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Communitarianism and the Roberts Court

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COMMUNITARIANISM AND THE ROBERTS COURT

ROBERT M. ACKERMAN*

ABSTRACT

In this Article, Professor Ackerman examines the work of the Roberts Court through a communitarian lens. Communitarians strive for a reasonable balance between individual rights and the collective good. They believe that even in a rights-conscious society, rights have limits, and involve responsibilities. And so, communitarians will often consider whether the Supreme Court has struck a proper balance between individual liberty and the public interest.

But communitarian theory has other, multidimensional aspects. Communitarians view people as social animals, who are not mere autonomous agents with nobody to care about but themselves. They therefore see the value not only of large-scale communities (such as an entire nation) but of smaller, intermediate communities, such as states, labor unions, civic organizations, religious congregations, and—at the most intimate level—families. As a consequence, Professor Ackerman asks whether, in cases ranging from Citizens United to Obergefell, the Court has adequately considered the role of intermediate communities—what we call “civil society”—in pursuing the good and animating citizens to connect with one another.

Finally, Professor Ackerman sees communitarianism as a way to view the world in a non-binary manner, thereby breaking down the political barriers that impair our ability to reason together and formulate good law and policy.

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I. INTRODUCTION

*In the law, the language of individual rights comes easily; the language of community is more foreign.*¹

What is “communitarianism”? Why does spell check think it is misspelled? And why should one care about a communitarian perspective on the Roberts Court?

Communitarianism provides a different way to think about legal issues. Some leading thinkers wear the communitarian mantle; others, without declaring themselves communitarians, have been influenced by communitarian views.²

This Article will briefly introduce communitarianism to the uninitiated. Without overtly proselytizing, it will introduce the essential concepts, at least as they may pertain to constitutional adjudication. Then it will review the Roberts Court from a communitarian perspective and draw out the central lessons.

What can we learn from a communitarian perspective? Don't we already have a surplus of perspectives, whether offered by critical legal studies, law and economics, dynamic interpretation, textualism, or a host of other “isms”? And what if the reader is convinced that she is not now nor will ever be a communitarian?

There are two answers. First, we gain an understanding when we consider alternative perspectives. Those who are not particular fans of law and economics, law and literature, or critical theory often admit (sometimes grudgingly) to benefitting from their insights. Even if communitarianism is not universally accepted, what it can teach remains important. Non-communitarians will have a deeper, richer understanding of some leading cases and controversies after considering a communitarian perspective.

Second, and even more important, however, is that the communitarian perspective can offer relief from wounds suffered in the tired fight between the left and the right, liberals and conservatives. Working through issues from a communitarian perspective tends to reduce some of the intellectual hostility that threatens to

1. ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, LAW AND COMMUNITY: THE CASE OF TORTS 1 (2004).

2. Communitarian leanings have been attributed to politicians as diverse as Bill Clinton, Tony Blair, Al Gore, George W. Bush, and John McCain. See RONALD B. McCABE, CIVIC LIBRARIANSHIP: RENEWING THE SOCIAL MISSION OF THE PUBLIC LIBRARY 21 (2001); Dana Milbank, *Needed: Catchword for Bush Ideology; 'Communitarianism' Finds Favor*, WASH. POST, Feb. 1, 2001, at A1. Communitarian sympathies have also been attributed to the Reverend Dr. Martin Luther King. See Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959, 1014 (2000).

dominate increasing parts of civic life and tends to offer common ground. In a time of heightened partisanship and acrimony, people of different political stripes have found a common denominator by taking a communitarian look at matters legal, social, and political.

Like most Americans, communitarians wish to strike a reasonable balance between individual rights and the collective good. They believe that even in a rights-conscious society, rights have limits and involve concomitant responsibilities.³ One has a right to trial by jury, but one has the responsibility to serve on a jury when called upon. Citizens have a right to be secure from unwarranted governmental intrusion, but railroad engineers must submit to periodic drug testing in deference to the legitimate interests of the community. Communitarians respect basic civil liberties, but fear that the predominance of “rights talk” in our society has compromised our ability to confront societal problems effectively.⁴ “Communitarians have therefore suggested an agenda to advance commonly held social values without unduly compromising individual rights.”⁵

The tension between individual rights and the public welfare is often at the crux of constitutional litigation and has been the subject of comment for some time.⁶ Communitarians favor neither extreme. But communitarian theory has other, perhaps more important, aspects. The sociologist Amitai Etzioni has observed, “[a] communitarian perspective recognizes both individual human dignity and the social dimension of human existence.”⁷ Communitarians view humans as social creatures, whose essence is derived not simply as autonomous agents with nobody to care for or about but themselves. “[W]hether we like it or not, whether we know it or not, we’re deeply

3. Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 650 (1995) [hereinafter Ackerman, *Tort Law*].

4. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991).

5. Ackerman, *Tort Law*, *supra* note 3, at 650.

6. See, e.g., Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1245-46 (1965); George W. Wickersham, *The Police Power, A Product of the Rule of Reason*, 27 HARV. L. REV. 297, 299, 304 (1914); Philip S. Simmons, Note, *Commercial Builders Revisits Nollan: Constitutional Taking and the Limits of Regulatory Exactions*, 13 WHITTIER L. REV. 937, 938 (1992); see also 12B TEX. JUR. 3D *Constitutional Law* § 157 (2017) (saying that the individual constitutional rights, specifically First Amendment rights, “are not absolute . . . and restrictions upon public speeches and publications are sometimes necessary for . . . the public safety and welfare”); 16 OHIO JUR. 3D *Constitutional Law* § 325 (2017) (saying the individual’s right to use private property is “subservient to the public welfare . . . and when private interests and public welfare conflict, the former must give way to the latter”).

7. *The Responsive Communitarian Platform: Rights and Responsibilities*, in THE ESSENTIAL COMMUNITARIAN READER, at xxv (Amitai Etzioni ed., 1998) [hereinafter *Communitarian Platform*].

bound up in the social world in which we happen to find ourselves.”⁸ Communitarians see the value not only of large-scale communities (such as an entire nation) but of smaller, intermediate communities, such as states, labor unions, civic organizations, religious congregations, and—at the most intimate level—families.

In his influential book, *Bowling Alone*, political scientist Robert Putnam argued that greater support for these intermediate communities would be necessary to rebuild America’s fraying social capital.⁹ So communitarians try to reinforce the concept of America as a “community of communities,” rather than just an amalgam of self-seeking individuals.¹⁰ Says Professor Aderson François, “[T]he right to connect with members of a larger community is as deep and innate a part of human nature as the right to be left alone.”¹¹ Communitarians would like to see greater recognition in our legal system of the value of intermediate communities and the desire to connect with others.

Finally, communitarians believe that along with rights come responsibilities and that we should be willing to make short-term sacrifices in favor of the long-term welfare of the public. Constraints on our behavior to preserve a healthy environment may be seen as a prominent example of this philosophy. Only the most short-sighted would insist on, say, an absolute right to do whatever one wants with one’s property without due regard to the right of future generations to live in a world in which breathable air, drinkable water, and a livable climate remain intact. Asking corporate officers to look beyond their balance sheets for the current quarter may be another manifestation of this idea.¹²

Constitutional litigation very often involves a contest between individual rights and a sense of the collective good, as expressed by leg-

8. DANIEL BELL, *COMMUNITARIANISM AND ITS CRITICS* 31 (1993).

9. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* *passim* (2000).

10. Amitai Etzioni, *The Community of Communities*, 19 WASH. Q. 127-38 (1996).

11. Aderson Bellegarde François, *Only Connect: The Right to Community and the Individual Liberty Interest in State-Sponsored Racial Integration*, 112 PENN ST. L. REV. 985, 1019 (2008).

12. I have previously written:

Communitarians support individual autonomy balanced by social responsibility, not a complete rejection of the former in favor of the latter. Disputants, like anyone else, should make choices based, at least in part, on their interests. They should recognize, however, that their long-term interests may well be dependent on the health of the community, that their own well-being may involve factors other than economic self-maximization, and that it is in their interests to build social capital, even if the immediate payback is not apparent.

Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 42-43 [hereinafter Ackerman, *Disputing Together*].

islative or administrative bodies. In the United States of America, the crucible for this contest is ultimately the United States Supreme Court. What are the rights of an accused defendant when the police or government prosecutors take steps to protect citizens from criminal harm?¹³ What measures may the government take to restrict an individual's right to own or use firearms?¹⁴ Under what circumstances may the government take private property for public use (and might public use include private projects that are deemed to promote the perceived public interest)?¹⁵ May the states regulate a woman's decision to terminate a pregnancy?¹⁶ May the federal government require individuals and businesses to purchase health insurance?¹⁷ These and other controversies pitting the asserted rights of individuals (and defining who may exercise these rights) against the prerogative of the government to protect what it deems the public interest occupy if not the greater part of the Supreme Court's docket, at least that part which attracts the greatest public and media attention. And well they should, as these matters involve fundamental questions regarding the extent of individual rights and the limits of governmental power—both the structural and substantive dimensions of rights and powers, the very essence of republican governance.

But communitarians will ask additional questions reflecting the multilayered composition of our country: Do corporations, unions, and other organizations have the same rights as individual citizens, or, for that matter, do they have special responsibilities in light of their having obtained a charter from the state?¹⁸ Are there some rights or responsibilities that can be claimed and exercised appropriately by intermediate communities, such as neighborhoods, political groups, and associations, be they private or public, for-profit or non-profit? Should the law recognize the rights of *groups*, and in particular, historically subordinated minority groups? Must we inevitably be locked into a binary choice between individual rights and government power? Should the law be more conscious of *responsibilities* owed by individuals, communities, or the state? Might intermediate communities sometimes play a mediating role in our legal and political discourse?

13. See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370, 388-89 (2010); *Herring v. United States*, 555 U.S. 135, 136-37 (2009).

14. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

15. See *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005).

16. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016); *Roe v. Wade*, 410 U.S. 113, 154 (1973).

17. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 616-17 (2012).

18. See Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 BROOK. L. REV. 895, 899 (2016).

The issues before the Roberts Court, like most of their predecessors, tend to take on a binary form: Which side should be dominant, the individual's assertion of a right or the government's interest in regulating conduct? Placed in such stark light, constitutional scholars tend to line up on the side of either "individual liberty" or "public welfare." Proponents from the left or right characterize their adversaries as either "radical libertarians" or "repressive authoritarians," both of which are extremes communitarians wish to avoid.¹⁹ The issues often take on a political cast, with Republicans and Democrats selectively advocating either individual rights or the public interest (depending upon the controversy)²⁰ and with both sides, of late, tending to think that the opposition has gotten the best of it.²¹

Communitarians, on the other hand, seek a happy balance. Somewhere, we believe, there is a "sweet spot" where both individual liberty and the public interest can reside together and obtain an appropriate amount of protection. We believe (perhaps naively) in the possibility of formulating policy that provides for the maximum protection of the public consistent with individual rights. While the courts are not always the most adept crucible for the formulation of

19. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 15 (1993) [hereinafter ETZIONI, SPIRIT].

20. Often this appears to be a matter of political dogma, rather than principled argument. Republicans tend to assert a "right" against government regulation of business while refusing to recognize a woman's right to control her own body. Compare *Restoring the American Dream—A Competitive America*, GOP: REPUBLICAN PLATFORM, <https://gop.com/platform/restoring-the-american-dream/> [https://perma.cc/URU9-U3UX] (last visited Jan. 12, 2018), with *A Rebirth of Constitutional Government—The Fifth Amendment: Protecting Human Life*, GOP: REPUBLICAN PLATFORM, <https://gop.com/platform/we-the-people/> [https://perma.cc/AK4J-MWFG] (last visited Jan. 12, 2018). Democrats tend to recognize a "right to life" for convicted murderers facing capital punishment but not for the innocent unborn. Compare *The 2016 Democratic Platform—Securing Reproductive Health, Rights, and Justice*, DEMOCRATS: PARTY PLATFORM, <https://www.democrats.org/party-platform#reproductive-health> [https://perma.cc/B9BL-VCQE] (last visited Jan. 12, 2018), with *The 2016 Democratic Platform—Reforming our Criminal Justice System*, DEMOCRATS: PARTY PLATFORM, <https://www.democrats.org/party-platform#criminal-justice> [https://perma.cc/MF55-X3W2] (last visited Jan. 12, 2018).

21. E.g., Sahil Kapur, *Ted Cruz Vows to Put Hard-Core Conservatives on Supreme Court*, BLOOMBERG POL. (Dec. 2, 2015, 5:00 AM), <https://www.bloomberg.com/politics/articles/2015-12-02/ted-cruz-vows-to-put-hard-core-conservatives-on-the-supreme-court> [https://perma.cc/E67C-GCMF] (reporting statement by Senator Ted Cruz that Democratic appointees to the Supreme Court remain consistently liberal, while some Republican appointees to the Court defected from conservative viewpoints); *Democratic National Convention, Day 1*, C-SPAN (July 25, 2016), <https://www.c-span.org/video/?412845-1/michelle-obama-bernie-sanders-address-democratic-national-convention> [https://perma.cc/6N3V-MVQ3] (noting on the first day of the 2016 Democratic National Convention, the Democratic Party pledged to overturn the Supreme Court's controversial *Citizens United* decision). For a description of the psychological phenomenon in which each side thinks it is at a disadvantage, see Shai Davidai & Thomas Gilovich, *The Headwinds/Tailwinds Asymmetry: An Availability Bias in Assessments of Barriers and Blessings*, 111 J. PERSONALITY & SOC. PSYCHOL. 835 (2016).

such policy, we encourage judicial deference to such efforts when undertaken by the legislative or executive branches of the government. The leader of what might be called “American political communitarianism,” Amitai Etzioni, has lamented that in the United States, the pendulum has swung too far in the direction of individual rights, to the detriment of the public good.²² But Etzioni, a Holocaust survivor, is also quick to caution against the “repressive authoritarianism” of regimes such as the People’s Republic of China and North Korea.²³ And those of us in the dispute resolution community wonder whether there are instances that are amenable to win-win solutions through which we can maximize public benefit without injury to important individual rights. Additionally, we wonder whether sometimes the assertions of “rights” or “principles” are bloated assertions of what are really interests, the reconciliation of which might advance the public good.²⁴

We should make certain things clear at the outset. The brand of communitarianism to which I subscribe is neither at war nor total peace with liberalism. While it embraces liberal democratic principles, it is not liberalism per se. It does not subscribe to the view that government is all-wise, all-knowing, and always benign, nor does it adopt the Rawlsian view that maximum freedom for the individual is the ideal state.²⁵ And while we honor ancestral communities, we reject altogether the reactionary notion that blood ties relegate us to a life of hidebound tradition and out-group antagonism.

Why this matters. Why is a communitarian critique of the Supreme Court important or even relevant? First, allow me to state the obvious. It is the Constitution, and not a communitarian (or any other) philosophy, that must be the lodestar for its own interpretation. We cannot impose a communitarian ethos in lieu of the Constitution, nor do I advocate that we do so, at least in the absence of an occasional amendment (perhaps, e.g., an amendment upending the *Citizens United*²⁶ and *Buckley*²⁷ decisions and allowing statutory regula-

22. ETZIONI, SPIRIT, *supra* note 19, at 26.

23. Robert M. Ackerman, *Taking Responsibility*, 4 TENN. J.L. & POL’Y 11, 57 (2008); *see also Communitarian Platform*, *supra* note 7, at xxvi-ii.

24. *See* GLENDON, *supra* note 4, at x-xi; BERNARD S. MAYER, THE CONFLICT PARADOX: SEVEN DILEMMAS AT THE CORE OF DISPUTES 131-166 (2015).

25. *See* JOHN RAWLS, A THEORY OF JUSTICE 12 (rev. ed. 1999) (“[A] society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed.”).

26. *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

27. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

tion of political spending²⁸) to reflect communitarian norms. The language of the Constitution itself must be the primary basis for what is, after all, constitutional interpretation. Even the Supreme Court's forays into statutory interpretation must proceed under a constitutional structure under which the legislature has the first (if not the last) word.

But as Professor Geoffrey Hazard has noted, "A judge can resolve an issue of law only by reference, implicit or explicit, to something more than the text of the law itself; if the issue was plain there would be nothing for the judge to decide."²⁹ We have certainly seen throughout our history varying interpretations of the Constitution and statutes based on philosophies of interpretation and political preferences.³⁰ And (at the risk of indulging in cynicism) even overarching philosophies expressed by members of the Court (e.g., "strict constructionism," "textualism," "structuralism," "interpretivism," "dy-

28. I say "perhaps," because such an amendment would alter the First Amendment (or at least the Court's interpretation of it) for the first time. That, like a flag-burning amendment or an amendment making it easier for Donald Trump to sue *The New York Times* for defamation (which Mr. Trump apparently advocated until he was reminded that he might more often appear on the right side of the "v" in such cases), is not a change to be taken lightly. See Hadas Gold, *Donald Trump: We're Going To 'Open up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866> [<https://perma.cc/J7KJ-TNAC>] (reporting Mr. Trump advocated changing libel law so he would have an easier time suing news organizations); *Donald Trump's New York Times Interview: Full Transcript*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html> (noting that in an interview with *The New York Times* shortly after the 2016 Presidential Election, Mr. Trump said he rethought about "opening up" libel law after being reminded that he might be sued a lot more).

29. Geoffrey C. Hazard, Jr., *Communitarian Ethics and Legal Justification*, 59 U. COLO. L. REV. 721, 723-24 (1988).

30. E.g., *Originalism*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; . . . the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect."); *Textualism*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means."); *Strict Constructionism*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The doctrinal view of judicial construction holding that judges should interpret a document or statute . . . according to its literal terms, without looking to other sources to ascertain the meaning."); *Interpretivism*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The doctrinal view that the only norms in constitutional adjudication are those stated or closely inferable from the text, and that it cannot be left to the judiciary to give moral content from age to age to such concepts as 'fundamental liberties,' 'fair procedure,' and 'decency.'"); *Dynamic Interpretation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An interpretation based on a consideration of evolving societal, legal, and constitutional circumstances or needs as time has passed since the creation or adoption of a governing text.").

namic interpretation”) seem to melt away when they interfere with a preferred outcome.³¹

Even the most devout originalist cannot claim that the Founders anticipated every instance of interpretation on which the Constitution would be brought to bear. “[T]he possibilities for creative interpretation in American law are such that every American lawyer carries new law in his pen,” says Professor Hazard.³² There exist any number of gaps, any number of opportunities for interpretation that do not readily avail themselves of a single, predetermined outcome. And it is here that a Justice’s philosophy must of necessity be brought to bear.³³

In this Article, I will try to explain why our nation and its citizens may be served by employing a communitarian philosophy in constitutional adjudication. In a time of deep division and heightened partisanship, we are best served by a fundamental law that establishes and nourishes republican institutions, balances individual rights with the public welfare, invites individual and collective responsibility, and allows a community of communities to flourish. These precepts allow the best civic instincts and morals of our society to thrive.

We cannot deceive ourselves to think that the Supreme Court is nonpolitical; the Justices are conscious of the political implications of many of their decisions.³⁴ But the judiciary remains the least political

31. The late Justice Antonin Scalia’s textualist philosophy receded when he indulged in interpretations of the Federal Arbitration Act that departed significantly from its plain language. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding that the Federal Arbitration Act’s exception of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” did not apply to general employment contracts (quoting 9 U.S.C. § 1 (2000))). Justice Thurgood Marshall forthrightly admitted to an activist view of his role:

We cannot play ostrich. . . . In the chill climate in which we live, we must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. We must dissent from a nation that has buried its head in the sand, waiting in vain for the needs of its poor, its elderly, and its sick to disappear and just blow away. We must dissent from a government that has left its young without jobs, education or hope. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better.

Justice Thurgood Marshall, Acceptance Speech of the Medal of Liberty at Independence Hall, Philadelphia, PA (July 4, 1992).

32. Hazard, *supra* note 29, at 724.

33. *See* Richard A. Posner, *What Am I? A Potted Plant? The Case Against Strict Constructionism*, *NEW REPUBLIC*, Sept. 28, 1987, at 23, 24; Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 *FORDHAM URB. L.J.* 131, 131-32 (2004).

34. It used to be said that the Supreme Court reads the election returns. FINLEY PETER DUNNE, *MR. DOOLEY’S OPINIONS* 26 (1901) (“[N]o matter whether th’ constitution

of the three branches, and lifetime appointments have the long-term tendency of allowing the Justices to take the long view and work at some remove from the fray. The Court, therefore, stands as the most prominent articulator of a national ethos, reminding us (and generations to come) of the principles on which our nation is based.³⁵ With all the buffeting of left and right, throughout all the shrill calls to populism, authoritarianism, nativism, libertarianism, or whatever “ism” strikes our fancy, *the center must hold*. Communitarianism is, among other things, an effort to define and hold that center.

Answering the critics. A critic of these efforts might see them as no more than the use of communitarianism (or a conception thereof) as a theoretical justification for a series of policy preferences along a linear scale ranging from individual rights maximization on one end to Benthamite utilitarianism³⁶ on the other. Put a different way, is there anything about communitarianism that would cause one to reconsider one’s own policy preferences in constitutional adjudication?

My answer is twofold: First, communitarians prefer not to see the world in binary form, i.e., as a one-dimensional continuum ranging from individual rights maximization on one end to public welfare maximization on the other. The possibility that rights entail responsibilities plays a role in our formulation. So do the potential roles of intermediate communities in defining the landscape. Spatially, then, the communitarian graph exists in at least two and probably three dimensions.

Second, communitarian considerations have caused many people, myself included, to reconsider our own policy preferences. What at one time may have been a reflexive response to constitutional issues can be leavened by the types of considerations addressed in this Article. And a communitarian framework can prove valuable as we seek common ground with others who have different political leanings, or who are approaching some of these issues for the first time. I hope

follows th’ flag or not, th’ supreme court follows th’ iliction returns.”). With the decision in *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam), we might now say that the Court *writes* the election returns.

35. Justice Anthony Kennedy, who frequently wields the deciding vote on the Roberts Court, often finds himself in the position of articulating our nation’s essential values. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). As a colleague of mine says, “It’s Anthony Kennedy’s world; we just live in it.” The wit and wisdom of Professor Jonathan Weinberg, circa 2015.

36. Jeremy Bentham’s utilitarianism asserts that the value of human action can be determined by the amount of happiness it produces. The goal, he argues, is not just to pursue actions in our personal lives that maximize pleasure and minimize pain, but also to take actions that yield the greatest good for the greatest number. 1 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-5 (London, W. Pickering 1823).

those who read this Article will also have reason to reexamine their preferences in light of communitarian criteria.

The plan of this Article. I began work on this Article under the premise (based largely on cases such as *Heller*³⁷ and *Parents Involved*³⁸) that the Supreme Court under Chief Justice John Roberts was perhaps the most anti-communitarian Court since the New Deal. More careful study has disabused me of that proposition. The Court's work is more nuanced and does not avail itself of such a broad-brush label.³⁹ Certain cases have both communitarian and anti-communitarian elements. The much-maligned *Citizens United* decision, for example, overturned a portion of a statutory scheme that was a careful calibration of rights in the pursuit of the public welfare (a fundamental communitarian principle),⁴⁰ a scheme consistent with communitarian hostility to an election system dominated by a moneyed oligarchy.⁴¹ But *Citizens United* also recognized the importance of intermediate communities such as corporations and unions, seeing them as potent instruments for the expression of political opinion.⁴²

37. *District of Columbia v. Heller*, 554 U.S. 570, 580-81 (2008) (holding that the Second Amendment guarantees individuals the right to bear arms, even for purposes unrelated to service in a militia).

38. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710-11 (2007) (holding that a Seattle school district's use of race in assigning students to school to create racial balance did not advance a compelling government interest, and was not narrowly tailored, as it used race as the sole factor in determining school assignments).

39. The approach of this Article is neither empirical nor comprehensive. Despite the temptation, any effort to explore the communitarian implications of the entirety of Roberts Court decisions would be unwieldy and would, in the end, produce too many trees to identify the forest. And I have decided against empirical analysis because (1) communitarianism is a centrist philosophy that is too subjective and nuanced to lend itself to measurement or use of a scale and (2) the communitarian enterprise tries not to view matters in binary form. See MAYER, *supra* note 24, at 17 (rejecting the notion that conflict must always be addressed in binary fashion).

40. See *infra* notes 184-89 and accompanying text.

41. See *Communitarian Platform*, *supra* note 7, at xxxiii ("To establish conditions under which elected officials will be able to respond to the public interest, to the genuine needs of all citizens, and to their own consciences requires that the role of private money in public life be reduced as much as possible."); Ackerman & Cole, *supra* note 18, at 983 (observing that many communitarians regard the *Citizens United* decision, where "a statute . . . designed to level the playing field and promote fair elections, was struck down in favor of a corporation's 'right' to influence elections," as "a step backward").

42. See *Citizens United v. FEC*, 558 U.S. 310, 392 (2010) (Scalia, J., concurring) (stating that "the individual person's right to speak includes the right to speak in association with other individual persons," and comparing corporate speech to speech of the Republican or Democratic Party—"the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf") (emphasis omitted); Ackerman & Cole, *supra* note 18, at 987 ("[T]he *Citizens United* decision might be viewed . . . as an assertion of the rights of the collective, as expressed through an intermediate community (i.e., the corporation or union).").

Another example: Professor Etzioni's reaction to *Kelo v. City of New London*, 545 U.S. 469 (2005), was to regard it with horror, because it allowed takings jurisprudence to take

Perhaps only one or two cases each term can be clearly viewed as pro- or anti-communitarian, and we will attempt to draw attention to these. But communitarians, as often as not, deal in shades of gray, not stark black and white.

Part II of this Article briefly describes communitarian theory and suggests some core communitarian principles relevant to constitutional adjudication. In Part III, I try to bring these principles to bear in the consideration of about twenty cases decided by the Roberts Court. Most of these will be recognized among the Court's leading cases, but a few will have been selected because they are particularly demonstrative of communitarian (or anti-communitarian) principles. This is the main body of this Article. The Article concludes by discussing, in Part IV, the centrality of the Court in articulating cultural norms and identifying and holding the middle.

A personal note. Throughout this Article, I have tried to resist the inclination to equate communitarianism with my own outcome preferences.⁴³ I began work on this Article during the summer of 2016, a contentious time in which our nation was rocked by terrorist attacks at home and abroad, shootings of and by police officers, and a most divisive political campaign. I am finishing this Article approximately a year after Donald J. Trump was sworn in as our nation's 45th President. At the time of Trump's inauguration, we had concluded a year in which the Supreme Court was short-handed because a Republican Senate was unwilling to even hold hearings on the nominee of a Democratic President with ten months remaining in his term. At times, the writing of an article advocating a moderate and accommodating approach to constitutional interpretation has felt like a futile endeavor

on a "Reverse Robin Hood" effect, potentially disrupting established communities (e.g., Detroit's Poletown) in favor of entities that were able to persuade public officials that their private interests were in the public interest. See Amitai Etzioni, *States to the Rescue*, NAT'L L.J. (Sept. 19, 2005), <https://www2.gwu.edu/~ccps/etzioni/documents/A339-KELOvsNewLondon.pdf> [<https://perma.cc/UH3C-DTGM>]. My analysis of *Kelo* is quite the contrary, as the decision allows for the assembly of large tracts for redevelopment that will help the community at large. See John E. Mogk, *Eminent Domain and the "Public Use"*: *Michigan Supreme Court Legislates an Unprecedented Overruling of Poletown in County of Wayne v. Hathcock*, 51 WAYNE L. REV. 1331, 1368 (2005) ("Clarification and judicious enforcement of the *Poletown* principles within the bounds of Michigan takings jurisprudence would have provided the proper balance between the rights of property owners whose land is being taken and the good of the community in which the property is located.").

43. For the sake of full disclosure, I will confess to being a lifelong Democrat whose policy preferences usually (but not always) lie a little to the left of the American center, but such conventional typecasting is something most communitarians are inclined to reject. My fellow communitarians include my sometimes coauthor, Professor Robert Cochran, and other conservatives such as Professors Mary Ann Glendon and Thomas Shaffer. And so, as I write, I like to think of these good people sitting on my shoulder, reminding me that this Article should not read as liberal screed. And I hope that my friends in the ACLU do not revoke my membership because I sometimes depart from civil libertarian orthodoxy.

amidst shrill appeals to nativism and a crescendo of populist authoritarianism on both a national and international level. The White House's current occupant may be the most anti-communitarian President in recent memory,⁴⁴ and I sometimes wonder whether the communitarian philosophy has run its course. But I have resolved that against this recent history, the need for a communitarian viewpoint resounds more strongly than ever. A communitarian approach to constitutional adjudication can be a principled way for us to find common ground and begin to heal a divided nation.

II. COMMUNITARIANISM IN THE CONTEXT OF CONSTITUTIONAL ADJUDICATION

In his definitive book, *The Spirit of Community*, Professor Amitai Etzioni described communitarianism as “a social movement aim[ed] at shoring up the moral, social, and political environment.”⁴⁵ In pursuing this goal, communitarians try to find a sane middle ground between the extremes of authoritarianism and libertarianism. This is a task often undertaken by the courts (and the United States Supreme Court, in particular) as they apply the United States Constitution to resolve controversies pitting claims of individual rights against the perceived general welfare.

Communitarianism is often set up in contradistinction to the Lockean or “Enlightenment” view that “place[s] individual liberty and autonomy at the center of the political universe.”⁴⁶ This Enlightenment view is prominent not only in the work of John Locke but also that of

44. Communitarians are unlikely to declare, “I alone can fix it.” Karen Tumulty & David Nakamura, *Donald Trump Vowed, 'I Alone Can Fix It.' But He Discovers Power Has Limits*, WASH. POST (Feb. 6, 2017) (quoting Donald Trump, Acceptance Speech at the Republican National Convention (July 21, 2016)), https://www.washingtonpost.com/politics/trump-vowed-i-alone-can-fix-it-but-he-discovers-power-has-limits/2017/02/05/6e323320-ebc4-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.9cf6f67d1f34 [https://perma.cc/8LKW-SNZ8]. Nor are they likely to engage in what one United States Senator has described as “four strategies used by authoritarian leaders from time immemorial to consolidate power,” 163 CONG. REC. S1909 (daily ed. Mar. 22, 2017) (statement of Sen. Merkley), or to speak in terms of “my military,” Tessa Berenson, *Former Defense Secretary Criticizes President Trump for Saying 'My Military'*, TIME (Apr. 14, 2017) (quoting President Donald Trump, Press Conference (Apr. 13, 2017)), <http://time.com/4739810/donald-trump-leon-panetta-military/> [https://perma.cc/5BGE-T4JL].

45. ETZIONI, SPIRIT, *supra* note 19, at 247.

46. François, *supra* note 11, at 1000. See IMMANUEL KANT, *On the Common Saying: 'This May Be True in Theory, but It Does Not Apply in Practice'*, in KANT'S POLITICAL WRITING 61 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 1970) (1793); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 271 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 14 (John Gray ed., Oxford Univ. Press 1991) (1859). Professor François provides a good description of the interplay between the Lockean view of individual liberty and communitarianism. See François, *supra* note 11, at 1000.

John Stuart Mill and Immanuel Kant and features prominently in the philosophy underlying the Constitution.⁴⁷ Certainly “the Constitution embodied ‘a philosophy of government, that was highly protective of individual liberty and manifestly Lockean.’”⁴⁸ The checks on state power, found most prominently in the Bill of Rights but also included in the structural constraints of the original Constitution, have the protection of individual rights at their core.

An extreme conception of individual rights “by necessity rejects the argument that the rights of the individual ought to suffer any limit purely for the benefit of the group.”⁴⁹ Professor Ronald Dworkin has said, “The prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do.”⁵⁰ This can become rather tautological and extreme: By asserting a mere claim as a right, that claim might now, by definition, blot out all that comes in its path.

Several commentators have depicted communitarianism as the yin to the yang of the “liberal” concept of individual rights. Professor François, for example, states, “In the face of liberalism’s radical conception of the primacy of the individual and individual rights, communitarianism stands in stark contrast and describes a set of ideas, the foundation of which relies on the tenets of community, moral education, and shared values.”⁵¹ Like Professor Etzioni, I am disinclined to view communitarianism in such binary terms. While Etzioni would argue that in the United States the “individual rights” view has obtained too much primacy, he would readily concede that this is not universally the case, and that there are other cultures (e.g., today’s Turkey, Venezuela, and, to cite an extreme case, North Korea) where the pendulum has swung too far in the direction of autocracy or even totalitarianism.⁵²

And so, Etzioni’s four-point communitarian agenda (outlined two decades ago) emphasizes the need to obtain a balance between rights and responsibilities.⁵³ His first point calls for a moratorium on the “manufacturing of new rights,” because “[t]he incessant issuance of

47. See KANT, *supra* note 46, at 14; LOCKE, *supra* note 46, at 271.

48. François, *supra* note 11, at 1004 (citing Ellen Frankel Paul, *Freedom of Contract and the “Political Economy” of Lochner v. New York*, 1 N.Y.U. J.L. & LIBERTY 515, 535 (2005)).

49. *Id.* at 1006.

50. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 193 (1977).

51. François, *supra* note 11, at 1008; see also BEAU BRESLIN, *THE COMMUNITARIAN CONSTITUTION* 39 (2004); Charles Taylor, *Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada*, in *CONSTITUTIONALISM, CITIZENSHIP AND SOCIETY IN CANADA* 183, 209 (1985).

52. See Amitai Etzioni, *Communitarianism*, in 1 *ENCYCLOPEDIA OF COMMUNITY: FROM THE VILLAGE TO THE VIRTUAL WORLD* 224-28 (Karen Christensen & David Levinson eds., 2003).

53. ETZIONI, *SPIRIT*, *supra* note 19, at 4.

new rights, like the wholesale printing of currency, causes a massive inflation of rights that devalues their moral claims.”⁵⁴ The clamor for rights takes up a significant portion of the Supreme Court’s docket, ranging from the right of individuals to possess firearms⁵⁵ to the right of gay people to marry⁵⁶ to the “right” not to have to pay for health insurance.⁵⁷ The problem, says Etzioni, is that “each newly minted right generates a claim on someone.”⁵⁸ Thus, if we recognize a “right” to health care, those unable to afford it will look to someone else (most likely an employer or the American taxpayer) to foot the bill.

The second point on Etzioni’s communitarian agenda is that rights entail responsibilities. Professor Mary Ann Glendon has expressed the problem best: “Buried deep in our rights dialect is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm.”⁵⁹ We are not mere consumers of rights ordained under the Constitution and state and federal statutes; citizenship means that we undertake certain responsibilities as well. And so, perhaps a business that takes advantage of the corporate form (i.e., indefinite life, limited liability on the part of its owners, etc.) carries along with it certain obligations to its employees, consumers, other contractors, and the communities in which it does business.⁶⁰

Note, however, that not all of these responsibilities must be products of legal compulsion. Some should be recognized as the moral and ethical obligations of a good citizen. It is not enough for Mr. Trump to justify a series of business bankruptcies by saying that he availed

54. *Id.* at 5.

55. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

56. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

57. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). While conservative critics of the Affordable Care Act rallied around this argument, the more potent view (supported by five Justices) was that Article I of the Constitution did not grant Congress the power to mandate the purchase of health insurance. *Id.* at 561 (Scalia, Kennedy, Thomas, and Alito, J., dissenting).

58. ETZIONI, SPIRIT, *supra* note 19, at 6 (emphasis omitted).

59. GLENDON, *supra* note 4, at 77.

60. Ackerman & Cole, *supra* note 18, at 972-73 (“[C]orporations . . . should look beyond the narrow objective of shareholder wealth maximization and assume responsibility for constituencies such as employees, customers, the communities in which the corporations operate, and even the entire world.” (citing David Millon, *Introduction: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993); Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393 (1993); Paul N. Cox, *The Public, the Private and the Corporation*, 80 MARQ. L. REV. 391 (1997); Marleen A. O’Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993)).

himself of the protection from creditors provided by American bankruptcy law.⁶¹ As a citizen and businessman (and now, as President), he owes some consideration to those with whom he does business, including making his best efforts to keep his promises. The law may allow you to stiff your subcontractors (or at least make them “see you in court” such that they are willing to accept fifty cents on the dollar), but we should feel morally compelled to do not just what we are legally obligated to do, but what is decent and right.

Sometimes, however, responsibilities can and should be legally compelled. Ours is a government not only *for* the people but *of* and *by* the people as well. To me that means, as a matter of constitutional adjudication and statutory construction, that it is neither unreasonable nor unconstitutional for the government to demand some quid pro quo for the rights of citizenship—whether it be the payment of taxes, engagement in some form of national service (military or otherwise), or participation in a national health care plan through which those who are incapable of providing for themselves receive coverage at the expense of those who can afford to pay more.⁶² The times and circumstances call for a little more *e pluribus unum* and a little less *don't tread on me*.

The third point on Etzioni's communitarian agenda is a recognition that certain responsibilities may exist without an immediate payback in the form of capturable rights. Citizens cannot always expect immediate dividends in response to their taxes, and not all of our sacrifices promise a gain to be recognized on our personal doorstep. A communitarian society makes *investments* for the general welfare, be it in the form of infrastructure, public education, or environmental protection.⁶³ This item is only occasionally at issue in con-

61. Russ Buettner & Charles V. Bagli, *How Donald Trump Bankrupted His Atlantic City Casinos, but Still Earned Millions*, N.Y. TIMES (June 11, 2016), <https://www.nytimes.com/2016/06/12/nyregion/donald-trump-atlantic-city.html>; Clare O'Connor, *Fourth Time's A Charm: How Donald Trump Made Bankruptcy Work For Him*, FORBES (Apr. 29, 2011), <https://www.forbes.com/sites/clareoconnor/2011/04/29/fourth-times-a-charm-how-donald-trump-made-bankruptcy-work-for-him/#1f0d13667ffa>.

62. This should not be read as a blanket endorsement of the Patient Protection and Affordable Care Act of 2010 (Obamacare), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. § 18001 (2012))—legislation that has significant defects in both structure and actuarial premises.

63. Not only should we not always expect an immediate payback for these investments, we should recognize the false myth of “nontaxing solutions,” like lotteries (which, upon analysis, are regressive taxes that rob the poor), to pay for public goods:

[F]rom public education to the war on illegal drugs, facile, nontaxing “solutions” have been offered. Thus it has been suggested that we can improve our education system without additional expenditures simply by increasing parental choices among schools. . . . And how should we deal with the demand for illicit drugs? “Just say no.”

stitutional adjudication, although it is frequently grist for the political mill in almost any discussion of legislative or budgetary priorities.

The fourth point on Etzioni's communitarian agenda is one that has had frequent encounters with the Roberts Court: We should favor "careful adjustments" to reconcile individual rights with the public welfare.⁶⁴ Some of these adjustments are made (or demanded) by the Court itself. Thus the requirement (often applied in First Amendment litigation) that the government employ the "least restrictive alternative" when a legitimate government interest potentially interferes with individual rights.⁶⁵ But it should also mean a measure of deference on the part of the Court when it considers a detailed, finely-tuned statute designed to promote the public welfare.

The complexities of modern life together with the practicalities of political compromise often require deft and detailed statutory and administrative remedies to life's problems—remedies ill-suited to the blunt instruments available to the courts. At least three cases considered by the Roberts Court—*Parents Involved*,⁶⁶ *Citizens United*,⁶⁷ and *Sebelius*⁶⁸—presented opportunities for the Roberts Court to defer to careful legislative adjustments. The results, overall, were less than entirely satisfying.

ETZIONI, SPIRIT, *supra* note 19, at 4. Even public-private partnerships should be examined lest they really entail a transfer of public goods to private ownership and a public subsidy of private profits.

64. ETZIONI, SPIRIT, *supra* note 19, at 11.

65. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (stating in a Religious Freedom Restoration Act case that "in order for the Health and Human Services mandate to be sustained, it must also constitute the least restrictive means of serving that interest"); *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (stating that although the Massachusetts Reproductive Health Care Facilities Act—which establishes buffer zones at abortion clinics—is content neutral, it is not "narrowly tailored" because the government pursued its legitimate interests "by the extreme step of closing a substantial portion of a traditional public forum to all speakers. . . . without seriously addressing the problem through *alternatives* that leave the forum open for its time-honored purposes") (emphasis added); *United States v. Alvarez*, 567 U.S. 709 (2012) (holding "stolen valor" law did not survive strict scrutiny partly because it was not the least restrictive alternative); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (making it "incumbent upon [the government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights"). The Religious Freedom Restoration Act essentially codified the test that the Court articulated in *Sherbert v. Verner* after *Sherbert* was overturned by *Employment Division v. Smith*, 494 U.S. 872 (1990). Eric Alan Shumsky, *The Religious Freedom Restoration Act: Postmortem of a Failed Statute*, 102 W. VA. L. REV. 81, 128-29 (1999).

66. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (decided with *Meredith v. Jefferson Cty. Bd. of Educ.*, 551 U.S. 701 (2007)).

67. *Citizens United v. FEC*, 558 U.S. 310 (2010).

68. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

Sebelius may have been the best example of this phenomenon. The Obama Administration and a majority of Congress⁶⁹ felt that in order to provide more widespread health care coverage, it would be necessary to require all Americans (either individually or through their employers) to purchase health insurance. Only through a mandate to obtain health care coverage could the Administration assure that there would be a large enough insurance pool to cover Americans previously deemed uninsurable (mostly those with pre-existing conditions); to cover such persons without the mandate would leave insurers at the mercy of adverse selection.⁷⁰ Passage of the Affordable Care Act did not quite result in universal health care coverage, but it did result in the insuring of twenty million Americans who did not previously enjoy such coverage.⁷¹

In *Sebelius*,⁷² opponents of Obamacare asserted that the legislation ran counter to fundamental liberties in that it *required* that eve-

69. The Affordable Care Act was passed when Democrats controlled the White House and enjoyed slim majorities in both houses of Congress. It was ultimately enacted without a single Republican vote. Shailagh Murray & Lori Montgomery, *House Passes Health-Care Reform Bill Without Republican Votes*, WASH. POST (Mar. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100943.html?sid=ST2010032201830> [https://perma.cc/SJ8W-NVT8]. Granted, the Obama Administration made repeated efforts to compromise on the legislation. Norm Ornstein, *The Real Story of Obamacare's Birth*, ATLANTIC (July 6, 2015), <https://www.theatlantic.com/politics/archive/2015/07/the-real-story-of-obamacares-birth/397742/> [https://perma.cc/7QMM-U4K3]. But the absence of anything approaching consensus not only made the Affordable Care Act (ACA) vulnerable to attack, it imposed a major overhaul of the healthcare system on a nation unprepared to accept its shortcomings (including major technological glitches in the initial rollout) as an inevitable (and amendable) consequence of reform.

70. Apparently, some insurers operating under the ACA have been debilitated due to the problem of adverse selection:

[I]nstead of a large number of individuals purchasing and paying for health insurance to cover the claims of a relatively small number who incur substantial health care costs, far fewer individuals are paying premiums to cover those same health insurance contingencies. Most high-risk consumers remain in the insurance pool to collect benefits, while younger and healthier consumers might leave the pool and stop paying premiums, thereby raising the unit cost of health insurance considerably. It is imperative to minimize adverse selection in order for health insurance to remain a financially viable product.

NAT'L ASS'N OF INS. COMM'RS, ADVERSE SELECTION ISSUES AND HEALTH INSURANCE EXCHANGES UNDER THE AFFORDABLE CARE ACT 1 (2011), <http://www.naic.org/store/free/ASE-OP.pdf> [https://perma.cc/A434-8G6Y]. This problem may now be exacerbated by the repeal of the individual mandate through recent tax legislation. See *infra* note 74.

71. Twenty million people have gained health insurance coverage because of the Affordable Care Act, estimates show. See Press Release, U.S. Dep't of Health and Human Servs., 20 Million People Have Gained Health Care Insurance Coverage Because of the Affordable Care Act, New Estimates Show (March 3, 2016), <https://web.archive.org/web/20160306012646/https://www.hhs.gov/about/news/2016/03/03/20-million-people-have-gained-health-insurance-coverage-because-affordable-care-act-new-estimates> [https://perma.cc/Q4NN-D44K].

72. 567 U.S. at 519.

ry American (either individually or through one's employer) purchase health insurance. To do so, in a simile employed by Justice Antonin Scalia, would be like requiring all Americans to purchase broccoli—something that might be beneficial to their health, but something that Congress lacked the power to require.⁷³ Chief Justice Roberts' opinion appeared to be headed in precisely that direction when he performed an about-face and declared that because the mandate's enforcement mechanism—a penalty assessed against persons who did not purchase insurance—was a tax, Congress had the power to impose it.⁷⁴

The Affordable Care Act, an act of Congress nearly 1,000 pages in length, seems to be a set of “careful adjustments” to reconcile individual rights with the general welfare.⁷⁵ It would also seem that the Legislature—and not the Court—would be the appropriate branch of government to fashion, debate, and enact such adjustments, with the Court intervening only if the measures undertaken by Congress had a draconian effect on individual rights.⁷⁶ But in the United States of

73. *Id.* at 660 (Scalia, J., dissenting) (saying that the failure to enter the health-insurance market, like the failure to buy cars and broccoli, is not “an activity that Congress can ‘regulate’” (emphasis omitted)).

74. *See id.* at 561-74 (majority opinion) (holding that Obamacare's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax, permitted by the Constitution). To constitutionalize a forced payment by calling it a “tax” is an exercise in formalist legerdemain. If Congress can force citizens to pay a tax, why can it not force citizens to make another form of payment, i.e., to a health insurer? Granted, the Sixteenth Amendment allows Congress to tax incomes, but is a penalty for refusing to participate in Obamacare really a tax on income?

The “tax” rationale ultimately became an instrument for upending the individual mandate, as it allowed a Republican Congress and Obama's Republican successor to use a tax measure (requiring only a simple congressional majority under Congress's arcane budget reconciliation procedures) to repeal it. *See Tax Cuts and Jobs Act of 2017*, Pub. L. 115-97, § 11081 (2017). Said President Trump, employing his usual hyperbole: “We eliminated an especially cruel tax that fell mostly on Americans making less than \$50,000 a year—forcing them to pay tremendous penalties simply because they could not afford government-ordered health plans. We repealed the core of disastrous Obamacare—the individual mandate is now gone.” President Donald Trump, State of the Union Address, (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/> [<https://perma.cc/N7YK-DGW8>].

75. *See Patient Protection and Affordable Care Act of 2010* (Obamacare), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. § 18001 (2012)). Republican critics of Obamacare would say that the sheer length and complexity of the legislation are among its shortcomings.

