendum petitions."⁵⁵ Justice Alito pushed the argument to the extreme

52. Compare Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 705–09 (2010) (finding evidence of the Bradley effect in the 2008 election), with Daniel J. Hopkins, *No More Wilder Effect, Never a Whitman Effect: When and Why Polls Mislead about Black and Female Candidates*, 71 J. POL. 769, 770 (2009) (finding the Bradley effect has slowly disappeared in American Politics).

53. *Doe v. Reed*, 130 S. Ct. 2811, 2824 (2011) (Alito, J., concurring) (citing Brief of Respondent Sam Reed at 58, 130 S. Ct. 2811 (2011) (No. 09-559)).

54. *Reed*, 130 S. Ct. at 2834 (Scalia, J., concurring).

55. *Reed*, 130 S. Ct. at 2843 (Thomas, J., dissenting). Justice Thomas was also the only Justice to come out against disclosure in *Citizens United v. Fed. Elec. Comm'n*, 130 S. Ct. 876, 980 (2010). The eight-Justice consensus on disclosure suggests this sort of civic courage has broad appeal on the Court.

and reasoned that if the state could provide names and addresses, then it could also provide “race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships.”⁵⁶ He also worried that the information provided could lead to “names of their spouses and neighbors, their telephone numbers, directions to their homes, pictures of their homes, information about their homes . . . any information posted to a social networking site, and newspaper articles in which their names appeared.”⁵⁷ Justices Thomas and Alito both believe that any state interest in providing information about signers is outweighed by the demands of the First Amendment.

Some civil libertarians may share the concerns of Justices Alito and Thomas.⁵⁸ They might be uncomfortable with the collateral issues like chilling of speech or invasion of privacy. The Supreme Court has recognized that some regulations that have a chilling effect on free speech work against the purposes of the First Amendment.⁵⁹ Disclosure of personal information is an activity that has traditionally implicated both the First Amendment and a right to privacy.⁶⁰

Others argue that such disclosure runs against the goals of deliberative democracy—that disclosure will in fact dissuade people from participating. In a note arguing that that legislatures should amend their public records laws after *Reed*, Karen Cullinane writes: “No matter how repugnant a view may seem, shaming the person who holds it discourages citizens from participating in a political process open to everyone—not just those holding a viewpoint held by a majority or even just those with the courage to act on their views.”⁶¹ Cullinane points to a Wall Street Journal poll which showed that three out of five people would hesitate before involving themselves in a ballot-issue committee if their identifying information was made public. She argues that this shows a chilling effect and somehow “[prevents] fellow citizens from better understanding the true extent of a view’s acceptance in wider society.”⁶² This worry is a persistent one in First Amendment law. A

56. *Reed*, 130 S. Ct. at 2824 (Alito, J., concurring).

57. *Reed*, 130 S. Ct. at 2825 (Alito, J., concurring).

58. Letter from the ACLU of Wash., as Amicus Curiae Supporting the Appellants in *Doe v. Reed*, to the Court of Appeals for the Ninth Circuit (Sept. 25, 2009), <http://aclu-wa.org/sites/default/files/attachments/2009-09-25—ACLUjol%20Amicus%20Ltr.pdf>.

59. See Robert A. Sedler, *Self-Censorship and the First Amendment*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 13, 21 (2011).

60. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 527–31 (2006).

61. Karen Cullinane, *Protecting Anonymous Expression: The Internet’s Role in Washington State’s Disclosure Laws and the Direct Democracy Process*, 44 U. MICH. J.L. REFORM 947, 958 (2011).

62. *Id.* at 960.

similar concern motivated carve outs in disclosure laws for persecuted groups.⁶³

But as Judge England noted in *ProtectMarriage.com*, these disclosure cases are categorically different from cases involving the NAACP in the segregated South or the Socialist Workers Party during the Red Scare. Whereas those groups had little chance of political success and were the targets of organized harassment, “here, Plaintiffs orchestrated a massive movement to amend the California Constitution. Proponents of the initiative were successful in their endeavor, raising nearly \$30 million, securing 52.3% of the vote and convincing over seven million voters to support Proposition 8.”⁶⁴ In these cases, the people being outed are the people who have until recently made up a national majority—the groups who have successfully passed gay marriage bans in more than half of the U.S. states. In Washington, this contingent managed 47% of the referendum vote.⁶⁵ And they are certainly represented in state and national legislatures. Eighteen members of Washington’s Senate and thirty-five members of its House opposed the underlying bill, Senate Bill 5688.⁶⁶

Most importantly, the historical contexts of the cases are incomparable. In the segregated South, African Americans and civil rights activists were being killed, often with the complicity of local law enforcement. Groups like Protect Marriage Washington, on the other hand, share their policy goals with a major national political party platform.⁶⁷ A world dominated by systematic lynching is categorically different from one punctuated by sporadic vandalism and bad press. Different social realities demand different applications of legal principles.

