# Is Moral Relativism a Constitutional Command?

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This Article focuses on the following question: Does the United States Constitution permit the government to base legal obligations on prevailing notions of morality alone? The current Supreme Court majority seems to answer this question "yes." Surprisingly, the dominant tendency among publishing academics also suggests an affirmative answer. Academics of widely divergent political stripes embrace this position. Traditional constitutional conservatives join with avowedly progressive civic republicans and radical democrats in asserting the government's power to exercise moral authority over individual members of society.

Of course, there are many differences among the members of this odd moralist coalition. For example, the conservative moralists and their progressive counterparts tend to use different ideological rationales to justify governmental enforcement of morals. The conservatives tend to speak in the traditional language of judicial restraint, while the progressives speak in terms of community values and participatory democracy. But both ends of the moralist continuum are concerned with reintroducing virtue into politics, and the practical outcome is the same under every ideological justification: The dominant forces in the politieal power structure are permitted to impose their moral values on recalcitrant, "immoral" members of the public.

In contrast to the currently dominant trend favoring government power to enforce morals, the premise of this Article is that the United States Constitution requires the government to operate under a mandate of moral relativism. This Article argues that the Constitution prohibits purely moralist legislation. This does not mean that government action may never include a moral component. To some extent, government action will always be based on notions of morality, and it would be foolish to dispute that morality enters into the decision-making processes of political policy makers. This Article makes the narrower assertion that although government operations will often coincide with some powerful political actor's concept of right and wrong, it is never permissible for government to regulate an individual's behavior if the government's primary motivation for the regulation is to enforce the moral beliefs of those who control the political process. In order to pass muster under the Constitution, government poliey must be premised primarily on some rationale other than morality, such as preventing a specifically identified harm to one individual by another.

Parts I and II of this Article focus on the Supreme Court's varied stances on the issue of moral regulation in several different areas of constitutional law. Part I surveys the extensive case law endorsing government efforts to

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enforce morality through law. Part II offers a counterpoint drawn from constitutional law opinions in three areas: freedom of expression, religious freedom, and constitutional privacy. In the first two areas, and in parts of the third, the Court has steadfastly rejected the governmental moralism that a majority of Justices happily embrace in other contexts. In First Amendment cases, the Court has taken very seriously Justice Jackson's dictum that government may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,"[1] and thus the Court has gone out of its way to protect those who persist in loudly rejecting society's prevailing norms.

Parts I and II highlight the inconsistencies in the Supreme Court's constitutional jurisprudence, in which a majority of the Court seems simultaneously to approve of moral legislation and recoil from its implications. This discussion also emphasizes the inadequacies of recent moralist academic scholarship from both the political left and right. Like the Court, the academic proponents of moralist legislation are unwilling to confront the logical consequence of a virtually unrestrained "moral" political process: that constitutional theory must become the servant of political power.

Part III addresses the deeper conflict in democratic theory that underlies the Court's contradictory treatment of constitutional limits on moral regulation. The basis of the conflict between Justices and commentators who would permit moral regulation and those who would not can be found in their widely differing perspectives on the exercise of power in a democracy. Advocates of moral regulation view democracy in static terms, emphasizing the powers granted to present political majorities. Opposition to moral regulation is premised on a very different view of democracy.

Part IV will offer one possible definition of this alternative democratic theory. This alternative theory relies strongly on the central democratic theme of constant political change. This theme requires that democracy be viewed in fluid, future-oriented terms. In other words, strong limits must be imposed on the authority of present majorities in order to protect the power of potential future majorities. The alternative view of democracy presented in this Part is a systematic version of the theory already implicit in the heavily amoral tone of the Court's First Amendment cases, and which I believe is also implicit in the overall structure of the American constitutional scheme.

This alternative view of democracy indicates that protestations about the need for governmentally-enforced collective morality and virtue are both empirically dubious and potentially dangerous. A truly universal morality is impossible to achieve. Therefore, within any diverse political community, the government's actions will usually reflect the interests of groups who have power in that society. A relativist Constitution will recognize the dangers of this reality by denying those who have power the ability to cloak their interests with the thick gloss of morality and virtue, and thereby attempt to extend their power into the indefinite future.

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1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

Part V suggests a mechanism to apply this alternative constitutional theory to the problem of moral regulation and proposes a simple constitutional framework that can be used to analyze moral regulations. This Part argues that constitutionalizing moral relativism is necessary to enforce democracy's need for limits on temporary political power. This can be done relatively easily by adapting an "amoral purpose" requirement from the "secular purpose" requirement presently used by the Supreme Court in Establishment Clause cases. The Establishment Clause prohibits any statute based on a sectarian purpose. Part V will set forth the argument that this prohibition should be extended to cover regulations based on secular moralist motivations. The Article concludes with the mild irony that only an amoral Constitution can create an environment in which individual morality can flourish.

## I. THE MORAL SOCIETY

For many years, and in many different constitutional contexts, the Supreme Court has asserted that the Constitution does not limit the government's authority to regulate and enforce morality. Even so, the Supreme Court typically exempts the category of fundamental rights from that general rule.[2] But this exemption for fundamental rights is less useful than it initially seems due to the way in which the Court arbitrarily, and sometimes tendentiously, defines which activities fall into the "fundamental" category.[3] Parts I.A and I.B describe how the Court has limited two categories of fundamental rights to permit a substantial amount of moral regulation. Part I.A details how the Court has refused to extend constitutional privacy protection beyond traditional, family-related behavior. Part I.B outlines the Court's reluctance to grant full First Amendment protection to "immoral" speech falling outside traditional political speech categories.

Limiting the definition of fundamental rights is significant because in the area of nonfundamental rights, the Court has permitted the government broad leeway to base legislation on majoritarian moral attitudes. The standard in these cases is very low: If the government does not seem to have lost its senses, moral regulations not implicating fundamental rights will probably survive constitutional scrutiny. A consistent application of the Court's position on moral regulation in these opinions would permit extensive governmental intrusion into virtually every aspect of a citizen's life.

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2. The Court's favorable treatment of moral regulation also influences its approach to the protection of acknowledged fundamental rights. In particular, the Court's circular method of defining fundamental rights in juxtaposition to existing patterns of moral regulation tends to disfavor expanding the protections afforded to fundamental rights. *See infra* notes 11-12 and accompanying text.

3. *See infra* notes 131-37 and accompanying text.

### *A. Sexual Conduct and Other Personal and Lifestyle Deviations*

By far the most notorious Supreme Court opinion approving governmental moral regulation appears in *Bowers v. Hardwick*,[4] the Georgia homosexual sodomy case. In *Bowers*, the Court specifically endorsed the proposition that a dominant political majority may enforce its moral beliefs through legal sanctions, including imprisonment. Thus, the Court rejected the notion that the Constitution grants broad protection of moral nonconformity. The *Bowers* majority declared that moral nonconformity is protected only if it fits into one of the precise categories of fundamental rights previously recognized by the Court.

Michael Hardwick, the plaintiff in *Bowers*, argued that the Georgia sodomy statute could not be applied to consensual adult sexual activity occurring in the bedroom of a person's home.[5] Hardwick based his claim in part on the well-established constitutional rights of free association and privacy. Nevertheless, the Supreme Court rejected Hardwick's claim, limiting the right of intimate association to several specific factual circumstances previously protected by the Court: marriage, procreation, traditional family relationships, and child rearing.[6] According to the Court, "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[7]

Hardwick also asserted a broader argument attacking the constitutional legitimacy of moral regulation. Hardwick claimed that the overall framework of the Constitution produced a heightened rationality standard that bars the use of morality to justify government action affecting individual liberty. As Justice White reported in his majority opinion, Hardwick asserted "that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[8] Hardwick's assertion, in essence, was that all moral regulation is unconstitutional, because all moral beliefs are inherently subjective and therefore irrational.

The Court responded by denying Hardwick's basic premise. Contrary to Hardwick's claim that the subjective nature of moral regulations automatically renders such regulations unconstitutional, Justice White concluded that this characteristic of moral regulations actually immunizes them from constitutional analysis and limitation. "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy

4. 478 U.S. 186 (1986).

5. The statute allowed a person to be imprisoned for up to 20 years for "'perform[ing] or submit[ting] to any sexual act involving the sex organs of one person and the mouth or anus of another.'" *Id.* at 188 n.1 (quoting GEORGIA CODE ANN. § 16-6-2 (1984)).

6. *Id.* at 190.

7. *Id.* at 191.

8. *Id.* at 196.

indeed."[9] In other words, Georgia did not need to rely on pragmatic, empirical judgments regarding public health and safety to justify the sodomy statute; majoritarian notions of morality alone were sufficient to render the statute constitutional.

For all the broad language regarding moral regulation in Justice White's opinion, the Court did not adopt an unequivocal rule that *any* moral regulation would survive constitutional scrutiny. Justice White emphasized that the Court would invalidate any moral regulation that infringed upon a specific fundamental right.[10] Nevertheless, because of the way in which Justice White defined fundamental privacy rights, this concession that some individual behavior is protected from majoritarian moral regulation provides little comfort to those falling outside the moral mainstream.

The Court held that a statute criminalizing homosexual sodomy does not violate fundamental privacy rights because this particular type of moral regulation has a long historical pedigree.[11] Nevertheless, Justice White's reasoning implies that fundamental privacy rights are defined only in juxtaposition to existing patterns of moral regulation. In other words, the fundamental privacy right would protect homosexual sodomy from moral regulation only if there were not a history or tradition of regulating this type of sexual behavior. Since there *is* a long tradition of regulating homosexual sodomy, then by definition no fundamental privacy right exists. The manner in which Justice White defines fundamental privacy rights makes such rights virtually useless in limiting the majoritarian enforcement of morality.

According to the *Bowers* majority, a fundamental right exists only if there is no history or tradition of regulating a particular type of sexual behavior. But if there is no history or tradition of regulating a particular type of sexual behavior—which probably means that the majority finds that behavior morally acceptable—the protection of constitutional privacy is unnecessary. *Bowers* creates a Catch-22 constitutional scheme: If you need the constitutional right (because you do not conform to the community's moral norm), the right is unavailable; but if you do not need the right (because your behavior conforms to the majority's expectations), the right applies with full force.[12]

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9. *Id.*

10. *Id.* at 190-91.

11. *Id.* at 192-94. Chief Justice Burger went beyond the Court's ostensibly nonjudgmental deference to majoritarian morality by seeming to endorse Georgia's specific moral judgment about people such as Hardwick: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197 (Burger, C.J., concurring).

For purposes of the current discussion, this Author takes at face value the majority's assertion that Georgia's longstanding policy singled out homosexual sodomy for criminal sanction. This Author's personal view, however, is that Justice Stevens offered a more accurate description of the moral judgment incorporated into Georgia's sodomy statute. Stevens emphasized that Georgia's longstanding policy was to prohibit *all* sodomy, including relevant sexual activity practiced by heterosexuals and married couples. *Id.* at 219 (Stevens, J., dissenting). As Justice Stevens pointed out, Jnstice White avoided the obvious intent of the Georgia statute because otherwise, White could not have upheld the statute. It would have been impossible for Justice White to identify an American legal tradition permitting the state to regulate a married couple's sexual activities in this way.

12. As Justice Blackmun pointed out in his dissent, Justice White's assertion that special deference should be given to moral regulations that have "ancient roots" conflicts with the familiar axiom that

*Bowers* is not the first example of the Court's tendency to approve government action intended to bolster society's dominant mores and lifestyles. This tendency has been evident in constitutional privacy opinions ever since the Court's earliest articulation of the right. For example, Justice Harlan endorsed government regulation based on traditional morality in his *Poe v. Ullman* dissent.[13] This endorsement of moral regulation is surprising because Justice Harlan's opinion anticipated the full Court's decision four years later in *Griswold v. Connecticut*,[14] and provided one of the primary intellectual models for the modern constitutional privacy right.

Justice Harlan's contention that society can protect traditional forms of morality appears in what is otherwise a very broad opinion with a predominantly libertarian tone. Justice Harlan distinguished between constitutionally unprotected activities such as adultery, fornication, and homosexual relations, which he believed could be regulated by the state on moral grounds, and constitutionally protected sexual activities conducted within the context of a legal marriage.[15] In Justice Harlan's view, the tradition of individual control over sexual activity within marriage "form[s] a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine must build upon that basis."[16] Thus, Harlan argued that the Constitution does not permit the state "to enforce its moral judgment by intruding upon the most intimate details of the marital relation."[17]

It is difficult to explain, as a matter of constitutional theory, why Justice Harlan believed that some forms of individual morality receive constitutional protection and others do not. Even Justice Harlan recognized that, as an intellectual matter, morality could not so easily be divided into neat compartments based on the longevity of a particular moral stricture. He specifically acknowledged that the moral judgment at issue in *Poe*—prohibiting married couples from obtaining contraceptives—"is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexuality, abortion, and sterilization, or euthanasia and suicide."[18] Having granted the state the authority to concern itself "with the moral soundness of its people" as well as their "physical well-being"[19] in order to protect traditional mores, Harlan is hard pressed to explain why a government intrusion into a married couple's bedroom to investigate the couple's use of contraceptives is constitutionally

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unconstitutional conduct cannot be legitimized by a pattern of repeated violations. *Id.* at 210 (Blackmun, J., dissenting); *see also* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."). Despite this axiom, the Court recently reasserted that the tradition and familiarity of a moral stricture is an important factor in distinguishing between permissible and impermissible moral regulations. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 568-69 (1991).

13. *See* 367 U.S. 497, 545-55 (1961) (Harlan, J., dissenting).

14. 381 U.S. 479 (1965).

15. *See Poe*, 367 U.S. at 545-46 (Harlan, J., dissenting).

16. *Id.* at 546.

17. *Id.* at 548.

18. *Id.* at 547.

19. *Id.* at 545-46.

more problematic than a similar intrusion to ensure that the man in bed is really the woman's husband and not the next-door neighbor.

In *Poe*, Justice Harlan was forced to fall back on the familiarity and popularity of certain relationships as a reference point for determining whether individual moral judgments are protected against government regulation. Individuals are protected only to the extent that they can appeal to a longstanding moral tradition from which the present political majority has deviated.[20] Thus, government rules prohibiting a married couple's use of contraceptives intrude into an area of traditional moral behavior (marital intimacy) and are therefore unconstitutional. On the other hand, government rules prohibiting adulterous or homosexual relationships forbid only traditionally immoral behavior and are therefore constitutional. Although this formulation of the privacy right served Justice Harlan's immediate purpose of invalidating the Connecticut statute at issue in *Poe*, it implicitly acknowledged that true moral dissenters are unprotected by the Constitution. A counter-majoritarian document thus was inadvertently transformed into a mechanism for perpetuating the majority's moral primacy and enforcing moral conformity. In the First Amendment cases, described in Part I.B, this reliance on tradition is augmented by overt judicial value judgments about the importance of some traditions and the relative worthlessness of others.

### *B. Morality and "Low-Value" Speech*

A general deference to dominant moral traditions can be seen in many of the Court's First Amendment free speech opinions dealing with speech outside the range of traditionally venerated political discourse. The Court has refused to take the advice of constitutional conservatives such as Robert Bork, who has suggested that constitutional protection should not extend at all to speech other than mainstream political debate.[21] The Court, nevertheless, has developed its own means of disfavoring speech it deems less important than the town-meeting discourse about current affairs that serves as a model for the strongest First Amendment protection.

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20. By relying so strongly on moral traditions, Justice Harlan's attempt to establish strong constitutional protection of privacy rights ironically anticipated not only the *Bowers* majority's limitation of constitutional privacy, but also Justice Scalia's even stronger traditionalist attack on the interpretation of constitutional rights generally. For example, observe Justice Scalia's notorious "insistence" that constitutional rights be "rooted in history and tradition," which according to Scalia requires courts to "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (Scalia, J., writing for the majority). Several commentators have pointed out that Scalia's approach would severely endanger efforts to provide judicial protection for many forms of individual rights. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085-98 (1990); Robin West, *The Ideal of Liberty: A Comment on* Michael H. v. Gerald D., 139 U. PA. L. REV. 1373, 1374-75 (1991). The same can be said of any constitutional theory that attempts to tie the definition of rights to a specific tradition or history of social acceptance.

21. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

The Court's standard for determining the level of protection offered a particular type of speech turns on the extent to which the speech contributes to the marketplace of ideas. On this point, the Court usually refers to a phrase from *Chaplinsky v. New Hampshire*,[22] the case that established the "fighting words" exception to the First Amendment. According to Justice Murphy's majority opinion in *Chaplinsky*, certain forms of speech, such as fighting words, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[23] The government's ability to assert a "social interest in order and morality" has been severely limited in subsequent fighting words cases,[24] but the Court continues to cite this language from *Chaplinsky* in other contexts as a justification for upholding government regulation of speech that runs contrary to society's moral norms.

For example, the Court routinely cites the government's interest in morality to justify legal regulation of sexually explicit speech. Beginning with the Supreme Court's first foray into the area of sexual speech in *Roth v. United States*,[25] the Court has marked the line between protected and unprotected speech by reference to vague, value-laden terms such as "prurient interest," "patent offensiveness," and "serious literary, artistic, political, or scientific value."[26] Sexual material may be banned as obscene only if it provokes something other than "normal sexual reactions" and "good, old-fashioned, healthy" interest in sex.[27] The moral overtone of these terms is reinforced by the fact that the Court permits the local community to define what is "prurient" or "offensive," based on the existing local moral standard.[28]

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22. 315 U.S. 568 (1942).

23. *Id.* at 572.

24. In *Chaplinsky*, the Court defined "fighting words" broadly to include two types of speech: words "which by their very utterance inflict injury" and "those which tend to incite an immediate breach of the peace." *Id.* at 572 (footnote omitted). In recent cases the Court has eliminated the first category of fighting words and significantly increased the state's burden of proof in the second. The modern standard limits the breach-of-peace variety of fighting words in two ways. To successfully prosecute speech as fighting words, the state must prove that the breach of peace is an immediate consequence of the speech, *see* Gooding v. Wilson, 405 U.S. 518, 524 (1972), and that the words were addressed directly to a particular listener. *See* Cohen v. California, 403 U.S. 15, 20 (1971). Both of these requirements are interpreted narrowly. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 408-10 (1989); Houston v. Hill, 482 U.S. 451, 458-66 (1987); Lewis v. New Orleans, 415 U.S. 130, 131-34 (1974).

Development of the fighting words doctrine since *Chaplinsky* demonstrates that the doctrine no longer rests on the state's interest in "morality." The doctrine now rests exclusively on the state's interest in preserving public order. In other words, the Court's justification for the fighting words doctrine has shifted from a moral rationale to a harm rationale, which is entirely consistent with the constitutional standard proposed in this Article.

25. 354 U.S. 476 (1957).

26. These are the operative terms of the so-called "Miller test" presently governing the regulation of sexually explicit expression. *See* Miller v. California, 413 U.S. 15 (1973).

27. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499 (1985) (footnote omitted).

28. "Serious" literary, artistic, political, or scientific value is judged by national rather than local standards, but the reference point for this part of the *Miller* test is "whether a reasonable person would find such value in the material, taken as a whole." Pope v. Illinois, 481 U.S. 497, 501 (1987) (footnote omitted). The national standard for measuring the *Miller* artistic value component at least protects sophisticated, avant-garde art from the more extreme examples of parochial narrow-mindedness. But the

The Court's position in the obscenity cases reflects the fears of a moral heartland under siege from immoral visigoths bred in the nation's corrupt urban centers.[29] The Court responds to these fears by refusing to extend the full measure of constitutional protection to those who deviate significantly from the standards of sexual recreation set by the nation's moral majority. The Court's obscenity decisions resemble its privacy decisions in that the Court incorporates the majority's moral standards into the definition of constitutional rights. In *Bowers*, the Court used the Constitution to protect the community's authority to enforce "a millennia of moral teaching."[30] In its obscenity cases, the Court frequently restates some version of Chief Justice Warren's belief in the "right of the Nation and of the States to maintain a decent society."[31]

Another recent example of the Supreme Court's endorsement of moral regnlation in the free speech context appears in *Barnes v. Glen Theatre, Inc.*[32] In *Barnes*, the Court upheld an Indiana public indecency statute that required dancers to wear pasties and G-strings when dancing at local bars. Chief Justice Rehnquist recognized in the plurality opinion that nude dancing is expressive conduct protected by the Constitution.[33] Nevertheless, he held that because nude dancing is "within the outer perimeters of the First Amendment,"[34] and since nude dancing is symbolic, rather than pure expression,[35] it does not receive the highest level of constitutional protection. Under the lower constitutional protection offered to symbolic speech, state regulation is upheld so long as the state can assert a substantial interest that is unrelated to the suppression of free expression.[36] According to Chief Justice Rehnquist, the state's interest in morality satisfied the substantial interest requirement.[37]

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*Pope* modification of *Miller* leaves intact the most troubling aspcct of the original case: artistic nonconformists are still subject to the tastes of the nonartistic mainstream. As Justice Stevens pointed out in *Pope*, "Certainly a jury could conclude that although those people [*i.e.*, persons with a professional interest in a contested work] reasonably could find value in the material, the ordinary 'rcasonable person' would not." *Id.* at 512-13 n.5 (Stevens, J., dissenting).

29. I am paraphrasing, but this is the clear sense of Chief Justice Burger's own depiction of the problem in his *Miller* majority opinion: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller*, 413 U.S. at 32 (footnote omitted).

30. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

31. Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

32. 501 U.S. 560 (1991). As will be discussed in the next Part, the Supreme Court frequently contradicts itself on the subject of moral regulation of expression. *Barnes* provides one indication of the Court's internal divisions and confusion on this subject. Although Justice Souter was one of the five-member majority that upheld the Indiana statute, he refused to endorse Chief Justice Rehnquist's or Justice Scalia's reliance on the state's interest in moral regulation. Justice Souter relied instead on the secondary effects allegedly produced by nude dancing establishments. *See id.* at 581-84 (Souter, J., concurring).

33. *Barnes*, 501 U.S. at 565-66.

34. *Id.* at 566-67.

35. *Id.*

36. This requirement is derived from United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

37. Although there was no direct evidence that morality was indeed the state's justifieation for the statute, Chief Justice Rehnquist inferred this purpose from the text and the common law roots of the statute. *See Barnes*, 501 U.S. at 567-68. However, the state's attorneys argued that the statute was also partly based on a harm rationale, which Justice Souter used as the basis for his concurring opinion. *Id.* at 582-83 (Souter, J., concurring).

