
Justifications for a Constitutional Jurisprudence of Deference to the States' Moral Judgments

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I. INTRODUCTION

The Supreme Court has a tradition of deferring to the states in constitutional controversies. For better or worse,¹ the Court often has found it appropriate to refuse to interfere with state laws raising constitutional questions. In other cases, this tack has been the cornerstone of powerful dissenting arguments. Examples of the former include *Washington v. Glucksberg*,² *Cooley v. Board of Wardens*,³ and *Bowers v. Hardwick*.⁴ Examples of the latter include *Romer v. Evans*,⁵ *United States v. Virginia*,⁶ *Miranda v. Arizona*,⁷ and *Roe v. Wade*.⁸ Other modern constitutional issues raise similar concerns and are amenable to similar arguments.⁹ In short, a constitutional jurisprudence of deference to the states has been, and continues to be, a popular interpretive strategy.

As the nature of most of the aforementioned cases indicates, however, this strategy often sparks serious controversy. It seems to arise most frequently in those cases with not only constitutional implications, but vital moral and political implications as well. It often is countered by powerful arguments from social justice, “fundamental rights,” or equality. Despite its controversial nature, the constitutional and moral justifications for this strategy rarely are made entirely clear in the opinions that utilize it. This may partially explain why those who disagree with the practical outcome of those opinions so often malign this approach.

This article will explore and critique a number of justifications for a constitutional jurisprudence of deference to state legislation based upon fundamental moral judgments. It endeavors to show whether, or more appropriately when, federal courts should utilize this approach. It argues that, in general, when the issue facing a federal court is politically controversial,¹⁰ no textually explicit constitutional limitation prohibits the state action,¹¹ and a judicial resolution would require the court to make a fundamental moral judgment, then the state’s moral judgment should be allowed to stand.

Part II explores a number of interpretive methodologies that lend their support to a jurisprudence of deference. The first is textualism, and Part II.A recognizes that, if the constitutional text is the sole legitimate tool of constitutional interpretation, and that text does not expressly require a state law to be struck down, then the courts have no constitutional authority to do so. Under this methodology, deference is achieved by default. Part II.B addresses structuralism, comparing the institutional capabilities of the judiciary with those of legislatures and concluding the latter are probably better qualified to decide morally sensitive questions for the public. Part II.C addresses arguments from original intent, noting that, like textualism, if the Framers did not consider a modern constitutional question—which is almost assuredly the case—then

the originalist must admit a lack of constitutional authority to act. Again, deference is achieved by default.

Part II also notes that federalism principles apply as analogous justifications for the deference approach. Part II.D makes this argument by analogizing a jurisprudence of deference to the Supreme Court's recent jurisprudence on sovereign immunity. Most importantly, this section adds an important leg to the argument espoused in this article by reaffirming the states' right, authority, and competence to make constitutional decisions.

Part III offers several critiques of the deference approach. Part III.A addresses democracy as a critical standard in the context of the debate concerning the relationship between democracy and the Rule of Law. This section argues that democracy's essence is a process, not a set of preferred substantive goals, and this process is intrinsically valuable. This process, however, can be thwarted by constitutional decisions of federal courts that, through the doctrine of judicial finality, can hinder the people's pursuit of an effective "political conversation." This provides a powerful disincentive to such a dialog, while the effect of deference would be the opposite.

Part III.B addresses the critical standard of morality. It centers on a dual critique of Ronald Dworkin's "moral reading" of the Constitution. First, by reasserting the process-based conception of democracy, it disputes Dworkin's conception of what constitutes morally just results. Second, it argues that, assuming legitimate law is properly that which is morally just, federal judges lack any unique competence—by virtue of their office—to make such determinations. Consequently, deference generally is the morally superior alternative. Part III.C concludes this section by addressing the critical standard of legitimacy as authoritativeness.

Part IV discusses the exception to a jurisprudence of deference: the judiciary's democracy-reinforcing function, first noted in *United States v. Carolene Products, Company*.¹² Specifically, this Part recognizes the limitations on the theoretical argument that the majoritarian process is intrinsically valuable and sufficient to produce just and efficient results. To legitimize a specific majoritarian act, one must show the process was "democratic" before arguing that the result of the process is worthy of deference. Undemocratic decisions are those that create or result from the vote of an improperly constituted majority: the majority of an electorate that excludes similarly situated people from the political process without justification. Such decisions are not entitled to deference.

Finally, Part V attempts to provide examples of this methodology's application by reference to cases that have, or probably will, face the Court. One example describes a situation where deference would be due. This example can be found in Justice Stevens' concurrence to *Washington v. Glucksberg*,¹³ which held there was no constitutional "right to die." Although agreeing with the Court's decision, Stevens

posited the possibility of a constitutionally guaranteed right to “freedom from pain.” Through a detailed discussion of this proposed right, it will be seen that such a case should be resolved under a jurisprudence of deference because the Court lacks justification to make this important moral decision.

Romer v. Evans,¹⁴ the Supreme Court decision striking down an amendment to the Colorado constitution that denied homosexuals protected status, provides the second example. Notwithstanding powerful arguments for deference, *Romer* exemplifies a circumstance where a jurisprudence of deference probably should not prevail. In *Romer*, the Court’s democracy-reinforcing function trumps considerations supporting deference.

Before proceeding further, it is important to note arguments this article will not make. It does not promote “states’ rights” of the sort espoused in ante-bellum southern legislatures.¹⁵ In general, the argument that the states created the national government and, therefore, the federal judiciary has no power to resolve disputes involving state law,¹⁶ is unsound. The people created both the state and federal governments and gave the federal government superiority within its field of influence.¹⁷ Therefore, those “states’ rights” arguments hold little weight. On the contrary, although this thesis assumes broad state police powers as a necessary prerequisite to deference, this piece focuses solely on the federal courts’ power and discretion in interpreting the Constitution.¹⁸

Nor is this piece a discussion of the minimalist approach in the sense espoused by Cass Sunstein.¹⁹ Although it was inspired in part by Sunstein’s work, this piece expounds upon only one aspect of his minimalism:²⁰ the passive virtues as they justify deference to state legislation.²¹ Moreover, in expounding upon the role of deference, this piece promotes it to an extent further than Sunstein would be willing to go.²² Finally, by importing a number of other interpretive theories into the discussion, this analysis goes beyond Sunstein’s largely economic justifications for the minimalist approach.²³

II. INTERPRETIVE METHODOLOGIES

As noted in the introduction, this section examines in detail several interpretive methodologies that support a jurisprudence of deference. The first three strategies—textualism, structuralism, and originalism—suggest that federal courts lack constitutional authority to resolve most morally and politically controversial debates. The fourth framework—federalism—although not an interpretive strategy per se, suggests that states do have such authority, even if the debate raises constitutional, as well as moral and political, concerns.

A. Textualism

It hardly should be surprising that the textualist methodology often supports a jurisprudence of deference. As Justice Antonin Scalia's preferred methodology,²⁴ textualism's application has presumably led to a number of the most recent espousals of the deference approach.²⁵ Textualism, stated simply, requires one to look at the plain meaning of the text to be interpreted, and only at that text, for the meaning of the law, because the text of the law is the only actual expression of the lawmaker's authoritative voice. Of course a textualist can search the meanings of individual words and perhaps even look to the world the drafters occupied in order to understand what they meant when they used specific words.²⁶ The textualist also can examine the relationships of words in a particular enactment. His interpretive exploration, however, can only go as far as the text will allow. A textualist generally will eschew legislative intent, morality, values seemingly expressed by the law, or any other extra-textual source as illegitimate bases of interpretive insight. For a textualist, those sources are irrelevant to the actual, authoritative meaning of the law.²⁷

In explaining the textualist approach to interpretation, Scalia is careful to note that this approach does not require one to be "too dull" to perceive broad social purposes or to perceive that new times may require new laws. He is more careful, however, to point out that pursuit of these goals is not the job of judges as judges.²⁸ Certainly a judge can hope the law will recognize and affect the "broad social purposes" he believes morally correct. He can advocate these positions in his private discussions. As a concerned citizen, he can vote for candidates for legislative or executive offices he believes will work to promote the social purposes with which he agrees. He can even advocate them publicly, within the bounds of his ethical limitations. The words the judge is authorized to interpret, however, have a "limited range of meaning, and no interpretation that goes beyond that range is permissible."²⁹ The text alone is the law, and it is the text that must be observed.³⁰

The same approach is equally applicable to constitutional interpretation as it is to statutory interpretation. Though never easy, the textualist approach is straightforward: If a state law is before the court, and the plain meaning of the text of the Constitution—on its face—does not speak specifically to the issue, then the state's judgment stands. In this way, the textualist methodology is not necessarily an approach that defers to the states as such. Instead, the textualist finds that the Constitution gives her no reason to strike down the law.³¹ Deference to the state lawmaker is simply the default outcome.³²

Such deference also is supported by the textualist critique of the "living" Constitution. As noted above, the pursuit of broad social goals certainly is important for the improvement of society, and law may need to change with the times. The creation of a "living" body of law that evolves with current ideological themes,

however, is the duty of legislatures. It is not a function of the Constitution, a document designed for continuity rather than easy adaptation.³³ If the constitutional text does not expressly speak to the issue, the only recourse for the disappointed party is to seek change through the political process.³⁴ To the extent we limit our discussion to moral questions that, almost invariably, are not the subject of explicit discussion in the constitutional text, the deference approach is the only alternative textualism will allow.

B. Structure—The Judicial Power

Although defined in Article III,³⁵ the “judicial power” has long been understood to mean more than simply the power to “decide cases and controversies.” Although exercised in those contexts, judges and scholars alike have adopted the position that the judicial power is substantively greater than the authority to dispose of disputes. Judicial review and the federal courts’ final interpretive authority over the Constitution are the primary examples of this line of thought and figure most prominently in this discussion.

Unlike textualism and federalism, which focus on substantive limits on judicial authority imposed by principles of positive law, examination of the judicial power is an examination of the federal courts’ institutional limitations.³⁶ These limitations stem from several characteristics of the judicial power.³⁷ These characteristics make courts appropriate forums for some kinds of decisions and particularly inappropriate for others. Often decisions with serious political or moral implications fall into the latter category.

A number of these characteristics are well known, and their support for a jurisprudence of deference apparent. For example, the courts are, in principle, fact-bound. They are theoretically limited to making a decision on the facts of a single case. This has several implications. Numerous commentators have argued that courts are “crippled lawmakers,” particularly incompetent to make policy decisions.³⁸ Courts lack the fact-finding ability necessary to forge policy on any scale beyond the law of the case.³⁹ In addition, the courts generally are best suited to, and most often do, exercise reflective power. In order to make the proper decision regarding the parties before them, the courts look most closely at facts that have already happened. They must rely primarily on facts involving several specific parties. This practice of looking backward, not forward, with a narrow factual scope⁴⁰ undermines a court’s ability to take all relevant factors into account in making forward-looking, policy- or morality-based decisions.

It also is well established that the courts have “little power beyond the force of reason.” Although judicial rulings have some intrinsic force against the parties, even then the courts depend upon the executive branch to enforce their judgments.⁴¹ More

importantly, when a case establishes a rule of law, the courts may be dependent upon the legislatures to let the rule stand.⁴²

Perhaps more importantly, the federal courts are, in principle, unresponsive to popular pressure.⁴³ They are not elected and are life tenured; thus they are less accountable to the people than any other branch of government. This unaccountability, coupled with judicial finality,⁴⁴ can undermine the legitimacy of judicial lawmaking.⁴⁵ Simply, if one believes representative decision making generally reaches better policy outcomes than judicial decision making, or that it is intrinsically valuable, then “usurpation” of the lawmaking process by the federal courts will raise legitimacy concerns, particularly if the judicial decision is ostensibly based on constitutional grounds, making it unassailable by ordinary democratic means.

The foregoing characteristics of the judicial power also may be considered in terms of the question of comparative competence which asks, as a comparative matter, which branch is better suited to resolve a particular type of issue. Quite simply, the judicial power is not the legislative power or the executive power. The courts’ institutional weaknesses might be less important if the judiciary were the only branch to turn to for political or moral decisions. This, of course, is not the case. Precisely where the judiciary is weak, the other branches were created strong. It is entirely proper to expect those branches be looked to for answers when an exercise of their sort of power is appropriate.

When political issues are to be decided and policy crafted, the legislative power is most appropriate.⁴⁶ Because they are elected, legislatures have a democratic legitimacy unmatched by the federal courts. They are the historically and constitutionally ordained lawmaking bodies. Legislatures undisputedly have the authority to make policy decisions.

Because legislatures generally represent the individuals that make up the body politic, when they function correctly they also are well suited to reflect and enact in public policy the interests of those individuals.⁴⁷ Admittedly, this may be more likely true in the legislatures of the less diverse states, as balancing is invariably easier when there are fewer interests with which to work. Perhaps more importantly, legislatures are better suited—or at least as well suited—to reach “good” decisions than the federal courts. Legislatures have superior institutional abilities to research policy questions and develop the expertise necessary to make forward-looking policy decisions. Therefore, they are at least as likely to reach sound overall policy decisions.⁴⁸ This difference may be particularly great when the comparison is between the Supreme Court and a state legislature dealing with local police power questions.

The final characteristic of judicial power may be the most important because it raises issues at the very core of the question whether federal courts should defer to states’ moral lawmaking. The full implications of these issues will be discussed in depth later, but they deserve note now for their relevance is premised on an observation

about a characteristic of the judicial power: The courts are the branch trusted to act based on reason rather than political ideology.⁴⁹ If we assume an issue with significant moral implications, judicial competence is undermined on the basis of one of two mutually exclusive principles. First, one may adopt the “postmodern” view that morality cannot be based on reason and, thus, the exercise of reason cannot reveal a morally correct decision.⁵⁰ Consequently, to the extent that morality and reason are less than synonymous,⁵¹ courts find themselves outside their field of special competence.⁵² This is not to say that people of different moral persuasions cannot have a principled discussion or even reach a consensus on some issues. It is quite another to say that a small group of relatively homogenous people like the Supreme Court can have that discussion for society or find the “best” resolution through a traditional, objective judicial inquiry.⁵³ It is even less likely that a single judge presiding over a case could do so.⁵⁴ What remains, then, is a dispute of moral ideology, one of those types of disputes traditionally defined as falling outside judicial competence.

Alternatively, one may take a “natural law” view that right reason can lead to a morally correct judgment. Legally trained judges, however, do not corner the market on this “right reason,” or practical wisdom. As such, their legitimate authority over moral disputes is limited.

This discussion of the nature of the judicial power reveals a strong argument that the more a case calls for a moral judgment, the more likely deference is an appropriate interpretive strategy.⁵⁵ This rule usually will be the appropriate course in cases where courts lack the information or research skills necessary to make a comprehensive policy decision.⁵⁶ Such situations will arise when circumstances are particularly local, changing rapidly,⁵⁷ or when the issue implicates controversial moral or political concerns. On the other hand, even if a court could rationalize a decision despite these limits, it arguably should not when the issue is the subject of a vibrant democratic debate on the question.⁵⁸ Courts also should recognize the legislatures’ institutional capabilities, not only to decide policy questions, but also to interpret the Constitution. Finally, even if a court could justifiably issue a ruling with broad political implications, in some situations the courts should realize that a broad ruling simply is inappropriate.⁵⁹

C. Original Intent

Before embarking on a detailed discussion of the originalist justification for deference, “originalism” must be defined. More accurately, the competing “versions” of originalism must be distinguished. There are basically two choices. While each purports to identify the “intent of the drafters” as a means of determining what effect a given law should have, each version looks to a different kind of intent. While this difference may be subtle, the source preferred by each approach has a significant

impact on its validity as an interpretive technique.

The first approach looks to the subjective intent of the individual members of the legislative body that passed the law, in the case of the Constitution, the drafters and ratifiers.⁶⁰ It is concerned with the general philosophy, aspirations, and preferences held by the enactors of the law in question.⁶¹ This version can be analogized to the statistical conception of democracy discussed by Ronald Dworkin.⁶² It holds that the relevant intent—the law—can be discerned by aggregating the individual drafters’ subjective intentions for the law.

