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# Awakening the Moral Consciousness: On the Numbing of the Conscience of a Nation

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# Awakening the Moral Consciousness: On the Numbing of the Conscience of a Nation

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## INTRODUCTION

Along with the Negro’s changing image of himself has come an *awakening moral consciousness* on the part of millions of white Americans concerning segregation.<sup>1</sup>

Life is a struggle. In nature, for instance, many creatures must struggle to see their first ray of sunlight. There is a most elegant struggle as the caterpillar fights to emerge from the cocoon transformed into a butterfly. Many birds mark the end of gestation and the beginning of avian ability with a remarkable struggle from within the egg. New shoots break free from the earth from a recently planted seed.

In religion, as another example, great significance is associated with the meaning of a struggle. The concept of “jihad,” or holy war, is

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1. MARTIN LUTHER KING, JR., *THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 468 (James M. Washington ed., 1986) (emphasis added).

important to Islam.<sup>2</sup> In Christianity, struggle is also an essential part of daily life.<sup>3</sup> In addition, in the Judeo-Christian tradition, the story of Jacob provides an example of struggle, where Jacob wrestled with an angel and refused to let go until blessed with a new spiritual identity.<sup>4</sup>

So should it be with citizens in the democratic political process—it is essential that the people themselves create the culture, imagine the environment, and reach consensus in the communities in which they live. Indeed, this is the heritage of the American Nation. The Nation was born out of a spirit of struggle and the framers realized that it was better to be governed by the collective standards of the people, as they know best how to meet their own needs.<sup>5</sup> Furthermore, we have retained these ideas in the fabric of our collective culture. The “American Dream,” to which many citizens aspire, is essentially a manifestation of this spirit of struggle in everyday life.<sup>6</sup> Success is never so sweet if it simply comes from a gift.<sup>7</sup>

2. See, e.g., THE HOLY QUR’AN WITH ENGLISH TRANSLATION 4:95 (6th ed. 2000) (“Those of the believers who sit . . . other than those who have a (disabling) hurt, are not on equal with those who strive for the cause of Allah with their wealth and their lives. Allah has conferred on those who strive with their wealth and lives a rank above the ones who sit (at home)”; *id.* at 2:218 (“Assuredly, those who believe and emigrate (to escape persecution because of their religion) and fight in the way of Allah, may hope for Allah’s mercy. Allah is Forgiving, Merciful.”); *id.* at 3:142 (“Did you suppose that you would enter the Garden before Allah had tested (known) those of you who really strived (for His cause), and who endured with steadfastness?”). See generally MALISE RUTHVEN, ISLAM: A VERY SHORT INTRODUCTION 118–46 (1997) (describing the importance of Jihad in Islam and the different forms thereof).

3. See James 2:14–26 (New International) (explaining that “a person is justified by what he does and not by faith alone” and that “faith by itself, if it is not accompanied by action, is dead.”); Luke 9:23 (New International) (“If anyone would come after me, he must deny himself and take up his cross *daily* and follow me.”) (emphasis added); Luke 14:27 (New International) (quoting Jesus that “anyone who does not carry his cross and follow me cannot be my disciple”); Mark 8:34 (New International); Matthew 10:38 (New International) (quoting Jesus that “anyone who does not take his cross and follow me is not worthy of me”); Matthew 16:24 (New International) (quoting Jesus that “[i]f anyone would come after me, he must deny himself and take up his cross and follow me.”); 1 Timothy 6:12 (New International) (“Fight the good fight of the faith. Take hold of the eternal life to which you were called . . .”).

4. See Genesis 32:22–31 (New International) (quoting God’s blessing to Jacob that “[y]our name will no longer be Jacob, but Israel, because you have *struggled* with God and with men and have overcome.”) (emphasis added). Even more fundamentally, a translation of “Israel” is “he struggles with God.” THE HOLY BIBLE (New International Version 32) (Ultra Thin Ref. Ed. 1999).

5. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

6. One example of the importance of participation in American life is the significance of negotiation and collective bargaining in the modern workforce. See 29 U.S.C. §§ 150–160 (2000) (creating the National Labor Relations Board and providing employees with the right to organize and bargain collectively). See also Marion Crain, *Building Solidarity Through Expansion of NLR Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 958 (1990) (“The NLR purported to establish a system of industrial democracy that would, through the vehicles of worker collective organization and bargaining, offer workers the opportunity to empower themselves.”).

Also consider that English notions of respect for the use of labor in making property one’s own still exist in the public mind. See Sandra B. Zellmer and Scott A. Johnson,

Rather, Americans derive a true sense of satisfaction and personal worth when they harvest the fruits of their own labor—having contributed individually and collectively to a goal deemed worthy by the person individually or society collectively.

Americans are called, in the present day, to a refinement of this spirit of struggle. Since struggle, by definition, includes even “violent efforts,”<sup>8</sup> struggle must take on a new meaning within the framework of the modern American democracy.<sup>9</sup> Surely humans strive to live in a world that is more

*Biodiversity in and Around McElligot's Pool*, 38 IDAHO L. REV. 473, 490 n.87 (2002) (stating that farmers who own lands potentially subject to regulation have been influenced by the labor theory of wealth as articulated by John Locke and noted by Sir William Blackstone).

7. Several forms of wealth transfer have been disfavored in the American democracy, in contrast from the British practices. For example, Thomas Jefferson initiated the abolishment of fee tail, an estate that could only be inherited by specified descendants of the decedent, and primogeniture, the right of the firstborn male son to exclusively inherit an ancestor's estate, in Virginia during the Revolutionary War era. See JESSE DUKEMINIER AND JAMES E. KRIER, PROPERTY 218 (5th ed. 2002); BLACK'S LAW DICTIONARY 630, 1210 (7th ed. 1999). Currently, the fee tail is rarely encountered in the few states that allow it. Spendthrift trusts, which restrict the beneficiary from assigning his interests, have been described as the “ideological descendant” of the fee tail. See JESSE DUKEMINIER AND STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 631–32 (6th ed. 2000) [hereinafter DUKEMINIER & JOHANSON]; BLACK'S LAW DICTIONARY 1518 (7th ed. 1999). Professor John Chipman Gray, for example, was “outraged” at the introduction of spendthrift trusts and stated that they would “form a privileged class.” See DUKEMINIER & JOHANSON at 631–32. Besides disfavoring attempts to concentrate real property within the family, there have also been concerns about other large wealth transfers. See James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 827 (2001) (explaining that public discontent with estate taxes and the movement to repeal them is relatively recent, and concluding that “[w]ealth concentration also harms the democratic process because it gives too much power to the affluent.”).

8. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1238 (11th ed. 2003) (defining the verb “struggle” as “to make strenuous or *violent* efforts in the face of difficulties or opposition”) (emphasis added).

9. See, e.g., U.S. CONST. art. I, § 8, cl. 15 (giving the Legislative branch the power of “calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”). For legislation enacted pursuant to this grant of power, see 18 U.S.C. § 2383 (2000), providing that:

Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States . . . or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both . . . and shall be incapable of holding any office under the United States.

The President is authorized to respond to any internal insurrections. See 10 U.S.C. § 331 (2000) (providing that “[w]hen there is an insurrection in any State against its government, the President may . . . call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.”).

Recall, also, that the Civil War is an example of the squelching of such an internal insurrection. See, e.g., *White v. Hart*, 80 U.S. 646, 650 (1875) (remarking that “[t]he doctrine of secession is a doctrine of treason, and practical secession is practical treason, seeking to give itself triumph by revolutionary violence. The late rebellion was without any element of right or sanction of law. The duration and magnitude of the war did not change its character.”);

orderly than the “state of nature,”<sup>10</sup> thereby mitigating some of the harsh circumstances previously described of the natural world. The essence of what is required of a citizen, then, is not an unconstrained instinct to struggle that would be more appropriate for the “state of nature,” but rather the will to put forth the necessary effort to become “community creatures.”<sup>11</sup> Modern American citizens must put forth the effort to know others and to be known by them. In other words, American citizens must discover a personal and moral identity for themselves, while respecting and acknowledging the rights and choices of others who do the same; they must search and examine their own prejudices,<sup>12</sup> while having patience for others as they try to extinguish their own stereotypes. This requires an equal,

Raymond v. Thomas, 91 U.S. 712, 714–15 (1871) (adjudicating a dispute arising out of the Civil War and stating that the power to declare war and suppress insurrection “carries with it inherently rightful authority to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress.”).

Analogously, the states also have inherent power to quell rebellions against the state. See *White*, 80 U.S. at 650–51 (1871). See also U.S. CONST. art. IV, § 4 (providing that the federal government shall protect the states against “domestic [v]iolence.”).

It should not come as a surprise that the framers intended the political process to be inclusive enough that grievances would be worked out without subsequent violent revolutions. They were, after all, seeking to establish a participatory government and attempting to control the “violence of faction.” See THE FEDERALIST NO. 10, at 55 (James Madison) (Henry B. Dawson ed., 1865) (“Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”). See also U.S. CONST. amend. I (“Congress shall make no law respecting . . . the right of the people peaceably to assemble”) (emphasis added). See also Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1020 (1984) (commending *The Federalist* for suggesting the “public-regarding forms of politics” as a solution to revolutionary legitimacy).

10. See THOMAS HOBBES, THE LEVIATHAN 74–79 (Edwin Curley ed., Hackett Publishing Company, 1994).

11. M. Scott Peck, M.D., provides a definition and discussion of “community creatures,” as opposed to merely “social animals.” See M. SCOTT PECK, MEDITATIONS FROM THE ROAD 239 (1993).

The ultimate goal is to remove the resolution of significant social and political issues from the committee room at the legislative building to the living room at the neighbor’s house. An important intermediate step, however, is interaction at a civic level. See generally ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (detailing a decline in American social and civic participation) [hereinafter PUTNAM]; ROBERT D. PUTNAM & LEWIS M. FELDSTEIN, BETTER TOGETHER: RESTORING THE AMERICAN COMMUNITY (2003) (describing efforts to create social capital) [hereinafter PUTNAM & FELDSTEIN].

In fact, according to President Washington, the very Constitution itself was “the result of a spirit of amity.” Letter of George Washington, President of the Federal Convention, to the President of Congress, Transmitting the Constitution (Sept. 17, 1787), reprinted in DANIEL M. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW app. 2, at 20 (3d ed. 2003) [hereinafter FARBER].

12. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 162–64 (1980) (suggesting that sufficient social interaction can, under some circumstances, help to remove stereotypes). But see Mandara Meyers, *(Un)equal Protection for the Poor: Exclusionary Zoning and the Need for Stricter Scrutiny*, 6 U. PA. J. CONST. L. 349, 349–51 (2003) (highlighting negative characteristics of modern communities).

perhaps even greater, quantum of “effort” as those in the natural world.

Somehow, however, Americans have wandered astray from this community-centered basis of social reform.<sup>13</sup> In the relatively recent past, courts have become increasingly involved in social movements.<sup>14</sup> To some that agree with the judiciary’s position in any particular case, the courts are to be praised for helping the country come to the “right”<sup>15</sup> result.