Chief Justice Rehnquist's plurality opinion in *Barnes* follows the now-familiar pattern of the Court's previous opinions upholding moral regulation of individual behavior. First, Rehnquist cites the two cornerstones of the constitutional doctrine that moral regulation is permissible: the privacy opinions, exemplified by *Bowers*, and the obscenity cases.[38] He then notes that "[p]ublic indecency statutes of this sort are of ancient origin,"[39] referring to the Court's recurrent theme that outside a narrow category of specifically enumerated rights, the Constitution permits society to regulate behavior that contravenes society's moral traditions.[40] Justice Scalia's concurring opinion drives this point home even more forcefully: "Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' *i.e.*, immoral. . . . [A]bsent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate 'morality.'"[41]

Finally, in *Barnes* there is a religious subtext to the Court's discussion of moral traditions. Once again, this follows a pattern also evident in *Bowers*. In *Bowers*, Chief Justice Burger asserted that condemnation of homosexuality "is firmly rooted in Judeao-Christian moral and ethical standards."[42] In *Barnes*, Chief Justice Rehnquist noted that the Indiana courts have traced the roots of the state's indecency statute "to the Bible story of Adam and Eve."[43] These religious references are more telling than they at first appear, because they reveal that in these moral regulation cases, the Court is allowing the government to establish an orthodox ethical framework of a sort that would be absolutely prohibited if the state acknowledged the framework's sectarian origins and implications. The absolutist and nonrational nature of these moral regulations reflects their religious roots. To the extent that moral regulations are essentially religious in nature, the results in *Bowers* and *Barnes* are triply wrong: (1) they violate the spirit of the constitutional privacy right; (2) they violate the clear countermajoritarian demands of the Court's First Amendment political speech jurisprudence; and (3) they violate the clear import of the First Amendment's prohibition of religious establishments.

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38. *See id.* at 569. The obscenity cases did not apply directly to the nude dancing statute because the dancing at issue in *Barnes* was not obscene. The obscenity decisions are relevant to *Barnes* only insofar as they establish the principle that moral regulation is a permissible function of government.

39. *Id.* at 568.

40. *See supra* notes 4-12 and accompanying text.

41. *Barnes*, 501 U.S. at 575 (Scalia, J., concurring) (italics in original). Justice Scalia did not join Rehnquist's plurality opinion because Scalia believed Rehnquist had provided too much protection to dance as symbolic speech. According to Scalia, symbolic speech is protected by the Constitution only to the extent that the First Amendment prohibits legislatures from regulating conduct with the specific intention of suppressing communication. *Id.* at 578-79. Since Scalia found that Indiana's purpose was to regulate the immoral condition of public nudity, regardless of whether the nudity is expressive, *see id.* at 575 & n.3, he concluded that Indiana was not guilty of constitutionally impermissible purposeful suppression. Therefore, Scalia argued, the government was not required to demonstrate a "substantial" or "important" interest to justify its statute. *Id.* at 579-80. This is a gentle way of saying that such regulations are subject to no constitutional scrutiny at all.

42. *Bowers*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

43. *Barnes*, 501 U.S. at 568 (citing Ardery v. State, 56 Ind. 328, 329-30 (1877)).

Part I.C will return to this argument after a brief discussion of the rationales commonly used by the Court and academic commentators to justify judicial deference to government regulation of morality.

### *C. Moralism, Democracy, and Judicial Authority*

In the cases discussed above, the Court has been fairly clear about what types of moral regulation it will permit. The Court, however, has been much less forthcoming about the rationale that justifies this broad deference to the moral decisions of the political majority. When the Court adopts a deferential stance toward moral regulation, it usually implies that political control over morality is an obviously legitimate affair that needs little justification. In a few opinions the Court has stated this position explicitly. Justice Scalia's conclusion in *Barnes* is typical: "Our society prohibits, *and all human societies have prohibited*," immoral behavior.[44] To assert that the Constitution dictates otherwise, Scalia suggests, would be so foolish as to deny the history of human society itself.

Most opinions on this subject are not as haughtily dismissive of constitutionally mandated moral skepticism as Scalia's blithe comment in *Barnes*. The courts occasionally have at least attempted to sketch an outline of the constitutional rationale for permitting moral regulation. The reasons that are given usually fall into one of two categories: reasons based on the practical limits of judicial power, and reasons based on democratic theory.

#### 1. The Practical Rationale for Judicial Deference to Moral Regulation

The first argument in favor of judicial deference to moral regulation appears in Justice White's majority opinion in *Bowers*: "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[45] Justice White thus raises the specter of a rampant judiciary, invalidating entire categories of law and forcing society to revisit virtually every statute presently on the books. Justice White's fears seem vastly overblown, however. Many pieces of legislation that "represent essentially moral choices" would not violate a constitutional rule against political regulation of morality. Under such a rule, legislation would survive constitutional scrutiny if the legislation were justified by a legitimate reason apart from morality.

For example, society may find many forms of criminal behavior immoral, but most criminal laws can easily be justified on the amoral, utilitarian, and

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44. *Id.* at 575 (emphasis added).

45. *Bowers*, 478 U.S. at 196; *see also* Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (then-Judge Bork noting that "[i]t is to be doubted that very many laws exist whose ultimate justification does not rest upon the society's morality.").

therefore constitutionally permissible grounds of deterrence or incapacitation.[46] Likewise, most other common forms of government regulation—such as environmental, workplace safety, and civil rights laws—also can be justified on the classically amoral ground of preventing one person or group from harming another.[47] The Constitution permits the government to enact such legislation despite the fact that these amoral regulations may also "represent essentially moral choices" by some of the legislation's supporters. The Court has often recognized in its Establishment Clause decisions that the Constitution does not prohibit criminal and social welfare statutes whose substance merely coincides with the religious views of one sector in society, so long as there is a valid, nonreligious rationale for the statute.[48] The same principle would apply under a constitutional rule prohibiting moral regulation—the courts would not be required to invalidate every statute that reflects someone's moral scheme, so long as the legitimate, amoral rationale for enacting the statute is not a sham.

Thus, Justice White's perception that prohibiting moral regulation would require the Court to invalidate a large body of legislation is unfounded. Most statutes would survive constitutional analysis under a standard geared toward prohibiting predominantly moral regulation. Criminals would not run free in the streets, and the government's social welfare apparatus would remain largely intact. The only noticeable increase in judicial activity would occur in those areas in which individuals and the government disagree about the morality of otherwise harmless behavior. Some examples of cases that might be affected by a standard prohibiting moral regulation are discussed in Part V.

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46. The position this Article takes has several obvious implications for the application of constitutional limits on criminal law. The broadest implication would be that criminal law could not be premised primarily on retributive theories of punishment, which are based on moral notions of *jus talionis*, or just deserts. For a good, recent critique of retributivism that supports this conclusion, see David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992). Like other forms of moral legislation, retributive criminal legislation usually has less to do with objective morality than with subjective majoritarian preferences and prejudices. "[W]henever a majority of the citizenry wants the penalties for a given crime raised, that crime *eo ipso* 'deserves' the increased penalties." *Id.* at 1653. A related, but more specific implication of this Article's theory would be that it casts doubt upon all existing death penalty statutes. The empirical evidence regarding the deterrent value of the death penalty indicates that the penalty has no utilitarian value. *See* Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 108 n.185 (1992).

47. The need for government to rely on a harm rationale in regulating individual behavior was, of course, the central theme of John Stuart Mill's work on this subject. According to Mill:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

JOHN S. MILL, ON LIBERTY 68 (Gertrude Himmelfarb ed., 1974) (1859). On the problem of defining "harm," see *infra* note 234.

48. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983); McGowan v. Maryland, 366 U.S. 420, 442 (1961).

## 2. The Democratic Theory Rationale for Judicial Deference to Moral Regulation

The second commonly cited rationale for judicial deference to moral regulation is far more important than the first. The second rationale rests on a view of democratic theory that relies almost exclusively on the principle of majority control over every major aspect of social policy. According to this view, the range of policies over which political majorities may exercise control includes not only traditional issues of economics and social welfare, but also policies that affect the "spirit" and basic values of the community. Put simply, proponents of judicial deference toward moral regulation argue that courts must permit society's political agents to regulate morality because the principles of democracy demand it, and because democratic society cannot survive without some overriding concept of the common good.

For the last twenty years, Robert Bork has been one of the most forceful advocates of this position. The claim that a democratic majority has the authority to enact its moral principles into law is a mainstay of Bork's academic and judicial writings. He provided the most succinct statement of this position more than twenty years ago in an article advocating a severe diminution in First Amendment protection of radical and nonpolitical speech that violates majoritarian mores.[49] According to Bork, nonpolitical speech (including avant-garde art) that runs contrary to society's norms may be regulated by the government because it is constitutionally "on a par with industry and smoke pollution."[50] Bork believes that a political majority in any community "surely has as much control over the moral and aesthetic environment as it does over the physical, for such matters may even more severely impinge upon [the majority's] gratifications."[51] Bork then quotes Professor Walter Berns' statement that "'[t]he objection "I like it" is sufficiently rebutted by "*we* don't."'"[52] This view of majoritarian power "assumes that in wide areas of life majorities are entitled to rule for no better reason that [sic] they are majorities."[53]

Several years later, then-Judge Bork elaborated on his theory of democratic government in *Dronenburg v. Zech*.[54] In *Dronenburg*, a twenty-seven-year-old petty officer unsuccessfully challenged the Navy's decision to discharge him for engaging in homosexual conduct. As in *Bowers*, the plaintiff in *Dronenburg* argued that the Constitution prohibited the government from punishing individual conduct simply because the behavior is morally repugnant to the political majority.[55] Bork rejected this claim on the ground

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49. *See* Bork, *supra* note 21.
50. *Id.* at 29.
51. *Id.*
52. *Id.* (quoting Walter Berns, *Pornography vs. Democracy: The Case for Censorship*, 22 THE PUB. INTEREST 3, 23 (1971)).
53. *Id.* at 2.
54. 741 F.2d 1388 (D.C. Cir. 1984).
55. *Id.* at 1397.

that it "attacks the very predicate of democratic government."[56] Bork acknowledged that in a constitutional democracy some matters are withdrawn from majoritarian control.[57] But these areas of protected conduct must be "solidly based in constitutional text and history,"[58] and therefore are relatively few in number.[59] Outside this small category of matters in which the Constitution protects individual moral choice from the majority, there is no substantive constitutional protection whatsoever from moral regulation, and the majority can do whatever it wants (short of infringing the Constitution's procedural protections) to those who disagree. "Relativism in these matters may or may not be an arguable moral stance," Bork added in a supplemental opinion to *Dronenburg*, "but moral relativism is hardly a constitutional command . . . ."[60]

In *Neutral Principles* and judicial opinions on related subjects, Bork presents his aversion to constitutional moral relativism as part of a traditional scheme for judicial restraint. He argues that in most respects our "Madisonian model" of democracy is a majoritarian system.[61] Bork often phrases his objections to judicial protection of moral dissenters by purporting to defend the ideal of participatory democracy: "[W]e are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own."[62]

This sentiment has long been a staple of conservative attacks on "activist" courts.[63] In his recent book, however, Bork formulates the theoretical argument for judicial deference to moral regulation in a more philosophically complex and more partisan way than the typical conservative appeal to simplistic populism.[64] Bork's more sophisticated view relies on his observations regarding the characteristics of self-definition inherent in all communities:

> Any healthy society needs a view of itself as a political and moral community. The fact that laws about such matters are invalidated may be

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56. *Id.*

57. Bork's *Neutral Principles* article contains a more elaborate discussion of this point. *See* Bork, *supra* note 21, at 2-3.

58. *Dronenburg*, 741 F.2d at 1397.

59. For example, Bork argues that the constitutionally protected area does not encompass any version of constitutional privacy. *See* Bork, *supra* note 21, at 6-11. He also asserts that even the rights specifically enumerated in the constitutional text should be interpreted as narrowly as possible. *See id.* at 11-20 (equal protection), 20-35 (First Amendment free speech).

60. Dronenburg v. Zech, 746 F.2d 1579, 1583 (D.C. Cir.) (statement of Bork, J.), *denying reh'g en banc to* 741 F.2d 1388 (D.C. Cir. 1984).

61. Bork, *supra* note 21, at 2-3.

62. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 130 (1990).

63. For a comprehensive version of this position, see RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).

64. Actually, Bork does not explore all the complexities of his argument. The better explanation of this position can be found in Lord Patrick Devlin's famous essay on the subject of moral regulation. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965). Another precursor of the Bork position is James Fitzjames Stephen's nineteenth-century book written in response to John Stuart Mill's *On Liberty*. *See* JAMES F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1873).

> less important than the moral lesson taught. Traditional views of morality are under attack from many quarters. Attempts to change morality are constitutionally protected, but defiance of laws based on morality should not be. In the area of symbolism, which is how a culture defines itself, it hurts badly that the Justices . . . should teach the lesson that Americans' attempt to define their communities politically and morally through law is suspect, and probably pernicious.[65]

In support of this argument Bork cites a statement in Lord Devlin's famous essay on the enforcement of morality through law: "'What makes society is a community of idcas, not political ideas alone, but also ideas about the way its members should behave and govern their lives.'"[66] This quote indicates the true nature of the democratic rationale supporting political regulation of morality. The real problem, it seems, is not that the activist courts have destroyed the town-meeting direct democracy that the Framers had in mind when they wrote the Constitution; rather, the problem is that the old town "just ain't what it used to be." Disruptive elements have crept onto the political stage that do not agree with and will not conform to the political majority's morals and lifestyle. The issue, therefore, is whether the political majority can use its power to prevent the new disruptive elements from changing the nature of the community, which, according to Bork's definition of the community, is the same as destroying the community.[67] At times Bork slips from the high ground of neutral principles and joins this battle over whose ideas should define the community. Bork suggests at one point that

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65. BORK, *supra* note 62, at 249.

66. *Id.* (quoting DEVLIN, *supra* note 64, at 89).

67. The identification of a community and its morality is the basis of Lord Devlin's essay on the matters discussed in this Article, and Lord Devlin uses the claim that "society means a community of ideas" as the source of authority for the government to enforce morality. *See* DEVLIN, *supra* note 64, at 10.

> [A]n established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the subversion of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.

*Id.* at 13-14.

H.L.A. Hart provided the definitive response to this argument:

> [Lord Devlin] appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment in its history, so that a change in its morality is tantamount to the destruction of a society. . . . But the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place. But it is only on this absurd criterion of what it is for the same society to continue to exist that it could be asserted without evidence that any deviation from a society's shared morality threatens its existencc.

H.L.A. HART, LAW, LIBERTY, AND MORALITY 51-52 (1963) [hereinafter HART, LAW, LIBERTY, AND MORALITY]. For a discussion of the empirical problems inherent in Devlin's disintegration thesis, see H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 248-62 (1983).

judges and lawyers advocating the constitutional rights of moral outsiders hold these ideas "not for their own perceived merits but as weapons employed to damage the morale and erode the aseendancy of bourgeois culture in order to achieve the hegemony of the left-liberal culture."[68] In this view, democracy is not the unexeeptionable neutral principle that Bork touts elsewhere, but rather a system designed to protect and perpetuate an existing majority's power. Bork acknowledges in his earlier article that our democracy is not "completely majoritarian,"[69] but under Bork's constitutional scheme it comes pretty close.

Bork's emphasis on community self-definition through virtually unfettered majority rule is by no means an uncontroversial definition of democracy. Part IV will offer a quite different definition of democracy, along with an argument that Bork's view is actually undemocratic because it permits a temporary political majority to use the governmental apparatus to make its political ascendaney permanent. Bork is not without allies in this debate over the meaning of demoeracy, however. One of the puzzling aspects of modern constitutional theory is that Bork's most fervent allies are the new generation of civic republican constitutional theorists—most of whom are ostensibly on the opposite side of the political continuum. Ironically, at least one element of the "left-liberal culture" seems to agree with Bork that the political majority should be given more power to perpetuate its values through law.

Bork's left-wing allies in this debate over the meaning of democracy propose a revival of the civic republican tradition in constitutional interpretation.[70] The origins and meaning of the republican tradition are at best foggy.[71] The modern version of republicanism also has hazy aspects. Modern civic republicans disagree about the theory's details and relationship with other branches of political theory.[72] There is, however, a rough consensus among proponents of a civic republican revival about the major tenets of the modern version of the theory. Again, the striking thing about this theory is that the major components of modern civic republicanism repeat many of Robert Bork's assertions about the nature of citizenship, society, and government.[73]

First, like Bork, the civic republicans contend that the community, rather than individuals living within it, should be given ethical priority when values conflict. Indeed, civic republicans argue that the individual members of

68. BORK, *supra* note 62, at 245.

69. Bork, *supra* note 21, at 2.

70. Professor Sunstein's prominent article on the subject summarizes this position. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

71. *See* H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703 (1988).

72. For example, there is some disagreement among civic republicans about the relationship of modern civic republicanism and liberalism. *Compare* Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987) (contrasting liberal and republican traditions) *with* Sunstein, *supra* note 70, at 1566-71 (arguing against a liberal/republican dichotomy and in favor of "liberal republicanism").

73. What follows is a brief synopsis of the modern civic republican position. For a much more detailed critique of the theory and its many problems, see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993).

society do not even have a recognizable ethical existence apart from society. In the civic republican universe, "the private sphere is constituted by public decisions,"[74] and individual desires are "understood to be shaped by circumstances; they are social constructs."[75] The community assumes priority over the individual in the civic republican scheme because the individual is simply a compendium of his or her social circumstances. In this scheme, politics is the sole means of achieving freedom, which in turn is defined in collectivist fashion as the "deliberative process in which a person chooses her own ends and does not merely attempt to satisfy whatever ends she 'has.'"[76] Values formed by individuals outside the framework of community political dialogue are presumptively illegitimate,[77] and any view that an individual's values should be placed on an equal footing with the contrary values endorsed by the community is "unrepublican."[78]

In practice, this means that the community is not obligated to respect the individual opinions or desires of inhabitants who disagree with the community's prevailing values. Individual preferences are entitled "at most to presumptive respect."[79] Moral dissenters will have their views considered during the deliberative process that characterizes a civic republican regime, but this deliberative process will eventually result in a conclusion about "the existence of a common good."[80] If the dissenters' views are not incorporated into the bundle of values defined by the community's majority as the "common good," then the dissenters may be forced to abandon their contrary views. Civic republicans believe that a proper republican dialogue will reveal that "some perspectives are better than others,"[81] and that some perspectives "may be irrational and wrong."[82] In civic republican theory, the community's ability to identify irrational or wrong individual perspectives and preferences "casts doubt on the notion that a democratic government ought to respect private desires and beliefs in all or almost all contexts."[83] Like Bork, the civic republicans understand that some individual preferences are protected by the Constitution no matter how much they offend the community's political

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74. Sunstein, *supra* note 70, at 1569.

75. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1133 (1986).

76. *Id.* at 1132-33; *see also* Frank I. Michelman, *The Supreme Court 1985 Term—Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 26 (1986).

77. As one commentator notes:

> [The republican] view of the human condition implies that self-cognition and ensuing self-legislation must, to a like extent, be socially situated; norms must be formed through public dialogue and expressed as public law. Normative reason, it then seems, cannot be a solitary activity. Its exercise requires knowledge, including self-knowledge, obtainable only by encounter with different outlooks in public argument.

Michelman, *supra* note 76, at 27 (footnote omitted).

78. *Id.*

79. Sunstein, *supra* note 75, at 1133.

80. Sunstein, *supra* note 70, at 1554.

81. *Id.* at 1574.

82. Sunstein, *supra* note 75, at 1135.

83. Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 5 (1991).

majority. But also like Bork, the civic republicans believe that "th[is] category of rights is a small one."[84]

The civic republicans concur wholeheartedly with Bork's observation that "[a]ny healthy society needs a view of itself as a political and moral community."[85] Along with Bork, the civic republicans "reject ethical relativism and skepticism"[86] and set themselves against the agnostic attitudes that characterize politics in the modern liberal society. "Where liberalism finds the primary purpose of government to be promotion of the diverse goods of its individual citizens, republicanism finds its primary purpose to be definition of community values and creation of the public and private virtue necessary for societal achievement of those values."[87] The main role of the civic republican government is to "instill principles of virtue"[88] in order to avoid political factionalization and the resulting disruption of the social consensus.

Once again, the civic republicans agree with Bork about the nature of the problem: Dissent threatens change, and change threatens the social fabric. The best way to thwart any potentially threatening attack on the "common good" is for society to teach "virtue" to all of its citizens (*i.e.*, teach the citizens what those in political power regard as virtue). The civic republican approach recognizes the importance of moral certainty and ethical permanence in this battle over values and power: "Education and prevailing morality . . . provide the principal lines of defense against the dangers of faction."[89]

Obviously, one should not push the point about agreements between Bork and the civic republicans too far. It is clear that they often have different views on the particular components of the "common good."[90] But despite their different policy preferences and ideological starting points, Bork and the

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84. Sunstein, *supra* note 75, at 1142.

85. BORK, *supra* note 62, at 249.

86. Sunstein, *supra* note 70, at 1554.

87. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 551 (1986).

88. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985).

89. *Id.*

90. For example, *Dronenburg* indicates that Bork thinks homosexuality is not part of the "common good," although he later stated, "I am dubious about making homosexual conduct criminal." BORK, *supra* note 62, at 250. The civic republicans, on the other hand, try very hard to insulate homosexuality from legal regulation. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1494-99, 1533-36 (1988); Sunstein, *supra* note 83, at 19. Despite their good intentions, the civic republicans' efforts to protect private sexual behavior from political regulation is directly contrary to their theory regarding the community's role in regulating the morality of every citizen. *See* Gey, *supra* note 73, at 872-79.

On the other hand, the conservative Bork and the progressive civic republicans do not disagree about legal policy conclusions as much as someone knowing only the scholars' reputations might expect. For example, the two factions generally agree that First Amendment protections should be sharply curtailed. *See* Bork, *supra* note 21, at 20-35; Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589; Sunstein, *supra* note 83, at 18-32. For a discussion of the fallacies of both positions, see Gey, *supra* note 73, at 865-79. For an excellent critique of the civic republican position on free expression rights, see Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

civic republicans demonstrate broad agreement about the community's authority to define for itself the "common good," and the need for individuals to "subordinate their private interests to the general good."[91] When the community's values confliet with an individual's values, both Bork and the civic republicans come down on the side of the community. "The foreclosure of the preferences of a minority is unfortunate," says Professor Sunstein, "[but] if the majority is prohibited from vindicating its second-order preferences through legislation, its own desires will be frustrated; the choice is between the preferences of the majority and those of the minority."[92]

As this discussion indicates, there is growing support on both ends of the political continuum for the proposition that courts should defer to the community's decision to define itself morally by punishing what the community regards as immoral behavior. Nevertheless, this approach to governmental moral regulation raises two major problems, neither of which the proponents of the deferential approach can overcome. The first problem is that community moral self-definition through law is specifically prohibited by a large body of case law in several different areas of constitutional jurisprudence. The second problem is that despite the democratic rhetoric typically adorning community self-definition arguments, the principle that the community may impose the dominant morality on everyone in society is deeply and irrevocably undemocratic. The next Part addresses the first problem, and Part III addresses the second.