Commentators have soundly criticized this approach at a number of levels. Three criticisms are particularly damaging. The first is that determining subjective intentions is impossible.⁶³ An accurate understanding of another’s subjective state of mind cannot be achieved, especially if the “other” is long dead and lived in an era dominated by different moral and political dilemmas and priorities.⁶⁴ Alternatively, even if we could somehow perceive subjective intentions, each drafter or ratifier could have multiple intentions, none of which alone explained what he intended the law to accomplish. Some drafters may have had no relevant intention at all.⁶⁵

The second criticism is that the drafters’ subjective intentions are irrelevant. Currently associated with Justice Scalia, Chief Justice Taney stated this criticism more than 150 years ago:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law *as it passed* is the will of the majority of both houses, and *the only mode in which that will is spoken is in the act itself*. . . .⁶⁶

This critique is similar to the textualist critique which holds that “the law” is only that which the lawmakers actually passed, not what they thought they were passing or what effects they intended their words to have.

The third criticism is that searching for subjective intentions is dangerous. This danger is Judge Learned Hand’s oft-cited concern that the courts not become “beves of platonic guardians.”⁶⁷ Quite simply, by attempting to discern the subjective intentions of presumably “reasonable” legislators, a judge is likely to impose his own sense of reasonableness to the law in question. Thus, he would illegitimately make the law whatever he thinks it should be. Even Dworkin, advocate of the “moral reading” of the Constitution, recognizes that such actions are intolerable.⁶⁸ These criticisms refute subjective intention originalism. It is not adhered to in the subsequent discussion.

The second originalist approach is the search for objective institutional intent. It is the preferable approach. Many commentators have attempted to describe the specifics of this approach, but Professor Robert Clinton does a particularly fine job. Clinton describes originalism as the view that “the Constitution or any amendment thereto should be interpreted as its spirit and language were understood when the relevant provision was drafted rather than in light of new and different meanings that later generations have created and supplied.”⁶⁹ Thus, period texts⁷⁰ and other evidence may be examined as tools to help understand the meanings the drafters imputed to the words they used. Only the words of the legal text may be examined to determine that text’s meaning, however.⁷¹ The values and principles apparently embodied by those “evidentiary” texts must be excluded from the calculation. Admittedly, this is a fine distinction. It must be made, however, in an attempt to preserve the legitimacy of the objective originalist inquiry from the pitfalls that claim its subjective cousin.

Having described the most defensible understanding of originalism, one can explore those general circumstances under which it justifies deference to the fundamental moral judgments embodied in state legislation. While this analysis requires extra steps, the outcome is similar to the previous analysis of textualism. Presuming an originalist’s adherence to originalism as the only legitimate method of constitutional interpretation, the Constitution, as understood by the framers, may not address the substantive controversy raised by the immediate case. In such a case, a judge has no grounds on which to declare the law unconstitutional.⁷² As such, the state law should stand.

Several commentators have applied similar analyses. For example, at least three of H. Jefferson Powell’s “Rules for Originalists” lead to similar conclusions. Rule number one states: “History itself will not prove anything nonhistorical.”⁷³ Powell bases this rule on the “universal recognition” that most contemporary constitutional cases involve factual situations and legal ambiguities not considered by the framers.⁷⁴ The Constitution could not explicitly address these issues. Equally important, no relevant historical evidence will be available. Thus originalism, “as a program of obedience to history,” will be inapplicable to solve such substantive constitutional dilemmas.⁷⁵

Rule number three states: “History answers—and declines to answer—its own issues, rather than the concerns of the interpreter.”⁷⁶ This rule pursues a point similar to the first, but focuses on the risk of revisionist historical interpretation rather than the mere lack of historical evidence. There is a potential conflict between an originalist’s “goal directed” use of history to resolve contemporary disputes and history’s “essential autonomy.”⁷⁷ Like modern political philosophers, the Constitution’s drafters were concerned primarily with the problems of their day.⁷⁸ They largely did not attempt to resolve the issues that would face their successors at the beginning of the twenty-first century. They scarcely could have imagined them. This deliberate refusal to extend

their “dead hand” to govern issues with which they were unfamiliar thwarts the originalist’s pursuit. The only available historical evidence is the fact that there is no historical evidence of intent.⁷⁹ Again, obedience to history will not lead to substantive answers.

Finally, Powell’s rule number four states: “Arguments from silence are unreliable and often completely ahistorical.”⁸⁰ This rule is a corollary to the third rule. It cautions against revisionist history in arguments from silence. The argument that “since the founders did not endorse a position, they must have rejected it”⁸¹ fails because it requires a historical inference to be drawn from an absence of historical evidence.⁸² No historian can affirm that the framers actually rejected the position today’s originalist claims. Such a claim lacks any basis for certainty.⁸³ Therefore, it is an insufficient basis for constitutional interpretation.⁸⁴

Professor Clinton adopted a similar analysis in his argument.⁸⁵ The second step in that approach asks: “Is there available, affirmative historical evidence from which an original understanding could be derived?”⁸⁶ If the answer is no, the originalist approach does not apply to the case at hand.

Clinton, however, takes his analysis further than Powell. He makes explicit a step Powell merely implied in the foregoing rules. It is vital to a complete interpretive methodology. Once originalism fails, some other methodology must be adopted to allow the decision-maker to reach a substantive decision.⁸⁷ Clinton lists several alternatives, including textualism, which support a jurisprudence of deference in such situations.⁸⁸ Yet for a dyed-in-the-wool originalist, many of these alternatives probably would seem unappealing. Fortunately, the framers did not merely enumerate substantive rights or give guidance for substantive decisions.⁸⁹ Instead, the framers focused a great deal of energy on lawmaking procedures.⁹⁰ Thus, for the dedicated originalist, there is an original intent for lawmaking procedure to consider when historical evidence of substantive intent is lacking. Uncoincidentally, this analysis also often supports a jurisprudence of deference. This original understanding of procedure is discussed in the next section: federalism.

D. Structure—Federalism

Federalism, though not necessarily an interpretive “strategy,” also deserves discussion as a concept that lends itself to a jurisprudence of deference. Although less a methodology than a set of principles, the premises of federalism must be considered as bases for a court’s decision to refuse to overrule a state legislature’s fundamental moral judgment. Such principles have been an integral component, if not the very foundation, of arguments respecting the states’ governing capabilities since the beginning of our republic.⁹¹ They recently have taken on increased importance in cases addressing the role of sovereign immunity,⁹² as well as “new-found” limits on

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Congress's power under the Commerce Clause⁹³ and section 5 of the Fourteenth Amendment,⁹⁴ other debates in which the competence of state governments is at the forefront.

The most important recent "resurgence" of federalism principles has occurred in the area of sovereign immunity. Undoubtedly there are significant differences between the sovereign immunity doctrine and a jurisprudence of constitutional deference to state legislation. Nonetheless, sufficient similarities exist between the two to justify drawing a comparison. For example, one could argue that at their practical core, both ask whether state legislatures⁹⁵ are sufficiently competent to be trusted with the resolution of political questions with potential constitutional implications.⁹⁶ In the context of a jurisprudence of deference, the answer is yes. The federalism principles espoused in the recent sovereign immunity jurisprudence support an argument that the federal courts should defer to state legislatures in the making of fundamental moral judgments.

The most informative discussion of federalism in the sovereign immunity context is Justice Anthony M. Kennedy's opinion in *Alden v. Maine*.⁹⁷ In that opinion, Kennedy laid out several fundamental principles that provide the foundation for a federalism-based argument for deference.

Kennedy's argument focuses on establishing the validity of the states as dual sovereigns:

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design"⁹⁸

This dual sovereignty vests states with an authority "no more subject, within [the states'] respective spheres, to the general authority than the general authority is subject to them, within its own sphere."⁹⁹ Moreover, this sovereign authority is not limited to matters with no national political or constitutional implications:

[E]ven as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal

Governments would exercise concurrent authority over the people—who were, in Hamilton’s words, ‘the only proper objects of government’¹⁰⁰

Thus it is clear that states have concurrent constitutional authority to legislate on topics that Congress, or the Court, could find to have national or constitutional importance. Admittedly, this observation by no means requires deference itself. It does, however, remind us that states are to be presumed competent to exercise lawmaking authority over any field of law or to limit any right, unless barred by the Constitution.¹⁰¹

Consequently, federalism principles add an additional leg to the textualist, structuralist, or originalist arguments for deference. Whereas those arguments tend to undermine the validity of various exercises of federal judicial lawmaking, they do not provide a positive reason to prefer state lawmaking as the alternative. The concept of federalism, however, applies in such cases. It assures the “judge” that the states should be presumed competent to step in to fill the resulting void. This avoids any argument that the situation requires the imposition of laws, and thus, even though constitutionally questionable, federal judicial lawmaking is the lesser of two evils. On the contrary, such lawmaking should be left to the states per the constitutional plan.¹⁰²

Federalism also provides a principled basis for discussing the moral and political superiority of state lawmaking in particular situations. Once broad state lawmaking power is shown to be constitutionally valid in general, it becomes clear that the only issue is whether such lawmaking *should* be left to the states in a given situation. Preliminarily addressed in part in Part II.B, this question will be taken up in more detail in Part III as well. As will be seen, this argument would seem particularly powerful when the issue is one that implicates local political concerns as much as, or more than, national ones or where the issue involves a contentious moral question.

III. CRITIQUES

This section examines in more detail the question stated in the introduction: When is deference to state legislation an appropriate interpretive strategy? As a working hypothesis, let us assume deference is appropriate *whenever* (1) the issue is one that falls within the states’ police power, (2) the text of the Constitution does not specifically require the law be stricken, and (3) the question before the court involves a contentious political topic and a judicial resolution would require the court to make a fundamental moral judgment.¹⁰³ The following subsections will critique this hypothetical strategy in light of several values often used to critique broader interpretive methodologies.

A. Democracy and the Rule of Law

The first critical standard is democracy. On its face, any rule requiring a court to defer to state legislation might appear to affirm the value of democratic government. Such an argument fails because it over-simplifies the issue.¹⁰⁴ It fails to consider what democracy means or, alternatively, what it means to promote democratic values. This section will address these issues in terms of the larger debate concerning the relationship between democracy and the Rule of Law. This is appropriate because the tension underlying this piece—that is, whether the states or the federal courts are more appropriate moral decision makers in terms of public policy—can be characterized accurately as one manifestation of the larger perceived tension between democracy and the Rule of Law. If this discussion can provide a satisfactory, even if limited, resolution to that tension, then the validity of the thesis set forth in this article—that federal courts generally should defer to state legislatures’ fundamental moral judgments—can more easily be judged.¹⁰⁵

An inquiry into the relationship between democracy and the Rule of Law initially requires that those terms be defined. For example, assume the Rule of Law is defined as a basic limiting principle, prohibiting the political branches from acting “arbitrarily and capriciously” in the exercise of their governing power, with the consequence being that courts may invalidate laws they find “wrong” in that sense. Assuming that definition of the Rule of Law, if one defines democracy as Geoffrey Walker initially might—simply another means of exercising coercive, capricious power¹⁰⁶—finding a conflict is likely; the essence of democracy is contradicted by definition by the Rule of Law’s fundamental limitation on the power of the political branches. Lani Guinier purports to make a similar argument. As a descriptive matter, the (white) majority is (arbitrarily and capriciously) tyrannizing the (non-white) minority. The Rule of Law demands this practice cease, necessitating changes in the governing structure—perhaps proportional, or cumulative, voting—to achieve the ends the Rule of Law demands.¹⁰⁷ While these hypothetical definitions provide little aid in deciding whether a “democratic” law or a “Rule of Law”-based nullification would achieve the morally “correct” result in any given case, the tension between these two definitions is apparent. That is sufficient for now.

Alternatively, if one defines democracy as Dworkin does, a communitarian ideal founded on the overriding and fundamental principle of equality,¹⁰⁸ then the Rule of Law, as defined hypothetically above, apparently is a complementary concept. Allowing courts to reject the arbitrary and capricious actions of the political branches, the offices of which are filled by the votes of the majority, is inherent in that notion of democracy. Again, these vague definitions offer little insight if we seek to determine the morally correct result in any case. But the lesser degree of tension is obvious.

There also are numerous ways to conceive of the Rule of Law. In contrast to a limiting principle on the power of the political branches, consider an understanding of the Rule of Law that requires, in principle, an absolute lack of *judicial* discretion.¹⁰⁹ While that ideal is likely to be perceived as practically unattainable,¹¹⁰ it most certainly would be viewed as complementary to democracy in the statistical sense. Alternatively, one can conceive of the Rule of Law from a Dworkinian viewpoint; our fundamental law can be found among a collection of abstract principles, requiring some minimal “fit” with precedent and history, but ultimately judged on moral grounds.¹¹¹ If one adopts this perspective, then the Rule of Law becomes attainable and compatible with an evolving communitarian democracy. It risks conflict with democracy in the statistical sense, however, insofar as judges may strike down some legislative acts they find immoral.

Consequently, it is apparent that, by a careful selection of definitions, one can choose whether or not to find tension. Moreover, any determination of the relevant definitions is as value-laden as the conception of the Rule of Law that Roberto Unger condemns¹¹² or the one Dworkin exalts.¹¹³ Nonetheless, the remainder of this section offers an interpretation of the tension perceived to exist between democracy and the Rule of Law and attempts to defend the values that support that interpretation. It concludes that the answer to the question, “is there a tension between the Rule of Law and democracy,” is no. The absence of tension will not always be apparent in the context of the real and apparent tension between majoritarianism and judicial review, however. Thus, this section also explains why the latter tension does not equate with a tension between democracy and the Rule of Law.

Explaining why there is no tension between democracy and the Rule of Law first requires a clear statement of the definitions of the terms to be applied. Let us begin with democracy. To most Americans, democracy—that is, American representative government—has its essence in counting votes: the side with the most votes wins.¹¹⁴ An understanding of democracy in the base statistical sense, however, inevitably forces judicial review, the courts’ power to limit the will and power of the people or their representatives, into an antagonistic position.¹¹⁵ There it generally will be perceived negatively for thwarting the majority will because the governing rule should be *whatever* the aggregate majority of individuals wants it to be.¹¹⁶ Conversely, if one perceives majoritarian rulemaking as secondary in importance to the protection of liberty, then judicial review also is antagonistic whenever it prevents a “democratic” attempt to infringe on liberty. Under those circumstances, however, it is majoritarianism that likely will be perceived negatively. Although jealous preservation of express negative liberties is a foundation of American government, neither majoritarianism nor preserving negative liberties alone fully embodies the true meaning of democracy. Consequently, the tensions they appear to create are largely illusory.

As noted above, “democracy” in its modern sense can safely be assumed to involve representative government, rather than direct governance by the populace. In looking for the “true meaning” of democracy, however, Roland J. Pennock’s conception¹¹⁷ is among the best of an innumerable number of conceivable definitions. Pennock’s description appears to espouse the view that democracy’s essence is revealed long before any law is promulgated. The essence of democracy is the full and free participation of all¹¹⁸ members of society in the political conversation and, ultimately, the majoritarian process.¹¹⁹

Indeed, the statistical conception of democracy generally is preferable insofar as the will of the majority generally should form the governing rule.¹²⁰ Rules must be made somehow, and insofar as the political conversation and voting processes at the heart of democracy occur before rules actually are affected, allowing the authoritative rules to be those preferred by the majority does not violate the fundamental values promoted by democracy. Moreover, to the extent any alternative rulemaking methodology would allow some minority to impose rules on the majority—a result which, in the abstract, would universally be decried as unjust and undemocratic—it is the only viable, practical option.¹²¹

There are two exceptions, however, to this general rule. These exceptions distinguish this conception of the role of the majority from that of a “base majoritarian,” to borrow Dworkin’s less than complimentary term. First, a majority’s decree¹²² cannot overcome textually demonstrable negative liberties.¹²³ Second, majority fiat cannot exclude a discrete and insular minority from participation in the democratic process.¹²⁴ In these instances, the majority cannot rule; the Rule of Law demands that priority be placed on “more valuable” fundamental principles. Thus the question turns to the definition of the Rule of Law to determine if it conflicts with this conception of democracy.

Looking for a definition of the Rule of Law, Geoffrey Walker adopts a position much like the one hypothesized earlier in this section. He argues that the Rule of Law is a limiting principle on the exercise of power by the people’s representatives. As such, an independent judiciary, an independent bar, and the power of judicial review are necessary to enjoying the Rule of Law.¹²⁵ In one sense, however, Walker’s argument sows the seeds of its own demise. Walker is correct that it is important in some instances to limit the power of representative institutions. That observation, however, merely reflects a broader principle, broader in the sense that it is not only the discretionary power of legislators that must be limited to prevent tyranny. Rather, all bodies possessed of governing authority must be limited in their ability to act arbitrarily; the Rule of Law is a limiting principle on the effectiveness of power, either the power of the majority or the power of judges. This is the problem of “finality.”

