

5-1-2013

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## Recommended Citation

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POPULAR CONSTITUTIONALISM AND *LEWIS V. HARRIS*:  
A MATTER OF JUDICIAL INDEPENDENCE

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Law and Sexuality Seminar  
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April 30, 2013

POPULAR CONSTITUTIONALISM AND *LEWIS V. HARRIS*: A MATTER OF JUDICIAL INDEPENDENCE

## I. INTRODUCTION

The fight for marriage equality in New Jersey and across the nation is intensifying and well chronicled. In the wake of recent successes in Maine, Maryland and Washington, marriage equality advocates in the Garden State are approaching their campaign with renewed fervor.<sup>1</sup> This paper will discuss the status of the New Jersey campaign for marriage equality, highlighting the history of the marriage equality debate in the state. The paper will focus on litigation, legislation, and possible next steps for marriage equality activists, including: further legislation or a legislative override; a public referendum to amend the New Jersey Constitution to provide for same-sex marriage; or a victory for marriage equality in the courtroom. Further, it will pose the question of whether the Supreme Court of New Jersey erred in failing to provide full marriage equality in *Lewis v. Harris*<sup>2</sup> or whether the current state of affairs on this issue is inevitable given the political realities of the state.

Part II of this paper will survey the recent history of the New Jersey campaign for marriage equality, both in the courts and in the legislative chambers as well as in the front office of the Statehouse in Trenton, New Jersey. First, the New Jersey Supreme Court case of *Lewis v. Harris* will be discussed, including a critical analysis of the majority opinion's overly pragmatic and deferential approach to the constitutional question of whether a denial of same-sex marriage constitutes a due process or equal protection violation under the state constitution.<sup>3</sup> Part II will also focus on then-Chief Justice Poritz's part concurrence, part dissent, which sternly criticized the majority for abdicating its responsibility to adjudicate constitutional questions to the New

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<sup>1</sup> Julie Bolcer, *Is New Jersey Next for a Marriage Referendum?*, THE ADVOCATE (Nov. 8, 2012, 1:41 PM), <http://www.advocate.com/politics/marriage-equality/2012/11/08/new-jersey-next-marriage-referendum>.

<sup>2</sup> *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

<sup>3</sup> *Id.*

Jersey Legislature.<sup>4</sup> The Part will conclude by surveying the various avenues through which marriage equality advocates are fighting for full marriage equality in the state. The political quagmire that the *Lewis* decision created will become evident in assessing the current status of the campaign towards marriage equality.

Part III will provide a constitutional theoretical basis for analyzing the *Lewis* decision, paying particular attention to the theory of popular constitutionalism, which advocates for judicial deference to democratic processes.<sup>5</sup> Under this theory, because of the differences between state and the federal constitutions, specifically the penetrability of state constitutions, non-judicial actors play a significant role in interpreting state constitutions. As evidenced in *Lewis*, judicial deliberations and decision-making are influenced by the judiciary's concern that non-judicial actors will mobilize in order to "correct" judicial decisions. Part IV will examine the *Lewis* decision under the lens of popular constitutionalism, ultimately concluding that *Lewis v. Harris* was wrongly decided. The court's pragmatic, minimalist approach in *Lewis* was overly deferential to the democratically elected legislature. The majority craftily characterized the due process issue of denying marriage equality and the question of "what is in a name" as questions of policy rather than of constitutional principle in order to avoid answering a question regarding a contentious social issue.

Finally, Part V will stress the importance of the court's independent role in constitutional adjudication. This role is even more critical when the court is charged with deciding claims regarding the civil rights of minority groups. Yet courts are even more likely to minimize this

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<sup>4</sup> *Id.* at 230 (Poritz, C.J., concurring in part and dissenting in part).

<sup>5</sup> Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L. J. 871, 875, 887 (1999).

role in equal protection and due process cases involving the rights of insular minorities.<sup>6</sup> The tenets of popular constitutionalism challenge the role of the court as an independent branch, serving to check the democratically-elected branches of government. Ultimately, the majority in *Lewis* abdicated its role as the bulwark of the state constitution, capable of protecting oppressed minorities against the power of the democratically elected branches of government and the people at large.<sup>7</sup> Whether categorized as popular constitutionalism,<sup>8</sup> pragmatic constitutionalism,<sup>9</sup> or deferential minimalism,<sup>10</sup> the concept that an independent judiciary should head to the popular will is troubling because it is antithetical to the premise of American government. Moving forward, if individuals, most significantly socially unpopular minority groups, are to be fully protected by the courts, the judiciary must eschew the tenets of popular constitutionalism and, instead, embrace its role as an independent branch of government.

## II. THE HISTORY OF MARRIAGE EQUALITY IN NEW JERSEY: IN THE COURTS AND IN THE LEGISLATURE

In order to understand the current standoff surrounding the campaign for marriage equality in New Jersey, it is important to first survey the principal case of *Lewis v. Harris*.<sup>11</sup> In *Lewis*, the New Jersey Supreme Court declared that same-sex couples must, on state equal protection grounds, be granted the same rights and benefits afforded to opposite-sex married couples.<sup>12</sup> Yet, the court left it to the New Jersey Legislature either to afford same-sex couples

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<sup>6</sup> Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudications*, 106 COLUM. L. REV. 1955, 1958 (2006).

<sup>7</sup> See THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>8</sup> See generally Reed, *supra* note 5.

<sup>9</sup> See generally Jeffrey L. Amestoy, SIXTEENTH ANNUAL ISSUE ON STATE CONSTITUTIONAL LAW: FOREWORD: *State Constitutional Law Lecture: Pragmatic Constitutionalism -- Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249, 1250 (2004).

<sup>10</sup> See generally Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996).

<sup>11</sup> *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

<sup>12</sup> *Id.*

the right to marry or to set up a parallel structure with which to allocate the rights and benefits.<sup>13</sup> While Justice Albin and the majority took a practical, deferential approach to the due process question, Chief Justice Poritz argued for a constitutional purism approach.<sup>14</sup> The majority's abdication of its responsibility to answer a critical constitutional question and guard the rights of insular minorities against the politically powerful<sup>15</sup> has led to a quagmire in which the political realities that accompany a highly debated issue have led to standstill.

Notably, the remedy the New Jersey Supreme Court contrived was not new. In *Baker v. State*, same-sex couples brought an action against the government seeking declaratory judgment that the refusal to issue them marriage licenses violated marriage statutes and the Vermont State Constitution.<sup>16</sup> The Vermont Supreme Court, under then-Chief Justice Amestoy concluded that excluding same-sex couples from the benefits and protections afforded opposite-sex married couples violated the Common Benefits Clause of the Vermont Constitution.<sup>17</sup> Yet, the court further found that whether these benefits and protections were to take the "form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative, rests with the Legislature."<sup>18</sup> State constitutional law scholar Robert F. Williams described this move by noting that the court "remanded" the case to the legislative branch with instructions to act,<sup>19</sup> in precisely the same manner as the New Jersey experience that will now be discussed below. Upon "legislative remand," the Vermont

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 230 (Poritz, C.J., concurring in part and dissenting in part).

<sup>15</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>16</sup> 744 A.2d 864, 867 (Vt. 1999).

<sup>17</sup> *Id.* Importantly, the New Jersey does not contain the same clause under which the Vermont decision was decided. The Common Benefits Clause, the pertinent part of the Vermont Constitution, reads as follows: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . ." VT. CONST. ch. I, art. 7.

<sup>18</sup> *Baker*, 744 A.2d at 867.

<sup>19</sup> Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV 73, 99 (2001).

Legislature passed a civil union act. Yet, in 2009, after experiencing and assessing the failures of civil unions, the state legislature amended the Vermont law so as to include same-sex couples in marriage and to phase out civil union by 2011.<sup>20</sup> If the Vermont experience is any indication, advocates will be successful in achieving the legality of same-sex marriage in New Jersey, but the precise method of success is unclear.

*A. Marriage Equality Litigation: Lewis v. Harris*

*Lewis v. Harris* involved seven same-sex couples-plaintiffs challenging New Jersey's law regarding civil marriage, which restricts civil marriage to heterosexual couples. After being denied marriage licenses, the *Lewis* plaintiffs sought both a declaration that New Jersey law violated liberty and equal protection guarantees and injunctive relief compelling defendants<sup>21</sup> to grant plaintiffs marriage licenses.<sup>22</sup> The state argued that same-sex marriage has "no historical roots in the traditions or collective conscience of the people of New Jersey to give it the ranking of a fundamental right" and that barring marriage to same-sex couples was a "rational exercise of social policy by the legislature."<sup>23</sup> Therefore, the state maintained that any change to the "bedrock principle" limiting marriage to heterosexual couples must come from the "democratic process."<sup>24</sup>

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<sup>20</sup> Marc R. Poirier, *Lewis v. Harris II* — "Civil Union" Versus "Marriage," *One More Time*, CONCURRING OPINIONS (Apr. 29, 2010, 2:15 PM), <http://www.concurringopinions.com/archives/2010/04/lewis-v-harris-ii-civil-union-versus-marriage-one-more-time.html>.

<sup>21</sup> The defendants included Gwendolyn L. Harris, then Commissioner of the New Jersey Department of Human Services, responsible for implementing the state's marriage statutes; Clifton R. Lacy, then Commissioner of the then-New Jersey Department of Health and Senior Services, responsible for operating the State Registrar of Vital Statistics; and Joseph Komosinski, then acting State Registrar of Vital Statistics, responsible for supervising local registration of marriage records. All defendants' positions included responsibilities relating to issuing marriage licenses. *Id.* at 202–03.

<sup>22</sup> *Id.* at 202.

<sup>23</sup> *Id.* at 205.

<sup>24</sup> *Id.* at 206.

The trial court granted summary judgment for the state, concluding that state laws relating to marriage did not violate the New Jersey State Constitution.<sup>25</sup> In so holding, the trial court noted that the plaintiffs were not attempting to lift a barrier to marriage, but to “change its very essence” and suggested the best avenue for accomplishing this endeavor was through the legislature, not through the courts.<sup>26</sup> A divided three-judge Appellate Division panel affirmed the trial court’s decision.<sup>27</sup> Basing the affirming decision on the text of the state constitution, the state’s history and traditions, and contemporary and social standards, Judge Skillman held that “[m]arriage between members of the same sex is clearly not a fundamental right.”<sup>28</sup> Significantly, in his dissent, Judge Collester, who found same-sex marriage to be a fundamental right, explained his disagreement with the majority’s perception of the court’s role in the case, stating: “we must interpret our Constitution to uphold individual rights, liberties and guarantees for all citizens even though our conclusion may disappoint or offend some earnest and thoughtful citizens.”<sup>29</sup> The New Jersey Supreme Court soon thereafter granted certiorari of the Appellate Court decision as a matter of right.

On October 25, 2006, the Supreme Court of New Jersey issued its decision in the case, considering whether, under the New Jersey Constitution, same-sex couples must be afforded the right to marriage and its attendant social and financial benefits and privileges.<sup>30</sup> The New Jersey Supreme Court unanimously decided that same-sex couples are entitled to the same protections as heterosexual couples under the New Jersey Constitution, but declined to find that the state

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<sup>25</sup> More specifically, the trial court granted summary judgment for the state and dismissed the plaintiffs’ complaint, concluding that marriage was restricted to a man and woman, that same-sex couples did not have a fundamental right to marriage, and that state laws related to marriage did not violate the state constitution’s equal protection guarantees. *Id.* at 203.

<sup>26</sup> *Id.*

<sup>27</sup> *Lewis v. Harris*, 875 A.2d 259 (App.Div.2005).

<sup>28</sup> *Id.* at 268.

<sup>29</sup> *Id.* at 278 (J. Collester, dissenting).

<sup>30</sup> *Lewis*, 908 A.2d 196.