Such praises should be reexamined. First, strictly legally speaking, in a society such as ours,<sup>16</sup> the concept of objective “right” is extraordinarily elusive. Americans are quite unwilling to substitute others’ moral and social judgments for their own.<sup>17</sup> The only “right” society can rely upon, then, is the “right” agreed upon by the majority of society.<sup>18</sup> Second, even

13. Archibald Cox states:

Constitutionalism works, our liberties are protected, and our society is free because officials, individuals, and the people as a whole realize that liberty for the weak depends upon the rule of law and the rule of law depends upon voluntary compliance. When the test comes, that realization must be strong enough for the people to rise up, morally and politically, and overwhelm the offender. *The roots of constitutionalism lie in the hearts of the people.*

ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 15 (1987) (emphasis added). See generally PUTNAM, *supra* note 11 (analyzing the decrease in American civil participation).

14. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a law against homosexual sodomy); *Roe v. Wade*, 410 U.S. 113 (1973) (striking down a law against abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a law against the use of contraceptives by married couples); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down segregation in the public schools); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down laws intended to curtail the use of child labor); *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a law regulating the number of hours employees could work).

Thus, De Tocqueville has proved to be somewhat of a soothsayer. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 93–98 (Harvey C. Mansfield & Delba Winthrop eds., 2000) (1835) (“There are in fact very few laws of a nature to escape judicial analysis for long, for there are very few that do not hurt an individual interest and that litigants cannot or will not invoke before the courts.”).

15. The word “right” is only used in its sense whereby it means “correct.” By the use of the word “right,” the author does not intend to imply that this article endorses either a “conservative” or “liberal” approach to constitutional law. See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1073 (11th. ed. 2003) (defining the word “right” as “conforming to facts or truth: Correct”). This Comment was not conceived under a framework of, or intended to advance, either ideology.

16. This would not be true in a form of government where an individual or a group is vested with the power to define an objective “right.” For example, in a monarchy, the monarch is believed to be divine. The American government, of course, is not such a system.

17. See, e.g., U.S. CONST. amend. I, § 1 (providing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”). Cf. THE FEDERALIST NO. 50, at 360 (James Madison) (Henry B. Dawson ed., 1865) (“If men were angels, no [g]overnment would be necessary. If angels were to govern men, neither external nor internal controls on [g]overnment would be necessary.”).

18. See, e.g., Sir Patrick Devlin, Lecture, *Legal Moralism Defended*, in LEGAL PHILOSOPHY: SELECTED READINGS 277 (Timothy C. Schiell, ed., 1993) (“If men and women try to create a society in which there is no *fundamental agreement* about good and evil they will fail; if, having

if a court's preference is "right," as determined on some scale of absolute morality,<sup>19</sup> to assume that the courts can actually cause social change may be premature.<sup>20</sup> Courts should consider the possibility that, by "helping" Americans reach the "right" result, they actually rob them of the culture and knowledge of organizing and mobilizing to effect social changes and the subsequent self dignity realized as a benefit of this participation—the natural products of a healthy democratic process.<sup>21</sup> It is possible, then, that the judiciary's modern propensity to exercise judicial review to strike the public's legislative enactments becomes a sort of judicial novocaine, numbing the consciences and denying the dignity<sup>22</sup> of millions of Americans.

Beginning with a brief description of the Civil Rights Movement in America to illustrate the power and effectiveness of an inclusive social movement, this Comment will identify and discuss five adverse consequences that may accompany judicial invalidation of legislative enactments. In light of these consequences of the political process and

based it on common agreement, the agreement goes, and the society will disintegrate.") (emphasis added). Devlin continues to say that, since a society must be based on "common agreement," legislation based on morality is permissible. *Id.*

On the other hand, the Supreme Court has recently held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). This highlights one troubling aspect of the effective determination of "right" as a matter of constitutional law. If an advocacy group convinces the legislature it is "right," and legislation is subsequently enacted, a rival group must only find "common agreement"—a majority of legislators—to change the law. However, when a court makes a constitutional judgment on the point, the judicial determination of "right" is more difficult to overturn. In such a case, a standard is imposed upon the society that is not founded upon common agreement. While Devlin contends that the "society will disintegrate," this Comment will argue that it will at least lead to some adverse consequences for the "winner" of the litigation, and may even lead to violence. *Id.*; see *infra* Part II.

19. Even should one propose to announce such a scale, it would most certainly be subject to immense controversy by the public. Cf. *LEARNED HAND, THE BILL OF RIGHTS* 73 (1958) ("For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."). But see Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L.J.* 1229, 1235 (lamenting the trend away from recognizing the laws of God as a guiding principle for secular government).

20. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (challenging the traditional assumption that courts stimulate social change).

21. See Julia K. Sullens, Comment, *Thus Far and No Further: The Supreme Court Draws the Outer Boundary of the Right to Privacy*, 61 *TULANE L. REV.* 907, 927 (1987) (explaining that, in the wake of *Bowers v. Hardwick*, 478 U.S. 186 (1986), "[h]omosexual advocates now know that they must aim their efforts at state legislatures, rather than courts, to repeal sodomy statutes and other laws which restrict their freedoms because of their sexual preference.").

22. Cf. MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?*, reprinted in *A TESTAMENT OF HOPE* 610 (James M. Washington ed., Harper Collins 1991) ("The dignity [African American's] jobs may deny them is waiting for them in political and social action.").

everyday living, this Comment will suggest ways the judiciary can support the American democracy, by examining the institutional character of the judiciary and reconsidering the importance and the role of the political process, methods to support access to the political process, and, finally, methods to tame the doctrine of substantive due process. Upon completion, the Comment will have underscored the need for courts to be careful to avoid suppressing the political process in favor of judicial “resolution.” Judicial intervention in social movements may actually deprive Americans of the culture and knowledge of mobilizing to effect social changes—the natural products of a healthy democratic process.<sup>23</sup>

### I. HISTORICAL EXAMPLE OF THE IMPORTANCE OF SOCIAL MOVEMENTS

Before considering the adverse affects of judicial intervention on the people of the nation, this Comment examines the history of a major social movement in America—the Second Reconstruction (also called the Civil Rights Movement).<sup>24</sup> Consideration of the role of the courts and the strategies chosen by both proponents and opponents of the movement provides a better understanding of what has successfully caused change in our society, and the results of any such processes.<sup>25</sup>

The Civil Rights Movement, for example, illustrates the importance of community collaboration in America. An instructive way to frame the discussion of the movement is to consider what caused the change from

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23. It is important to realize what this Comment does *not* address. This Comment takes no policy position on what the government should do—only the manner in which results should be reached. For a similar argument, please see James B. Thayer, *Legal Tender*, 1 HARV. L. REV. 73, 73 (1887) (noting analogously that “whether Congress has the power . . . [and] whether under any given circumstances it is wise or right that Congress should use it, are very different things.”).

24. This Comment limits the discussion of history due to the scope of the article. However, in focusing on Civil Rights history, the Comment does not intend to overlook or belittle the experience of other social movements, including the Women’s Rights movements, Labor and Union movement, and Gay Rights movement. For a review of these histories, see generally MARY FRANCES BERRY, *WHY ERA FAILED* (1986) (examining the ERA in the larger context of the constitutional amendment process); RENEE FEINBERG, *THE EQUAL RIGHTS AMENDMENT* (1986) (providing a history and background of the Equal Rights Amendment); ROSENBERG, *supra* note 20, at 203–27, 341 (concluding that the court’s involvement weakened the organization of women’s rights advocacy groups). Treating a social movement as distinct from others also creates an artificial appearance that the movements are in fact separate. In reality, however, they are often interconnected. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994) (affording protections not only on the account of race, but also “color, religion, sex, or national origin”).

25. This Comment takes notice that there are difficulties in comparing social movements. Some authorities have argued that this practice “obscures and confuses” issues. See, e.g., Serena Mayeri, *A Common Fate of Discrimination: Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1048–51 (2001). However, history is a powerful tool to consult in attempting to improve upon the past. In addition, acclaimed scholars have compared major social movements to draw conclusions. See generally, ROSENBERG, *supra* note 20 (comparing major social movements).



1619, when the first African slaves arrived,<sup>26</sup> to 2003, when the Supreme Court approved affirmative action legislation designed to benefit African Americans.<sup>27</sup> At all critical times, it was that oppressed people and privileged people of conscience worked together to produce social reform. During slavery, slaves rebelled,<sup>28</sup> escaped to freedom,<sup>29</sup> and worked to create a network to bring about equality.<sup>30</sup> Even people who were not enslaved, when convicted by their conscience, worked to bring about this change.<sup>31</sup>

26. See JOEL WILLIAMSON, *A RAGE FOR ORDER: BLACK/WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* ix (1986).

27. See *Grutter v. Bollinger*, 539 U.S. 306, 343–33 (2003).

28. See generally ROBERT V. HAYNES, *BLACKS IN WHITE AMERICA BEFORE 1865: ISSUES AND INTERPRETATIONS* 286–353 (1972) (detailing the movements of African-American protestors and resisters before 1865). For a specific example, see *id.* at 288 (including a narrative of Thomas Wentworth Higginson, a white abolitionist describing a revolt in Charleston).

29. See generally CHARLES L. BLOCKSON, *THE UNDERGROUND RAILROAD* (1987) (collecting narratives of escaped slaves); WILLIAM STILL, *THE UNDERGROUND RAILROAD* (1872) (in the author's own description, "[n]arrating the hardships, hair-breadth escapes and death struggles of the slaves in their efforts for freedom, as related by themselves and others, or witnessed by the author; together with sketches of some of the largest stockholders, and most liberal aiders and advisers, of the road").

30. See BLOCKSON, *supra* note 29, at 4 (noting the role of freed African-American men as "assiduous organizers of networks to freedom"); *id.* at 117–23 (describing the efforts of Harriet Tubman); W.E.B. Dubois, *Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880* (1935), reprinted in HAYNES, *supra* note 28, at 447–90 (describing the role of African-Americans in waging the Civil War). See generally FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* (Gramercy Books 1993) (1845) (describing abolitionist efforts).