63. *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958); *Brown v. Socialist Workers*, 459 U.S. 87, 102 (1982).

64. *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 929 (E.D. Cal. 2011).

65. *Doe v. Reed*, 130 S. Ct. 2811, 2816 (2011).

66. See S.B. 5688, 61st Leg., Reg. Sess. (Wash. 2009), available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/5688.pdf>.

67. Under the “Preserving Our Values” plank of the Republican Party’s 2008 national platform, the platform in place during these cases, the “Preserving Traditional Marriage” section reads:

Because our children’s future is best preserved within the traditional understanding of marriage, we call for a constitutional amendment that fully protects marriage as a union of a man and a woman, so that judges cannot make other arrangements equivalent to it. In the absence of a national amendment, we support the right of the people of the various states to affirm traditional marriage through state initiatives.

2008 Republican Party Platform: Preserving Traditional Marriage, THE AMERICAN PRESIDENCY PROJECT (Sept. 1, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=78545>.

Furthermore, when the public participates in direct democracy, why should the public do so from a sterile position, free from the consequences of their actions? As Scalia made clear in *Reed*, this type of ballot initiative is more than a public opinion poll.⁶⁸ It is political action that will have a direct effect on the rights and liberties of other citizens, exactly the type of high stakes deliberation over fundamental rights where the mob mentality that Garner described is most dangerous. Civil rights are the type of constitutional decision that Rawls thought required certain preconditions, including appeal to public reason. Even if we assume that some degree of privacy is necessary for citizens to form opinions and deliberate, it does not follow that they must be allowed to actually legislate anonymously.⁶⁹ And financial disclosure, as the Court has also held, does not in itself prevent anyone from speaking or voting.⁷⁰ Transparency in both of these instances forces voters to, as Arendt might say, interact face to face in shared political space. It encourages voters to think of themselves as individual citizens, with skin in the game and responsibility for the treatment of their fellow citizens.

Some have rightly worried about the power of the Internet to aggregate and disseminate identifying information.⁷¹ The groups who wanted to publish names in Washington did not do themselves any favors by choosing the vaguely menacing titles "Know Thy Neighbor" and "WhoSigned." It is not difficult to imagine maps and databases being abused and signatories being intimidated or their property vandalized.

For their part, the organizers of these groups have voiced a distinctly legal and democratic goal. Tom Lang, a director of one of the groups, publicly stated his organization's aim as follows: "for social change to happen, there has to be a shaming part."⁷² He said the group's goal was discussion, rather than intimidation, and that he was, "trying to get you to understand that if you're going to try to take away my rights I want you to know what you're doing"⁷³ Indeed, as Chesa Boudin points out in a student note

68. *Reed*, 130 S. Ct. at 2833 (Scalia, J., concurring).

69. Gardner notes that "[P]rivacy and anonymity are not the same. . . . A solitary walk on the beach or a private weekend in the country may afford the liberal citizen all the opportunity he or she needs to reason individually about his or her beliefs and values" Gardner, *supra* note 39, at 940–41.

70. *Citizens United v. Fed. Elec. Comm'n*, 130 S. Ct. 876, 914 (2010).

71. See generally Gardner, *supra* note 39. Cullinane makes an argument for interpreting Washington's PRA in light of the technology available when it was passed: "The essential values currently animating disclosure policies should not have radically changed from those deemed important during the decades leading up to and at the passage of the PRA. . . . Technology, on the other hand, has changed, and in a way that severely distorts the purpose of the PRA" Cullinane, *supra* note 61, at 976.

72. William Yardley, *Privacy Looms Over Gay Rights Vote*, N.Y. TIMES, Oct. 31, 2009, <http://www.nytimes.com/2009/11/01/us/01petition.html>.

73. *Id.*

in the Yale Law Journal, the distinction between speech and lawmaking is crucial here.⁷⁴ In the same way that transparency allows elected officials to deal with complex issues and arrive at informed decisions in the formal legislative process, it guides and tempers direct democracy.