Constitution required that marriage be specifically required to confer these protections and benefits.<sup>31</sup> In so deciding, the court expressly deferred to the New Jersey Legislature as to how the attendant rights should be acknowledged in a statute.<sup>32</sup> Two questions were before the court, one based on due process rights and one on equal protection considerations:

In this case, we must decide whether persons of the same sex have a fundamental right to marry that is encompassed within the concept of liberty guaranteed by Article I, Paragraph 1 of the New Jersey Constitution. Alternatively, we must decide whether Article I, Paragraph 1's equal protection guarantee requires that committed same-sex couples be given on equal terms the legal benefits and privileges awarded to married heterosexual couples and, if so, whether that guarantee also requires that the title of marriage, as opposed to some other term, define the committed same-sex legal relationship.<sup>33</sup>

#### 1. The Majority's Deferential Pragmatism

In holding that denying same-sex couples the rights and benefits statutorily afforded to heterosexual couples violated the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, the majority based its conclusion on the State's legislative and judicial commitment to eradicating sexual orientation discrimination.<sup>34</sup> Although finding that same-sex couples are entitled to certain rights and benefits, the majority declined to recognize that same-sex couples had a fundamental right to marriage.<sup>35</sup>

Following the general Fourteenth Amendment Due Process standard set forth by the United States Supreme Court, the majority first addressed the due process claim. The majority reasoned that fundamental rights are only those so "deeply rooted in the tradition, history, and

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 222.

<sup>33</sup> *Id.* at 200.

<sup>34</sup> *Id.* The text of the constitutional provision in question provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, ¶ 1.

<sup>35</sup> *Lewis*, 908 A.2d at 200.

conscience of the people” to be found to be fundamental.<sup>36</sup> In defining the asserted liberty interest in question, the court limited its review to same-sex marriage as a fundamental right, not the “abstract” right to marriage.<sup>37</sup> Despite the “rich diversity of the state, the tolerance and goodness of its people, and many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law,” the majority did not find same-sex couple’s right to marriage to be fundamental.<sup>38</sup>

The court then turned to the question of whether the state’s marriage laws offend the equal protection principles of the state constitution. The majority rejected a so-called “all-or-nothing” approach for conducting its equal protection analysis, reasoning that awarding the rights attendant to marriage does not necessarily require that same-sex couples be granted the right to marry.<sup>39</sup> The court therefore divided the equal protection issue into two distinct questions: “whether committed same-sex couples have a constitutional right to the benefits and privileges afforded to married heterosexual couples, and, if so, whether they have the constitutional right to have their ‘permanent committed relationship’ recognized by the name of marriage.”<sup>40</sup>

Significantly, the majority recognized the unjustified dichotomy between the “seeming ordinariness of the plaintiffs’ lives” and the “social indignities and economic difficulties” the plaintiffs faced due to the “inferior legal standing” of same-sex couples under New Jersey law.<sup>41</sup> The consequences of this unequal treatment included: the expensive and time-consuming process

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<sup>36</sup> *Id.* The test the court utilized, as set forth by the United States Supreme Court, involved a two-step inquiry. First, “the asserted fundamental liberty interest must be clearly identified” and second, “that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people” of New Jersey. *Id.* at 206–07 (citing *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965)).

<sup>37</sup> *Id.* at 208. The court reasoned that: it is “concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State’s history and its people’s collective conscience.” *Id.*

<sup>38</sup> *Id.* at 211.

<sup>39</sup> *Id.* at 202, 206.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 202.

of cross-adopting each other's children; paying excessive health insurance premiums; not having the right to "family leave;" adverse inheritance tax consequences; and denial of privileges customarily extended to family members at medical facilities.<sup>42</sup> Noting that the judiciary and legislature have acted progressively to provide committed same-sex couples a "strong interest in equality of treatment relative to comparable heterosexual couples," the majority concluded that denying homosexual couples the rights and benefits afforded to heterosexual married couples violated the equal protection guarantee embedded in the New Jersey Constitution.<sup>43</sup>

The court then turned to the question of whether same-sex couples must be afforded the right to marriage itself.<sup>44</sup> Rather than find that same-sex marriage must be legalized in order for marriage laws to be in compliance with the state constitutional mandate of equal protection, the majority took a more cautious approach by deferring to the New Jersey Legislature. The court required that the legislature either "amend the marriage statutes to include same-sex couples or create a parallel statutory structure" that would provide the "rights and benefits enjoyed and burdens and obligations borne by married couples."<sup>45</sup> The majority explicitly stated that the proper statutory scheme to define same-sex couples, be it marriage or otherwise, was a question to be left to the "democratic process."<sup>46</sup> The majority further noted that if the legislature created a "parallel statutory structure" that did not include the title of marriage, the court would not presume that such a structure contravenes equal protection principles so long as the parallel structure provided the rights and benefits of marriage available to same-sex couples.<sup>47</sup> In short, while finding an equal protection violation, the majority failed to find a constitutional right to

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 215.

<sup>44</sup> *Id.* at 206.

<sup>45</sup> *Id.* at 200.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

marriage equality, instead leaving it to non-judicial, democratically-elected actors to determine the future of same-sex marriage in the state.

## 2. The Poritz Dissent: A Constitutional, Not a Political Question

Then-Chief Justice Poritz, joined by Justices Zazzali and Long, concurred with the majority that denying the rights and benefits to same-sex couples statutorily afforded to heterosexual couples violated the equal protection guarantee of the state constitution.<sup>48</sup> On the fundamental rights claim, Poritz found no “principled basis” to distinguish between the rights and benefits flowing from the right to the title of marriage, dissenting both from the majority’s bifurcation of the equal protection argument and from the majority’s finding that there was no fundamental right to same-sex marriage encompassed within the New Jersey State Constitution’s concept of ordered liberty.<sup>49</sup>

Chief Justice Poritz took particular issue with the majority’s narrow framing of the constitutional questions presented. Criticizing the majority’s characterization of the asserted liberty right as limited to same-sex marriage, the Chief Justice noted that the majority avoided the “more difficult questions of personal dignity and autonomy” raised by the *Lewis* plaintiffs. Poritz reasoned that the majority’s framing of the due process question as whether there is a fundamental right to same-sex marriage deeply rooted in the tradition of the state as suggesting the answer—“no.”<sup>50</sup> The Chief Justice found the majority’s logic troubling and viciously circular: because the right has been historically denied to those who now tried to exercise it, it cannot be fundamental.<sup>51</sup> Conversely, had the majority asked the broader question of whether

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<sup>48</sup> *Id.* at 224 (Poritz, C.J., concurring and dissenting).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 227.

<sup>51</sup> *See id.* at 227–28.

the right to marriage is so deeply embedded in tradition as to be ranked fundamental, the answer would be a resounding “yes.”<sup>52</sup>

Further, Poritz objected to the majority’s due process analysis, noting that, as the Supreme Court of the United States established in *Loving v. Virginia*,<sup>53</sup> a right can be deemed fundamental even if it is not found in the “historical traditions and conscience of the people.”<sup>54</sup> Again criticizing the majority’s overly narrow analytical framework, Poritz noted that in *Loving*, the Court did not inquire whether interracial marriage was deeply rooted in Virginia’s traditions, but simply whether the plaintiffs had a right to marry, even though they had traditionally been denied such a right.<sup>55</sup> Highlighting the lessons of *Loving*, Chief Justice Poritz concluded that:

*Loving* teaches that the fundamental right to marry no more can be limited to same-race couples than it can be limited to those who choose a committed relationship with persons of the opposite sex. By imposing that limitation on same-sex couples, the majority denies them access to one of our most cherished institutions simply because they are homosexuals.<sup>56</sup>

In Poritz’s view, the majority entirely failed to address the precise relief sought by the plaintiffs: inclusion and participation in the institution of marriage.<sup>57</sup> While the benefits and

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<sup>52</sup> *Id.* at 228 (citing *J.B. v. M.B.*, 783 A.2d 707 (2001); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967)) (noting that the right to marry is fundamental and protected by both state and federal constitutions).

<sup>53</sup> *Loving*, 388 U.S. 1 (1967).

<sup>54</sup> *Lewis*, 908 A.2d at 228 (Portiz, C.J., concurring and dissenting) (citing *id.*).

<sup>55</sup> *Id.* To be sure, it is important to note that the Supreme Court has developed substantive due process under the Fifth and Fourteenth Amendments significantly since 1967.

<sup>56</sup> *Id.*

<sup>57</sup> The dissent noted the plaintiffs’ focus on the significance of the right to marry itself. As though responding to the question of “what’s in a name,” the plaintiffs explained: “When I am asked about my relationship, I want my words to match my life, so I want to say I am married and know that my relationship with Alicia is immediately understood, and after that nothing more needs be explained;” and:

When you say that you are married, others know immediately that you have taken steps to create something special . . . . The word ‘married’ gives you automatic membership in a vast club of people whose values are clarified by their choice of marriage. With a marriage, everyone can instantly relate to you and your relationship. They don’t have to wonder what kind of relationship it is or how to refer to it or how much to respect it.

*Id.* at 226.

rights attendant to marriage were important to the plaintiffs, Poritz’s dissent focused on the “deep and symbolic significance” of the institution of marriage and the power of language and labels to perpetuate prejudice about differences.<sup>58</sup> As a result, Chief Justice Poritz argued that “[t]he question of access to civil marriage by same-sex couples ‘is not a matter of social policy but [one] of constitutional interpretation’” best addressed by the courts of law, rather than the legislature.<sup>59</sup>

#### B. Marriage Inequality in New Jersey: The Failure of Civil Unions in the Wake of *Lewis v. Harris*

As discussed above, in the *Lewis* decision, the New Jersey Supreme Court directed the New Jersey Legislature either to grant same-sex couples the right to marriage or to create a parallel statutory structure” that would provide the “rights and benefits enjoyed and burdens and obligations borne by married couples.”<sup>60</sup> The legislature was given a deadline of 180 days to correct the violation.<sup>61</sup> The New Jersey Legislature, taking its cue from the majority in *Lewis*,

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<sup>58</sup> *Id.* at 224, 226.

<sup>59</sup> *Id.* at 231 (quoting Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004)). Massachusetts is one of only a few states that have a provision in its constitution permitting or requiring its state supreme court to give an advisory opinion to the governor or legislature. MASS. CONST. ch. 3, art. II (“Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.”). In fact, Massachusetts’ advisory opinion clause is the oldest in the nation. M.A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 214. Upon request, in February 2004, the justices of the Massachusetts Supreme Court issued their opinion regarding the constitutionality of the Massachusetts Senate’s bill Senate, No. 2175, which would have provided for civil unions for same-sex couples while statutorily prohibiting same-sex couples for entering into marriage. Opinions of the Justices to the Senate, 802 N.E.2d 565, 568. The bill would provide the legal protections, benefits, and rights and responsibilities associated with civil marriage while precluding inclusion in the traditional institution of marriage. *Id.* The majority opinion concluded that the proposed legislation would violate the equal protection and due process requirements of the state constitution and that the violating provisions were inseverable from the remainder of the bill. *Id.* at 572. The Massachusetts’ legislature’s use of the advisory opinion clause in order to avoid adoption an unconstitutional act exemplifies a successful dialog between the branches of government in order to protect individuals’ rights.

<sup>60</sup> *Lewis*, 908 A.2d at 200. Importantly, as noted above, this is the same remedy that the Vermont Supreme Court crafted in *Baker v. State*. 744 A.2d 864, 867 (Vt. 1999).