31. See Robert Robinson, *Slavery Inconsistent with the Spirit of Christianity*, Sermon Preached at Cambridge 24–26 (Feb. 10, 1788) *microformed on* The Eighteenth Century 1-2586 reel 11560 no. 3 (Primary Source Microfilm); Reverend David Rice, *Slavery Inconsistent with Justice and Good Policy*, Speech Delivered in the Convention 3, 24 (1792) *microformed on* The Eighteenth Century 1-2586 reel 1513 no. 10 (Research Publications); Minutes of the Proceedings of the Eight Convention of Delegates From the Abolition Societies Established in Different parts of the United States § 133 (Jan. 10–14, 1803) *microformed on* serial 1-1030 (KTO Microfilm); Address of the American Convention for Promoting the Abolition of Slavery and Improving the Condition of the African Race to the People of the United States 4 (Jan. 1804) *microformed on* Early American Imprint Microprint 1–3 no. 5698 (Readex Microprint); Minutes of the Proceedings of the Eleventh American Convention for Promoting the Abolition of Slavery and Improving the Condition of the African Race 5–6 (Jan. 13–14, 1806) *microformed on* serial 1-1030 (KTO Microfilm); Minutes of the Adjourned Session of the Twentieth Biennial American Convention for Promoting the Abolition of Slavery and Improving the Condition of the African Race 18–19 (Nov. 3, 1828) *microformed on* serial 1-1030 (KTO Microfilm). See generally HENRIETTA BUCKMASTER, *LET MY PEOPLE GO: THE STORY OF THE UNDERGROUND RAILROAD AND THE GROWTH OF THE ABOLITIONIST MOVEMENT* 25–47 (1941) (describing the efforts of white abolitionists in organizing the underground railroad); WILLIAM E. CAIN, *WILLIAM LLOYD GARRISON AND THE FIGHT AGAINST SLAVERY: SELECTIONS FROM THE LIBERATOR* (1995) (collecting published articles from Garrison's *The Liberator* and other public remarks advocating abolition of slavery); RUSSEL B. NYE, *WILLIAM LLOYD GARRISON AND THE HUMANITARIAN REFORMERS* (1955) (describing the efforts of William Lloyd Garrison and other white abolitionists).

Thus, following the Civil War,<sup>32</sup> African Americans were permitted to vote and actually held a number of public offices.<sup>33</sup> Unfortunately, this trend did not continue. “After the Civil War ended, white southern politicians and government officials went to work subverting and reducing the position of blacks in the American South.”<sup>34</sup> At the same time, southern legislatures passed “Black Codes” which were “designed to put black citizens in a state of near slavery by limiting their rights and privileges.”<sup>35</sup>

The critical question is what might one do if he were an African-American man in the 1890s, when private whites had free reign<sup>36</sup> to enforce racial segregation in the south. Certainly, he would be aware of the level of violence. For example, an African American was lynched an average of once every three days.<sup>37</sup> What would he do then? Perhaps he would consider flight from the South; but where would he go? Would he have the education to know which direction to travel? Would he have the resources to move himself and family? Would he make a stand for what he felt was right, rather than run from his home? If he concluded that escape was not an option, as the circumstances would likely warrant, were there any legal remedies to protect himself, his family, and his property?

His legal remedies were limited. His education was limited. Thus, his participation in the legal process was consequently limited. His only remaining remedy would be to revolt. This, of course, would be offensive both to any sense of loyalty and patriotism, as well as to the peaceful spirit of democracy.<sup>38</sup> In addition, revolt would present intense and immediate risk to the individual and his family.<sup>39</sup> Fortunately, people of conscience and privilege assisted African Americans during these critical times,

32. See *infra* notes 119–129 and accompanying text (considering whether violence can be considered in the political process).

33. ROBERT D. LOEVEY, *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* 3 (1997).

34. *Id.*

35. *Id.*

36. *Id.* at 8 (noting that (1) white leaders accepted lynchings as a way to enforce segregation in the south; (2) the Civil Rights Cases prevented Congress from intervening; and (3) whites in the south would not convict one another of these crimes under state laws). See also MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 4–5 (1987) (quoting a Judge in 1868 as saying it was “almost an impossibility . . . to convict a white man of any crime . . . where the violence has been against a black man” and listing statistics of the frequency of lynchings). See generally PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2002) (providing a general historical account of lynching in America).

37. LOEVEY, *supra* note 33, at 8.

38. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (recognizing that “all men are created equal”).

39. See BELKNAP, *supra* note 36, at 5 (1987) (noting that “[w]hites whipped and even killed blacks for often trivial reasons” and that “[l]ynching reached a peak in the 1890s and remained at a relatively high level through the first two decades of the twentieth century”).

providing a support and escape network.<sup>40</sup>

Yet again, in the fifth and sixth decades of the twentieth century, African Americans from across the nation banded together<sup>41</sup> to obtain the political rights necessary to make real changes in American society, and then actually to *exercise* those rights to effect socio-political change. Different groups with different philosophies and interests had to realize a common goal, to “keep their eyes on the prize,” and to conceptualize themselves as equals within the American community.<sup>42</sup> The movement was amazing in organization, strategy, and sheer determination.<sup>43</sup> No other modern American movement has achieved such momentum.

Subsequently, as a result of this long process and the dedication of

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40. See HAYNES, *supra* note 28. See also TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS (1954–63) 366–74 (1988) (recounting the killing of three volunteers, Andrew Goodman, Michael Schwerner, and James Chaney—two Caucasian men and one African-American man—while they investigated a church burning); TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS (1963–65) 361–74 (1998) (same); STEVEN KASHER, THE CIVIL RIGHTS MOVEMENT: A PHOTOGRAPHIC HISTORY 1954–68 at 66 (1996) (noting that whites joined the initial sit-in demonstrations at the Woolworth’s in Greensboro, N.C.) [hereinafter KASHER]; *id.* at 96 (noting that the coverage of “Bull Connor’s barbarities” at Birmingham on the headlines of the *Washington Post* and the *New York Times* for twelve days “brought sympathy and support (including money) to the Birmingham movement from many”); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 347 (1994) (noting that “Northern lawyers began going south to volunteer”); Joseph I. Lieberman, *Why I go to Mississippi*, YALE DAILY NEWS (Oct. 28, 1963) (describing Joseph Lieberman’s rationale for supporting the Civil Rights Movement as a student), available at <http://www.joe2004.com/site/DocServer/CivilRightsBack.doc?docID=652> (on file with the North Carolina Law Review).

41. This communication was not always harmonious. The conversations between Dr. King and Malcolm X, for instance, was at times particularly acrimonious. For example, Malcolm X referred to the 1963 March on Washington as the “Farce on Washington,” objecting on the belief that “the march had been manipulated by the president to project a prettified [sic] image of racial harmony.” See KASHER, *supra* note 40, at 121 (1996).

42. See, e.g., *id.* at 66 (1996) (quoting Franklin McCain, one of the four Woolworth protestors in Greensboro, N.C., as saying that, after the sit in, “I probably felt better on that day than I’ve ever felt in my life. Seems like a lot of feelings of guilt or what-have-you suddenly left me, and I felt as though I had gained my manhood, so to speak, and not only gained it, but had developed quite a lot of respect for it.”).

43. See, e.g., MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM, *reprinted in* A TESTAMENT OF HOPE 430–38 (James M. Washington ed., Harper Collins 1991) (including an account of Dr. King’s admiration and excitement over the African-American community’s “enthusiasm for freedom” in deciding to commit to the Montgomery bus boycott). See also Archibald Cox, *Direct Action, Civil Disobedience, and the Constitution*, in CIVIL RIGHTS, THE CONSTITUTION, AND THE COURTS 3 (1967) (“Reform would not have moved so fast, if it progressed at all, without the freedom rides, the sit-in demonstrations, the Birmingham parades, and the march from Selma to Montgomery.”) [hereinafter Cox]; DOUGLAS JOHN MCADAM, POLITICAL PROCESS AND THE BLACK PROTEST MOVEMENT 1948–1970 app. II at 520–21 (photo. reprint 1982) (1979) (listing a chronology of sit-in demonstrations during from February 1, 1960 to March 31, 1960); ROSENBERG, *supra* note 20, at 135 fig.4.3 (showing an almost exponential growth in the number of demonstrations from 1940–1964).

leaders and members of the community,<sup>44</sup> Congress passed landmark legislation,<sup>45</sup> thereby granting African Americans many of the rights they struggled to obtain. The argument that judicial decisions furthered the Movement, such as *Brown v. Board of Education*,<sup>46</sup> does not weaken the thesis of this Comment. This is because, while *substantive due process* is critically considered as a source of rights, the Comment does not pass upon other sources of rights in the Constitution, for the simple reason that, although the highlighted problems with judicial review may attach to any exercise of the power, the provisions of, for example, the Equal Protection clause and the Bill of Rights, have text, history, and legislative intent sufficient to support enforcement of those rights. The recently developed doctrine of substantive due process is much more suspect on these points and is therefore reviewed in a critical light in this Comment.

## II. ADVERSE CONSEQUENCES OF JUDICIAL INTERFERENCE

As illustrated by the Civil Rights Movement, social movements can effectively bring about social change. Next, it is necessary to compare the efficacy of judicial intervention in bringing about social change. This Section will show that, under certain conditions,<sup>47</sup> judicial intervention results in one or more of at least five undesirable consequences.

### A. *Judicial Limitations*

First, courts are ill-equipped to make decisions with regard to social, moral, religious or other political issues because their communication is limited to the language of the law.<sup>48</sup> Cases directly illustrative on this point

44. For further detail on the lives of five outstanding leaders in the African-American community see generally JOHN WHITE, *BLACK LEADERSHIP IN AMERICA: FROM BOOKER T. WASHINGTON TO JESSE JACKSON* (2d ed. 1990) and JOHN WHITE, *BLACK LEADERSHIP IN AMERICA: 1895–1968* (1985).

45. See generally Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2 (2000)) (including provisions to prevent discrimination in employment); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601 (2000)) (prohibiting housing discrimination); Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(a), 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973a(a) (2000)) (protecting the right to vote); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1973a(a) (2000)). See generally BELKNAP, *supra* note 36, at 205–28 (accounting the process by which the Civil Rights Act of 1968 was passed); LOEVEY, *supra* note 33 (describing the political process leading to the enactment of the Civil Rights Act of 1964).

46. 347 U.S. 483 (1954).

47. See ROSENBERG, *supra* note 20, at 1–41 (describing different constraints and conditions impacting the Court's effectiveness).

48. See Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 VA. L. REV. 843, 844 (1998) (“The basic difficulty is that constitutional law is . . . ‘thinner’ than moral and political discourse generally.”); Jay Michealson, *On Listening to the Kulturkampf, or, How America Overruled Bowers v. Hardwick even though Romer v. Evans Didn't*, 49 DUKE L. J. 1559, 1609

are those cases that have cited to *Lawrence v. Texas*.<sup>49</sup> The *Lawrence* opinion gives a litigant a powerful *legal* argument that the scope of the constitutional right to privacy protects the defendant's activities,<sup>50</sup> but this argument alone is somehow incomplete. Several cases that distinguish *Lawrence* show that something essential is missing from the discussion, and judges are uncomfortable deciding these cases simply as a matter of law.<sup>51</sup> In other words, these judges realize that any resolution of the serious social issues presented by privacy cases cannot be addressed adequately in the judicial forum.

One case that draws such a distinction illustrates the difficulty a court has with making decisions under the *Lawrence* standard of the right to privacy. In *State v. Freeman*,<sup>52</sup> a father was charged with having sexual relations with his twenty year-old daughter, the crime of incest under Ohio law.<sup>53</sup> Determining that the *Lawrence* standard recognizes a privacy right when adults engage in sexual practices with full and mutual consent, the court distinguished the facts before it from *Lawrence* on two grounds.<sup>54</sup> First, the court noted that *Lawrence* did not extend a privacy right where there would be "injury" to a person.<sup>55</sup> "In the case of incest," the court held, "there is injury to persons."<sup>56</sup> The court underscored this point by emphasizing the alleged injuries of the father himself due to incestuous relationships in his past.<sup>57</sup> The court further distinguished the facts of the case before it by noting that, unlike the sodomy statute in *Lawrence*, "the state has a legitimate interest in preventing incest: protecting the family unit."<sup>58</sup> Finally, the court noted that the acts at issue in *Lawrence* were admittedly consensual, whereas it was unclear in *Freeman* whether the conduct was mutually consensual.