76. An enactment of this complexity also requires the promulgation of regulations—more carefully tailored adjustments—by the Executive Branch, and the Affordable Care Act frequently delegates authority to the Secretary of Health and Human Services. *See, e.g.*, 42 U.S.C. § 18022(d)(2)(B) (2012) (“The Secretary shall issue regulations under which employer contributions to a health savings account . . . may be taken into account in determining the level of coverage for a plan of the employer.”); *id.* § 18031(h)(1) (“Beginning on January 1, 2015, a qualified health plan may contract with . . . a health care provider only if such provider implements such mechanisms to improve health care quality as the

America, the National Legislature (Congress) is limited to those powers enumerated in the Constitution (chiefly, in Article I). In other words, the Constitution does not give Congress a blank check to enact whatever measures it wants without constraint. While in the past, the Court had been willing to defer to Congress regarding *restrictions* on human activity (typically under a broad reading of the Commerce Clause),⁷⁷ in this instance, Congress *required* activity; that is, it required that Americans purchase health insurance. It is difficult to find any enumerated power in the Constitution (apart from raising an army⁷⁸ and levying taxes⁷⁹) allowing Congress to *require* an activity. But by calling the penalty for noncompliance a “tax,” the Chief Justice was able to preserve a legislative cornerstone of the Obama Administration while still providing legal justification for future challenges to Congressional mandates.

Sebelius may nevertheless be viewed as a communitarian decision on two counts. For one, it preserved a “carefully tailored” legislative solution to promote the general welfare against an individual rights challenge. Procedurally, it evidenced willingness on the part of a conservative Chief Justice to acknowledge the Article I argument (with the concurrence of four other Justices), while avoiding the disruption and chaos that would have followed the striking down of the legislative centerpiece of a president from the opposing political party. I suspect that it is no accident that the opinion was authored by the Chief Justice who, despite his Republican pedigree and conservative leanings, may have considered it his duty not to upset the apple cart in an election year.⁸⁰ The *Sebelius* decision can, therefore, be viewed

Secretary may by regulation require.”); *id.* § 18116(c) (“The Secretary may promulgate regulations to implement this section,” which prohibits discrimination in federally funded health programs.).

77. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (holding Congress had power under the Commerce Clause to prohibit racial discrimination in public accommodations.); *Wickard v. Filburn*, 317 U.S. 111, 123-24 (1942) (holding Congress had power under the Commerce Clause to impose limitation on wheat production by farmers.); *United States v. Darby*, 312 U.S. 100, 123 (1941) (holding Congress had power under the Commerce Clause to regulate employment conditions.).

78. U.S. CONST. art. I, § 8.

79. *Id.* amend. XVI.

80. Roberts may not have been the first Chief Justice to have done this. William Rehnquist’s service as Chief Justice was marked by a subtle but noticeable move from his role as the Court’s conservative stalwart to a more centrist position. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 430 (2000) (declining to overturn *Miranda*—despite Rehnquist being an early and harsh critic of *Miranda*—because it “has become embedded in routine police practice to the point where the warnings have become part of our national culture”); see also Aaron J. Ley & Gordie Verhovek, *The Political Foundations of Miranda v. Arizona and the Quarles Public Safety Exception*, 19 BERKELEY J. CRIM. L. 206, 240-41 (2014).

The Obamacare appletart was eventually upset in the 2016 election. Whatever one’s views on the substance, that is as it should be. Obamacare was done by political forces, and

as communitarian from both a substantive and procedural standpoint. It upheld the general welfare (as perceived by the President and Congress) on the narrowest of grounds, handed libertarians a Pyrrhic victory, and avoided political chaos. The repeal of Obamacare would require a political change by the electorate in the form of a new president, and at least in 2012, that was a change the American people were unwilling to make.⁸¹

Communitarian philosophy, of course, extends well beyond Professor Etzioni's four-point agenda. A Responsive Communitarian Platform,⁸² promulgated at roughly the same time as Professor Etzioni's seminal work, articulates a number of principles for "shoring up the moral, social, and political environment."⁸³ Since that time, hundreds of people (this Author included) have signed onto the platform, and a number of commentators have expounded upon the communitarian vision.⁸⁴

It is difficult to capture the full range of communitarian thought in a few paragraphs. Daniel Bell (who has a vision of communitarianism somewhat different but nevertheless compatible with that of Etzioni) has observed, "[c]ommunitarian politics entails that citizens should be engaged in politics as members of a nation committed to advancing its common good rather than as private persons with particular interests to advance."⁸⁵ That is not a bad working definition, but no single solution or legislative agenda will fully address the

so will it be undone (if Republicans in Congress and the White House can finally figure out, after six years, just *how* they have meant to replace Obamacare).

In *Bell, supra* note 8, at 62, a book structured as a dialogue, Daniel Bell's communitarian protagonist says, "[w]ere Americans to restructure their health-care system in such a way as to guarantee medical care for all, I don't expect serious opposition to last." Perhaps Bell underestimated the depth or intensity of the opposition. Or perhaps Democrats have succeeded in creating yet another "entitlement" that Republicans find politically impossible to repeal.

81. Ironically, that is a change the electorate may have been willing to make a year later, when the rollout of Obamacare proved problematic. Mr. Trump's election in 2016 may have underscored that policy preference, although polls taken just a few months later suggested a slight preference to Obamacare over its repeal. See Margot Sanger-Katz & Haeyoun Park, *Obamacare More Popular Than Ever, Now That It May Be Repealed*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/interactive/2017/02/01/us/politics/obamacare-approval-poll.html?_r=0; Robert King, *Poll: Obamacare Gaining Popularity*, WASH. EXAMINER (Feb. 24, 2017), <http://www.washingtonexaminer.com/poll-obamacare-gaining-popularity/article/2615671> [<https://perma.cc/RD2G-4ECC>]; Steven Shepard, *Poll: Support for Obamacare is Rising*, POLITICO (Feb. 22, 2017), <http://www.politico.com/story/2017/02/obamacare-repeal-replace-poll-235245> [<https://perma.cc/WLZ2-RNJA>].

82. See *Communitarian Platform, supra* note 7.

83. ETZIONI, SPIRIT, *supra* note 19, at 247.

84. *New Endorsers of the Responsive Communitarian Platform*, COMMUNITARIAN NETWORK, <https://communitariannetwork.org/new-endorsers> [<https://perma.cc/C3HK-2YSX>] (last updated Aug. 10, 2017); see also BELL, *supra* note 8; BRESLIN, *supra* note 51; François, *supra* note 11; Hazard, *supra* note 29.

85. BELL, *supra* note 8, at 138.

communitarian ideal. Any notion of communitarian “dogma” is inimical to a movement that avoids the extremes and cultivates a diversity of views. Although communitarians will subscribe to common principles, the term “doctrinaire communitarianism” is oxymoronic, in that the movement is an evolving one that views few things in terms of absolutes.⁸⁶

I therefore hope to provide not so much “*the* communitarian view” of constitutional law, but rather one person’s analysis of the work of the Roberts Court through a communitarian lens.⁸⁷ As difficult as it is to boil communitarianism down to its essence, I suggest the following communitarian concepts, gleaned from Professor Etzioni’s agenda, the Responsive Communitarian Platform, and other communitarian writings, as conducive to an analysis of the Court’s work:

- Exercising caution with respect to the minting of new rights.
- Recognizing that with rights come responsibilities.
- Maintaining checks on government autocracy and tyranny.
- Expanding public participation in politics and discourse.
- Eliminating invidious discrimination and promoting equality.
- Empowering intermediate communities.
- Transcending the impulse to reduce every problem to a binary choice.

The Section that follows employs these concepts to address the work of the Roberts Court.

A. *Relevance of Communitarianism to the Court’s Work*

The ongoing relevance of the communitarian viewpoint can most easily be seen at the extremes. As communitarians are opposed to repressive authoritarianism, so the Constitution protects us against the most repressive and authoritarian conduct of government, as well as powerful and noxious intermediate (albeit private) communities, such as overreaching corporations or racist organizations. As we believe that human existence cannot be sustained through unremitting individual entitlement, so the decisions of the Supreme Court recognize reasonable limitations on speech, privacy, and other individual rights. But focusing on those extremes tells us mostly what communitarianism is *not*. At least as importantly, communitarians are *for* the ability of people to organize (through government and private associations at all levels) and take collective action for the common good, so long as such action does not unduly interfere with the rights of others. The Constitution, fortunately, includes the Bill of Rights,

86. Ackerman, *Tort Law*, *supra* note 5, at 654.

87. My insistence in the use of the lowercase “c” (Etzioni prefers the uppercase) demonstrates this non-doctrinaire approach. *Id.* at 654 n.29.

limiting the intrusions of government. But the Constitutional Convention was originally called to remedy the impotence of government under the Articles of Confederation, most notably demonstrated by the chaos of Shay's Rebellion.⁸⁸ To borrow a few phrases from the Preamble, a "more perfect Union" was needed to "promote the general Welfare."⁸⁹ This communitarian strain is too often neglected in constitutional analysis, be it from "liberal" or "conservative" viewpoints.

It is my working thesis that the Court should defer, whenever possible, to collective efforts (typically by Congress, but sometimes by the states or by other intermediate communities) to promote the general welfare. A relatively trivial objection (say, the "right" not to file a form indicating a religious objection to paying for employees' contraception coverage⁹⁰) to a measure designed to serve an overwhelming public need (say, widespread access to health care) should be considered in the context of the general welfare as well as that of civil liberties. Not that every liberty interest must fall by the wayside, but a claim of individual rights should not be allowed to throw an entire country into chaos or disorder.⁹¹ Just as the Bill of Rights is not a "suicide pact,"⁹² not every "rights"-based objection should cause an entire scheme to protect the public to come crashing down.⁹³ But we are

88. DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* 11-12 (1990) (suggesting that the Framers were attempting to avoid insurrections like Shays' Rebellion when they drafted the Constitution); see also Ackerman, *Disputing Together*, *supra* note 12, at 53-55.

89. U.S. CONST. pmbl.

90. See *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); see also *infra* notes 367-72 and accompanying text (discussing *Zubik*).

91. Justice Ginsburg considered the religious objection to birth control coverage raised in *Hobby Lobby*, while heartfelt, to be rather trivial, and I am inclined to agree. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting). The only question in my mind is whether the inconvenience to the public of recognizing the objection (which may have entailed no additional public expenditure) was equally trivial.

92. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

93. It is not altogether clear that Obamacare is the prototype for a scheme worthy of such protection. The Affordable Care Act is unduly long, complex, and fraught with difficulty. Perhaps it is a legislative Humpty Dumpty, just waiting to be pulled down. I have significant doubts, however, about the ability of the Trump Administration and the current Congress to turn the remains into an edible omelet. After six years of promising to repeal the Affordable Care Act, Republicans appear not to have developed an acceptable substitute. See Mike DeBonis, Ed O'Keefe & Robert Costa, *GOP Health-Care Bill: House Republican Leaders Abruptly Pull Their Rewrite of the Nation's Health-Care Law*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/powerpost/house-leaders-prepare-to-vote-friday-on-health-care-reform/2017/03/24/736f1cd6-1081-11e7-9d5a-a83e627dc120_story.html?utm_term=.7051004addc5 [https://perma.cc/8DZA-7TWJ]; Robert Pear, Thomas Kaplan & Maggie Haberman, *In Major Defeat for Trump, Push to Repeal Health Law Fails*, N.Y. TIMES (Mar. 24, 2017), <https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html>. The reality-challenged new President after about a month in office said, "Nobody knew that health care could be so complicated." Robert Pear & Kate Kelly, *Trump Concedes Health Law Overhaul Is 'Unbelievably Complex'*, N.Y. TIMES (Feb.

quick to concede that every assertion of government prerogative cannot be allowed to sweep away the bona fide rights of individuals or groups. Oftentimes, the public interest is best served through the recognition and enforcement of individual rights.

How the Court treats litigants—largely through its interpretation and application of procedural rules in civil cases—also has communitarian implications. I will therefore discuss instances in which the Roberts Court has, in a rather formalistic way, disfavored group remedies. This individualistic rather than communitarian view of civil litigation has had a distinct—although hardly uniform—tendency to deny litigants access to remedies that are more efficiently pursued through large-scale litigation. In this regard, the Court has indeed taken on a distinctly anti-communitarian drift during the Roberts years. I will discuss this in greater detail in Part III.D.

III. APPLYING COMMUNITARIAN CONCEPTS TO THE WORK OF THE ROBERTS COURT

A. *Exercising Caution with Respect to the Minting of New Rights*

*An ideal is something to be aimed at, but which, by definition, cannot be immediately realized. A right, on the contrary, is something that can and, from a moral point of view, should be respected here and now. If it is violated, justice itself is abused.*⁹⁴

At the forefront of Professor Amitai Etzioni's action agenda for communitarianism is a "moratorium on the minting of most, if not all, new rights."⁹⁵ In a sense, it is of little use to call for a moratorium on the recognition of new or expanded rights by the Supreme Court. The Court is not a legislature that can put the brakes on new law; subject to its discretion regarding grants of certiorari, the Court is obliged to take on cases as presented. Nobody can tell gay rights activists or Second Amendment advocates that they must refrain from advancing causes such as official recognition of gay marriage or an individual right to bear arms, respectively, nor can Professor Etzioni seriously think that the Court can uphold its collective hand in response and say, "Let's lay off the new rights for now." While the recog-

27, 2017), <https://www.nytimes.com/2017/02/27/us/politics/trump-concedes-health-law-overhaul-is-unbelievably-complex.html>.

94. Maurice Cranston, *Are There Any Human Rights?*, 112 DAEDALUS 1, 14 (1983).

95. ETZIONI, SPIRIT, *supra* note 19, at 4; *cf.* Hazard, *supra* note 29, at 729 ("[A]ny claim of right that is sufficiently specific to be intelligible can be superseded by going up one more flight in the golden stairway of increasingly general principles.").

nition of new or expanded rights is serious business, no periodic moratorium can halt the march of progress or tell the afflicted, “Not now.”⁹⁶

Professor Etzioni’s moratorium may be more appropriate for the legislative and executive branches of government. Both branches, on both a federal and state level, have tried to ascribe special importance to favored interests by employing rights-based language. Was the world crying out, in 2012, for an Airline Passengers Bill of Rights, promulgated by the Obama Administration to keep those fortunate enough to enjoy the luxury of air travel free of the indignity of having to sit on an airport tarmac for more than three hours?⁹⁷ Even assuming that the free enterprise system was inadequate to keep the airlines on their toes, was it necessary to declare it a “right” not to sit in a stuffy airplane cabin?⁹⁸ This regulation takes a back seat, however, to the countless versions of the “Taxpayer Bill of Rights” that have been enacted on the state⁹⁹ and federal¹⁰⁰ levels. Doubtless,

96. Writing from a Birmingham jail to fellow clergymen, the Reverend Dr. Martin Luther King Jr. defended the use of nonviolent resistance to racism, and how individuals have a moral obligation to violate unjust laws rather than awaiting their invalidation in the court system. “For years now I have heard the words ‘Wait!’ It rings in the ear of every Negro with a piercing familiarity. This ‘Wait’ has almost always meant ‘Never.’ . . . We must come to see . . . that ‘justice too long delayed is justice denied.’ ” Letter from Dr. Martin Luther King Jr. to Fellow Clergymen 5, at ¶ 3-6, ¶ 1 (Apr. 16, 1963) [hereinafter King Letter].

97. See 14 C.F.R. § 259.4(b)(1) (2012). It is hard to place such a measure on a par with President Obama’s efforts to combat pollution and climate change through federal regulation. See, e.g., Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). Unfortunately from a communitarian standpoint, the Trump Administration has proposed repeal of this measure. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (proposed Oct. 16, 2017).

98. It is the rhetoric of “rights” to which I most object. It is nice for airline passengers to be comfortable, and perhaps the consolidation of the airline industry allowed carriers to be less mindful of their passengers and in need of this regulation. But must every legislative or administrative remedy be a call to Armageddon?

99. Several states have adopted a “Taxpayer Bill of Rights” (TBOR), including Colorado, COLO. CONST. art. X, § 20; Connecticut, CONN. GEN. STAT. ANN. § 12-39n (West 2017); Florida, FLA. STAT. ANN. § 213.015 (West 2017); New York, N.Y. TAX LAW §§ 3000-13 (McKinney 2017); and Tennessee, TENN. CODE ANN. § 67-1-110 (West 2017).

100. In 2014, the IRS adopted a TBOR of its own. News Releases, IRS Adopts “Taxpayer Bill of Rights,” 10 Provisions to be Highlighted on IRS.gov, in Publication 1, IR-2014-72 (June 10, 2014), <https://www.irs.gov/newsroom/irs-adopts-taxpayer-bill-of-rights-10-provisions-to-be-highlighted-on-irsgov-in-publication-1>.

Congress has passed several pieces of legislation with “Taxpayer Bill of Rights” in the title. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988) (containing the “Omnibus Taxpayer Bill of Rights”); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998) (containing Title III, which is known as “Taxpayer Bill of Rights 3”). In 2015, Congress incorporated the ten rights contained in the IRS TBOR into the Internal Revenue Code. See 26 U.S.C. § 7803(a)(3) (2012). Congress has attempted to further amend the Internal Revenue Code to enhance taxpayer rights. To that end, several bills have been introduced, the most recent being the Taxpayer

some taxpayers have been subjected to rough handling by the IRS and state tax collection agencies, and some legitimate grievances are being addressed here. But the more layers of “rights” we proclaim, the less meaning each such effort conveys.

In light of the Court’s role in the evolution in human rights (and especially the rights of the LGBTQ community) during the past twenty years, it is by no means clear that communitarians, including Etzioni, would really subscribe to a complete moratorium.¹⁰¹ The chief concern, as Etzioni explained, is that “each newly minted right generates a claim on someone.”¹⁰² Several cases in which the Roberts Court created or expanded rights demonstrate that assertion. In *Citizens United*,¹⁰³ the Court invalidated a portion of the McCain-Feingold Act (limiting political advertising by corporations and unions), declaring (not for the first time) that corporations and unions have the same First Amendment rights as natural persons.¹⁰⁴ The decision has exacted a price by hindering efforts to assure fair elections.¹⁰⁵ In *District of Columbia v. Heller*,¹⁰⁶ the Court for the first time held that the Second Amendment recognizes an individual right to bear arms.¹⁰⁷ While the Court acknowledged that its rule did not

Bill of Rights Enhancement Act of 2015, S. 1578, 114th Cong. (as introduced in the Senate, June 16, 2015).

101. Professor Etzioni would appear to have admitted as much. See Amitai Etzioni, *A Communitarian Position for Civil Unions*, in MARY LYNDON SHANLEY, JUST MARRIAGE 63-66 (Joshua Cohen & Deborah Chasman eds. 2004) (“Civil unions—if made available to both gays and heterosexuals who want to signal a different form of commitment than traditional marriages—are a reasonable middle ground. . . . Civil unions accord those involved in them *most* of what traditional marriages provide: the right to inherit, share health benefits, and so on. . . . And such unions allow social conservatives to believe that that which is sacred to them has been respected. Such a compromise is not the best of all worlds, but it is the best that one can achieve in our society at this stage in history. We must respect other members of our community the way that we wish for them to respect us.”). Of course, much has transpired in the way of public opinion on gay marriage since 2004.

102. ETZIONI, SPIRIT, *supra* note 19, at 6.

103. *Citizens United v. FEC*, 558 U.S. 310 (2010).

104. *Id.* at 353.

105. See *id.* at 479 (Stevens, J., dissenting) (“[T]he Court’s opinion is . . . a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.”); Ackerman & Cole, *supra* note 18, at 927 (“If any doubts existed as to the impact of the Court’s decision in *Citizens United*, the 2014 midterm elections made clear that the Court had opened a door to unprecedented corporate political spending—with no meaningful control or limitation by ‘the procedures of corporate democracy.’” (citing Derek Willis, *Outside Groups Set Spending Record in Midterms*, N.Y. TIMES (Dec. 10, 2014), http://www.nytimes.com/2014/12/11/upshot/outside-groups-set-spending-record-in-midterms-.html?_r=0)).

106. 554 U.S. 570 (2008).

107. *Id.* at 636.

prohibit all forms of firearms regulation,¹⁰⁸ the decision nevertheless places a crimp on efforts to stem firearm-related crime, with a potential toll on victims of gun violence. Thus, the reformulation of this right came at a potentially dear price.

Sometimes, however, new rights can be conferred without exacting a price on others. In *Obergefell v. Hodges*,¹⁰⁹ for example, the Court declared that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require that same-sex couples have the same right to marry as those of the opposite sex.¹¹⁰ The advancement of this “new” right places a claim on nobody. Nobody’s marriage rights are diluted, no families are compromised; if anything, families—the most basic intermediate community—are strengthened by providing official sanction and a sense of permanency to gay unions.¹¹¹ True, a county clerk in Kentucky can cite religious objections to issuing marriage licenses to gay couples, but her objections fall short because they go to what she may or may not do in her official capacity (i.e., while acting on behalf of the state), not to what she may do or believe as a private citizen.¹¹² She remains free to voice her opposition to gay marriage and to belong to a church that refuses to sanctify gay marriage. What the courts have said is only that she may not exercise *power* as a public official to deny others a right.¹¹³ In

108. *Id.* at 632.

109. 135 S. Ct. 2584 (2015).

110. *Id.* at 2604.

111. Some will claim that communitarianism demands that we respect the “right” of fundamentalist religious communities to adhere to a Biblical injunction against homosexuality. *Obergefell*, however, does not deny them the right to make that assertion *within* their own communities. But to compel religious compliance or to impose religious strictures on the entire public through government action is offensive to the rights of the public-at-large, places a claim on all those who are not adherents to the religious doctrine being asserted, and is therefore probably a violation of the Establishment Clause. See James C. Nelson, *The Religion Clauses: A Sword With Two Edges*, 39 MONT. LAW 3, 3 (2014) (“The[] fundamentalist religious and conservative organizations cannot have it both ways. If they do not want the State telling them what to believe, then they cannot expect the government to adopt their beliefs as part of the generally applicable body of state law.”).

112. The clerk was Kim Davis of Rowan County. See Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), https://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?_r=0.

113. Specifically, the Sixth Circuit said:

It does not seem unreasonable for Plaintiffs, as Rowan County voters, to expect their elected official to perform her statutorily assigned duties. And yet, that is precisely what Davis is refusing to do. Much like the statutes at issue in *Loving* and *Zablocki*, Davis’ “no marriage licenses” policy significantly discourages many Rowan County residents from exercising their right to marry and effectively disqualifies others from doing so.

Miller v. Davis, 123 F. Supp. 3d 924, 936-937 (E.D. Ky. 2015), *appeal dismissed*, 667 F. App’x 537 (6th Cir. 2016). Further:

her capacity as a state actor, she has no *rights*; and while the state's *power* to determine who may or may not marry is compromised, the state is not burdened by according the right to marry to gay couples.

The same salutary effect was obtained over a decade earlier when, in *Lawrence v. Texas*,¹¹⁴ the Court decriminalized sexual relations between consenting gay adults. Declaring that a victimless crime is unconstitutional creates no victims itself. It does not harm the majority when the Court extends to a subordinated minority a right that the rest of us have long enjoyed. Such a ruling may offend some people's religious beliefs or sense of morality, but those people remain free to retain and profess their own beliefs and moral concerns. Whether they are allowed to *impose* their beliefs and morals on others or to make their moral judgments the judgments of the state through the criminal law is another issue altogether.