<sup>61</sup> *Lewis*, 908 A.2d at 200.

quickly passed the Civil Union Act in December 2006 in order to comply with the equal treatment mandate required by the opinion.<sup>62</sup>

But the New Jersey Legislature also created the Civil Union Review Commission (the “Commission”) as part of the Civil Union Act.<sup>63</sup> The Commission was tasked with reviewing all aspects of the Civil Union Act and was to report its findings and recommendations semi-annually to the New Jersey Legislature and Governor.<sup>64</sup> The Commission was to expire three years after its creation, effective February 19, 2007, and was to issue a final report upon its expiration.<sup>65</sup>

The Commission held public hearings during which many civilly unionized couples testified, explaining their experiences in the wake of the Civil Union Act and the failings of the civil union system. During a September 2007 hearing before the Civil Union Review Commission panel, hundreds of civilly unionized couples gathered to voice their displeasure over the failures of the civil union structure.<sup>66</sup> After several hearings and considerable fact-finding, the Commission’s final seventy-nine-page report concluded that the civil union structure

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<sup>62</sup> 2006 N.J. Laws 103.

<sup>63</sup> *Id.*

<sup>64</sup> Specifically, the duties of the Commission included:

evaluating the implementation, operation and effectiveness of the act; collecting information about the act’s effectiveness from members of the public, State agencies and private and public sector businesses and organizations; determining whether additional protections are needed; collecting information about the recognition and treatment of civil unions by other states and jurisdictions including the procedures for dissolution; evaluating the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage; and evaluating the financial impact on the State of New Jersey of same-sex couples being provided civil unions rather than marriage.

*Civil Union Review Commission*, OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LAW AND PUBLIC SAFETY, <http://www.nj.gov/oag/dcr/curc.html>.

<sup>65</sup> N.J. STAT. § 37:1-36 (2007).

<sup>66</sup> Angela Delli Santi, *NJ Civil Unions Fall Short, Panel Told*, WASH. POST (Sept. 26, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/26/AR2007042601005.html>.

did not provide full equality to same-sex couples and recommended that the state adopt same-sex marriage.<sup>67</sup>

In short, the Commission concluded that a civil union does not equal a marriage. Citing to “overwhelming evidence,” the Commission concluded that, not only did the Civil Union Act fail to provide adequate protections to same-sex couples, as required under *Lewis*, but it also posed economic, medical, and emotional hardships for same-sex couples.<sup>68</sup> Another major issue that the Commission discussed in its report, which was raised by many same-sex couples at the various public hearings, is that some employers and hospitals do not recognize the rights and benefits of marriage for civil unionized couples.<sup>69</sup> Therefore, employers deny equal health benefits to partners of employees and partners are unable to make important medical decisions and to visit partners in the hospital.

The failures of the Civil Union Act are not limited to the denial of benefits, but are inherent in the separate, “parallel” structure itself. The Commission noted that even if, “given enough time, civil unions are understood to provide rights and responsibilities equivalent to those provided in marriage,” the separate status of a civil union sends a message to the public that same-sex couples are not equal to opposite-sex couples under the law.<sup>70</sup> While deferring to the legislature in *Lewis*, the majority nonetheless recognized the plight of same-sex couples: “the title of marriage is an intangible right, without which they are consigned to second-class

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<sup>67</sup> New Jersey Civil Union Review Commission, *The Legal, Medical, Economic & Social Consequences of New Jersey's Civil Union Law 2*, Dec. 10, 2008, available at <http://www.nj.gov/oag/dcr/downloads/CURC-Final-Report-.pdf> [hereinafter *Final Report*].

<sup>68</sup> Susan K. Livio, *Commission Says New Jersey Should Allow Gay Marriage*, NJ.COM (Dec. 10, 2008), <http://www.nj.com/news/index.ssf/2008/12/goldstein.html>.

<sup>69</sup> *Final Report*, *supra* note 67, at 1.

<sup>70</sup> *Id.* at 2.

citizenship.”<sup>71</sup> This observation no doubt has proven accurate in light of New Jersey’s experience with the parallel statutory structure of civil unions.

Many scholars have noted that a primary concern related to the separate institution of civil unions for same-sex couples is the stigma that comes along with the separate label. A civil union is not a marriage. As Martha Minow explains: “Human beings use labels to describe and sort their perceptions of the world. The particular labels often chosen in American culture can carry social and moral consequences while burying the choices and responsibility for those consequences.”<sup>72</sup> Given the weight Americans give to labels in order to assess the world around them, “language and labels play a special role in the perpetuation of prejudice about differences.”<sup>73</sup>

Scholars have addressed the question that the New Jersey Supreme Court struggled with in *Lewis*: what is in a name? As Professor Marc Poirier has described, “the availability of two different names will tend to force anyone involved in identifying or even thinking about a couple or family relationship to perform the distinction between same-sex and different-sex couples.”<sup>74</sup> As Professor Poirier reasons, although the state may proclaim that civil unions are to be deemed the equivalent of marriage, such a “disclaimer is ineffective,” as the legal distinction reinforces the everyday practices of categorization, including those practices that are harmful and plausibly unconstitutional.<sup>75</sup>

Until there is but one name to describe a couple who choose to share their lives together under the law, same-sex couples will not achieve full equality with their opposite-sex

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<sup>71</sup> *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006). Interestingly, the court concluded that “[u]nder our equal protection jurisprudence, however, plaintiffs’ claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.” *Id.*

<sup>72</sup> MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 4 (1990).

<sup>73</sup> *Id.* at 6.

<sup>74</sup> Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425, 1480 (2009).

<sup>75</sup> *Id.* at 1481–82.

counterparts. Therefore, it is constructive to survey the inroads, setbacks, and standstills that marriage equality advocates have experienced since the Commission's final report concluded that the Civil Union Act is a failure. In doing so, it is important to note how democratically elected actors are influenced by the political realities regarding such a divisive and highly debated issue in order to understand not only why the *Lewis* majority erred in deferring a constitutional question to these actors, but also why it was such a critical error.

*C. The Fight Continues: The Quagmire in the Wake of Lewis v. Harris*

In the wake of *Lewis v. Harris*<sup>76</sup> and the Commission's report signaling the inadequacy of the Civil Union Act,<sup>77</sup> marriage equality advocates and many public officials have responded with increased purpose to finally achieve marriage equality.<sup>78</sup> As the campaign for marriage equality continues in both the New Jersey Statehouse and in the courts, it becomes increasingly clear just how significant a miscalculation it was for the *Lewis* majority to defer to the legislature on an issue so important and contentious as the rights of a minority group. By failing to properly address the rights of same-sex couples in *Lewis v. Harris* and instead leaving the issue for the political playground that is Trenton, New Jersey, the New Jersey Supreme Court renounced its role as ultimate adjudicator of the New Jersey Constitution. The fight towards full marriage equality in New Jersey since the Civil Union Commission's proclamation that the Civil Union Act has failed to provide equality highlights how politics can stand as a barrier to justice where a court relinquishes its "constitutional duty to redress violations of constitutional rights."<sup>79</sup> Moreover, as demonstrated by the current state of affairs in New Jersey, the *Lewis* decision has led to a political quagmire in which same-sex couples have been left without a proper remedy.

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<sup>76</sup> *Lewis*, 908 A.2d 196.

<sup>77</sup> *Final Report*, supra note 67.

<sup>78</sup> See, e.g., Tim Eustace, *Making Marriage Equality a Reality in New Jersey*, BLUE JERSEY (Feb. 24, 2013), <http://www.bluejersey.com/diary/22610/making-marriage-equality-a-reality-in-nj>.

<sup>79</sup> *Baker v. State*, 744 A.2d 864, 867, 898 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

## 1. Legislative Efforts to Achieve Marriage Equality

According to polling data, a majority of New Jerseyans support the legalization of same-sex marriage and popular support for same sex marriage has steadily increased.<sup>80</sup> In fact, an April 2013 poll showed that support for same-sex marriage is at an all-time high in the state, with sixty-two percent of voters in support of marriage equality.<sup>81</sup> Given the trend towards accepting marriage equality<sup>82</sup> and the Civil Union Commission's conclusion that the Civil Union Act has fell short of providing equality to same-sex couples, one might think that the next logical step would be toward full marriage equality in New Jersey. Nevertheless, though their status has not backtracked, the future of the rights of same-sex couples in the state is entirely uncertain. Although same-sex couples could achieve marriage equality via a legislative override, public referendum, or pending litigation, a direct path to marriage equality is anything but certain.

### a. Marriage Equality in the Legislature

One avenue through which advocates have sought to achieve marriage equality is the legislative process, yet supporters in the New Jersey Legislature have struggled to achieve passage of a true marriage equality bill. In January 2010, during the last days of the legislature's

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<sup>80</sup> See *New Jersey Supports Legal Same-Sex Marriage*, PUBLIC POLICY POLLING, July 29, 2011, available at [http://www.publicpolicypolling.com/pdf/PPP\\_Release\\_NJ\\_0725.pdf](http://www.publicpolicypolling.com/pdf/PPP_Release_NJ_0725.pdf); David Redlawsk, *Rutgers-Eagleton Poll Finds New Jerseyans Support Legalizing Gay Marriage*, RUTGERS: EAGLETON INSTITUTE OF POLITICS, Nov. 18, 2009, available at [http://eagletonpoll.rutgers.edu/polls/release\\_11-18-09.pdf](http://eagletonpoll.rutgers.edu/polls/release_11-18-09.pdf); Annie-Rose Strasser, *Poll: New Jerseyans Support Same-sex Marriage*, THINK PROGRESS (last visited Mar. 5, 2013), <http://thinkprogress.org/tag/marriage-equality-new-jersey/?mobile=nc>.

<sup>81</sup> Dan Raftner, *Support for Marriage Equality at All-Time High*, HRC BLOG (Apr. 16, 2013), <http://www.hrc.org/blog/entry/support-for-marriage-equality-in-new-jersey-at-all-time-high/>.

<sup>82</sup> For instance, the Supreme Court recently granted certiorari in *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012), and *United States v. Windsor*, 133 S. Ct. 786, 184 L. Ed. 2d 527 (2012), two cases with significant implications on same-sex marriage in the country. The Court heard oral arguments on both cases in March, 2013. See *U.S. Supreme Court Hears Same-Sex Marriage Arguments*, CNN POLITICS (Mar. 27, 2013, 2:45 PM), <http://www.cnn.com/interactive/2013/03/politics/transcript-scotus-same-sex-marriage/>. Moreover, there are now ten jurisdictions, including nine states and the District of Columbia, that issue marriage licenses to same-sex couples. *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/>. Another six states provide for civil unions. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NCSL (Mar. 21, 2013), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>.

lame duck session and prior to then-Governor Corzine's departure, the New Jersey Senate voted on but failed to pass a marriage equality law; the bill never made it to the General Assembly for a full vote.<sup>83</sup> In February 2012, the next legislative session, the legislature finally passed same-sex marriage, making New Jersey the third state in the nation to pass a marriage equality bill under a governor opposed to marriage equality. Nevertheless, as he had vowed to do in January 2012 if the measure passed,<sup>84</sup> Governor Chris Christie swiftly vetoed the bill.<sup>85</sup>

The bill, though vetoed, is not yet dead, a fact that has marriage equality advocates hopeful. The New Jersey Legislature has until January 2014 to find the two-thirds supermajority needed to override the veto, a move that would require more support from Republican lawmakers.<sup>86</sup> In the Senate, the bill originally passed by a vote of twenty-four to sixteen. Only three more votes are needed to reach a supermajority. An override in the General Assembly is a higher hurdle. The original vote in the Assembly was forty-two to thirty-three; therefore, twelve more affirmative votes are necessary.<sup>87</sup> In early February 2013, legislators in both the Assembly and Senate chambers announced plans to seek to override the veto.<sup>88</sup> The fact that Washington

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<sup>83</sup> Vanessa Juarez, *NJ Senate Defeats Same-Sex Marriage Bill*, CNN POLITICS (Jan. 7, 2010, 8:59 PM), <http://www.cnn.com/2010/POLITICS/01/07/new.jersey.same.sex.marriage/index.html>; see Matt Friedman, *Advocates File Lawsuit Hoping to Legalize Same-Sex Marriage in New Jersey* (June 29, 2011), [http://www.nj.com/news/index.ssf/2011/06/advocates\\_file\\_lawsuit\\_hoping.html](http://www.nj.com/news/index.ssf/2011/06/advocates_file_lawsuit_hoping.html). The measure lost in the Senate fourteen-to-twenty and never made it to the Assembly for a vote. Heather Haddon, *New Jersey Gay Nuptial Strategies Take Shape*, WALL STREET J. (Jan. 18, 2013), <http://online.wsj.com/article/SB10001424127887323968304578249881696524280.html>.