Three major issues starkly present themselves on this reasoning. First, how did the court decide that there was "injury" to persons? Beyond this, what is the standard by which this injury is to be measured and what of the possibility that there are some cases of incest where the parties are not

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(2000) (stating that the sodomy debate is "more properly one of morality than of legality").

49. 539 U.S. 558 (2003).

50. *But cf.* *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 815-17 (11th Cir. 2004) (holding that *Lawrence* does not recognize a new fundamental right).

51. *See* *U.S. v. Peterson*, 294 F. Supp. 2d 797, 807 (D.S.C. 2003); *State v. Clark*, 161 N.C. App. 316, 321, 588 S.E.2d 66, 68-69 (2003); *State v. Freeman*, 801 N.E.2d 906, 909 (Ohio App. 7 Dist. 2003).

52. *Freeman*, 801 N.E.2d at 906.

53. *Id.* at 907.

54. *Id.* at 909.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

injured? Second, the court stated that the legitimate state interest supporting an incest statute was the “protection of the family unit.” What, then, is a “family unit?” Does this rest upon a traditional notion of what constitutes a family,<sup>59</sup> and, if so, would a statute against homosexual sodomy also be justified by such logic? Finally, assuming the conduct was consensual (it was, after all, unclear from the facts before the court<sup>60</sup>), would that mean this incestuous conduct would come within a *Lawrence* zone of privacy?<sup>61</sup>

These questions are important because, although the learned judge settled the parties’ rights in the context of the language of the law, the questions left unresolved are essentially moral, religious, philosophical, and ethical issues that the judge—indeed, the judiciary as a whole—is woefully ill equipped to handle.<sup>62</sup> Important issues should not be decided in a forum that cannot consider all the relevant sources that contribute to a satisfactory social solution. Some have argued that, because the courts are inappropriate venues for the discussion of the deeper questions of morality, the matter should be left to community discussion without the involvement of the government *at all*.<sup>63</sup> However, the legislative process is an adequate

59. See, e.g., *Inching Down the Aisle: Differing Paths toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2024 (2003) (noting the different treatments of the legal term “family” in the courts); *Changing Realities of Parenthood: The Law’s Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2059 (2003) (suggesting that “individuals falling well outside the traditional definitions of parenthood and family can act, in effect, as parents.”). See also *Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F.3d 804, 814–15 (11th Cir. 2004) (considering the scope of the “family unit” under Florida law).

60. *Freeman*, 801 N.E.2d at 909.

61. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (emphasizing that the majority opinion cited “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*” and expressing concern that this reasoning “call[s] into question” a variety of “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity”).

62. See *Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1985) (“Moral issues should be resolved by the people, and the laws pertaining thereto should be written or rescinded by the representatives of the people.”). *But see Lawrence*, 539 U.S. at 577 (quoting Justice Steven’s dissent in *Bowers* for the proposition that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”).

63. Michaelson, *supra* note 48, at 1609–10 (suggesting that a “*Bowers II*” that would overrule the first *Bowers*—essentially the recent *Lawrence v. Texas* opinion—would provide a “position of neutrality” and would allow community discussion tools such as “moral censure, media campaigns, promises of hellfire, philosophical reasoning, recourses to Darwin, immunological theodicy, stories of roman decadence, pictures of lovely straight children, social advance, [and] parental love.”). The author does not address, however, why this rationale should apply to every legislative enactment.

In addition, this Comment suggests that citizens who are displeased with current statutes have exactly the same persuasive tactics that Michaelson suggests the majority should employ.

and effective forum for this public discussion, if the people have the incentive to force their representatives to be responsive.<sup>64</sup>

### B. *Discouragement of Community-based Solutions*

Second, where the judiciary intervenes in social debate, the political and social capacity of the individual within the public sphere will deteriorate. This is because citizens will be blinded by advancing only their own political needs and desires, rather than becoming aware of the needs of the community at large and how their needs fit into the larger social framework.<sup>65</sup> As one scholar wrote, while in the democratic process, citizens:

[A]re forced to find or create a common language of purposes and aspirations, not merely to clothe our private outlook in public disguise, but to become aware ourselves of its public meaning . . . . In the process, we learn to think about the standards themselves, about our stake in the existence of standards, of justice, of our community, even of our opponents and enemies in the community; so that afterwards we are changed. Economic man becomes a citizen.<sup>66</sup>

The more courts show a willingness to provide an easy answer to litigants, the less likely citizens are to take the path of greater resistance and greater reward by seeking community-based solutions for their problems. For example, if African-American advocacy groups<sup>67</sup> could have received total relief from the judiciary on a case addressing only their particularized grievances, they probably would have preferred the instant legal solution. These groups would not have banded together with the political and economic grassroots campaigns that ultimately empowered a

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Surely, the burden must be on someone to press the public case, and practically, the minority should bear the burden of persuasion because they are most interested in reforming the law.

64. See THE FEDERALIST NO. 70, at 491 (Alexander Hamilton) (Henry B. Dawson ed., 1865) (“In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the Government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority.”). See also *Ewing v. California*, 538 U.S. 11, 28 (2003) (noting that the Supreme Court does “not sit as a ‘superlegislature’ to second-guess these policy choices”). See generally *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (holding that the Due Process Clause does not allow the judiciary to act as a “superlegislature”).

65. See generally PUTNAM & FELDSTEIN, *supra* note 11 (detailing a decline in American social and civic participation).

66. Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1624 n.7 (1988) (quoting Hannah Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 347 (1981)).

67. Advocacy groups included the Congress of Racial Equality, the National Association for the Advancement of Colored People, the Southern Christian Leadership Conference, and the Nation of Islam.

generation of activists with the knowledge of the power of political organization and the accompanying personal dignity.<sup>68</sup>

Although judicial intervention does not prevent groups from working together in the political process, it provides a disincentive to the process based solution that provides a deeper, more substantive social solution in the long run.

### C. *Reduction of Opportunities for Community Involvement*

Similarly, yet distinctly, the public and social sphere will suffer from a systematic deterioration. Citizens will be denied the opportunity to develop important social skills critical to a properly functioning democracy: communication, empathy, and advocacy to and for their peers. This is in stark contrast to individual advocacy in an elite judicial process. When citizens participate in the political process, it is often necessary to communicate with other interested persons and groups to forge coalitions supporting the group's goal. In litigation, however, one need only communicate directly to the court. The better scenario, therefore, is for people to develop communication skills by working with others in their own community and seeking litigation only as a last resort.

Not only will prevailing litigants be deterred from developing social advocacy skills, but judicial intervention will create a hostile social environment by making it difficult for a group to advocate on its own behalf in its community. As Rosenberg notes:

[T]he data suggest that [court decisions] may mobilize opponents [of significant social reform]. With civil rights, there was growth in the membership and activities of pro-segregation groups such as the White Citizens Councils and the Ku Klux Klan in the years after *Brown*. With abortion, the Right to Life movement expanded rapidly after 1973. While both types of groups existed before Court actions, they appeared re-invigorated after it. In addition, in the wake of the Supreme Court's 1989 *Webster* decision, seen by many as a threat to continuing access to safe and legal abortion, pro-choice

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68. For a specific instance of the recent application of economic pressure, see Press Release, National Association for the Advancement of Colored People, NAACP Boycott of South Carolina to Continue Despite Vote to Remove Flag from Capitol Dome (May 11, 2000) (reporting on the "economic boycott of South Carolina since January 1, 2000. More than 200 meetings, conventions and family reunions have been cancelled, resulting in the loss of at least \$20 million" and that the South Carolina legislature decided to remove the confederate flag from atop the capitol building in Columbia). See also Jeremy Quittner, *Cracker Barrel Buckles*, THE ADVOCATE, at 24 (Feb. 4, 2003) (reporting that Cracker Barrel added sexual orientation to its non-discrimination policy following "years of angry protests from activists and shareholders and a decade-long boycott by gays and lesbians"), available at [http://www.findarticles.com/pl/articles/mi\\_m1589/is\\_2003\\_Feb\\_4/ai\\_97175008](http://www.findarticles.com/pl/articles/mi_m1589/is_2003_Feb_4/ai_97175008) (on file with the North Carolina Law Review).



forces seemed to gain renewed vigor.<sup>69</sup>

In the present day, Americans can observe this phenomenon as the judiciary becomes involved in advancing the gay rights movement.<sup>70</sup> The response has been swift and significantly negative.<sup>71</sup> Indeed, some courts foresaw such consequences even before empirical studies on the point were performed.<sup>72</sup> Thus, while judicial review has the effect of squelching progressive, genetic social movements as described in the previous Section, it also has the ironic potential to invigorate reactive, resistive social movements.

Unnecessary judicial involvement is especially suspect in light of

69. ROSENBERG, *supra* note 20, at 341–42. The Supreme Court’s 1989 plurality decision in *Webster*, which Rosenberg cites, held that a Missouri law requiring doctors to determine whether a fetus was viable after the twentieth week of gestation was reasonably related to the legitimate government interest to prevent aborting a viable fetus. See also BELKNAP, *supra* note 36, at 28 (noting that the Ku Klux Klan experienced a Southern revival following *Brown v. Board of Education*); Timothy R. Johnson and Andrew D. Martin, *The Public’s Conditional Response to Supreme Court Decision*, in AM. POL. SCI. REV., June 1998, at 2 (summarizing a previous study that “[t]he effect of *Roe* was further crystallization of issue preferences and greater homogeneity of within-group beliefs . . . [f]rom this they conclude, in line with the structural response hypothesis and contextual theory, that the Court’s decision polarized group attitudes toward abortion”) (citation omitted).

70. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas statute making it a crime for persons of the same sex to engage in certain sexual conduct violated the Due Process Clause); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that barring an individual from the protections, benefits, and obligations of civil marriage solely because they would marry someone of the same sex violated the state’s constitution).

71. See President George W. Bush, State of the Union Address (Jan. 20, 2004) (suggesting that, if “[a]ctivist judges” insist upon defining marriage “by court order, without regard for the will of the people and their elected representatives,” resort to the constitutional amendment process would be appropriate), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (on file with the North Carolina Law Review); Fifty-state Rundown on Gay Marriage Laws, at [www.stateline.org](http://www.stateline.org) (last visited Oct. 8, 2004) (noting that Missouri passed a constitutional amendment banning gay marriage on August 3, 2004) (on file with the North Carolina Law Review); *The Battle Over Same Sex Marriage*, at [http://www.pbs.org/newshour/bb/law/gay\\_marriage](http://www.pbs.org/newshour/bb/law/gay_marriage) (Nov. 8, 2004) (noting that voters in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Utah, and Oregon approved amendments on their ballots in the 2004 election and noting that President Bush will continue to press for a federal amendment banning gay marriage) (on file with the North Carolina Law Review).