A conservative communitarian with what Beau Breslin calls a "thick" notion of the good might take issue with this.¹¹⁵ With respect to matters such as homosexual relationships and abortion, conservative communitarians will not apologize for drawing from community morals (most often religious teachings) and imposing them as precepts important to the community's well-being.¹¹⁶ It is here that I am compelled to take a more libertarian view. I see no harm to the Republic in allowing gay people to partake in the same privileges and pleasures as heterosexuals. Abortion is a harder case because there one can plausibly argue that the rights of more than one human being are placed in jeopardy by the exercise of a woman's right to choose.¹¹⁷ But as a male, I consider myself at a moral disadvantage if I try to decide for somebody else whether her autonomy should be subordinated to whatever rights the unborn may possess. So far, the Court seems to have struck a reasonable balance.

Davis has refused to comply with binding legal jurisprudence, and in doing so, she has likely violated the constitutional rights of her constituents. When such "sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell*, 135 S. Ct. at 2602. Such policies simply cannot endure.

Id. at 943.

114. 539 U.S. 558 (2003).

115. BRESLIN, *supra* note 51, at 85.

116. See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 538 (1989) (defending the "naive" view that "the justice or injustice of laws against abortion and homosexual sodomy may have something to do with the morality or immorality of these practices after all").

117. See *infra* notes 231-38 and accompanying text.

1. *Criminal Prosecutions and National Security*

The Court *should* exercise caution in recognizing individual rights where doing so may leave the community defenseless. A proper balance must be struck, in which minor intrusions on personal liberty may have to be tolerated in order to avoid greater dangers. Etzioni provides the example of sobriety tests for truck drivers and airline pilots (to which we should add Amtrak engineers¹¹⁸), who might have to bear the inconvenience of a short stop and brief intrusion in light of the dangers that intoxication can pose on others.¹¹⁹ Decisions of the Court involving the weighing of the rights of the criminally accused versus the state's interest in protecting citizens from crime also fall into this category. Herewith two examples of such cases, drawn from lesser-known decisions of the Roberts Court.

In criminal prosecutions, the exclusionary rule prevents the use of illegally obtained evidence in a subsequent trial. The Supreme Court developed the rule as a means of disincentivizing police from violating suspects' constitutional rights, including the violation of Fourth Amendment rights by means of warrantless or otherwise illegal searches and seizures of evidence.¹²⁰ In *Herring v. United States*,¹²¹ the Roberts Court declined to apply the exclusionary rule to evidence (methamphetamine and an illegally obtained gun) seized from the defendant based on a warrant that the arresting officers had every reason to believe was valid but which, in fact, had been revoked. (The warrant was from a neighboring jurisdiction and still erroneously appeared in that jurisdiction's electronic records.¹²²) Chief Justice Roberts, writing for the Court's majority, opined that applying the exclusionary rule here would not disincentivize improper conduct by law enforcement authorities, which in this case was not knowing and deliberate, but only negligent.¹²³ Justice Ginsburg dissented, arguing that much of *tort* law is based on the premise of disincentivizing neg-

118. See Emma G. Fitzsimmons & Josh Keller, *Why an Amtrak Train Derailed in Philadelphia*, N.Y. TIMES (May 17, 2016), https://www.nytimes.com/interactive/2016/05/17/us/amtrak-train-crash-derailment-philadelphia.html?_r=0.

119. ETZIONI, SPIRIT, *supra* note 19, at 168 ("The introduction of screening gates is a good example of the type of new measures that Communitarians favor. They entail a small contribution by each of us, typically a minor inconvenience, and provide a major benefit for all of us. Likewise, sobriety checkpoints enable us to drive more safely, and drug testing allows us to travel more safely on mass transit, airplanes, and school buses.")

120. See, e.g., *United States v. Calandra*, 414 U.S. 338, 348 (1974).

121. 555 U.S. 135 (2009).

122. *Id.* at 137-38.

123. *Id.* at 147-48.

ligent behavior; ergo, police negligence could also be discouraged by denying the state its evidence in criminal cases.¹²⁴

On balance, the Chief Justice has the better argument here. Criminal liability, and the rules of evidence on which it is based, should not be subject to a game of “gotcha” when law enforcement authorities—acting with neither illegal intent nor bad motive—obtain evidence of crime.¹²⁵ Excluding evidence negligently obtained (as opposed to, say, imposing civil liability on the police or government) penalizes the public, not the negligent officer or her employer. It gives the accused an undeserved bonus, the equivalent of a “Get Out of Jail Free” card, while providing the public with protection from neither crime nor deliberate police misconduct. It arguably protects the public against *negligent* police misconduct, but that is small recompense for the failure to punish and deter crime.

Justice Ginsburg explains, however, that the Fourth Amendment is in place not so much to protect the guilty as to protect innocent victims of warrantless searches.¹²⁶ So what would have happened in *Herring* had the accused been innocent of any wrongdoing? Had the search of the defendant in this case revealed no illegal items in his possession, he likely would have been arrested pursuant to the revoked warrant, but released immediately after the error was revealed (there being no other charges on which to hold him), probably within an hour.¹²⁷ This is inconvenient, to be sure, but a small price to pay, given the seriousness of crime and the importance of good faith efforts on the part of the

124. See *id.* at 148 (Ginsburg, J., dissenting). Public officials and the governments they work for are immune from tort liability for negligent behavior that does not constitute a knowing violation of a person’s civil rights. I view that as unfortunate. See Ackerman, *Tort Law*, *supra* note 5, at 682-83. But see *id.* at 685-90. Negligence liability might be a better way of dealing with negligent conduct than depriving the people of evidence necessary for a criminal conviction. It places responsibility where it belongs, without the gamesmanship encouraged by the exclusionary rule.

In 1971, then-Chief Justice Warren Burger suggested a statutory remedy that would supplant the suppression doctrine: “I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials. . . . Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct—something that the suppression doctrine, of course, can never accomplish.” *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting).

125. In her dissent, Justice Ginsburg hints that the arresting officer may have been pursuing a personal vendetta against the accused. *Herring*, 555 U.S. at 156 (Ginsburg, J., dissenting). If that were indeed so, the maliciousness of the officer’s behavior may have been better reason for application of the exclusionary rule.

126. See *id.* at 152.

127. In *Herring* the neighboring jurisdiction notified the arresting jurisdiction immediately after the mistake was discovered, which was nonetheless after the search had transpired. *Id.* at 138 (majority opinion).

police to fight it.¹²⁸ We would be better served by a rule allowing a civil remedy (dispensing with the current immunities protecting negligent police and their employers¹²⁹), providing the accused sufficient compensation for actual injury but not punitive damages, because the police (despite their loss of immunity) lacked the malice or improper motive necessary to invoke such damages.¹³⁰ Much as the federal government provides compensation to families victimized by negligent drone strikes (or even well-aimed strikes causing collateral damage),¹³¹ local governments could be encouraged to maintain a fund to provide immediate but modest compensation to persons who have been negligently detained. Negligent police conduct would be deterred, innocent and inconvenienced citizens would be compensated, but the public interest in fighting crime would be preserved.¹³²

The second case, also drawn from criminal law, is more difficult. In *Miranda v. Arizona*,¹³³ the Warren Court established protections

128. Admittedly, in rare instances an arrest may mean more than a minor intrusion; for example, a strip search.

129. Over time, the Court has unnecessarily extended the Eleventh Amendment beyond its original and necessary meaning, especially with regard to Eleventh Amendment immunity. Jack W. Pirozzolo, Comment, *The States Can Wait: The Immediate Appealability of Orders Denying Eleventh Amendment Immunity*, 59 U. CHI. L. REV. 1617, 1622-23 (1992); see also *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (“[Knowledge] of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States.”). Currently, police officers and other public officials are shielded from damages for civil liability so long as they did not violate an individual’s “clearly established” statutory or constitutional rights. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

130. “Courts have traditionally agreed that punitive damages can be awarded only when the tortfeasor causes harm by conduct ‘that constitutes an extreme departure from lawful conduct’ and that is motivated by or evinces an antisocial mental state as well. . . . Some courts insist upon malice, ill-will, and intent to injure, evil motive or the like, while others have found it sufficient that the defendant engages in wanton misconduct with its conscious indifference to risk.” DAN B. DOBBS, *THE LAW OF TORTS* 1064 (2000) (footnotes omitted).

131. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-699, *MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE’S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN* (2007), <http://www.gao.gov/products/GAO-07-699> [<https://perma.cc/PMH9-67FG>]; see also Cora Currier, *Does the U.S. Pay Families When Drones Kill Innocent Yemenis?*, PROPUBLICA (Aug. 12, 2013), <https://www.propublica.org/article/does-the-u.s.-pay-families-when-drones-kill-innocent-yemenis> [<https://perma.cc/FYF2-QTJH>].

132. While there would be budgetarily-based resistance to compensating victims of negligent police misconduct, leaving the harm on the victim (as the rules currently provide) in effect requires her to subsidize behavior for which the entire community should pay. Victims should not have to pay disproportionately for the harm caused by negligent behavior. See Ackerman, *Tort Law*, *supra* note 5, at 682 n.184. Ironically, the exclusionary rule, together with the immunities enjoyed by public officials and governments, has the opposite effect: Exclusion of evidence rewards the guilty while immunities leave innocent victims uncompensated. I would nevertheless leave the exclusionary rule intact (along with a civil remedy) where the Fourth Amendment violation was deliberate.

133. 384 U.S. 436 (1966). *Miranda* was an extension of *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964) (holding that where “[an] investigation . . . has begun to focus on a par-

against involuntary and forced confessions in the form of the now famous “*Miranda* warning,” which includes the right to remain silent and the right to an attorney. In *Berghuis v. Thompkins*,¹³⁴ the accused (Thompkins), was arrested in connection with a lethal shooting that had occurred a year earlier. Thompkins was shown the *Miranda* warning and read a portion of the warning out loud (ostensibly to prove that he could read), but declined to sign a statement acknowledging that he had read and understood his rights.¹³⁵ The accused sat through three hours of questioning, rarely responding except for an occasional head nod or short verbal response, such as “Yeah,” “No,” or “I don’t know.”¹³⁶ The Court said, “At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney.”¹³⁷ (Nor, for that matter, did he expressly waive his right to an attorney or to remain silent.) Thompkins complained only by stating that the chair he was sitting in was hard.¹³⁸ Justice Kennedy’s opinion for the Court describes what happened next:

About 2 hours and 45 minutes into the interrogation, Helgert [the interrogating officer] asked Thompkins, “Do you believe in God?” Thompkins made eye contact with Helgert and said “Yes,” as his eyes “well[ed] up with tears.” Helgert asked, “Do you pray to God?” Thompkins said “Yes.” Helgert asked, “Do you pray to God to forgive you for shooting that boy down?” Thompkins answered “Yes” and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.¹³⁹

Thompkins was charged with first-degree murder, and the above statement was allowed into evidence.¹⁴⁰ A conviction was ultimately obtained, and Thompkins’ habeas petition ultimately reached the Supreme Court, with Thompkins maintaining that he had effectively invoked his privilege by remaining largely silent for most of the interrogation.¹⁴¹

ticular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent,” the accused has been denied assistance of counsel in violation of the Constitution).

134. 560 U.S. 370 (2010).

135. *Id.* at 375.

136. *Id.* at 375-76.

137. *Id.* at 375.

138. *Id.*

139. *Id.* at 376 (second alteration in original) (citations omitted).

140. *Id.*

141. *Id.* at 379.

Justice Kennedy's majority opinion stated that the confession was voluntary and, therefore, admissible.¹⁴² Justice Sotomayor wrote a dissenting opinion, contending that the prosecution had not sustained its burden of proving that the confession was voluntary.¹⁴³ Here, the police had complied with the technical requirements of the *Miranda* warning. But had they obtained a confession that was truly voluntary? Today, when any viewer of television police procedurals can recite the *Miranda* warning, it is easy to forget how controversial the *Miranda* decision was when first issued. In *Miranda*, a 5-4 majority (against a stinging dissent by Justice White) declared that a four-part warning was necessary in state and federal police interrogations to ensure that confessions obtained during custodial interrogation were truly voluntary.¹⁴⁴ Custodial interrogations, said Chief Justice Warren for the majority, were inherently problematic (and unreliable) not only because of the potential for physical coercion; the very circumstances of custodial interrogation were so mentally coercive that even in the absence of physical violence a suspect's will could be overborne by the power of the state.¹⁴⁵ But Justice White felt that the *Miranda* majority had struck the balance between the constitutional protections against self-incriminating testimony and the right to counsel in a manner that did not take the state's legitimate interest (i.e., obtaining useful evidence to convict criminals) sufficiently into account.¹⁴⁶ If previously the game had been rigged against the accused, now it was being rigged against the state.

The *Miranda* warning has become so routine by now that the furnishing of the warning does not appear to encumber the work of law enforcement agencies. That does not appear to be where the problem lies. The *Miranda* warning may have made suspects a little more circumspect about spilling the beans to police interrogators, but the warning nevertheless falls short of ensuring completely against involuntary and unreliable confessions. Communitarians would consider how a more proper balance might be struck between the legitimate interests on both sides. This is not quite the same as trying to obtain a "level playing field"; after all, it is not a mere game that we are playing.

142. *Id.* at 389.

143. *Id.* at 396-403 (Sotomayor, J., dissenting).

144. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

145. *Id.* at 448.

146. *See id.* at 542 (White, J., dissenting) (stating that there was now the likelihood that a significant number of individuals who would have been convicted going free); *see also id.* ("In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity.").

Instead, we should look at the reasons underlying the concern about involuntary confessions and the probative value of the confession obtained. Before *Miranda*, the concern was largely twofold: (1) that the quest for confessions gives rise to violent, coercive techniques; and (2) that involuntary confessions are inherently unreliable. In *Thompkins*, the record indicated the absence of any physical violence against the suspect, and the other evidence adduced at trial strongly suggested that the confession was reliable. But there is little doubt that 2¾ hours of questioning without the assistance of defense counsel are likely to have a psychologically coercive effect. And just how probative is the single word “yes,” coming in response to a leading question after that 2¾ hours? Notwithstanding the officers’ technical compliance with *Miranda*, there is reason to believe that the probative value of this “statement” was outweighed by the coercive effect of 2¾ hours of custodial investigation of an unrepresented suspect.¹⁴⁷

Back in my law school days (when the landmark cases of the Warren Court were received as if they were tablets from Mount Sinai), I argued, as had the Chief Justice in *Miranda*, that there was something inherently unseemly about prying even the truth from an unrepresented individual facing the full power of the state.¹⁴⁸ My older, communitarian self asks whether this evil, without more (i.e., either physical intimidation or other circumstances suggesting that the confession is unreliable) is enough to outweigh the important and genuine government interest in fighting crime.

Constitutional rights should be enforced in such a way as to protect against real evils, usually in the form of overreaching by the state that causes concrete harm. They should not be reduced to mere gamesmanship. There is a constitutional right against self-incrimination;¹⁴⁹ there

147. The *Thompkins* interrogation brings to mind the videotaped interrogation of Brendan Dassey included in the televised documentary miniseries, *Making a Murderer*. There, a teenager of below-average intelligence was subjected to prolonged questioning (after having been falsely told that his mother did not wish to join him), in response to which he muttered monosyllabic answers. When the suspect was unable or unwilling to describe an important detail of the “crime” in which he had allegedly participated, the interrogator described the detail in a leading manner and finally obtained a grudging acknowledgment. That the subject did not understand what had just transpired (i.e., confession to participation in a brutal rape/murder) was underscored by his asking when he could return to school, as he had a project due in sixth period. It is very hard to see the probative value of this “confession.” See *MAKING A MURDERER* (Netflix 2015).

148. I recall this forty-three years later because it was a rare circumstance in which I obtained the momentary approval of my Criminal Law professor.

149. In his *Miranda* dissent, Justice White suggested that the prohibition on self-incrimination may not extend beyond courtroom confessions. See *Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (White, J., dissenting). This argument collapses upon the realization that the end and aim of custodial interrogation is to obtain a confession that will be admissible at trial.

is also a constitutional right to counsel¹⁵⁰ and a constitutional right to be free from cruel and unusual punishment.¹⁵¹ There is no constitutional right not to be convicted, nor is there even a right for the accused to enjoy a “level playing field” against the state. So if (1) a confession is not coerced, (2) there is no deliberate harm inflicted on a suspect, and (3) there are no other circumstances suggesting that the confession is unreliable (or at least lacking in probative value), the more compelling rationales underlying *Miranda* are not present, and there may be no reason the confession should not be used to obtain a conviction and protect the citizenry. What is in fact unseemly about hours-long custodial interrogation unassisted by counsel is its tendency to draw out unreliable and incriminating statements from even law-abiding citizens. The problem is exacerbated as the age of the person under interrogation declines.¹⁵² There should be a real need, or at least a strong interest, in order to allow government action to move forward when it intrudes on individual liberty. National security cases take such concerns to something approaching an existential level. They potentially pit individuals claiming important rights protected by the Constitution against the government’s need for measures to safeguard national security.

In his recent book, *The Court and the World: American Law and the New Global Realities*,¹⁵³ Associate Justice Stephen Breyer discusses the Court’s evolving approach to these national security cases. Justice Breyer first describes early cases such as *Ex parte Milligan*,¹⁵⁴ *Ex parte Quirin*,¹⁵⁵ *Korematsu*,¹⁵⁶ and the *Steel Seizure*

150. U.S. CONST. amend VI.

151. *Id.* amend VIII.

152. See Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 221-22 (2005); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 59-61 (2007). The “confessions” of the five juvenile defendants in the notorious Central Park jogger case (discussed in the Scott-Hayward article) present an excellent example of this phenomenon. See Scott-Hayward, *supra*, at 57-58.

153. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

154. 71 U.S. 2, 127 (1866) (showing the Court’s unwillingness to give President Lincoln the power of military commission jurisdiction over citizens where the civil courts were functioning, even during wartime).

155. 317 U.S. 1, 31 (1942) (holding that the German saboteurs had no right to be tried neither in civilian courts nor by jury because military tribunals had jurisdiction over the case). However, underlying the Court’s decision in *Quirin*, Justice Breyer says, are “positive implications . . . respecting the Court’s readiness to review executive action in time of war.” BREYER, *supra* note 153, at 41.

156. *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding the constitutionality of FDR’s Executive Order 9066, which ordered Japanese Americans into internment camps during World War II). According to Justice Breyer, in *Korematsu*, “[t]he Court took its broad-

Case,¹⁵⁷ which illustrate the Court's initial reluctance but also its growing willingness to question presidential prerogative in time of war. He then takes up four post-September 11 cases—*Rasul*,¹⁵⁸ *Hamdi*,¹⁵⁹ *Hamdan*,¹⁶⁰ and *Boumediene*¹⁶¹—in which executive branch efforts to combat the War on Terror, including holding enemy combatants at the Guantanamo Bay Naval Base, were challenged on statutory and constitutional grounds. Justice Breyer summarizes the outcomes:

Taken together, [the four cases] took the government's side on two matters. The Court reaffirmed the constitutional power of the executive branch (authorized by Congress) to detain enemy combatants "during active hostilities" as in all previous wars. It also held that the executive could detain an American citizen fighting against the country as an enemy combatant. Otherwise, the Court [not without dissent] held for the detainees across the board: the habeas corpus statute did give Guantanamo prisoners the right to bring court cases contesting their detention as unlawful. In the event that a detainee . . . contested his status as "enemy combatant," the executive must provide him the basic elements of due process The Court further found that the executive lacked the statutory power to conduct trials of enemy combatants before special military commissions, and also that Congress lacked the constitutional power to suspend the "privilege" of habeas corpus for Guantanamo detainees without meeting the requirements of the Suspension Clause; detained aliens could therefore petition the courts for release. In sum . . . even amid serious security threats, the Constitution does not give the President (or Congress) a blank check to determine the response.¹⁶²

est view of the President's war powers (and its narrowest view of its own power to protect individual liberties)." BREYER, *supra* note 153, at 31.

157. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579 (1952) (deciding that the President had gone too far, when, to avert a strike of steel workers that would pose serious risk to the military, the Truman Administration seized the nation's steel plants in the midst of the Korean War); *see also* BREYER, *supra* note 153, at 42.

158. *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that courts had jurisdiction to consider claims of wrongful imprisonment by foreign aliens held at Guantanamo Bay).

159. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (recognizing that the President, in time of hostilities, has authority to detain an American citizen as an "enemy combatant," but the detainee is entitled to sufficiently fair due process and a right to be heard by a neutral tribunal).

160. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593-94 (2006) (holding that the government's use of a special military commission to try Guantanamo Bay prisoners was unlawful).

161. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that aliens detained as enemy combatants at military bases have a right under the Constitution to challenge the lawfulness of the detention).

162. BREYER, *supra* note 153, at 77-78 (footnotes omitted).

For communitarians, there are at least three important things to note with respect to these cases. The first is that even in wartime, the President does not enjoy *carte blanche* with respect to matters of national security. The Court had long departed¹⁶³ from Cicero's observation that "the laws fall silent" at time of war.¹⁶⁴ Certain due process guarantees remain in place, even for those designated by the executive as "enemy combatants."

The second observation is that none of the constraints on executive power imposed by the Court posed a serious threat to national security. The petitioners were far removed, in both time and place, from any combat zone. According them due process involved no distraction to troops in the field or to their commanders and no hampering of the war effort. The Court assured the petitioner's procedural protections with no guaranty of a favorable outcome on the merits. In short, the outcomes of these cases presented no cause to invoke President Lincoln's defense of his suspension of habeas corpus: "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"¹⁶⁵

Finally, as Justice Breyer notes, the Court resisted the temptation to construct bright-line rules which, while "bring[ing] clarity to the law . . . may prove it unworkable, if not harmful to the very security interests it means to advance, or needlessly restrictive of civil liberties."¹⁶⁶ In Justice Breyer's words:

The temptation to generalize may be strong but must be avoided: bright-line rules are ill suited to a "war" the shape of which we can discern only dimly. . . . The inability of courts to predict accurately the nature of future risks, either to security or to civil liberties, argues strongly that judges should proceed case by case.¹⁶⁷

Conscious of my own limitations—I am neither an expert in national security nor the law of war—I would venture to say that the Court gave maximum recognition to civil liberties (extending them to noncitizens as well as citizens) consistent with the government's prerogative to wage war effectively. Differently phrased—invoking a theme we will revisit later on—it allowed the government to satisfy its security needs in a manner least restrictive to individual rights.¹⁶⁸ It not only rejected the government's invocation of a legal technicali-

163. At least as early as the *Steel Seizure Case*.

164. See BREYER, *supra* note 153, at 15, 18, 41, 78.

165. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 191 (First Vantage Books 2000) (1998); BRESLIN, *supra* note 51, at x; BREYER, *supra* note 153, at 79.

166. BREYER, *supra* note 153, at 80.

167. *Id.* at 84.

168. See *id.* at 85.

ty—the fact that Guantanamo Bay was not, technically, on American soil or within the jurisdiction of any federal court—but also refused to ignore the risks posed by a new kind of war contemplated by neither the Framers of the Constitution nor the authors of the Geneva Convention.¹⁶⁹ The Court employed neither a libertarian straight-jacket nor an “all’s fair in war” approach. While purists on either side might criticize the Court’s eclecticism, it landed pretty close to the sweet spot for communitarians.