## II. THE AMORAL CONSTITUTION

As the opinions discussed in the previous Part indicate, there is deep opposition on the Supreme Court to the principle that the Constitution prohibits political regulation of morality. The puzzling thing about these opinions is that other Supreme Court opinions express deep *support* for a constitutional requirement of moral relativism. Moreover, Supreme Court endorsement of constitutionally mandated moral relativism is not a new phenomenon. Supreme Court majorities have identified moral relativism as a constitutional mandate in First Amendment cases at least since the early 1940's,[93] and the philosophical basis for this mandate was set forth more than twenty years before that.[94] Robert Bork has written at length about this phenomenon, which he attributes to the infiltration of the courts by something called the "intellectual class,"[95] and to "decades of left-liberal dominance on the Supreme Court."[96]

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91. Sunstein, *supra* note 88, at 31.

92. Sunstein, *supra* note 75, at 1142.

93. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

94. *See infra* notes 98-113 and accompanying text.

95. BORK, *supra* note 62, at 246.

96. *Id.* at 247. It is unclear to which decades Bork refers. At the time Bork wrote his book, a Democratic President had not appointed a Justice to the Supreme Court since 1967 (President Johnson's appointment of Thurgood Marshall), and only one of the nine Justices then on the Court (Justice White) was appointed by a Democrat (President Kennedy).

Putting aside Bork's sinister conspiracy theory of the phenomenon's origins, he accurately identifies the areas that reflect the strongest influence of moral relativism. As Bork says, "[m]oral relativism is particularly evident in cases decided under the First Amendment, which deals with religion and speech."[97] If anything, Bork understates relativism's influence in modern First Amendment jurisprudence. The influence is so pervasive that one cannot fully understand the meaning of modern free speech and freedom of religion doctrine without coming to terms with moral relativism. More importantly, it is impossible for lower court judges and political officials to apply the First Amendment to specific cases without internalizing the demands of moral relativism. Relativist attitudes have also leeched into other areas of constitutional law outside the First Amendment. For example, despite the contrary indications in *Bowers*, even constitutional privacy jurisprudence has a strong relativist component. This Part will discuss a few examples from each of these areas to illustrate the pervasive influence of relativism in modern constitutional law, an influence that Part III will argue cannot be limited to the precise factual circumstances raised in the cases discussed below.

### *A. Moral Relativism and Free Speech*

Modern First Amendment law has its roots in the Holmes and Brandeis opinions in the Espionage Act and syndicalism cases that reached the Court in the early part of the twentieth century.[98] In these opinions the intellectual skeptic Holmes and the Enlightenment liberal Brandeis provided a model for a relativist constitutional jurisprudence. The theme of all these opinions is that the government may not use the law to identify and enforce political "Truth," if indeed such a thing even exists.

The cases in which this theme was developed involved convictions of political radicals and opponents of the United States' involvement in World War I. Holmes and Brandeis took the position that the convictions were improper because they were based on the government's desire to embrace and protect a particular set of political ideas, rather than on the government's need to protect itself from the more concrete threat posed by imminent violent revolution. Neither Holmes nor Brandeis took lightly the political appeal of ideological certainty. As Holmes wrote in his eloquent *Abrams* dissent, ideological certainty is a perfectly respectable intellectual position: "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[99] Even though they recognized that ideological certainty may be an intellectually respectable position in the abstract, both Holmes and

97. *Id.*

98. *See, e.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *see also* Bork, *supra* note 21, at 23.

99. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

Brandeis denied (albeit for very different reasons) that ideological certainty is a legitimate political stance under the American constitutional scheme.

Holmes argued in these early free speech opinions that the U.S. Constitution denies government the authority to exercise the philosophical certainty that usually accompanies the procurement and exercise of political power. Holmes' theory of the state incorporates his melancholy view that human moral schemes are imperfect and impermanent things, a characteristic demonstrated by the fact that time "has upset many fighting faiths."[100] According to Holmes, regulation of speech may not be based solely on the majority's belief that the ideas proposed by political radicals (or other dissidents) are substantively wrong. Indeed, quite the opposite is true: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[101] Holmes' famous comment in *Lochner* that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics"[102] is usually viewed simply as an expression of Holmes' opinion that courts should have limited constitutional authority over economic affairs. However, this statement is also a specific application of Holmes' broader view that human society in general is incapable of formulating any permanent set of ethical, economic, or political guidelines to govern its affairs. According to Holmes, human beings are merely "grubs," who have "cosmic destinies" that they cannot even fathom, much less predict, control, or explain.[103] In a society composed of "grubs," it would be foolish to let any set of rulers adopt and enforce abstract principles of right and wrong, because all moral principles are inherently flawed by the characteristically human inadequacies of the people who devise them.

Justice Brandeis joined Holmes' opinions in the early speech cases, but Brandeis' approach to the First Amendment issues turued on very different considerations. The clearest expression of Brandeis' attitude toward free speech is found in his concurring opinion in *Whitney v. California*.[104] In this opinion, Justice Brandeis replaced the cynical Holmes' sense of human frailty and historical inevitability with the liberal's sense of historical possibility and hope. Brandeis ascribed these same optimistic views to the Framers. "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means."[105]

Unlike Holmes, Brandeis expressed the rosy belief that freedom from government regulation of political ideology will lead to something other than

100. *Id.*
101. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).
102. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
103. *See* OLIVER W. HOLMES, *Law and the Court*, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 168, 173 (Mark D. Howe ed., 1962).
104. 274 U.S. 357, 372 (1927) (Brandeis, J., coneurring).
105. *Id.* at 375.

the expression of the dominant forces in the community. Brandeis attributed to the Framers the view that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[106] According to Brandeis, the American scheme assumes that free speech will lead to the discovery and spread of political truth because the system is premised on a belief in the "power of reason as applied through discussion."[107] Under this system, a rational citizenry can be relied upon to make proper political decisions without goverument direction. Therefore, "the fitting remedy for evil counsels is good ones."[108]

Holmes and Brandeis viewed the world from diametrically different perspectives. To Brandeis, "[i]t is the function of speech to free men from the bondage of irrational fears."[109] In Holmes' view, human beings can be expected periodically to exchange one set of irrational fears for another. The "discovery and spread of political truth" therefore carries a far different meaning for Holmes: "I used to say when I was young that truth was the majority vote of that nation that could lick all others."[110] The older Holmes presented a sanitized version of this view in *Abrams*, in which he argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[111] Although this was a more benign phrasing, Holmes' basic position remained the same: power determines "Truth."

Despite their very different perspectives, Holmes and Brandeis agreed on a key point that defines their uniform approach to the First Amendment: "Truth" in all its forms cannot be determined a priori; it is a product of process and change. And since human change can never end, truth will always be an elusive goal. Anyone claiming to have achieved "Truth" is dangerous because he or she is denying the very process of constant experimentation that defines both human existence, and the American constitutional scheme.

Thus, the practical result is the same under both the pessimistic Holmes and the optimistic Brandeis versions of free speech theory. Both permit only one justification for regulating speech: The government must prove that the regulation is necessary to prevent the speaker from causing immediate harm to others in society.[112] The goverument may not regulate speech that does not create an immediate harm "however reprehensive morally" the speech may be.[113]

By prohibiting government from using anything but a harm rationale for regulating speech, these early Holmes and Brandeis opinions gave birth to what is now the cardinal principle of First Amendment free speech jurisprudence: The state may not regulate speech simply because the government (and

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 376.
110. Oliver W. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).
111. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
112. *See Whitney*, 274 U.S. at 377 (Brandeis, J., concurring); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
113. *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

the political majority it represents) disagrees with the content of the speech. The Supreme Court has applied this principle repeatedly during the last fifty years. The Court began applying this principle even before it finally acknowledged in *Dennis v. United States* that the Holmes and Brandeis approach to First Amendment issues had superseded the approach endorsed by Justice Sanford and the other members of the earlier Court's majority.[114]

One of the most eloquent early restatements of this position was provided by Justice Jackson in the flag salute case. "If there is any fixed star in our constitutional constellation," Jackson wrote, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[115] Moreover, Justice Jackson emphasized that "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ about things that touch the heart of the existing order."[116] Under the U.S. Constitution, "[a]uthority . . . is to be controlled by public opinion, not public opinion by authority."[117]

These phrases are quoted with the understanding that Justice Jackson's words have lost some of their resonance through frequent repetition. These words are also quoted with the knowledge that Justice Jackson himself sometimes abandoned their meaning when he believed that those exercising the freedom to differ had gotten a little too close to the heart of the existing order.[118] Despite Justice Jackson's occasional reluctance to follow his own better instincts, his *Barnette* opinion still stands as a prescient indication of how strong the underlying principle proscribing content regulation of speech would become in the decades following World War II.

Since *Barnette*, the Court has used the First Amendment requirement of ideological relativism to protect political dissidents of every stripe, ranging from Communists[119] to Klansmen.[120] Along the way, the Court has repeatedly cited what Justice Brennan called the "bedrock principle" of the Court's free speech jurisprudence: "[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[121] The principle which forbids the government from imposing either civil or criminal sanctions on an individual because of the content of that person's ideas has become "so engrained in our First Amendment

114. 341 U.S. 494, 507 (1951).

115. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

116. *Id.*

117. *Id.* at 641.

118. *See Dennis*, 341 U.S. at 561-79 (Jackson, J., concurring). In *Dennis*, it was left to Justices Black and Douglas to remind Justice Jackson and the other members of the majority that under the majority's construction of the First Amendment, "[t]he Amendment . . . is not likely to protect any but those 'safe' or orthodox views which rarely need its protection." *Id.* at 580 (Black, J., dissenting).

119. *See* Yates v. United States, 354 U.S. 298 (1957).

120. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

121. Texas v. Johnson, 491 U.S. 397, 414 (1989).

jurisprudence . . . as to not require explanation."[122] The Court continues to phrase the rule against content regulation in absolute terms because it fears that a weaker rule would encourage the government to attempt to "drive certain ideas or viewpoints from the marketplace,"[123] and because "history teaches [that] judicial evaluations of viewpoint-based restrictions are especially likely to 'become involved with the ideological predispositions of those doing the evaluating.'"[124]

The constitutional prohibition on government punishment of viewpoints that offend the status quo is not limited to political speech. The Supreme Court has refused to adopt Robert Bork's suggestion that art, literature, and other moral and aesthetic expression should be placed on the same constitutional level as industry and smoke pollution.[125] Instead, the Court has emphasized that moral dissent receives the same constitutional protection as political dissent. The free speech guarantee in the First Amendment "is not confined to . . . ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."[126] When the Court considered Georgia's attempt to prohibit private possession of obscene materials, it confronted and rejected unanimously the proposition that the government "has the right to control the moral content of a person's thoughts."[127] "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds," Justice Marshall concluded.[128] "To some, [dictating moral thoughts] may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."[129]

These statements express a very broad view of the limitations on government power to enforce morality in the realm of thought and expression. The cases in which the statements appear represent a constitutional current that runs directly contrary to the position taken by the Court in *Bowers* and other cases discussed in Part I. In its free speech jurisprudence the Court has crafted a rule that not only explicitly adopts moral relativism as a constitutional command in theory, but with regard to most categories of speech also seems willing to apply that rule in practice. The Court began by adopting the agnosticism that Holmes and Brandeis expressed about matters of political ideology, and then combined this ideological agnosticism with the recognition

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122. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501, 508 (1991).

123. *Id.*

124. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 225 (1983) (quoting JOHN H. ELY, DEMOCRACY AND DISTRUST 112 (1980)).

125. *See* Bork, *supra* note 21, at 29.

126. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 689 (1959). *Kingsley* overturned a New York order prohibiting the exhibition of a motion picture based on D.H. Lawrence's *Lady Chatterley's Lover*. The state unsuccessfully attempted to justify suppression of the movie on the ground that the picture "attractively portray[ed] a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry." *Id.* at 688.

127. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

128. *Id.*

129. *Id.* at 565-66.

that political affairs were intellectually indistinguishable from other matters that are defined by abstract value judgments. The Court's free speech cases rest on a conclusion that, at least in the areas of thought, pure expression, and symbolic speech, the government may not enforce any moral scheme against citizens who march to a different moral drummer. Justice Harlan both summarized this theme and stated the credo of the modern First Amendment in his famous admonition in *Cohen v. California* that "one man's vulgarity is another's lyric."[130]

Of course, the Court does not provide all speech the same high constitutional protection. Instead of following the path of relativism to its logical conclusion, and therefore prohibiting moral regulation of all forms of expression, the Court has instead created a hierarchy of speech, in which some types of speech are protected more rigorously than others.[131] Contrary to the Court's unequivocal statement in *Barnette* that the government may not establish any orthodoxy in "politics, nationalism, religion, or other matters of opinion,"[132] the Court has permitted the government to prosecute speech that falls into broad, disfavored categories such as obscenity,[133] "fighting words,"[134] or defamation.[135] The Court exhibits some discomfort with permitting these exceptions to the *Barnette* principle, and therefore has limited the government's ability to define these unprotected categories of speech as

130. 403 U.S. 15, 25 (1971); *see also Kingsley*, 360 U.S. at 689 (holding that the Constitution "protects expression which is eloquent no less than that which is unconvincing").

131. This hierarchy of speech was inaugurated by the *Chaplinsky* dictum that certain speech is "no essential part of any expression of ideas." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The problems associated with any attempt to segregate high-order speech from low-order speech are illustrated by Alexander Meiklejohn's unsuccessful attempts to explain such a distinction in the two decades following *Chaplinsky*. Meiklejohn started from the same premise that motivated the Court in *Chaplinsky*—that public policy speech is given priority by the First Amendment. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). But it soon became evident that this limited protection was inconsistent with Meiklejohn's intention to strengthen First Amendment protections of speech. Thus, in his later writings he modified his definition of public policy speech to include all communication contributing to the development of values, which in turn contributed to explicit political beliefs and practices. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57. Meiklejohn believed that such communication included virtually all forms of speech, including obscenity. Although Meiklejohn does not acknowledge it, this modification of the hierarchy amounted, in effect, to an abandonment of the hierarchy of speech. *See* Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1582-83 (1988). The evolution of Meiklejohn's work demonstrates that the protection of unorthodox ideas cannot be reconciled with a view of the First Amendment that incorporates a hierarchy of speech. Attempts to reconcile these two irreconcilable theoretical stances produce intellectual convolutions that mask the real judgments being made about the proper constitutional value. Meiklejohn protected unorthodox ideas by pretending to keep the hierarchy, but defined the public policy level of the speech hierarchy so broadly that the top category of the hierarchy encompassed virtually all speech and therefore lost all meaning. The Court maintains the hierarchy by sacrificing the protection of unorthodox ideas that are not "essential" to the expression of ideas. Under both systems the important thing is the bottom line: May the government define and then ban a category of politically unpopular speech? Meiklejohn says "no"; the Court says "yes."

132. *Barnette*, 319 U.S. at 642.

133. *See* Miller v. California, 413 U.S. 15 (1973).

134. *See* Gooding v. Wilson, 405 U.S. 518 (1972); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

135. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

broadly as many governmental officials would like.[136] Nevertheless, the Court has explicitly permitted government to make moral judgments in banning "low-value" speech such as sexually explicit expression, which violates the political majority's sexual mores.[137]

What is one to make of this inconsistency? The Court contradicts its own absolutist language in the free speech cases discussed above when it relegates some speech to a lower level of the constitutional hierarchy. The Court's frequent reference to the constitutional protection of unorthodox ideas is violated by the very concept that discussions of some subjects are less worthy of constitutional protection than others simply because some powerful members of the government decide that the speech is not an "essential part" of public discourse.

The answer to this dilemma lies outside free speech theory. The inconsistencies noted above in the Court's free speech jurisprudence are simply a microcosm of the larger inconsistencies found in the Court's treatment of moral regulation generally. The dispute on the Court between the relativists and the moralists reflects the deeper disagreements on the Court and in society about the nature of democracy. When Holmes and Brandeis described the First Amendment in terms of moral uncertainty and constant political change, they also described a particular view of social flux in a democratic system. They described a system that is always imperfect because it is always mutating into some new form, which will in turn be guided by a new set of goals and principles. When Robert Bork speaks instead of political truth being what the majority says it is,[138] he is arguing for a very different kind of system. He is arguing for a morally static society, in which the dominant forces in a community can preserve their power by inculcating in new generations the values that legitimize existing political and social arrangements. The question whether government can regulate morality cannot be decided outside the context of these very different views of society, nor can the Court's First Amendment inconsistencies be reconciled without endorsing some version of either the Holmes/Brandeis or the Bork position on the nature of democracy.

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136. *See* Texas v. Johnson, 491 U.S. 397, 409 (1989) (rejecting Texas' argument that it could use the fighting words doctrine to prohibit the burning of an American flag because the hostility of observers could lead to physical altercations); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (prohibiting the state from holding a speaker who published false information about the plaintiff liable under the tort of intentional infliction of emotional distress, where the false information published by the defendant was clearly intended as satire); Jenkins v. Georgia, 418 U.S. 153 (1974) (unanimously reversing the Georgia Supreme Court's decision that the movie *Carnal Knowledge* could be held obscene in some communities under *Miller's* "contemporary community standards" test).

137. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991); Paris Adult Theater I v. Slaton, 413 U.S. 49, 61 (1973). The Court has not so clearly approved of moral determinations in the other two frequently cited areas of unprotected expression—fighting words and defamation. Especially in light of the strict limitations the Court has imposed on those two justifications, they are much more easily justified in terms of harm rather than morality. *See also New York Times*, 376 U.S. 254 (limiting the scope of libel actions); *supra* note 24 (discussing limits placed on the fighting words doctrine).

138. Bork, *supra* note 21, at 30-31.

The next Part will return to the subject of democratic theory and its relationship to moral regulation. The remainder of this Part will discuss two other areas of constitutional law that contain frequent overtures to the constitutional mandate of moral relativism: the religion clauses of the First Amendment and the implied constitutional right of privacy.

### *B. Moral Relativism and the First Amendment's Religion Clauses*

The First Amendment contains two religion clauses. One clause protects the free exercise of religion. The other prohibits any law "respecting an establishment of religion."[139] In applying these provisions, the Court has required the government to refrain from taking a position on the theological merits of any religious issue.[140] The Court has also prohibited the government from acting in any way to accomplish a religious objective.[141] In both respects, the Establishment Clause is a nearly perfect model for a relativist Constitution. The Court has specifically linked its Establishment Clause jurisprndence to a general notion of individual moral freedom. "[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[142] It is only a short step from denying a religious majority the power to enforce its faith on those who follow a different god (or none at all), to denying a moral majority the power to enforce its ethics on those who pursue a different vision of right and wrong.

The Free Exercise Clause jurisprudence that is relevant to the present discussion incorporates much of the logic and uses many of the arguments found in the free speech cases discussed above.[143] Many of the early cases

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139. U.S. CONST. amend. I.

140. The government may take steps to prevent religious practitioners from harming others in society, even though this action may limit the freedom of religious adherents to practice their faith. For example, the government does not violate the Establishment Clause when it prevents human sacrifice by groups who view such activities as a neeessary part of religious worship. *See* Reynolds v. United States, 98 U.S. 145, 166 (1879). Likewise, the government may prohibit parents from withholding, on religious grounds, a blood transfusion, when the transfusion is necessary to save their child's life. *See* Jehovah's Witnesses v. King County Hosp., 390 U.S. 598 (1968) (per curiam). The government also may restrict the behavior of religious adherents to prevent them from imposing their faith on nonadherents. *See* United States v. Lee, 455 U.S. 252, 261 (1982) (refusing to exempt Amish employers from Social Security taxes because that would "operate[] to impose the employer's religious faith on the employees"). Although the government acts against one religious group in each of these examples, the action is not a violation of the Establishment Clause because the government is acting for reasons that have nothing to do with its position on the merits of the theological controversy. The government is merely preserving a social context in which individuals can formulate their own views on theological issues free from coercion or subtle pressure imposed by powerful religious groups.

141. This "secular purpose" requirement is the first component of the three-part *Lemon* test. *See infra* notes 155-57 and accompanying text.

142. Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985).

143. The one major exception consists of the free exercise cases that permit the government to "accommodate" religion by granting special exemptions to religious practitioners from generally applicable laws that violate the practitioners' religious duty. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yodcr, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). The precise dimensions of the constitntional accommodation doctrine are unclear; the Court seems to have substantially reduced its scope in Employment Div. v. Smith, 494 U.S. 872 (1990). Also, there is some

that developed the relativist approach to free speech—including *Barnette*—involved nonconformist religious practitioners (usually Jehovah's Witnesses).[144] The inherently unprovable and disputatious nature of religious speech was especially appropriate for developing the deep skepticism toward "Truth" that characterizes modern free speech doctrine. As the Court explained in one of the early religious speech cases:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.[145]

Despite the antagonism that accompanies religious, moral, and political diversity—or rather, because of it—the Court has held that protecting the ability to disagree about the most basic aspects of life is "essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[146] In the free exercise of religion cases, as in the free speech cases, the Court affirmed the constitutional value of a social context in which "many types of life, character, opinion and belief can develop unmolested and unobstructed."[147] In these cases the Court does not merely require the political majority to tolerate contrary views.[148] Rather, it affirmatively adopts the amoral position: The government may not prohibit political, religious, or moral dissent because under our constitutional system the government is denied the power to endorse one version of truth over another.

The Establishment Clause is the specific embodiment of this requirement that the government maintain an agnostic attitude toward religion. As Justice

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question whether the theoretical underpinnings of the doctrine are consistent with the separationist thrust of the Establishment Clause. *See* Steven G. Gey, *Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990).

144. *See, e.g.*, Fowler v. Rhode Island, 345 U.S. 67 (1953); Burstyn v. Wilson, 343 U.S. 495 (1952); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Largent v. Texas, 318 U.S. 418 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938). It should be noted that although *Cantwell* itself turned on the Free Exereise Clause, the Court has recognized that free speech interests were also implicated. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 761 (1976). The Court has continued to use the Free Speech Clause to protect religious practitioners in the modern era. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

145. *Cantwell*, 310 U.S. at 310.

146. *Id.*

147. *Id.*

148. For contrary views advocating a tolerance model of the First Amendment, see LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986); Suzanna Sherry, *An Essay Concerning Toleration*, 71 MINN. L. REV. 963 (1987); Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305 (1990); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649 (1987). For an argument that toleration provides a weak protection for free speech in particular and civil liberties in general, see Gey, *supra* note 131, at 1613-21.

Kennedy pointed out recently in *Lee v. Weisman*,[149] the First Amendment prohibits the government even from participating in debate about religious affairs, no matter how ecumenical or tolerant the government's participation may seem. "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."[150] Thus, the Free Exercise Clause and the Establishment Clause are two sides of the same coin. The Establishment Clause requires the government to stand aside from matters of faith and morality, while the Free Exercise Clause protects the individual's authority to make the same determinations free from collective manipulation or sanction.