Understanding the problem of finality as it applies to the courts’ power over moral and political issues starts from the premise that, standing alone, admonitions that

government power must be limited are equivalent to “parchment barriers.” Like any other principles, they have no force of their own. Only when the people, especially those in power, adhere to these warnings do the limits have any force. It is deeply rooted in the American constitutional psyche, however, that no branch of government can be trusted to respect this necessary limiting principle on its own.¹²⁶ Our conception of the Rule of Law requires that our liberties be guaranteed by structural limitations on government made effective by “ambition countering ambition”¹²⁷ on all sides. It recognizes that the threat of tyranny due to the arbitrary exercise of power can come from any branch, including the judiciary.¹²⁸ Thus, recognizing the problem of finality is an important conception within the Rule of Law. It is the judiciary’s finality over constitutional issues that makes judicial review—and thus the Rule of Law as conceived by Walker and others—a threat to both democracy and the Rule of Law properly understood.¹²⁹

Therein lies the rub for thinkers like Cappelletti¹³⁰ and Dworkin¹³¹ who place great faith in the benevolence and principled restraint of judges. The Rule of Law requires limitations on discretionary power, not merely majoritarianism. Like any other “men,” the members of the judiciary are presumed incapable of limiting themselves, given uncheckable power.¹³² When judicial finality is considered—effectively giving the judiciary absolute power over those constitutional issues on which they choose to rule—it becomes apparent that Dworkin’s conception of the role of federal judges actually conflicts with the Rule of Law.¹³³ This vision of judicial review also risks a conflict with democracy as the federal courts’ decisions can undermine an effective political conversation. These are important weaknesses in Dworkin’s argument.

The rub for the other side of the debate, however, is that judicial review is necessary to limit the majority’s power to enact the laws it chooses in order to protect the minority’s participation rights or the Constitution’s negative liberties. Judicial review’s tendency to “undermine democracy” cannot be universally condemned, since democracy, properly understood, demands such limitations, as does the Rule of Law.

To conclude, a number of tensions are apparent. Judicial review invariably conflicts with majoritarianism. Majoritarianism will be in tension with the Rule of Law whenever the majority acts arbitrarily and capriciously, and with democracy whenever the majority undermines the minority’s participation rights. Alternatively, judicial review will conflict with the Rule of Law and democracy whenever a court arbitrarily imposes its values to thwart a majoritarian rule enacted through a democratic process marked by full and free participation by all. Democracy and the Rule of Law will not conflict, however, because they will concurrently condemn majoritarian oppression of the minority’s participation rights and a minority’s attempt to thwart a majoritarian rule through the courts in almost all other cases.¹³⁴

Turning to the focus of this article, the question becomes whether judicial

review violates either democracy or the Rule of Law when it allows a court to strike down state legislation that is based on a fundamental moral judgment. This analysis supports the proposition that, in general, federal courts should defer to state legislatures' resolutions of moral issues. Absent violation of express negative liberties or minority participation rights, such resolutions are products of a valuable democratic process. That value arises because of the political conversation that should be protected and allowed to flourish as part of the rulemaking process.¹³⁵ Barring one of the exceptions to majority sway,¹³⁶ allowing the courts unlimited power to nullify such resolutions would violate that process and the political conversation. To the extent such a violation might be grounded purportedly in the Constitution, the doctrine of judicial finality would tend to undermine the conversation entirely, present and future. Deference is the only practical and legitimate option. Moreover, to the extent a court acted arbitrarily in striking down that state law, judicial review would itself violate the Rule of Law. Determining how far the federal courts can go in overruling a state resolution of a moral issue without arbitrarily imposing their own values is the subject of the next section: morality.

B. Morality

The second critical value is morality. Constitutional thinkers largely avoided concern for morality for hundreds of years. It ran contrary to early common law traditions, which characterized the judicial role as a process by which judges simply described the law as it existed. It conflicted with early American positivism, which disavowed natural law conceptions and, thus, similarly prohibited judicial inquiries into what the law ought to be.

Morality as an interpretive standard experienced a "rebirth" in the mid- to late-twentieth century. This rebirth was sparked by Supreme Court justices like Earl Warren and William Brennan¹³⁷ who clearly considered the moral impact of their decisions,¹³⁸ if they did not always articulate that consideration.¹³⁹ As a result, morality blossomed into a standard against which constitutional jurisprudence is measured. Insofar as law exists as a part of a larger society, this concern for morality certainly is a valid intellectual exercise. The role that concern should play in actual judicial constitutional interpretation, however, is another question entirely. This section largely focuses on that concern.

Perhaps the preeminent voice of the "moral reading"¹⁴⁰ of the Constitution is Ronald Dworkin. Dworkin's scholarship has significantly influenced thought on morality's role in constitutional interpretation. A writer wishing to discuss morality in the context of constitutional interpretation is well advised to address Dworkin's argument or risk falling far short of a complete discussion of the topic. This section begins by describing Dworkin's theory before moving on to discuss those points on

which the author is compelled to disagree. The description of Dworkin's theory is admittedly condensed, but sufficient for the purposes of this analysis.

In a nutshell, Dworkin's methodology looks to a conception of "fit," as well as moral superiority, to determine which is the best theory or outcome in any given case.¹⁴¹ The best theory in a case—the law, if you will—will be found among those potential theories that meet or exceed a minimum threshold of "fit." Once that group is established, however, fit becomes largely irrelevant.¹⁴² The best theory for the case will be the one among that number that maximizes moral appeal. That theory will be the law.

"Fit" is an amorphous concept. Depending on the interpreter, fit may be judged by consistency with constitutional tradition,¹⁴³ legal precedent,¹⁴⁴ original intent,¹⁴⁵ or perhaps a social science-oriented concept like political economy.¹⁴⁶ For Dworkin, the necessary consistency is with the American constitutional design or, more accurately, "the [principles embodied in the] dominant lines of past constitutional interpretation by other judges."¹⁴⁷ At its core, fit requires adherence to a precedent of some sort, a concession to consistency with the past. For Dworkin, this consistency is important for a number of reasons.

The first reason is normative and closely related to Dworkin's promotion of his moral values. As will be discussed in detail shortly, Dworkin believes equality is the highest moral value. Insofar as he believes the trend in constitutional jurisprudence has been toward greater egalitarianism, consistency with this trend is consistency with the most important moral value.¹⁴⁸

Fit also has intrinsic value. One could conceive of this value in numerous ways. For example, one might argue that a morally just decision accepted by society is better than an equally just decision that is not accepted.¹⁴⁹ Social acceptance increases the likelihood or speed of the decision's implementation—or lessens the likelihood that it will be challenged. Successful implementation of a morally just decision is, of course, morally desirable.¹⁵⁰

One also could argue that honoring fit leads to certainty and predictability. This predictability could be morally valuable at a number of levels. First, it could lead to a more efficient allocation of resources. For an economist, this efficiency could be morally appealing. Alternatively, allowing for planning allows individuals to avoid some of the otherwise harmful consequences of even arbitrary rules. For a utilitarian, such a society is preferable to one lacking predictability.

One way Dworkin chooses to discuss the intrinsic value of fit is in terms of judicial integrity.¹⁵¹ This integrity includes requirements that consistent reasoning be applied in crediting or discrediting principles, and that such principles are applied evenly in decision making. Dworkin accepts this notion of integrity as a defense against charges that his moral reading encourages judges to become platonic

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guardians.¹⁵² To the extent this integrity prevents morally unjust outcomes, it has moral worth.

For Dworkin, more important than fit is moral appeal. For him, a morally appealing law or decision is one that honors the principle of equal concern and respect for all members of the political community.¹⁵³ Yet this is not the only political position Dworkin promotes. At least two others are vital to his argument. They follow closely from his decision to prioritize egalitarianism.

Dworkin argues that law must respect individual independence of judgment.¹⁵⁴ This classic liberal principle holds that the government has no right or power to define the “good life” for the individual members of the community. This principle allows Dworkin to initiate his theory. Insofar as each person is competent to determine his or her own good, each is entitled to equal concern and respect as an autonomous moral agent.

Dworkin also “redefines” democracy from the “statistical” sense to a “communal” sense.¹⁵⁵ In the former sense, community action is simply some “function . . . of what the individual members of the group do on their own,” without any sense of action as a group.¹⁵⁶ This sense is exemplified by the stock market, where the market’s “action” is the aggregate of millions of individual buy-sell decisions. In the realm of politics, this statistical democracy is identified with the majoritarian premise. Under this premise, collective decisions should normally be those a majority of citizens would favor if fully informed or rational.¹⁵⁷

Adopting the communal sense of democracy is the mechanism by which Dworkin institutes the moral good of equal concern and respect as democracy’s highest goal. Action is communal when it cannot be reduced to some statistical function of individual actions. “It is a matter of individuals acting together in a way that merges their separate actions into a further, united act that is together *theirs*.”¹⁵⁸

Having defined collective action as something normatively greater than an aggregation of individual interests, Dworkin is free to reform the notion of democracy into what he describes as the “constitutional conception.”¹⁵⁹ Under this conception, the defining aim of democracy is altered. Collective decisions “must be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.”¹⁶⁰ This conception allows for majoritarianism, but only insofar as it provides a mechanism that promotes the goal of equal status among citizens. Majoritarianism is not desirable simply as a matter of commitment to majority rule.¹⁶¹

The foregoing description might appear to indicate that Dworkin’s main concern is for process—guaranteeing institutions whose lawmaking actions are most likely to promote equality.¹⁶² Dworkin’s concern for equal *status* among citizens, however, belies that this is not true. In fact, the final aspect of Dworkin’s constitutional

conception of democracy is that it is result-driven.¹⁶³ The federal courts¹⁶⁴ must guarantee not only just democratic processes, but also just results.

Having condensed Dworkin's argument for the sake of brevity, it becomes clear that there are a number of grounds on which it may be criticized. In considering these criticisms, the reader should keep in mind the focus of this piece. The working hypothesis is that federal courts should defer to state legislatures when the issue is politically controversial, the constitutional text does not expressly demand judicial action, and the state legislation at issue reflects a fundamental moral judgment.

Dworkin takes great pains to argue that thwarting the will of the majority imposes no moral costs in and of itself.¹⁶⁵ Only when the majority will coincides with the morally best outcome—promoting the equal status of citizens—would overruling the majority's judgment be "bad" in any sense. Insofar as Dworkin identifies democracy with his moral vision of equal concern and respect, violating the majority's decision can be both harmless to democracy and morally right.

It is apparent that the power of Dworkin's argument can be found in his definition of democracy. Indeed, change the definition of democracy—that is, divorce the democratic process from Dworkin's notion of preferred ideological goals—and other moral considerations suddenly become relevant and competitive. Specifically, it may be that nullifying the majority's decision has moral consequences of its own. As should be apparent, this article argues that democracy's essence differs from what Dworkin espouses. Democracy's essence is a process, not a set of substantive goals; a means, not an end. This process is characterized by a "political conversation." This conversation is intrinsically valuable.¹⁶⁶ To the extent the end result of the majoritarian process is the best and only representation of the outcome—if temporary—of that conversation, it is valuable as well. Moreover, to the extent regular reliance on the courts to conclusively and finally thwart the majority's will provides a disincentive to a political conversation, such reliance is undesirable. Therefore, striking down rules enacted by majoritarian legislatures involves moral consequences.¹⁶⁷

Sunstein generally concurs in this analysis:

Of course the Court's resolution may be right, in the sense that the Court identifies the just result. But democratic self-government is one of the rights to which people are entitled, and unless the democratic process is not functioning well, judicial foreclosure may represent not a vindication of rights but a controversial choice of one right over another. And even if the Court's resolution is right, things may go badly wrong. The Court may not produce social reform even when it seeks to do so. It may instead activate forces of opposition and demobilize the political actors that it favors. It may produce an intense social backlash, in the process

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delegitimizing both the Court and the cause it favors. More modestly, it may hinder social deliberation, learning, compromise, and moral evolution over time. A cautious course . . . will not impair this deliberative process and should improve it.¹⁶⁸

The analysis set forth in this piece differs slightly from Sunstein's due to the different definitions of democracy underlying the two theses. Yet both recognize that democracy, as a process, is equally important as achieving "just" results.¹⁶⁹ Therefore, violating that process is undesirable.

This criticism can be exemplified by analyzing Dworkin's argument that democracy is equally impaired when a legislature makes an erroneous decision as when a court makes an erroneous decision.¹⁷⁰ Dworkin notes that "the possibility of error is symmetrical."¹⁷¹ Therefore, he argues, the majoritarian premise must be abandoned.¹⁷²

Of course, under that logic, the probability of error is symmetrical. The costs associated with those errors, however, are not necessarily so. The majoritarian premise need not be abandoned if one attaches greater value to the deliberate democratic decision making process than the judicial decision making process. Having attached those values, there is a greater cause for moral regret when an incorrect decision is reached *and* the vital democratic process is violated than when the people or their representatives only make a poor decision.

This asymmetry of costs is exacerbated by judicial finality. When the courts reach a bad decision, not only is the democratic process thwarted, but if there is a purported constitutional basis for the decision, the incorrect decision also is more difficult to correct.¹⁷³ Only the same or a higher court, or the unlikely event of a constitutional amendment, can reverse the decision. An errant decision by a state legislature or executive official, however, can be reversed more quickly and easily through the same political process. This lack of finality is especially important in the context of the morally and politically contentious issues presumed in our hypothesis.¹⁷⁴

A more important criticism does not challenge Dworkin's definition of democracy. One can accept the constitutional conception of democracy and agree that achieving the morally best *result* should be the ultimate goal of democratic governance. Assuming that is true, Dworkin fails to explain why it should be judges who decide what is "morally best."¹⁷⁵ As noted earlier, this criticism can be leveled under either one of two mutually exclusive moral theories.

The first is postmodernism. For an adherent to this theory, it is apparent that "morally best," particularly as it applies to society as a whole, is an arbitrary and unfounded distinction.¹⁷⁶ Quite simply, although one might personally believe in objective moral truths, one cannot prove them to be objectively true by reference to reason, that is, apart from reference to the values themselves.¹⁷⁷ Consequently, this

inability to prove objectively the validity and superiority of one's values precludes one from setting forth one's morality—that is, moral policy preferences—as true and justifiably imposing it on others. Applied to our discussion, to the extent humans cannot agree on the contours of morality, it would be wrong for a single judge, or several judges, to impose their views as society's law. Notwithstanding Dworkin's protestations that “integrity” is a sufficient safeguard, allowing a judge to make decisions about morally best results necessitates the judge's imposition of her personal values, not objectively true moral principles. Even a judge, as a human being, could not truly believe that objectively correct moral values might differ from her personal values. That a judge could somehow withstand that cognitive dissonance—understanding that her beliefs are somehow morally wrong—better than any other person is simply incredible.

The second theory is natural law theory, which proposes that reason and practical wisdom can reveal moral truths. Under this theory, one might argue that the courts—the institutions trusted to act with reason rather than political ideology—are perfectly suited to make binding moral judgments for society. Judges, in other words, will be better able to discern moral superiority than the average person as a result of their training to act in a principled fashion.

This argument may be countered easily. Quite simply, one may validly demand proof that judges corner the market on wisdom to discern what is morally best.¹⁷⁸ When morality is at issue, why not give preference to theologians, moral philosophers, or even ordinary men and women who do their best to wrestle with moral issues? When we limit the issue to morality, it is precisely there that judges lose special preeminence of skill or wisdom.¹⁷⁹ While judges may be best suited to answer objective questions of law-sans-morality because of specialized legal training, legal training imparts no special moral wisdom.¹⁸⁰ At a minimum, it certainly does not inherently make lawyers more moral.

This argument may be countered in turn, however, if not fully dispelled. Taking a case-by-case view, one might argue that even a morally imperfect judge, trained to act more or less on a principled basis, may take into account all these authorities for guidance. Then, if the opinion he writes reasons to a morally correct outcome, why not accept it?

While perhaps valid in theory, this argument ignores the fact that, as a practical matter, it often will be difficult for society to determine which opinions actually reflect proper moral reasoning. This criticism reflects the argument of the postmodernists. It does not adopt their moral relativism, however, but rather reiterates that a view of judges as final moral lawmakers runs contrary to the fundamental justification for representative government as preferable to rule by the few.

Again, when it comes to practical governance, it will be difficult to determine the morally best path. Simply, reasonable people—including people of similar moral

persuasions—will often, indeed regularly, disagree about the morally ideal resolutions to particular dilemmas. All human beings are morally fallible, and all will make morally incorrect decisions—some purposefully, some accidentally. These people make up the institutions of government, making them morally imperfect as well. The question is, when a moral decision must be made, which imperfect institution should we prefer to make it?