The issue in most of the criminal and national security cases that reach the Supreme Court is not one of “minting” new rights (as Etzioni might describe the phenomenon); rather, it is a matter of extrapolating on long-recognized rights. The privilege against self-incrimination and the right to legal counsel are expressly set forth in the Fifth and Sixth Amendments. *Escobedo*,¹⁷⁰ *Miranda*, and their progeny are extrapolations of these rights; a recognition that the application of the Fifth and Sixth Amendments rules to actual cases requires explication beyond the mere recital of constitutional maxims. Even the most devout textualist must concede that the Supreme Court and the lower courts must give meaning to the general statements included in the Bill of Rights.¹⁷¹

Sometimes the Court’s explanations appear, on the surface, to be contractions or limitations of those rights. The First Amendment states that “Congress may make no law”¹⁷² impairing the freedom of speech, but all recognize that this statement does not grant the liberty to shout “fire” in a crowded theatre¹⁷³ or even to defame others with impunity.¹⁷⁴ But these are not really contractions of rights; they

169. Perhaps the government’s resort to Guantanamo Bay (as well as “dark sites” for “enhanced interrogation”) was an effort to keep ugly truths offshore because, as Jack Nicholson bellowed in *A Few Good Men*, we “can’t handle the truth.” See *A FEW GOOD MEN* (Castle Rock Entertainment 1992).

170. *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964).

171. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (Scalia, J.) (“Some have made the argument . . . that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” (internal citations omitted)); cf. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) (“In their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”).

172. U.S. CONST. amend I.

173. See *Schenck v. United States*, 249 U.S. 47 (1919).

174. E.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

are refinements of the Constitution's general statements necessary to resolve real cases and controversies. These issues will resurface in new contexts (as the War on Terror has demonstrated), and the Court cannot avoid such cases. We can only hope that the Court rejects an absolutist approach to both the assertion of individual rights and the insistence upon governmental prerogative.

B. Recognizing That with Rights Come Responsibilities

*How can we be sure that rights are realizable unless they are matched by corresponding duties?*¹⁷⁵

Professor Etzioni has complained that Americans feel “a strong sense of entitlement . . . [but] a rather weak sense of obligation.”¹⁷⁶ Consequently, the Responsive Communitarian Platform recognizes that individual citizens, communities, and polities all have obligations, and that “responsibilities . . . must be borne by citizens, individually and collectively, in a regime of rights.”¹⁷⁷ Citizenship is not a game of claiming rights without undertaking responsibilities, of all take and no give.¹⁷⁸ It should not be reduced to a mere series of transactions between the individual and the government or the citizens it represents. Rather, citizenship (as distinguished from consumerism) entails paradigms of responsibility and reciprocity: Each member of the community owes something to the rest, and the community owes something to each of its members.¹⁷⁹ We are not mere consumers of civil liberties; we are citizens with mutual obligations.

While taxes are the most obvious of these obligations, one's civic duty runs far deeper than this. We pay taxes to support publicly financed schools, even though few of us have an expectation of a direct payback from any child but one's own.¹⁸⁰ We render aid to people in

175. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 230 (2000).

176. ETZIONI, *SPIRIT*, *supra* note 19, at 3.

177. *Communitarian Platform*, *supra* note 7, at xxv.

178. As Beau Breslin explains, “liberal autonomy has recently taught that rights and liberties can be all too readily redeemed; while the responsibilities that accompany our tradition of freedom can be just as easily sidestepped.” BRESLIN, *supra* note 51, at 67.

179. As left-leaning as this might sound, this precept is understood by all but the most libertarian of commentators. Conservative law professor Mary Ann Glendon has lamented, “[b]uried deep in our rights dialect is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm.” GLENDON, *supra* note 4, at 77.

180. Unfortunately, an “I’ve got mine, Jack” philosophy has starved public education in recent decades, leaving American schoolchildren further and further behind their peers in other developed nations. The new Secretary of Education has been criticized for failing to understand that education is a *public* good. See Dana Goldstein, *Betsy DeVos, Pick for Secretary of Education, Is the Most Jeered*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/us/politics/betsy-devos-nominee-education-secretary.html>; Kate Zernike, *Nominee Betsy DeVos’s Knowledge of Education Basics Is Open to Criticism*, N.Y. TIMES

peril, even though the law rarely requires it. We look for ways that we can employ our talents for the benefit of our neighborhoods, our religious and fraternal organizations, and those less fortunate than ourselves. Despite the apparent popularity of the Tea Party, the citizenry continues to recognize the need to tax itself.¹⁸¹ The Northwest Ordinance's set-aside of one section in each township to support public schools was but an early version of the recognition of public goods,¹⁸² which benefit the community at large. Responsibility to others manifests itself sometimes as a private and sometimes as a public obligation. As the late American philosopher Yogi Berra explained, "You go to someone's funeral because someday you'll want them to come to yours."

Rarely are these responsibilities (except for taxes and, for some, military service) imposed by governmental fiat, and that is entirely appropriate in a free country. And the Supreme Court—which like most Anglo-American courts is reactive, not proactive—is rarely in a position to impose such responsibilities. Still, it can recognize and support the efforts of other branches of government to promote reciprocity. Acting with due respect for a sustainable environment is

(Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/us/politics/betsy-devos-education-secretary-confirmation-donald-trump.html>.

181. In November 2016, the voters of metropolitan Detroit narrowly rejected a tax assessment to support public transportation in this transit-starved area. *See Regional Transit Authority Tax Proposal Narrowly Defeated in Metro Detroit*, CBS DETROIT (Nov. 9, 2016, 9:30 AM), <http://detroit.cbslocal.com/2016/11/09/regional-transit-proposal-rejected-in-oakland-macomb-counties-fate-hangs-on-wayne-washtenaw-voters/> [<https://perma.cc/584U-Z3NT>]. Previous referenda have supported the Detroit Zoo and the Detroit Institute of Art. *See* Patricia Cohen, *Suburban Taxpayers Vote to Support Detroit Museum*, N.Y. TIMES (Aug. 8, 2012), <http://www.nytimes.com/2012/08/09/arts/design/detroit-institute-of-arts-county-millage-tax-approved.html>; Bill Laitner, *Detroit Zoo Millage Renewal Gets OK from Voters*, DETROIT FREE PRESS (Aug. 3, 2016, 9:43 AM), <http://www.freep.com/story/news/local/michigan/2016/08/02/detroit-zoo-millage-okd-oakland-co-leads-macomb/87979300/> [<https://perma.cc/R3KS-WS4Q>]. Those voting on the affirmative side in these contests recognize that citizenship sometimes means supporting public goods that will not result in "immediate payback" to themselves. "I've never been to the DIA, but I think we should all support it" was a common refrain even among residents of Macomb County, Michigan, a county that voted for the art museum levy despite its reputation as a stronghold of "Reagan Democrats" and its subsequent narrow support for Donald Trump in the 2016 presidential election. *See* David Muller, *After Winning Michigan for Trump, Macomb County Viewed as Symbol of U.S. Political Realignment*, MLIVE (Nov. 10, 2016, 4:25 PM), http://www.mlive.com/news/detroit/index.ssf/2016/11/macomb_county_could_represent.html [<https://perma.cc/KM7S-ZGXF>]; Christina Hall & Eric D. Lawrence, *Macomb vs. Everybody? County Flexes Muscles in Regional Fights*, DETROIT FREE PRESS (Nov. 29, 2016, 10:49 AM), <http://www.freep.com/story/news/local/2016/11/29/macomb-regional-transit-millage-dia-zoo/93922816/> [<https://perma.cc/KL7V-N856>].

182. Local public goods are generally understood to be "public goods whose effects involve a relatively limited geographical area, such as roads, streets, parks, recreational facilities, schools, libraries, and police or fire protection, these being only part of this huge array of resources." Annon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1, 10 (2004).

prominent in this regard; environmental measures often ask citizens to “pay it forward,” recognizing that short-term sacrifices may be necessary in order to foster long-term gains. The Court has, as often as not, supported executive branch efforts to refine and enforce more general environmental protection measures enacted by a Congress that was more communitarian than the Congresses we have seen of late.¹⁸³

In at least two prominent cases, however, *Citizens United*¹⁸⁴ and *Hobby Lobby*,¹⁸⁵ the Roberts Court failed to recognize that certain privileges granted by the government are subject to limitations and burdens. When a business incorporates, it does so largely to enjoy advantages not enjoyed by unincorporated associations—advantages such as perpetual existence and limited liability for its owners. At one time, the privilege to incorporate was conferred sparingly and limited to those entities that could demonstrate to the state that they would fulfill some worthwhile public purpose.¹⁸⁶ Today, while incorporation is more freely allowed, corporations nevertheless are expected to undertake certain civic responsibilities and burdens.¹⁸⁷ One such burden, or so we thought, involved limitations on participation in political campaigns. The Roberts Court, invoking “rights” rhetoric, decided in *Citizens United* that the barriers that distinguished corporations from flesh-and-blood citizens were artificial, and that corporations (and labor unions) enjoyed all the same rights as natural persons to participate in political campaigns.¹⁸⁸ This would include, pre-

183. *E.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2449 (2014). *Contra* *Rapanos v. United States*, 547 U.S. 715, 739 (2006); see also BRIANNE GOROD, CONSTITUTIONAL ACCOUNTABILITY CTR., ROBERTS AT 10: ROBERTS’ ENVIRONMENTAL LAW RECORD: IT’S NOT GOOD, BUT DON’T COUNT HIM OUT, https://www.theconstitution.org/wp-content/uploads/2017/12/Roberts_at_10_06_Environment_0.pdf [<https://perma.cc/Q6L8-AB3E>].

184. *Citizens United v. FEC*, 558 U.S. 310 (2010).

185. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

186. See *Citizens United*, 558 U.S. at 426-28 (Stevens, J., dissenting).

187. Some of these, like the political spending limitations struck down in *Citizens United*, are imposed by law. Others, like charitable works, are undertaken voluntarily, out of a sense of civic obligation. A communitarian approach to corporate citizenship would impose obligations on the part of corporations to do more than simply return maximum profits to shareholders, and would require them to take the interests of employees, contractors, customers, and other members of the community into account.

It is only when corporations are allowed, and even required, to adopt a more communitarian view—one that does not see profit maximization as the corporation’s sole *raison d’être* and the owners as the only people that matter—that corporate activity, whether in the form of charitable works, regard for workers, the environment, the community, or even political expenditures, can take on a less rapacious, more humane form.

Ackerman & Cole, *supra* note 18, at 1013-14.

188. Elsewhere, I have acknowledged that *Citizens United* has a communitarian side in its recognition of the role that intermediate communities like corporations and unions may play in organizing people for a common purpose. See *supra* notes 40-42 and accompanying text.

sumably, corporations whose ownership and/or management were neither citizens nor residents of the United States and which did not necessarily share the same interests as the nation's citizens.¹⁸⁹

A similar result was obtained in *Hobby Lobby*. There, the Court held that the religious objections¹⁹⁰ of a closely held corporation's¹⁹¹ owners exempted the corporation from an Obamacare requirement that it purchase health insurance that included birth control coverage for corporate employees.¹⁹² The Court said, in effect, that a corporation could practice religion, taking on the religious beliefs of its owners. In both *Hobby Lobby* and *Citizens United*, corporations were allowed to exercise political or religious rights that previously were accorded only to real persons, while giving up no corporate privileges in return. The corporate petitioners could have their cake and eat it too—all rights and no concomitant responsibilities. This is especially pernicious if a corporation is deemed to have no responsibility save maximum return of profit to its shareholders, with none of the moral constraints that limit human rapaciousness.

In another article, Professor Lance Cole and I have proposed that the Roberts Court's personification of corporations—with its attendant extension of rights—justifies the imposition of obligations on corporations beyond the production of optimal return to shareholders. Lacking the moral conscience of real persons, corporations may potentially act like monsters if left unchecked.¹⁹³ And so either limitations must be imposed on corporate activities or obligations must be imposed on corporate actors in order to restore balance. A sense of moral obligation—of the responsibilities we owe to one another as members of a community—must be imposed on corporations if they

189. As the Court in *Citizens United* explained:

If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could "enhance the relative voice" of some (*i.e.*, humans) over others (*i.e.*, nonhumans).

Citizens United, 558 U.S. at 424 (Stevens, J., dissenting) (internal quotation marks omitted).

190. These objections were brought under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, not under the First Amendment *per se*. *Hobby Lobby*, 134 S. Ct. at 2759.

191. Professor Lance Cole and I have suggested that the *Hobby Lobby* holding should be limited to closely held corporations, although the opinion does not explicitly say so. See Ackerman & Cole, *supra* note 18, at 968.

192. One of the covered forms of birth control was considered an abortion prohibited under the owners' religious beliefs. *Hobby Lobby*, 134 S. Ct. at 2765.

193. See Ackerman & Cole, *supra* note 18, at 993-94.

wish to be treated in the same manner as sentient beings.¹⁹⁴ Recognition of this constraint is, so far, missing from the jurisprudence of the Roberts Court.

C. *Maintaining Checks on Government Autocracy and Tyranny*

*The power the Constitution grants it also restrains.*¹⁹⁵

The flip side of the recognition of individual rights is the exercise of government power. While of late, communitarians like Professor Etzioni have bemoaned the extension of individual rights, communitarians' aversion to autocracy means that we cannot overlook the need to curb governmental overreach. While it is sheer hyperbole to deride virtually all regulatory efforts as the footsteps of jackbooted stormtroopers, tyrannical government is precisely what the Bill of Rights was designed to prevent.

A considerable amount of the Supreme Court's business involves placing limits on a sometimes overbearing government, be it in the form of regulations that compromise religious beliefs,¹⁹⁶ liability rules that have a chilling effect on speech,¹⁹⁷ draconian restrictions on reproductive rights,¹⁹⁸ intrusions into the bedroom,¹⁹⁹ or overzealous restrictions on immigration.²⁰⁰ The Court's efforts to invoke neutral principles in this area are often overshadowed by politically charged debate in the public arena. To some, it is tyranny for the federal government to command individuals to purchase health insurance;²⁰¹ to an almost altogether different group, it is tyranny for the State of

194. *Id.* at 994. (“[I]f corporations are to be endowed with human qualities and human rights, those qualities should include due regard for those who (along with shareholders) are affected by corporate conduct. Along with rights come responsibilities.”).

195. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

196. *See Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (holding the Arkansas Department of Correction's policy, as applied, violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000 (2012), “which prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest”).

197. *See Elonis v. United States*, 135 S. Ct. 2001, 2017 (2015) (recognizing the necessity of “ ‘extend[ing] a measure of strategic protection’ to otherwise unprotected false statements of fact in order to ensure enough ‘breathing space’ for protected speech”).

198. *E.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

199. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

200. The Fourth Circuit struck down President Trump's latest travel ban. *See Int'l Refugee Assistance Project v. Trump*, No. 17-2231, 2018 WL 894413, at *20 (4th Cir. Feb. 15, 2018). Recently, the Supreme Court said it would hear the issue in 2018 by granting certiorari in *Hawaii v. Trump*, No. 17-965, 2018 WL 324357 (Jan. 19, 2018) (mem.). The Supreme Court let the third ban go into effect while the case is pending.

201. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

Texas to impose new limitations on where a woman may go to obtain an abortion.²⁰²

At the outset, we should be clear about this much: For the most part, governments (including the states and the federal government) do not have *rights*.²⁰³ But that is not to say that government has no useful role. True federalists, in the Madison/Hamilton/Jay mold, recognize that there are some vital functions only a strong national government is cut out to perform. And states (along with their local subdivisions) may function as intermediate communities, taking on functions more suitable to smaller government entities that are presumably closer to the citizenry.²⁰⁴

202. See *Whole Woman's Health*, 136 S. Ct. at 2300.

203. Several qualifications are in order here. States do have some rights, mostly having to do with rights that states have between and among themselves. In the international system, states have a right of self-defense; when they are invaded by another state, they have a right to defend themselves. U.N. Charter art. 51 (providing for the right of countries to engage in self-defense, including collective self-defense, against armed attack). Fairly recently, international law has recognized a right of collective defense (e.g. NATO). See *id.*; North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. Within the United States, the Constitution recognizes a state's right not to give up territory to another state or to merge with another state, see U.S. CONST. art. IV, § 3, and to be protected from suits from citizens of other states, see U.S. CONST. amend XI. The Eleventh Amendment has been interpreted to also preclude certain suits by citizens against their own states, see *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), an unduly broad interpretation in my view.

For good reason, the Supreme Court has declared that states may not be commandeered to do the bidding of the federal government. *Printz v. United States*, 521 U.S. 898, 919 (1997) ("The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." (citing THE FEDERALIST NO. 15 (Alexander Hamilton) (Clinton Rossiter ed., 1961))); *New York v. United States*, 505 U.S. 144, 145 (1992) ("Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program." (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 288 (1981))); see also *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding a federal statute conditioning granting of federal funds on the state having a minimum drinking age because Congress did not exceed Tenth Amendment restrictions). The federal system places American states in a very different posture than French *departments*, regional government entities that are mere subdivisions of the French central government, obliged to do Paris's bidding.

The commandeering issue is likely to be revived as several cities across the nation declare themselves "sanctuary cities" that refuse to serve as agents of the national government in carrying out President Trump's immigration and deportation policies. The independence of these cities may, in turn, be "trumped" by state legislatures that command them, as their subdivisions, to comply with those policies. See, e.g., Julián Aguilar, *Texas Senate Approves Anti-"Sanctuary" Legislation, Sending Bill to House*, TEX. TRIBUNE (Feb. 7, 2017), <https://www.texastribune.org/2017/02/07/texas-senate-tentatively-approves-anti-sanctuary-city-legislation/> [<https://perma.cc/NTM3-DDTA>] ("Republican-controlled Texas Senate [gives] its final stamp of approval . . . to a controversial bill that would gut funding from local and state entities that don't enforce immigration laws.").

204. Political scientist Beau Breslin claims that today's communitarians have much in common with eighteenth-century anti-Federalists, in that they favor smaller governmental units and oppose concentration of power in a central government. BRESLIN, *supra* note 51, at 11-14. Not quite, as far as this communitarian is concerned. True, modern communitari-

Justice Sandra Day O'Connor (a former state legislator and jurist) observed that "the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"²⁰⁵ Some of the Constitution's limitations on government tyranny and autocracy are structural. Both the separation of powers (among the three branches of government) and, as Justice O'Connor observed, the division of powers (between the federal and state governments) serve as checks on governmental power. The Constitution outlines processes for lawmaking (e.g., placing the legislative power in Congress, subject to a presidential veto) and adjudication (e.g., the due process provisions of the Fifth and Fourteenth Amendments) that tend to limit overreach. The President may not be able to circumvent deportation of undocumented immigrants not because it is inherently evil to do so, but because the Constitution forbids the President from unilaterally amending the immigration laws without the consent of a Congress that may be inconveniently controlled by his political opponents.²⁰⁶ President Obama's inclination to end-run the legislative process and keep immigrant families intact did not make him a tyrant, but his benign intentions did not allow him to thwart the will of a Congress that refused to move as quickly as he would have to loosen the nation's statutory limitations on immigration. Likewise, President Trump cannot arbitrarily restrict entry into the country by executive fiat.²⁰⁷ What differentiates a republic from more autocratic forms of government are the structural constraints that prevent leaders from disregarding the rules when they are inconvenient.

To communitarians, sitting at or near the political center, the present level of governmental intrusion in the United States may elicit little more than a shoulder shrug, rather than a clarion call to the

ans favor government action at the most intimate level of government that can handle the problem efficiently. See *infra* note 313 and accompanying text. But that is a far cry from inverting the Madisonian system of supremacy for the national government. See U.S. CONST. art. VI, cl. 2.

205. *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1990) (Blackmun, J., dissenting)).

206. I admit to oversimplification here. Like much legislation, the immigration statutes delegate some rulemaking power to the executive branch, which in almost any government, exercises prosecutorial discretion regarding what types of cases to pursue. Even President Trump will be unable to deport eleven million undocumented aliens at once. But the 4-4 deadlock on the Supreme Court has let stand a court of appeals ruling striking down President Obama's efforts to significantly alter the status of undocumented immigrants without adequate statutory authority. See *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

207. See sources cited *supra* note 200.

barricades.²⁰⁸ The fact scenarios in the Roberts-era cases challenging government intrusion, such as the Obamacare cases (including *Hobby Lobby*) and the abortion cases (such as *Whole Women's Health*²⁰⁹), hardly bring to mind Orwellian images of Big Brother. But these cases, defining the margins of tolerable government intrusion, are the product of a mature system in which the basic legal parameters of government power have been long established.²¹⁰ Many other nations would love to have this problem.²¹¹

Communitarians, looking for the middle ground, are apt to favor legislative solutions to promote the common good. These solutions, often as not the product of compromise (at least back in the days of legislative compromise), are entitled to deference from a court that should exercise restraint and, dare I say, a dose of humility for which the judicial branch of the federal government is not particularly famous.²¹² Some statutes (such as the notorious Jim Crow laws popular in the South in the century following the Civil War) offend basic

208. Judging by the rhetoric from the 2016 Republican National Convention, we have every reason to be alarmed. What some of us regard as reasonable regulation of pollution, business dealings, and labor relations—with the left pressing for more regulation to meet the challenges of global climate change, welfare capitalism, and income disparity—is regarded by the political right as tantamount to slavery. See Donald J. Trump, Republican Nominee Acceptance Speech at Republican National Convention (July 21, 2016), <http://abcnews.go.com/Politics/full-text-donald-trumps-2016-republican-national-convention/story?id=40786529> [<https://perma.cc/NY7E-KGAC>]; Harold Hamm, Speech at Republican National Convention (July 20, 2016). Hamm is the CEO and founder of Continental Resources (one of the largest oil producers in the country), shale oil pioneer, and the thirty-ninth richest person in the United States.

209. *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

210. I hasten to add that we are talking about the *legal* parameters of government power here. On the street, excessive use of government power remains a daily challenge, as evidenced by the almost daily complaints of excessive use of police force, especially against African-American citizens.

211. As I write this, we are still in the early months of the Trump Administration. But we might take solace in President Trump's compliance—so far—with judicial decrees striking down his executive orders suspending immigration from predominantly Muslim countries. See *supra* note 200. He might tweet about a “so-called judge,” Amy B. Wang, *Trump Lashes Out at ‘So-Called Judge’ Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.13dfe9855f1e [<https://perma.cc/8T5A-GWZL>], but so far, there have been no defiant Jacksonian utterances (“John Marshall has made his decision, now let him enforce it.”) threatening noncompliance, see Jeffrey Rosen, *Supreme Court History: The First Hundred Years*, THIRTEEN, <http://www.pbs.org/wnet/supremecourt/antebellum/history2.html> [<https://perma.cc/CL9E-LE8Q>] (last visited Jan. 12, 2018).