The structure of the First Amendment's religion clauses reflects two value judgments. First, the clauses indicate that religious judgments are individual, not collective in nature. Institutionalized religious bodies are protected not in their own right, but rather as a means of protecting the individual's right to religious association.[151] The institutions are a means to achieve religious freedom; they are not the embodiment of it.[152] Second, whatever the

149. 112 S. Ct. 2649 (1992).

150. *Id.* at 2656.

151. In this respect, the right of religious association is identical to the implied right of association attached to other First Amendment freedoms. *See* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed."); NAACP v. Alabama, 357 U.S. 449, 461 (1958) ("[For First Amendment purposes] it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.").

152. *See Roberts*, 468 U.S. at 617-18:

> [T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievance, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

The Court has not consistently respected its own rule that the needs of individual religious practitioners should be given precedence over the needs of organized religion. In at least two instances, the Court has elevated the interests of organized religion over the religious freedom of individuals. *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding a federal Civil Rights Act provision exempting religious organizations from statutory prohibition against discrimination in employment on the basis of religion); Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding the free exercise right of Amish parents to withdmw children from school at age 14, despite a state law requiring children to remain in school until age 16). In *Yoder*, the Court used the Free Exercise Clause to permit the Amish religious order to deny education to children of parents who were members of the faith. Although he dissented from the Court's holding, Justice Douglas noted:

> It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights. . . . If [a child] is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.

*Id.* at 245-46 (Douglas, J., dissenting). Likewise, in *Amos* the Court permitted the Mormon Church to fire an assistant building engineer who had worked for 16 years in a gymnasium owned by the Church. The Chureh's sole reason for firing the engineer was that the engineer refused to join the Mormon Church. The Court upheld the statutory exemption for what would otherwise be a clear-cut violation of the religious discrimination provisions of the Civil Rights Act, holding that the exemption has the "proper purpose of lifting a regulation that burdens the exercise of rcligion." *Amos*, 483 U.S. at 338. In *Yoder* and *Amos*, the Court unfortunately elevates the intercsts of the Church over the rights of individuals. However, the cases are anomalies within Free Exercise Clause jurisprudence. In recent cases the Court has cast doubt on the free exercise rationale of *Yoder*. *See, e.g.*, Employment Div. v. Smith,

relationship between individual faith and institutional religion, the First Amendment's religion clauses reflect the belief that religion is particularly incompatible with democratic government.[153] This is evident in the Court's recent conclusion that "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[154]

For over twenty years, the Court has employed a three-part standard to assess the government's compliance with the strictures of the Establishment Clause. This standard was set forth in its present form in *Lemon v. Kurtzman*, although each component of what became known as the "*Lemon* test" had already been present in the Court's Establishment Clause jurisprudence for many years prior to *Lemon*: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advanccs nor inhibits religion, . . . [and] finally, the statute must not foster 'an excessive government entanglement with religion.'"[155] A government policy is unconstitutional under the *Lemon* test if it violates any one of the three components. Thus, a facially neutral statute will be found unconstitutional if it is enacted with a solely or primarily religious purpose.[156] Likewise, a statute that promotes some legitimate state end may nevertheless be found unconstitutional if it also has the "direct and immediate effect of advancing religion."[157] The first two prongs of the *Lemon* test demonstrate the strength of the Constitution's anti-establishment mandate: The government may not advance religion even unintentionally, nor may it act with the intention of advancing religion even if its action does not, in practice, demonstrably advance religion. Part V will return to the *Lemon* test because a form of the *Lemon* test may provide a helpful framework for analyzing moral regulation generally.

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494 U.S. 872, 881-82 & n.1 (1990) (suggesting that the crucial element in the *Yoder* decision is the substantive due process right of parents to direct the education of their children). In other cases, the Court has emphasized that the free exercise right attaches to individual religious practice, even when the practice contradicts or is not sanctioned by a recognized religious organization. *See, e.g.*, Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).

153. The Author has explained the reasons for this incompatibility elsewhere, Gey, *supra* note 143, at 166-72, and will return to this point below. *See infra* part III.B.

154. Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992).

155. *Lemon*, 403 U.S. 602, 612-13 (1971) (citations omitted).

156. The Court has stated that "a statute that is motivated in part by a religious purpose may satisfy the first criterion." Wallace v. Jaffree, 472 U.S. 38, 56 (1985). The Court, however, has never defined the extent to which the secular purpose for a statute must outweigh the religious purpose to satisfy this component of *Lemon*. It is clear, nevertheless, that a government statute or policy is unconstitutional if there is no discernible secular reason for the statute or if the state fails to identify a "clear secular purpose" for its action. *See* Edwards v. Aguillard, 482 U.S. 578, 585 (1987); Epperson v. Arkansas, 393 U.S. 97, 103 (1968).

157. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783-84 & n.39 (1973).

### C. Moral Relativism and the Constitutional Privacy Right

The strong Establishment Clause restriction on governmental regulation of religious belief and behavior is merely one variation on the First Amendment theme discussed in this Part. As the religion and speech clause cases indicate, there is a broad and deep current within modern First Amendment jurisprudence that requires the government to adopt a relativist stance toward many important moral issues. The Court has not improved on Justice Jackson's formulation of the principle in *Barnette* that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[158] The overriding theme of the Court's First Amendment cases indicates that the law may *not* be based on the political majority's moral choices. But the ostensible strength of this principle, which is repeatedly emphasized in the Court's First Amendment cases, seems to contradict directly with the Court's concession in *Bowers v. Hardwick* that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[159] In one set of cases the Court prohibits moral orthodoxy, and in another set the Court indicates that majoritarian moral orthodoxy alone provides a legitimate rationale for state action.

It is not possible to explain this anomaly by limiting the constitutional protection of unorthodoxy to a narrow range of First Amendment concerns. There are strong parallels between the Court's rationale for First Amendment protection and its justification of the constitutional privacy right. In *Wallace v. Jaffree*, Justice Brennan noted that "the Court has identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment."[160] This same concern for individual freedom of conscience has figured prominently in the Court's constitutional privacy opinions. The protection of individual unorthodoxy has been a central feature of the Court's constitutional privacy jurisprudence ever since *Griswold v. Connecticut*[161]—the first case recognizing a constitutional privacy right. In *Griswold*, Justice Douglas identified the First Amendment as one of the constitutional components pointing toward the broad protection of "privacy and repose."[162] Without the protection of "peripheral" freedoms, Douglas noted, "the specific rights would be less secure."[163]

The interconnection of First Amendment freedom of conscience and constitutional privacy is stated even more explicitly in *Stanley v. Georgia*.[164] Throughout the majority opinion in *Stanley*, the Supreme Court intermingled

158. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
159. *Bowers*, 478 U.S. at 196.
160. 472 U.S. 38, 50 (1985).
161. 381 U.S. 479 (1965).
162. *Id.* at 484-85.
163. *Id.* at 483.
164. 394 U.S. 557 (1969).

the privacy and First Amendment rationales for its conclusion that Georgia could not punish the private possession of obscene materials. The Court used both rationales to carve out an area of constitutionally protected moral autonomy, which the Court used to rebut the state's assertion that it "has the right to control the moral content of a person's thoughts."[165] The protected area of moral autonomy identified in *Stanley* includes not only the First Amendment right "to receive information and ideas regardless of their social worth,"[166] but also the broader right "to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[167]

*Stanley* and *Griswold* are not the only privacy decisions that incorporate the moral relativism of the First Amendment into the constitutional privacy right. Even the later contraception and abortion cases use the moral ambiguity of these issues to limit the government's ability to stipulate answers to metaphysical questions such as when life begins. "If the right of privacy means anything," Justice Brennan wrote in *Eisenstadt*, "it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[168] The constitutional demand that morally-laden decisions be insulated from state regulation is also a central feature of the Court's abortion decisions. The Court's drift away from the trimester framework of *Roe v. Wade*[169] has not diminished the support a majority of the Court continues to express for the central element of moral relativism at the heart of the privacy right. This is made clear in the Court's most recent statement on the subject in *Planned Parenthood v. Casey*:

> These matters [*i.e.*, abortion and contraception], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define

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165. *Id.* at 565.

166. *Id.* at 564.

167. *Id.*

168. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in original). The court of appeals' opinion in *Eisenstadt* made the moral regulation point even more clearly. Baird v. Eisenstadt, 429 F.2d 1398, 1401-02 (1st Cir. 1970). The case involved a Massachusetts statute prohibiting distribution of contraceptives to single persons. After finding that the statute could not be justified either as a deterrent to intercourse or as a health measure, the court of appeals held that the statute's only justification was the state's determination that "contraceptives per se . . . are considered immoral." *Id.* The court held that a purely moral rationale for such a statute could not survive scrutiny under the federal constitutional right to privacy: "Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state." *Id.* at 1402. Justice Brennan asserted that the Supreme Court was avoiding the moral regulation issue, because under the Equal Protection Clause, "the [constitutional privacy] rights [to obtain contraceptives] must be the same for the unmarried and the married alike." *Eisenstadt*, 405 U.S. at 453. But by rejecting the state's attempt to regulate only unmarried persons' access to contraception, the Court *did* resolve the question of moral regulation: the Court prohibited the state from distinguishing between married and unmarried fornication on moral grounds. *Id.*

169. 410 U.S. 113, 163-66 (1973).

> the attributes of personhood were they formed under compulsion of the State. . . .
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> . . . .
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> . . . [A pregnant woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[170]

Public attention is understandably focused on the *Casey* decision's restructuring of the *Roe* framework for regulating abortion. But the typical focus on the mechanics of *Casey* and *Roe* has unfortunately overshadowed the fact that a very conservative Supreme Court has strongly reaffirmed the principle that moral autonomy is the philosophical basis for the constitutional privacy right. Of course, this explicit adoption of moral autonomy as part of the constitutional privacy right also casts doubt on the logic of the specific rules governing abortion regulation adopted by the *Casey* plurality.[171] Also, if the government has no authority to define a moral concept of existence and apply it to a pregnant woman who has a very different point of view on the matter, it makes little sense for the *Casey* plurality to permit government to regulate abortion in order to protect "potential life."[172] As Justice Stevens has repeatedly emphasized, regulatory assumptions about the legal status of "potential life" are inextricably bound up with religious conclusions that the Establishment Clause prohibits the state from making.[173]

The decision whether to consider a fetus a "potential life" or a mere mass of protoplasm inevitably involves a metaphysical judgment about the meaning of life. The question at the root of the abortion cases is whether the government or the individual has the authority under our constitutional system to make this kind of abstract moral determination. As Justice Stevens argues in *Casey*, the debate within the Court concerning the government's authority to make this sort of judgment in many respects is a subset of the Establishment Clause debate about whether the government may impose upon the entire society the political majority's theological position on other equally abstract metaphysical issues. This Article suggests that the Establishment Clause

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170. 112 S. Ct. 2791, 2807 (1992) (plurality opinion).

171. For example, if a woman has a right to determine for herself the attributes of personhood that attach to the fetus, it is inconsistent to uphold legislation intended to ensure that a woman makes her moral decision about abortion in a "thoughtful and informed" manner, and that she takes into account all the "philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term." *Id.* at 2818. This is analogous to asserting that the government may condition the exercise of First Amendment free speech rights upon certification that the speaker has taken a course in political theory, or conditioning free exercise rights upon the certification that the practitioner has read and honestly considered alternative faiths. The First Amendment free speech protection would lose most of its force if the government could condition its exercise in this way, just as the freedom of conscience embedded in the constitutional privacy right is severely weakened if the government can manipulate the moral decisions of pregnant women.

172. *See id.* at 2817.

173. *See, e.g., id.* at 2839-40 (Stevens, J., concurring in part and dissenting in part); Webster v. Reproductive Health Servs., 492 U.S. 490, 563-72 (1989) (Stevens, J., concurring in part and dissenting in part); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 778 (1986) (Steveus, J., concurring).

debate is, in turn, actually a subset of an even broader debate among the Justices over the permissibility of legally enforced moralism. As one academic proponent of moral regulation asserted recently: "[T]he real debate is over whether it is appropriate for the government to legislate on the basis of moral norms. The real divide is not between religious and secular; rather, it is whether it is proper for the government to enforce moral norms [that are] external . . . ."[174]

The cases discussed in the first two Parts of this Article illustrate the Court's contradictory stance on this question. The remainder of this Article will argue that these contradictions can be resolved by imposing as a general constitutional principle the requirement of moral relativism found in the First Amendment cases and in the theoretical underpinnings of the reproductive freedom privacy decisions.

## III. MORAL MAJORITIES AND DEMOCRACY

As one of the primary defenders of moral regulation sitting on the Supreme Court today, Justice Scalia has no difficulty relating the abortion decisions to the larger issues of moral and political authority. The debate about abortion, Scalia noted in *Casey*, is in essence a debate over whether or not a fetus should be considered a human being. "There is of course no way to determine this as a legal matter; it is in fact a value judgment."[175] Since there is no way to ascertain as a matter of objective scientific fact whether a fetus is a human being, Scalia would have society make this value judgment politically:

> The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate [against the Court], to protest that we do not implement *their* values instead of *ours*.[176]

In Scalia's view, *Roe v. Wade* and its progeny violate the American culture's democratic principles by "banishing the [abortion] issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight."[177] According to Scalia, the political battles outside the Court over the meaning of *Roe* reflect "the twin facts that the American people love democracy and the American people are not fools."[178]

Scalia's position in the abortion cases is consistent with his view that democracies, like all human societies, routinely prohibit activities because those who control policy in the society believe the activities are immoral.[179] Scalia believes that the key distinction between democracies and other

174. Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 78 (1991).

175. *Casey*, 112 S. Ct. at 2875 (Scalia, J., concurring in part and dissenting in part).

176. *Id.* at 2885 (emphasis in original).

177. *Id.*

178. *Id.* at 2884.

179. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (Scalia, J., concurring).

political cultures is not the existence of moral regulation, but rather the mechanism for writing morality into law: Democracies impose morality through the electoral process, while autocracies impose morality through governmental fiat. "The permissibility of abortion, and the limitations imposed on it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[180] This perspective on democracy leads Scalia to mischaracterize both the theory and operation of the constitutional privacy right at issue in *Casey*.

Scalia criticizes the majority's decision in *Casey* on the ground that the majority has replaced "the people's" value judgments with its own.[181] But if taken literally, this statement incorrectly implies that the majority has endorsed a particular position on the moral legitimacy of abortion in the face of "the people's" opposite view. This literal reading is obviously untrue. The *Casey* majority did not "decorate a value judgment and conceal a political choice"[182] about whether abortion is morally right or wrong. Rather, the majority in *Casey* made the very different determination that *no* governmental entity—neither the Court nor the legislature—may make the value judgment that abortion is immoral and then impose that judgment through legal sanctions on those who disagree.

Justice Scalia accurately describes this as a political judgment. But it is a more sophisticated political judgment than Scalia implies. The *Casey* majority did not, as he asserts, make a political judgment to impose a particular set of moral values on an unwilling public. Rather, the Court made a political judgment about the nature and extent of political authority in a democracy. This decision, in turn, contained a series of implicit determinations about the nature of a citizen's political freedom in a democracy.

Justice Scalia's opinion in *Casey* also contains a series of unstated assumptions about the nature of political freedom in a democracy. When Scalia defines democracy as characterized by "citizens trying to persuade one another and then voting,"[183] he suggests that a citizen's political freedom in a democracy includes the right to join with others of like mind, gain control of the government, and impose an agreed-upon set of moral rules on everyone in society. Justice Scalia's entire critique of the majority decision in *Casey* rests on his assumption that political freedom in a democracy includes the right to exercise collective power. The rhetorical strength of Scalia's partial dissent in *Casey* derives primarily from his allegation that the majority decision in the case limits "the people's" political freedom in some significant way.[184]

Justice Scalia's approach is flawed because he misconstrues the central focus of democratic theory. Scalia seeks to defend the rights of "the people"

180. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., concurring in part and dissenting in part).

181. *See id.* at 2885.

182. *Id.* at 2875.

183. *Id.* at 2873.

184. *See id.* at 2875.

to make and enforce moral judgments.[185] But the collective entity known as "the people" is only a temporary and constantly shifting amalgamation of individual citizens. These individual participants in a democratic government will perceive "the people's" freedom in terms of their own ability to live their lives as they choose. In other words, "the people's" freedom means individual freedom—that is, the degree to which each individual citizen may make decisions about his or her own life free of government-imposed sanctions. Thus, Scalia's criticism of the *Casey* majority is defensible only if he can demonstrate that individual freedom is diminished by the Court's decision to allocate to individuals the decision-making authority over matters of childbirth and abortion. Viewed from this perspective, Scalia's position is insupportable. Since the individual citizen's freedom to make decisions about her own life is increased by the *Casey* majority decision (at least as compared with the alternative proposed by Scalia), it would be illogical for any citizen to conclude that *Casey* diminishes her political freedom. Individual freedom is significantly diminished when the Court tells a woman that she may not (or, conversely, that she must) have an abortion. Individual freedom is not significantly diminished when the Court tells one person that she may not impose her values on her neighbors.

Scalia's position makes sense only if viewed from one of two anti-democratic perspectives on the exercise of political power. First, Scalia's position would make sense within a political system that as a general rule gives decisions made by an institutionalized government precedence over the views of individuals. This is an unacceptable interpretation of the American constitutional democracy because a system that tends to give precedence to the decisions of government over those of the citizens who compose the government is exactly the contrary of a democratic regime. Second, Scalia's position would be reasonable if one assumes that democracy is characterized by nothing more than the unfettered right to exercise political power (*i.e.*, the power that comes from being part of the group that controls the government). This is also an unacceptable interpretation because such a regime could not be distinguished from any other totalitarian political arrangement. Democracy must mean something more than the right of powerful citizens to be moral bullies and political thugs.

The repeated references in Justice Scalia's *Casey* opinion to the majority's value judgments obscure the real subject being debated by the Justices in the constitutional privacy cases. The real dispute between Scalia and the majority in *Casey* is not about whether a fetus is a human being. The real dispute is over the meaning of democracy as embodied in the United States Constitution. Scalia, like Bork, defines democracy in its narrowest, most simplistic form. To borrow Bork's phrase, democracy means that truth is what the majority says it is at any time.[186] Scalia's entire constitutional method, which relies heavily on the discovery of a "relevant tradition protecting, or denying

185. *See id.* at 2876.
186. *See* Bork, *supra* note 21, at 30.

protection to, [an] asserted right,"[187] assumes that as a matter of theory democracy means nothing more than the perpctual exercise of power by those who—by dint of sheer numbers, financial clout, or clever manipulation of the electoral process—manage to gain control of the levers of political power. If this is all democracy means, then Scalia is correct to assume that there is no real difference between democratic and undemocratic regimes other than the mechanism by which political power is exercised. But there is an alternative view of democracy, which is more consistent with the themes and structure of the Constitution, and which more reasonably explains and justifies a decision like *Roe v. Wade*. The remainder of this Part will set forth this alternative view of democracy and describe how moral regulation fits into this alternative democratic universe.

### *A. An Alternative View of Democracy: Winners' Principles, Losers' Principles, and Democratic Theory*

The alternative view of democracy proposed here acknowledges that Justice Scalia correctly describes one-half of democratic theory. As Scalia suggests, democracy does mean that in many respects a political majority may do what it wants. Most of the provisions in the Constitution's first three Articles are aimed at providing the majority with an adequate and efficient means to enforce its will. In contrast to Scalia's reductivist view of democracy, however, the alternative view recognizes that a true democracy must do more than simply provide a political majority with the ability to take a snapshot of its values and then use every power in the government's arsenal to perpetuate those values forever. Democracy also requires that the political system always be open to change. Political majorities must have the ability to alter their views, to modify values that are cast into doubt by the passage of time, to grow, and even to regress. Likewise, political minorities must have the right to reject the majority's views, agitate for the adoption of their own agenda, and muster support in an attempt to gain sufficient political clout to become the new majority.

In addition to allowing political majorities to do what they want in many circumstances, democracy must also prevent present majorities from acting solely at their pleasure in order to preserve the system for as-yet-unboru future majorities who may want to take the nation in a different direction. The alternative view of democracy is premised on the understanding that political strength inevitably deteriorates, and that seemingly invincible majorities eventually disintegrate, mutate, or become absorbed by new majorities. Thus, a proper democratic political structure is one that adapts easily to new political majorities and the often radically different values those new majorities represent.

All the political accouterments necessary to ensure that the government remains at the behest of "the people"—for example, the right to vote, the right

187. Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989).

to communicate with representatives, the separation of powers, and the power of impeachment—would have no purpose if not for the organizing principle of democracy that change is constant and inevitable. These mechanisms exist only to transfer power from one group to another as the community evolves. Yet Scalia's view of democracy emphasizes the static, eternal nature of the community and its values. Scalia views democracy as providing a mechanism through which a majority asserts itself when members of the majority think they are right.[188] But this is only one of the two important functions of democratic government. The other requires the government to provide an avenue for change when the passage of time, different circumstances, or new ways of thinking reveal that at some earlier point the majority was, in fact, wrong.[189]

Given the inevitability of constant change, a true democracy cannot be based wholly on the needs of political winners. Yet both Scalia and Bork (as well as their civic republican counterparts on the political left)[190] focus on political winners when they urge the Court to get out of the way and let "the people"—by which they mean the majority—rule. They suggest streamlining the implementation of majoritarian sentiments by removing most constitutional limits on the application of political power to enforce the majority's values. The primary features of the Bork/Scalia and civic republican systems incorporate what this Author has characterized elsewhere as "winners' principles."[191] The term "winners' principles" refers to those aspects of a democratic system that permit political winners to make their wishes known to the government and then to justify government action implementing those wishes.

The alternative view of democracy proposes that in addition to winners' principles, a truly democratic system must also contain a set of "losers' principles."[192] Three losers' principles are relevant to the present discussion: the principle of political impermanence, the principle of radical skepticism, and the principle of individual autonomy.[193] These losers' principles require the winners in a democratic system to refrain from regulating the beliefs and (to an extent explored below)[194] behavior of political losers. Losers' principles keep the political system fluid by preventing those who gain control

188. "Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward." Planned Parenthood v. Casey, 112 S. Ct. 2791, 2885 (1992) (Scalia, J., concurring in part and dissenting in part).

189. This Article uses the terms "right" and "wrong" in the same sense as Scalia, as purely descriptive terms denoting the political majority's preferences, rather than normative terms denoting some absolute or divinely-ordained moral truth. Like Scalia, this Article rejects some external measure of right and wrong by which political decisions can be judged. Thus, when this Article says that the passage of time or new circumstances reveal that an earlier majority's position was "wrong," it simply means that members of the new majority disagree with the stance taken by their predecessors.

190. *See supra* notes 70-92 and accompanying text.

191. *See* Gey, *supra* note 73, at 879-97.