<sup>84</sup> *NJ Senate Oks Gay Marriage; Gov. Vows Veto*, CBS NEWS (Feb. 13, 2012, 5:59 PM), [http://www.cbsnews.com/8301-201\\_162-57376958/nj-senate-oks-gay-marriage-gov-vows-veto/](http://www.cbsnews.com/8301-201_162-57376958/nj-senate-oks-gay-marriage-gov-vows-veto/).

<sup>85</sup> Kate Fernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 7, 2012, available at <http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gay-marriage-bill.html>.

<sup>86</sup> Julie Bolcer, *Is New Jersey Next for a Marriage Referendum?*, THE ADVOCATE (Nov. 8, 2012), <http://www.advocate.com/politics/marriage-equality/2012/11/08/new-jersey-next-marriage-referendum>.

After a bill is conditionally vetoed, the legislature has until the end of its two-year legislative term to override the veto by a supermajority, or two-thirds, of both houses, revise the legislation, or let it die. NJ CONST. art. V, § 1.

<sup>87</sup> Zack Ford, *New Jersey Legislators Will Vote to Override Chris Christie's Marriage Equality Veto*, THINK PROGRESS (last visited Mar. 5, 2013), <http://thinkprogress.org/tag/marriage-equality-new-jersey/?mobile=nc>.

<sup>88</sup> *Id.*

D.C. and nine states,<sup>89</sup> including New York and Connecticut, have legalized same-sex marriage may be part of the rationale for the newfound sense of support for an override.<sup>90</sup> Still, this effort will be met with opposition.

There are significant political implications of a campaign to override Christie's veto. The New Jersey Family Policy Council, a politically active groups whose mission is to stop what its supporters believe to be the breakdown of the traditional family and family values, is committed to mobilizing its members and dollars against an override effort and believes the fight to override will die in the Assembly.<sup>91</sup> Because of potential political implications of voting for the override, any vote will likely occur only after the upcoming June 2013 primary election.<sup>92</sup> In order to succeed in this new override push, a number of Republican legislators would have to vote for the measure and against the powerful and popular Governor Christie.<sup>93</sup> There are Republicans who may vote for the measure, and holding the vote after the June primary would relieve sympathetic Republicans from having to go on record in favor of same-sex marriage before the primary season in which they may be facing more conservative primary challengers.<sup>94</sup> Interestingly, Steven Goldstein, former Chair of Garden State Equality, New Jersey's largest civil rights advocacy organization, which focuses on LGBT rights, has noted that political realities play a significant role in the fight for marriage equality. Goldstein noted that, if Governor Christie considers a run for the presidency in 2016, his stance on same-sex marriage could change given that "national polling indicates that voters will continue to become more supportive of marriage

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<sup>89</sup> See *supra* note 82.

<sup>90</sup> Haddon, *supra* note 83.

<sup>91</sup> *Id.*

<sup>92</sup> Ford, *New Jersey Legislators Will Vote to Override Chris Christie's Marriage Equality Veto*, *supra* note 87. The political realities of leaving this issue to the legislature to resolve highlights the importance of having a branch of government that is largely removed from the political realm to define the constitutional rights of minority groups.

<sup>93</sup> Haddon, *supra* note 83.

<sup>94</sup> *Id.*

equality, making the issue a political winner for a Republican, at least in a general election.”<sup>95</sup>

As demonstrated, advocates will have to strategize and traverse the extremely precarious political thicket if they are to succeed in the legislature.

#### b. Marriage Equality via a Public Referendum

In addition to a possible legislative override, another strategy supported by some, but certainly not all marriage equality supporters, is a public referendum to amend the New Jersey Constitution to legalize same-sex marriage.<sup>96</sup> In his veto message of the same-sex marriage legislation outlining his objections and recommendations to the bill,<sup>97</sup> Governor Christie called for a referendum on same-sex marriage in place of legislation legalizing same-sex marriage.<sup>98</sup> In support of his actions to veto the legislation, and instead to support a referendum to let voters decide, Governor Christie publicly stated that: “this is not an issue that should rest solely in the hands of the Senate, or in the hands of the Speaker [of the New Jersey General Assembly] or the other 118 members of the Legislature. Let’s let the people of New Jersey decide what is right for the state.”<sup>99</sup> Moreover, Governor Christie received much criticism for stating: “The fact of the matter is, I think people would have been happy to have a referendum on civil rights rather than fighting and dying in the streets in the South.”<sup>100</sup> Other public officials, led by the Governor, have called for a public vote via referendum as a means to defeat the proposal even though the legislature was posed to pass it.

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<sup>95</sup> Bolcer, *supra* note 86.

<sup>96</sup> See NJ CONST. art. II., § 1

<sup>97</sup> See NJ CONST. art. 5, § 1, ¶ 14 for the delineation of the New Jersey Governor’s constitutionally prescribed veto power.

<sup>98</sup> Patrick Murray, *Trenton’s Referendum Mania*, POLITICKERNJ (Feb. 13, 2012), <http://www.politickernj.com/patrick-murray/54760/trentons-referendum-mania>.

<sup>99</sup> *Transcript: Gov. Christie Speaks in Bridgewater on Gay Marriage*, ASBURY PARK PRESS, Jan. 24, 2012, available at <http://www.app.com/article/20120124/NJNEWS10/301240066/TRANSCRIPT-Gov-Christie-speaks-Bridgewater-gay-marriage>.

<sup>100</sup> Matt Friedman, *Black Leaders: Gov. Christie Needs History Lesson After Linking Civil Rights to Gay Marriage Vote*, NJ.COM. (Jan. 25, 2012), [http://www.nj.com/news/index.ssf/2012/01/black\\_leaders\\_gov\\_christie\\_nee.html](http://www.nj.com/news/index.ssf/2012/01/black_leaders_gov_christie_nee.html).

Currently pending before the New Jersey Legislature is SCR-88, a concurrent resolution<sup>101</sup> that, if passed by a majority of New Jersey voters after passing both chambers of the legislature, would amend the state constitution to define “marriage” as the “the legally recognized union of two persons of any gender.”<sup>102</sup> Many have expressed that the rights of same-sex couples should not be left to a majority of voters because such a move would be tantamount to a tyranny of the majority; eliminating the safeguards built into representative government poses a special threat to disfavored minority groups.<sup>103</sup> Columnist Patrick Murray warns that the referendum process leaves pressing policy issues to the public, which “lacks both access to information and the ability to deliberate . . . which our founders specifically said should be left to an informed, deliberative system of representative government,” concluding that “you don’t put civil rights to a public vote.”<sup>104</sup>

There are widely varying views among proponents as to whether to proceed with the referendum. The current state of the fight for marriage equality poses particular political hurdles.

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<sup>101</sup> The New Jersey State Constitution can be amended by concurrent resolution. A resolution to amend may originate in either house. The proposal must sit on the desk of each member of both houses at least twenty-one days prior to a vote in the house of origination and a public hearing on the measure must also take place before a vote. In order to then be presented to the people on the ballot, three-fifths the members of each house must vote in the proposal’s favor. If the measure fails to receive a three-fifth approval, but receives a majority of votes, the measure can be referred to the legislature in the next legislative year. The measure would then only require a majority vote to be presented to the people. If a majority of voters vote in favor of the proposal, the amendment will become part of the constitution on the thirtieth day after the election. NJ CONST. art. IX, ¶¶ 1–7; Assemb. Rule 21:1 (specifying that a constitutional amendment presented to the people must be via a concurrent resolution and other parliamentary requirements); Senate Rule 24, 25 (same).

<sup>102</sup> SCR-88, 215th Sen. (N.J. 2012). A concurrent resolution is the constitutionally prescribed mechanism for placing public questions on the ballot at a general election. Unlike in other states, many of which have a mechanism for voter-initiated referenda, any referendum in New Jersey would first need to be passed by the legislature before it could be placed on the ballot. *See supra* note 101. Given the opposition to a referendum from Democratic legislators and the fact that the Democrats control both the General Assembly and the Senate, the prospect of a referendum appears unlikely. Bolcer, *supra* note 86.

<sup>103</sup> *See, e.g.,* Lauren E. Repole, Comment, *Direct Tyranny: The Human Rights Act as a Safeguard Against Harmful Majoritarianism in Jackson v. District of Columbia Board of Elections and Ethics*, 42 SETON HALL L. REV. 685 (2013) (discussing the concerns associated with putting civil rights issues on the ballot). In a noteworthy dissent in *Strauss v. Horton*, a California Supreme Court case regarding the constitutionality of Proposition 8, Justice Moreno expressed concerns about allowing a majority of voters to dictate the rights of insular minorities, reasoning that “the will of the majority be tempered by justice.” *Strauss v. Horton*, 207 P.3d 48, 130 (Cal. 2009) (Moreno, J., concurring in part and dissenting in part).

<sup>104</sup> Murray, *supra* note 98.

Governor Christie strongly opposes same-sex marriage, but has indicated he would accept the results of any public referendum on the topic.<sup>105</sup> A majority of the legislature, but not yet a veto-proof majority, supports same-sex marriage, but not a public referendum to amend the New Jersey Constitution to allow for same-sex marriage, in part because of the concerns of leaving such an issue to a majority vote.<sup>106</sup> For instance, the Senate President, Stephen Sweeney, has publically announced that civil rights should not be put on a ballot for a majority vote.<sup>107</sup> Senator Ray Lesniak, a long-time state senator and Democratic supporter of same-sex marriage legislation, is quoted as predicting that a referendum could be a “last resort” if the legislative override fails, *Garden State Equality v. Dow*,<sup>108</sup> currently pending in New Jersey Superior Court, proves unsuccessful in achieving marriage equality, and “Christie remains in office with his present attitude.”<sup>109</sup> Meanwhile, Assemblyman Reed Gusciora, New Jersey’s first openly gay legislator and a Democratic Assemblyman who has long championed marriage equality, publicly supports a referendum. Assemblyman Gusciora has introduced a bill that would allow voters to approve marriage equality via the ballot and supports a measure being placed on the ballot in the November 2013 election.<sup>110</sup>

The possibility of a referendum to achieve marriage equality has divided advocates as well as public officials. The referendum does pose advantages: it would allow voters and same-sex

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<sup>105</sup> A majority of the general vote on the concurrent resolution would amend the New Jersey Constitution to define marriage as “the legally recognized union of two persons of any gender.” SCR-88, 215th Sen. (N.J. 2012).

<sup>106</sup> Matt Katz, *Christie Calls for Same-Sex Marriage Referendum*, PHILA. INQUIRER, Jan. 25, 2012, available at [http://articles.philly.com/2012-01-25/news/30663269\\_1\\_gay-marriage-bill-marriage-referendum-marriage-equality/3](http://articles.philly.com/2012-01-25/news/30663269_1_gay-marriage-bill-marriage-referendum-marriage-equality/3).

<sup>107</sup> *Id.*

<sup>108</sup> *Garden State Equal. v. Dow*, CIV.A. MER-L-1729-11, 2012 WL 540608 (N.J. Super. Ct. Law Div. Feb. 21, 2012). See *infra* notes 120–139 and accompanying text.