Our earlier discussion of democracy suggests it should be the representative institutions within American government that make these decisions. As noted above, Lord Acton reminds us of the dangers of “moral aristocracies,” which would include a federal judiciary with the power to make fundamental moral decisions for society: power corrupts and absolute power corrupts absolutely. Endowed as they are under our system with finality, federal courts with the power to decide moral issues for a nation will tend to become corrupted and cease to rule on the basis of reasoned morality, even if they could. Numerous commentators suggest we have reached that point today, questioning whether the justices of the Supreme Court, as a group, actually rule on the basis of reason rather than political preference.¹⁸¹ Whether or not that is currently true, however, is largely irrelevant to the question of whether it could be true. It is that possibility that demands that representative bodies, including state legislatures, be given the primary right and responsibility for moral lawmaking. In a world of practical moral disagreement, it would be undesirable for a single, morally imperfect body to have final moral decision making authority for the nation. We should certainly, as a society, engage in moral lawmaking in order to improve ourselves—individually and collectively, now and for the future.¹⁸² And there is no reason the courts could not play an important role in society’s moral conversation. A realistic assessment of our inability to perfect ourselves morally, however, demands that we not preclude ourselves from the possibility of salutary moral change. Since representative bodies best protect this interest—at least under the American system—they should be given priority, and deference, in moral lawmaking.

C. Legitimacy

The final value, legitimacy, can be framed in terms of many other values. For example, arguments from federalism, democracy, and morality implicate concerns for critical moral legitimacy. Since they have been discussed above, these potential sources of legitimacy are not addressed in this section, except peripherally as necessary. Rather, in this section, the idea of authoritativeness is considered as an expression of the ideal of critical legitimacy.

Discussion of the critical legitimacy of a state legislature’s resolution of a morally controversial issue can proceed in two ways. One could argue in favor of the majoritarian lawmaking process’s legitimacy on its own. Alternatively, as this piece

involves a comparison between rulemaking by representative institutions, including state legislatures, and by federal courts, one could challenge the legitimacy of the courts, and argue that, given the two choices, majoritarianism is preferable. As the earlier parts of this piece have spent a good deal of time doing the latter, this Part will endeavor to do the former by setting forth an argument that state resolutions of morally divisive issues are—or at least can be¹⁸³—critically legitimate.

The essence of the legitimacy-as-authoritativeness standard is that one must obey a law because one has a duty to obey it, and one has a duty to obey it because the obligation is morally just. The ultimate inquiry considers the means by which we can say an obligation is morally justified. To borrow Dworkin's terminology, how can we say that individuals are "moral members"¹⁸⁴ of a community, bound to obey the decisions of its government? Answers can be pursued in a number of ways.

For example, suppose one accepts Dworkin's notion of democracy in the "constitutional" or "communal" sense.¹⁸⁵ Under this conception, collective (democratic) action is not some "statistical function of individual action."¹⁸⁶ It "presupposes a special, distinct, collective *agency*."¹⁸⁷ Democracy "is a matter of individuals acting together in a way that merges their separate actions into a further, unified act that is together *theirs*."¹⁸⁸ This is the relevant political community. In turn, moral membership in this community is established (it is proven legitimate) when it honors "democratic conditions."

"Of course," Dworkin admits, "it may be controversial what the democratic conditions, in detail, really are, and whether a particular law does offend them."¹⁸⁹ He quickly follows, however, with an argument that, "according to the constitutional conception, it would beg the question to object to a practice assigning those controversial questions for final decision to a court, on the ground that that practice is undemocratic, because that objection assumes that the laws in question respect the democratic conditions, and that is the very issue in controversy."¹⁹⁰ One can accept the accuracy of Dworkin's latter statement, yet nonetheless use the former as a springboard to an argument in favor of majoritarian legitimacy. Quite simply, one need only find some reason, other than that the courts are "undemocratic," to show that majorities—be they popular or representative—should be favored over courts as the bodies best suited to express the unified community voice and resolve questions about the precise scope of the democratic conditions or whether a particular law offends them.

Of course, longstanding American tradition holds that the voice of the majority is the voice of the community, and therefore the minority should yield to the will of the majority. James Gardner writes:

In his first inaugural address, Thomas Jefferson declared that "absolute acquiescence in the decisions of the majority" is "the vital principle of republics" and one of the "essential principles of our government." In

later years, Jefferson maintained that “the will of the society enounced by the majority of a single vote, as sacred as if unanimous, is the first of all lessons in importance.”¹⁹¹

Yet more than mere tradition is required. Some normative justification must be provided as a reason *why* the minority ought to yield to the majority and concede that its voice is the voice of the community in which they hold moral membership.

The answer flows almost directly from the very definition of communal democracy. One need not commit to majority rule for majority rule’s sake to recognize that the majority’s voice is the best expression of community values. The majority is the community, if not the whole of it. If one is looking for the “general will,”¹⁹² then, naturally, “[t]he way to discover the general will, . . . is to compute it by consulting the citizens.”¹⁹³ Even assigning the utmost respect to judges’ wisdom and reason, it is the people—not merely the most learned few of their number—who express the community voice.

Voting, then, “is not an attempt to canvass public opinion, but rather to solve a much more epistemological problem—the identification of the general will.”¹⁹⁴ Of course, not every voter will agree on what the community voice should say, or more accurately, what truly is the community’s will. A minority will disagree with the ultimate outcome. To characterize this disagreement as a loss, however, presumes the statistical sense of democracy that, for the sake of this argument, we have abandoned. Rather, the minority “simply erred” as to what was the community’s will.¹⁹⁵

Under the conception of democracy set forth in this article, this “legitimacy by necessity” argument will satisfy the authoritativeness inquiry in most cases. Yet, one will recall, it was earlier suggested that the majority voice cannot always hold sway—either when it violates express negative liberties or it excludes individuals from the political conversation. Thus, relying on the “necessity” argument alone requires a concession that state lawmaking is legitimate only part of the time, and a not-so-easily determinable part at that. Moreover, the argument does not necessarily explain satisfactorily why individuals are members of the community in the first place, or why citizens should obey a law they think is morally unjust. Thus, this argument would benefit from the addition of another theory to fill the gaps and legitimize the states, even when their processes go awry. A version of the just institutions theory best satisfies this requirement.

The just institutions theory starts from the premise that states¹⁹⁶ and their political institutions are necessary to preserve the possibility of a decent life for their citizens. Thus, those people have a “clear moral interest” in their establishment.¹⁹⁷ Presuming a just government overall, the people thereafter have a moral interest in preserving that framework. Even dissidents—arguing against an “immoral” act of government—have an interest in preserving a just framework that allows them to

dissent and work to change unjust laws.¹⁹⁸ Alternatively, those individuals have a general consequentialist moral duty to obey (the state is authoritative as to them), because that government makes the exercise of their rights possible.¹⁹⁹

That said, the two questions stated earlier must be answered before the just institutions theory can properly be applied to legitimize a government, in this case, state governments: What initially makes the government just, and why, more precisely, is a government morally legitimate if it passes immoral laws?

Jeremy Waldron makes an argument about the initial legitimacy of a state in the context of his “natural duty approach.”²⁰⁰ This approach emphasizes two considerations: “first, the moral importance of justice; and second, the moral significance of the difficulties that attend the pursuit of justice without political institutions.”²⁰¹

The moral importance of justice was recognized by John Rawls in *A Theory of Justice*: “Justice is the first virtue of social institutions [L]aws and institutions . . . must be reformed or abolished if they are unjust.”²⁰² Setting aside potential difficulties with his conception of justice, the question, then, is what makes an institution just? Of course, an institution would be just if it achieved just outcomes, but as this piece has shown the practical difficulty of making *that* determination in the face of interminable human disagreement, it makes that means of finding justice in an institution practically unattainable. Fortunately, pursuing justice is a good in itself: “It is morally imperative that the demands of justice be pursued period.”²⁰³ To the extent the state governments “promote justice,” or allow the people to pursue justice through them, they are morally legitimized and, thus, authoritative.

Waldron makes the point succinctly:

The pursuit of justice often requires coordination, among those who are attempting to do justice and among the various spheres in which they are attempting to do it. Institutions are necessary for that coordination. Without them, there will be more injustice. So to the extent that the avoidance of injustice is a moral imperative, the establishment of coordinating institutions is a moral imperative.²⁰⁴

Applying the theory advanced in Waldron’s article, the states as coordinating institutions are “doing something that justice requires,”²⁰⁵ sufficient to make them just and authoritative. They provide a forum for the political conversation necessary for a functioning democracy. The political conversation fostered by the states provides a means for discussing morally preferable policies and provides the best and only means for determining the community will. The states also provide a legislative process that provides the necessary means to express the community will as a unified voice and implement the policies that will demands. The states are just institutions.²⁰⁶

Such a description does not necessarily address the question of immoral laws; if a state passes immoral laws, how can it be morally legitimate? While Waldron might stand his ground and argue that occasional errors do not delegitimize a state, two additional points can be made in the context of the argument presented here. The first point lies in the practical difficulty of establishing a particular law as immoral for purposes of public policy. To the extent there is reasoned debate about whether a particular law might be immoral, while we cannot presume that all laws are moral, neither is it likely that one will be able to conclusively declare a particular law immoral despite ongoing disagreement among citizens and thereby claim no moral obligation to follow it. To adopt Rawls's point that unjust laws must be abolished may be an unassailable moral position in the abstract, but to argue it in practice requires assumptions about morality, when the principle itself necessarily demands verifiable answers.²⁰⁷

The second point requires a restatement of the two exceptions to a jurisprudence of deference discussed above: A state law is not due deference where a majority has violated express negative liberties or where a law is passed by or creates an unjustly constituted majority. In those cases, the federal courts may step in to nullify state legislation. Under the process-based conception of democracy explained in this piece, these are the two instances of truly unjust state laws. To the extent the federal courts can remedy these instances of injustice, the larger federal system remains legitimate. In turn, the states—despite their moral error—remain legitimate government entities as part of that larger system.

IV. THE WORTHIEST EXCEPTION—*CAROLINE PRODUCTS* FOOTNOTE 4

The thesis set forth in this article places a great deal of reliance on majoritarian democratic processes as sufficient to produce just and efficient results. It proposes that majoritarian processes are intrinsically valuable as guarantors of legitimate government. Yet to be valid, such processes must actually be democratic. It must be a justly constituted majority that makes the decisions the people should make.²⁰⁸ Therefore, as noted above, the most notable exception to the reliance on the majoritarian premise defended herein is that a decision reached as the result of the vote of an improperly constituted majority—or one that creates an unjustly constituted majority—is not authoritative.²⁰⁹ This section discusses this exception in greater detail.

John Hart Ely has come closest to espousing the theory underlying this exception. In his book, *Democracy and Distrust*,²¹⁰ Ely expounded upon the principles announced by Justice Stone in the now famous fourth footnote in *United States v. Carolene Products*.²¹¹ Ely's theory focused on protecting the participatory rights of

discrete and insular minorities as a way of guaranteeing that such individuals' interests would be protected.²¹² Although Ely's methodology ultimately is flawed and, thus, cannot be accepted in its entirety, the most important component of his theory forms the heart of this exception.

Ely divided the participation he sought to protect into two distinct parts. The first, political participation,²¹³ is that which is adopted wholeheartedly as the foundation of this exception. Protecting political participation itself requires multiple guarantees.

The first and most important guarantee is the right to vote.²¹⁴ American history since the Civil War has taught us, however, that legal suffrage alone is insufficient to guarantee a well-functioning democracy.²¹⁵ Poll taxes and literacy tests are the preeminent examples of how the vote can be undermined to corrupt democratic participation.²¹⁶ Yet corrupting influences can infiltrate the democratic process much more discretely. This is because democracy does not begin or end with casting a vote. An equally important aspect of democracy is the democratic conversation, the colloquy among members of a political community. This conversation allows for a discussion of issues facing those members in order to reach the morally best outcome where possible, or an acceptable inter-group compromise where necessary. Therefore, the right to participate in this conversation must also be guaranteed. Our First Amendment expressly does so through its protection of free speech, free press, and the derivative rights of free assembly and political association. The courts must certainly enforce these.

Unfortunately, free participation can be undermined more "subtly." Ely argues that democracy malfunctions when the process is "undeserving of trust."²¹⁷ One way the process can be untrustworthy occurs when, "though no one is actually denied a voice or vote, representatives beholden to an effective majority are systematically disadvantaging some minority [and] denying that minority the protection afforded other groups by a representative system."²¹⁸ In this proposition, Ely is partially correct. Insofar as a state, through invidious discrimination, takes affirmative steps that undermine an individual's ability to exert influence over government decision making, democracy suffers.²¹⁹ This can occur in a number of ways. Equal access to courts can be denied. Unequal access to public forums or other content-based restrictions on speech can be promulgated. Unique barriers to political participation or success can be imposed. A strong argument can be made that state-supported inequality of access to education fits this categorization.²²⁰ In these cases, the courts must step in to prevent an undemocratic policy from standing.²²¹

The full extent of Ely's analysis cannot be accepted, however. This reservation stems from the limitations inherent in the idea of democracy, properly understood. Democracy is a process. It does not require that certain substantive judgments about equality or rights be made, except insofar as they affect the governing process. Ely

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blurs this distinction, apparently requiring the courts to make substantive policy judgments based on moral values. Indeed, Ely recognized this problem.²²² Unfortunately, to solve it he attempted to stretch the process analysis to a point where it could no longer bear the weight he placed on it.

Ely describes this aspect of his approach as its “social component.”²²³ This component requires “the consequent enforcement of the representative’s duty of equal concern and respect to minorities and majorities alike.”²²⁴ With this language, the similarities with Dworkin are apparent. Of course, the two do not reach their results the same way. While Dworkin unabashedly promotes moral results, Ely contends that his concern is only with process.²²⁵

Unfortunately, Ely cannot help but reach the same result. An arbitrary distinction can arise twice in making a single decision. In this context, a judge would make an arbitrary distinction by determining that benefits have been unjustly distributed. It is impossible to distinguish such a determination from a results-based approach. The judge’s own moral values would be her guide in determining the injustice of the distribution, just as they would under Dworkin’s approach. Presuming the judge has such a standard of justice in mind, she would naturally tend to make the second arbitrary distinction. She would enforce a change in the democratic process to create a just situation. Having moved from a concern with removing barriers to participation to a concern with avoiding prejudice and promoting equal status among citizens, Ely crossed the line into allowing judges to make substantive moral judgments for which their judgment is not superior.

V. APPLICATION—OPPOSING OUTCOMES

The foundation for a jurisprudence of deference has now been laid. The primary rule espoused by this jurisprudence is that if the issue facing the court is politically controversial, no textually explicit constitutional limitation prohibits the state actions, and a judicial resolution would require the court to make a fundamental moral judgment, then the state’s substantive judgment should be allowed to stand. The one vital exception to this rule, however, is that a substantive judgment cannot stand if its effect is to undermine the process of democratic decision making. To clarify the effect of these rules, the subsequent subsections will apply them to two issues that have faced the Supreme Court, or likely will in the near future.

A. *Romer v. Evans*

In *Romer v. Evans*,²²⁶ the Court was asked to decide the constitutionality of Amendment 2 to the Colorado Constitution. This provision provided:

Neither the State of Colorado . . . nor any of its agencies . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall . . . be the basis of or entitle any person or class of persons to have or claim any minority status, quotas preferences, protected status or claim of discrimination.²²⁷

Writing for the Court, Justice Kennedy struck down the provision as unconstitutional. To simplify the argument, Kennedy noted that equal protection is based on the principle that the government must remain open on an impartial basis to all members of the community.²²⁸ At the very least, the “bare desire to harm a politically unpopular group” cannot constitute either a legitimate or a rational state interest.²²⁹ In this case, the amendment at issue imposed a “broad and undifferentiated disability” on homosexuals based on their identity as homosexuals.²³⁰ This could be explained by nothing except animus towards the class it affected.²³¹ Therefore, the amendment failed even rationality review and had to be nullified.

Justice Scalia filed a powerful dissenting opinion. Scalia noted the amendment did not deprive homosexuals of general governmental protection against arbitrary discrimination;²³² it merely denied them special benefits based on their orientation.²³³ A denial of preferential treatment could not properly be considered unconstitutional, or all laws disadvantaging one group would be unconstitutional.²³⁴ Similarly, Scalia noted that a state may legitimately criminalize homosexual conduct.²³⁵ As such, merely denying special protections for homosexuals must be allowable.