Some interested in LGBT rights might also be wary because anonymity has been traditionally used as a shield for members of persecuted groups.⁷⁵ The Internet, for example, allowed lesbians and gay men to build community and support without having to out themselves to their families and coworkers.⁷⁶ In the broader context of a patriarchal and heteronormative society, anonymity is useful because it shields minority groups from a hegemonic state. Others might be critical of oppressed groups adopting means that might themselves be criticized as oppressive or inherently biased.⁷⁷

But the gay rights movement has made impressive gains in the last thirty years. Now many gay rights activists consider coming out to be one of the most powerful political statements gay and lesbian Americans can make.⁷⁸ A majority of Americans support legalized same-sex marriage.⁷⁹ The recent political victories in states like New York, Washington, and Maine

74. Chesa Boudin, Note, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2178 (2011).

75. See Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 199, 202 (2003).

76. *Id.* at 162.

77. See CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 159–70 (1989). MacKinnon labels the state—and consequently the law—as inherently male. *Id.* at 160–65. She considers the traditional understanding of civil liberties, wherein the state doesn't act in the name of individual freedom, to be problematic from a feminist standpoint. *Id.* MacKinnon would likely reject the civic republican conception of citizenship as a good choice for oppressed groups. That conception embraces a classical liberal conception of the state and the citizen's relationship to it.

78. Indeed, this strategy seems to be wildly agreed upon. The outspoken activist Dan Savage and the libertarian Andrew Sullivan both have advocated coming out as the most effective way to advance gay rights. Interview by BigThink with Andrew Sullivan, <http://bigthink.com/andrewsullivan> (see the “It Gets Better—But Not Through Politics” segment); Dan Savage, *The Single Most Important Political Action a Gay Person Can Take* SLOG (May 14, 2011, 10:31 AM), <http://slog.thestranger.com/slog/archives/2011/05/14/the-single-most-important-political-action-a-gay-person-can-take>. See Richard Socarides, *Rob Portman and His Brave, Gay Son*, THE NEW YORKER (March 15, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/03/rob-portman-and-his-brave-gay-son.html#ixzz2Nhz4rUQK> (“Will Portman proved, once again, that the most powerful political act any gay person can take is coming out.”).

79. Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP, (May, 20 2011), <http://www.gallup.com/poll/147662/First-Time-Majority-Americans-Favor-Legal-Gay-Marriage.aspx>.

will likely be viewed as a tipping point in the years to come.⁸⁰ All of these indicators suggest that the LGBT rights movement is at a place where it should embrace this courageous conception of citizenship.

Many argue that encouraging civic courage is a good in itself.⁸¹ But beyond its inherent virtue, embracing this conception of democratic citizenship would have other benefits. Issues around LGBT rights, and especially the recognition of gay marriage, are highly polarized. Embracing a conception of citizenship that involves civic courage rather than anonymity has the potential to move the political debate forward. The next section will look at the phenomenon of polarization. It will then examine American attitudes toward the LGBT community and suggest how structuring public referenda around a robust conception of civic republicanism could alter those attitudes.

IV. POLARIZATION

A. Theories of Polarization

Polarization is a phenomenon in which a majority of subjects express extreme support or opposition for an issue.⁸² In most circumstances, people's preferences for everything from peanut butter to tax policy follow a standard bell curve. A majority of people will find themselves in the middle, in moderate positions. This type of distribution is sometimes called unimodal because it produces only one mode—the statistical term for the value that appears most often—at the top of the curve. If a group is polarized, that means that the bell curve is inverted, so that a majority of subjects identify with one extreme or another.⁸³ A polarized distribution will produce a bimodal “U” shaped curve. This type of distribution has two modes, one at either extreme.⁸⁴ The so-called “Culture Wars” that have

80. See *A Festive Mood in Maine as Same-Sex Marriage Becomes Legal*, N.Y. TIMES, Dec. 29, 2012, http://www.nytimes.com/2012/12/30/us/same-sex-marriage-becomes-legal-in-maine.html?_r=0; Katharine Q. Seelye, *Last Holdout in New England, Rhode Island Weighs Gay Marriage*, N.Y. TIMES, Jan. 23, 2013, <http://www.nytimes.com/2013/01/24/us/politics/rhode-island-weighs-gay-marriage-as-the-last-holdout-in-new-england.html>.

81. See *supra* Part III.A.

82. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74–76 (2000).