<sup>109</sup> Bolcer, *supra* note 86. Others have also referred to a ballot measure as a last resort. See Elise Young, *Gay-Marriage Activists Split on Next Move After Victories*, BLOOMBERG, Dec. 20, 2012, <http://www.bloomberg.com/news/2012-12-20/gay-marriage-activists-split-on-next-move-after-victories.html>, for a discussion of a splintering effect that the referenda issue has caused among marriage equality advocates.

<sup>110</sup> Zack Ford, *New Jersey Lawmakers Introduces Marriage Equality Referendum*, THINK PROGRESS (last visited Dec. 11, 2012), <http://thinkprogress.org/tag/marriage-equality-new-jersey/?mobile=nc>.

marriage proponents to bypass the political standoff between executive and the legislative branches in order to force action and to succeed in achieving marriage equality. Even in light of the success of marriage equality referenda in Maine, Maryland, and Washington in the November 2012 general election, lawmakers and advocates in New Jersey still object to the concept of putting civil rights to a popular vote.<sup>111</sup> In addition to the problem of putting civil rights issues to a popular vote, the acrimony that a public debate about such an issue would spark and the potentially harmful implications it would have on the LGBT community are important considerations. Studies have shown that state same-sex marriage referenda have negative impacts on the on the LGTB community living in that state, “even if they do not participate at all in advocacy.”<sup>112</sup> Such effects include “heightened stress—both for LGBT individuals and their children—divided families and communities, and extra psychological risk for those who engage in the hostile political campaign.”<sup>113</sup> The long-term negative consequences of losing such a referendum also cannot be overstated.

Opponents of a referendum also note practical reasons to avoid a public referendum: how extraordinarily expensive and potentially cost-prohibitive it would be to conduct a proper campaign in New Jersey’s media market.<sup>114</sup> Particularly in the light of the fact that Governor Christie will be running for reelection and all legislative seats will be open,<sup>115</sup> a ballot measure during the November 2013 election could draw millions of dollars from out-of-state conservatives who oppose same-sex marriage and who passionately view marriage as between and man and a woman.<sup>116</sup> When asked about the possibility of a referendum in New Jersey,

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<sup>111</sup> Bolcer, *supra* note 86.

<sup>112</sup> Ford, *New Jersey Lawmakers Introduces Marriage Equality Referendum*, *supra* note 110.

<sup>113</sup> *Id.*

<sup>114</sup> Bolcer, *supra* note 86.

<sup>115</sup> In New Jersey, General Assembly seats are up for election every two years and Senate seats are open every four years. NJ CONST. art. IV, § 2. All legislative seats are open and on the ballot for the 2013 election cycle.

<sup>116</sup> Young, *supra* note 109.

Steven Goldstein, former Chair of Garden State Equality, stated that: "A referendum is . . . a contest of which side can raise more millions. A referendum puts a community's civil rights up for sale to the highest bidder . . . ." <sup>117</sup> He further asked three pointed rhetorical questions:

Would you want your civil rights to be at the mercy of the financial infestation of our political system? Aren't we sick of the Super PAC lies that slice our society with hate? Can you imagine the exponential hate – and cost – that would infest a marriage equality referendum in hardball New Jersey? <sup>118</sup>

No bill that would allow for a public referendum in November 2013 has received any traction to date in the New Jersey Legislature. Given the many concerns voiced by marriage equality advocates, it does not yet seem to be the next likely course of action in the fight for marriage equality.

## 2. Back in the Courtroom to Seek Full Marriage Equality

While the fate of marriage equality in the legislature and at the ballot box is uncertain, advocates continue a multi-pronged approach by also pursuing further litigation in the courts in the light of the failures of the Civil Union Act to remedy the plight of same-sex couples. On March 18, 2010, the *Lewis* plaintiffs filed a motion with the New Jersey Supreme Court in aid of litigants' rights, <sup>119</sup> which challenged the inadequacy of the Civil Union Act to fulfill the mandate set forth in *Lewis*. <sup>120</sup> In consideration of the shortcomings of the Civil Union Act, this petition

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<sup>117</sup> Bolcer, *supra* note 86.

<sup>118</sup> *Id.*

<sup>119</sup> New Jersey courts provide an unusual procedure in which litigants can file a "motion for order enforcing litigant's rights." 1 N.J. PRAC., COURT RULES ANNOTATED R 1:10-3 (2013 SUPP.); *see* an example motion form at <http://www.judiciary.state.nj.us/rules/app11m.pdf> and an example order form at <http://www.judiciary.state.nj.us/rules/app11o.pdf>. A motion in aid of litigants' rights is an appropriate "vehicle for a party who alleges a violation of judgment." Abbott ex rel. Abbott v. Burke, 20 A.3d 1018 (2011). For instance, when the state failed to fund "Abbott districts" at the levels required under School Funding Reform Act, as offered in prior litigation in exchange for relief from Supreme Court decisions and remedial orders setting forth funding requirements, a class of schoolchildren filed a motion in aid of litigants' rights. *Id.*

<sup>120</sup> *Garden State Equal. v. Dow*, CIV.A. MER-L-1729-11, 2012 WL 540608 (N.J. Super. Ct. Law Div. Feb. 21, 2012). This action has been referred to "*Lewis II*." *See* Marc R. Poirier, *Lewis v. Harris II — "Civil Union" Versus "Marriage," supra* note 20.

asked the court to compel the New Jersey Legislature to grant civil marriage to same-sex couples. In response to the motion, on July 26, 2010, the court denied plaintiffs' motion to enforce litigants' rights, without prejudice.<sup>121</sup> In so ruling, the court articulated that the proper venue for the action was in the Superior Court.<sup>122</sup>

Following the directive of the New Jersey Supreme Court, on June 29, 2011, plaintiffs filed a four-count complaint in the Superior Court, Law Division, Mercer County. The plaintiffs filed both state and federal law claims, including that the Civil Union Act violates both the New Jersey Constitution and the Fourteenth Amendment of the United States Constitution.<sup>123</sup> The plaintiffs include Garden State Equality as lead plaintiff, and seven same-sex couples, all represented by Lambda Legal. The defendants, like those in *Lewis*, are named in their official capacities based on their respective roles in implementing and enforcing state law.<sup>124</sup>

The specific complaints include: a denial of equal protection under Article I, Paragraph 1 of the New Jersey Constitution; a denial of the fundamental right to marry under Article I, Paragraph 1 of the New Jersey Constitution; a denial of equal protection under the Fourteenth Amendment to the United States Constitution, in violation of 42 U.S.C. §1983; and a the denial of substantive due process under the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. §1983.<sup>125</sup> The defendants moved for the court to dismiss the complaint for failure to state a claim. The court denied the motion to dismiss as to the count that same-sex couples were denied equal protection under Article I, Paragraph 1 of the New Jersey Constitution, and granted the motion with respect to the other three claims. Soon thereafter, the plaintiffs moved for the court to reconsider the dismissal of the third claim, that the Civil Union

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<sup>121</sup> *Garden State Equal.*, 2012 WL 540608 at \*2.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

Act denies same-sex of equal protection under the Fourteenth Amendment to the United States Constitution, in violation of 42 U.S.C. §1983.<sup>126</sup>

In an unpublished opinion addressing defendant’s motion to dismiss the complaint, Judge Feinberg of the New Jersey Superior Court, Law Division granted the motion for reconsideration. As a consequence, the case will proceed to trial on the equal protection claims under the Article I, Paragraph 1 of the New Jersey Constitution and the Fourteenth Amendment of the United States Constitution.<sup>127</sup> In her analysis, Judge Feinberg noted that *Baker v. Nelson*<sup>128</sup> was no longer controlling precedent. In *Baker*, the Supreme Court dismissed an appeal of a Minnesota Supreme Court judgment holding that a state law defining marriage to be between only “persons of the opposite sex” for lack of a federal question under both the Equal Protection and Due Process Clauses of the Constitution.<sup>129</sup> *Baker*, Judge Feinberg reasoned, “was decided forty years ago and both doctrinal and societal developments since *Baker* indicate that it has sustained serious erosion.”<sup>130</sup>

In coming to the conclusion that *Baker* is no longer controlling, the judge surveyed the changing federal legal landscape in regard to sexual orientation as a protected class.<sup>131</sup> In this regard, Judge Feinberg noted that *Baker* has been undermined by subsequent Supreme Court precedent, such as *Romer v. Evans*<sup>132</sup> and *Lawrence v. Texas*.<sup>133</sup> Judge Feinberg also noted that “the denial of the title of marriage to same-sex couples’ relationships has been likened by courts

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at \*9.

<sup>128</sup> 409 U.S. 810 (1972).

<sup>129</sup> *Id.*; 191 N.W.2d 185 (Minn.1971).

<sup>130</sup> *Garden State Equality*, 2012 WL 540608 at \*4.

<sup>131</sup> *Id.* at \*3.

<sup>132</sup> *Id.* at \*6 (citing *Romer v. Evans*, 517 U.S. 620 (1996) (finding Colorado’s Amendment 2 violated the Equal Protection Clause of the Federal Constitution)).

<sup>133</sup> *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a Texas statute criminalizing sodomy as violative of the Due Process Clause and overturning *Bowers v. Hardwick*)).

and scholars to other forms of discrimination once considered to be appropriate,” such as miscegenation laws or discrimination based on sex.<sup>134</sup>

Moreover, Judge Feinberg observed that the recent Ninth Circuit case, *Perry v. Brown*,<sup>135</sup> in which the Ninth Circuit affirmed a lower decision finding that Proposition 8, a voter-enacted constitutional amendment California limiting marriage to opposite-sex couples, violated the Fourteenth Amendment of the Equal Protection Clause because the amendment singled out certain citizens for unfavorable treatment.<sup>136</sup> Judge Feinberg reasoned that, although the Civil Union Act, unlike Proposition 8, “was intended to confer more benefits on same-sex couples,” . . . the Civil Union act is arguably similar because it singles out a certain class of citizens, namely gays and lesbians, for allegedly disfavored treatment.”<sup>137</sup> Judge Feinberg therefore concluded that, while the Civil Union Act does bestow certain benefits on same-sex couples, it also denies these couples the designation of marriage and “allegedly does not bestow upon plaintiffs all of the benefits enjoyed” by opposite-sex couples.<sup>138</sup> The court was satisfied that there is sufficient state action to permit the claim under the Federal Equal Protection Clause to proceed.<sup>139</sup> This case is still pending. As will be discussed below, this case provides an opportunity to learn from the *Lewis* decision and to finally grant marriage equality to same-sex couples in New Jersey.

### III. STATE CONSTITUTIONAL THEORY AS A BASIS FOR UNDERSTANDING THE 2006 *LEWIS V. HARRIS* DECISION

Given the failings of the Civil Union Act and the current disorder surrounding the fight for

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<sup>134</sup> *Id.* at \*3. Judge Feinberg specifically cited to *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Supreme Court struck down a state anti-miscegenation law as violative of the Equal Protection Clause and *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which the Court included classifications based on sex with those classifications subject to heightened judicial scrutiny.

<sup>135</sup> 667 F.3d 1078, 9th Cir. (Cal.). As discussed above, this case was granted certiorari and was heard before the Supreme Court as *Hollingsworth v. Perry* in March 2013. 133 S. Ct. 786 (2012); *see supra* note 82.

<sup>136</sup> *Garden State Equality*, 2012 WL 540608 at \*8.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at \*\*9–10.

marriage equality, it is helpful to understand the majority's analysis in *Lewis* under a state constitutional law framework. States constitutions are profoundly different from the United States Constitution in their origin, function, form, and quality and therefore must be understood, evaluated, and utilized on their own terms.<sup>140</sup> In this regard, state constitutional scholar Robert F. Williams summarizes the primary characteristics upon which state constitutions differ from the federal model, including: their length, which is in part due to the states' broader range of plenary authority; their inclusion of policy matters that could be treated by legislation; and the state constitutions' relative ease of revision and amendment.<sup>141</sup> It is the final distinguishing factor that will be the primary basis of this theoretical discussion.