72. In *Baker v. Wade*, 774 F.2d 1285, 1285 (5th Cir. 1985), the court stated:

Moral issues should be resolved by the people, and the laws pertaining thereto should be written or rescinded by the representatives of the people. Were a federal court to decree that the United States Constitution decides the issue and override the opinion of those of the different view, the natural course of the public debate and the developing consensus would be misshapen. *The feelings of the losers, perhaps still in the majority, could be elevated by the nature of the fiat, and their frustrations might be vented upon the winners to a degree that increased the burdens of the latter beyond the consequences endured under the invalidated statute.*

774 F.2d at 1285 (emphasis added).

research that indicates that people are unlikely to change their opinions on a subject once they have received information sufficient to form an opinion.<sup>73</sup> If this is indeed the case, then it is all the more important for the community to discuss these ideas without influence from an elite class of judges that hold a position of respect among the American public.<sup>74</sup> The Supreme Court has had difficulty making up its institutional mind in the past.<sup>75</sup> The first decision on any particular issue will probably “help[ ] individuals elaborate their opinions,” therefore “subsequent decisions within the same issue area—even if they overrule an initial landmark decision—will have little effect on public opinion.”<sup>76</sup> Rather than risking polarizing the opponents of those who seek social reform as well as contributing to the “elaboration” process only to unsuccessfully attempt to change the public’s mind after the fact,<sup>77</sup> the courts should be willing to allow the political process room to operate.

#### D. *Erosion of Political Responsibility*

Fourth, judicial intervention provides political representatives a way out of politically uncomfortable situations. The representative can deflect responsibility to the judiciary’s decision, rather than take a politically risky stance on the matter.<sup>78</sup> Although some cases that come before the judiciary

73. See Johnson & Martin, *supra* note 69, at 300–01 (describing the process of forming an opinion and referring to it as “elaboration”).

74. See *id.* at 300 (citing “research demonstrating that even people who know very little about the Supreme Court often hold it in high regard.”).

75. Compare, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (validating the state legislature’s act to criminalize sodomy) and *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (validating “separate but equal” treatment by upholding a statute providing for racially segregated railway accommodations) with *Lawrence*, 539 U.S. at 578 (invalidating the state legislature’s act to criminalize sodomy) and *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (invalidating “separate but equal” treatment by striking down racial segregation in public schools).

76. See Johnson & Martin, *supra* note 69, at 300.

77. See, e.g., *Lawrence*, 539 U.S. at 589–91 (Scalia, J., dissenting) (citing a number of cases that relied on the Supreme Court’s first judgment on the validity of laws enacted pursuant to a moral rationale, then remarking that “[w]hat a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.”).

78. See, e.g., JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 441 (1981). Among the quotes collected in this source, a former Representative declares that “[s]ince only the most politically secure congressman can afford to offend constituents—and since there are so many ways to offend them—natural survival instincts dictate that a congressman will duck any tough issues that he can.” *Id.* (quoting Les Aspin, *Why Doesn’t Congress Do Something*, 15 FOREIGN POL’Y 70, 73 (1974)). Another Representative stated that, “Congress usually won’t face up to a problem before it has to, until it is forced to.” *Id.* (quoting Donald W. Reigle, Jr. and Trevor Ambrister, *A Congressman’s Diary*, in *DILEMMAS OF DEMOCRACY: READING IN AMERICAN GOVERNMENT* 80 (Peter Collier ed., 1976)). See also Thomas G. West, *The Constitutionalism of the Founders Versus Modern Liberalism*, 6 NEXUS 91–95 (noting an analogous problem of congressional shirking of responsibility by passing broad laws empowering administrative agencies to act). Cf. JAMES BRADLEY THAYER, JOHN MARSHALL 109 (Da Capo

should be settled as a matter of constitutional law (some rights are clearer than others,)<sup>79</sup> special attention should nevertheless be devoted to the possibility of abuse by public officials, especially where the source of the constitutional right is suspect. Because legislative officials are intended to be directly responsive to the will of the people,<sup>80</sup> judicial interference assists the legislative branch in abdicating its constitutionally assigned role.<sup>81</sup>

It is also true that this deflection of responsibility does not occur in every case. In fact, in some instances, public officials will be invigorated by a judicial decision.<sup>82</sup> Even if this is true, however, it is the people, not

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Press 1974) (1901) (“[By exercising judicial restraint], the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation”).

79. Cf. James B. Thayer, *The Origin And Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (“[The Court] can only disregard the Act [of Congress] when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question.”); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 35–46 (Yale Univ. Press 2d ed. 1986) (1962) (detailing the judicial development of this “clear mistake” rule).

80. See U.S. CONST. art. I, § 2, cl. 1 (requiring members of the House to be elected “every second Year by the People”); U.S. CONST. art. I, § 3, cl. 1 (providing for a six year term for Senators).

81. Beyond simply serving as a representative to their constituencies, Congress may also have a constitutional responsibility to engage in the constitutional debate. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 9 (1999) (quoting President Lincoln’s opposition to *Dred Scott* and his position that “the people will have ceased to be their own rulers” if they simply accept the decisions of the Supreme Court as law applicable beyond the litigants in any particular case) (quoting *Lincoln’s First Inaugural Address* (March 4, 1861), in *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897*, at 9 (James D. Richardson, ed., 1897)); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1987) (“Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes an oath precisely to that effect.”); Eugene W. Hickok, Jr., *Congress, the Court, and the Constitution: Has Congress Abdicated Its Constitutional Responsibilities?*, Lecture Before the Heritage Foundation (Nov. 29, 1990) (stating that “to say the courts exist to give meaning to the laws and the Constitution is not to embrace the idea that only courts can give meaning to the laws and the Constitution.”) available at <http://www.heritage.org/Research/GovernmentReform/HL299.cfm> (on file with the North Carolina Law Review).

82. See, e.g., Kevin Clarke, *Suspended Sentence: How the U.S. Almost Put Capital Punishment to Death*, (1998) (stating that “[i]n response to his court’s decision, an angry [California Governor] Reagan neatly capsulated the debate that has swirled around this issue since Furman, calling it a ‘case of the courts setting themselves above the people and the legislature’ and vowing ‘revenge.’”), available at <http://salt.claretianpubs.org/issues/deathp/hiscap.html> (on file with the North Carolina Law Review); Nebraska Governor Mike Johanns, *State of the State Address* (Jan. 11, 2001) (“I also ask this body to make a bold commitment to honor the life of the unborn. I, like many in our state, was saddened by the U.S. Supreme Court decision striking down Nebraska’s law banning partial-birth abortion . . .”), available at <http://gov.nol.org/speeches/speeches2001/sos01112001.html>. (on file with the North Carolina Law Review); News Conference, Department of Justice (May 1, 2002) (quoting Attorney General Ashcroft as saying “[o]n April the 16th, the United States Supreme Court

judges, who should motivate representatives. In this sense, if judges become the motivators of legislative and executive representatives, then the judiciary will not simply have usurped the role of an independent branch of government, but of *the people themselves*. In view of the fact that judges cannot mechanically apply the law and must rely, to some extent, on their own subjective value systems and experiences, this is simply an unacceptable amplification of the preferences of the learned legal class from which judges hail. At least one judge has conceded that personal preferences cannot be eliminated from the process of judging, even where the judge recognizes that subjectivity exists and commits himself to the control thereof.<sup>83</sup>

Thus, even if a court decision stimulates the political debate, the judiciary will have usurped the role of the people in establishing matters of legislative and/or executive importance.<sup>84</sup> It is not for the courts to decide what the matters of the public debate shall be; rather, the determination is for the constituents of policymakers.<sup>85</sup>

#### *E. Inefficient Allocation of Resources*

From a practical standpoint, social advocates realize that limited resources must be applied in the most efficient method to affect a particular result.<sup>86</sup> If the judiciary induces the people into thinking that the courts can

issued a decision that did grave injury to our ability to protect children from exploitation. The Court struck down provisions of the Child Pornography Prevention Act, a law passed with bipartisan support in 1996 . . .”), [http://www.usdoj.gov/criminal/ceos/ashcroft\\_childporn.htm](http://www.usdoj.gov/criminal/ceos/ashcroft_childporn.htm) (on file with the North Carolina Law Review); Press Release, Oklahoma House of Representatives Media Division, OKC Legislator Condemns Supreme Court For Striking Down Texas’ Sodomy Law (June 26, 2003), available at <http://www.lsb.state.ok.us/house/NEWS6328.htm> (on file with the North Carolina Law Review).

83. Edward M. Chen has weighed in on the issue of subjectivity and the judiciary. Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1120 (2003). He states:

In short, my understandings and perceptions, and perhaps my subconscious predilections, are fashioned to a significant extent by my life experiences. And although a judge’s duty is to recognize those predilections and control them, it is simply unrealistic to pretend that life experiences do not affect one’s perceptions in the process of judging.

*Id.*

84. See ROSENBERG, *supra* note 20, at 229–41 (citing Justice O’Connor’s belief that judicial decisions can place an item on the public agenda, and concluding that “evidence for extra-judicial influence is lacking”). See also Michaelson, *supra* note 48, at 1608, 1611 (arguing that a court decision can serve to stimulate the political debate).

85. See STEPHEN E. FRANTZICH & STEPHEN L. PERCY, *AMERICAN GOVERNMENT: THE POLITICAL GAME* 339–40 (Stan Stoga & Roger B. Wolkoff eds., 1994) (explaining that members of Congress gain the power to set agendas through a seniority system and highlighting the importance of committees to enacting legislation).

86. See ROSENBERG, *supra* note 20, at 339 (noting the Rev. Dr. M. L. King, Jr.’s complaint of the expense of pursuing judicial action). See also Dennis J. Hutchinson, 4 GREEN BAG 2d 157,

bring about social changes,<sup>87</sup> advocacy groups will be deceived into expending large amounts of resources in a litigation strategy that may well make their real task,<sup>88</sup> true community understanding and acceptance, even more difficult.

If the judiciary in fact behaves as “fly paper” to obstruct groups,<sup>89</sup> then it is obviously not acting as a defender of the political process, but is serving to trap those interests that would otherwise prove successful with empty promises of social change at the inflated cost of litigation. The courts would thus hinder the goal of empowering citizens to advocate for and with others effectively in the democratic process.<sup>90</sup>

#### F. Summary

Taken together, these five adverse consequences of judicial intervention are quite disturbing. These consequences are especially worrisome when one considers that the effect of denying the opportunity to learn of democracy will not be isolated; rather, parents, not having learned the democratic savvy necessary to become true “community creatures,” will be unable to teach their children how to participate effectively in their own community. As the Rev. Dr. M. L. King, Jr. wrote, “[w]e in this generation must do the work and in doing it stimulate our children to learn and acquire higher levels of skill and technique.”<sup>91</sup> Thus, these negative consequences may well resonate throughout future generations.<sup>92</sup> It is critical, therefore, to consider how the courts can avoid premature interjections into the political process.