83. ALAN J. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 7 (2010).

84. *Id.*

dominated news headlines for the last few decades are often framed as a product of polarization around certain social issues.⁸⁵

James A. Thomson of the RAND Corporation has argued that, among other things, polarization inhibits political discourse and limits the efficacy of sound policy analysis in politics.⁸⁶ As Cass Sunstein has noted, polarization can be dangerous to democratic decision making.⁸⁷ For example, in a controlled experiment a group of jury members asked to place a dollar amount on a plaintiff's damages consistently arrived at a higher number than an individual juror would have before deliberation.⁸⁸ This means that if we took the average of each juror's pre-deliberation estimates of damages, the number would be smaller than the amount actually awarded after the jurors interacted with one another. In other words, when members of a homogenous insular group deliberate, they tend to shift towards more extreme positions.

In this way, polarization negates the positive effects of group deliberation—the sort of marketplace-of-ideas model articulated by John Stuart Mill in *On Liberty*⁸⁹ or the additional check on the tyranny of the majority articulated by Alexander Hamilton in *Federalist* 70.⁹⁰ In the context of LGBT rights, polarization has the added danger of demonizing and dehumanizing a minority. General anxiety or ignorance about the LGBT community can fester and become outright hostility. Sunstein, though he remains ambivalent about whether enclaves moving to extremes is ultimately good or bad for policy making, does worry about unjustified extremism and fanaticism.⁹¹

85. For an empirical analysis of public polarization and hot button issues, see Paul DiMaggio, John Evans & Bethan Bryson, *Have Americans' Social Attitudes Become More Polarized?*, 102 AM. J. SOC. 690, 715 (1996) (finding some evidence that Americans are polarized around the issues of abortion and poverty, but little evidence to show clear polarization around many other social issues); John H. Evans, *Have Americans' Attitudes Become More Polarized?—An Update*, 84 SOC. SCI. Q. 71, 77 (2009) (finding evidence of popular polarization around abortion and issues relating to sexuality).

86. See James A. Thomson, *A House Divided: Polarization and Its Effect on RAND*, RAND CORPORATION, 2010, http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP291.pdf.

87. Sunstein, *supra* note 82, at 76 (“[D]eliberating enclaves can be breeding grounds both for the development of unjustly suppressed views and for unjustified extremism, indeed fanaticism.”).

88. Sunstein, *supra* note 82, at 95.

89. See Mill, *supra* note 35.

90. THE FEDERALIST NO. 70, at 357 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.”).

91. Sunstein, *supra* note 82, at 76.

The historian and social critic Gertrude Himmelfarb has argued that polarization around these issues signals a larger rift in society.⁹² She proposes that during the twentieth century, decadent liberal attitudes supplanted more traditional Victorian values, and that the two systems are not only incompatible, but are responsible for some of the most heated political clashes of the last fifty years. The dividing line, she suggests, might be the most important aspect of contemporary society.⁹³

Himmelfarb bemoans the fact that "alternative lifestyles that were frowned upon by polite society not so long ago are now not only tolerated but given equal status with traditional lifestyles."⁹⁴ She claims that Victorian "manners and morals" that were once prized are now regarded as "puritanical and hypocritical."⁹⁵ She sees the current polarization in America as a backlash against the mid-century revolutions in culture, sexuality, and politics.⁹⁶ And while Himmelfarb does recognize a certain amount of heterogeneity and overlap, she insists that two distinct cultures exist. Even though people might hold a few idiosyncratic beliefs, "in general, there is a common set of mind, a confluence of values and beliefs, that locates most people, most of the time, for most purposes, within one or the other culture."⁹⁷

Where Himmelfarb looked to large cultural phenomena to explain polarization, others have looked to individual level psychology. Some of the psychological mechanisms that have been identified include social comparison and limited argument pools. Social comparison is a term that describes when people move their judgments in order to "preserve their image to others and their image to themselves."⁹⁸ A limited argument pool factors in because people choose the best argument from those around them, and when group members are already inclined in a certain direction, the available arguments are all skewed in that same direction. The result is the group as a whole moving towards an extreme point and pulling new members with

92. GERTRUDE HIMMELFARB, *ONE NATION, TWO CULTURES: A SEARCHING EXAMINATION OF AMERICAN SOCIETY IN THE AFTERMATH OF OUR CULTURAL REVOLUTION* 117–18 (1999). Notably, Himmelfarb rejects the civic republicanism that I am championing here as a cure for the rift that she sees. Instead, she would focus on cultivating individual virtue. *Id.* at 44.

93. Himmelfarb writes: "In some respects, [the cultural polarization] is even more divisive than the class polarization that Karl Marx saw as the crucial fact of life under capitalism." *Id.* at 117–18.

94. *Id.* at 118.

95. *Id.*

96. She sees it as the rise of a counter-counterculture: "If the dominant culture is the heir of the counterculture, the dissident culture represents a counter-counterculture, a reaction against the increasingly prevalent and increasingly 'looser' system of morals." *Id.* at 124.