Relatively speaking, a state constitution is much easier to amend than the federal Constitution.<sup>142</sup> Therefore, as Professor Williams concludes, it is easier to "correct an error" made by a state court interpreting a state constitution.<sup>143</sup> Williams identifies two paramount reasons why state constitutions are more easily penetrable by democratic majorities: the process of selection of state supreme court justices and the methods of adopting and/or modifying constitutions to achieve social change.<sup>144</sup> States currently employ various methods for selecting

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<sup>140</sup> ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 20, 36 (2009).

<sup>141</sup> *Id.* at 25.

<sup>142</sup> Robert F. Williams, *American Constitutional Law* at 4, <http://camlaw.rutgers.edu/statecon/subpapers/williams.pdf>. As discussed above, *supra* Part II.D, it has not proven "easy" to resolve the "error" imbedded in the decision of *Lewis v. Harris*. See also WILLIAMS, *supra* note 140, at 29. Some state constitutions are certainly easier to amend than others, and the procedures by which state constitutions can be amended vary by state. *Id.* at 87–88, 359–99. In addition to that the fact that states vary with respect to direct democratic methods available to amend their respective constitutions, see Repole, *supra* note 103, at 696, states vary in their non-direct procedures by which the state constitution can be amended and in the complexity of the procedural hurdles necessary. For instance, in New Jersey, the constitution can be amended by concurrent resolution, but must first be passed by a three-fifths majority (or a simple majority if voted on in a consecutive legislative session after failing to achieve a three-fifths majority) before being presented to the people on the ballot. NJ CONST. art. IX, ¶¶ 1–7. Conversely, in California, citizens need only acquire signatures equaling eight percent of the number of citizens who voted in the most recent gubernatorial election in order to present a constitutional amendment to the electorate. CA CONST., art. II, §8.

<sup>143</sup> Williams, *American Constitutional Law*, *supra* note 142, at 4.

<sup>144</sup> Reed, *supra* note 5, at 875, 887. For instance, twenty-five states elect state supreme court justices through direct election, either by partisan or non-partisan methods. Moreover, many states have direct democratic methods to adopt or amend constitutional text, particularly through constitutional initiatives and referenda. *Id.* at 888.

state supreme court justices, such as partisan election, nonpartisan election, election by legislature, gubernatorial appointment, as is the process in New Jersey, and merit selection.<sup>145</sup> Selection by popular vote certainly raises concerns about the independence of the judiciary. Yet, for purposes of the present discussion, this first point is of little relevance, as New Jersey's judiciary are appointed and confirmed by the Senate and, in contrast to many states' judiciaries, are not elected.<sup>146</sup>

As to the second point, that state constitutions are more easily modified, New Jersey does have methods through which democratic majorities can modify the constitution. In regard to the penetrability of state constitutions, one reason for this is the use of direct democratic methods to amend state constitutions. Direct democracy is “the process by which voters directly decide issues of public policy by voting on ballot propositions.”<sup>147</sup> While a number of states have some form of direct public lawmaking method, be it the initiative, referendum, or recall,<sup>148</sup> these mechanisms of popular voter participation in governing and constitution-making have never been adopted in the federal constitutional model.<sup>149</sup> There are generally two subgroups of direct democratic methods: substitutive and complementary.<sup>150</sup> Substitutive direct democracy allows the public to bypass the government completely, thereby substituting popular lawmaking for the representative process.<sup>151</sup> The initiative, the most common form of substitutive direct democracy, allows citizens to propose legislative measures or constitutional amendments to be placed on a ballot for a popular vote.<sup>152</sup>

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<sup>145</sup> Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, <http://www.willamette.edu/wucl/pdf/review/39-4/tarr.pdf>.

<sup>146</sup> NJ CONST., art. VI, § VI.

<sup>147</sup> DAVID V. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 1 (1984).

<sup>148</sup> For a discussion of the direct democratic methods adopted by the states, see Repole, *supra* note 103, at 696.

<sup>149</sup> WILLIAMS, *supra* note 140, at 32.

<sup>150</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1510 (1990).

<sup>151</sup> *Id.* A ballot initiative or plebiscite is the most common form of substitutive democracy.

<sup>152</sup> See Repole, *supra* note 103, at 688–690.

Conversely, complementary democracy does not allow voters to entirely bypass the government. The referendum is the most common form of complementary democracy and “refers a proposed or existing law or statute to voters for their approval or rejection.”<sup>153</sup> In this scenario, the electorate and legislature act jointly in order to ratify a measure.<sup>154</sup> The recall is a procedure by which the electorate can remove a public official by submitting a petition required to allow the entire electorate to vote on the tenure of the public official.<sup>155</sup> New Jersey’s Constitution allows for a form of popular referendum, whereby the legislature first enacts a measure and then poses it to the electorate to vote on before the measure can go into effect.<sup>156</sup> The electorate cannot directly propose a constitutional amendment in the state.

In light of these differences between the federal Constitution and state constitutions, constitutional scholars have theorized about how the approaches of the state and the Supreme Court of the United States vary with respect to constitutional interpretation given the potential influence of non-judicial actors in the state model. In 1999, Professor Douglas Reed coined the term “popular constitutionalism” to describe his theory that the “processes of generating state constitutional meanings . . . are subject to much more intense political disputation by interests and coalitions of interests than is the Federal Constitution.”<sup>157</sup> Constitutional scholar Mark Tushnet describes the premise of popular constitutionalism as a dialogue—constitutional law as a

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<sup>153</sup> THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL* 2 (1989).

<sup>154</sup> Eule, *supra* note 150, at 1512.

<sup>155</sup> See Repole, *supra* note 103, at 690. Though the recall will not specifically be discussed, it is worthwhile to note that the presence of a recall process may also be relevant when assessing the decision-making processes of a court. For instance, in an unprecedented use of the recall mechanism, Iowa’s electorate voted to recall Iowa Supreme Court justices who were part of a unanimous decision to legalize same sex marriage in the state. See A.J. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, available at <http://www.nytimes.com/2010/11/04/us/politics/04judges.html>. Such popular mobilization could certainly serve as a warning to judges and justices in states that allow for the recall of members of the judiciary.

<sup>156</sup> NJ CONST. art. IX, ¶¶ 1–7; Assemb. Rule 21:1; Senate Rule 24; 25; see also Eule, *supra* note 150, at 1512.

<sup>157</sup> Reed, *supra* note 5, at 875

conversation between the people, legislatures, executives, and courts.<sup>158</sup> Under this view, it is the interaction and conversations between non-judicial and judicial actors that produce constitutional law.<sup>159</sup> According to Professor Tushnet, what is most noteworthy about popular constitutionalism is that the courts “have no normative priority in the conversation.”<sup>160</sup>

Popular constitutionalism stems from the understanding, as expressed by Professor Williams, that state constitutional questions should not be approached in the same manner as the federal Constitution. One difference posed by Professor Reed is that state constitutionalism is subject to far more intense political debate by special interest coalitions than its federal counterpart, whereby non-judicial actors who vie strategically against one another to advance their understandings of state constitutional meanings play an integral role.<sup>161</sup> The role of non-judicial actors, Reed posits, is justified by the fact that state constitutions give great credence and power to democratic majorities, which in turn invites and encourages contestation and dispute.<sup>162</sup> To that end, according to Professor Reed, state constitutional law is often sustained and developed by the political activities of interest groups and social movements to a much greater degree than by judicial actors.<sup>163</sup> Therefore, state constitutional meaning is derived from the interplay between judicial interpretation and extra-judicial mechanisms, such as popular mobilization. Accordingly, under this theory, state constitutional law is not defined by the courts alone and is more readily influenced by political processes and public mobilization.<sup>164</sup>

In particular, Professor Reed has noted that legal mobilization, through public interest litigation, and voter mobilization, through ballot initiatives, have diminished the judge’s role in

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<sup>158</sup> Mark V. Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV 991, 997 (2006).

<sup>159</sup> *Id.* at 999.

<sup>160</sup> *Id.*

<sup>161</sup> Reed, *supra* note 5, at 874.

<sup>162</sup> *Id.* at 885.

<sup>163</sup> *Id.* at 875.

<sup>164</sup> *Id.*

determining the meaning of state constitutional provisions as they relate to gay rights and same-sex marriage.<sup>165</sup> He argues that this phenomenon shows that state judicial determinations of controversial state constitutional rights questions are rarely final and that the court of public opinion will likely prevail, even where the political implications are messy and confrontational.<sup>166</sup> Reed argues that the judiciary’s awareness of the potential for popular mobilization of non-judicial actors influences judicial deliberations and decision-making. In addressing the Vermont Supreme Court decision of *Baker v. State*,<sup>167</sup> Professor Reed noted that the Vermont Supreme Court was aware that a decision mandating same-sex marriage “outright might face intense opposition.”<sup>168</sup> This court explicitly noted that “judicial authority is not ultimate authority.”<sup>169</sup> According to Professor Reed, this, “in a nutshell, is the lesson of popular constitutionalism.”<sup>170</sup>

Furthermore, Professor Reed argues against the longstanding presumption of judicial supremacy in determining the law, arguing that non-judicial actors may properly be a part of the process. Indeed, Professor Reed even takes issue with Chief Justice John Marshall’s edict from *Marbury v. Madison*,<sup>171</sup> at least as it applies to state constitutionalism. Chief Justice Marshall reasoned in *Marbury*: “It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 875–76.

<sup>167</sup> 744 A.2d 864 (Vt. 1999). As mentioned above, *Baker* was a precursor to *Lewis* in which the Vermont Supreme Court considered similar questions to those addressed later in *Lewis* and left it to the legislature to design a system with which to assure that same-sex couples receive the same benefits as heterosexual married couples. *Id.*

<sup>168</sup> Reed, *supra* note 5, at 871.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> 5 U.S. 137 (1803); *see also* ADRIAN VERMUELE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY ON LEGAL INTERPRETATION 234–36 (2006) (discussing the questionable analysis establishing judicial review and judicial supremacy in interpreting the constitution in *Marbury* in light of historical materials suggesting that the Constitution was a special form of popular law or popular enforcement made by the people to bind their governors).

ordinary act.”<sup>172</sup> In the famous words of Chief Justice Marshall, “[it] is emphatically the province and duty of the judicial department to say what the law is.”<sup>173</sup> Professor Reed objects to the dichotomous nature of Marshall’s constitutional theory, taking issue with the notion that there is no middle ground between the constitution being superior and unchanged by ordinary means and the constitution merely being on the level of ordinary legislative acts.<sup>174</sup>

Critical to the popular constitutionalism analysis is the importance of politics to the constitutional process. Former Chief Justice of the Vermont Supreme Court Jeffrey L. Amestoy,<sup>175</sup> in considering Professor Reed’s theory of popular constitutionalism, describes his own state constitutional law approach as “pragmatic constitutionalism.”<sup>176</sup> Amestoy notes that constitutional interpretation is not exclusively reserved for judges under the popular constitutionalism paradigm.<sup>177</sup> As Amestoy asserted with regard to state constitutional interpretation, “law and politics matter. The inter-relationship of ‘politics’ (and by ‘politics’ I mean the recognition that the state constitutional framework empowers a citizenry to alter state constitutions by much more direct political activism than is possible in the federal context) and “law” is more subtle than is generally recognized.”<sup>178</sup>

Proponents of popular constitutionalism contend that the court should not necessarily abrogate its role as a counter-majoritarian institution, but should be cognizant of non-judicial actors in crafting state constitutional law.<sup>179</sup> If the court is not the only player in defining state

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<sup>172</sup> 5 U.S. 137 (1803).