192. *See id.*

193. *See id.*

194. *See infra* part V.

of the government from perpetuating their control indefinitely. Thus, each of the losers' principles discussed below can be deduced from the central democratic requirement of popular consent, which is Scalia's focus when he argues that in a democracy "the people" should be allowed to control public policy. This Article argues that a system which lacks these losers' principles cannot accurately be said to operate under a regime of popular consent, and therefore cannot be described as a democracy. Paradoxically, the absence of losers' principles renders even the most strongly majoritarian political system undemocratic.

### 1. The Principle of Political Impermanence

The conception of democracy embodied in the United States Constitution is premised on the expectation of constant social and political change. Political stasis—or the attempt to produce stasis—is incompatible with democracy because, in effect, stasis represents the ossification of political power. Democracy ends as soon as someone or some group seeks to hold power indefinitely. As noted above, this principle is a simple extrapolation from the democratic requirement of popular consent: If citizens in a democracy have the right to consent to a government pursuing one set of policies and values, they must also retain the right to withdraw that consent and transfer it to another government representing a wholly different set of policies and values.

Periodic elections are one method of satisfying the first losers' principle. However, the constant change that characterizes democracy is not limited to the identity of individuals occupying political office. Changing political leaders would be irrelevant if the new leaders could not abandon policies pursued by their predecessors and lead the society in a new direction. The principle of political impermanence therefore must apply to the policies that guide society, as well as the personnel who implement those policies. Likewise, the possibility of change must include the option of radical change, including the abandonment of present governmental structures, or even of democracy itself. Democratic political leaders may not insulate from attack a set of "constitutional truths,"[195] because to do so would allow those leaders to set the terms of debate over policy, and therefore violate the core democratic premise that in a democracy the people are always free to abandon old values, policies, and leaders in favor of new alternatives.

The principle of political impermanence indicates that despite Justice Scalia's frequent appeals to democracy,[196] his insistence on using practices that are hundreds of years old to establish the parameters of current law is actually anti-democratic.[197] In a democratic system, those who control the

195. *See* Bork, *supra* note 21, at 31.

196. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2882-85 (1992) (Scalia, J., concurring in part and dissenting in part).

197. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989).

political process may not justify penalizing the behavior of those who do not merely by referring to "our unquestioned constitutional tradition that [certain practices] are proscribable."[198] A democratic system demands that those in power do more than simply conform their regulatory activity to historical norms. Democratically enacted regulations must also conform to the temporal limits democracy places on the exercise of power.

According to the principle of political impermanence, moral dissenters must be protected from legal regulation by those presently in power because the dissenters must retain the ability to participate in the political system and to cultivate political support among opponents of the current power structure. A society that legally penalizes homosexuality, for example, will severely hamper the present and future political participation of homosexuals, and will likewise skew future citizens' views on matters concerning sexual morality. Even if the present political majority believes that homosexuality is immoral, its representatives in government may not act on that belief because the principle of political impermanence requires these representatives to acknowledge the possibility that the present majority's moral perceptions may be "wrong," in the sense that a succeeding political majority may endorse or at least tolerate homosexuality. The first losers' principle requires those presently controlling the government always to respect the fact that today's immoral minority may be tomorrow's moral majority.

### 2. The Principle of Radical Skepticism

The second losers' principle is the principle of radical skepticism. "Radical skepticism" refers to the attitude of a quintessentially democratic citizen toward all assertions of collective truth. This second principle requires that all governmental policies be subjected to the skeptical gaze of this hypothetical citizen, which means that all policies should be recognized from the point of their adoption as potentially false or harmful.

This principle follows logically from the recognition that democracy is characterized by the constant ebb and flow of power. The principle of radical skepticism dictates that in a democracy the government may not give any policy or value absolute political priority over any other policy or value. No one in society has the authority to limit the range of policies, ideas, or values that other citizens may choose to adopt. Likewise, no individual or group has the authority to limit a citizen's ability to *reject* a policy or value that most other citizens have adopted. Democracy favors the skeptical over the ingenuous citizen because the skeptic helps the political system evolve by constantly attacking or casting doubt upon the status quo. This preserves for future generations policy alternatives that present majorities (often for self-interested reasons) would prefer to foreclose.

Like the other losers' principles, the principle of radical skepticism can be deduced from the singularly democratic characteristic of popular consent.

198. *Casey*, 112 S. Ct. at 2876 (Scalia, J., concurring in part and dissenting in part).

Political perfectionism and ideological certainty are incompatible with democracy because a democratic government cannot substitute its judgment for that of any individual citizen. In every battle over policy in a democracy, *all* options have to be on the table for consideration. If the government is permitted to remove "wrong" options from consideration prior to the discussion, then the government in effect manufactures consent for its own preferred policies by foreclosing alternatives. This is the antithesis of democratic decision-making. If the present majority uses the apparatus of government to inculcate its own values among the citizenry, thereby insulating certain policies or values from the critical scrutiny of free citizens participating in an open political process, then the system ceases to be a democracy with regard to these matters. Instead, it becomes either an oligarchy, a theocracy, or a monarchy, depending on which form of political master is granted authority to dictate these unquestionable core values to the rest of society.

Like all losers' principles, the principle of radical skepticism limits collective power in order to protect the individual citizen's right freely to consider options hostile to the present power structure. Individual citizens are not bound by the principle until they gain power and attempt to use the governmental apparatus to further their own stated goals. Thus, individuals may reject moral relativism and adopt a stance of complete moral certainty for their own personal lives. However, any attempt by such individuals to join with others, gain political power, and use that political power to impose their moral certainty on reluctant dissenters would violate the principle of radical skepticism. In exchange for giving up the authority to construct what they view as a moral society, moral individuals are insulated from the threat that their own moral code will be outlawed by some future "immoral" majority. It is another paradox of democracy that the principle of radical skepticism must be imposed on the government to protect the individual citizen's right to act with moral certainty.

### 3. The Principle of Individual Autonomy

The third losers' principle is the principle of individual autonomy. This principle describes the proper order of authority in a democratic society. In a democracy, the government is always subordinate to the individuals who live in society, not vice versa. The principle of individual autonomy asserts that a democracy is made up of individuals who will never be (and *should* never be) fully absorbed into the political structure. Individual citizens must remain autonomous in significant ways from collective control asserted through the government. Without a significant degree of individual autonomy, popular consent—which is the common denominator in every form of democratic theory—would be a sham. Without some guarantee of individual autonomy, citizens would simply give back to the government a political endorsement that the government itself has carefully dictated.

Like the first two losers' principles, the principle of individual autonomy prevents any group that gains control of the government from confusing its own perspectives and interests with the collective good. The third losers' principle incorporates the understanding that a structural mechanism removing certain aspects of individual belief and behavior from collective control is necessary to protect the democratic system against the permanent co-optation by a temporarily ascendant group.

Many aspects of individual behavior will remain subject to collective regulation in a democratic regime governed by these principles. But the losers' principles outlined above require the government to adhere to a specific set of permissible regulatory objectives. This category of permissible regulatory objectives is quite broad. However, the category of impermissible regulatory objectives is smaller, and easily identified. Impermissible governmental objectives are those that interfere with each individual citizen's political independence from government control, the preservation of which is absolutely necessary in a democratic system that bases governmental sovereignty on popular consent. In addition, even government regulations that pursue legitimate objectives must be drawn in such a fashion that they do not interfere unnecessarily with individual autonomy. If a legitimate governmental objective can be accomplished in a manner that preserves individual freedom over matters involving value choices, the government may not pursue its objective in a more intrusive manner.

The details of these requirements will be explored in the next Part. As a conclusion to the present discussion, however, please note that the discussion has returned to the main focus of this Article: Is moral relativism a constitutional command? A reasonable interpretation of the losers' principles described above requires that this question be answered "yes." According to these losers' principles, it is impermissible for the government to regulate the "immoral" thoughts, actions, or lifestyles of its citizens. The concept of democratic government based on popular consent—which the three losers' principles are intended to enforce—is inconsistent with any regulation based primarily on the desire to enforce a political majority's moral beliefs. Individual moral autonomy is indistinguishable from individual political autonomy, which is an indispensable condition of true democratic popular consent.

Parts IV and V will discuss this point and suggest a relatively simple test for ascertaining when legitimate governmental objectives are present. Before doing so, however, a brief discussion will distinguish the losers' principles from other countermajoritarian theories based on the assertion of affirmative fundamental rights.

### *B. The Paradox of Limiting Democracy in Order to Save It, and the Inadequacy of Fundamental Rights*

Judges and commentators who would eliminate most judicially imposed constraints on the exercise of democratic power are typically critical of all theories that, like the three losers' principles discussed above, claim to

"improve" democracy by limiting majority rule. The essence of this criticism is that democratic theory cannot accommodate severe limitations on the exercise of popular will through democratic mechanisms, because such limitations are inconsistent with the core principle that a democratic culture should be able to define itself any way it wants. This theme is emphasized repeatedly by conservatives such as Scalia and Bork,[199] and it is the root of the progressive civic republican arguments against strong protection of rights through judicial review of legislative and executive action.[200] Admittedly, this Article's version of democratic theory displays a superficial paradox.[201] This Article proposes a series of democratic principles that in certain circumstances would sharply curtail some superficially democratic processes and invalidate some of the policies those processes produce. If the set of losers' principles set forth here accurately encapsulates democratic theory, then democracy severely restricts the power of *any* political authority—even one that has been placed in power through democratic mechanisms. According to these losers' principles, a democratically elected majority violates the very principles that provide it with political legitimacy when that majority establishes by law a set of values for society, declares those values to be preeminent, and imposes those values on reluctant individuals within the society. All actions taken by democratically elected representatives receive only presumptive and limited respect because democratic action is based on the precondition that *all* political policies, as well as the deeper philosophical and moral currents from which these policies are drawn, must *always* be open to question. When Justice Holmes suggested that the Constitution is equally compatible with communism and laissez-faire capitalism,[202] he referred not just to the amoral philosophical core of the First Amendment—he also expressed the central relativist tenet of democracy itself.

The democratic paradox produced by the losers' principles outlined above can best be illustrated and defended by returning briefly to the universal democratic characteristic of popular consent. The first section of this Part asserts that authentic popular consent is not possible in a system that does not incorporate some version of the losers' principles. This conclusion follows from the recognition that popular consent is fraudulent if the consent given is dictated or controlled by the political authority whose legitimacy rests on the democratic approval of the populace. The three losers' principles

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199. *See supra* notes 49-69, 175-87 and accompanying text.

200. *See supra* notes 70-92 and accompanying text.

201. Of course, the same paradox appears in any form of democratic theory that purports to protect minority rights—as virtually all modern theories do. Even Robert Bork recognizes that the majority is constrained in some areas:

> A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. . . . The model . . . has also a counter-majoritarian premise . . . for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

Bork, *supra* note 21, at 2-3.

202. *See supra* notes 100-03 and accompanying text.

discussed in this Part prevent popular consent from being undermined in these ways. In contrast, the facially more democratic system favored by Bork and Scalia on the right, and the civic republicans on the left, leaves the political system vulnerable to capture by a popular and efficient ruler who could use the apparatus of government to manufacture popular consent from docile and compliant citizens. Ironically, unchecked democracy produces only ersatz democracy beeause popular consent that is intentionally molded by the actions of those who control the political system cannot be the basis for a legitimate democratic government.

These references to popular consent highlight an important distinction between this Article's defense of countermajoritarian constitutional protections and other prominent arguments in favor of judicially enforced limits on popular government. For example, this Author rejects David A.J. Richards' effort to link constitutional interpretation to moral principles of justice,[203] as well as Michael Perry's notion that judges should participate with other government officials in "the search for political-moral knowledge" in order to lend substance to constitutional limits on government action.[204]

For reasons that will be discussed further in the next Part, countermajoritarian limits on democratic governments cannot be justified in our modern, secular era by giving courts the authority to impose moral order on a morally unruly universe.[205] Both Perry and Richards apply their system of moral constitutionality in a sane, inclusive, and humane manner. But any such system is potentially exclusionary and oppressive. Put simply, there is no guarantee that a group of judges given the authority to inject moral value into the Constitution will pick the correct moral value. It is far safer—and more in keeping with the democratic premises of our Constitution—to deny that the constitutional framework incorporates any collectively determined moral values whatsoever. If the motivating force of democracy is popular consent, and popular consent depends on an autonomous exercise of individual moral judgment, then collective morality of any sort—whether legislatively or judicially enforced—is incompatible with democratic government. Individual morality will flourish only when collective morality is kept carefully in check.[206]

For similar reasons, courts cannot justify circumventing the pitfalls of a morality-based constitutional jurisprudence by positing a set of political guidelines derived from a Rawlsian exercise in original principles. John Rawls suggests that there are principles of justice with which every rational person would agree in an abstract discussion that takes place without regard to that

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203. *See* DAVID A.J. RICHARDS, THE MORAL CRITICISM OF LAW (1977).

204. Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 592 (1985). For a full account of Professor Perry's theory, see MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988).

205. *See infra* part IV.

206. As a basis for government action, morality shares many characteristics with religion, and like religion, is basically incompatible with democratic government. *See infra* notes 250-58 and accompanying text.

person's actual station in society.[207] However, both the natural rights and social contract traditions on which Rawls draws are riddled with disputes over the meanings and implications of the theories. Implementing such a system at the Supreme Court level to identify countermajoritarian constitutional rights would require an assertion of affirmative values that judges could justify only in the subjective fashion parodied by John Hart Ely: "We like Rawls, you like Nozick. We win 6-3. Statute invalidated."[208]

All these efforts to identify affirmative constitutional values confront the difficult fact that one set of values can easily be offset by another. Each theorist is vulnerable to the criticism that "[i]f the greatest minds of our culture have not succeeded in devising a moral system to which all intellectually honest persons must subscribe, it seems doubtful, to say the least, that some law professor will make the breakthrough any time soon."[209] The problem is that all subjectively identified constitutional values are contestable. It is preferable to avoid this problem by abandoning the effort to read affirmative values into the Constitution and rely instead on the Constitution's negative implications. In other words, instead of attempting to identify the specific components of justice embodied in the Constitution that are protected from majoritarian assault, it is preferable to start from the opposite conclusion that the Constitution does not embody *any* theory of justice beyond the proposition that succeeding democratic majorities must be given the opportunity to decide such matters for themselves. This provides a much stronger basis for protecting minority rights from democratic majorities, because democratic majorities are being required to do nothing more than preserve the system of entitlements that they themselves cite as a justification for the exercise of political power. The present (presumptively temporary) democratic majority is permitted to do anything it wants except to act in a way that denies the political opposition the ability to take control in the future. Fundamental rights theorists encounter difficulty because they assert that minority rights must be protected *in spite of* democracy. In contrast, this Article contends that the proposed countermajoritarian losers' principles are required *because of* democracy.[210]

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207. *See* JOHN RAWLS, A THEORY OF JUSTICE 11-12 (1971).

208. ELY, *supra* note 124, at 58.

209. BORK, *supra* note 62, at 255.

210. In this superficial respect, the theory proposed in this Article recalls John Hart Ely's insistence that judicial review be informed by "participation-oriented, representative-reinforcing" values. ELY, *supra* note 124, at 87. Unlike Ely, however, who argues that the Constitution does not embody a wide range of substantive limits on democratic lawmakers, this Article argues that the very need to guarantee representation of future majorities requires the imposition of substantive constitutional limits on the political actions of current majorities. Ely would have the Court focus "not simply [on] the legislative product here, but [on] the process that generated it." *Id.* at 157. Ely would permit judicial intervention if the legislative process is characterized by systematic undervaluation of a minority's interests. *Id.* The theory proposed in this Article goes much further than that propounded by Ely, by recognizing that some legislative products based on the majority's moral values are capable of skewing the representative process just as much as an overt act politically harming a discrete and insular minority. This Article is also perhaps more cynical than Ely about the efficacy of "guaranteeing 'virtual representation' by tying the interests of those without political power to the interests of those with it," in the context of legislative battles over moral legislation. *Id.* at 83. Where the subject of legislative dispute concerns

## IV. MORAL RELATIVISM AS A CONSTITUTIONAL COMMAND

If the alternative conception of democracy sketched out in the previous section is correct, then Judge Bork was wrong in *Dronenburg v. Zech* about the constitutional status of moral regulation.[211] Contrary to Judge Bork's comment in *Dronenburg*, moral relativism *is* a constitutional command. This conclusion follows directly from the three losers' principles outlined above. The first losers' principle requires the government to refrain from regulating morality because the presumption of political impermanence implies that sooner or later each prevailing moral scheme will evolve into a distinctly new form, or will be replaced by an entirely new set of values. The second losers' principle requires that *all* collective decisions be viewed skeptically, including collective decisions about morality. The third losers' principle ensures that the government may not manufacture its own popular consent by dictating values (including attitudes toward the majority's moral beliefs) to individual citizens. As will be explained below, there is no way to guarantee the individual the political autonomy necessary to a democracy without also guaranteeing the individual moral autonomy from government control.

Although the proposed principles seem to require the government to adopt a stance of moral relativism, this conclusion is probably counterintuitive to most readers of this Article, and is directly contrary to the judicial opinions discussed in Part I. Nevertheless, because a true democracy—that is, a political system based on popular consent—demands that the government comply with the three losers' principles, a true democracy must avoid adopting a particular moral code and enforcing that code through law on all of the society's citizens. Because this Author would agree that the United States Constitution is an attempt to provide a structure for democratic government, it is logical to read the Constitution's substantive provisions in this light. Thus, to the extent that the Court has interpreted the Constitution in an undemocratic manner, the cases discussed in Part I were wrongly decided.

This Part will attempt to substantiate this claim. Part IV.A explains why political freedom is impossible to achieve without ensuring each citizen complete moral autonomy from the government. Part IV.B will draw analogies between the rationale for restricting the government's ability to impose moral orthodoxy and existing rules prohibiting the government from establishing religion. The next Part will draw on the Establishment Clause cases in proposing a relatively simple mechanism for applying the constitutional command of moral relativism.

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irreconcilable and absolute values, there is little hope of moral outsiders being protected adequately by moral insiders. In these situations, the courts must step in to preserve the process, even though that means putting substantive limits on the results the process may produce.

211. "Relativism in these matters [*i.e.*, homosexuality] may or may not be an arguable moral stance . . . but moral relativism is hardly a constitutional command . . . ." Dronenburg v. Zech, 746 F.2d 1579, 1583 (D.C. Cir.) (statement of Bork, J.), *denying reh'g en banc to* 741 F.2d 1388 (D.C. Cir. 1984).

### *A. The Political Importance of Moral Autonomy*

It is logically impossible to propose a democratic form of government without also requiring that the citizens of that government retain a significant measure of political autonomy. A government that forces its citizens to vote only for the existing rulers in every election cannot be considered a democracy under even the weakest definition of that term. This Article argues that the same can be said about a government that is permitted to regulate less overtly political aspects of its citizens' characters. This is the issue: If a government loses its status as a democracy when it commands a citizen to support a particular candidate in an election, does that same government also abandon democracy when it attempts to dictate, through law, matters such as sexual proclivity and behavior, personal appearance, social behavior and associations, and attitudes about matters that do not pertain directly to the merits of particular political candidacies or issues?

This Part will argue that a democratic government should be prohibited from interfering with its citizens' moral autonomy because there is no coherent way of distinguishing between "nonpolitical" factors that determine a person's moral character and the "political" factors that determine a person's character as a voter and a citizen of a democracy. This Part will also argue that moral regulation is inconsistent with widely accepted general principles of constitutional law developed in this century. It is inconsistent because such legislation involves the government regulating orthodoxy for its own sake, without any proof that "immoral" behavior creates direct harms of a sort that would justify collective interference with the moral independence guaranteed to every democratic citizen. The last section of this Part sets forth the argument that a political majority's adoption of a uniform moral scheme threatens democratic government in much the same way as the adoption of a state religion. This logical linkage between moral regulation and the establishment of religion leads to the next Part's discussion of a proposed constitutional standard for limiting the regulation of morality.

#### 1. The Political/Nonpolitical Distinction

As noted above, even the narrowest definition of democracy must prohibit the government from dictating the votes of its citizens. A citizen's vote is the key to the democratic process by which individuals give their consent to their governors.[212] Likewise, activities closely associated with the vote, such as political debate, informal verbal discussions of political issues, and participation in a political party or movement, must be protected from governmental

212. The vote is used in this example only because it is the most common form of communicating the citizen's views in a democracy. A democracy may also use more direct forms of enlisting and recording citizen support, such as direct citizen participation in a New England-style town meeting. The point about the relationship between the citizens and the government would be the same under any alternative mechanism of citizen participation: If the government dictates what the citizen communicates to the government, the government has abandoned democracy.

coercion to the same extent as the vote itself. These related activities are necessary if the vote is to be a meaningful indicator of the citizen's views.

All democratic systems that incorporate some form of institutional protection against certain aspects of majority rule must at least extend that protection to activities such as voting and nonviolent political debate. Virtually all modern constitutional theorists recognize that the American Constitution's version of democracy is based on at least this limited range of countermajoritarian protections.[213] Theorists who refuse to extend the Constitution's countermajoritarian protection beyond this narrow range must therefore find some way to distinguish the relatively few activities that receive countermajoritarian protection under their system from the much larger category of activities that are left unprotected. Thus, supporters of moral regulation necessarily must rely on a distinction between political attitudes and behaviors (which the government may not regulate) and nonpolitical attitudes and behaviors (which the government may regulate).[214] This Article contends that political activities are practically and logically indistinguishable from nonpolitical activities. If this is so, then governmental regulation of "immoral," but not overtly political, behavior is invalid to the same extent, and for the same reasons, as the regulation of legitimate political action opposing the present political majority.

The growth of government in the modern era creates insurmountable practical problems in attempting to distinguish political activities from nonpolitical activities. As government regulation touches virtually all types of human behavior, it becomes increasingly difficult to argue that any activity is beyond the reach of political action. Virtually any modern definition of the term "political" therefore will incorporate most forms of moral regulation. For example, an activity can be described as "political" because it is a matter that is frequently the subject of public debate, or because it is something about which much of the public is curious or concerned, or because the government has acted on the subject by prohibiting, regulating, or encouraging the activity. Any of these characterizations draw into the "political" category virtually every aspect of the modern citizen's private and public life. If government action on a subject or public interest in that subject are the

213. Robert Bork has posited one of the most limited conceptions of countermajoritarian constitutional protection. Yet, even he extends protection to political expression and decision-making due to "the importance of [such speech] to democratic organization." Bork, *supra* note 21, at 20.

214. The regulation of some political behavior—such as taking part in a violent revolution—will be permitted in every democratic scheme. The logic of such regulation is that actual revolution may be prohibited because it intrudes into the political freedom of other citizens in society by denying them the power they have won through the proper democratic political processes. Nevertheless, under our existing constitutional regime governing political speech, the expression of attitudes favoring violent political revolution may not be proscribed unless the expression is accompanied by an immediate threat that the illegal action will occur. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-28 (1982); Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969). In contrast, as noted in Part I, the Court's current constitutional jurisprudence frequently permits the government to regulate moral behavior even when such behavior does not immediately infringe upon the moral freedom of others in society. This Article does not claim that moral dissent must be protected absolutely; it contends only that moral dissenters should be protected from regulation to the same extent as political dissenters.

primary factors considered in determining an activity's "political" nature, the line between political and nonpolitical activities is too indeterminate to serve as a consistent limitation on the use of government power.