97. *Id.* at 126.

98. Sunstein, *supra* note 82, at 89.

them.⁹⁹ Both of these mechanisms could potentially be undermined by the public mindset discussed in Part II. An argument pool that is made up of brave citizens of all stripes is less likely to be small and homogenous. Citizens would have a hard time avoiding opposing viewpoints and, perhaps more importantly, an easy time seeing the fellow citizens who might be affected by a policy.

Other psychological tendencies also contribute to group polarization. Physical spacing reduces polarization, and a sense of common fate and solidarity tend to increase it.¹⁰⁰ Importantly in the LGBT context, the existence of an “outgroup” also tends to increase the intensity of polarization.¹⁰¹ As a matter of fact, real or perceived group membership is a key part of groups that move to extremes. And as Himmelfarb argued, issues like gay rights split down a clear line, with identifiable groups on both sides. Thus “Culture War” issues, like gay rights and abortion, are the types of controversies that lend themselves to intense polarization. One way to explain the evidence of popular polarization around these issues is that people on either side of these issues find easy ways to define and distinguish themselves from their opponents—for example age, religion, and religiosity.

That is not to say polarization always facilitates oppression. Like the historical use of anonymity by the LGBT community, polarization and isolated argument pools have sometimes been useful for minorities.¹⁰² Like-minded groups allow for the development of ideas and for the voices of traditionally silenced members to be heard. Sunstein explains:

Even if group polarization is at work—perhaps *because* group polarization is at work—enclaves can provide a wide range of social benefits, not least because they greatly enrich the social argument pool. In fact, the First Amendment right of expressive association should be understood in precisely these terms. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.¹⁰³

But, once again, the LGBT movement has moved past the point where taking advantage of insular groups is useful. The LGBT community has

99. *Id.* at 89–90.

100. *Id.* at 91.

101. *Id.* In other words, when a group has another group to define themselves against, they emphasize distinctions.

102. *Id.* at 111.

103. *Id.*

built alliances and changed enough minds to garner the support of a majority of Americans. Gay and lesbian voices now have a prominent place in popular media, blogs, academia, think tanks, and other deliberating bodies.

B. Empirical Studies of Polarization

Empirical studies over the past few decades have confirmed that the country's politics have become more polarized, but social scientists disagree about the nature and extent of the polarization. Most political scientists seem to agree that both party elites and the parties themselves have become more liberal and conservative.¹⁰⁴

There is disagreement, however, about the extent to which polarization exists. Morris Fiorina and Samuel Abrams, for example, have argued that the average voter today is no more ideologically sophisticated or polarized than the average voter a generation ago.¹⁰⁵ Fiorina and Abrams say that Himmelfarb's thesis is largely unsupported by empirical evidence, and that voters' identification with relativism or absolutism had little correlation with their political preferences.¹⁰⁶ Fiorina and Abrams have also challenged the assertion made by Sunstein and others that Americans are becoming geographically polarized—that liberals and conservatives are moving into cities and neighborhoods of like-minded people to the detriment of the general body politic.¹⁰⁷

Others have pushed back against this view. Alan Abramowitz and Kyle Saunders have shown that when average citizens who are relatively well educated and politically engaged are surveyed, they show much more evidence of polarization than poorly educated and disengaged citizens.¹⁰⁸ They also argue that Americans are becoming more geographically polarized. The average margin of victory in presidential elections, for example, has increased over time, and voters from states that consistently vote for Republican candidates were much more likely to display a number of predictable characteristics.¹⁰⁹

104. See Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563 (2008); Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408, 410 (2008).

105. Fiorina & Abrams, *supra* note 104, at 584.

106. *Id.* at 569.

107. *Id.* at 576–77. But see John Tierney, Op-Ed., *Must We Talk?*, N.Y. TIMES, Nov. 7, 2006, <http://www.nytimes.com/2006/11/07/opinion/07tierney.html>.

108. Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 542, 545 (2008).

109. *Id.* at 549.

Even if we doubt the existence of strong polarization among average voters generally, gay marriage (along with abortion) seems to be one area where the parties themselves acknowledge the issue as a helpful tool.¹¹⁰ For example, gay rights continue to be an important campaign issue, especially for Republican candidates. George W. Bush's 2004 reelection campaign made a federal marriage amendment part of the national discussion.¹¹¹ Some political scientists have called his re-election the most polarized in modern political history.¹¹² In the 2012 Republican primaries, at least one candidate aired ads declaring his opposition to gays serving openly in the military and his support for exclusively heterosexual marriage.¹¹³

Though the evidence of general polarization in the electorate is mixed, there is at least some empirical and anecdotal evidence that the public is polarized around abortion and sexual politics.