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168 (2001) (paraphrasing Justice Thurgood Marshall, in an interview, that “his own campaign against Jim Crow . . . had produced empty or unstable victories.”).

87. By this point, such an inducement has been shown to be quite questionable.

88. This is to say nothing of the expense to the public that comes from extensive litigation, as the legislature is a more efficient avenue to handle broad social issues.

89. See ROSENBERG, *supra* note 20, at 343 (concluding that “[s]ocial reformers, with limited resources, forgo other options when they elect to litigate. These options are mainly political and involve mobilizing citizens to participate more effectively . . . . [W]hile such exercises may make for fine reading in constitutional law textbooks, they seldom bring reform any closer.”).

90. See *infra* notes 135–44 and accompanying text.

91. KING, *supra* note 43, at 611.

92. *But see* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (“As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”) (emphasis added).

### III. SOLUTION

#### A. *Judicial Character*

##### 1. Humility

Any solutions to the repercussions of judicial intervention must begin with an examination of the judicial perception of the judicial institution itself. As Professor Tribe observed, “[t]he [Supreme] Court’s self-confidence in what it sees as matters constitutional is matched only by its disdain for the meaningful participation of other actors in constitutional debate.”<sup>93</sup> Although the judiciary has a duty to interpret the Constitution, it must also respect the other democratic branches. The judiciary must check its own self-image, if for no other reason than that no one else *can* meaningfully check it. It is true that there technically are some checks on the judiciary. These include impeachment,<sup>94</sup> the possibility of constitutional amendment,<sup>95</sup> the judicial appointment process,<sup>96</sup> and the judiciary’s limited jurisdiction.<sup>97</sup> However, once judges have been appointed, it is difficult to check them. For example, impeachment requires a supermajority,<sup>98</sup> amendment requires a significant and cumbersome effort,<sup>99</sup> and judges cannot have their salaries diminished during their terms in office.<sup>100</sup> Therefore, the only useful checks are the

93. Laurence H. Tribe, *eroG v. hsuB: Through the Looking Glass*, in BUSH v. GORE: A QUESTION OF LEGITIMACY 62 (Bruce Ackerman ed., 2002); see DE TOCQUEVILLE, *supra* note 14, at 445 (stating that “[o]n my arrival in the United States, I was struck with surprise to discover the extent to which merit was common among those who were governed and how little there was among those who governed.”); ROSENBERG, *supra* note 20, at 2–3 (noting the possibility of the “mystification” of the legal profession). See also sources cited in note 81 (noting that the Court is not the only institution charged with interpreting the Constitution).

94. See U.S. CONST. art III, § 1 (providing that judges shall hold their offices while on “good [b]ehavior”). However, over the course of American history, only “[s]ixty-one federal judges or Supreme Court Justices have been investigated for impeachment, of whom thirteen have been impeached and seven convicted.” David Barton, *Impeachment of Federal Judges*, at <http://www.wallbuilders.com/resources/search/detail.php?ResourceID=69> (last visited Nov. 10, 2004) (on file with the North Carolina Law Review). See also FRANTZICH & PERCY, *supra* note 85, at 343 (explaining the impeachment process).

95. See U.S. CONST. art. V (providing the process by which the Constitution is to be amended).

96. See U.S. CONST. art. II, § 2, cl. 2 (The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .”).

97. See U.S. CONST. art. III, § 2 (providing that, except in those cases where the Supreme Court has original jurisdiction, “the [S]upreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

98. See sources cited in note 94.

99. See U.S. CONST. art V.

100. See U.S. CONST. art. III, § 1 (“The Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

appointment process and the limitation of jurisdiction.<sup>101</sup> The appointment process is somewhat weak, as some candidates will not voice their positions on issues during questioning. The appointment process also provides no recourse after a judgment has been issued. The option to limit jurisdiction is also a thorny choice, as the rights of the citizens will be impaired if they do not have access to the courts.

Moreover, given the potential reach and power of judicial review, the judiciary exercises power that simply cannot be checked, and would therefore only be limited by public perceptions of the institution's legitimacy. After all, a court can simply invalidate or refuse to recognize any legislative or executive attempt to check its power since, by its own pronouncement, it is the final authority on the interpretation of the Constitution, including whether the other branches have authority to act in the first instance.<sup>102</sup>

## 2. Patience

The second trait the judicial institution must strive to achieve is patience. Two cases serve to underscore the impatience of the judiciary in waiting for the political process to operate.

First, in *Frontiero v. Richardson*,<sup>103</sup> the Court relied on the volume of legislation Congress passed<sup>104</sup> extending protections on the basis of sex to "conclude that classifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny."<sup>105</sup> The concurrence questioned if the Court should intervene where the Equal Rights Amendment ("ERA") was already working its way through the political machinery.<sup>106</sup> "By acting prematurely and unnecessarily," the opinion stressed:

[T]he Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political

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101. See 149 CONG. REC. S2030 (daily ed. Feb. 6, 2003) (statement of Sen. Santorum) (during confirmation hearing of Miguel Estrada, noting that Estrada has refused to disclose his judicial philosophy).

102. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803) (establishing the principle of judicial review); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (reaffirming the principle of judicial review and holding that the Supreme Court is the final authority on questions of constitutional law).

103. 411 U.S. 677 (1973).

104. The Court specifically mentioned the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the pending Equal Rights Amendment. *Id.* at 687.

105. *Id.* at 688.

106. *Id.* at 692 (Powell, J., concurring in the judgment).

decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.<sup>107</sup>

Secondly, in *Lawrence*, the Court referred to international trends in supporting the decision.<sup>108</sup> In addition, the Court noted that five state courts had refused to follow *Bowers*<sup>109</sup> and the national trend to repeal the laws in general.<sup>110</sup> All of this points to the fact that people, pursuant to the political process, were reaching the result the Court wanted all on their own. Just as Justice Powell pointed out in *Frontiero*,<sup>111</sup> the Court again stepped in at just the time when state legislatures were debating important issues on their own.<sup>112</sup>

Simply put, trends in public opinion will eventually be enshrined in legislation.<sup>113</sup> All it takes is a bit of patience on the part of an understandably eager judiciary.

To those that argue that constitutional “rights” cannot wait, it is well for them to consider the adverse consequences explored hereinabove, and, specifically, the possibility of polarization. Is it really best to have the judiciary jump to the conclusion when individuals may become polarized, making the community less comfortable for proponents of social reform?<sup>114</sup> It would be an implausible counterargument to say that the mere extension of constitutional rights will afford peace and a comfortable living environment. In the past, this may have been true, as people lived far away from each other and came into contact with each other less. Today, however, Americans mostly live in urban centers and are in constant contact with each other, physically as well as technologically. It is far better to have a community consensus than to have a dubious “right”

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107. *Id.*

108. See *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003). See generally Symposium, *Has the Supreme Court gone too far?*, COMMENTARY MAGAZINE 14, at [http://committeeforjustice.org/contents/news/news100103\\_commentary.shtml](http://committeeforjustice.org/contents/news/news100103_commentary.shtml) (Oct. 2003) [hereinafter COMMENTARY MAGAZINE] (“As for permitting judges to conform domestic law to foreign law, that is to abandon national sovereignty, something almost no political leader would undertake to defend.”) (on file with the North Carolina Law Review).

109. *Lawrence*, 539 U.S. at 2483.

110. *Id.*

111. See note 106 and accompanying text.

112. See, e.g., Arthur S. Leonard, *Nationwide, Sodomy Laws in Full Retreat*, at <http://www.gaycitynews.com/gcn28/nationwide.html> (last visited Nov. 10, 2004) (describing the trend of state legislatures repealing sodomy statutes) (on file with the North Carolina Law Review); Molly Hennesy-Fiske, *State’s Sodomy Statute Could Fall: A Repeal Effort Will Be Discussed at a Town Hall Meeting Tonight in Raleigh*, NEWS & OBSERVER (Raleigh, N.C.), April 15, 2003, at C1 (describing a town hall meeting to discuss the possible repeal of North Carolina’s sodomy statute).

113. See COMMENTARY MAGAZINE, *supra* note 108.

114. See generally *Bush v. Gore*, 531 U.S. 98 (2000) (removing the voting issues from the state political process, which would have allowed for an alternative “resolution”).



conferred by the judiciary.<sup>115</sup> Where the Constitution is not clear and judges must stray from the “language and design” of the document to find rights,<sup>116</sup> it is better not to make the environment worse for the citizens than it otherwise would be. For example, some gay rights advocates agree that patience is an important component of social change. Some fear that “too rapid a march toward [gay] marriage equality will engender a popular backlash.”<sup>117</sup> Justice Ginsburg also advocated for a moderate approach to the role of the judiciary in pushing social change.<sup>118</sup>

### B. *Political Process and Revolution*

Given the benefits of the political process and its primacy in our democratic system, courts should encourage it.<sup>119</sup> However, it is important to realize that democratic advocacy can sometimes lead to violence if the

115. See *Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1985) (case predicting that the consequences could be worse for the winners of litigation if the majority of society is polarized and energized by judicial action).

116. “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)); see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field.”) (citations and quotations omitted).

117. See *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2011 (2003).

118. Justice Ginsburg believes that “the court should ‘reinforce,’ or, at most, ‘moderately add impetus’ to social change.” See *Carey Olney, Better Bitch Than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 BUFF. WOMEN’S L.J. 97, 127 (2000–01) (quoting Ruth Bader Ginsburg, *Constitutional Adjudication as a Means of Realizing the Equal Stature of Men and Women Under the Law*, 14 TOCQUEVILLE REV. 125, 134 (1993)).

119. Of course, the whole of this Comment rests on the premise that political participation is an inherent *good* in our society. See PUTNAM, *supra* note 11, at 31–47 (detailing a decline in American social and civic participation); Brest, *supra* note 66, at 1623 (favorably presenting “civic republicanism”); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 704 (1991) (same); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988) (exploring “civic republicanism”). However, some have criticized this as unrealistic because Americans do not force participation in the democracy. See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1034–35 (1984).