This very broad definition of "political" is logically necessary to avoid the bizarre conclusion that the deeply political actors who run the government are acting nonpolitically when they regulate certain individual activities. The practical problems inherent in any attempt to carve out an area of "nonpolitical" activity that is freely subject to government regulation produce an unavoidable logical conundrum: There will never be a category of unprotected "nonpolitical" activities subject to government regulation because the government regulation itself converts the targeted activity from "nonpolitical" to "political." This logical conundrum, in turn, undercuts efforts to limit the Constitution's countermajoritarian protections to a narrowly defined category of overtly "political" behavior. If democracy means that the government may not proscribe certain individual behavior simply because the political majority does not agree with the values motivating that behavior, then the government has no authority to regulate morally deviant activities that do not interfere directly with the liberty of other individuals in society.[215]

The practical and logical problems arising out of the distinction between "political" and "nonpolitical" activities correspond roughly to similar problems in the First Amendment debate over whether to use different constitutional standards to assess government regulations directed at "high-value" and "low-value" speech.[216] As discussed in Part II, the Supreme Court has been of two minds on this question. On one hand, the Court has refused repeatedly to permit the government to limit First Amendment protection of either staidly serious political speech,[217] or political speech generally.[218] If the Court's statements in these cases are taken at face value, they seem to indicate that the Constitution protects the expression of moral dissenters just as highly as it does traditional political dissent. Also, as Robert

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215. The phrase "interfere directly with the liberty of other individuals in society" is analogous to the current standard regarding the regulation of political expression, which may be regulated only if it is likely to incite or produce "imminent lawless action." *Brandenburg*, 395 U.S. at 447.

216. For a general overview of this debate from two supporters of the categorization approach to First Amendment law, see Lawrence Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989), and Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

217. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 54 (1988) (unanimously overturning a jury verdict against *Hustler* magazine for publishing a scurrilous parody of Jerry Falwell, noting that the First Amendment protects political caricature even though "[t]he appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided."); Cohen v. California, 403 U.S. 15, 22-23, 25 (1971) (rejecting the government's contention that the "[s]tates, acting as guardians of public morality, may properly remove this offensive word ['fuck'] from the public vocabulary," and noting that "we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

218. *See* Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 689 (1959) (noting that the First Amendment "protects advocacy of the opinion that adultery may sometimes be proper, no less than socialism or the single tax"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the First Amendment prohibits the government from establishing any orthodoxy in "politics, nationalism, religion, or other matters of opinion").

Post has pointed out, the underlying theme of the Court's decisions protecting unsavory or outrageous speech is that democracy requires the government to adopt a relativistic attitude toward ultimate values and the competing communities those values represent.[219]

In contrast to the cases protecting dissenting expression, which seem to deny the government the authority to define the value of speech based on the majority's moral views, the Court abandons its relativist approach when it permits the government to define and regulate "low-value" speech such as obscenity. Under the modern standard, the most sexually explicit speech is constitutionally protected only if it has "serious" literary, artistic, political, or scientific value.[220] Of course, what counts as "serious" largely depends on the mainstream views of the literary, artistic, political, or scientific establishment.[221] Thus, the work of Robert Mapplethorpe or 2 Live Crew will be protected only if established experts can shoehorn the work into existing, widely-recognized categories of social value.[222] Avant garde or contrarian expression must be domesticated in order to receive constitutional protection.[223]

This process by which speech must be domesticated or certified by "experts" before being protected, exists in direct contrast to the Court's own overtures to the principle that society may not establish a governing orthodoxy of opinion concerning any subject. It also belies any argument that moral regulation is conceptually distinct from political regulation. The time, effort, and energy expended by government agencies to censor Mapplethorpe's

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219. Specifically, Post argues that

> the constitutional concept of public discourse forbids the state from enforcing such a standard [outlawing outrageous speech] . . . because to do so would privilege a specific community and prejudice the ability of individuals to persuade others of the need to change it. Outrageous speech calls community identity into question . . . and thus it has unique power to focus attention, dislocate old assumptions, and shock its audience into the recognition of unfamiliar forms of life.
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> . . . [O]n this account, an "outrageousness" standard is unacceptable not because it [is subjective,] but rather because it would enable a single community to use the authority of the state to confine speech within its own notions of propriety. . . . [T]he concept of public discourse requires the state to remain neutral in the "marketplace of communities."

Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 632 (1990) (footnotes omitted).

220. Miller v. California, 413 U.S. 15, 24 (1973).

221. In *Pope v. Illinois*, the Court recognized that the judgment of "serious" value should be based on national, rather than local, criteria. 481 U.S. 497, 500-01 (1987). The Court, however, also noted that the social valuation would be made by a "reasonable person," *id.*, thus reaffirming that a particular work could be banned if it were found to be so outside the mainstream that the "reasonable" person would not find it valuable.

222. *See* Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir.) (overturning the district court's determination that 2 Live Crew's music is obscene, and noting that expert testimony substantiated the group's claim that its music had serious artistic value), *cert. denied*, 113 S. Ct. 659 (1992); Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, at A1 (reporting that a museum was acquitted of obscenity charges for mounting a Mapplethorpe retrospective after the jury heard five days of testimony "from some of the nation's leading museum directors"); Isabel Wilkerson, *Obscenity Jurors Were Pulled 2 Ways*, N.Y. TIMES, Oct. 10, 1990, at A12 (discussing the jurors' deference to expert witnesses).

223. For a more detailed version of this argument, see Gey, *supra* note 131, at 1626-33.

photographs and 2 Live Crew's music indicates that the moral gestures incorporated into deviant expression are viewed by the government itself as matters of legitimate political concern. This exercise of governmental authority requires an equally political response by the targets of potential governmental regulation. In order to express themselves in their own preferred way, moral dissenters must give obeisance to political authority, either by turning their attention away from their main concerns and toward direct, traditional political action, or by courting experts who themselves have a significant measure of influence with the government. If moral dissenters have no way to escape an involvement in politics in order to do what they want, it is illogical to claim that the government has the authority to regulate the dissenter's behavior because the government tendentiously characterizes that behavior as nonpolitical.

### 2. The Prevention of Harm and the Regulation of Morality

Perhaps the incoherence inherent in the political/nonpolitical distinction explains why the Court and sympathetic commentators frequently justify the distinction between highly-protected/high-value and less-protected/low-value speech by appealing to the unarticulated perceptions and values of the common man and woman. This is Justice Stevens' version of the common man/common woman argument:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[224]

Frederick Schauer, a prominent academic proponent of the hierarchy-of-speech approach to the First Amendment, argues along similar lines that "most people do believe that there are 'commonsense differences' between different categories of utterances."[225]

But the fact that "most people believe" something does not automatically entitle them to enforce that belief on other members of society who disagree with the majority's judgment. If the Court is serious about its professed desire to protect unorthodoxy, the political majority should not have the right to sanction any speech simply because the majority finds that speech worthless, ignorant, foolish, or just plain wrong. The high-value/low-value speech rationale for regulating "immoral" expression has the same fatal flaw as the political/nonpolitical distinction. Both rationales contradict the Court's professed concern with protecting moral unorthodoxy because they give the majority the authority to suppress the expression of moral dissent by the simple expedient of asserting that the disfavored moral expression does not fit the majority's own definition of "serious," socially significant expression.

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224. Young v. American Mini Theaters, 427 U.S. 50, 70 (1976).
225. Schauer, *supra* note 216, at 288.

Even if this Article is correct regarding the incoherence of the political/nonpolitical and high-value/low-value dichotomies that have been used to justify moral regulation of unorthodox expression, what does this conclusion entail outside the realm of expression protected by the First Amendment? At first glance, it does not necessarily follow that the government should be required to adopt a stance of moral relativism outside the realm of expression covered by the First Amendment. Verbal speech is obviously different from physical behavior in its capacity to impinge upon the freedoms of others in society. However, many government efforts to regulate morality do not focus on those potentially harmful aspects of behavior that distinguish behavior from verbal speech. Moral regulation is often based solely on the majority's decision to punish immorality for its own sake, without regard to the consequences that flow from the "immoral" behavior. When this is the case, the same arguments that undermine the political/nonpolitical and high-value/low-value rationales for regulating expression also undermine the legitimacy of the political majority's attempt to regulate morally noncon-forming behavior.

Obviously, in cases such as *Bowers*, the Court has explicitly rejected this approach, but in these decisions the Court contradicts the collective moral relativism that is the defining characteristic of the speech, religion, and constitutional privacy cases. The Court usually avoids reconciling these contradictory positions by relying on a rigid distinction between speech and behavior. An early free exercise of religion opinion contains a representative example of this distinction: "[T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[226] In some respects, the distinction between speech and behavior serves a libertarian function. The speech/behavior distinction plays a crucial role in protecting radical speech, political hyperbole, and confrontational art. The range of intellectual freedom protected by the First Amendment would be considerably smaller if First Amendment jurisprudence did not include the principle that individuals have a constitutional right to think about, discuss, and even advocate many activities in which they may not engage directly.[227] In the absence of this principle, the government would be able to prohibit many types of expression by making the always-plausible contention that discussing harmful activities makes it more likely that these activities will occur.[228]

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226. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

227. "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." Noto v. United States, 367 U.S. 290, 297-98 (1961).

228. The classic articulation of this argument is Justice Sanford's statement in *Gitlow v. New York*:

> The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

268 U.S. 652, 669 (1925).

Although the distinction between speech and behavior is crucial in protecting expression concerning potentially harmful activities such as revolution or criminal behavior, the speech/behavior distinction is unhelpful in the area of moral regulation. The distinction is unhelpful because it does not explain the contrast between the Court's vigorous protection of moral dissidence that is expressed in an abstract verbal form, and the Court's passive acceptance of almost any government regulation of moral dissidence that is expressed through discrete and unobtrusive personal behavior. In each instance—where someone expresses immoral ideas or behaves immorally—no one is being harmed except the speaker/actor, and even then, the "harm" is only an abstract (and dubious) "moral harm." The constitutional jurisprudence is inconsistent because in the context of regulations targeting expression, the Court strictly prohibits the imposition of moral orthodoxy, but in the context of regulations targeting behavior, the Court routinely accepts the imposition of moral orthodoxy as a permissible governmental objective.

What the Court has not (and arguably, cannot) explain is why moral unorthodoxy, unaccompanied by activity directly harmful to other members of society, is subject to the highest constitutional protection in some contexts, and in other contexts is completely devoid of constitutional protection. The Court permits the regulation of unorthodox political speech only if that speech constitutes a direct and immediate harm to the interests of other members of society.[229] If there is no threat of direct and immediate harm, the government may not regulate the expression. As noted previously, this rule is not limited to the context of political speech; the same rule applies with regard to the regulation of expression depicting or advocating immorality.[230]

When the Court speaks of "harm" in the speech cases, it uses that term very narrowly. The Court does not permit the political majority to regulate expression simply because the majority fears that others in society will adopt, and act upon, a speaker's dangerous ideas. The modern Court has firmly rejected Justice Sanford's notion that the government may suppress what it considers "dangerous" speech in order to "suppress the threatened danger in its incipiency."[231] Today, impassioned speech advocating illegal action must be followed immediately by the prohibited acts before the state can step in to sanction the speaker.[232] Modern free speech jurisprudence is inhospitable to arguments that some ideas can be deemed intrinsically harmful because they represent antisocial views.[233] So long as others in society retain the ability

229. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-28 (1982); Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974); Hess v. Indiana, 414 U.S. 105, 107-08 (1973); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

230. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Jenkins v. Georgia, 418 U.S. 153, 159 (1974); Stanley v. Georgia, 394 U.S. 557, 565-66 (1969); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 688-89 (1959).

231. *Gitlow*, 268 U.S. at 669.

232. *See Claiborne Hardware*, 458 U.S. at 927-28; *Brandenburg*, 395 U.S. at 447.

233. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2549 (1992); United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 409, 414 (1989); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327-28 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

to oppose bad ideas with good, which is another way of saying that others in society retain the political power to agitate for their own points of view, then the constitutional requisite of direct and immediate harm has not been met.

If the term "harm" is viewed in this very limited way, the regulation of immoral behavior seems indefensible.[234] Most forms of immoral behavior pose no more of a threat to other members of society than verbal advocacy of that behavior. Michael Hardwick[235] did nothing to interfere with his fellow citizens' lives. He was threatened with criminal sanctions not because his behavior was harmful, but because his behavior was unorthodox. Society regulates "immoral" behavior such as homosexuality not because such behavior directly or immediately harms anyone in society, but rather because society finds that behavior morally repugnant.

There should be no difference in the Court's treatment of government actions targeting "immoral" behavior and "immoral" expression because in both instances, the key to the constitutional standard should be the government's objective in passing the statute. A government obviously has the authority to prevent one person from engaging in behavior that interferes with the moral and political freedom of others. When the government acts in this manner, it is simply preserving the conditions of individual autonomy necessary to sustain the democratic political system. But absent some evidence that one individual's "immoral" behavior is causing direct harm to the political freedom of others, the government's only conceivable rationale for regulating behavior on moral grounds is to impose a form of moral orthodoxy, which the Court has repeatedly denounced as constitutionally impermissible,

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234. The precise meaning of the term "harm" is subject to some dispute, and it is certainly possible to debate where to draw the line in a particular factual circumstance between "harm" and "harmlessness." *See, e.g.*, JOEL FEINBERG, THE MORAL LIMITS TO THE CRIMINAL LAW: HARM TO OTHERS (1984); JOSEPH RAZ, THE MORALITY OF FREEDOM 412-24 (1986). Indeed, some commentators have taken the notion of "harm" to such an extreme that it becomes indistinguishable from moralism. *See* Gey, *supra* note 131, at 1598-1612. But these debates over the precise meaning of "harm" are largely irrelevant to the discussion here. First, as discussed in the text, the Supreme Court has already provided a very narrow definition of "harm" in the political speech cases. Thus, it is appropriate to ask why this same definition of "harm" should not be applied to all moral regulations. Second, in the most notorious moral regulation cases, such as *Bowers v. Hardwick*, the "immoral" individual's actions are far removed from any direct effect on anyone not voluntarily participating in the socially disfavored activity. In these cases, there is only a very weak pretense that the activity is being regulated to prevent a "harm"; the real issue is whether the government may regulate on the basis of morality alone. H.L.A. Hart explained many years ago why these cases do not implicate the "harm" principle:

> [A] right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a value. For the expression of the utilitarian principle that coercion may be used to protect men from harm, so as to include their protection from this form of distress, cannot stop there. If distress incident to the belief that others are doing wrong is harm, so also is the distress incident to the belief that others are doing what you do not want them to do. To punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle is liberty to do those things to which no one seriously objects. Such liberty plainly is quite nugatory.

HART, LAW, LIBERTY, AND MORALITY, *supra* note 67, at 46-47.

235. *See supra* notes 5-12 and accompanying text.

and which violates all three central requirements of a democratic society discussed in the previous Part.[236]

There is no reason to protect dissident speech other than to protect the dissident. Thus, if the Constitution "protects advocacy that adultery may sometimes be proper,"[237] the same Constitution should protect two consenting adults who engage in adultery behind the closed doors of their home,[238] and should even more rigorously protect two consenting adults whose actions do nothing more than convey to a morally hypersensitive majority the perception that something tawdry is afoot.[239] If the Constitution prohibits the state from dictating what morally scandalous materials a person may view or read in the privacy of his or her home,[240] it is unreasonable to permit the government to dictate the identity of that same person's sexual partners, and equally unreasonable to permit the state to regulate that person's sexual practices to make them meet the proclivities of the sexual majority.[241] In each case, the person subject to regulation is simply asserting "the right to satisfy his intellectual and moral needs in the privacy of his own home."[242]

For the same reason, the degree of constitutional protection should not be based on whether the behavior is perceived as valuable by most people in society. If the Constitution protects unorthodoxy, as the Court routinely contends, then there is no place for distinctions based on the social importance the majority accords to the behavior in question. If the Constitution protects a high school student's right to wear an armband communicating a message of political dissent,[243] the document should also protect the right of high school students to wear unusual hair or clothing styles, even though high school administrators perceive the students' dress as trivial, sloppy, antisocial, or willfully antagonistic.[244] Likewise, social dancing should be protected, not because it contains "some kernel of expression,"[245] but because no one in a democratic government has the authority to make subjective judgments about the value of the dancing to the participants.

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236. *See supra* part III.A.

237. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 689 (1959).

238. *See* Hollenbaugh v. Carnegie Free Library, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978) (upholding the firing of a librarian and a library custodian after members of the community complained about them living together in a state of "open adultery").

239. *See* Swank v. Smart, 898 F.2d 1247 (7th Cir.), *cert. denied*, 498 U.S. 853 (1990).

240. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969).

241. The obvious reference is to Bowers v. Hardwick, 478 U.S. 186 (1986). It is worth noting that the *Bowers* rule permitting moral regulation of homosexuality has not fared well in the state courts. Several state courts have overturned *Bowers*-type state statutes on state constitutional principles of individual liberty very similar to those advocated in this Article. *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980); Commonwealth v. Bonadio 415 A.2d 47 (Pa. 1980); Texas v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992).

242. *Stanley*, 394 U.S. at 565.

243. *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

244. Of course, most courts have refused to afford students this right. *See, e.g.*, New Rider v. Board of Educ., 414 U.S. 1097 (Douglas, J., dissenting), *denying cert. to* 480 F.2d 693 (1973); Karr v. Schmidt, 460 F.2d 609 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972). *But see* Holsapple v. Woods, 500 F.2d 49 (7th Cir.) (per curiam) (holding unconstitutional a high school dress code which provided for dismissal of male students for wearing excessively long hair), *cert. denied*, 419 U.S. 901 (1974).

245. Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

Over fifty years ago, Justice Jackson insisted that "[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."[246] The Court continues to use this cultural relativism as its lodestar in the cases cited in Part II. But if the Supreme Court were consistently to pursue this pluralistic vision of constitutional democracy, then "nonpolitical" values would have to be protected just as highly as "political" values, "low-value" ideas would have to be protected to the same extent as "high-value" ideas, and harmless, but unorthodox behavior would have to be put on the same constitutional plane as harmless, but unorthodox expression. If the Constitution protects individual unorthodoxy, eccentricity, and abnormality, then there is no place in constitutional jurisprudence for what Judge Richard Posner once called the "residual bin" of "harmless liberties."[247] The very fact that the liberties in this category are harmless should insulate them from government control. The fact that the political majority believes that these "harmless liberties" are unimportant is irrelevant, except insofar as it demonstrates that judicially enforced constitutional protection of "harmless liberties" is crucial to preserve the individual autonomy that is an indispensable element of a healthy democracy.

### *B. Religious Orthodoxy, Moral Orthodoxy, and the Constitution*

As the discussion in Part I indicates, the Court has not followed the relativist logic that appears in many constitutional opinions to the conclusion this Article proposes. In at least one subset of constitutional law, however, the Court *has* reached conclusions similar to those proposed here. This Article's proposal to provide constitutional protection to immoral behavior is quite similar to the approach the Court has already taken in its Establishment Clause opinions involving majoritarian efforts to impose religious orthodoxy on a religiously diverse populace.

As noted above,[248] collective religious relativism has been the theoretical underpinning of the Court's Establishment Clause jurisprudence from the outset. The Court summarized the meaning of the Establishment Clause almost fifty years ago as follows:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.[249]

246. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943).
247. Swank v. Smart, 898 F.2d 1247, 1252 (7th Cir.), *cert. denied*, 498 U.S. 853 (1990).
248. *See supra* part II.B.
249. Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

There is little philosophical discussion of religious relativism in the Court's cases. Debate over philosophical principles supporting the constitutional separation of church and state usually revolves around disputes over the history of the First Amendment and the intent of the Framers.[250] Nevertheless, a single philosophical theme characterizes the Court's treatment of Establishment Clause issues over the years. This theme suggests that the Court's implicit rationale for prohibiting the government from imposing a particular religious viewpoint on everyone in society is analogous to the rationale cited earlier to justify prohibiting the government from regulating morality.[251]

The implicit theme that has characterized the Court's treatment of religion under the Establishment Clause is this: The government has no authority to impose religious orthodoxy upon the entire society because religion is peculiarly incompatible with the structure and requirements of a functioning democracy. Thus, if the government were to adopt a particular state religion, this action would undermine certain elements of a democratic culture that the Constitution protects. The elements of democracy threatened by a state religion are roughly the same as the three losers' principles outlined in the previous section of this Article: the principles of political impermanence, radical skepticism, and individual autonomy.[252]

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250. In *Everson*, which was the Court's first systematic treatment of the Establishment Clause in the modern era, both the majority opinion and Justice Rutledge's dissent contain long discussions of Establishment Clause history and very little independent theorizing about the meaning and function of religion in the American constitutional structure. *See id.* at 8-16; *id.* at 33-44 (Rutledge, J., dissenting). Most of the philosophical arguments used by the Court in *Everson* to support its conclusions about the separation of church and state appear in James Madison's *Memorial and Remonstrance Against Religious Assessments*, which is attached as an appendix to the *Everson* opinion. *See id.* at 63-74.

More recent opinions from Justices on both ends of the Establishment Clause continuum continue to focus on historical debates rather than philosophical investigations of the relationship between democracy and religion. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The true meaning of the Establishment Clause can only be seen in its history."); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 243 (1963) (Brennan, J., concurring) ("The exposition by this Court of the religious guarantees of the First Amendment has consistently reflected and reaffirmed the concerns which impelled the Framers to write those guarantees into the Constitution.").

251. The contention here is not that the Court has consistently followed this rationale, nor even that the Court would endorse the rationale if it were offered explicitly for consideration in the context of a particular case. Rather, this Article argues that the implicit rationale attributed to the Court explains much better than the Court's own stated reasons why a majority of Justices have consistently rejected the arguments of dissenting Justices and academics, who propose to adopt an Establishment Clause standard that would permit the government to favor religious over secular or agnostic approaches to life. *See* Lee v. Weisman, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting); Allegheny County v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting in part and concurring in part); *Wallace*, 472 U.S. at 91 (Rehnquist, J., dissenting); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1. Most of the Court's Establishment Clause decisions can be explained by reference to the rationale set forth in the text. The decisions that deviate from that rationale do not point toward a contrary principle. Rather, these inconsistencies indicate that the Justices, like most of us, have not completely reconciled the conflicting demands of a secular democratic constitutional scheme and a society "whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952).