C. Polarization and LGBT Rights

What do the rulings in *Reed* and *ProtectMarriage.com* have to do with polarization over issues of LGBT rights? By upholding a state's power to make ballot signatories and campaign donors public and by adopting a high threshold to win an exemption, the rulings force groups working against expanding LGBT rights to, as Scalia said in *Reed*, "stand up in public for their political acts."¹¹⁴ For advocates of renewed civic republicanism and others who are hopeful that the political process can provide solutions for controversial issues like gay marriage, there is reason to believe that this general rule of transparency will allow for more heterogeneous deliberation and movement toward a widely accepted solution. Depolarization can take place either when people's sense of belonging to a distinct group is questioned or when new group members with whom they identify introduce conflicting arguments into the pool.¹¹⁵ For proponents of expanded LGBT

110. Linda C. McClain, *Red Versus Blue (and Purple) States and the Same-Sex Marriage Debate: From Values to Polarization to Common Ground?*, 77 UMKC L. REV. 417, 418–19 (2008).

111. David Stout, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb 24, 2004, <http://www.nytimes.com/2004/02/24/politics/24CND-GAY.html>.

112. Alan I. Abramowitz & Walter J. Stone, *The Bush Effect: Polarization, Turnout, and Activism in the 2004 Presidential Election*, 36 PRESIDENTIAL STUD. Q. 141, 141 (2006). *But see* JAMES W. CEASER & ANDREW E. BUSCH, RED OVER BLUE: THE 2004 ELECTIONS AND AMERICAN POLITICS (2005) (downplaying the role of hot-button social issues).

113. Richard A. Oppel Jr., *Perry Ad Focuses on Gays and Christianity*, THE CAUCUS (Dec. 7, 2011), <http://thecaucus.blogs.nytimes.com/2011/12/07/perry-ad-focuses-on-gays-and-christianity/>.

114. *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2011).

115. Sunstein, *supra* note 82, at 93.

rights, there is reason to believe that public debate will move people towards more LGBT friendly positions or at least stem the tide of state constitutional amendments banning the recognition of same-sex couples.

Heavily polarized issues tend to stagnate. Abortion, for example, is one of the few issues where evidence of polarization is almost universally acknowledged.¹¹⁶ And, since *Roe v. Wade*, abortion has been a political football. Both parties use abortion as a wedge issue and state laws often flip back and forth as different parties take control of the legislatures.¹¹⁷ *Reed* and *ProtectMarriage.com* remove one possible barrier. Anonymity encourages polarization.¹¹⁸ By disclosing donors and signatories, groups like Protect Marriage expose their members to opposing viewpoints. In fact, a number of the incidents that the plaintiffs in *ProtectMarriage.com* listed as evidence of past harassment involved picketing, boycotts, and other protests.¹¹⁹ The court refused to find that these amounted to the sort of "serious and widespread harassment" that would warrant an exemption. In fact, the court pointed out: "the acts which Plaintiffs complain are mechanisms relied upon, both historically and lawfully, to voice dissent."¹²⁰

These types of dissent are part of a public discourse that proponents of deliberative democracy hope produce the best possible outcomes. Cass Sunstein ended his survey of the causes and effects of polarization with a plea for "ensuring that deliberation occurs within a large and heterogeneous public sphere, and for guarding against a situation in which like-minded people wall themselves off from alternatives perspectives."¹²¹ And John Stuart Mill, who advocated that *every* vote should be a public vote, also called for a large and varied public sphere: "it is only by tag collision of adverse opinions that the remainder of the truth has any chance of being supplied."¹²²

Encouraging public discussion might also promote movement on the issue because it would force opposing groups to use a common language. In their book *Red Families v. Blue Families*, Naomi Cahn and June Carbone

116. Fiorina & Abrams, *supra* note 104, at 569.

117. At the federal level, the so called Mexico City rule, allowing foreign aid funds to be used by clinics that provide information about abortion, has changed like clockwork with the election of different parties to the presidency. See Peter Baker, *Obama Reverses Rules on U.S. Abortion Aid*, N.Y. TIMES, Jan 23, 2009, <http://www.nytimes.com/2009/01/24/us/politics/24obama.html>.

118. Sunstein, *supra* note 82, at 101 ("Group polarization can intensify if people are speaking anonymously and if attention is drawn, through one or another means, to group membership.").