However, the closest Americans have come in the past to forced participation is the forced *consideration* of social issues through the mass media. This at least increases the likelihood that people will participate. For instance, some Caucasians became involved in the Civil Rights Movement upon seeing images on the television—a new and powerful medium of forcing people to confront social issues in the comforts of their own home. See ROSENBERG, *supra* note 20, at 113 fig.4.1 (showing increased coverage of the civil rights movement in magazines). For a sampling of representative images in the media, see generally KASHER, *supra* note 20 (documenting the Civil Rights Movement with a number of images from the period).

political procedures provide no remedy for the oppressed group.<sup>120</sup> A court might find the exercise of judicial review proper to prevent a complete breakdown of the democratic process, for example, a resort to violence. An important illustration of the need to reach the proper balance of judicial intervention is best highlighted by the contrasting scenarios in *Cooper v. Aaron*<sup>121</sup> and *Bush v. Gore*.<sup>122</sup> In *Cooper*, Arkansas state officials, by forcibly and illegally refusing to follow a federal court order to integrate Little Rock High School, behaved in a manner that would have led to violence.<sup>123</sup> The Florida state government in *Bush v. Gore* opted to provide more time, under state law, to reach a legal conclusion regarding the hotly contested results of the 2000 presidential election in a non-violent environment. Thus, the democratic process was protected by judicial intervention in *Cooper v. Aaron*, whereas the political process was “short-circuited” in *Bush v. Gore* even while the process was yet properly functioning.<sup>124</sup>

Considering these two cases together raises questions of whether, and to what extent, courts should consider the potential for violence as a proper basis for judicial action. There is a fine line between participation and violence, between demonstration and riots. Because Congress is given the power to squelch rebellions and insurrections,<sup>125</sup> preserving the peace is more of a law enforcement or public safety issue than a judicial one in the absence of legislative action. The courts must try to force the legislative branch to respond to “violence” by declining to intervene and squelching the violence itself. When Congress must respond to public demonstrations, by characterizing them as violence, this plunges congressional officials back into the political process. The officials’ respective constituencies will assess the legislative characterization of the situations and actions in response thereto. Representatives will then be accountable for suppressing any political discourse they improperly deemed “violence.” In fact, if the unaccountable judiciary elects to do otherwise and suppresses the political

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120. See sources cited in note 36.

121. 358 U.S. 1 (1958) (per curiam).

122. 531 U.S. 98 (2000).

123. Arkansas Governor Faubus, who called the National Guard to defy the integration of the local high school, proclaimed, “Now begins the crucifixion!” TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS (1954–63) 224 (1988). After this, “[b]y midmorning, angry whites had beaten at least two Negro reporters, broken many of the schools’ windows and doors, and come so close to capturing the Negro students that the Little Rock police evacuated them in desperation. Central High was segregated again before lunch, and students joined the mob in cheers of victory.” *Id.* See generally BELKNAP, *supra* note 36, at 4–5 (detailing the violence in Little Rock and elsewhere after the *Brown* decision).

124. See Tribe, *supra* note 93, at 61 (noting that the court may have made “a deliberate decision to short-circuit” the democratic process) (emphasis omitted).

125. U.S. CONST. art. I, § 8, cl. 15. See also sources cited in note 9.

process by “resolving” issues, that could be a sophisticated censoring by removing the object of the debate.<sup>126</sup> Nevertheless, if the political process is not functioning properly, and demonstrations have turned truly violent, courts should take action to restore a peaceful functioning of the political process.<sup>127</sup>

The whole of this discussion of what constitutes “political participation” illustrates another problem scholars have identified with the courts attempting to exercise judicial review to repair failings of the political process. The anatomy of the political process, scholars argue, is so complex as not to allow for diagnosis of problems or prescription of solutions by judges.<sup>128</sup> However, so long as people have the ability to participate peacefully and fully, the political process is essentially working as the Constitution requires.<sup>129</sup>

### C. *A Proper Conception of Due Process*

As an initial matter, Professor Ely has pointed out that the only proper interpretation of the Due Process clause is *procedural* due process.<sup>130</sup> Indeed, the text of the Constitution supports the learned professor’s view.<sup>131</sup> The professor also noted, however, the attendant judicial restraint issues if

126. See U.S. CONST. amend. I.

127. For example, this might be a foundation for *Cooper v. Aaron*, 358 U.S. 1 (1958). For where the other levels of government—in that case, the state—are violent, it would seem appropriate for the court to repair the political process through judicial review. See sources cited in note 123 (describing the level of violence of the facts from which *Cooper* emerged).

128. See Richard L. Hasen, *The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 730 (1998) (concluding that there is not an appropriate standard by which to measure competitiveness).

129. Cox, *supra* note 43, at 6.

130. ELY, *supra* note 12, at 18 (“Familiarity breeds inattention, and we apparently need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness’”). It is quite odd, indeed. Justice Scalia, in several concurrences, has argued:

I think it unlikely that the procedures constitutionally “due,” with regard to an arrest, consist of anything more than what the Fourth Amendment specifies; but petitioner has in any case not invoked “procedural” due process . . . I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.

See *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring).

131. See U.S. CONST. amends. V, XIV (“without *due process* of law”) (emphasis added). This phrasing suggests that there is a “due process” for every governmental action. Although the text might suggest that the required due process is different for each interest (life, liberty, etc.), it nevertheless supposes that some of level of process would be sufficient (in other words, *due*). See also sources cited in note 125. Cf. *The Magna Carta* c.39 (1215) (“No free man shall be arrested or imprisoned or disseised or outlawed or exiled or in any way victimized, neither will we go attack him or send any one to attack him, *except by the lawful judgment of his peers or by the law of the land.*”) (emphasis added).

courts are permitted to prescribe different levels of process for different interests without guidance.<sup>132</sup> Beyond this, substantive due process presents serious separation of powers issues. Justice Holmes recognized this problem when the doctrine of substantive due process made its first debut.<sup>133</sup> Finally, the extension of substantive due process presents significant federalism issues, as rights under the Fourteenth Amendment's due process clause are applied against the states.<sup>134</sup>

#### D. Representation Reinforcement and Process Failure

Professor Ely's constitutional theory, as laid out in the seminal book *Democracy and Distrust*, calls for the judiciary to protect "discrete and insular minorities" from the tyranny of the majority.<sup>135</sup> The Court first acknowledged this theory in the now famous fourth footnote of *United States v. Carolene Products Co.*<sup>136</sup> Although the Court reduced the level of scrutiny for economic regulation in *Carolene Products*, it suggested in that footnote that courts should defer to the legislative branch when the process was working fairly.

Although this approach is encouraging insofar as it focuses the Court's attention on ensuring that the political process is receptive to participation by all groups of citizens, it is problematic in at least two respects. First, Ely's theory might allow courts to focus on the *result of the process* (i.e., the law at issue), rather than on the *process itself*.<sup>137</sup> That is, the theory might be used to justify striking an offending statute, while it should only invalidate barriers to participation in the political process (e.g., prohibitions on the right to vote, exclusion from public meetings, etc.).<sup>138</sup>

132. ELY, *supra* note 12, at 19.

133. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (expressing displeasure at the Court's interpretation of the Constitution and stating that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics").

134. See *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring) (emphasizing that "[a] construction which . . . turns [due process] into a summary of the specific provisions of the Bill of Rights would . . . tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom"); see also Earl M. Maltz, *The Concept of Incorporation*, 33 U. RICHMOND L. REV. 525, 533-36 (1999) (discussing incorporation as it relates to judicial activism).

135. ELY, *supra* note 12, at 135-79 (1980).

136. 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

137. See Ron Replogle, *The Scope of Representation—Reinforcing Judicial Review*, 92 COLUM. L. REV. 1592, 1592 (1992) ("When that process is impaired, judges may nullify political decisions without imposing their values on the citizenry so long as they protect interests to which the political process would respond were it operating soundly.") (emphasis added).

138. See ELY, *supra* note 12, at 180 (1980) (discussing whether a right to travel should be

Secondly, courts should be certain that they are in fact dealing with a discrete and insular minority,<sup>139</sup> because of the adverse consequences attendant to the exercise of judicial review.<sup>140</sup>

These consequences could actually thrust a group that was not truly politically impotent<sup>141</sup> into just such a state. For example, a process theorist has stated that one factor useful to identify a “perfect market” is “when affected interests are organized, repeat players.”<sup>142</sup> If, however, discrete and insular minorities are defined as those who are unorganized and first time players in the political structure, the courts will give them their remedy and they will have no need to become “organized, repeat players.”

limited to a right to travel for political purposes).

139. See Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 316 (1990) (acknowledging some discomfort with “some awkwardly drawn line between ‘interest groups’ and ‘unprotected minorities’”). Professor Ely, for example, argued against finding that women were discrete and insular minorities. In fact, he felt that women were neither discrete nor insular. ELY, *supra* note 12, at 164–70. On the other hand, Ely appears prepared to subject laws affecting homosexuals to invalidation. *Id.* at 162–64.

Other scholars have called for expanding the categories of people that classify as “discrete and insular minorities.” See, e.g., Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN’S RTS. L. REP. 263, 285 n.218 (1992) (comparing restrictions on marriage between homosexuals to miscegenation statutes declared unconstitutional and arguing that homosexuals may be a quasi-suspect class); Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31, 38–39 (2003) (“The poor are truly a ‘discrete and insular minority.’ The poor possess little political power, and are obviously underrepresented in legislatures. By definition, they lack money to give contributions to political candidates or to set up political action committees.”); Olga Popov, *Towards a Theory of Underclass Review* 43 STAN. L. REV. 1095, 1098 (1991) (advocating for a review of laws that negatively impact the underclass).

Conversely, some scholars have argued that some groups should not be considered discrete and insular minorities. See, e.g., Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1199 (2003) (“Big American business firms are not discrete and insular minorities. They have exceptional access to influence in legislatures, administrative agencies, and the courts through government advisory commissions, trade associations, lobbies, and lawyers.”); Sharon Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1218 (2003) (“Individuals with disabilities, as currently defined, do not constitute a ‘discrete and insular minority’ and are not easily identifiable as a class.”); Colleen Carlton Smith, *Zelman’s Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 VA. L. REV. 1953, 1994 (2003) (arguing that “laws that make a distinction only between religious and secular pursuits do not” [raise constitutional concerns] in a nation where “the vast majority of people claim to be religious”).

The courts have already turned away some claims by groups that they are “discrete and insular minorities.” See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (holding that elderly persons do not constitute a discrete and insular minority).

140. See sources cited in notes 44–86, 110–113 and accompanying text.

141. Where the group is already unable to exert political influence, this is less problematic. One particularly clear example is aliens, who do not have the right to vote. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Another compelling example is the prosecution of Asian minorities in the late nineteenth century. See Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1078 (2003).

142. See Levmore, *supra* note 139, at 306.

Stated differently, a court is most ineffective in ushering change where the group is unable to persuade the legislative branch of the relief it seeks.<sup>143</sup>

If affording a nebulous constitutional right to the plaintiffs in such an instance did not result in negative consequences for the plaintiffs or the community at large, this would be less troubling. However, we have identified a number of negative consequences that could serve to make the plaintiffs' communities more disparaging, their lives more difficult, and their goals more distant.<sup>144</sup>

Thus, for the plaintiffs' sake, as well as for the good of the community at large, plaintiffs challenging legislation should bear the burden to illustrate their political isolation before the court takes notice of a "discrete and insular" status.