<sup>173</sup> *Id.*

<sup>174</sup> Reed, *supra* note 5, at 886.

<sup>175</sup> Amestoy was Chief Justice of the Vermont Supreme Court when the court considered the case of *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>176</sup> Amestoy, *supra* note 9, at 1250.

<sup>177</sup> *Id.* at 1253.

<sup>178</sup> *Id.* at 1257.

<sup>179</sup> *Id.* at 1255.

constitutional law, the primary role of the court becomes persuasiveness.<sup>180</sup> Justices can serve as supervisors of the process who offer guidance to the legislature through statements of principle, but allow for the non-judicial actors to formulate a solution.<sup>181</sup>

Although Reed’s popular constitutionalism is based on the premise that state constitutionalism differs from federal constitutionalism because state constitutions are generally more amendable to democratic process, scholars have also applied popular constitutionalism tenets to federal constitutional theory. This scholarship, though focusing on federal law, is nonetheless instructive in placing the *Lewis* majority’s pragmatic approach in perspective. For instance, popular constitutionalism reflects at a state level the theory that Professor Sunstein refers to as “decisional minimalism,”<sup>182</sup> whereby a court decides “as little as necessary to justify an outcome.”<sup>183</sup> Professor Sunstein proposes that courts should avoid certain important decisions in order to ensure they are decided by democratically accountable actors.<sup>184</sup> Therefore, under the minimalist paradigm, the court is justified in leaving open “the most fundamental and constitutional questions” in order to promote democratic accountability and deliberation.<sup>185</sup>

Professor Sunstein further maintains that minimalism is most important when a court is faced with an issue that is particularly divisive or hotly debated in the public sphere.<sup>186</sup> Like Professor Reed’s approach to state constitutionalism, Professor Sunstein advocates for a pragmatic, cautious approach because of the potential for a backlash to an unpopular decision given the contentious nature of the same-sex marriage issue. Most critically, Professor Sunstein

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<sup>180</sup> *Id.* at 1261.

<sup>181</sup> *Id.* at 1265.

<sup>182</sup> Sunstein, *supra* note 10, at 7.

<sup>183</sup> Christine S. Baxter, Comment, *Equal Protection—“And Now, by the Power Vested in the People of New Jersey You Will Not be Pronounced . . .” Popular Constitutionalism and the Struggle for Same-Sex Marriage*, 38 RUTGERS L.J. 1215 (2008) (citing Sunstein, *supra* note 182, at 6).

<sup>184</sup> Sunstein, *supra* note 10, at 7.

<sup>185</sup> *Id.* at 7–8.

<sup>186</sup> *Id.* at 10.

advocates for judicial prudence before asserting “even a correct principle against a democratic process that is not ready for it.”<sup>187</sup> Professor Sunstein goes so far as to recommend that the Court should stay away from the issue of same-sex marriage, “whatever it may be thinking about the merits of the underlying constitutional claims.”<sup>188</sup> Similarly, state constitutional scholar and theorist Professor Reed argues that the resolution of contentious issues, such as gay rights and same-sex marriage, through popular constitutionalism may provide greater legitimacy to the eventual victories that advocates will achieve.<sup>189</sup> Minimalism, according to Professor Sunstein, is advantageous because it allows for greater involvement and input from other branches of government by allowing “the democratic process room to adapt . . .” and maneuver.<sup>190</sup> Though such an untidy, deferential, and indefinite adjudication may not sit well with some, Professor Sunstein justifies such untidiness as necessary when a democracy is in moral flux, because courts may not have the best or the final answers.<sup>191</sup> Courts ought, to and are justified by, proceeding in a manner that recognizes that the judiciary is but one participant in the system of democratic deliberation.<sup>192</sup>

Moreover, Professor Eskridge has offered that judicial deference can also increase tolerance in the long run while mediating social clashes in the short run.<sup>193</sup> Under what he refers to as the “jurisprudence of tolerance,” Professor Eskridge proposes that the judiciary should be cautious when traversing certain legal issues and should adopt more conservative judicial strategies for dealing with cultural clashes by operating “to lower the stakes of identity politics

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<sup>187</sup> *Id.* at 97.

<sup>188</sup> *Id.* at 15.

<sup>189</sup> Reed, *supra* note 5, at 931–32; *see also* William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (discussing how judicial deference can increase tolerance). (2004).

<sup>190</sup> Sunstein, *supra* note 10, at 19–20.

<sup>191</sup> *Id.* at 101.

<sup>192</sup> *Id.*

<sup>193</sup> Eskridge, *supra* note 189.

and culture clashes. The Court's moderating role is especially important when warring identity groups threaten to radicalize politics.”<sup>194</sup> In short, he proposes that there are long-term benefits to deference. Popular constitutionalism, at the state level, appears to reflect these various, yet fundamentally similar scholarly theories.

The practice of judicial deference is not merely a theory. As Professor Schapiro noted, state court deference to state legislatures continues to be strong.<sup>195</sup> Similarly, Professor Suzanne Goldberg has noted that, when views about social groups, such as gays and lesbians, are in flux, courts considering equal protection and due process claims “go to great lengths to avoid acknowledging their central role in substantiating either the ‘old’ or ‘new’ norm.”<sup>196</sup> Professor Goldberg likewise concludes that the courts are “inescapably involved in absorbing, evaluating, and influencing” popular judgments regarding certain social groups, yet seek to obfuscate their judicial role, particularly in regard to the rights of a social group about whom social judgments are in flux.<sup>197</sup>

This state constitutional interpretation theoretical foundation is important to keep in mind in turning back to the decision of *Lewis v. Harris*. Although state constitutionalism may be distinct in that the process by which the state constitution is created, revised, and amended allows for greater interplay between democratic majorities, it does not necessarily follow that the process of interpretation requires an indeterminate process open to non-judicial actors. The New Jersey Supreme Court's hesitation may have been a pragmatic strategy to avoid having to declare

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<sup>194</sup> *Id.* at 181. *The Least Dangerous Branch: The Supreme Court and the Bar of Politics*, by Alexander Bickel, is also a highly relevant and influential work of legal scholarship in which Bickel discusses the “passive virtues” of the Supreme Court. Bickel's theory is premised on the idea that the Court should utilize techniques for *not* deciding when a decision may be improvident. Bickel emphasizes the importance of a dialogue between the Court and the democratically-elected branches of government. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE BAR OF POLITICS* (2nd ed. 1986).

<sup>195</sup> Robert A. Schapiro, *Judicial Deference and Judicial Coordinancy in State and Federal Constitutional Law*, 85 *CORNELL L. REV.* 656, 666 (2000).

<sup>196</sup> Goldberg, *supra* note 6, at 1955, 1958, 1961.

<sup>197</sup> *Id.* at 1961.

a potentially unpopular constitutional principle, even a correct principle, “against a democratic process that [was] not ready for it.”<sup>198</sup> The New Jersey Supreme Court’s decision has led to an unproductive stalemate.<sup>199</sup>

#### IV. *LEWIS V. HARRIS*: A FAILED POPULAR DIALOGUE

Understanding the *Lewis* decision in light of the popular constitutionalism paradigm is constructive. Such an analysis illustrates the consequences of a judiciary deferring to non-judicial actors when defining constitutional rights, particularly where the right in question involves a minority interest. To do so, it is helpful to also consider the analyses employed in the *Baker v. State* decision, which the *Lewis* Court’s strategy largely mirrored.<sup>200</sup> The majority in *Lewis*, in “remanding”<sup>201</sup> to the New Jersey Legislature, was clearly conscious of the divisive nature of the issue of same-sex marriage. As the majority noted, there was and still is a “nationwide public debate raging over whether same-sex marriage should be authorized under the laws or constitutions of the various states.”<sup>202</sup> There is little doubt that the court’s awareness of the potential push-back of an unpopular decision played a role in the majority’s analysis.<sup>203</sup> Ultimately, *Lewis* was wrongly decided. For marriage equality advocates to succeed in their fight in the New Jersey courts, the state courts must take a constitutional purism approach, as

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<sup>198</sup> Sunstein, *supra* note 10, at 97.

<sup>199</sup> Tushnet, *supra* note 158, at 999.

<sup>200</sup> 744 A.2d 864 (Vt. 1999). Although both the New Jersey and Vermont Supreme Courts adopted deferential strategies, the New Jersey decision did not exactly mirror one another because the Vermont Constitution, unlike the New Jersey Constitution, includes a Common Benefits Clause, which guarantees all citizens equal benefit and protection of the law. VT. CONST, ch. 1, art. 7; *see supra* note 17 for the text of the clause. *Lewis*, as discussed in detail above, hinged upon equal protection grounds. *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006). It is also important to note that the New Jersey experience has only mirrored the experience in Vermont up to a point. While upon “legislative remand”, the Vermont Legislature passed a civil union act, after experiencing and assessing the failures of civil unions, in 2009 the legislature amended the Vermont law so as to include same-sex couples in marriage and to phase out civil union by 2011. Poirier, *Lewis v. Harris II — “Civil Union” Versus “Marriage,” One More Time*, *supra* note 20.

<sup>201</sup> *See Baker*, 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part) (criticizing the majority for remanding a constitutional question to the legislature).

<sup>202</sup> *Lewis*, 908 A.2d at 209.

<sup>203</sup> *See Reed*, *supra* note 5, at 871.

advocated by Chief Justice Poritz in *Lewis*.<sup>204</sup> What has occurred in the state since the *Lewis* decision is perhaps precisely what Professor Tushnet described as a dialogue,<sup>205</sup> but a failed dialogue.

*A. Popular Constitutionalism and Lewis v. Harris*

Vermont Supreme Court Justice Denise Johnson dissented in *Baker v. State* on grounds similar to those of Chief Justice Poritz in *Lewis*. Justice Johnson concluded that the Vermont Supreme Court's act of "remanding" to the legislature "abdicates [the] Court's constitutional duty to redress violations of constitutional rights."<sup>206</sup> Analyzing the Vermont Supreme Court *Baker* decision, Professor Williams noted that, in deferring to the legislature to craft a remedy, the Vermont court was influenced by other states, such as Hawaii, where a state constitutional amendment following the unpopular opinion of the Hawaii Supreme Court<sup>207</sup> overturned the court's holding.<sup>208</sup> Chief Justice Amestoy explicitly acknowledged these events as instructive when he criticized Justice Johnson's dissent as being "significantly insulated from reality."<sup>209</sup> Further, as Professor Williams noted, Chief Justice Amestoy "acknowledged the fact that state constitutions present somewhat of a paradox when guaranteeing rights, because judicial rights interpretation can be overturned by a mere majority vote through state constitutional amendment" in many states.<sup>210</sup>

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<sup>204</sup> *Lewis*, 908 A.2d at 230 (Poritz, C.J., concurring in part and dissenting in part).

<sup>205</sup> Tushnet, *supra* note 158, at 999.

<sup>206</sup> *Baker*, 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part).

<sup>207</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In *Baehr*, the Hawaii Supreme Court held that refusing to grant marriage licenses to same-sex couples qualified as sex discrimination under the state's constitution. *Id.* In 1998, in response to this decision, Hawaii state legislators proposed a referendum limiting marriage to opposite-sex couples, which was approved by the electorate. Ballotwatch 2008, *Same Sex Marriage: Breaking the Firewall in California*, INITIATIVE AND REFERENDUM INSTITUTE 1 (Nov. 2008), available at <http://www.iandrinstitute.org/BW%202008-2%20%28Marriage%29.pdf>.

<sup>208</sup> WILLIAMS, *supra* note 140, at 99. A similar amendment also passed in Alaska. *Id.*; ALASKA CONST. art. 1, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

<sup>209</sup> *Baker*, 744 A.2d at 898.

<sup>210</sup> WILLIAMS, *supra* note 140, at 99.