119. *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 919–22 (E.D. Cal. 2011).

120. *ProtectMarriage.com*, 830 F. Supp. 2d at 934.

121. Sunstein, *supra* note 82, at 105.

122. Mill, *supra* note 35, at 25.

make exactly this point.¹²³ When groups become polarized in issues that they see involve moral absolutes, like gay marriage and abortion, they become especially entrenched. Cracking polarization around these issues involves changing the discussion.¹²⁴ Cahn and Carbone argue, “[genuine] engagement also requires a recognition that leadership couched in terms of one paradigm may needlessly antagonize the other.”¹²⁵ In fact, studies show that how gay marriage is framed makes a difference in how groups react to proposed legislation.¹²⁶ Cahn and Carbone advocate movement forward based on state-by-state electoral politics, rather than federal litigation, a decidedly civic republican approach.¹²⁷

Those of us who favor extending legal rights like marriage and employment discrimination protection to the LGBT community should applaud the outcomes of *Reed* and *ProtectMarriage.com* because they facilitate continued acceptance of the LGBT community. Americans have become more accepting of the LGBT community over the past thirty years.¹²⁸ In fact, in 2011, for the first time ever, a Gallup poll found a majority of Americans in favor of gay marriage.¹²⁹ From the early 1990s onward, the percentage of Americans who believe that sexual relations between two adults of the same sex are “always wrong” has dropped precipitously.¹³⁰

Political scientists who have studied this dramatic shift in opinion have come up with a few different theories to explain the change. One popular theory is called the Contact Hypothesis.¹³¹ This theory has also been used to describe relations between black and white citizens. In the context of race relations, research tends to show that the contact between groups functions in complicated ways. For example, in communities where schools were desegregated, racist attitudes among white students remained relatively constant, even after they began to have daily interactions with black stu-

123. NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010).

124. Cass Sunstein explains why simply bringing more information to a debate like gay marriage together isn't enough: “when people have a fixed view of some highly salient public issue, they are likely to have heard a wide range of arguments in various directions, producing a full argument pool, and additional discussion is not likely to produce movement.” Sunstein, *supra* note 82, at 93.

125. CAHN & CARBONE, *supra* note 123, at 3.

126. See, e.g., Vincent Price, Lilach Nir & Joseph N. Cappella, *Framing Public Discussion of Gay Civil Unions*, 69 PUB. OP. Q. 179 (2005).

127. CAHN & CARBONE, *supra* note 123, at 7.

128. See generally Paul Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. OF POL. 1208 (2003).

129. Newport, *supra* note 79.

130. Brewer, *supra* note 128, at 1208–09.

131. L. Marvin Overby & Jay Barth, *Contact, Community Context, and Public Attitudes Toward Gay Men and Lesbians*, 34 POLITY 433, 435 (2002).

dents.¹³² The theory works a little more neatly in describing the relationship between straight and gay subjects. Jay Barth, L. Marvin Overby, and Scott H. Huffmon looked at attitudes of residents of South Carolina in 2006, when the state was voting on its own same-sex marriage amendment.¹³³ They found that certain forms of interpersonal contact have a dramatic, though not definitive, effect on attitudes about gay rights.¹³⁴ Citizens with more personal contact with gays and lesbians are consistently more accepting of measures that promote equal treatment in areas like employment, military service, and adoption rights.¹³⁵

Voters that remain opposed to expanding LGBT rights tend to have a number of traits in common—they tend to go to church one or more times a week, identify as fundamentalist Christian, and live in distinct geographic areas.¹³⁶ Problematically, they are also less likely to know anyone who is gay or lesbian.¹³⁷ And as earlier researchers have noted, this presents a paradox that reinforces polarization: “Not only does contact tend to foster greater acceptance of gay men generally, but in addition heterosexuals with already positive attitudes . . . are more likely than others to experience contact,” because gay and lesbian citizens are more likely to interact with those who aren’t hostile to their lifestyles.¹³⁸ Contact is especially important because studies show that even increased political knowledge does not have a discernible effect on attitudes toward gay rights.¹³⁹ In fact, increased exposure to gay and lesbian citizens, both through media and through friends and family members coming out, has been one of the most important drivers of the dramatic change in attitudes towards LGBT rights in the last few decades.¹⁴⁰

Insofar as the rule emerging from *Reed* and *ProtectMarriage.com* promotes interaction between citizens, we can be optimistic that it will accelerate the trend of public support for same-sex marriage, employment protection, and other LGBT rights issues. As Sunstein notes, the most effec-

132. *Id.*

133. Jay Barth, L. Marvin Overby & Scott H. Huffmon, *Community Context, Personal Contact, and Support for an Anti-Gay Rights Referendum*, 62 POL. RES. Q. 355 (2009).