### E. Justice Black's Incorporation

One possible solution to the judiciary's tendency to suppress the political process through its exercise of judicial review, especially in light of the expanding law of substantive due process, is to adopt Justice Black's view which incorporates the entire Bill of Rights and applies it to state action. The Supreme Court incorporated the Double Jeopardy Clause<sup>145</sup> as a part of substantive due process in *Palko v. Connecticut*.<sup>146</sup> However, it has refused to accept Justice Black's total incorporation theory,<sup>147</sup> instead propounding a number of indeterminative rationales for applying some constitutional protections to the states while ignoring others. These rationales include incorporating only those protections that are "implicit in the concept of ordered liberty,"<sup>148</sup> those where failure to apply the protection "shocks the conscience"<sup>149</sup> of the court, those which will not create a "font of tort law," those which should apply due to "tradition and conscience of our people,"<sup>150</sup> and those which ensure "personal autonomy,"<sup>151</sup> thereby exposing many public enactments to a finding of

143. ROSENBERG, *supra* note 20, at 338 n.2 (quoting Justice Jackson during *Brown* oral argument that "this case is here for the reason that action couldn't be obtained from Congress," and noting that Professor Ely's theory "frees the Court to act in precisely those instances where it most unlikely to be of any help.").

144. See notes 47-92, 110-113 and accompanying text.

145. U.S. CONST. amend. V.

146. 302 U.S. 319 (1937).

147. See *Adamson v. California*, 332 U.S. 46, 50-51 (1947) (concluding that the Fifth Amendment's protection against self-incrimination is not a protection against state action through the Fourteenth Amendment).

148. See *Palko*, 302 U.S. at 325.

149. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

150. See *Palko*, 302 U.S. at 325.

151. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning,

unconstitutionality.<sup>152</sup> Although no other Justice has supported Justice Black's theory of total incorporation,<sup>153</sup> the Court should reconsider substantive due process<sup>154</sup> jurisprudence in light of the effect of the exercise of judicial review on the democratic process.<sup>155</sup>

Justice Frankfurter argued that total incorporation would offend principles of federalism.<sup>156</sup> To the extent that this is true, the benefits of total incorporation outweigh the offense to federalist principles. First, instead of paying simple lip service to judicial restraint, there will be bright line rules that constrain judges against varying subjective preferences.<sup>157</sup> Secondly, applying the Bill of Rights to state action will curb abuse of power by a state and thereby increase the ability of the people to participate in the federal and state<sup>158</sup> political processes.<sup>159</sup> A citizen is only so free to participate as the weakest protections they have against governmental abuse of power. A citizen would be uncomfortable participating at either the state or federal levels of government without the full benefit of the provision of the Bill of Rights.<sup>160</sup> Finally, if Justice Frankfurter could have

of the universe, and of the mystery of human life.”).

152. See sources cited in note 13 and accompanying text.

153. *Albright v. Oliver*, 510 U.S. 266, 304 n.20 (1994) (Stevens, J., dissenting).

154. Judges should not limit their consideration to substantive due process. Other exercises of judicial review also curtail the operation of the political process. However, to the extent these exercises of judicial review are closer to the “language and design” of the Constitution, there would appear to be less cause for concern. See notes 47–92, 110–13 and accompanying text.

155. The Court has recognized that it should be careful in breaking new ground with substantive due process because of notions of judicial restraint. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). However, true limits on judicial review are clearly defined jurisprudential limits, rather than general principle of judicial restraint without any boundaries.

156. In *Adamson v. California*, 332 U.S. 46, 67 (1947), Justice Frankfurter concurred, arguing:

A construction which gives to due process no independent function but turns it into a summary of the specific provision of the Bill of Rights would . . . tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom.

157. See notes 47–92, 110–13 and accompanying text.

158. James Madison explained how the protections of both the federal and state governments provide citizens with “double security” against tyranny. See THE FEDERALIST NO. 51 (James Madison) (Henry B. Dawson ed., 1865) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments . . . [h]ence a double security arises to the rights of the people.”). Additional protections at both the state and federal level appear consistent with this view.

159. The Court has effectively “selectively” incorporated most of the provisions of the Bill of Rights since *Palko*. These rights include the Fourth Amendment protection from unreasonable search and seizure, the Fifth Amendment right against self-incrimination, the Sixth Amendment rights to counsel, a speedy, public trial, to confront witnesses, and to jury trials in criminal cases, and the Eighth Amendment right against cruel and unusual punishments and excessive bail. See FARBER, *supra* note 11, at 398–99. Even so, a total incorporation approach would still be *exclusive*, thus limiting judicial review and the negative consequences attendant thereto.

160. Provisions that have not been incorporated include “the Second Amendment guarantee

foreseen the present day, an exclusive incorporation would perhaps have been more to his liking than the modern doctrine. For, at least under total exclusive incorporation, there would have been a definite limit to the extent of offense to federalist principles. Today, the courts are free to continue expanding substantive due process, despite having already incorporated most of the Bill of Rights.<sup>161</sup>

Thus, a total incorporation of the Bill of Rights is justified because the people will be empowered to bring about changes without judicial overreaching making it more difficult for citizens to bring about true social change.<sup>162</sup> In addition, such an approach will also forbid further encroachment of federalism principles. Finally, total incorporation provides the court with a clear mandate, checking its reach into the democratic process.

#### F. *Holistic Representation Reinforcement*

Finally, each branch of government should, pursuant to its own duty to interpret the Constitution,<sup>163</sup> strive to maintain a true democratic environment in which people are free to participate. The other branches should not simply rely on the courts to protect the democratic process.<sup>164</sup> For example, while Congress is the branch constitutionally entrusted with policymaking, it can still support the democratic process by enacting constitutionally sound policies. Such wisdom includes taking care not to erode the civil liberties of the people through the exercise of even legitimate legislative power.<sup>165</sup> Statutes like the PATRIOT Act will intimidate political dissenters because of the possibility of abuse.<sup>166</sup> Similarly, the executive branch can support freedom of participation by refraining from pursuing policies that intimidate citizens, such as labeling citizens “enemy combatants.”<sup>167</sup> It requires no great intellectual leap for a

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of a right to bear arms, the Fifth Amendment requirement of a grand jury indictment for major crimes, and the Seventh Amendment right to jury trial in civil cases.” FARBER, *supra* note 11, at 298–99.

161. *Id.*

162. This is quite aside from the persuasive reasoning advanced by Justice Black concerning the Amendment’s legislative history. See *Adamson v. California*, 322 U.S. 46, 73, (1947) (Black, J., dissenting). See generally Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (arguing, on the basis of the intent of the principal sponsor of the Fourteenth Amendment, that the Bill of Rights should be incorporated).

163. See sources cited in note 78 and accompanying text.

164. *Id.*

165. See generally Jeremy C. Smith, Comment, *The USA PATRIOT Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security*, 82 N.C. L. REV. 412 (2003) (criticizing the PATRIOT Act as unconstitutional and unwise).

166. *Id.*

167. See, e.g., *Padilla v. Bush*, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002) (referring to and



citizen rationally to fear that, if another citizen is detained without any constitutional protections, the same may happen to him. Consequently, those detentions may stunt the political process.

### CONCLUSION

Courts should trust the people of the nation,<sup>168</sup> even when the people make choices contrary to the jurists' own best judgment.<sup>169</sup> It may take more time, but citizens involved in the democratic process will eventually arrive at the "right" decision.<sup>170</sup> Even if a court could be *absolutely certain* that its decision would be "right,"<sup>171</sup> the *mere possibility* that the people will lose an opportunity to wrestle with their own consciences and to work through complex moral and political issues within and with their community (in essence, *to participate* in the democratic process) offends the Spirit of the Nation.<sup>172</sup>

Justice White provided a piercing observation when he wrote that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."<sup>173</sup> Indeed, this seems

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summarizing a June 9, 2002 Order signed by President Bush authorizing the Department of Justice to detain Jose Padilla as an "enemy combatant."). This order is available at <http://news.findlaw.com/cnn/docs/padilla/padillabush60902det.pdf> (on file with the North Carolina Law Review). See also *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003) (concluding that the President may not constitutionally detain an American citizen seized within the country as an enemy combatant), *rev'd on other grounds*, 124 S.Ct. 2711 (2004).

168. See THAYER, *supra* note 78, at 108 (noting that the legislature, as representative of the people, "is entitled to the most entire and real respect").

169. This rationale is not that dissimilar from that of the Apostle Paul. See *Philemon* 1:8, (New International) ("Therefore, although in Christ I could be bold and order you to do what you ought to do, yet I appeal to you on the basis of love."). Paul refrained from exercising a power to order a just result, trusting that Philemon would fall back on the proper principles and do the right thing. *Id.* Similarly, the Supreme Court should not be afraid to trust the people to fall back on democratic and community centered principles in reaching the correct decision. Although both the Apostle Paul and the Supreme Court Justices reserve the right to order the "right" result, they both should have faith in the people that they will reach the "right" result. To do otherwise would rob both Philemon and the American people of the opportunity and the duty to do the mental and moral calculations that make the individual and the community (whether the church or the nation) that much stronger. See also Senator Robert F. Kennedy, *Address at the University of Capetown*, in *RFK: COLLECTED SPEECHES* 240 (Edwin O. Guthman & C. Richard Allen eds., 1993) ("We must recognize the full human equality of all of our people—before God, before the law, and in the councils of government . . . . We must do it for the single and fundamental reason that it is the right thing to do.").

170. Other governmental systems operate at a much faster pace. However, such systems often sacrifice deliberation and liberty for the possibility of efficiency and swift change.

171. See sources cited in note 16 and accompanying text.

172. See THAYER, *supra* note 78, at 107 ("The tendency of a common and easy resort to [judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.").

173. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). See *Michael H. v. Gerald D.*, 491 U.S.

an echo of the very case in which the power of judicial review was first established.<sup>174</sup> Thus, the Court must not venture beyond the Constitution to preserve not only its own legitimacy, but the strength of the entire democracy. However, the Court has summarily disposed of the very opinion in which Justice White reiterated this most foundational principle.<sup>175</sup>

The purpose of this Comment is not to suggest that the judiciary has no role in the constitutional order. The project has simply been to contribute to the discussion of the nature of the “countermajoritarian difficulty.” Although exercise of judicial review presents “difficulties,” the exercise of these countermajoritarian powers of the court are sometimes necessary. While it is the judiciary’s duty to “say what the law is,” judges should nevertheless remain aware of the consequences of the exercise of judicial review, especially when the exercise of judicial review is not “clearly rooted in the language and design of the Constitution.” When the courts are sensitive to these issues, the people will have an opportunity to produce real and lasting social change.

With all this in mind, therefore, let us disprove of an unnecessary schedule of injections of judicial novocaine that would numb the conscience of the lively American nation and render it slow and unresponsive. Rather, let the remedies of the freedoms of speech, of the press, and of association course through the veins of the body of the Nation and make it strong and youthful henceforth.<sup>176</sup>

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110, 122 (1989) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

174. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (“Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.”).

175. See *Lawrence v. Texas*, 534 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”). It is interesting to consider that such an overruling in fact undermines *Marbury*. It would be most troubling for the Court to use the power established in *Marbury* to undermine the rationale to justify the use of the power in the first instance.

176. Cox, *supra* note 43, at 6 (“The Federal Constitution guarantees extraordinarily wide opportunities to use mass meetings, parades, and similar public demonstrations to express sentiment . . . . The Freedom March held in Washington in the summer of 1963 is a dramatic example.”).