252. The point in describing the theory of religion and democracy that underlies much of the Court's modern Establishment Clause cases is simply to illustrate that in one major aspect of constitutional law, the Court itself has employed a relativistic analysis similar to the one proposed in this Article. Obviously, there is more to this than can be explored here. For a more detailed examination of the

Any alliance between the government and religion violates the first two losers' principles (political impermanence and radical skepticism) by linking the political structure and its policies with the eternal, unquestionable verities of a particular faith. These negative implications of a sectarian political structure are not limited to state establishments of traditional, institutionalized religious faiths. Even the establishment of a nontraditional, noninstitutionalized religion would have the effect of imposing unconditional, immutable principles on society from outside the political structure, thereby violating the democratic requirement that the state remain open to radical policy shifts and the transfer of power.[253] God's word cannot be abandoned or altered by mere human inclination. In contrast, political policies and fundamental principles *must* be constantly challenged and periodically abandoned or radically altered if the system that produces those principles is to be described as democratic.

An alliance between church and state would also violate the third losers' principle by impinging on the individual autonomy that is an indispensable element of democratic popular consent. The Supreme Court has recognized explicitly the need to preserve individual autonomy from the collective imposition of religion through the state. According to the Court, religion "must be a private matter for the individual, the family, and the institutions of private choice."[254] More important than the subjective and individual nature of religious faith, an alliance between church and state would violate the principle of individual autonomy by politically ostracizing individuals

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theoretical relationship between democracy and religion, including a discussion of the problems created when the Court abandons its relativistic stance by permitting governmental accommodation of religion, see Gey, *supra* note 143.

253. This conclusion follows from the fact that even the most open-ended, inclusive definitions of religion define religious principles as absolutist and permanent. For example, the very broad definition of "religious belief" used by the Supreme Court in the conscientious objector cases included within that term beliefs "which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." United States v. Seeger, 380 U.S. 163, 176 (1965). Likewise, the theologian Paul Tillich, whose work contributed to the Supreme Court's broad definition of religion, referred to religiou as an "ultimate concern, of what you take seriously without reservation." PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 63 (1972).

254. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971). In one respect, this conclusion follows from the special nature of religion. In the modern era, religion is founded on faith, a distinctively individualistic phenomenon. *See* Gey, *supra* note 143, at 168-69. Individuals can learn about the objects of religious faith from collective entities such as the church, and they can be guided by the faith of others; but religious faith is something that can be experienced only by individuals, and never by collective agents such as government. The highly individualized nature of religious faith explains the Court's imposition of an extremely broad definition of religion in the conscientious objector cases. *See* Welsh v. United States, 398 U.S. 333, 336, 339 (1970) (interpreting the statutory language "an individual's belief in a relation to a Supreme Being" to mean "'[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the [draft] exemption.'") (quoting *Seeger*, 380 U.S. at 176). It also explains the Court's repeated insistence in Free Exercise Clause cases that government may not delve into the merits of an individual's religion once the government has determined that the person holds his or her "religious" beliefs sincerely. *See* Frazee v. Illinois, 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exereise Clause, one must be responding to the commands of a particular religious organization."); Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner correctly perceived the commands of [his] . . . faith. Courts are not arbiters of scriptural interpretation.").

within society for no other reason than that they hold different values than the majority. The threat to the political structure posed by institutionalized political ostracism of religious dissenters has long been one of the Court's primary concerns in its Establishment Clause decisions. The Court has emphasized that the Establishment Clause protects individual dissenters not only for their own sake, but also because such protection is necessary to make effective the democratic political structure erected by the Constitution.[255]

The broader structural importance of guaranteeing individual political autonomy to religious dissenters has also been emphasized recently by several current Justices who take a generally narrow view toward constitutional limitations on government authority.[256] For present purposes, the relevance of these opinions is that in the Establishment Clause cases, even some of the Court's more conservative members apply a mandate of collective religious relativism to counteract claims that in a democracy, the majority should have the authority to define the society's religious mores as it sees fit. As Justice Kennedy recently noted, "While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance [in favor of the majority] urged upon us."[257]

This Part has briefly pursued the similarities between the establishment of religion and moral regulation for two reasons. First, the constitutional concerns regarding religious establishments are also applicable to moral regulation. The democratic principles embodied in the First Amendment

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255. As Justice Black stated:

> [T]he purposes underlying the Establishment Clause go much further than [protecting religious minorities from religious coercion]. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.

Engel v. Vitale, 370 U.S. 421, 431 (1962).

256. For example, Justice O'Connor has argued that the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under the approach because it "sends a message to nonadherents that they are outsiders, not full members of the political cemmunity, and an accompanying message to adherents that they are insiders, favored members of the political community."

Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

In *Lee v. Weisman*, Justice Kennedy also linked the Establishment Clause to the need to protect personal autonomy in order to preserve democracy. "One timeless lesson [of the First Amendment] is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." 112 S. Ct. 2649, 2658 (1992).

Likewise, in the same case, Justice Souter expressed the view that the Establishment Clause is intended to ensure "that religious belief is irrelevant to every citizen's standing in the political community," and concurred generally with James Madison's conclusion that "'religion and Govt. will both exist in greater purity, the less they are mixed together.'" *Id.* at 2676 (Souter, J., concurring) (quoting a letter from James Madison to Edward Livingston (July 10, 1822), *in* 5 THE FOUNDERS' CONSTITUTION 105, 106 (Philip B. Kurland & Ralph Lerner eds., 1987)).

257. *Lee*, 112 S. Ct. at 2660.

require a religious majority to refrain from imposing on the rest of society beliefs that the majority is absolutely convinced are correct and must be obeyed.[258] The rationale for this relativism mandate is that democracy cannot survive the stultifying political effects that inevitably flow from the actions of an unrestrained majority driven by absolute certainty concerning matters of religious value. My argument is that the same interests in preserving a politically fluid democracy should be applied to examples of moral regulation.

The second reason to emphasize the constitutional religion cases is because the Establishment Clause jurisprudence provides the outlines of a mechanism for enforcing the proposed mandate that the state maintain a stance of moral relativism. This is the subject of the final Part of this Article.

## V. A MODEST PROPOSAL TO ENFORCE THE CONSTITUTIONAL MANDATE OF MORAL RELATIVISM

Even if this Article is correct about the incompatibility of democracy and moral regulation, a major practical obstacle remains: How would a constitutional mandate of moral relativism be enforced? Many readers who accept the argument that the Supreme Court's constitutional jurisprudence regarding moral regulation is contradictory, may nevertheless be ready to accept this inconsistency on the pragmatic ground that no reasonable alternatives are available. Justice White presumably expressed a common fear when he noted in *Bowers* that if the courts were given a broad constitutional mandate to eradicate all moral regulation "the courts [would] be very busy indeed."[259] This Part will respond to these fears, drawing on the Court's existing Establishment Clause jurisprudence to propose a modest standard that could be used by courts to overturn government actions enforcing morality, while leaving the government substantial leeway to pursue objectives consistent with the losers' principles that characterize a proper democracy.

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258. Conversely, interpreting the Constitution to permit legal regulation of morality may have broader implications for the principle of separation of church and state, as Lord Devlin recognized in his defense of moral regulation:

> A man who concedes that morality is necessary to society must support the use of those instruments without which morality cannot be maintained. The two instruments are those of teaching, which is doctrine, and of enforcement, which is the law. If morals could be taught simply on the basis that they are necessary to society, there would be no social need for religion; it could be left as a purely personal affair. But morality cannot be taught in that way. Loyalty is not taught in that way either. No society has yet solved the problem of how to teach morality without religion. So the law must base itself on Christian morals and to the limit of its ability enforce them, not simply because they are the morals of most of us, nor simply because they are the morals which are taught by the established Church—on these points the law recognizes the right to dissent—but for the compelling reason that without the help of Christian teaching the law will fail.

DEVLIN, *supra* note 64, at 25.

259. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

### *A. The Proposed Standard*

The similar dangers to democracy posed by religious establishments and moral regulation suggest that moral regulation should be subjected to a version of the standard the Court uses presently to regulate relations between church and state. The goal of applying such a standard to moral regulation would be the same as in the religion cases: to protect individual moral autonomy in order to preserve the conditions necessary for democratic governance. With that objective in mind, all government regulation of morality should be subjected to two requirements. First, all government actions regulating individual expression or behavior must have a primarily amoral purpose. That is, government actions may not have the primary purpose of prohibiting individuals from believing in, expressing, or acting in accordance with values contrary to those endorsed by the government, unless the individual actor creates an immediate threat of harm to other individuals. Second, all government actions must have a substantially amoral effect. In other words, government actions that restrict the moral activities of individuals must restrict those activities no more than is necessary to achieve a permissible governmental objective other than the regulation of morality.

These two requirements are related to the first two elements of the *Lemon* test, which is the current standard in Establishment Clause cases.[260] The *Lemon* test requires that legislation have a secular purpose and a primary effect that neither enhances nor inhibits religion.[261] Much of the analysis courts would apply to moral regulations under my proposed standard would resemble the analysis they already employ in the religion cases.

There are two major differences between the proposed amorality standard and the *Lemon* test. First, the amoral purpose requirement would play a much larger role in the morality cases than the secular purpose requirement plays in the religion cases. Second, the secular effect requirement of the religion standard would be weakened in its application to moral regulations, to take into account the unavoidable fact that even legislation having permissibly amoral purposes will have some effect on the moral atmosphere in society. A brief discussion of these differences, as applied to some of the cases discussed in previous Parts, will illustrate that this proposal is not as radical as it first may seem, and will also demonstrate that the proposal does not greatly increase the courts' intrusion into the decisions of the elective branches of government.

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260. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The *Lemon* test includes a third component, which prohibits excessive governmental entanglement with religion. This element is not applicable to moral regulation cases, which lack the institutional structure of organized religion.

I recoguize that *Lemon* has come under attack recently both within and outside the Supreme Court. For a discussion of these attacks, and a defense of the *Lemon* test, see Stephen G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463.

261. *Lemon*, 403 U.S. at 612-13.

### B. The Amoral Purpose Test

At first glance, a standard that depends on a judicial analysis of the legislature's purpose in passing a statute seems to conflict with the Court's usual practice in constitutional law cases. In general, the modern Court professes to disregard legislative intent in adjudicating constitutional cases. The Court has stated this unequivocally: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[262] Fortunately, this statement does not accurately reflect how the Court actually responds to government actions that are explicitly intended to violate the Constitution. In fact, the Court frequently gauges the legitimacy of governmental motives in many different types of constitutional cases.

The religion cases provide some of the purest examples of motive analysis in constitutional law because a legitimate purpose requirement is built into the relevant constitutional standard. The Court has struck down several state actions solely because they were motivated by the desire to endorse or advance the interests of religious groups.[263] The Court has indicated how serious it is about the secular purpose portion of the *Lemon* test by expressing its unwillingness to defer routinely to legislative statements of secular intent. Even if a legislature states an ostensible secular intent, "it is required that the statement of such purpose be sincere and not a sham."[264] Thus, the Court has rejected implausible legislative claims of secular motives,[265] and has delved into various sources beyond the statutory text to determine whether the legislative process was tainted by impermissible religious objectives.[266]

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262. United States v. O'Brien, 391 U.S. 367, 383 (1968).

263. *See* Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (striking down a Louisiana statute requiring schools teaching evolution also to teaeh creationism on the ground that "the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint"); Wallace v. Jaffree, 472 U.S. 38, 58 (1985) (striking down Alabama's silent prayer statute on the ground that the state "did not present evidence of *any* secular purpose") (emphasis in original); Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) (finding a state statute requiring posting of the Ten Commandments on classroom walls unconstitutional beeause "[t]he Ten Commandments are [sic] undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact"); Epperson v. Arkansas, 393 U.S. 97, 107-08 (1968) (holding an Arkansas statute banning the teaching of evolution in public schools unconstitutional because "[i]t is clear that fundamentalist sectarian conviction was and is the law's reason for existence"); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223-24 (1963) (holding unconstitutional a state requirement that public schools begin eaeh day with readings from the Bible, and rejecting the state's eontention that Bible-reading exercises had a secular educational purpose).

264. *Edwards*, 482 U.S. at 586-87; *see also Stone*, 449 U.S. at 41 (stating that although the district court found an "avowed" secular purpose for posting Ten Commandments in classroom, "[u]nder this Court's rulings . . . such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment.").

265. *See Edwards*, 482 U.S. at 586-89; *Stone*, 449 U.S. at 41; *Schempp*, 374 U.S. at 223.

266. In *Edwards* and *Wallace*, the Court investigated statements made by legislative supporters during the process leading up to the adoption of the statutes. *Edwards*, 482 U.S. at 586-96; *Wallace*, 472 U.S. at 56-57. In *Edwards*, the Court considered legislative evidence including testimony of non-legislators before legislative committees. 482 U.S. at 591-92 (discussing the testimony of Edward Boudreaux, a leading expert on creation science who had testified at the Senate hearings). In *Wallace*, the Court also considered the relationship betwecn the challenged statute and other statutes covering

These highly detailed investigations of legislative intent demonstrate the Court's resolve in the religion cases to insulate the government's political policies from the governing majority's impermissible religious objectives, even when there is no clear evidence that the religious objectives have actually had their intended effect.[267]

Although the area of religion represents the Court's most explicit acknowledgement that statutes may be unconstitutional because of the government's impermissible purposes in passing legislation or enforcing policies, it is by no means the only segment of constitutional law in which the Court has scrutinized the government's motives to determine the constitutionality of a particular action. In equal protection cases involving racial or gender discrimination, for example, proof of discriminatory intent is required to support a finding that a particular government action is unconstitutional.[268] Although discriminatory impact may be relevant to the constitutional determination in such cases, an act will be deemed unconstitutional only if the discriminatory impact establishes the existence of a discriminatory intent or purpose on the part of the government agency.[269]

A similar analysis is used in dormant Commerce Clause cases. When the Court is confronted with a state statute that discriminates against out-of-state commerce, the state must demonstrate "both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."[270] As in the equal protection and religion areas, the "legitimate purpose" requirement applied in the dormant Commerce Clause cases is sufficiently rigorous to allow the courts to look into the legislative process that produced the statute and hold the statute unconstitutional if the legislative history indicates that the state had an impermissible discriminatory intent.[271]

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similar subjects to assess whether any possible secular objectives could be accomplished by the other statutes. 472 U.S. at 58-60. In *Epperson*, the Court even looked to an antecedent statute passed by another state to determine the meaning of Arkansas' statute. 393 U.S. at 108-09. The Court also analyzed advertisements and letters to the editor from members of the public supporting the statute as evidence of the legislature's unstated rationale for passing the statute. *Id.* at 107-08 & n.16.

267. This conclusion follows from the rule that the secular effect and entanglement components of the *Lemon* test do not have to be considered by a court that has determined that the statute is based on an unconstitutional intent. *See Edwards*, 482 U.S. at 583; *Wallace*, 472 U.S. at 56.

268. *See* Washington v. Davis, 426 U.S. 229, 240 (1976) (describing the "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

269. *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977).

270. Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)). For an example of the extensive investigations into legislative processes necessary under this standard, see Atlantic Prince, Ltd. v. Jorling, 710 F. Supp. 893 (E.D.N.Y. 1989).

271. *See* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675-78 (1981) (analyzing the legislative process, including provisions of prior statutes and veto statements by the governor, and concluding that the state's purported rationale of protecting highway safety was not the actual purpose of the statute); *see also* New Energy Co. v. Limbach, 486 U.S. 269, 279 & n.3 (1988) (rejecting a health rationale for the tax credit given to locally produced ethanol on the ground that "a subjective purpose that has so little rational relationship to the provision in question is not merely implausible but, even if true, is inadequate to validate patent discrimination against interstate commerce").

Finally, in First Amendment cases concerning free speech, the Court has ruled that legislative intent is relevant to the constitutionality of a statute in several ways.[272] Legislative intent is especially important when a statute regulates speech because of its content. The First Amendment's prohibition of content-based regulation of speech places severe restrictions on the rationales a legislature may cite to justify a statute limiting expression.[273] Content-based regulations will be upheld only if the state demonstrates that its regulation "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[274]

Legislative intent is also a significant factor in challenges to statutes that are not facially content-based, but rather purport to regulate only the "time, place, or manner" of speech. "Time, place, or manner" statutes are subjected to an intent analysis derived from the content-based regulation cases. Such statutes will be upheld only if the regulation is "'justified without reference to the content of the regulated speech.'"[275] In both instances, the Court will scrutinize the government's asserted justification for the statute with various analytical tools to determine whether "the asserted justification is in fact an accurate description of the purpose and effect of the law."[276] Even in the absence of legislative history explicitly indicating that the legislature had an impermissible motive in enacting a statute regulating speech, the government's failure to rely upon other, less restrictive avenues of achieving the government's asserted purpose may override the deference normally given to the legislature's stated purpose.[277]

This rough overview of the various ways in which the Court has used legislative intent as a measure of a statute's constitutionality is offered to provide a point of comparison with this Article's proposed standard for assessing moral regulation. This proposed standard would operate in much the same way as the Court's existing pattern of examining legislative intent in the areas described above. Under the proposed standard prohibiting government actions intended primarily to regulate morality, the courts would subject government actions to all the traditional methods of ascertaining legislative intent. The courts would then assess whether legislative assertions of amoral

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272. While legislative intent often begins the First Amendment free speech analysis, it does not conclude it. "[L]egislative intent is not the *sine qua non* of a violation of the First Amendment. . . . [E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." Minnesota Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983) (italics in original). My proposed moral regulation standard also resembles free speech doctrine in this respect, because even if an example of moral regulation survives the amoral purpose requirement, it must still satisfy the amoral effect requirement.

273. *See generally* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2549 (1992) (noting that the "possibility that the city is seeking to handicap the expression of ideas . . . would alone be enough to render the ordinance presumptively invalid").

274. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

275. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

276. Burson v. Freeman, 112 S. Ct. 1846, 1859 (1992) (Kennedy, J., concurring).

277. *See* Boos v. Barry, 485 U.S. 312, 329 (1988); Minnesota Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 586 (1983).

intentions are plausible, and give some consideration to the alternative means available to achieve the legislature's stated amoral objectives. Again, this is no different than the practices the courts currently employ in First Amendment, Equal Protection Clause, and dormant Commerce Clause cases, and the intrusion into legislative processes is no greater than in those areas where analysis of legislative intent is a regular feature of constitutional disputes.

The amoral purpose requirement is important on a theoretical level because it focuses both the courts and the elective government bodies on the proper scope of democratic governance. The requirement is important on a practical level because using a simple legislative intent analysis would dispose of most forms of moral regulation that violate the minimum democratic protections embodied in the losers' principles. As noted in the previous section, these protections bar statutes that interfere with individual moral behavior and belief for no other reason than that the political majority finds such behavior or belief immoral. An analysis of precedents that may be affected by this new standard indicates that applying the amoral purpose requirement would often be a relatively simple and straightforward affair. The cases indicate that legislatures and other government officials driven by moral righteousness seldom cloak their intent to cultivate virtue.

For example, consider the recent Seventh Circuit Court of Appeals decision in *Swank v. Smart*.[278] In *Swank*, a policeman was fired for being seen giving a motorcycle ride to a young female student at a local college.[279] The court of appeals ruled that the policeman had no substantive constitutional defenses to the firing, because his behavior—which included "casual chit-chat,"[280] coupled with non-intimatc social association[281]—fell into the category containing what Judge Posner called "harmless liberties."[282] According to Judge Posner's majority opinion, "harmless liberties" receive almost no constitutional protection. In this category of behavior, "[t]he legal test therefore is sheer unreasonableness," and in Swank's case the town's belief

278. 898 F.2d 1247 (7th Cir.), *cert. denied*, 498 U.S. 853 (1990).

279. Swank was one of three members of a small town's police force. After work one night, he rode his motorcycle into town looking for a friend. While looking for his friend, Swank was flagged down by a 17-year-old female student at the local college, who was standing on a street corner with another student. According to the court of appeals, the student "was attracted by the 'cute little elephant on the bike.'" *Id.* Swank, who was married, chatted with the student about innocuous matters: "The riders discussed Tina's courses at the college, the motorcycle, her former boyfriend, her opinion of Carthage, and similar topics" for several minutes. *Id.* at 1249. Swank then took the student for a ride on the motorcycle. The ride took place just after midnight and lasted for approximately one half-hour. After the ride, "Swank deposited [the student] at the intersection where he had found her and where the other girl was still waiting." *Id.* at 1249-50. Unfortunately, someone saw Swank giving the student a ride and reported his actions to the chief of police. The chief concluded that "the Carthage police had to have the complete confidence of the college and its students and that the motorcycle ride had 'tarnished' the police force's (collective) badge," and Swank was subsequently fired. *Id.* at 1250.

280. *Id.* at 1251.

281. Ironically, Mr. Swank might have lost his case because he did not become friendly enough with the student. If Swank had taken the student home and engaged in sexual activity, Posner hints that the constitutional protection of intimate association might have provided greater protection against political retaliation. *See id.* at 1251-52.

282. *Id.* at 1252.

that his innocuous encounter with the student conveyed an appearance of moral impropriety was enough to satisfy that test.[283]

There was no real dispute in *Swank* that the policeman was discharged because his late-night motorcycle ride with the young woman was considered immoral by the townspeople. The case involved a clash of moral cultures, one staid and conservative, the other somewhat (but not all that much) more libertine.[284] In the absence of a standard such as the one this Article proposes, Judge Posner's conclusion in *Swank* will usually prevail:

> [T]he appearance of impropriety was there—in a married man's giving a teenage girl whom he had never met before a motorcycle ride late at night . . . . Or so at least the town could conclude without taking such leave of its senses as would convict it of a denial of substantive due process.[285]

If the standard this Article proposes is applied, however, the opposite outcome is equally compelling. There is no dispute in the case that Mr. Swank was fired because he had conducted his private life in a way that the town's majority found morally disreputable. This is a clear case of moral sanction. The town would not deny it, and applying the proposed standard would not require any intrusive investigation into the subtleties of legislative intent.[286]

Most other cases involving moral sanctions and public employees would be equally clear. For example, the proposed standard would prohibit a school official from refusing to hire a teacher because of that teacher's "homosexual tendencies."[287] Likewise, a public library would not be permitted to fire two employees simply because they were living together in "open adultery" and their living arrangements offended the conservative mores of the community.[288] The proposed standard would simply prohibit such firings for immorality, or force public employers to explain why private, off-duty behavior has any perceptible effect on the performance of the employee's official duties. The proposed standard would not greatly increase the importance of the unconstitutional conditions doctrine.[289] It would remain

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283. *Id.* at 1253.

284. Recall that aside from some mild flirting, nothing sexual or otherwise improper happened between the policeman and the student. *See id.* at 1255.

285. *Id.* at 1253.

286. For another Seventh Circuit case in the spirit of *Swank*, see Rathert v. Village of Peotone, 903 F.2d 510 (7th Cir.) (denying constitutional protection to a policeman fired from a small-town police force for wearing a gold ear stud through his left ear), *cert. denied*, 498 U.S. 921 (1990).

287. Jantz v. Muci, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993).

288. Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328, 1329 (W.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978).