More importantly for the purposes of this piece, Scalia also noted that homosexuals generally not only have access to the political forum, but also significant weight therein. This was certainly the case in Colorado. There, their clout far outweighed their numbers.²³⁶ Moreover, it could not reasonably be argued that Colorado’s decision was motivated by bare animus. Many Colorado localities had passed homosexual-friendly ordinances, and the same electorate had decriminalized homosexual conduct.²³⁷ Thus, for Scalia, Kennedy’s rationale failed.

Kennedy’s rationale indeed fails. Particularly on the argument that a state’s enactment can be unconstitutional because the court perceives a bare desire to harm an unpopular group, Scalia has a powerful response. Sunstein writes:

In this context, the “bare desire to harm” can be translated into one side in a “culture war.” Those who take this side believe that the state should not approve homosexuality through antidiscrimination law, and “surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.” The relevant animus here is not a bare desire to harm but a product of a widespread

“moral disapproval of homosexual conduct.” In Justice Scalia’s eyes, this kind of animus is not objectionable from the constitutional point of view.²³⁸

In this case the Court clearly faced a politically contentious topic: homosexuality. The Court’s effort to take sides in this “culture war” required the justices to look to their own values to make a fundamental moral judgment concerning homosexuality in order to characterize Amendment 2 as displaying “animus.” Sunstein argues that legitimate arguments can be made that “bare animus” was not necessarily the motivating factor behind the amendment.²³⁹ Yet the point of this article is that the substance of such arguments should be irrelevant to the courts. The Court’s moral judgment is not superior to the states’, and the Court should have deferred to the moral judgment expressed in Colorado’s substantive enactment.²⁴⁰

In one very important sense, however, Amendment 2 imposed on homosexuals a unique disability with a direct impact on their participation in the democratic decision making process. Although Colorado’s voters legitimately could have denied special status to homosexuals, unlike other groups to which the state legitimately could deny special status, Amendment 2 decreed that only homosexuals would be required to amend the state’s constitution to overrule that judgment.²⁴¹ While a group like farmers, for example, could simply try again before the legislature or the people if they “lost” as a result of the democratic decision making process, homosexuals could not. For them to “try again” to persuade the community that they deserved a substantive benefit, they would have to change the constitution. As such, their ability to participate—to compete on fair footing for the benefits of belonging to their political community—was undermined. On these grounds, the amendment properly was declared unconstitutional.

B. The Right to “Freedom from Pain”—Justice Steven’s Concurrence in *Washington v. Glucksberg*

The second scenario is one that has not yet faced the Supreme Court. The issue naturally flows from a decision the Court has handed down, however. It is likely to present itself before the Court in the near future.

In *Washington v. Glucksberg*,²⁴² the Court was asked to decide the constitutionality of Washington state’s statutory prohibition on physician-assisted suicide. Writing for the Court, Justice Rehnquist found that such a prohibition did not violate due process protection and was constitutional. Rehnquist held that, because suicide was neither “deeply rooted in this Nation’s history and tradition” nor “implicit in the concept of ordered liberty,” it was not a fundamental right.²⁴³ If suicide itself was not a fundamental right, assisting another to commit suicide could not be a

fundamental right either.²⁴⁴ As such, the state could prohibit assisted suicide so long as the prohibition was rationally related to a legitimate government objective.²⁴⁵ Rehnquist found that the statute was rationally related to several legitimate interests, including interests in preserving life, protecting the integrity of the medical profession, and protecting vulnerable groups.²⁴⁶ Therefore, the statute was constitutional.

Perhaps more interesting than Rehnquist's opinion was Justice Stevens' concurrence. Stevens agreed that a prohibition on assisted suicide was constitutional.²⁴⁷ He argued the state has an "interest in preserving and fostering the benefits that every person may provide to the community."²⁴⁸ As he put it, "[t]he value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making the decision to end that life."²⁴⁹

Stevens' concern for autonomy, however, led him to propose a different, "smaller" fundamental right. This right is not a right to end one's life, but rather a right to "control the circumstances of his or her imminent death."²⁵⁰ Presuming inevitable and imminent death, Stevens' posited, an individual might have a fundamental autonomy right to avoid pain, even if exercising the right hastens death.²⁵¹ In such circumstances, the state's interests would no longer trump.²⁵² Whether this right will be recognized is the open question in this area of the law. Under a jurisprudence of deference, the answer is clear. Maybe it will be recognized, and perhaps it should be, but the federal courts should not do so.

In this case, the right at issue is not the right to vote. Nor is it even remotely related to participation in the democratic decision making process.²⁵³ No group or individual would be prohibited from contributing to the democratic process by a law that refused to recognize such a right. Presumably, no member of a relevant minority would be excluded from the democratic process that made the decision, if such a minority can be identified at all. As such, the democracy reinforcing function of the courts would not be implicated.

Of course, neither are we dealing with a distribution of government benefits, the more traditional "constitutionally gratuitous" rights. Nonetheless, the decision whether to allow one to control the circumstances of his death implicates a number of moral values. Such a decision maker must consider the value of human life, both intrinsically and to society. She must consider the value of human autonomy. She must consider how much risk society should be willing to accept that a doctor's prognosis may be wrong. She must determine how imminent is imminent enough. She must determine whether a slippery slope concern is valid. She must consider the other values espoused by the state: preserving medical ethics and protecting vulnerable groups.

In making these moral decisions, the justices of the Supreme Court can claim no superiority over the average state legislator, either because there is no moral

superiority to be found or because the justices are not uniquely positioned to find it. No amount of legal training can allow them to better determine the value of human life or how much risk society should accept. Thus, the courts have no grounds for overruling the moral judgments of state legislatures in these matters. On the contrary, insofar as democratic processes have value of their own, the decision of that democratic body should stand.

VI. CONCLUSION

This article has endeavored to justify a constitutional jurisprudence of deference to substantive state law expressing fundamental moral judgments. It has shown that when the issue facing a federal court is a contentious moral or political issue, state legislatures are to be presumed competent, per the constitutional plan. More than a presumption, state lawmakers possess institutional capabilities that make them particularly well-suited to crafting policy. These capabilities will be more pronounced when the issue implicates interests unique to the states, as well as important moral concerns. Honoring state lawmaking decisions generally will promote democracy and honor the Framers' original intentions. Allowing the people's representatives the chance to make moral decisions will increase the likelihood that the people, and their representatives, will respect those decisions, rather than challenge them. Thus, moral policies are more likely to be effected.

On the other side of the coin, the federal courts are generally inferior institutions for deciding public policy questions with moral implications. They lack precisely those institutional capabilities that make state lawmakers well suited for such decisions. The courts were not structurally designed as lawmaking institutions. Courts also lack the democratic legitimacy possessed by legislatures. Perhaps most important in today's philosophical debate, the federal courts can claim no superiority in determining morally preferable public policy. And with the power of judicial finality, the risks of moral error by the federal judiciary are too high.

Of course, there are usually exceptions to every rule. This jurisprudence of deference is no different. It was not designed to apply to all situations the courts might face. When a state has violated constitutionally explicit rights, deference would surely be a mistake. Similarly, when the issue does not implicate a fundamental moral judgment, this methodology may be inapplicable. Most important, a court that would defer to a substantive judgment flowing from a state's democratic process must be certain those processes were genuinely democratic. It would be a mistake for a court to defer to a state law that either passes because of a flawed democratic process or perpetuates one.

There may be other exceptions to this rule of deference. It may not explain every "good" decision the courts have ever reached, including some decisions that had

moral implications. Of course, such retrospective analyses have the benefit of hindsight, a hindsight often colored by the eventual resolution of those moral issues. Unfortunately, we have no such lens for viewing the moral and political issues we face today and will face tomorrow. It is for such situations that a jurisprudence of deference is likely to be the best methodology. By applying it, we will honor our heritage as a constitutional democracy and have the best chance of maintaining a good society in the process.

Notes

1. *Compare* *Bradwell v. People of State of Ill.*, 83 U.S. 130 (1872) (deferring to Illinois' decision to disallow women's admission to the state bar), *with* *Cooley v. Board of Wardens*, 53 U.S. 299 (1851) (deferring to Pennsylvania harbor safety regulation).
2. 521 U.S. 702, 710 (1997) ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life").
3. 53 U.S. 299, 319 (1851) (upholding a Pennsylvania law requiring ships using the Philadelphia port to receive a local pilot in light of the need for diverse rules "which alone can meet the local necessities of navigation").
4. 478 U.S. 186, 194 (1986) (upholding a Georgia statute which criminalized sodomy because the "right" to sodomy was not "deeply rooted in this Nation's history and tradition" insofar as the several states had long outlawed it).
5. 517 U.S. 620, 636-53 (1996) (Scalia, J., dissenting):
Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality, is evil. I vigorously dissent.
Id. at 636.
6. 518 U.S. 515, 566-603 (1996) (Scalia, J., dissenting). "Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent." *Id.* at 567.
7. 384 U.S. 436, 526-45 (1966) (Harlan, J., dissenting). "What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it." *Id.* at 516.
8. 410 U.S. 113, 171-78 (1973) (Rehnquist, J., dissenting).
The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and

19. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 51 (1996).
20. Sunstein describes minimalists as:
 - judges who seek to avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to decide particular cases. Minimalists emphatically believe in reason-giving, but they do not like to work deductively; they do not see outcomes as reflecting rules or theories laid down in advance. They also tend to think analogically and by close reference to actual and hypothetical cases.

Id. at 14. In short, they make decisions that are both “narrow” and “shallow.” See *id.* at 16, 20 (describing narrowness as avoiding broad rules and shallowness as avoiding issues of basic principle).
21. One of the principle benefits of a rule of deference is that it requires courts to avoid making decisions in morally or politically charged cases and, thus, avoids situations where judges create broad, substantive “abstract principles” to decide cases on the basis of their own moral views. See *infra* Part III.B (explaining why such decisions are undesirable).
22. Although deference may be one expression of minimalism, see *id.* at 51 (describing “passive virtues” as a court’s refusal to take jurisdiction), I argue for deference as a rule and support that rule with reference to “abstract theories” and “basic principles.” Moreover, I would extend the rule of deference to several situations where Sunstein would not advocate its use as an expression of minimalism.
23. See *id.* at 16-19 (discussing decision costs and error costs).
24. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14-25 (1997) (describing Scalia’s textualist approach). Justice Felix Frankfurter also adhered to this approach.
25. See *supra* notes 5, 6 (noting Scalia’s dissents in *Romer v. Evans* and *U.S. v. Virginia*).
26. A separate debate asks whether a textualist may look to the current meaning of words, or only to the meaning of words at the time of drafting or passage. While I tend to prefer the latter because the drafters—the authoritative source of law—only used words as they understood them, the nuances of this debate exceed the scope of this simple description of textualism. In any event, the ultimate point remains the same regardless of which source of meaning one chooses to apply: only the text is authoritative.
27. “[W]ith respect to 99.99 percent of the issues of construction there *is* no legislative intent, [thus] any clues provided by legislative history are bound to be false.” SCALIA, *supra* note 24, at 32. See also *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279-81 (1996) (Scalia, J., concurring):
 - The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it [O]pinions using legislative history are often casual, sometimes even careless, in their analysis of what “intent” the legislative history shows. Perhaps that is because . . . the Court really makes up its mind on the basis of other factors. Or perhaps it is simply hard to maintain a rigorously analytical attitude, when the point of departure for the inquiry is the fairyland in which legislative history reflects what was in “the Congress’s mind.

Id. (citations omitted).
28. SCALIA, *supra* note 24, at 32.
29. *Id.* at 24.
30. *Id.* at 22.

31. *See* *United States v. Virginia*, 518 U.S. 515, 567 (Scalia, J., dissenting) (“Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent.”)
32. *See* *Romer v. Evans*, 517 U.S. 620, 636 (Scalia, J., dissenting) (“Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions”).
33. *See* SCALIA, *supra* note 24, at 40 (“It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away”).
34. As a general rule, “we” are comfortable sending groups—majorities or minorities—to the political branches to advocate political goals, including issues of non-fundamental group rights (though “fundamentalness” has been considered a constitutional inquiry). Quite simply, the political branches are better suited to balance the interests of groups. *See infra* Part II.B (discussing the nature of the powers of the branches).
35. U.S. CONST. art. III, § 2 (extending the “judicial Power” “to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party . . . ” as well as to cases “between Citizens of different States”).
36. *Cf.* MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 7 (1989) (noting a similar distinction).
37. Although the federal courts are created under, and governed by, positive law, these institutional limitations are more accurately described as the secondary effects of the courts’ characteristics, rather than direct effects of the rules themselves.
38. *See* CAPPELLETTI, *supra* note 36, at 37 (citing Devlin, *infra* note 45, at 10).
39. *See* Gerald Rosen, Speech at Kalamazoo College (November 21, 1996), in 63 *VITAL SPEECHES OF THE DAY* 194 (January 15, 1997):

There is a more fundamental reason why Judges should not legislate or administer, and that is that we are uniquely unqualified and incompetent to perform these functions by virtue of the nature of the Judicial institution itself When we get a case, we have only the litigants and their hired experts before us to inform our decisions and actions. We do not have the ability to call in witnesses with broad expertise, and we rarely get the best people in a given field. Nor is there broad-based public participation. Unlike Congress and the Executive, we cannot hold hearings at which witnesses and experts on all sides of a question testify about the broader policy ramifications of a proposed action.
40. Some also argue that courts are limited to a “narrow reading” of the law. Whether this actually limits the courts’ power is a debatable proposition. Theoretically, however, courts lack the opportunity to look at issues not raised by the litigants because they are limited to deciding the cases before them. This narrow view of the legal issues may preclude a court from considering many factors relevant to a comprehensive policy. The courts also may give slight consideration to the ramifications of their decisions on parties not before them, as they focus on “doing justice” for the unique individuals who are. Even if courts do consider these issues, because the parties have not prepared and argued issues they believe to be peripheral, the courts’ fact-finding abilities

will be relatively weak. See CAPPELLETTI, *supra* note 36, at 37 (noting that parties are generally interested in the decision on their case and not in the development of law).

Of course, cases like *Roe v. Wade* tend to refute this assertion as a matter of factual accuracy. Whether such forward-looking judicial decisions are proper when the court faces morally contentious issues is the subject of this article. I do not claim that deference is the appropriate strategy when forward-looking policy is best shaped by reasoned analysis, i.e. where there is general agreement on values or policy, or when the principles of law implicated by a case lack fundamental moral impact.

41. See *id.* (noting that the judiciary “can rely upon only a limited range of tools to enforce its policy decisions, and lacks the capacity to monitor such enforcement and its effects”).
42. This is unless, of course, the court bases its decision on constitutional grounds. This will become important later in this article.

Indeed, most state legislatures technically abide by federal courts’ decisions in most cases. Equally often, however, those same legislatures seek to avoid those rulings through creative lawmaking or erode them by challenging their limits. Moreover, state executive officials may exercise their discretion to enforce the law with varying degrees of diligence when they, or their constituents, disagree with its moral underpinnings or question its legitimacy. These subversions create inefficient results and blur the lines of cause and effect. When a law is enforced piecemeal, or with varying degrees of diligence, an accurate measure of its effects is impossible. It is impossible to determine whether the law is a good one because it is never fully tested. Rather, the debate turns to whether some individual or group unjustly undermined the law. Moreover, so long as these peripheral debates continue, neither are good laws given sway nor bad ones replaced with better alternatives. The question, then, is whether state legislatures and executives will do better in this regard when the state legislatures choose what the law will be. The answer, presumably, is yes.

43. THE FEDERALIST No. 78, at 469-72 (A. Hamilton) (Clinton Rossiter ed., 1961). See also RONALD DWORKIN, FREEDOM’S LAW ch.1 (1996) (describing the courts’ fundamental role in democracy in the “communal” or “constitutional” sense). In Part III, I critique Dworkin’s definition of democracy.
44. See *infra* Parts III.A and B.
45. See CAPPELLETTI, *supra* note 36, at 40:

This objection, ‘that judicial law-making is unacceptable because undemocratic,’ is considered by Lord Devlin to be a ‘fatal’ one, indeed the only one which is decisive in any country which wants to preserve its democratic character. [He states:] ‘It is a great temptation to cast the judiciary as an elite which will bypass the traffic-laden ways of the democratic process. But it would only apparently be a bypass. In truth it would be a road that would never rejoin the highway but would lead inevitably, however long and winding the path, to the totalitarian state.’

(citing Devlin, *Judges and Lawmakers*, 39 MOD. L. REV. 1, 16 (1976)). See also *infra* Parts III.A (discussing the import of finality) and III.C (discussing the legitimacy critique). But see generally DWORKIN, *supra* note 43 (arguing that judicial lawmaking, if it promotes the moral ideal of equal concern and respect, is legitimate).

46. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (noting that courts may properly defer to the legislature on policy questions when the legislature’s institutional qualities put it in the best position to decide the question).

47. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 67 (1980) (“[A]s between courts and legislatures, it is clear that the latter are better situated to reflect consensus.”).
48. *Cf. id.* at 53:
The conventional wisdom here, that courts are markedly worse than legislatures at determining legislative facts, surely can stand significant qualification—but at the same time there isn’t any reason to suppose they are better at it. More fundamentally, there are likely to be situations in which the facts are inherently intractable, not susceptible to resolution in any way that would satisfy all observers That factual uncertainty is an element of a problem does not mean the problem is not a profoundly moral one, or that it is one that the courts have any superior claim to being able or entitled to solve.
49. Of course, a judge could ostensibly base his political ideology on reason. But to make that claim merely begs the question of why that ideology could any more legitimately be imposed in a judicial decision. See ELY, *supra* note 47, at 57-58 (1980) (“The error here is one of assuming that something exists called ‘the method of moral philosophy’ whose contours sensitive experts will agree on, that ‘there are only two kinds of reasoning—one is sound and the other is unsound.’ That is not the way things are.”) (citations omitted); *id.* at 59 (“The objection to ‘reason’ as a source of fundamental values is therefore best stated in the alternative: either it is an empty source, or, if not empty . . . it is so flagrantly elitist and undemocratic that it should be dismissed forthwith.”) *Id.*
50. This postmodern view can be stated at different levels of generality. For instance, one may argue that reason cannot lead to a single, morally best principle that can legitimately be imposed to govern any given case. Even if we assume judges to be reasonable people, the fact that judges do not agree on the correct resolution of moral disputes supports this view. As Chief Justice Earl Warren put it: “It is not likely ever, with human nature as it is, for nine [justices] to agree always on the most important and controversial issues of life.” To use Kant’s terminology, reason may lead one person to one set of “categorical imperatives” and another person to a different set. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 25 (James W. Ellington trans., Hackett Publishing Co. (1981)) (1785). Alternatively, even if one concedes that reason can lead to indisputable moral principles, reliance on “reason” gives no guidance as to how those principles should be assigned weight or balanced in any given moral dilemma.
51. *Cf.* Joshua D. Greene et al., *An FMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *SCI.* 2105, 2105-2108 (2001). In this study, researchers recorded brain activity while subjects were presented with one of two versions of the “trolley dilemma.” In this dilemma, a trolley carrying five people has run out of control and will imminently kill the passengers. Some subjects of the experiment were given the option of flipping a switch to send the trolley to another track where it will stop safely but only after striking and killing a pedestrian. The majority chose to flip the switch and save five lives at the expense of one. The other subjects were given the option of pushing a “bulky” person in front of the trolley, killing the person but stopping the train and saving the passengers. Although “morally equivalent” to the first hypothetical from an objective point of view, a majority of these subjects believe this would be morally wrong. The question was why.

Although they proposed no answer as to why it was morally justifiable to sacrifice one life

for five in some situations but not others, the researchers noted that the images of brain activity they produced tended to show heightened brain activity in regions associated with emotional processes in the latter group of subjects, but not the former. They concluded, contrary to many modern notions of moral philosophy, that they had shown moral decision making to involve something more than the exercise of “reason” alone.

52. This is not to say that a well-reasoned opinion would not be preferable to a poorly reasoned one. Rather, it is to say that reason cannot prove one value superior to another. *Cf. id.* Alternatively, one might argue, even if a judge thinks he looks at all relevant factors, his limited viewpoint limits his consideration to those factors he thinks are relevant, not those factors that are relevant as a matter of objective truth. As a fallible human being, that opinion of what is relevant inevitably is fallible as well.
53. *See ELY, supra* note 47, at 56:
[S]urely the claim here cannot be that lawyers and judges are the best imaginable people to tell good moral philosophy from bad Since judges tend generally to be drawn from roughly the same ranks as legislators, the heart of the argument here is that moral judgments are sounder if made dispassionately, and that because of their comparative insulation judges are more likely so to make them. . . . One might begin by questioning [this] incompatibility between popular input on moral questions and “correct” moral judgment. In fact there are reasons for supporting that our moral sensors function *best* under the pressure of experience.
See also Greene et al., *supra* note 51 (suggesting that at least some moral decision making is not the result of objective reasoning).
54. *See infra* text accompanying note 168 (discussing cognitive dissonance).
55. *See* Sunstein, *supra* note 19, at 101 (noting that issues implicating moral and political concerns will ultimately be decided democratically, not judicially).
56. *See id.* at 99.
57. *See id.* at 100.
58. *See id.* at 98 (“It also seems plausible to suggest that courts should be reluctant to vindicate even good principles when the vindication would compromise other interests”)
59. *See id.* at 91:
[In the context of affirmative action] the Supreme Court would be singularly ill-advised to issue a broad ruling These programs are exceptionally diverse, and from the standpoint of both policy and principle, some are far better than others. A blanket ban would make little sense . . . in light of the fact that this is an area in which democratic institutions are far from inattentive. On the contrary, the nation has embarked on a large-scale debate about such programs. That debate raises complex issues of both morality and fact. [T]he wide range of potentially relevant issues is hard to handle through a simple, rule-like constitutional decree.
60. This version “calls for adjudication to be governed by the general moral or political beliefs of the constitution-makers without regard to whether or not those beliefs were codified in the Constitution.” Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L.REV. 226, 235 (1988).
61. *Id.*
62. *See* DWORKIN, *supra* note 43, at 10.

63. See Kay, *supra* note 60, at 236-42. It should be noted that while Kay attempts to refute the argument that inquiry into original intent is impossible, he was largely unconcerned with the subjective intents of the drafters. *Id.* at 235.
64. Even if one could ask the “other” about his subjective intentions, getting a clear picture of those intentions depends upon a number of factors. The questioner must ask the correct questions, and the questionee must be forthright and give honest answers, for example.
65. Insofar as legislators are concerned with the welfare of their local constituencies (as well as reelection), “horse-trading” is a likely explanation for many votes. It is an explanation, however, that lends nothing to an understanding of the law’s meaning.
66. Aldridge v. Williams, 44 U.S. 9, 24 (1845) (emphasis added).
67. Learned Hand, *The Bill of Rights* 73 (The Oliver Wendell Holmes Lectures, 1958):
For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.
68. See DWORKIN, *supra* note 43, at 10-11.
69. Robert N. Clinton, Original Understanding, Legal Realism, and the Interpretation of “This Constitution,” 72 IOWA L. REV. 1177, 1180 (1987). See also Kay, *supra* note 60, at 234-35.
70. Note, for example, the ever-popular *Federalist Papers*.
71. In this way, originalism is not all that different than Scalia’s textualism. See SCALIA, *supra* note 24, at 38:
I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton’s and Madison’s writings in the *Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.
It may be even more precise as well, as this originalist viewpoint provides the answer to the question of “when” we should look for meaning: The originalist would look to the meanings of words as they were understood at the time the text was drafted or ratified, rather than at current meanings.
As such, the analysis could conceivably end here, just as it did in the prior section on textualism. If the constitutional text—understood in the sense that the drafters understood the words they used—does not address the specific situation at bar, then the Constitution gives the judge no reason to strike down the law. The state lawmakers’ substantive judgment stands by default. To be true to the originalist perspective, however, a deeper analysis is in order.
72. This assertion is different than the one criticized *infra* in the text accompanying notes 80-84. It is a different argument to say that the Framers took no position on an unforeseen issue (or at least no discernible position) and, therefore, the legislatures are free to act, than to say, as a historical matter, that the Framers rejected a certain interpretive position on an unforeseen issue and, therefore, the courts may not consider it.
73. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 662 (1987).
74. *Id.* at 664-65.
75. *Id.* at 665.
76. *Id.* at 669.

77. *Id.*
78. Powell, *supra* note 73, at 669.
79. *Id.* at 670.
80. *Id.* at 671.
81. *Id.*
82. *Id.*
83. Powell, *supra* note 73, at 671.
84. *Id.*
85. Clinton, *supra* note 69, at 1267. *Cf.* Brecht v. Abrahamson, 507 U.S. 619, 632 (1993) (“As a general matter, ‘we are reluctant to draw inferences from Congress’ failure to act.’”) (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988)).
86. Clinton writes:
Without historically demonstrated *affirmative* discussion of the meaning of a particular clause at issue, historically demonstrated definitive connotation of the language as used during drafting and ratification, or other affirmative indications of meaning in the text or structure of the document, the most a historian can do is speculate from other affirmative or negative evidence regarding what the adopters might have thought about an issue to which they gave no thought. Because of the contextualist perspective of any such undertaking and the likelihood that contemporary normative values will dominate the inquiry, there is no logical reason in the absence of *affirmative* evidence of original understanding to prefer this subjectively derived, so-called historical meaning to one derived through ahistorical, nonoriginalist methods of constitutional interpretation.
Id. at 1286.
87. *Id.* at 1273.
88. *Id.* at 1273-74. As I later argue in greater depth, deference in itself may be a legitimate methodology. I believe that deferring to the state’s substantive judgment can be a valid interpretive alternative on its own, instead of merely the de facto outcome of another interpretive strategy.
89. As Powell recognizes, this was, in fact, rare. *See* Powell, *supra* note 73, at 669-71.
90. *See* ELY, *supra* note 47, at 87.
91. Many Anti-Federalist critiques, of course, focused on apprehension that state governments would be overborne by the powerful new national government established by the Constitution. In turn, many Federalist defenses involved concessions to the competence of state governments and assurances that the national government would be limited while the states would retain much of their authority. In a similar vein, the Eleventh Amendment is widely, though not unanimously, thought to have been a triumph of federalist values as an overwhelmingly popular reaffirmance of states’ sovereign immunity after *Chisholm v. Georgia*, 2 U.S. 419 (1793), held that states could be forced into federal court to answer the claims of citizens of other states. *See* *Hans v. Louisiana*, 134 U.S. 1 (1890) (expanding state sovereign immunity under the Eleventh Amendment to include federal question cases); *but see* *Welch v. Texas Highway and Public Transportation Dep’t*, 483 U.S. 468, 500-01 (1987) (Brennan, J., dissenting) (criticizing *Hans*).
92. *See* *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
93. *See* *United States v. Lopez*, 514 U.S. 549 (1995).

94. *See* *City of Boerne v. Flores*, 521 U.S. 507 (1997).
95. Of course, sovereign immunity can also arise in cases concerning the actions or inactions of executive officials. *See, e.g.* *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex Parte Young*, 209 U.S. 123 (1908).
96. This question is at the core of this discussion concerning deference. Likewise, in the realm of sovereign immunity, if one looks behind the historical debate between the Brennan/Souter position and the Powell/Rehnquist position, this question is apparent. *Compare* *Welch*, 483 U.S. at 520 (Brennan, J., dissenting) (stating that federal courts must be available to vindicate federal rights), *with* *Seminole Tribe*, 517 U.S. at 95 (discussing comity concerns). *See also* *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act (ADEA) is an ineffective congressional abrogation of states' sovereign immunity as the ADEA exceeds Congress's authority under § 5 of the Fourteenth Amendment).
97. 527 U.S. 706 (1999).
98. *Id.* at 713 (citing U.S. CONST. Art. I, § 8; Art. II, §§ 2-3; Art. III, § 2; Art. IV, §§ 2-4; Art. V; *Printz v. United States*, 521 U.S. 898, 919 (1997); *Seminole Tribe*, 517 U.S. at 71, n.15; *New York v. United States*, 505 U.S. 144, 156-159, 177 (1992); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).
99. *Alden*, 527 U.S. at 714 (citing THE FEDERALIST NO. 39, at 245 (J. Madison) (Clinton Rossiter ed. 1961)).
100. *Id.* (citing *Printz*, 521 U.S. at 919-20).
101. One might argue that the Supremacy Clause provides just such a constitutional limit. To do so, however, would be to miss the thrust of the argument in this article. Although certainly an issue, invocation of the Supremacy Clause only begs the question whether federal law is applicable. If it is, then state law must certainly fall. If it is not, however, then the Supremacy Clause is irrelevant.
- In this article, a lack of congressional regulation is presumed, though one also could construct an argument that, generally, when federal courts should defer to state lawmaking, congressional regulation is similarly inappropriate. *See* *Boerne v. Flores*, 521 U.S. 507 (1997). *Boerne* held that although Congress can pass broad remedial legislation to address violations of the Fourteenth Amendment, it cannot expand the scope of that amendment by legislation because the Court has final interpretation over the Constitution. Thus, assuming a constitutional question, if the Court decides that it has no constitutional grounds to overrule state legislation, the more limited authority of Congress would also seem inadequate. *See, for example, Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (D. Fla. 2000), where the Court held that Congress could not abrogate state sovereign immunity with the ADEA and applying reasoning which effectively strikes the Act down, for an example of this principle in practice. Thus it appears that the states will fill a major regulatory function in the politically and morally contentious realm of age discrimination. *See id.* at 91 (“Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.”).
102. *But see* *Welch*, 483 U.S. at 514-16 (Brennan, J., dissenting) (discussing federal supremacy in structural terms). Brennan's argument that federal jurisdiction exists, however, merely begs the

- question of whether judicial power *should* be exercised.
103. This latter finding would be problematic insofar as it would require a judge to reference his or her own values to determine whether, or how great, a moral or political discussion exists. For the purpose of this piece, I ask the reader to assume that this could be done. I would note, however, that this kind of value judgment is not as dangerous as others I will shortly critique insofar as recognizing that an issue exists is at least one long step from deciding it.
104. To say a principle that prevents the nullification of the majority's voice is consistent with democracy implies a far too limited view of democracy. Although honoring the majority's voice may be correct at times, perhaps most of the time, such an argument presumes that democracy is equivalent with placing absolute power in the hands of the majority. This sounds like an extreme view of parliamentary democracy. In any event, so long as one believes there are instances where the majority cannot rule, this conception must be rejected.
105. An "alternative" conflict between judicial review and democracy is the former's tendency towards the juridification of law. This argument posits that the looming spectre of judicial review causes legislatures to pass laws with both eyes on "getting it past the courts" instead of on what is best for society. This is a valid criticism, though not the one on which I choose to focus.
106. Geoffrey de Q. Walker, *The Rule of Law* 1 (1988).
107. *See generally* LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 1-20 (1994). Note the similarities with Dworkin's description of the "majoritarian premise."
108. *See* DWORKIN, *supra* note 43, at 17-20, 25 (1996).
109. *See* ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 88-100 (1975) (criticizing adjudication).
110. This view requires one to recognize that the admonition that judges should have no will, only judgment, is an impossible ideal. A strict formalist view of the courts is impossible to reconcile with reality because judges always are influenced by their own values.
111. *See generally* DWORKIN, *supra* note 43.
112. *See* UNGER, *supra* note 109 (noting the "antinomy of rules and values").
113. *See* DWORKIN, *supra* note 43, at 7-12. It is necessary, of course, to qualify this reference to Dworkin by noting he argues that although the Constitution embodies abstract moral values, judges should never impose their personal moral values in their judgments. Whether this distinction is possible is another argument entirely, and one I address in a subsequent section.
114. *See id.* at 16.
115. I think it undisputed that the Rule of Law, in any conception, is a limiting principle on the power of government. In turn, if one adopts the base statistical conception of the majoritarian premise, that the will of the majority of the voters should *always* govern, then any limiting principle on the majority's power is antagonistic to democracy.
116. *See* DWORKIN, *supra* note 43, at 19.
117. "Government by the people, where liberty, equality and fraternity are secured to the greatest possible degree and in which human capacities are developed to the utmost, by means including free and full discussion of common problems and interests." ROLAND J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 7 (1979). Of course, the first part remains little more than a truism, with the important question being not whether democracy secures liberty and equality, but how a particular democracy balances those often-conflicting ideals. As I have argued, I believe that however that balance is ultimately struck, negative liberty must be given the greatest weight. *See* CASS R. SUNSTEIN, *THE NEGATIVE CONSTITUTION: TRANSITION IN LATIN*

AMERICA 367 (1993):

Courts should protect, first and foremost, a firm negative constitution, protecting individuals from government impositions. [Second,] courts should be reluctant to protect positive rights, such as the right to welfare, to a clean environment, or to social security Most of the negative rights are [uniquely] capable of judicial enforcement. Moreover, most of them are central not only to individual liberty, but also to democracy

118. Of course, the right to some forms of participation can be revoked by society for cause. There is nothing violative of this conception of democracy by preventing some—children and, arguably, felons for example—from participation.
119. *See, e.g.,* Mauro Cappelletti, *The Judicial Process in Comparative Perspective* 46 (1989).
120. I adhere to the predominate statistical conception because Dworkin’s communitarianism poses far too great a risk of promoting the undesirable judicial activism I criticize. Quite simply, the rights often discovered through such activism are not fundamental rights. The judgment of a right as fundamental may involve—separately or in tandem, depending upon one’s understanding of the term “fundamental”—a social-historical or moral basis. The moral basis will be discussed in detail in the subsequent section. Looking to a social-historical basis, it would seem impossible for a judge to argue fundamentality without undermining her authority to declare it. For a right to be fundamental, it either must be “fundamental” to most, if not all, people currently in society, in which case representative legislative determinations of fundamentality would seem to be more valid, or it must be “fundamental” to society, not limited to its present composition. Under that conception, the tradition test espoused by Justice Rehnquist would seem to be appropriate. *See* *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (describing the test for “fundamentality” as whether the right is “deeply rooted in [our nation’s] history and tradition”). In either event, the judge’s personal conceptions of fundamental rights are not the best grounds on which to declare certain rights as fundamental for society as a whole. As such, they have no superiority over legislative enactments.
121. “It is manifestly unfair . . . that the majority should be ruled by the minority. Therefore, naturally, the majority has the same right as the entire body.” James A. Gardner, *Madison’s Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 138 (2000) (citing HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, bk. II, ch. V. sec. XVII, at 249 (F. Kelsey trans., 1925) (1646)).
- As should be apparent, ideals like “equality” are not a part of this conception of democracy. This is not to disparage equality’s value, or to preclude the pursuit of equality through democratic means. Rather, it is to recognize that substantive equality is separate from democracy and, thus, some manifestations thereof may lose out in the democratic decision making process.
122. Here, I make no distinction between a majority of the people (*i.e.*, through a public referendum) and a majority of the people’s representatives in a legislature. I do not mean to intentionally discount Cappelletti’s criticism of the continued legitimacy of modern “democratic” rulemaking in increasingly administrative states. I am deeply concerned, however, by Cappelletti’s uncompromising advocacy of a liberal activist court. I remain dissatisfied by his failure to explain satisfactorily how such judicial decrees would be legitimate in their own right and his willingness to sweep the well-recognized risks of unchecked judicial arbitrariness under the rug.