212. Most readers are familiar with the joke about the psychiatrist who finds herself in heaven. St. Peter greets her, saying, “We’re so glad you’re here, we have a psychiatric emergency! . . . It’s God. He has terrible delusions of grandeur—he thinks he’s a federal judge!” See, e.g., Garrett Epps, *Judicial Review Doesn’t Mean What You Think It Means*, AM. PROSPECT (Apr. 9, 2012), <http://prospect.org/article/judicial-review-doesnt-mean-what-you-think-it-means> [<https://perma.cc/9WAS-X4LE>].

rights and beg to be struck down. Others (such as the Texas statute struck down in *Whole Women's Health*) are enacted on grounds that are merely pretextual, claiming to protect a public interest (like women's health) but actually designed to advance another agenda (in this instance, severe limitations on access to legal abortions). Several of the statutes struck down in whole or in part by the Roberts Court, however, involve what Etzioni would call "carefully tailored" solutions to promote the public welfare. With few notable exceptions, the work of the Roberts Court has gotten into the seams, but not the fabric of comprehensive statutory enactments. *Hobby Lobby* invalidated not a statute, but an administrative regulation regarding the details of mandatory coverage under the Affordable Care Act.²¹³ In *Sebelius*, the Court, while striking down a portion of that Act,²¹⁴ declined to upend its major premise, thanks to the Chief Justice's use of the taxation rationale to preserve the guts of Obamacare. Even *Citizens United*, while invalidating a portion of the McCain-Finegold Act, left intact that Act's disclosure requirements²¹⁵ (much to Justice Thomas's chagrin²¹⁶). The statutes struck down in *Heller*,²¹⁷ *Harris*,²¹⁸ and *Whole Women's Health*²¹⁹ were enacted not by Congress, but by legislative bodies in the District of Columbia, Illinois, and Texas. Apart from *Whole Women's Health*, none of these decisions are positive developments from a communitarian standpoint. But it would be hard to contend that the Court has been tearing up the pea patch and undoing comprehensive regulatory schemes on a wholesale level.²²⁰

213. And it did so by applying another act of Congress, the Religious Freedom Restoration Act of 1993.

214. A provision of the ACA expanded the scope of the Medicaid program and increased the number of individuals the state must cover. A state would potentially lose all of its federal Medicaid funds if it did not comply with the ACA's new coverage requirements. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 540-41 (2012). On the question of whether the ACA's Medicaid expansion exceeded Congress's authority under the Spending Clause, two opinions amounting to a majority of the Justices found the expansion unconstitutionally coercive. *Id.* at 2601-08 (Roberts, J., concurred by Breyer, J. & Kagan, J.) (stating Medicaid expansion could survive, but states must be offered the choice to opt out of it); *id.* at 2657-68 (Scalia, J., dissenting, joined by Kennedy, J., Thomas, J., & Alito, J.) (stating ACA's Medicaid expansion is unconstitutionally coercive).

215. *Citizens United v. FEC*, 558 U.S. 310, 368-70 (2010).

216. *Id.* at 480 (Thomas, J., dissenting).

217. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that provisions of the District of Columbia's Firearms Control Regulations Act violated the Second Amendment).

218. *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (holding that Illinois's Public Labor Relations Act, which permitted union security agreements, violated the First Amendment).

219. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (holding that a Texas law placing a series of restrictions on abortion clinics imposes an unconstitutional burden on a woman's right to abortion).

220. Compare, for example, the Court's assault on the New Deal in the 1930's. *E.g.*, *Helvering v. Davis*, 301 U.S. 619 (1937); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

The case of *Shelby County v. Holder*²²¹ nevertheless deserves special attention because of the Roberts Court's willingness to strike down an important portion of an effective federal statute tailored to protect the voting rights of minority groups. In *Shelby County*, the Court struck down the "preclearance" provisions of the 2006 extension of the Voting Rights Act of 1965 (VRA), claiming that the "extraordinary problem"²²² that justified the VRA's initial passage in 1965 was no longer in place. Section 5 of the VRA required that several jurisdictions (six southern states and some counties with a history of discrimination) obtain "preclearance" (i.e., permission from the Justice Department or a three-judge federal district court) before enacting any law pertaining to voting.²²³ The Court noted that the requirement of federal permission was "a drastic departure from basic principles of federalism,"²²⁴ and that the rule requiring that certain states obtain preclearance was "an equally dramatic departure from the principle that all States enjoy equal sovereignty."²²⁵ The Chief Justice cited the significant progress of the affected states since 1965 with respect to black voter registration, voter turnout, and the election of African-American officials.²²⁶

But the majority opinion scarcely mentioned that the Fifteenth Amendment (which expressly gives Congress "power to enforce this article by appropriate legislation"²²⁷) effectively trumped previously enacted portions of the Constitution pertaining to separation of powers and state sovereignty. Just as seriously, it ignored a 15,000 page legislative record presenting "countless 'examples of flagrant racial discrimination' since the last [VRA] reauthorization" and findings that "'second generation barriers constructed to prevent minority voters from fully participating in the electoral process' continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions."²²⁸

221. 133 S. Ct. 2612 (2013).

222. *Id.* at 2618.

223. 52 U.S.C. §10304 (2016).

224. *Holder*, 133 S. Ct. at 2618.

225. *Id.*

226. *Id.* at 2618-19.

227. U.S. CONST. amend. XV, § 2.

228. *Holder*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting). Justice Ginsburg discussed how the VRA aims to curb the "new approach" of discriminatory voting practice; i.e., "[e]fforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot . . . aptly described as 'second-generation barriers' to minority voting." *Id.* at 2634; see also Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 80 (2010) ("Second-

The Court's refusal to defer to congressional findings in an area where the Constitution expressly gave Congress the power to enforce the voting rights of racial minorities is a matter of grave concern. Acting on its professed concern regarding the *division* of powers, the Court ignored the doctrine of *separation* of powers, giving short shrift to congressional findings and invading the legislative realm in a manner often criticized by conservatives.²²⁹ The VRA is precisely the type of "carefully tailored scheme" of regulation to which communitarians would have us defer.²³⁰ And as we shall underscore in the next subsection, usurpation of legislative power in the context of voting rights is especially egregious from a communitarian standpoint.

1. *The Special Case of Abortion*

The abortion cases present special circumstances. Pro-choice advocates present them as a simple conflict between individual liberty (a woman's right to choose) and overbearing government regulation. The most recent abortion case to attract the Court's attention, *Whole Women's Health*, involved a heavy-handed effort by the Texas Legislature to limit access to safe, legal abortions under the pretext of safeguarding women's health: at best a paternalistic measure, at worst a subterfuge.²³¹ When a case is postured as a clash between a

generation barriers . . . allow formal access to the franchise but dilute minority voting strength by limiting the effect that minority votes could have on the political process.").

229. Recent Senate confirmation hearings for then-Judge Neil Gorsuch provide a sampling: "Judges aren't free to re-write statutes to get results they believe are more just. Judges aren't free to re-order regulations to make them more fair. And no, Judges aren't free to 'update' the Constitution. That's not their job." *Nomination of Judge Neil Gorsuch to Serve as Associate Justice of the Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Chuck Grassley, Sen. of Iowa), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-hearing-nomination-judge-neil-gorsuch-serve-associate-justice> [<https://perma.cc/AY77-YXS8>].

Law that can change in a moment and capriciously is inherently destabilizing. An activist judge who makes law plants insecurity in our system. Rather, our Constitution provides for law to be enacted legislatively with the sanction of the American people through the ballot box. Policy changes advanced by judges can be reversed and reversed again. Law properly grounded in the democratic and political process cannot.

Nomination of Judge Neil Gorsuch to Serve as Associate Justice of the Supreme Court: Hearing Before the S. Comm. on the Judiciary, 115th Cong. (2017) (statement of Mike Crapo, Sen. of Idaho), <https://www.crapo.senate.gov/media/newsreleases/crapo-gorsuch-will-be-a-servant-of-the-law-not-a-maker-of-it> [<https://perma.cc/3FYJ-QDHX>].

230. See text accompanying note 64, *supra*.

231. *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). The Texas statute, enacted in 2013, imposed two abortion restrictions. The first required every physician performing abortions to have admitting privileges at a hospital within 30 miles of the abortion site; the second subjected abortion facilities to the particularly exacting standards for ambulatory surgical centers. *Id.*

woman's *right* to control her own body and the government's *interest* in protecting maternal health, a rights-conscious Court will be inclined to side with the pro-choice position.

But if, instead, a case is characterized as a conflict between a woman's *right* to choose and an unborn child's *right* to life, pro-life forces stand a fighting chance in a rights-oriented regime. The conflict then might revolve around whether and when an unborn child has cognizable legal rights, something that has never been explicitly recognized by the Court.²³² In both American law and American politics, advocates on either side have the best chance of prevailing when they engage in what Professor Glendon calls "rights talk."²³³ The careful calibration of competing *interests* advocated by Etzioni may, at one time, have come into play in the legislative or administrative process, but the rhetoric of *rights* plays out more effectively in the courts and in what passes for political discourse these days.²³⁴

This is unfortunate. Neither pro-life nor pro-choice advocates have a monopoly on morality.²³⁵ While the current state of abortion jurisprudence and Supreme Court membership suggest that neither side will fully get its way in the foreseeable future, reasonable legislative

232. In *Roe*, the Court declined to recognize the "personhood" of an unborn child. *Roe v. Wade*, 410 U.S. 113, 158 (1973). Without personhood, there could be no cognizable rights.

233. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1993).

234. Unfortunately, Congress seems to engage less and less in the age-old legislative art of forging consensus out of competing interests, instead resorting to sharp debate and the drawing of doctrinal battle lines. The chief culprit may be legislative gerrymandering, which increasingly creates congressional districts along party lines, requiring members of Congress to adhere to the positions clearly identified with their partisan bases. A gerrymander is a "distortion of district boundaries and populations for partisan or personal political purposes." *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). "Whether a gerrymander creates a majority party or merely increases the majority's power, it may 'lock in' a partisan imbalance so skillfully that the legislature is not 'responsive to the changing will of the electorate.'" Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 407 (1993) (quoting Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 112 (1985)).

In the abortion battle, adherence to partisan bases means a pro-life position for Republicans and a pro-choice position for Democrats. Any wavering or compromise from these positions is likely to draw a primary challenge from an opponent claiming that the incumbent has dared to depart from the party line. (While this orthodoxy appears to be more prominent among Republicans, Democrats should recall their 1992 National Convention, at which Pennsylvania Governor Robert Casey was denied the opportunity to speak in opposition to a pro-choice platform plank. Michael deCourcy Hinds, *The 1992 Campaign: Pennsylvania; Democratic Ticket Heads Into Fertile Territory*, N.Y. TIMES (July 19, 1992), <http://www.nytimes.com/1992/07/19/us/the-1992-campaign-pennsylvania-democratic-ticket-heads-into-fertile-territory.html>. The Senate is somewhat less prone to this affliction, because at least some states include a diverse enough population as to encourage senators to acknowledge the legitimacy of both sides of the debate, and to tolerate nuance.

235. See generally LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990) (acknowledging that there are moral arguments on both sides of the abortion debate).

compromises could reconcile a respect for human life with due deference to maternal autonomy while remaining true to the constitutional framework set forth in *Roe v. Wade*²³⁶ and its progeny.²³⁷ Unfortunately, the political landscape is not availing of such mutual accommodation. Says Professor Glendon, “The language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over.”²³⁸

D. Expanding Public Participation in Politics and Discourse

*Silent citizens may be perfect subjects for an authoritarian ruler,
they would be a disaster for a democracy.*²³⁹

Communitarians favor broad public participation in our democracy. This necessarily includes access to legal remedies, participation in political life, and the First Amendment freedoms that allow public discourse to flourish.²⁴⁰ While not First Amendment absolutists, we are inclined to tip the scales in close cases in favor of speech and freedom of conscience, in large part because of the role of speech in preserving democratic participation. *Speech*, not compulsion, as we would allow for speech advocating a course of action that we would neither take ourselves nor impose on others.

1. Procedural Devices to Limit Group Participation

Broad participation in public life includes enfranchisement in the voting booth and beyond. It includes access to legal remedies in a manner that includes the poor as well as the rich and invites participation by those who are at risk of being relegated to the fringes of society. In this sense, communitarianism is more republican than democratic, because it honors the Constitution’s efforts to preserve fundamental rights of minorities against the oppression of the major-

236. 410 U.S. 113 (1973).

237. Most notably, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 837 (1992). While upholding the constitutional core of *Roe*, *Casey*’s “undue burden” test has allowed states to impose waiting periods and counseling requirements on women seeking abortions. See David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 844 (1999).

238. GLENDON, *supra* note 4, at 9. This statement provoked a lively debate among my colleagues as to who has “won” and who has “lost” the abortion debate (and who, therefore, has to get out of town), given the difficulty of obtaining a safe abortion in some places. Again (as noted *supra* note 21), both sides seem to choose martyrdom.

239. ROBERT A. DAHL, ON DEMOCRACY 97 (1998).

240. “Communitarians favor strong democracy. That is, we seek to make government more representative, more participatory, and more responsive to all members of the community. We seek to find ways to accord citizens more information, and more say, more often.” *Communitarian Platform*, *supra* note 7, at xxvii.

ity.²⁴¹ Communitarians would, therefore, urge the courts to preserve people's ability to obtain redress through access to the legal process, often by banding together as a class.

In a series of cases, however, the Roberts Court has (systematically, it would appear) denied access to the courts on the part of consumers, employees, and persons claiming discriminatory or otherwise unfair treatment by the government or the private sector. Sometimes this has been done under the guise of procedure. In *Ashcroft v. Iqbal*,²⁴² for example, the Court imposed heightened pleading requirements for individuals claiming religious and ethnic discrimination by the Attorney General and the Director of the FBI.²⁴³ In so doing, it ignored the decades-old practice of "notice pleading" allowed under Rule 8 of the Federal Rules of Civil Procedure and made it extremely difficult for plaintiffs claiming discrimination to move even to the discovery stage against federal officials.²⁴⁴ Rather than expanding access to *Bivens*²⁴⁵ actions and other civil remedies against official misconduct (as advocated earlier²⁴⁶), the Court erected a procedural barrier to block such access.

In *Wal-Mart Stores, Inc. v. Dukes*²⁴⁷ and *AT&T Mobility v. Concepcion*,²⁴⁸ the Court limited the ability of aggrieved litigants to coalesce into groups and bring class actions.²⁴⁹ In *Wal-Mart*, the Court (by a

241.

"Communitarians are not majoritarians. The success of the democratic experiment in ordered liberty . . . depends, not on fiat or force, but on building shared values, habits and practices that assure respect for one another's rights and regular fulfillment of personal, civic, and collective responsibilities. Successful policies are accepted because they are recognized to be legitimate, rather than imposed."

Id. at xxvi.

242. 556 U.S. 662 (2009).

243. The case was brought by a Muslim man who was imprisoned and allegedly subjected to harsh treatment. *Id.* It could just as easily fall under the earlier section of this Article dealing with state overreaching. What the Court has effectively done here is to impose a procedural obstacle that undermines efforts to corral government misconduct.

244. As Justice Breyer's dissent pointed out, the officials' legitimate interest in being able to conduct the business of government without harassment could be effectively protected by controls placed on the discovery process by the trial court. *Id.* at 700 (Breyer, J., dissenting).

245. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

246. See *supra* notes 127-49 and accompanying text.

247. 564 U.S. 338 (2011).

248. 563 U.S. 333 (2011).

249. The communitarian implications of class actions are evident. "In some instances . . . the class action is the only mechanism by which our legal system can redress a large-scale public wrong." John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1421 (2003).

5-4 margin) imposed additional burdens on the commonality requirement for class certification and concluded (unanimously) that monetary relief was improper in Rule 23(b)(2) cases.²⁵⁰ The decision on monetary relief was probably justified by a fair reading of the rule. But the heightened commonality requirement resulted in more front-end litigation expenses and, as a practical matter, significantly reined in access to the class action remedy.²⁵¹ In *Concepcion*, the Court held that the Federal Arbitration Act (FAA)²⁵² preempted a California statute barring class action waivers in arbitration agreements.²⁵³ *Concepcion* was but one in a line of cases in which the Court has adopted an overly broad interpretation of the FAA so as to bar access to the courts on the part of consumers, employees, and other aggrieved parties.²⁵⁴

Arbitration can be an excellent means of resolving disputes and reinforcing social capital when the process is voluntarily adopted by members of a trade, religious group, or other organization of like-minded people who wish to live in accordance with the norms and procedures of their intermediate community.²⁵⁵ It is inappropriate, however, when fine-print arbitration clauses are sprung on unwitting consumers or employees who assumed that the law would grant them a day in court. To enforce arbitration provisions under these circum-

250. 564 U.S. 338, 340, 359-60 (2011).

251. See Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 728 (2015).

252. In particular, 9 U.S.C. § 2 (2006).

253. “[T]he most active area of constitutional law with respect to the American federal system involves federal preemption of state law.” Robert A. Sedler, *The Constitution and the American Federal System: An Update*, 61 WAYNE L. REV. 267, 287 (2016). The Roberts Court’s defenders will cite the FAA cases as examples of preemption cases in which the Court has merely shown a “[p]ragmatic [p]reference for [u]niformity.” See, e.g., Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997, 1011-13 (2009). In their eyes, federal displacement of state legislation designed to protect consumers or employees is but a benign attempt to avoid “regulatory balkanization.” *Id.* at 1012. My argument, however, is not that the FAA does not preempt state law where the latter is in conflict. It is that the unnecessarily broad manner in which the Roberts Court has chosen to interpret the FAA sweeps everything from its sight.

254. For some very good commentary, see Charles Gibbs, *Consumer Class Actions After AT&T v. Concepcion: Why the Federal Arbitration Act Should Not Be Used to Deny Effective Relief to Small-Value Claimants*, 2012 U. ILL. L. REV. 1345; Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 821 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 714 (2012).

255. See Ackerman, *Disputing Together*, *supra* note 12, at 46 (describing the use of arbitration by a relatively small, homogeneous group in the diamond trade). Arbitration also works well when, in a collective bargaining agreement, union-represented employees agree to the arbitration of workplace disputes. Unlike most consumer arbitration, labor-management arbitration involves sophisticated repeat players on both sides who understand what they are getting into and have agreed to abide by the “law of the shop.” *Id.* at 48.

stances requires a tortured reading of the FAA²⁵⁶ and mocks our promises of due process and equal justice under the law. And to say that the arbitration process itself is inimical to class remedies (as the Court does in *Concepcion*) suggests both unfamiliarity with arbitration practice and hostility toward citizens' efforts to find common cause.²⁵⁷

2. Voting Cases with Communitarian Implications

We have previously discussed *Shelby County v. Holder* in the context of the Court's refusal to defer to a legislative scheme carefully tailored to produce benign results.²⁵⁸ *Shelby County* is particularly egregious in that the Court struck down legislation designed to promote public participation in the face of a long and sordid history of racial discrimination, a history that persists, albeit in different forms.²⁵⁹ It was especially ironic for the Court to jettison the VRA's preclearance requirement precisely because it had been so effective in reducing voting discrimination. Justice Ginsburg said in her dissent, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."²⁶⁰

That being said, it is somewhat reassuring that the remaining provisions of the VRA continue to have a salutary effect. In *North Carolina State Conference of NAACP v. McCrory*, a unanimous three-

256. The very language of the FAA excludes employment disputes from its reach. See Federal Arbitration Act, 9 U.S.C. §1 (2016) ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."). Yet the Court has chosen to ignore this language. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). Neither the language of the FAA nor arbitration practice prohibits the use of class adjudication in arbitration, yet in *Concepcion* the Court majority insists that class actions are inconsistent with arbitration practice. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343-44 (2011). *Contra id.* at 361 (Breyer, J., dissenting) ("Unlike the majority's examples, class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere.").

257. See THE COLL. OF COMMERCIAL ARBITRATORS, GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 445-65 (4th ed. 2017) (devoting an entire chapter to class arbitration).

258. See *supra* notes 221-26 and accompanying text.

259. Justice Ginsburg's dissent discussed how the VRA aimed to curb the "new approach" of discriminatory voting practice; i.e., "[e]fforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot . . . aptly described as 'second-generation barriers' to minority voting." *Holder*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting). These barriers include racial gerrymandering, at-large voting in lieu of district-by-district voting to prevent minority citizens from obtaining representation, discriminatory annexation, and other forms of vote dilution. *Id.* at 2635; see also Garrett, *supra* note 228, at 80 ("Second-generation barriers, on the other hand, allow formal access to the franchise but dilute minority voting strength by limiting the effect that minority votes could have on the political process.").

260. 133 S. Ct. at 2650.

judge panel of the Fourth Circuit Court of Appeals struck down a state's voter identification provisions that "were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act."²⁶¹ What distinguishes this case from the Roberts Court's approach is the Fourth Circuit's willingness to recognize the sordid facts underlying what might be passed off as a racially neutral measure.²⁶² The opinion thereby incorporates a dose of realism that is sometimes missing from the opinions of the Roberts Court.

Realism did prevail, however, in *Cooper v. Harris*,²⁶³ a 2017 Roberts Court decision concerning a racial gerrymander of two North Carolina congressional districts. Applying a clear error standard, a majority comprised of Justices Kagan, Breyer, Ginsburg, Sotomayor, and Thomas upheld a district court's conclusion that the two districts were unconstitutional racial gerrymanders because they "packed" African-American voters into a limited area,²⁶⁴ limiting their influence in other districts.²⁶⁵ The Supreme Court adopted a realistic (rather than formalistic) approach in upholding the district court's determination that racial considerations predominated in the redrawing of district lines.²⁶⁶

Finding a constitutionally protected community of interest among African-American voters may be a relatively easy matter, given the dictates of the Fifteenth Amendment and the VRA. Whether consti-

261. 831 F.3d 204, 219 (4th Cir. 2016). The Supreme Court thereafter denied certiorari. See *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

262. The Fourth Circuit pointed out that before enacting the voting law, the North Carolina legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the legislature enacted a law that restricted voting and registration in five different ways, all of which disproportionately affected African Americans. *McCrary*, 831 F.3d at 214. The court observed: "In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist." *Id.*

263. 137 S. Ct. 1455 (2017).

264. Even without a majority black voting-age population (BVAP), electoral history showed that the two districts at issue were extraordinarily safe for African Americans' preferred candidates. Yet the legislature redrew Districts 1 and 12, increasing their BVAP from 48.6% to 52.7% and from 43.8% to 50.7%, respectively. *Id.* at 1466.

265. *Id.* at 1459.

266. *Id.* at 1477-78. North Carolina posited separate arguments justifying the redrawing of both districts. The state argued that it redrew District 1 as a majority-minority district to avoid liability for vote dilution under section 2 of the VRA. This argument was a clear error of law, as the third condition for proving vote dilution under section 2 (that a district's majority white bloc-voting is sufficient to defeat the minority's preferred candidate) was not met in this case. *Id.* at 1469. Regarding District 12, the state altogether denied the use of race and claimed that politics alone motivated the district's redrawing, an explanation that was rejected by the Court. *Id.* at 1473.

tutional protections extend to gerrymanders motivated by purely *political* considerations will be tested in *Gill v. Whitford*,²⁶⁷ heard during the Court's October 2017 term. Will the Court see political affiliations as communities with constitutionally protected interests, or will it continue to entertain the fiction that voting remains meaningful when geography is distorted and legislative districts are arranged such that the outcome is predetermined? An end to such gerrymandering would have communitarian effects, not the least of which is a reduction in the partisanship that thwarts consensus-building efforts in federal and state legislatures.²⁶⁸

We should comment briefly on the impact of *Citizens United* on public discourse. Arguably, *Citizens United* could be cited as a Roberts Court decision that increased such discourse. By allowing corporations and unions to engage in political speech in an unfettered manner, the case at least theoretically increased the number of voices with an opportunity to be heard in electoral campaigns.²⁶⁹ But as a practical matter, *Citizens United* has allowed moneyed interests to dominate political discourse to an unprecedented extent, sucking some of the air out of political campaigns.²⁷⁰ The use of "dark money," including that of corporations whose managers might be noncitizens with motives inimical to American interests, has further clouded the picture. In the end, it is hard to claim (at least with a straight face) that *Citizens United* was conducive to broader citizen participation in the electoral process.²⁷¹

267. 137 S. Ct. 2289 (2017) (granting certiorari), *argued* Oct. 3, 2017. The Supreme Court agreed to hear Wisconsin's challenge to the decision in *Whitford v. Gill*, 218 F. Supp. 3d 837 (2016), where a three-judge panel of the U.S. District Court for the Western District of Wisconsin held that a redistricting plan was an unconstitutional partisan gerrymander. The Supreme Court ordered that the injunction entered by the panel prohibiting the use of the plan in future elections be stayed pending disposition of the appeal.