134. *Id.*

135. Overby & Barth, *supra* note 131, at 456.

136. *Id.* at 451.

137. Barth et al., *supra* note 133, at 360.

138. Gergory M. Herek & Eric K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey*, 30 J. OF SEX RES. 239, 243 (1993).

139. Paul Brewer, *Values, Political Knowledge, and Public Opinion about Gay Rights: A Framing Based Account*, 67 PUB. OPINION Q. 173, 174 (2003).

140. Barth et al., *supra* note 133, at 361; see also Brewer, *supra* note 128, at 1217.

tive messenger to counter a polarized group is someone like them.¹⁴¹ So while the types of protest that we saw in *ProtectMarraige.com* undoubtedly have some effect, we should hope for more interactions like the ones at least nominally called goals by KnowThyNeighbor.com—interaction with neighbors, church members, teammates, and family.

V. LGBT RIGHTS AND REFERENDA AFTER *DOE*

Another good reason to promote transparent public debate about public referenda is that they are particularly dangerous for minority groups. In *Federalist 10*, James Madison voiced a concern common among his peers:

When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good, and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.¹⁴²

Alexis de Tocqueville made similar observations in *Democracy in America* decades later.¹⁴³ Today at least twenty-seven states have direct democracy mechanisms like Washington—a mechanism largely rejected in the founding era due to a deep (and prescient) distrust of mob democracy.¹⁴⁴

Madison and Tocqueville's suspicions have been put to the test in the last decade by a few different political scientists. In the late 1990s, Barbara S. Gamble examined thirty years of initiatives and popular referenda across the country. She found that initiatives that restricted civil rights for minority groups were successful over three-quarters of the time while public referenda as a whole were only approved about a third of the time.¹⁴⁵ Her conclusions were questioned by a duo of political scientists a year later.¹⁴⁶

141. Sunstein, *supra* note 82, at 93–94.

142. THE FEDERALIST NO. 10, at 50 (James Madison) (Ian Shapiro ed., 2009).

143. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 296 (Gerald E. Bevan, trans., Penguin Edition, 2003) (“I am not suggesting that, at the present time in America, there are frequent instances of tyranny. I am saying that no guarantee against tyranny is evident and that the causes for the mildness of the government should be sought more in circumstances and habits than in the laws.”).

144. Boudin, *supra* note 74, at 2142–43.

145. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997).

146. Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: An Extension*, 42 AM. J. POL. SCI. 1020 (1998).

But in the last few years, a reexamination confirmed her results.¹⁴⁷ The most recent study focuses specifically on how gay and lesbian civil rights measures fare, and found that the LGBT community loses 71% of the time.¹⁴⁸ Contrary to Cullinane's worries that new technology means political participation will be chilled, the authors suggest that technology makes bringing together large, homogenous majorities much easier, and therefore makes statewide civil rights initiatives more dangerous for LGBT groups.¹⁴⁹

If voters after *Reed* understand that signing a ballot initiative is an act of legislating, and therefore something more immediate and efficacious than a typical election for representatives, the dynamics of the vote may change. The mob mentality described by social scientists may give way to a more cautious decision making. And while some might criticize this development as undemocratic,¹⁵⁰ the documented history of majorities using public referenda to curtail minority rights should confirm in us the suspicions of the authors of the *Federalists Papers*. At the very least, in the context of public referenda dealing with minority rights, mechanisms to promote deliberation and caution should be welcomed.

VI. CONCLUSION

Doe v. Reed and *ProtectMarriage.com v. Bowen* are both part of a shift towards a particular understanding of democratic citizenship. This move towards what political theorists have called civic republicanism should be welcomed, especially in the context of the continued legal and political battle for LGBT equality. Even though the Court in *Reed* did not deal with the state of Washington's argument that it had an interest in providing information about petition signatories to the public, the effect of the ruling is that voters in public referenda will be acting publically. And when we are engaged in direct democracy, with the rights of a minority at stake, this is exactly the form that our political action should take. ♣

147. Donald P. Haider-Markel et al., *Lose, Win or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304 (2007).

148. *Id.* at 312.

149. *Id.* at 313.

150. Cullinane, for one, advocates for an uninhibited, frictionless conception of democracy, wherein the public's attitudes are translated into policy with the highest fidelity possible. Cullinane, *supra* note 61, at 960.