123. I specifically exclude positive rights like abortion rights. If such rights are to be protected, it should be as the result of the democratic process, not some warping of the Rule of Law. See SUNSTEIN, *supra* note 117, at 374 (“[Positive liberties] should be created at the level of ordinary legislation, and subject to democratic discussion, rather than placed in the foundational document.”).
124. See *United States v. Carolene Products*, 304 U.S. 144 (1938) (holding that the Supreme Court needs to step in—arguably because of the supremacy of the rule of law—to protect discrete and insular minorities when those individuals are excluded from the political process as a result of invidious discrimination); ELY, *supra* note 47, at 88-101 (arguing that the nature of the Constitution’s protection of minorities is not to define certain substantive values that cannot be disturbed, but to assure equal access to participation in the process by which those values and prohibitions are defined). See also SUNSTEIN, *supra* note 117, at 369 (counting anti-discrimination principles among negative rights). In light of my otherwise individualistic view of democracy, this exception might appear to conflict with the rest of my argument. I find it sufficient to refer to my definition of democracy to answer this criticism. Even my individualistic conception must recognize the rights of all individuals to participate. The fact that such individuals are grouped into discrete and insular minorities does not change that fact or make each member any less an individual. See also *infra* Part IV.
125. See WALKER, *supra* note 106.
126. See generally THE FEDERALIST NO. 51 (A. Hamilton) (Clinton Rossiter ed., 1961).
127. *Id.* at 322.
128. This formulation notes the importance not only of an independent judiciary with the power of judicial review, but also the importance of having strong legislative and executive powers, each with interpretive authority. Although these may seem antithetical to the Rule of Law, I think this conception of separation of powers as part of the Rule of Law is necessary because I agree with Dworkin, to an extent, about the unavoidable importance of people in any governing system. See DWORKIN, *supra* note 43, at 3, 6.
129. Federalism also is an important limiting concept in the American system of government. In this context, I do not argue that the states could overrule a Supreme Court judgment. The Supremacy Clause certainly forbids that. My argument—largely ignoring the FEDERALIST’s observations about the ability of officials to limit themselves—is simply that in seeking the best constitutional interpretation, the courts should recognize that, in light of judicial finality—as well as the judiciary’s structural limitations—they might not be the best institution to make rules in morally or politically charged situations. They should recognize and respect the value of contested finality, despite no apparent compulsion to do so, and recognize that their exercise of power risks undermining the debate and foreclosing the benefits of continued democratic dialogue.
130. See CAPPELLETTI, *supra* note 36, at 30-35, 40-46.
131. See DWORKIN, *supra* note 43, at 10.
132. Dworkin unsatisfactorily explains, for example, how a judge could conceivably declare an objectively moral outcome without importing his own moral preferences. Justice Brennan certainly must have thought that he had the morally best resolution in mind when he abstractly condemned the death penalty, but that moral belief was certainly not universal and, arguably, not objectively correct.

133. Dworkin might respond that the Rule of Law, within the conception of communitarian democracy, requires that the principle of equal concern and respect be implemented and preserved as the keystone of legitimate government. Ultimately, it does not matter by what method or government branch that principle is implemented, although the judiciary—guided by presumably superior reason and acting as disinterested arbiters—is more likely to achieve the goal. For Dworkin, asking how to limit judicial power is simply the wrong question. I maintain that it is the right question, however, since asking anyone—including judges—how to maximize something like “equal concern and respect” is to seek an arbitrary answer.
134. *See infra* Parts III & IV.
135. *See infra* note 164 (using Aristotle’s virtue ethics to explain the moral value in a vibrant political conversation).
136. The strongest argument against this position is my apparent inconsistency in condemning judicial discretion to strike down legislation and questioning finality in general, but adopting them as unavoidable parts of the two exceptions. It might appear that I ignore Unger’s “sham” argument when it suits my ends. Unger argued that the Rule of Law imposes no real limit on the discretionary power of judges because they are the branch entrusted to enforce, and thus define, the limiting principle. Without any check on their power to do so, the principle is ineffective to limit the judges’ own power. (Note the similarities to my discussion concerning the problems with finality.) The criticism of my position would be, simply, that while I purport to limit judicial discretion in theory, I leave it intact—thus falling prey to my own theory—to the extent I allow judges to enforce two exceptions to majority rule. I can live with this appearance of conflict for three reasons.
- The first is the limited scope of this piece’s argument: We are only talking about federal judicial decisions that would require the making of a fundamental moral judgment in order to strike down a state law. This argument says nothing so bold as that federal courts should have no discretion to apply law to facts or no discretion to clarify the vagaries of antitrust law; or that lower federal courts should refuse to follow binding precedent.
- Second, I propose only limited discretion to nullify majoritarian rules and hardly finality at all, even in those contexts where this approach applies. The rules I propose allow for only two situations where judges—absent precedent in the case of lower federal courts—would legitimately exercise their discretion to strike down legislation on constitutional grounds. Moreover, that discretion would be fairly innocuous. By protecting express negative liberties, the courts’ activism would simply result in a negation of democratic lawmaking. It would neither create new positive rights, nor be final. The legislature could always try a different strategy to reach the same end. Similarly, in their democracy reinforcing function, the courts would not make positive rules. They would simply guarantee that a justly constituted majority made them.
- Third, I answer this criticism by noting my agreement with Dworkin that people—including judges—and thus their discretion, are inevitable factors in any governing system. While we can, and should, do our best to limit arbitrariness, it would be impossible to avoid discretion entirely. Thus my conception should not be condemned for this reason. As Justice Scalia notes, all we can do is seek out the best way of conceiving a government; perfection is unattainable.
137. Justice Brennan’s steadfast position that the death penalty was unconstitutional was arguably the preeminent example of judicial morality at work. It is also true that more “conservative” justices like Justice Black, and especially Justices Thomas and Scalia, undoubtedly consider the

- moral impacts of their decisions. Taking Scalia as an example, however, to the extent his morality leads him to adopt a jurisprudence of deference to state legislation, it has something more to recommend it, as this piece endeavors to show.
138. See DWORKIN, *supra* note 43, at 5 (describing Brennan as “one of the more liberal and explicit practitioners of the moral reading . . . in modern times”).
139. See *id.* at 3 (“[I]t would indeed be revolutionary for a judge openly to recognize the moral reading, or to admit that it is his or her strategy of constitutional interpretation, and even scholars and judges who come close to recognizing it shrink back, and try to find other, usually metaphorical, descriptions of their own practice.”).
140. *Id.* at 2.
141. See *id.* at 11 (noting that the moral reading asks judges to “find the best conception of constitutional moral principles”). Dworkin’s argument has both empirical and normative components. First, he argues that the moral reading is, in fact, how judges actually interpret the Constitution. See *id.* at 2 (“[T]here is nothing revolutionary about the moral reading in practice. So far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading”) In addition, Dworkin argues that they should apply the moral reading. This argument itself has normative and empirical components. Not only does this methodology lead to the best outcomes, but the only truly defensible ones as well. Quite simply, all other alternatives are either practically incoherent or morally untenable. See *id.* at 12-13 (arguing that Learned Hand’s theory of judicial review as a last resort simply has been overcome by history); *id.* at 13-14 (arguing that originalism is “indefensible in principle and unpalatable in result”).
142. *But see infra* text accompanying notes 150-151 (discussing fitness as integrity—a concept with its own moral worth).
143. See *Alden v. Maine*, 527 U.S. 706 (1999). Justice Kennedy argues that our federalism demands that Congress treat states in a manner consistent with their status as residuary sovereigns and joint participants in the Nation’s governance. This “plan of the convention” argument holds that “Eleventh Amendment Immunity” is a misnomer because sovereign immunity is neither derived from nor limited by the Amendment’s text. Rather, the States’ immunity from suit is a fundamental aspect of the sovereignty they enjoyed before ratification of the Constitution. They retain this sovereignty under the plan of the convention, and thus they retain sovereign immunity except insofar as it was altered by the original constitutional plan or the Fourteenth Amendment.
144. Scalia concedes, “*stare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it.” SCALIA, *supra* note 24, at 140.
145. See Clinton, *supra* note 69. Though not speaking in terms of fit, Professor Clinton’s argument defines originalism as an endeavor to interpret constitutional text in a manner consistent with the drafters’ understanding of their words.
146. See John C. Reitz, *Political Economy and Abstract Review in Germany, France, and the United States*, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE (John C. Reitz, Sally J. Kenney & William M. Reisinger eds., 1999).
147. DWORKIN, *supra* note 43, at 10. See also *id.* at 10-11:
[Judges] must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see

that what they contribute fits with the rest. (I have elsewhere said that judges are like authors jointly creating a chain novel in which each writes a chapter that makes sense as part of the story as a whole.) Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution.

148. Of course, the Rehnquist Court has slowed this trend. American constitutional history as a whole, however—particularly that associated with the Warren Court—bears the weight of this assertion.
149. *See* Robert P. George, *Making Men Moral* 32 (1993) (citing Thomas Aquinas, *Summa Theologiae*, I-II q. 96, a. 2 & q. 95, a.3).
150. One might argue that a less just decision that nonetheless remains a moral improvement and can be implemented is superior to an morally perfect decision that society will refuse to follow or will resist, thus resulting in less moral improvement.
151. DWORKIN, *supra* note 43, at 10.
152. *Id.* at 11-12.
153. *Id.* at 7-8.
154. *Id.* at 24-26.
155. *Id.* at 15-19.
156. DWORKIN, *supra* note 43, at 19.
157. *Id.* at 16.
158. *Id.* at 20.
159. *Id.* at 17.
160. *Id.*
161. DWORKIN, *supra* note 43, at 17.
162. Indeed, Dworkin appears to focus on procedure himself. *See id.* at 17.
163. *See id.* at 34.
164. Dworkin argues that American constitutional history has already vested the courts with the power to review legislation for constitutionality. Thus, he concludes it is the federal courts that have the final responsibility to enforce the requirement of equal status among citizens. As it is at the heart of the controversy, this conclusion will be considered in greater detail shortly.
165. *See id.* at 17-18.
166. The inherent moral value of a political conversation can be discovered by analyzing it under the rubric of Aristotle's virtue ethics. For Aristotle, the highest human pursuit was the pursuit of excellence. In turn, the highest form of excellence was *arête*, or virtue. *See* Roger Crisp, *Ethics, in FROM ARISTOTLE TO AUGUSTINE* 109, 110 (David Furley ed., 1999). Virtue, however, was not an end itself, nor was it a sufficient means to an ultimate end. Instead, happiness was the ultimate end, *id.* at 114, and virtuous acts were the means to that end. Such acts were the only component of happiness, *id.* at 111, so that the highest human good—not only for the individual, but also for the community by implication—“turn[ed] out to be activity of the soul that expresse[d] virtue.” *Id.* at 115.

Virtue, however, is not an inherent human characteristic. On the contrary, like any other form of excellence, it is a goal to be sought after, and a goal that can only be achieved if properly understood.

Aristotle's process of understanding virtue arguably can be divided into two steps. The first step is the most important for this analysis. It implies an understanding that virtue is not found through a "flash of inspiration," but through practice, much like any other skill. *See id.* at 118 (describing the means by which virtue can be attained). Applied to this analysis, leaving resolution of moral issues to state legislatures is the only way to allow them to practice their moral skills. And only through practice can we expect those legislatures to become more virtuous, *i.e.* better able to make morally correct decisions. Thus, the moral value to be found in a democratic conversation is not necessarily that it will result in morally superior rules in the present. Rather, it lies in the fact that deference to that conversation is the only way state legislatures will be able to become more virtuous. Resort to the federal courts to resolve moral issues undermines that process. In fact, the mere knowledge that the courts will ultimately decide a moral dispute will often be enough to shift a legislature's focus away from trying to discover what is morally best, thus undermining its pursuit of virtue regardless whether the court actually intervenes in the future. *See supra* note 105 (discussing juridification).

The second step towards understanding Aristotelian virtue is understanding the "doctrine of the mean." Under this principle, virtue of character aims at the mean, or "appropriateness," in the following way:

We can, for example, be afraid or be confident, or desire, or feel anger or pity, or in general feel pleasure and pain both too much and too little, and in both ways not well; but at the right times, about the right way, is what is intermediate and best, and this is proper to virtue. Likewise, there is an excess, a deficiency and a mean in the case of actions as well."

See Crisp, *supra* note 164, at 119 (citing Aristotle's *Nicomachean Ethics*). One might translate this principle to mean that virtue is unlikely to be found in absolutes, though one must be careful not to confuse the challenge of applying moral truths with an argument that there are no such truths. What might be a virtuous action for one person in one situation may not be virtuous for another in a different situation. Stated otherwise, you should do what is right, and what is right often depends on the circumstances. *Id.* at 120 (describing the applicability of the doctrine of the mean). Applying this second step to this Article's analysis, another argument appears. Although perhaps less persuasive than the first, this argument adopts the position that, to the extent the Supreme Court espouses a single moral position for the entire nation, we move closer to a law of absolutes. More pragmatically, we lose the opportunity for states to experiment with laws espousing different moral values (or applying those same values in a different manner or degree) to see which are more consistent, in practice, with the pursuit of the moral "good," or more effective to achieving those ends.

167. One might ask why the federal courts—with judges selected through the appointment and consent process—could not also be a part of the conversation. The answer is that they could be, but are not when they dominate the conversation by acting as the final constitutional arbiter.

168. Sunstein, *supra* note 19, at 32-33.

169. *See* ELY, *supra* note 47, at 90:

I don't suppose it will surprise anyone to learn that the body of the original Constitution is devoted almost entirely to structure, explaining who among the various

actors—federal government, state government; Congress, executive, judiciary—has authority to do what, and going on to fill in a good bit of detail about how these persons are to be selected and conduct their business. Even provisions that at first glance might seem primarily designed to assure or preclude certain substantive results seem on reflection to be principally concerned with process.

170. DWORKIN, *supra* note 43, at 32-33.

171. *Id.* at 33.

172. *Id.* at 33.

173. *See* Sunstein, *supra* note 19, at 19:

One of the major advantages of minimalism is that it grants a certain latitude to other branches of government by allowing the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems.