268. When a legislative seat is comfortably in the hands of one party, the tendency is to elect representatives drawn from the extremes, rather than the more moderate, accommodating representatives elected when the two major parties truly contest the election. *See supra* note 234. For a discussion of the defects of a binary approach to decisionmaking, see *infra* notes 353-61 and accompanying text.

269. Perhaps the principal justification of the kind of speech allowed under *Citizens United* is that it benefits the recipient as well as the speaker of the communication. "Speech promotes self-government whenever it informs the citizenry of information and arguments they need in order to govern themselves intelligently. . . . Corporations as well as individuals can contribute political argument and information to the public store." Jonathan Weinberg, *On Commercial—and Corporate—Speech*, 99 MARQ. L. REV. 559, 593-94 (2016).

270. *See supra* notes 184-89 and accompanying text.

271. The Communitarian Platform states, in pertinent part:

It is said that giving money to politicians is a form of democratic participation. In fact, the rich can "participate" in this way so much more effectively than the poor, that the democratic principle of one-person one-vote is severely compromised. It is said that money buys only access to the politician's ear; but even if

E. Eliminating Invidious Discrimination and Promoting Equality

*No one is free until we are all free.*²⁷²

Communitarians at their best are pluralistic.²⁷³ In his acclaimed work, *Bowling Alone*, Professor Robert Putnam distinguishes between “bonding” (or exclusive) social capital that looks inward and cements homogeneous groups and “bridging” (or inclusive) social capital that is outward looking and encompasses people across diverse social groups.²⁷⁴ Most of us will quickly distance ourselves from that strain of communitarianism that confuses community with clannishness and harbors deep out-group antagonisms.²⁷⁵ “Liberal communitarians”²⁷⁶ see value in ethnic, racial, religious, and other ancestral (or constituent) communities, but recoil from exclusionary practices and notions of racial or ethnic superiority. As intermediate communities go, we may acknowledge the social capital inherent in intimate, local, ethnic communities, but we just as often find meaning in voluntary associations that we form and re-form based on political, social, or professional values.

The healthiest form of bonding social capital is that which is outward-looking. It places members of an identifiable group (often one that has been a target of discrimination or exclusion) in a position to cope more successfully in society and to forge mutually beneficial links with other groups.²⁷⁷ Pluralistic communitarians approach differences not out of fear, but curiosity. We hope to avail ourselves of the institutions of civil society—churches, synagogues, schools, civic

money does not buy commitment, access should not be allotted according to the depth of one’s pockets. It is said that every group has its pool of money and hence as they all grease Congress, all Americans are served. But those who cannot grease at all or not as well, lose out and so do long-run public goals that are not underwritten by any particular interest groups.

Communitarian Platform, *supra* note 7, at xxxii-xxxiii.

272. Quote commonly attributed to the Reverend Dr. Martin Luther King, Jr.

273. “Our communitarianism is not particularism.” *Communitarian Platform*, *supra* note 7, at xxxv.

274. See PUTNAM, *supra* note 9, at 357-58.

275. This is sometimes called the “dark side” of bonding social capital. See PUTNAM, *supra* note 9, at 360-61; Ackerman, *Disputing Together*, *supra* note 12, at 50.

276. There are some who would consider this term an oxymoron. See BRESLIN, *supra* note 51, at 34-57. Breslin prefers to describe communitarians like Etzioni, Glendon, and Putnam (i.e., communitarians who continue to embrace liberal democracy) as “prescriptive communitarians.” See *id.* at 64-77.

277. Historically black colleges and universities are one form of such groups; historically women’s colleges are another. Ideally, students at these colleges seek not an isolated, homogeneous enclave but a secure base from which to build bridging social capital. They emerge from these institutions not bitter or isolated but confident and outgoing.

organizations, and the like—to build a diverse and heterogeneous *community of communities*.

Our first President understood how this should work even in the early days of the Republic. George Washington wrote, in his famous letter to the Jewish community of Newport, Rhode Island:

It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.

May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid.²⁷⁸

The writer Sarah Vowel recently explained, “Tolerance, [Washington] meant, was small, petty and obsolete because they lived in a big new country where citizens stood side by side.”²⁷⁹ Not mere tolerance, but the “good will” of other inhabitants was to be enjoyed by members of minority groups. Our diversity was to be a source of strength, not the occasion for mere tolerance.²⁸⁰

Our jurisprudence, therefore, must recognize that in a country in which certain groups (and in particular, members of racial minorities) have been systematically subordinated, efforts by communities to advance opportunities for subordinated groups while promoting pluralism should be rewarded, not stifled. Unfortunately, the Roberts Court has sometimes allowed rigid legal formalism to obstruct that task.

Chief Justice Roberts, in particular, has been criticized for excessive formalism, or what has sometimes been called “mechanical ju-

278. Letter from George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790), <https://founders.archives.gov/documents/Washington/05-06-02-0135> [<https://perma.cc/EPR4-YHWP>].

279. Sarah Vowell, *Join the Army and Choose Whichever God You Like*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/2016/08/14/opinion/sunday/join-the-army-and-choose-whichever-god-you-like.html?mcubz=1>.

280. The 2016 Summer Olympic Games served as an athletic metaphor for this strength through diversity. All told, the United States Olympic Team garnered 121 medals, 46 of them gold. The United States of America did not simply compete with the world; in the rich racial, ethnic, and religious diversity of its Olympic athletes, the United States was the world, or at least a healthy cross-section of it. See, e.g., *2016 Summer Olympics—Medal Tracker*, ESPN, <http://www.espn.com/olympics/summer/2016/medals> [<https://perma.cc/3V6E-GMZ9>] (last visited Jan. 12, 2018).

risprudence.”²⁸¹ Cloaked in rhetoric that sounds principled on its face, Roberts’ opinions sometimes ignore the real-life facts which form a basis for good law.²⁸² In the companion cases, *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*,²⁸³ the Roberts Court struck down school integration plans promulgated by local school districts in Seattle, Washington and Jefferson County (Louisville), Kentucky. Both plans had the apparently fatal flaw of taking race into account in the assignment of students in order to obtain racially balanced schools.²⁸⁴ Both plans viewed racial balance only in binary terms (“white” or “nonwhite” in Seattle, and “black” or “other” in Jefferson County); this was particularly problematic in Seattle, a district in which there were a significant number of Asian, Latino, and Native-American students.²⁸⁵ But the Louisville plan was designed to extend the benign effects of a remedy that had previously been ordered by a court as a means of correcting decades of racial segregation. This compelled Justice Breyer to ask in dissent, “Is it conceivable that the Constitution, implemented through a court desegregation order, could permit (perhaps *require*) the district to make use of a race-conscious plan the day before the order was dissolved and then *forbid* the district to use the identical plan the day after?”²⁸⁶ Is there such a thin line between that which is constitutionally compelled and that which is constitutionally prohibited that a locality is prohibited from taking voluntary action to address racial imbalance in its schools?

281. See Steven L. Winter, *John Roberts’s Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 555 n.38 (2009). In a biting critique of the Chief Justice’s approach, Professor Winter describes formalism “as a mode of reasoning that treats concepts as meaningful entirely abstracted from their contexts.” *Id.* at 553.

282. Professor Winter explains:

[T]he idea of formalism as abstraction from context entails a focus on abstract entities (rights-bearing individuals equal before the law) and their relations (e.g., freedom of contract) to the exclusion of the contextual social factors (e.g., education, social recognition, mutual respect, economic position) that gives those entities and relations substance and shape.

Id. at 555.

283. 551 U.S. 701 (2007) (cases integrated).

284. *Id.* at 710-11.

285. Justice Kennedy’s concurring opinion accepted the proposition that diversity could be a compelling interest that might survive the strict scrutiny accorded to racial classifications, but wrote that the Seattle plan in particular was not “narrowly tailored to achieve its own ends.” *Id.* at 787, 723; see also Robert M. Ackerman, *Community, Diversity, and Equal Protection: The Louisville and Seattle School Cases*, 112 PENN ST. L. REV. 937, 938 (2008) [hereinafter Ackerman, *Equal Protection*].

286. See *Parents Involved*, 551 U.S. at 856. Phrased another way, Justice Breyer asked, “How could such a plan be lawful the day before dissolution [of a court’s desegregation order] but then become unlawful the very next day?” *Id.* at 821.

The answer could apparently be found in a seemingly straightforward statement by the Chief Justice: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁸⁷ This statement, an unobjectionable truism on its face, captures the alluring formalism of Roberts’ rhetoric. It ignores, however, the reality of life in America 150 years after the abolition of slavery, a reality in which the racial divide permeates all too many aspects of American life, and all too often results in fewer opportunities for persons of color. To the formalist, there can be no wrong in rules that are racially “neutral” on their face, and nothing right about a rule that provides for differential treatment on the basis of race.²⁸⁸ To the communitarian, there remains much work to be done in order to achieve even a rough approximation of racial equality, and wide berth must be given to measures that promote equal, or at least nearly equal, participation in American life. It is very difficult to honestly rectify racial inequality without taking race into account.²⁸⁹ In some instances, proxies (like the use of economic or geographic criteria or “individualized consideration”) may be acceptable ways to accomplish the goal of racial equality.²⁹⁰ But it is apparently *verboten* to call the

287. *Id.* at 748.

288. Professor Winter explains that there is a “sense of formalism at work in the notion of formal equality,” and that “this notion of formalism is profoundly linked to individualism.” Winter, *supra* note 281, at 553-54.

To be fair, Chief Justice Roberts appears to consistently view any racial criteria with suspicion, sometimes to benign effect. In *Buck v. Davis*, the Chief Justice determined that inviting testimony from an expert witness that a defendant was more likely to be a future danger because he was black strongly suggested ineffective assistance of counsel. 137 S. Ct. 759, 780 (2017). In so doing, Chief Justice Roberts overcame a number of procedural (and formalistic) objections, leading Justice Thomas to begin his dissent with the words, “[h]aving settled on a desired outcome, the Court bulldozes procedural obstacles and misapplies settled law to justify it.” *Id.* at 780-81 (Thomas, J., dissenting). To the Chief Justice, however, this was a clear case of racial injustice:

[O]ur holding on prejudice makes clear that Buck may have been sentenced to death in part because of his race. . . . [T]his is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.

Id. at 778 (majority opinion).

289. See François, *supra* note 11, at 989-90.

290. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (“[U]niversities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a ‘plus’ factor in the context of individualized consideration of each and every applicant.” (citations omitted)).

problem by its name—by explicitly using racial classifications to address problems related to race.²⁹¹

I do not mean to suggest that this is an easy case. Strict scrutiny may, in fact, be justified any time we take the extreme step of classifying people by race, and the binary racial categories used by the school districts here were rather crude²⁹² and even offensive. Chief Justice Roberts distinguished the Seattle and Jefferson County plans from the diversity plan upheld in law school admissions in *Grutter v. Bollinger*²⁹³ in part because the latter undertook a “highly individualized, holistic review”²⁹⁴ employing “a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”²⁹⁵ It is healthy to view students not simply in terms of a racial classification, but as multifaceted individuals bearing a number of relevant characteristics.²⁹⁶ But the Court used a second reason to distinguish this case from *Grutter*—one that appears quite odd. The Chief Justice observed that in upholding the admission plan in *Grutter*, the Court had “relied upon considerations unique to institutions of higher education.”²⁹⁷ So, after segregating students for the first thirteen years of their education, it was now okay for public institutions to teach them to live in a diverse community. Forgive us for thinking that the racial segregation students have endured during the early, formative parts of their educational careers have necessitated the affirmative action plans adopted by colleges and universities—an infirmity that democratically elected school boards in Seattle and Jefferson County were trying to address.²⁹⁸

291. Professor Neil Siegel has suggested that Justice Kennedy’s “understanding of public education as an engine of interracial socialization and community counseled against barring almost all use of racial classifications, when it is presently uncertain whether communities can accomplish meaningful levels of racial integration without them.” Ackerman, *Equal Protection*, *supra* note 285, at 943.

292. See *Parents Involved*, 551 U.S. at 786 (Kennedy, J., concurring in part and concurring in judgment).

293. 539 U.S. 306 (2003).

294. *Parents Involved*, 551 U.S. at 723 (quoting *Grutter*, 539 U.S. at 337).

295. *Id.* at 722 (quoting *Grutter*, 539 U.S. at 325).

296. “Despite notions to the contrary, there is only one human race. Our single race is independent of geographic origin, ethnicity, culture, color of skin or shape of eyes—we all share a single phenotype, the same or similar observable anatomical features and behavior.” Michael Hadjiargyrou, *Race is a Social Concept, Not a Scientific One*, LIVE SCI. (Aug. 29, 2014, 8:16 PM), <http://www.livescience.com/47627-race-is-not-a-science-concept.html> [<https://perma.cc/P2YG-R6Q4>].

297. *Parents Involved*, 551 U.S. at 724.

298. Justice Breyer noted, in his dissent, that “the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.” *Id.* at 803 (Breyer, J., dissenting). To Professor Siegel, “a key question in *Parents Involved* was how the institution of public education in America[] should go about performing its formation

Communitarians might suggest deference to the community values inherent in the Seattle and Jefferson County school boards' integration plans. But we do so at some risk. The system of racial apartheid struck down in *Brown v. Board of Education*²⁹⁹ and its progeny was built on majoritarian rules based on a long-standing custom of the community. We might try to distinguish the Seattle and Jefferson County plans, as Professor Steven Winter does, based on their benign intent. "Classification by race was undertaken solely for the purpose of ameliorating racial isolation," says Professor Winter.³⁰⁰ "The racial classification in *Seattle*, unlike the segregation at issue in *Plessy* and *Brown*, created no second-class citizens."³⁰¹ This justification was rejected, however, in the plurality opinion in *Regents of the University of California v. Bakke*,³⁰² another decision encumbered by legal formalism. What is a benign expression of community mores to some is outright discrimination to others.

The failure of *Parents Involved* lies in what Professor Winter calls Justice Roberts's insistence "on equal protection as a radically individualist right regardless of the social groups to which we belong and the impact and social consequences that flow from that sociological reality."³⁰³ Professor François suggests an intriguing reformulation.³⁰⁴ While acknowledging the long-standing scholarly debate between the primacy of the individual and the importance of group identity, Professor François concedes that "it would not seem likely that the community will soon displace the individual at the heart of American constitutional jurisprudence."³⁰⁵ But he remains steadfast in the assertion that "the right to connect with members of a larger communi-

function—that is, what the social mission of public education in America should be." Ackerman, *Equal Protection*, *supra* note 285, at 943.

299. 347 U.S. 483 (1954).

300. Winter, *supra* note 281, at 555.

301. *Id.* at 556.

302. 438 U.S. 265, 294 (1978) (plurality opinion) ("[The University] urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.' The clock of our liberties, however, cannot be turned back to 1868." (footnotes omitted) (citing *Brown*, 347 U.S. at 492)); *see also* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting) ("We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals.").

303. Winter, *supra* note 281, at 555.

304. I had asked Professor François to speak and write for an AALS/Penn State Law Review symposium on *Parents Involved* after having been impressed with an amicus brief that he had written for the case, replete with communitarian themes. His resulting work, *Only Connect*, did not disappoint. *See* François, *supra* note 11.

305. François asserts, however, "[I]t is difficult to see how the liberal conception of the individual, however much it may have served as a robust intellectual foundation for a constitutional jurisprudence of rights, actually resembles real people." *Id.* at 1017.

ty is as deep and innate a part of human nature as the right to be left alone.”³⁰⁶ Most significantly, he states:

[T]he right to community cannot be reduced to a desire to associate with those with whom one shares political, economic, or intellectual interests, or with those to whom one is tied by cultural, religious, geographic, racial, or family, or even romantic bonds. Rather, the right to community is a right that expresses the humanistic impulse to step outside of oneself and to move toward sympathy and understanding of others different from oneself; it recognizes not exclusionary associational ties but inclusionary community connections; it encourages social relations that weave tight bonds among diverse members of the group; it requires not a life cut down into associational fragments but one open to a communal whole; and above all, it flows not to the group but to the individual. It is, in short, an individual liberty right, not a communitarian group interest.³⁰⁷

This passage is an excellent distillation of what it means to be a communitarian in a republic that continues to repose great value in individual rights.³⁰⁸ It is of the same cloth as the Reverend Dr. Martin Luther King’s observation that “[w]e are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”³⁰⁹ This is the very essence of liberal communitarianism. We are all something less than we can potentially be due to the structural barriers society imposes on our ability to associate with people of different races, religions, and ethnicities. We seek membership and participation in a community every bit as diverse as our multicultural society promises. The children of Seattle and Jefferson County—and vicariously their parents, friends, and neighbors—had a right to break the bonds of segregation (*de jure* or *de facto*) and associate with those who were different to overcome the constraints of insularity and be part of something larger than themselves. They had, and we have, a *right to community*.

F. Empowering Intermediate Communities

*Our ultimate end must be the creation of the beloved community.*³¹⁰

306. *Id.* at 1019.

307. *Id.*

308. I have previously noted “the irony that communitarian principles might find their legal expression only through the minting of a new ‘right.’” Ackerman, *Equal Protection*, *supra* note 285, at 942.

309. King Letter, *supra* note 96.

310. Dr. Martin Luther King, Jr., Statement to the Press at the Beginning of the Youth Leadership Conference, Raleigh, North Carolina (Apr. 15, 1960).

It is perhaps in the area of group rights where communitarians are most likely to part company with a traditionally liberal interpretation of the Constitution. Whereas civil libertarians see the Constitution, and particularly the Bill of Rights, as protecting *individuals* against the power of the state, communitarians are also likely to embrace opportunities to give full expression to group rights. That is why, for example, *Citizens United's* recognition of First Amendment rights on the part of corporations and unions is not nearly as threatening to communitarians as *Buckley v. Valeo's* willingness to equate money with speech. While civil libertarians give at least lip service to freedom of association, critics of *Citizens United* may be slow to acknowledge what should be allowed to happen when people do, in fact, associate.

On the opposite side of the coin, we regard it as unfortunate that in *Parents Involved*, the Court failed to consider the communitarian gains to be realized through integration plans that promoted interracial association or, what Professor François called "the right to community."³¹¹ Among the goals articulated in the Constitution's Preamble are to "provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."³¹² Inherent in the Constitution was an effort by the Founders to reach out and build something larger than themselves.

That larger something necessarily had to include the instruments of civil society, i.e., voluntary associations (formal and informal) constructed by citizens to enhance their lives economically, socially, intellectually, religiously, and culturally. Neither the individual nor the federal government could handle all tasks; intermediate communities were needed to perform most of the work necessary for society to function. The Constitution provides a structure conducive to these intermediate communities; indeed, inherent in the very idea of federalism is the concept that some functions are best left to smaller governmental units. Consistent with this concept, the Communitarian Platform provides:

Generally, no social task should be assigned to an institution that is larger than necessary to do the job. What can be done by families, should not be assigned to an intermediate group What can be done at the local level should not be passed on to the state or federal level There are, of course, plenty of urgent tasks . . . that do require national and even international action.

311. François, *supra* note 11, at 1019.

312. U.S. CONST. pmbl.

But to remove tasks to higher levels than is necessary weakens the constituent communities.³¹³

As the Communitarian Platform acknowledges, the most basic and intimate intermediate community is the family.³¹⁴ The ability to form a family, a right assumed by most of us, was what same-sex couples fought for in *Windsor v. United States*³¹⁵ and *Obergefell v. Hodges*.³¹⁶ By supporting the formation of marriages in *Windsor* and *Obergefell*, the Court strengthened the intermediate community of the family and encouraged the formation of more stable environments for children.³¹⁷ Few, if any, intermediate communities contribute more to a healthy society than stable and loving families.

But families alone do not make a community.³¹⁸ Churches, synagogues, mosques, neighborhood organizations, bowling leagues, profit and non-profit corporations, charitable organizations, advocacy groups, and a plethora of other institutions (formal and informal) are

313. ETZIONI, SPIRIT, *supra* note 19, at 260.

314. *Communitarian Platform*, *supra* note 7, at xxviii (“The best place to start is where each new generation acquires its moral anchoring: at home, in the family.”).

315. 133 S. Ct. 2675 (2013). In *Windsor*, the Court invalidated a section of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2012), defining “marriage” as a union between one man and one woman. DOMA had thereby ignored how eleven states had redefined the term and deprived members of same-sex marriages the benefits to which they would have been entitled under federal law. Said Justice Kennedy for the Court:

[T]he State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.

Windsor, 133 S. Ct. at 2692. Ironically *Obergefell*, like DOMA, would deprive the state of the ability to define marriage in the same historical manner.

316. 135 S. Ct. 2584 (2015). We have mentioned earlier how *Obergefell* is likely to be regarded as disturbing to conservative communitarians. See *supra* notes 109-12 and accompanying text.

317. The Michigan plaintiffs in *Obergefell*, April DeBoer and Jayne Rowse, a lesbian couple, felt compelled to bring litigation because the state had denied them the right to adopt special-needs children. *DeBoer v. Snyder*, 772 F.3d 388, 397 (6th Cir. 2014), *rev’d sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

318.

Community is an essential human need. We cannot develop as individuals in isolation. Our first essential community is our family; for most of us, this remains the foundational community of our lives. But to develop fully as individuals, we have to establish a wider range of communities. This is both how we are drawn into the wider world as well as how we establish ourselves as autonomous individuals with an existence separate from our families.

MAYER, *supra* note 24, at 240.

intermediate communities falling somewhere between the family and the state. It does take a village, not only to raise a child but to support a healthy, prosperous society. Professor Putnam says:

Researchers in . . . education, urban poverty, unemployment, the control of crime and drug abuse, and even health have discovered that successful outcomes are more likely in civically engaged communities. Similarly, research on the varying economic attainments of different ethnic groups in the United States has demonstrated the importance of social bonds within each group. . . . [R]esearch in a wide range of settings . . . demonstrates the vital importance of social networks for job placement and many other economic outcomes.³¹⁹

I must pause for a moment to acknowledge that intermediate communities can sometimes be sources of the type of invidious discrimination that we discussed in the previous subsection. Much of civil rights law has derived from individuals and subordinated groups seeking protection from intermediate communities—most frequently the states, but sometimes corporations and other powerful organizations—through the federal government and its courts. For every community like Seattle and Jefferson County that tries to promote diversity and the building of bridging capital, there have been many more (including Jefferson County decades ago) that have insisted that community norms require barriers to integration and advancement. Intermediate communities are not always benign, and even now, the Reverend Dr. Martin Luther King’s vision of the Beloved Community is not within easy reach.³²⁰

While *Citizens United*, *Hobby Lobby*, *Windsor*, and *Obergefell* all extol the value of intermediate communities, at least two Roberts Court decisions—*District of Columbia v. Heller* and *Harris v. Quinn*—fail to adequately account for the role of intermediate communities. In *Heller*, the Court declared, for the first time, that the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation.”³²¹ It is not as if a right to bear arms had never before been acknowledged (outside the language

319. Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. DEMOCRACY 65, 66 (1995).