Perhaps keeping in mind the principles of popular constitutionalism, as the *Baker* Court ostensibly did, the *Lewis* majority noted that determining whether a particular right is so critical to the concept of ordered liberty to be ranked fundamental requires “both caution and foresight.”<sup>211</sup> There is no doubt that not all rights are fundamental within the due process analysis. As the New Jersey Supreme Court noted, the United States Supreme Court has warned against a “liberty protected by the Due Process Clause” being “subtly transformed into the policy preferences of the Members of [the] Court.”<sup>212</sup> Again in a cautious manner, the *Lewis* majority warned against imposing the court’s “personal value system on eight-and-one-half million people” under the guise of newly found rights effectively bypasses “the democratic process as the primary means of effecting social change in this State.”<sup>213</sup> While recognizing that the court need not look beyond state borders for the source of rights defined under the New Jersey Constitution, the court, perhaps looking for further justification for its decision, still noted that that no jurisdiction, not even Massachusetts, has declared that there is a fundamental right to same-sex marriage under either the federal constitution or its own.<sup>214</sup>

What is perplexing about the *Lewis* decision is the court’s juxtaposition of the importance of judicial independence in limiting the power of government to oppress minorities and, at the same time, the need to defer to the legislative branch of government. The court recognizes its responsibility “to decide constitutional questions, no matter how difficult,” yet notes that

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<sup>211</sup> *Lewis v. Harris*, 908 A.2d 196, 200, 209 (N.J. 2006).

<sup>212</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>213</sup> *Lewis*, 908 A.2d at 211. Shortly thereafter, the majority made an assurance that: “this Court will never abandon its responsibility to protect the fundamental rights of all of our citizens, even the most alienated and disfavored, no matter how strong the winds of popular opinion may blow.” *Id.* It is difficult to reconcile this sentiment with the outcome of the case, particularly in light of the court’s reliance on popular opinion and tradition as a basis to deny a due process right to same-sex marriage and to instead defer to the legislature.

<sup>214</sup> *Id.* Notably, in *In re Marriage Cases*, California’s highest court found that same-sex couples had a fundamental right to same-sex marriage. 183 P.3d 834 (Cal. 2008). A majority of California voters overturned this ruling with the passage of Proposition 8 in November 2008, which amended the state constitution to limit marriage to same-sex couples. In *Strauss v. Horton*, though upholding the validity of Proposition 8, California’s Supreme Court held the same-sex marriages entered into between June and November of 2008 remained valid and that the fundamental rights ruling of *In re Marriage Cases* applied to these marriages. 207 P.3d 48, 119 (Cal. 2009).

deference to the legislature is a cardinal principle of “our law.”<sup>215</sup> The majority went so far as to conclude that the “constitutional relief that we give to plaintiffs cannot be effectuated immediately or by this Court alone.”<sup>216</sup> While denouncing any suggestion that the court was trying to influence the legislature, it announced that it would not only leave it to the legislature to come up with the appropriate remedy, but that, whatever course of action the legislature takes, the court’s starting point “must be to presume the constitutionality of legislation.”<sup>217</sup>

Harkening to the lessons of Alexander Hamilton in *The Federalist No. 78*, the majority discussed the independent judiciary’s role as the bulwark of the Constitution against legislative encroachment because the judiciary is the only branch of government capable of protecting oppressed minorities against the power of the democratically elected branches of government.<sup>218</sup> Therefore, it is clear that the majority was aware of its responsibility as a countermajoritarian institution to protect insular minorities.<sup>219</sup> Significantly, Justice Albin left open the possibility that the parallel structure created by the legislature could violate the rights of same-sex couples, but that “[a] proper respect for a coordinate branch of government counsels that [the court] defer until it has spoken.”<sup>220</sup> To hold otherwise would “short-circuit the democratic process from running its course.”<sup>221</sup> The court did not, however, discuss how to determine when exactly the democratic process has run its course.

#### *B. Lessons from Lewis and the Future of Marriage Equality in New Jersey*

The court’s responsibility is constitutional adjudication, but that should not suggest that the court must “steer clear of the swift and treacherous currents of social policy” where the court

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<sup>215</sup> *Lewis*, 908 A.2d at 230–31.

<sup>216</sup> *Id.* at 224.

<sup>217</sup> *Id.* at 221–22.

<sup>218</sup> *Id.* at 230–31 (citing *THE FEDERALIST NO. 78* (Alexander Hamilton)).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 222.

<sup>221</sup> *Id.* at 223.

is navigating uncharted constitutional territory.<sup>222</sup> Yet, the majority in *Lewis* adopted a pragmatic approach, reasoning that, “profound change in the public consciousness . . . must come about through civil dialogue and reasoned discourse, and the considered judgment of the people in whom we place ultimate trust in our republican form of government.”<sup>223</sup> The majority’s concern for letting the democratic process “run its course”<sup>224</sup> eclipsed the court’s responsibility to adjudicate constitutional issues. As previously discussed,<sup>225</sup> a premise of popular constitutionalism is that the court should “defer” to non-judicial actors in regard to highly contested issues so that when change does occur, the public is more willing to accept it. Polls in New Jersey suggest that a clear majority of New Jerseyans support the legalization of same-sex marriage.<sup>226</sup> Yet, as detailed above,<sup>227</sup> the status of same-sex marriage has not changed since *Lewis* and the future of legalization, left to the devices of democratic majorities, is uncertain.

Although the majority in *Lewis* took a pragmatic approach to constitutional interpretation, ultimately the decision was wrongly decided because equality is a matter of constitutional interpretation, not merely a matter of public policy.<sup>228</sup> The court should have followed Chief Justice Poritz’s approach and affirmatively decided the due process and the label of marriage issues regardless of concerns about the after-effects of an unpopular decision. As Chief Justice Poritz reasoned, the plaintiff’s interests in *Lewis* arose out of constitutional principles integral to the operation of liberty of a free people.<sup>229</sup> While there may be no way to separate the law from

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<sup>222</sup> See *id.* at 222.

<sup>223</sup> *Id.*

<sup>224</sup> See *id.* at 223.

<sup>225</sup> See *supra* Part III.

<sup>226</sup> See Strasser, *supra* note 80.

<sup>227</sup> See *supra* Part II.D.

<sup>228</sup> *Lewis*, 908 A.2d at 231 (Poritz, C.J., concurring in part and dissenting in part) (quoting Opinions of the Justices to the Senate, 802 N.E.2d 565, 569) (Mass. 2004)).

<sup>229</sup> *Id.* at 230.

politics in the practice of constitutional law and interpretation,<sup>230</sup> the court should not freely abdicate its responsibilities as an independent branch of government.<sup>231</sup>

Simply because other non-judicial actors ostensibly play a larger role in defining the law of the state,<sup>232</sup> this should not necessarily be a justification for the courts to defer to these actors, particularly on fundamental right and equal protection matters. It more reasonably follows that the constitution's penetrability should be cause for vigilance, not acquiescence. There certainly may be some middle ground between an impenetrable constitution and one that is no different than ordinary legislation.<sup>233</sup> Nevertheless, though increased activity on behalf of the other branches increases total involvement, the process of organized liberty should not be seen as a zero-sum experiment. For instance, Professor Schapiro suggests that the judiciary can "coordinate" with the other branches in interpreting the constitution without deferring to the other branches of government.<sup>234</sup> Professor Shapiro further reasons that "the case for independent executive and legislative interpretation builds on the case for independent judicial interpretation."<sup>235</sup> Coordinate action among the branches "merely recognizes the voices" of the other branches of government, "it does not silence the Judiciary."<sup>236</sup>

A constitutionally defined right is a right no matter how the public may respond to a judicial opinion recognizing such a right. In perhaps the most important footnote written in an opinion, the Supreme Court reasoned that it should act to improve the democratic character of government by protecting those groups that are especially at risk because democracy, thus far,

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<sup>230</sup> See generally Tushnet, *supra* note 158.

<sup>231</sup> See FEDERALIST NO. 78 (Alexander Hamilton).

<sup>232</sup> See generally Reed, *supra* note 5.

<sup>233</sup> See *supra* notes 129–131 and accompanying text.

<sup>234</sup> Schapiro, *supra* note 195, at 666.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*; see also Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-1990).

has failed to be democratic enough to include them.<sup>237</sup> *Federalist No. 78*, though of course referring to the structure of the federal judiciary, is nonetheless noteworthy here. Although the judiciary has neither the power of the purse nor the sword, its power lies in its completely independent judgment.<sup>238</sup>

Most troubling about a pragmatic, deferential state constitutionalism approach under the popular constitutionalism paradigm is the proposition that court practice prudence in asserting a correct principle against a democratic process that is not ready for it.<sup>239</sup> Justice Amestoy's proposition, that the court's role in defining constitutional law is persuading non-judicial actors by offering guidance but avoiding formulating a solution,<sup>240</sup> falls short of encapsulating the role of the court: to provide a solution, a remedy. At times, the right decision is not popular, but it does not make it less right under the law. Although democratic majorities may have an easier time penetrating, revising, and amending a state constitution rather than the federal Constitution, it does not necessarily follow that the court should abdicate any of its responsibility to interpret that constitution as it now stands. Politics cannot matter more than law if the judicial branch functions as designed.<sup>241</sup> The question of access to civil marriage by same-sex couples "is not a matter of social policy but of constitutional interpretation."<sup>242</sup> It is a question for the court to decide.

## V. CONCLUSION

Whether categorized as popular constitutionalism,<sup>243</sup> pragmatic constitutionalism,<sup>244</sup> or deferential minimalism<sup>245</sup> the concept that an independent judiciary should head to the popular

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<sup>237</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>238</sup> *See* FEDERALIST NO. 78 (Alexander Hamilton).

<sup>239</sup> Sunstein, *supra* note 10, at 97.

<sup>240</sup> Amestoy, *supra* note 9, at 1261.

<sup>241</sup> *Cf. Reed*, *supra* note 5, at 931.

<sup>242</sup> *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (2004).

<sup>243</sup> *See generally* Reed, *supra* note 5.

will is troubling because it is antithetical to the premise of American government. As the architect of the United States Constitution, James Madison, warned, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”<sup>246</sup> Although state constitutions may vary from their federal counterpart in that they are more easily modified, state courts should not forgo the lessons of the founders regarding the rights of disfavored minorities. Rooted in the pragmatic, strategic approach to constitutional interpretation is the proposition that certain decisions, even though perhaps ultimately “right,” are not yet ready to be decided.<sup>247</sup> This concern regarding the price of potential error and the cost of an unpopular decision can and will lead to fundamental unfairness.<sup>248</sup>

The ultimate misstep in emphasizing an overly pragmatic, minimalist approach to constitutional interpretation, particularly when the rights of insular minorities are at issue, is that the independent judiciary, who is charged with protecting these individuals from governmental intervention, is displaced with the democratic processes of non-judicial actors who may seek to attack these same rights. This proposition is not to suggest that there is no place for democratic processes in policy setting. Such a suggestion is utterly baseless in the American and New Jersey experience. What this paper hopes to suggest is that the presence and power of these non-judicial actors should be reason for the court to hold tight to its responsibilities, not to yield them. It is not a question of judicial supremacy, but of judicial independence. *Lewis v. Harris*

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<sup>244</sup> See generally Amestoy, *supra* note 9.

<sup>245</sup> See generally Sunstein, *supra* note 10.

<sup>246</sup> THE FEDERALIST No. 51 (James Madison).

<sup>247</sup> See Sunstein, *supra* note 10, at 89.

<sup>248</sup> *Id.* at 99–100 (acknowledging that minimalism can be unfair and “a blunder”).

may have led to cacophonous conversation between the people, legislatures, executives, and courts,<sup>249</sup> but it has been a failed dialogue.

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<sup>249</sup> *See supra* text accompanying notes 117–19.