174. *See id.* at 17 (“Facts and values can go in unanticipated directions, thus rendering anachronistic a rule that is well-suited to present conditions.”).

175. Dworkin’s argument that our established constitutional practice of allowing judges to have final interpretive authority forecloses any reason to resist that practice and strain for something better sounds of an illegitimate argument of consistency for consistency’s sake. *See* DWORKIN, *supra* note 43, at 34-35.

176. Such arbitrariness can occur at two levels. The first occurs in the act of determining whether a particular constitutional provision states an abstract principle at all. The second occurs in the act of applying that principle to the case.

177. *See* Stanley Fish, Essay, Postmodern Warfare: The ignorance of our warrior intellectuals, HARPER’S MAG. 33 July 2002, at 34:

And here is a point that is often missed, the independence from each other, and therefore the compatibility, of two assertions thought to be contradictory when made by the same person: (1) I believe X to be true and (2) I believe that there is no mechanism, procedure, calculus, test, by which the truth of X can be necessarily demonstrated to any sane person who has come to a different conclusion.

Founder James Wilson, though one doubts he would accept the conclusion of postmodernism, suggested the same:

Having thus stated the question—what is the efficient cause of moral obligation?—I give it this answer—the will of God. This is the supreme law. His just and full right imposing of laws, and our duty in obeying them are the sources of our moral obligations. If I am asked—why do you obey the will of God? I answer—because it is my duty to do so. If I am asked again—how do you know this to be your duty? I answer again—because I am told so by my moral sense or conscience. If I am asked a third time—how do you know that you ought to do that, of which your conscience enjoins the performance? I can only say, I feel that such is my duty. Here investigation must stop; reasoning can go no farther. The science of morals, as well as other sciences, is founded on truths, that cannot be discovered or proved by reasoning. Reason is confined to the investigation of unknown truths by the means of such as are known. We cannot, therefore, begin to reason, till we are furnished, otherwise than by reason, with some truths, on which we can found our arguments.

James Wilson, *The Laws of Nature* (1790) (quoted in *Our Sacred Honor: Words of Advice from the Founders in Stories, Letters, Poems, and Speeches* 405 (William J. Bennett ed., 1997)).

178. See ELY, *supra* note 47, at 57:
It is thus no surprise that the case that our ‘insulated’ judiciary has done a better job of speaking for our better moral selves turns out to be historically shaky, ‘Can we really be sure that it was Marshall or Taney rather than Clay or Webster who did the better job of articulating values? Which of the Civil War Justices excelled Lincoln in voicing the hopes and goals of the republic? . . . Which Justice in the 1920’s gave better tongue than Norris or LaFollette to the American dream?’
179. See *id.* at 64:
Even if we assume, however—though it’s virtually self-contradictory to do so—that there *is* a consensus lurking out there that contradicts the judgment of our elected representatives, there would still remain the point, sufficient in itself, that that consensus is not reliably discoverable, at least not by the courts.
180. See *id.* at 59:
The objection to “reason” as a source of fundamental values is therefore best stated in the alternative: either it is an empty source, in the same way “neutral principles” turned out to be an empty source, or, if not empty, it is so flagrantly elitist and undemocratic that it should be dismissed forthwith.
181. See, e.g., 1996 FIRST THINGS 67 (November 1996), available at <http://www.firstthings.com/ftissues/ft9611/articles/eodmaster.html>.
182. See generally, GEORGE, *supra* note 149.
183. This qualification is intended as a concession to the two exceptions, outlined in Parts III.A and IV, to the democracy-based legitimacy of state legislative processes: State laws are not entitled to deference if they violate explicit negative liberties or if they are passed by or create unjustly constituted majorities. It is not intended as a concession to Dworkin that the majoritarian process only is valuable if it yields some substantive vision of morally just results.
184. DWORKIN, *supra* note 43, at 23.
185. Note that Dworkin concedes that democracy, in the communal sense, “demands much the same structure of government as the majoritarian premise does. It requires day-to-day political decisions be made by officials who have been chosen in popular elections.” *Id.* at 17. One might say that this observation provides the opening necessary to legitimate majoritarian state lawmaking, regardless of the specifics of the outcome, even under the communal sense of democracy.
186. *Id.* at 20.
187. *Id.*
188. *Id.*
189. DWORKIN, *supra* note 43, at 18.
190. *Id.*
191. Gardner, *supra* note 119, at 137 (quoting Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in *THE LIFE AND WRITINGS OF THOMAS JEFFERSON* 321,324 (Adrienne Koch & William Peden eds., 1972); Letter from Thomas Jefferson to Baron F.H. Alexander (June 13, 1817), in *10 THE WRITINGS OF THOMAS JEFFERSON* 89 (Paul Leicester Ford ed., 1899)).
192. *Id.* at 141 (citing JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 72 (Maurice Cranston

trans., 1968)).

193. *Id.* (citing William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 11 (1982)).
194. *Id.* (citing JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., 1968)).
195. *Id.* “When, therefore, the opinion contrary to my own prevails, this proves only that I have made a mistake, and that what I believed to be the general will was not so.” *Id.* (citing CHARLES R. BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* 67 (1989)).

The result of this analysis will probably not satisfy those who take “moral membership” to mean something more, like “equal concern and respect for individuals” in the Dworkinian sense, or, more straightforward, some measure of equal substantive treatment. The answer to such readers is to remind them that the vision of democracy espoused in this piece does not require those two ends (and certainly does not require judges to impose them). Rather, democracy would be undermined if such moral visions were imposed at a constitutional level. “Equal concern and respect” at the constitutional level is satisfied when all individuals have equal access to the political conversation and the majoritarian process. While one may envision some measure of substantive equality as morally right, it is to the political process that he should turn in order to pursue them.

196. States in the broader sense, that is, not the fifty entities making up the United States.
197. Jeremy Waldron, *Special Ties and Natural Duties*, 22 *PHIL. & PUB. AFF.* 3, 22 (Winter 1993) (citing Kant and Hobbes). Admittedly, this analysis “lowers the bar” for legitimacy. Rather than pursuing *the* just society—as Dworkin apparently does by arguing that “equal concern and respect” are necessary conditions of a legitimate democracy—it looks for *a* just society. “Lowering the bar,” however, may not be unreasonable. First, this piece has attempted to show that imposing individual conceptions of social justice as absolute conditions of legitimacy is, itself, unjust and undemocratic. *See also id.* at 29 (“An institution can be just in two ways: (a) it can be just in the way it operates; and (b) it can be just in the sense that it is doing something that justice requires.”) Second, and perhaps more important, creating a perfectly just society is impossible in an imperfect world.
198. To the extent law cannot exist without society, it is in a dissident’s interest to preserve a generally just society in order to, perhaps, make the small changes he or she deems necessary.
199. *See id.* at 19 n.35 (citations omitted). *See also id.* at 20 (“In order for [a government] to [do justice], [it] must elicit a certain amount of compliance and support from us. The natural duty theory is that they are entitled to that compliance and support simply by virtue of the quality of organization that they have put together.”). Note that under this theory, “the *obligatoriness* of respecting an institution’s demands of justice is secured independently of consent, as a matter of moral background.” Consent is not necessary. *See id.* at 26.
200. Waldron, *supra* note 196, at 20.
201. *Id.* at 27.
202. *Id.* at 28 (citing JOHN RAWLS, *A THEORY OF JUSTICE* (1971)).
203. *Id.* at 28.
204. *Id.* at 27-28.
205. Waldron, *supra* note 196, at 29.
206. Any argument that another state or other types of institutions could achieve the same ends, though an accurate observation, is irrelevant. Under this theory we need not look for the best,

- most just institutions. We are only asking if we have a just institution.
207. To take a position closely related to Rawls, abolishing just laws would itself necessarily be immoral.
208. *See* ELY, *supra* note 47, at 105 (“[R]ights like these, whether or not they are explicitly mentioned, must nonetheless be protected, strenuously so, because they are critical to the function of an open and effective democratic process.”)
209. One might argue, on this view, that I am not too distinct, philosophically, from the Dworkinian viewpoint I criticize. Indeed, there are several important similarities. *See id.* at 82:
Naturally that cannot mean that groups that constitute minorities of the population can never be treated less favorably than the rest, but it does preclude a refusal to *represent* them, the denial to minorities of what Professor Dworkin has called ‘equal concern and respect in the design and administration of the political institutions that govern them.’
The equality I promote with this exception, however, only is equal access to political participation, not ultimately equal political results. *See id.* at 87, 88 (noting that the Constitution leaves the selection and accommodation of substantive values almost entirely to the political process).
210. ELY, *supra* note 47.
211. 304 U.S. 144, 153 n.4 (1938):
There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, on restraints upon the dissemination of information, on interferences with political organizations, and as to prohibition of peaceable assembly.
Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national or racial minorities, or whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.
Id. (citations omitted).
212. *See* ELY, *supra* note 47, at 75 n.*.
213. *See id.* at ch.4.
214. *See id.* at 99, 116-25.
215. Well-functioning in the sense that every person has relatively equal weight in the decision making process, not that every person has a right to some preferred set of substantive outcomes. *See id.* at 103 (“Our government cannot fairly be said to be ‘malfunctioning’ simply because it sometimes generates outcomes with which we disagree, however strongly. . . .”); *id.* at 135 (“One thing we know the Constitution, the Equal Protection Clause in particular, cannot mean is

- that everyone is entitled to equal treatment by every law.”).
216. *See* ELY, *supra* note 47, at 116-25 (discussing malapportionment).
217. *Id.* at 103.
218. *Id.*
219. *See id.* at 102-03 (describing this as an “antitrust” or “referee” orientation).
220. Some might argue that I have made a distinction without a difference insofar as determining when “democracy” is “malfunctioning” requires a moral judgment. I believe there is a distinction. By focusing on process, the courts will avoid making substantive policy decisions. They will not enforce non-constitutional rights. They will not distribute governmental benefits. They will not prevent a justly constituted majority from making the policy decisions it believes are best for the people. They will merely prevent the unjust exclusion of individuals from effective participation in the processes by which those decisions are made.
221. Some may critique this position by saying that a determined court could still reach the same illegitimate substantive goal by manipulating the democratic process. My response is twofold. First, that would be difficult. In many cases, a majority will be large enough that, though an illegitimate decision may be stricken, most of its substantive policy will stand. Second, that is a risk I am willing to take. Originalists, I believe, would agree that one of the courts’ earliest and most important charges was to protect minorities. If so, I believe this exception must be made. No one else can be trusted to make these decisions. *See id.* at 103 (“Obviously our elected representatives are the last persons we should trust with identification of either of these situations.”).
222. *See* ELY, *supra* note 47, at 157 (“The rub comes in how the Court should go about identifying such situations. Just leaving it to their gestalt judgment seems obviously unacceptable, too close to simply handing over an unbridled power of substantive review.”).
223. *Id.* at 161.
224. *Id.* at 99. As I noted earlier, I agree that maintaining a democratic conversation is important. Once we presume a representative has been elected and concern ourselves with his duties of office, however, we are concerned with his duty as a policy maker. Indeed, some of his policy decisions can undermine the democratic process. Not all, however, shall. Ely fails to draw a line demarcating which the court should concern itself with and which it should not. I attempt to do so. Therein lies my disagreement with Ely.
225. *See id.* at 136:
Benefits—goods, rights, exemptions, or whatever—that are not essential to political participation or explicitly guaranteed by the language of the Constitution, however, we can call constitutionally gratuitous—though obviously they may be terribly important—and malfunction in their distribution can intelligibly inhere only in the process that effected it.
226. 517 U.S. 620 (1996).
227. *Id.* at 624 (citing Colo. Const., Art. II, § 30b.)
228. *Id.* at 633.
229. *Id.* at 634. (citing Dep’t of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).
230. *Id.* at 632.
231. Romer, 517 U.S. at 634.
232. *See id.* at 637 (Scalia, J., dissenting). Kennedy conceded this point. He suggested Amendment

- 2 might extend further, but he assumed a relatively narrow reach for the purposes of the case. He assumed Amendment 2 would not prevent homosexuals from taking advantage of general civil and criminal law. *See id.* at 630.
233. *See id.* 638-39 (Scalia, J., dissenting).
234. *See id.* (Scalia, J., dissenting); ELY, *supra* note 47, at 135-36; Sunstein, *supra* note 19, at 55 (noting that the amendment was both over-inclusive and underinclusive, but noting that such legislation is perfectly acceptable, and indeed quite common).
235. *See Romer*, 517 U.S. at 640-41 (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).
236. *See id.* at 646-47 (Scalia, J., dissenting).
237. *See id.* at 645 (Scalia, J., dissenting).
238. Sunstein, *supra* note 19, at 58-59. Compare with *United States Department of Agriculture v. Moreno*, 413 U.S. 523, 522-27 (1973) (Rehnquist, J., dissenting). Rehnquist characterized a perceived “bare desire to harm” the “hippie-communes” as an effort to promote a moral commitment by funding traditional rather than untraditional families.
239. *See* Sunstein, *supra* note 19, at 56-57. Sunstein notes that the state could have made the following legitimate argument:
- We do not want to legitimate homosexuality as a social practice. We are not tyrants, and we do not seek to subject homosexual acts to criminal punishment (as we are permitted to do under *Bowers v. Hardwick*). But we do want to make a statement that homosexuality is not officially sponsored. That is, homosexuals do not, as such, qualify for legal protection from discrimination. We are trying to express a widely held moral commitment that homosexuality is not to be approved even if it is to be tolerated. We choose to express that view through a prohibition on special protections against discrimination. True, our law applies to people with homosexual tendencies who do not engage in homosexual activity; but people with tendencies are likely to engage in acts. We do not punish through criminal law the tendencies alone; hence we think our basic goal is well enough matched to our amendment.
240. At this point, a critic might re-raise the objection that my jurisprudence of deference does not provide sufficient protection against discrimination for discrete and insular minorities. One might raise *City of Cleburne v. Cleburne Living Centers*, 473 U.S. 432 (1985), where the Court prevented invidious discrimination against the mentally retarded on a theory similar to *Romer*. Indeed, this case is difficult to reconcile with my theory as described so far. Three points begin to address that problem, however.
- First, discrimination against the handicapped is hardly a morally contentious topic. I doubt that anyone seriously believes that the state should be allowed to invidiously discriminate against such people on the basis of their handicap. Thus, my theory may be inapplicable by its own design.
- Second, application of my theory should lead to the same result. The city’s decision in *Cleburne* was to exclude the mentally retarded from the community by denying Cleburne Living Centers a permit to build a group home in the city. Such a prohibition from becoming a member of the relevant political community is clearly a legal exclusion from the democratic conversation. Such a decision may be nullified under my theory.
- Finally, in *Cleburne*, the Court addressed the plight of a minority that was clearly discrete

and insular. Insofar as the mentally handicapped's minority status is based on an irreversible physical condition, they are distinct from both "hippies"—who are different because of a moral choice—and perhaps homosexuals—for whom the genetics vs. choice debate rages on. As such, basic equal protection principles should be more solicitous of protecting the handicapped than the other two groups.

241. See Sunstein, *supra* note 19, at 57.
242. 521 U.S. 702 (1997).
243. *Id.* at 728.
244. *Id.*
245. *Id.*
246. *Id.* at 728-33.
247. *Glucksberg*, 521 U.S. at 741 (Stevens, J., concurring).
248. *Id.* at 741 (Stevens, J., concurring).
249. *Id.* (Stevens, J., concurring).
250. *Id.* at 745 (Stevens, J., concurring).
251. *Id.* at 748 (Stevens, J., concurring). The justification for this right is similar to the one Justice O'Connor used to uphold a woman's right to an abortion in *Casey*. "At the heart of liberty is the right to define one's own concept of existence . . . and of the mystery of human life." O'Connor's adoption of this rationale has led some to believe that if the Court is ever presented with the opportunity to recognize a fundamental right to "control the circumstances of his or her impending death," the Court will recognize it.
252. See *Glucksberg*, 521 U.S. at 745-50 (Stevens, J., concurring). The state's interest in preserving life cannot hold sway, this theory holds, because the society's interest is not as strong when the choice is not whether to die, but how to end a doomed life. Similarly, insofar as death is imminent, medical ethics cannot prohibit doctors from providing comfort to patients. In such instances, the doctor patient relationship would not suffer from such acts. On the contrary, refusing to prescribe medication to ease suffering and make death more tolerable would be contrary to the doctor's role as healer. Finally, society's interest in preventing abuse of vulnerable individuals does not hold sway when the individual is actually competent and makes a rational and voluntary decision to die.
253. One might argue that this is the antithesis of a participation right. Once a person ends his life, he will never participate again.