289. The proposal would conform to proposals to revise the doctrine along the lines suggested by Kathleen Sullivan and Cass Sunstein. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990). In Professor Sunstein's formulation, the unconstitutional conditions doctrine should be abandoned in favor of a more sensitive inquiry into "first, the nature of the incursion on the relevant right, and second, the legitimacy and strength of the government's justifications for any such intrusion." *Id.* at 620-21.

true that an individual does not have a right to be a policeman;[290] but the government's authority to hire, fire, and regulate the lives of its employees would necessarily be limited by rendering impermissible certain reasons for government action.[291]

It is again emphasized that the judicial scrutiny of government action under this Article's proposal would be no different in kind from that which already occurs in other areas of constitutional law. Courts already enforce the rule that the state's general authority to hire whomever it wants as a police officer does not include the authority to hire only whites with the intention of creating a racially homogenous police force. It is not a large step (in methodology, anyway) from prohibiting intentional discrimination against racial minorities, to prohibiting intentional discrimination against moral minorities.

Over the years, courts have attempted to offer some protection to moral minorities under existing doctrine. For example, prior to *Bowers* there were several reported opinions applying some version of existing constitutional doctrine (usually a form of privacy) to prevent the state from exercising moral control over its employees.[292] *Bowers* seems to have halted the progression of law protecting moral dissenters through constitutional privacy, but the point here is simply that courts have already exhibited the ability to address moral

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290. See Holmes' famous attack on the unconstitutional conditions doctrine:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517-18 (Mass. 1892). Whatever the theoretical merits of his attack on the doctrine, Holmes' statement is no longer an accurate depiction of existing law. *See* Rankin v. McPherson, 483 U.S. 378 (1987) (holding that the First Amendment prohibits a county constable from firing an employee who, after hearing about the assassination attempt against President Reagan, sarcastically commented to a fellow worker, "[I]f they go for him again, I hope they get him.").

291. It is worth noting that cases similar to *Swank* are not unusual. Many courts have refused to provide constitutional protection to public employees fired or sanctioned for engaging in immoral behavior such as adultery, homosexuality, or cohabitation. *See, e.g.*, Potter v. Murray City, 760 F.2d 1065 (10th Cir.) (policeman fired for practicing polygamy), *cert. denied*, 474 U.S. 849 (1985); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971) (university librarian denied promotion for seeking homosexual marriage), *cert. denied*, 405 U.S. 1046 (1972); Dawson v. State Law Enforcement Div., No. 3:91-1403-17, 1992 U.S. Dist. LEXIS 8862 (D.S.C. Apr. 3, 1992) (law enforcement agency employee fired for engaging in homosexual activity); Kukla v. Antioch, 647 F. Supp. 799 (N.D. Ill. 1986) (unmarried police sergeant and dispatcher fired for living together); Suddarth v. Slane, 539 F. Supp. 612 (W.D. Va. 1982) (state trooper fired for having an adulterous affair); Johnson v. San Jacinto Junior College, 498 F. Supp. 555 (S.D. Tex. 1980) (junior college registrar demoted to teacher because of an adulterons affair); Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977) (librarian and custodian fired for living together in an adulterous relationship), *aff'd mem.*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978).

292. *See, e.g.*, Thorne v. City of El Segundo, 726 F.2d 459, 470-71 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984); Briggs v. North Muskegon Police Dep't, 563 F. Supp. 585, 590 (W.D. Mich. 1983), *aff'd mem.*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, 473 U.S. 909 (1985); Shuman v. City of Philadelphia, 470 F. Supp. 449, 461 (E.D. Pa. 1979); Major v. Hampton, 413 F. Supp. 66, 68-71 (E.D. La. 1976); Drake v. Covington County Bd. of Educ., 371 F. Supp. 974, 979 (M.D. Ala. 1974); Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399, 400-01 (N.D. Cal. 1973), *aff'd*, 528 F.2d 905 (9th Cir. 1975); Mindel v. United States, 312 F. Supp. 485, 488 (N.D. Cal. 1970).

regulations in a way that preserves individuality without devolving into *Lochnerian* excess.[293]

Since *Bowers*, other courts have protected groups ostracized by what is essentially a political majority's moral proscription—such as opposition to homosexuality—by shoehorning the disfavored group into an equal protection framework that evolved in the very different circumstances of racial and gender discrimination.[294] The protection offered to moral minorities under either the privacy or equal protection precedents is haphazard and imperfect. It is often difficult to adapt existing doctrine to protect individuals who are grouped together only in the sense that they are targets of the political majority's moralistic fervor.[295] This Article's proposal consolidates and reinforces the protection offered to moral minorities in these cases, but it also provides an alternative, and smoother route to the same conclusion.

Under this Article's proposal, the government is given the initial burden of justifying its action under the relevant constitutional standard. If, as will frequently be the case, the government cannot articulate a more concrete justification for its regulation than moral condemnation, the courts would protect the morally ostracized group. Again, this is not very different from what the Supreme Court itself already has said is required by the Equal Protection Clause. "The Constitution cannot control [racial and ethnic] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[296] The amoral purpose requirement merely extends this protection

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293. *See* Lochner v. New York, 198 U.S. 45 (1905) (holding a New York wage and hour law unconstitutional on substantive due process grounds).

294. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 376 (9th Cir.) (Canby, J., dissenting), *denying reh'g en banc to* 895 F.2d 563 (1990); Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990); Meinhold v. United States, 808 F. Supp. 1455 (C.D. Cal. 1993); Swift v. United States, 649 F. Supp. 596 (D.D.C. 1986); *see also* Pruitt v. Cheney, 963 F.2d 1160 (9th Cir.), *cert. denied*, 113 S. Ct. 655 (1992).

295. Privacy claims will encounter resistance stemming from the argument that the Constitution protects only claims of privacy that are "deeply rooted in this Nation's history and tradition." *See* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). Equal protection claims will encounter resistance on the ground that the behavior binding together the group targeted for regulation is amorphous and defined by volitional conduct, and therefore does not deserve heightened scrutiny under the Equal Protection Clause. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (noting that one factor in determining whether a group receives heightened scrutiny under the Equal Protection Clause is whether that group exhibits "obvious, [immutable, or distinguishing characteristics that define them as a] discrete group"). Even though the privacy and equal protection analyses are quite different, the dynamics of constitutional rights adjudication today is such that when the Supreme Court rules against a targeted group on one basis, lower courts will often interpret the Supreme Court's action as foreclosing other, distinct constitutional claims made on behalf of that same group. For example, the Court's decision in *Bowers v. Hardwick* was based exclusively on constitutional privacy grounds. The Court expressly declined to consider equal protection claims against Georgia's homosexual sodomy statute because those claims had not been raised by the parties. *See* 478 U.S. 186, 196 & n.8 (1986). Nevertheless, some lower courts have interpreted *Bowers* as also foreclosing—or at least strongly discouraging—equal protection claims on behalf of homosexuals. *See High Tech Gays*, 895 F.2d at 573 n.9; Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Watkins*, 847 F.2d at 1354-55 (Reinhardt, J., dissenting).

296. Palmore v. Sidoti, 466 U.S. 429, 433 (1984); *see also* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985) (noting that catering to private prejudices is not a legitimate state interest under even the lowest grade of equal protection scrutiny).

beyond racial prejudice to the equally subjective category of moral prejudice. The amoral purpose requirement thus reinforces the Equal Protection Clause by explaining in the majoritarian terms of democratic theory why dissenters of every stripe must be protected until their behavior directly and immediately threatens other participants in the political process.[297]

Admittedly, in addition to these salutary functions, the amoral purpose standard could also potentially generate a certain amount of litigation over silly and trivial matters of recreational immorality. The subject of nude sunbathing eomes to mind. My first inclination is to deride such examples in dog-eared Latin—*de minimis non curat lex*—and make them go away. But upon closer examination, cases of recreational immorality may not be so trifling after all. After briefly investigating the claims of the nude sunbathers as an example of trivial immorality, there appears to be no good reason to reject their claims for constitutional protection. Thus, the Author does not feel especially apologetic about giving constitutional stature to the sunbathers' chosen sin.

First of all, a surprising number of nude sunbathing cases are litigated and reported with full opinions.[298] This indicates that someone out there has more than an academic interest in this activity. Both the government and the renegade sunbathers see enough merit in their respective claims to spend a great deal of legal time and energy on the subject. Second, in each of the

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297. The amoral purpose requirement reinforces the First Amendment free speech protection in much the same way that it bolsters other constitutional provisions—by refocusing the court's attention on whether the government has the authority to regulate, rather than whether the individual has the right not to be regulated. For example, the flag-burning cases could have been decided in a more satisfactory fashion if the Court had identified and rejected the impermissible governmental objective of dictating the use of particular imagery, rather than attempting to micro-analyze the speakers' conduct to determine whether they were attempting to communicate particular ideas by burning a particular flag. *See* Steven G. Gey, *This Is Not a Flag: The Aesthetics of Desecration*, 1990 WIS. L. REV. 1549.

The amoral purpose requirement would also be helpful in cases such as Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992), which involved a challenge to the so-called "decency clause" amendment to the National Endowment for the Arts ("NEA") authorization statute. The "decency clause" required the Endowment to take into consideration "general standards of decency" in awarding arts grants. *See* 20 U.S.C. § 954(d)(1) (Supp. V 1993). The district court held the clause unconstitutional on First Amendment grounds as an impermissible interference with intellectual freedom in the arts. *Finley*, 795 F. Supp. at 1472-76. The court reached this conclusion only after drawing elaborate analogies between the role of artistic freedom in society as a whole and the role of academic freedom in the cireumscribed context of the university. *Id.* Again, although these analogies were reasonable, an appellate court that is less attuned to the needs of the arts community may well refuse to follow the court's logic this far. This is a recurring problem with the fundamental rights approach; once the courts develop a pattern of describing a particular right in terms of A, B, and C, the coarts are reluctant to expand their description to include D, even if D is the next step in a logical progression. The amoral purpose requirement would provide a more direct mechanism for overturning such a statute, on the ground that the statutory history of the "decency clause" indicates a clear intent on the part of Congress to impose the majority's view of particular moral issues on all artists participating in the NEA grant program. *See id.* at 1461-62.

298. *See, e.g.*, Davis v. Gates, No. 91-56174, 1992 U.S. App. LEXIS 22417 (9th Cir. Sept. 14, 1992); United States v. Biocic, 928 F.2d 112 (4th Cir. 1991); South Fla. Free Bcaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984); Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976); United States v. Hymans, 463 F.2d 615 (10th Cir. 1972); Craft v. Hodel, 683 F. Supp. 289 (D. Mass. 1988); National Capital Naturists v. Accomack County, No. 85-452-N, 1987 U.S. Dist. LEXIS 8160 (E.D. Va. Sept. 10, 1987); Chapin v. Town of Southampton, 457 F. Supp. 1170 (E.D.N.Y. 1978).

cases listed below in note 298, without exception, the court ruled against the sunbathers' constitutional claims. The basic problem is that the sunbathers do not fit into one of the common fundamental rights pigeonholes. Even Justice Douglas—who once provided a paean to "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality,"[299] and in the same opinion went on to honor the "freedom to walk, stroll, or loaf"[300]—would not speak up for the hapless naturalists.[301]

The courts' blasé attitude toward nude sunbathing is not surprising. It is hardly the most monumental issue facing the nation. The key fact for present purposes is that the government rarely attempts to justify the prohibition of nude sunbathing on anything except "indecency" grounds, and the courts never ask for anything more. Most of the reported cases involve either beaches historically devoted to nude sunbathing,[302] or arrests in isolated areas where a park ranger or policeman happened to encounter bathers who were trying to avoid other people.[303] Given the fact that the bathers depicted in the reported cases seem to go out of their way to avoid intruding on their more modest fellow citizens—thus eliminating the argument that conflicting liberties are at stake—the government seems to have no reason to prohibit the nudists' behavior other than to satisfy the modest majority's desire to bring the moral equilibrium back into balance. If no other argument for the prohibition of nude sunbathing can be found,[304] there is no reason to refrain from subjecting these government regulations to this Article's general rule. Thus, the total prohibition of unobtrusive nude sunbathing should be deemed unconstitutional.

As this discussion indicates, this Article presents two responses to the argument that the amoral purpose requirement trivializes constitutional law. First, if the behavior being regulated were truly trivial, the regulation would not exist. Moral regulation—embodied in the "indecency" determination in the

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299. Roe v. Wade, 410 U.S. 113, 211 (1973) (Douglas, J., concurring).

300. *Id.* at 213.

301. *See* Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) ("No one would suggest that the First Amendment protects nudity in public places . . . ."). The sunbathers have had to resort to the law reviews for solace. Aside from this Article, see Richard B. Kellam & Teri Scott Lovelace, *To Bare or Not to Bare: The Constitutionality of Local Ordinances Banning Nude Sunbathing*, 20 U. RICH. L. REV. 589 (1986).

302. *See, e.g., South Fla. Free Beaches*, 734 F.2d 608.

303. For one account of a fish and wildlife officer "skulking behind sand dunes until the opportunity to swoop down like a wolf on the fold first presented itself," see United States v. Biocic, 928 F.2d 112, 118 (4th Cir. 1991) (Murnaghan, J., concurring).

304. Of course, if there are such reasons, the amoral purpose requirement would be satisfied and, subject to considering other alternatives as required by the amoral effect requirement, the regulation would stand. For one example of such a statute, see New England Naturalist Ass'n v. Larsen, 692 F. Supp. 75 (D.R.I. 1988) (involving a statute which closed a nude beach to preserve an endangered species). Also, the government has a legitimate interest in desiguating areas on public beaches where modest members of the public can go without secing nude sunbathers. So long as the designation of nude and clothed areas is accomplished with some sensitivity to the interests of both groups, this is permissible. Such a desiguation would interfere with the constitutional right to sunbathe nude to the same permissible extent as a narrowly drawn time, place, and manner traffic regulation, which is justified by the need to "secure convenient use of the streets by other travelers, and to minimize the risk of disorder." Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

sunbathing cases—is not a trivial matter to the modest majority, and likewise it is not a trivial matter to those who march (under risk of arrest) to the beat of a different drummer. Second, the right to be contrary is never a trivial matter in a democracy, even if the manner of expressing one's contrariness may be.[305] As this Article has emphasized repeatedly, nonconformity is probably a democratic citizen's single most valuable trait.

### *C. The Amoral Effect Test*

The amoral purpose requirement will be the primary component of the proposed constitutional standard limiting moral regulation. The amoral purpose requirement will play the major role in applying this standard because if the standard were adopted and legislatures were put on notice that they could not justify statutes explicitly on moral grounds, legislatures would only infrequently be able to devise amoral justifications for most of the moral legislation considered in the previous sections. For example, I cannot think of a plausible amoral justification for firing Mr. Swank,[306] for requiring Mr. Rathert to refrain permanently from wearing an earring,[307] for prohibiting Mr. Hardwick from engaging in consensual sexual behavior of whatever sort he and his partner desire,[308] or, for that matter, to justify a government policy prohibiting nude sunbathing on isolated sections of public beaches and parks.[309] Most statutes based primarily on majoritarian morality are so divorced from rationales unrelated to morality that they would be clearly insupportable under the amoral purpose requirement.

Despite the fact that the amoral purpose requirement would be the primary focus in cases litigated under this proposed standard, a narrowly drawn amoral effect requirement would be necessary to keep the government honest about its intentions in situations where a regulation restricting individual behavior serves at least some amoral purpose. The amoral effect requirement would simply prohibit regulatory effects on minority morality that go beyond the amoral justifications for the regulation. For example, the prevention of epidemics is clearly a legitimate, harm-based, amoral justification for statutes such as vaccination requirements. But the prevention of AIDS would not be a legitimate basis for prohibiting all homosexual relationships or sexual activity.[310] Such a regulation would be both underinclusive—because it

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305. The Supreme Court itself has occasionally acknowledged this point. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (upholding, in a full opinion, the First Amendment right to place tape over the words "Live Free or Die" on a New Hampshire license plate).

306. *See* Swank v. Smart, 898 F.2d 1247 (7th Cir.), *cert. denied*, 498 U.S. 853 (1990); *supra* notes 278-86 and accompanying text.

307. *See* Rathert v. Village of Peotone, 903 F.2d 510 (7th Cir.), *cert. denied*, 498 U.S. 921 (1990).

308. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

309. *See supra* notes 302-04 and accompanying text.

310. The state of Georgia raised a form of the health argument in *Bowers*, but since the case was decided by the district court on a motion to dismiss, no evidence was introduced to support the state's contentions. *See Bowers*, 478 U.S. at 208 (Blackmun, J., dissenting).

would not affect the increasing percentage of AIDS cases involving heterosexuals—and overinclusive—because many homosexuals practice safe sex.

To comply with the amoral effect requirement, the state would be required to establish a close fit between the legitimate goal and the means chosen to achieve it. In this respect, language similar to that used by the courts in intermediate scrutiny equal protection cases would provide a good summary of the government's constitutional obstacle under the amoral effect test: The government would be required to demonstrate that its restriction on individual behavior is "substantially related to achievement of [the legitimate amoral] objectives."[311] If the government has other means of achieving its legitimate objectives which restrict individual moral behavior significantly less than the alternative chosen by the government, the government would have to present a plausible argument for why it did not choose the less intrusive alternative method of achieving its purposes. Thus, instead of serving as an independent check on government action, as the secular effect does in the Establishment Clause cases, the amoral effect requirement aets simply as an analytical tool for enforcing the amoral purpose requirement.

When read together in this way, the amoral purpose and effeet requirements impose only modest limits on government action. The two requirements would not substantially alter the political landscape. In particular, the requirements would not prohibit the government from enacting statutes that carry implicit messages about the morality of certain behaviors, so long as those behaviors are being regulated for legitimate, harm-based reasons. It is a common principle of Establishment Clause jurisprudence that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[312] Likewise, the amoral purpose and effect requirements would not obligate the courts to overturn murder statutes (which are one of the most obvious forms of harm-prevention legislation) on the ground that such statutes require individuals to conform their conduct to the moral determination that killing people is wrong.

The amoral purpose and effect requirements come into play only where the government acts to interfere with autonomous individual behavior that does not directly impinge upon the freedoms of others in society. These requirements are modest measures to ensure that the government stays within the proper range of its authority under a democratic constitution. Imposing these two simple requirements would make constitutional law internally consistent, and would conform the doctrine to the underlying themes of democratic government (embodied in the losers' principles outlined above) on which the Constitution rests. The risks of requiring the government to stay in its proper place are small. It is doubtful that imposing these simple requirements would cause the Republic to fall, even if a few wayward souls do insist on sunbathing in the nude.

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311. Craig v. Boren, 429 U.S. 190, 197 (1976).
312. McGowan v. Maryland, 366 U.S. 420, 442 (1961).

## CONCLUSION

Two important points are usually overlooked in debates between constitutional theorists who would uphold moralist legislation and those who would overturn such laws. The first is that despite their defense of society's authority to assert its moral certainty, the constitutional theorists who would uphold moral legislation are themselves moral relativists. Bork and Scalia rely on the concept of majority rule, rather than some platonic moral ideal, to justify the enforcement of morality. When Bork says that "[t]rnth is what the majority thinks it is at any given moment,"[313] he also presumably means that truth may be something else when a new majority takes power tomorrow. Lord Devlin also acknowledges that the political agencies which have the duty to enforce morality cannot hope to ascertain any unquestionably "trne" or eternal moral verities. Devlin instead asserts that the law should enforce society's "common morality,"[314] as defined by the man in the Clapham omnibus. "Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral."[315]

Thus, for all the talk from these quarters about laws establishing a moral society, we are really talking about just another batch of ordinary legislation, cobbled together in the same imperfect and sometimes cynical fashion as the most mundane section of the Internal Revenue Code. The demotion of collective morality to common politics is inevitable in the modern era. As soon as society abandons any notion of basing its laws on the commands of a perfect God, it must resort to fallible and fickle human determinations of value. Unless we adopt the totalitarian notion that the rulers are inherently more ethically perceptive than the ruled, every citizen legitimately may reject the government's moral judgments. Thus, to turn Bork's axiom on its head, the majority's assertion about any given moral proposition that "we think so" is definitively rebuttable by any individual's assertion that "*I* don't."[316]

Ironically, those who argue for the legal enforcement of common morality are really making the nihilistic assertion that raw power should determine what is "moral." Those who argue in favor of moral relativism as a constitutional mandate recognize that no person's or group's assertion of value is any more valid than any other person's or group's contrary assertion, and that the relative power relationship of the contenders is irrelevant to the determination of which morality is "true." On the other hand, supporters of moral regulation necessarily must argue that the inherently unprovable merits of a particular moral code chosen by a politically powerful group count more than the equally unprovable moral code chosen by politically weak individuals. In the end, the debate is not about morality at all. It is about power. In the minds of the constitutional moralists, might literally makes right.

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313. Bork, *supra* note 21, at 30.
314. DEVLIN, *supra* note 64, at 10.
315. *Id.* at 15.
316. *See* Bork, *supra* note 21, at 29; *see also supra* text accompanying note 52.

The second point that is usually lost in these discussions involves the intended targets of moral regulation. When it enforces a moral code against "immoral" individuals, the state does not act in the abstract. Rather, it targets particular individuals based on their most personal characteristics. The problem is that in many instances of moral regulation (activities associated with homosexuality come to mind), the issue of morality becomes subtly intertwined with rank bigotry. "Morality," Oscar Wilde once wrote, "is simply the attitude we adopt toward the people we personally dislike."[317] Making moral relativism a constitutional command would allow us to deal with this reality by addressing openly what is perhaps more a psychological problem than a legal one.

This Article has suggested one mechanism for implementing the constitutional command of moral relativism. This proposal would draw on the Court's existing Establishment Clause jurisprudence to require every government action to have a primarily amoral purpose and effect. Under this proposal, the government would be allowed to regulate morality only to the extent necessary to protect the moral freedom of other individuals in society. Moral motivations would not be entirely excised from the law, but political control of purportedly immoral beliefs, expression, and behavior would be permitted only if the immorality threatens some direct and particularized harm to others. Despite the superficially nihilistic overtones of this proposal, it may actually produce a more moral society than that which currently exists. A constitutional command of moral relativism would produce a structure of values that is protected from the distortions imposed by the heavy hand of government coercion and punishment. Paradoxically, collective moral relativism is the only way to ensure that a system of individual morality lives up to its claims.

317. Oscar Wilde, *An Ideal Husband*, *in* SELECTED WRITINGS OF OSCAR WILDE 173 (R. Fraser ed., 1969). And, after all, Mr. Wilde should know. *See* RICHARD ELLMAN, OSCAR WILDE 462-78 (1988) (recounting Wilde's trial, conviction, and sentence of two years at hard labor for homosexual offenses); *see also id.* at 479 (noting one London newspaper's approving editorial comment that "'a dash of wholesome bigotry' was better than overtoleration").