320. “The Beloved Community” is a term that was first coined in the early days of the twentieth century by the philosopher-theologian Josiah Royce, who founded the Fellowship of Reconciliation. The Reverend Dr. Martin Luther King, Jr., also a member of the Fellowship of Reconciliation, popularized the term. *The King Philosophy*, KING CTR., <http://www.thekingcenter.org/king-philosophy> [https://perma.cc/Q5UF-D2VL] (last visited Jan. 12, 2018).

321. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

of the Second Amendment) in the individual context.³²² But the Court chose this occasion to read an individual right *into the Constitution*. On previous occasions, the Court had declined to do so,³²³ and the plain language of the Second Amendment supports this view.³²⁴

Verbal gymnastics aside, the most reasonable approximation to the truth is that it was very difficult to separate individual weapons ownership from militia membership at the time of the Bill of Rights' adoption; individual citizens, who routinely used their firearms for hunting and occasionally for self-defense, brought their guns to militia meetings and did not seem to give much thought to the different capacities in which they were used.³²⁵ But this is of little import in modern society. The question is not how the Second Amendment played out in 1791; the question is how we can best apply its language to the reality of the modern world, in which gun violence and its prevention are very legitimate concerns. The Communitarian Platform attempts to resolve the controversy in a single sentence: "We join with those who read the Second Amendment the way it was written, as a communitarian clause, calling for community militias, not individual gun slingers."³²⁶ That is nice, but it, too, fails to take into account the legitimate private uses of firearms (from hunting to self-defense), the palpable fear of those living in violence-raked communities,³²⁷ and the debate as to whether widespread firearms ownership makes us safer or places us in greater peril.

Writing for the majority in *Heller*, Justice Scalia acknowledged, "We are aware of the problem of handgun violence in this

322. Justice Scalia's majority opinion cites several state constitutions as sources of this right, *id.* at 584-85, 601-03, along with post-Civil War discourse about the rights of freed blacks, *id.* at 616.

323. *E.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886).

324. Lest anyone forget, the Second Amendment somewhat clumsily reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The majority opinion of Justice Scalia, *see, e.g., Heller*, 554 U.S. at 577, and the dissenting opinion of Justice Stevens, *see id.* at 637, 676, joust mightily over the meaning of this language. For a more amusing but nevertheless insightful analysis, see Steven L. Winter, *Confident, but Still Not Positive*, 25 CONN. L. REV. 893, 915 (1993).

325. *See* Allison L. Mollenhauer, Note, *Shot Down!: The D.C. Circuit Disarms Gun Control Laws in Parker v. District of Columbia*, 53 VILL. L. REV. 353, 360 (2008) ("Early Americans understood the right as permitting private uses of guns, including hunting, defending against attacks by individuals and resisting a tyrannical government, in addition to any militia service the state required of an individual.").

326. *Communitarian Platform*, *supra* note 7, at xxxv (emphasis omitted).

327. Detroit's police chief has parted company from most of his peers by encouraging citizens to arm themselves against crime. Drew Zahn, *Detroit Police Chief to Citizens: Arm Yourselves*, WND (Jan. 3, 2014, 2:46 PM), <http://www.wnd.com/2014/01/detroit-police-chief-to-citizens-arm-yourselves/> [<https://perma.cc/DD6B-C8VL>].

country But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”³²⁸ Justice Stevens aptly responded, “[T]he right the Court announces was not ‘enshrined’ in the Second Amendment by the Framers; it is the product of today’s law-changing decision.”³²⁹ For communitarians, this gets to the crux of the matter. A proper balance might have been struck by deferring to the legislative process; a process more conducive to a weighing of complex considerations than a sweeping judicial declaration. Instead, a law tailored to an “urban crime problem in that it is local in scope”³³⁰ was struck down in favor of a newly minted constitutional right.

The Court did assure us that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”³³¹ Subsequent decisions of lower courts have determined that the Second Amendment does not preclude the states or federal government from banning military-style semi-automatic weapons³³² or forbidding convicted felons from possessing firearms.³³³ But the Court’s discovery of an individual right under the Constitution, where prior decisions had recognized only a community right, remains disturbing to communitarians.

Equally disturbing is the far less publicized case of *Harris v. Quinn*.³³⁴ In *Abood v. Detroit Board of Education*,³³⁵ the Burger Court had upheld the widespread practice of charging nonunion members a “fair share” agency fee to compensate labor unions for providing representation in collective bargaining and grievance proceedings. But in *Harris*, the Roberts Court held that the collection of agency fees (even if they did not directly finance the union’s political activities) violated dissenting workers’ First Amendment rights.³³⁶ The Court

328. *Heller*, 554 U.S. at 636.

329. *Id.* at 679 (Stevens, J., dissenting) (emphasis added).

330. *Id.* at 682 (Breyer, J., dissenting). Justice Breyer went on to say:

[T]he law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted. In these circumstances, the District’s law falls within the zone that the Second Amendment leaves open to regulation by legislatures.

Id.

331. *Id.* at 626 (majority opinion).

332. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (holding state law banning assault weapons and large-capacity magazines does not violate the Second Amendment).

333. *See, e.g.*, *United States v. Gieswein*, 346 Fed. App’x 293 (10th Cir. 2009).

334. 134 S. Ct. 2618 (2014). *Harris* was announced on the same day as *Hobby Lobby*, to far less fanfare and criticism.

335. 431 U.S. 209 (1977).

336. The plaintiffs were employed as home-care personal assistants who were hired by the recipients of care but whose salaries were paid by the state. Justice Alito’s opinion stopped just short of overturning *Abood*, finding that the *Harris* plaintiffs were not public employees in the strict sense. *Harris*, 134 S. Ct. at 2644. Justice Kagan, dissenting,

reasoned that when a union engages in collective bargaining with a public entity, it necessarily engages in political speech, such that any attempt to segregate political from nonpolitical funds is unavailing.³³⁷

The *Harris* decision was followed one year later by argument of *Friedrichs v. California Teachers Association*,³³⁸ in which the Court was invited to overturn *Abood* in its entirety. Judging by the oral argument in *Friedrichs*, this would almost certainly have come to pass but for Justice Scalia's untimely death.³³⁹ The resulting 4-4 tie left *Abood* at least temporarily in place.³⁴⁰

As it stands, the *Harris* decision is a shocking abandonment of the communitarian norms that underlie American labor law. That law, most notably through the National Labor Relations Act,³⁴¹ was designed to level the playing field in labor-management relations by providing for industrial democracy.³⁴² Unions were allowed to organize the workforce, and if they could obtain the support of the majority of the workers in a given shop (the "bargaining unit"), they had a right—in fact, an *obligation*—to represent all of the workers in collective bargaining and grievance procedures.³⁴³ The law did not oblige all workers represented by the union to become *members* of the union, but

thought this was a distinction without a difference. *Id.* at 2645 (Kagan, J., dissenting); see also Ackerman & Cole, *supra* note 18, at 989 n.431.

337. *Harris*, 134 S. Ct. at 2632 (saying that it is conceptually difficult to distinguish, in public-sector cases, between union expenditures made for collective-bargaining purposes and those made to achieve political ends). Additionally, the Court reasoned that speech cannot be restricted because public employees' salaries and conditions of employment are matters of public concern. *Id.* at 2642-43. If this was true in a case involving home-care workers receiving salaries from the state, it could be no less true of people working directly for and paid by the state or a local school district, as would be the case in *Friedrichs v. California Teachers Association*.

338. 135 S. Ct. 2933 (2015).

339. See Transcript of Oral Argument at, *Friedrichs*, 135 S. Ct. 2933 (No. 14-915). The Court is again considering the issue of the agency shop in *Janus v. AFSCME Council 31*, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 138 S. Ct. 54 (2017), *argued* Feb. 26, 2018. The Court recently heard arguments on February 26, 2018.

340. See *Friedrichs*, 135 S. Ct. at 2933.

341. 29 U.S.C. §§ 151-69 (1935) (popularly known as the "NLRA" or "Wagner Act"). Technically speaking, the NLRA applied to neither the *Harris* nor *Friedrichs* scenarios, as it leaves to the states the law as to employees of state and local government.

342. In *Citizens United*, the Court (perhaps naively) assured us that "corporate democracy" would sufficiently protect the interests of dissenting shareholders. *Citizens United v. FEC*, 558 U.S. 310, 361-62 (2010) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)). Lance Cole and I have offered an extensive critique of this rationale. See Ackerman & Cole, *supra* note 18, at 931-47. Certainly, dissenting members of a bargaining unit have far more opportunity to express their dissent and vote the union out than do corporate shareholders with respect to corporate management.

343. 14 Penn Plaza, LLC v. Pyett, 556 U.S. 247, 256 (2009) ("[The] broad authority [of a union] 'is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation.'" (quoting *Humphrey v. Moore*, 375 U.S. 335, 342 (1964))).

they were (in the absence of a so-called “right to work” law³⁴⁴) required to pay an agency fee in return for the union’s obligation to provide “full and fair representation” to all members of the bargaining unit.³⁴⁵

Extension of the *Harris* rationale to all public employees would forsake the principle of industrial democracy in favor of a far less useful “right” to abandon one’s co-workers. Granted, home-care personal assistants may not feel the same sense of solidarity as those working in the same public school or municipal office. We nevertheless have reason to hold our collective breath now that a *Friedrichs*-type case has found its way to a Supreme Court in which Justice Gorsuch has succeeded Justice Scalia.³⁴⁶ Abandonment of *Abood* would enshrine “right-to-work” as constitutional doctrine with respect to public employees. The “right” of workers to be represented without having to pay the freight would produce a freeloader effect, crippling unions much as it has in many so-called “right-to-work” states.³⁴⁷ Workers would obtain small First Amendment coin in ex-

344. The Labor Management Relations Act, 29 U.S.C. §§ 141-97 (1947), also known as the Taft-Hartley Act, allowed states to enact “right-to-work” laws, which prohibited the charging of even an agency fee to nonunion members. The use of the term “right-to-work” has been a triumph of anti-union propaganda and the myth of rugged individualism. No collective bargaining agreement prevents anyone from working or compels workers to join a union. *Id.* § 164(b). The agency fee arrangement simply requires represented employees to pay their fair share (an amount somewhat lower than full union dues) in return for representation. What has been called the “right-to-work” is really the “right” to freeloader.

345. For the duty of representation owed by unions to nonmember employees in the bargaining unit, see *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (holding that unions have a duty to represent, in good faith, all employees in the bargaining unit). One hitch here: In many instances, only union members are permitted to vote on ratification of collective bargaining agreements. *See, e.g., Williams v. Pub. Employment Relations Bd.*, 139 Cal. Rptr. 3d 618, 624 (Cal. Ct. App. 2012) (upholding determination by state agency that denying non-member employees the right to vote in union elections was not an unfair labor practice); *Penn. Labor Relations Bd. v. E. Lancaster Cty. Educ. Ass’n.*, 427 A.2d 305, 309 (Pa. Commw. Ct. 1981) (holding that exclusion of nonmember employees from union elections did not violate the union’s duty of fair representation). *But see* *Branch 6000 Nat’l Ass’n of Letter Carriers v. NLRB*, 595 F.2d 808, 813 (D.C. Cir. 1979) (upholding NLRB ruling that barring nonmembers from voting on a referendum concerning the terms and conditions of employment was an unfair labor practice). That nonunion members of the bargaining unit might be excluded from voting on the contract under which they will be bound is quite troubling, if we are truly concerned about industrial democracy.

346. *See Janus v. AFSCME Council 31*, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 138 S. Ct. 54 (2017), *argued* Feb. 26, 2018.

347. *See* BUREAU OF LABOR EDUC., UNIV. OF ME., THE TRUTH ABOUT “RIGHT TO WORK” LAWS, at tbl. 1 (2011), https://umaine.edu/ble/wp-content/uploads/sites/181/2011/04/RighttoWork_Laws.pdf [<https://perma.cc/JK3A-SQJH>]. (reporting that as of 2007, the average percentage of union representation in “right-to-work” states is 6.6%, compared to 15.1% in “free-bargaining” states). “Right-to-work” has contributed to the shocking decline in union representation of the work force. *See* Alexia Fernández Campbell, *One Reason the Rust Belt Turned Red*, ATLANTIC (Nov. 14, 2016), <https://www.theatlantic.com/business/archive/2016/11/one-reason-the-rust-belt-turned-red/507611/> [<https://perma.cc/UDT3-LRHL>] (noting that after Michigan passed a right-to-work law in 2012, union membership fell 11%, and that similar results occurred after Wisconsin passed a right-to-work law in 2015);

change for the loss of effective union representation, and the concept of community would suffer a critical blow.³⁴⁸ Whither solidarity?

*G. Transcending the Impulse to Reduce Every Problem
to a Binary Choice*

*Principle without compromise is empty; compromise without
principle is blind.*³⁴⁹

The tendency to see most everything in binary terms plagues philosophical commentary, political controversies, and legal disputes. Too often, commentators see communitarianism in opposition to liberalism, when in fact communitarians like Etzioni, Glendon, and Putnam advocate for a “third way” through which people of many political stripes might forge consensus based on commonly held values. Too many controversies before the Supreme Court are depicted as clashes between “liberals” and “conservatives,” “libertarians” and “authoritarians,” or as pitting civil liberties against state power.

Of course, our adversarial system contributes to this. The “v” that separates litigants is conducive to an “us” versus “them” mentality, even in areas lending themselves to mutual accommodation. While lower courts may press parties to explore negotiated and mediated solutions to problems, by the time a case reaches the Supreme Court, the issues have been honed and the knives have been sharpened. Appointments to the Supreme Court have similarly taken on a bitter, adversarial tone.³⁵⁰ The quest for fair, competent, and impartial jurists

see also Jake Rosenfeld, Patrick Denice & Jennifer Laird, *Union Decline Lowers Wages of Nonunion Workers*, ECON. POLY. INST. (Aug. 30, 2016), <https://www.epi.org/publication/union-decline-lowers-wages-of-nonunion-workers-the-overlooked-reason-why-wages-are-stuck-and-inequality-is-growing/> [<https://perma.cc/ZSR7-KQTS>] (“The great organizing drives that began after congressional passage of the National Labor Relations Act (NLRA) of 1935 resulted in the unionization of more than 1 of every 3 private-sector workers by the 1950s. Today, that fraction has fallen to approximately 1 of 20 private-sector workers—the lowest rate in over a century.”)

348. *See* PUTNAM, *supra* note 9, at 81-83 (lamenting the decline of unions and its effect on social capital).

349. Stephen B. Smith, *A Lincoln for Our Time*, N.Y. TIMES (Feb. 14, 2013), <http://www.nytimes.com/2013/02/17/books/review/lincolns-tragic-pragmatism-by-john-burt.html?mcubz=3> (reviewing JOHN BURT, *LINCOLN’S TRAGIC PRAGMATISM: LINCOLN, DOUGLAS, AND MORAL CONFLICT* (2012)).

350. The bitterness may have reached its peak in 2016, when a Republican Senate refused to even conduct hearings on the Supreme Court nominee of a Democratic president who had eleven months remaining in his term. Republicans would charge, however, that the recriminations began with the Democrats’ opposition to the nomination of Robert Bork for the Court in 1987. James Robertson, *The Judicial Nomination War Started with Bork. Let’s End It with Gorsuch*, WASH. POST (Mar. 15, 2017), https://www.washingtonpost.com/opinions/the-judicial-nomination-war-started-with-bork-lets-end-it-with-gorsuch/2017/03/15/3effeb4e-0990-11e7-b77c-0047d15a24e0_story.html?utm_term=.4a74ebc53671.

has devolved into a litmus test of whether a judicial nominee will vote to overturn *Roe v. Wade* or *Citizens United* (pick your poison).

This adversarial phenomenon has certainly been exacerbated by the excessive partisanship that pervades present-day American politics. But our insistence on “rights talk” is responsible as well. Professor Mary Ann Glendon has suggested:

[T]he prominence of a certain kind of rights talk in our political discussions is both a symptom of, and a contributing factor to, this disorder in the body politic. . . .

. . . [R]ights talk encourages our all-too-human tendency to place the self at the center of our moral universe. . . . [I]t regularly promotes the short-run over the long-term, crisis intervention over preventive measures, and particular interests over the common good.³⁵¹

Glendon further notes, “Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.”³⁵²

We might alleviate this state of affairs by ceasing to regard every problem as a binary choice. In his recent book, *The Conflict Paradox*, Bernard Mayer posits that conflict is unnecessarily exacerbated when we insist on seeing disputes in “either/or” terms. Mayer explains that “conflict promotes less complex thinking—and simpler thinking promotes conflict.”³⁵³ Therefore, our first challenge “is to make sure we are not swept into a more primitive and polarized way of thinking.”³⁵⁴ Mayer sets forth seven “key polarities” that often stymie efforts to resolve conflict: (1) competition and cooperation; (2) optimism and realism; (3) avoidance and engagement; (4) principle and compromise; (5) emotions and logic; (6) neutrality and advocacy; and (7) community and autonomy.³⁵⁵ Of these, the fourth (principle and compromise) and seventh (community and autonomy) are the most conducive to a better understanding of how a communitarian outlook can promote creative and useful constitutional decisionmaking.

Mayer observes that community and autonomy are far from polar opposites. To the contrary, “[c]ommunity and autonomy are not only wrapped up in each other, but one *requires* the other. We establish our independence by having a healthy attachment to others, and we

351. GLENDON, *supra* note 4, at x-xi.

352. *Id.* at 14.

353. MAYER, *supra* note 24, at 14 (capitalization omitted).

354. *Id.* at 16.

355. *See id.*

can become truly autonomous only if we have a healthy network of social relationships.”³⁵⁶

We discussed earlier how strong bonding social capital is conducive to the building of bridging social capital. In like manner, healthy communities nurture autonomous individuals, and confident individuals are most likely to contribute to vibrant communities. Even the Tea Party movement, which stresses the importance of individual rights and autonomy, has enjoyed at least a modicum of success because individuals banded together to back a political cause.³⁵⁷ America is a free and prosperous country because we have usually been able to strike a balance between individual initiative and the public interest.³⁵⁸ Cases make their way to the Supreme Court because sometimes we need an ultimate decider as to where that balance should be struck. If the answer is clear-cut, we should be able to figure it out on our own without resorting to the nation’s ultimate arbiter.

It is therefore not surprising that the Court often appears polarized, replicating the sharp divisions in our country. This is not altogether unhealthy. As Mayer notes, “Communities need to find a way for members to raise important issues with each other, or the vitality of the community will diminish.”³⁵⁹ Indeed, “[r]esort to the courts, as grueling and disruptive as it may be, is an affirmation of the community’s rules, mores, and its very legitimacy.”³⁶⁰ And the appearance of sharp divisions on the Court can be deceptive. Approximately half of

356. *Id.* at 248.

357. There is evidence that the Tea Party was a product of “Astroturfing”—i.e., a few individuals promoting their politics by establishing what looked like a grass roots movement from the top down. Jeff Nesbit, *The Secret Origins of the Tea Party*, TIME (Apr. 5, 2016), <http://time.com/secret-origins-of-the-tea-party/> [<https://perma.cc/LG8B-7GT8>]. But few popular movements are able to sustain themselves without some leadership at the top: a Washington, a Lenin, a Mandela. Where such leadership is lacking, we see ineffectual movements like Occupy Wall Street. Andrew Ross Sorkin, *Occupy Wall Street: A Frenzy That Fizzled*, N.Y. TIMES (Sept. 18, 2012), https://dealbook.nytimes.com/2012/09/17/occupy-wall-street-a-frenzy-that-fizzled/?_r=0.

358. There are those, Senator Bernie Sanders among them, who would claim that certain intermediate communities (corporations, for the most part) have obtained the upper hand and have created an unhealthy imbalance. Hence the call for “revolution.” Kelly Riddell, *Sanders Calls For ‘Political Revolution’ So He Can Deliver on Policy Proposals*, WASH. TIMES (Feb. 3, 2016), <http://www.washingtontimes.com/news/2016/feb/3/bernie-sanders-calls-political-revolution-make-goo/> [<https://perma.cc/YPE2-344Q>].

359. MAYER, *supra* note 24, at 263. That is why it is so dangerous for a presidential candidate to use a federal judge’s ethnicity to question his impartiality. See Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict’*, WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>. Or, after his inauguration as president, to refer to a member of the judiciary as a “so-called judge.” Donald Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en> [<https://perma.cc/XXN4-7RAT>].

360. Ackerman, *Disputing Together*, *supra* note 12, at 59.

the cases decided by the Supreme Court result in unanimous or near-unanimous decisions.³⁶¹ The 5-4 and 6-3 decisions are not so infrequent as to be called aberrant, but they nonetheless appear in a minority of cases. Not unexpectedly, we direct our attention to these cases because they are the ones in which competing viewpoints come most sharply into focus. But there is apparently more consensus on the Court than most Americans are led to believe.

Even in some of the more controversial cases, the possibility of integrative solutions that accommodate essential interests has not always eluded the Court. The national security cases discussed earlier in this Article³⁶² represent instances in which the Court recognized essential civil liberties without compromising national security. The “least restrictive alternative” doctrine, frequently applied in First Amendment cases³⁶³ and occasionally in other realms,³⁶⁴ encourages government at all levels to pursue a course of action that promotes legitimate state interests while preserving individual rights to the fullest extent possible. Regulatory schemes are struck down only if they place an “undue burden” on constitutional rights; this practice acts in a similar manner.³⁶⁵

Occasionally, the Court can recognize opportunities for the parties themselves to stand on principle without compromising essential values, i.e., opportunities to overcome Mayer’s fourth polarity problem. In *Hobby Lobby*,³⁶⁶ the Court held that employers with religious objections could not be required to provide certain contraceptive coverage under the Affordable Care Act. Thereafter, federal regulations required employers to cover these contraceptives as part of their health plans, unless they submitted a form either to their insurer or to the federal government stating that they objected on religious grounds. In *Zubik v. Burwell*,³⁶⁷ the petitioners alleged that even submitting this form substantially burdened the exercise of their re-

361. The data for the October 2015 term is representative. Out of 75 decided cases, “36 were unanimous, nine were 8-1 or 7-1, 19 were 6-3 or 6-2, and only 11 were decided by one or two votes. Typically, about one in five decisions are 5-4, not all are constitutional cases and the court doesn’t always divide on liberal-conservative lines.” Robert A. Sadler, *As Election Looms, Don’t Panic About the Supreme Court*, DETROIT FREE PRESS, Oct 2, 2016, at A19.

362. See notes 153-69 and accompanying text.

363. See *supra* note 65.

364. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Olmstead v. L.C.*, 527 U.S. 581 (1999); *O’Connor v. Donaldson*, 422 U.S. 563 (1975).

365. Abortion cases such as *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), are good examples of this phenomenon.

366. 134 S. Ct. 2751 (2014), discussed *supra* notes 185-94 and accompanying text.

367. 136 S. Ct. 1557 (2016).

ligion, in violation of the Religious Freedom Restoration Act.³⁶⁸ The Supreme Court requested supplemental briefing addressing “whether contraceptive coverage could be provided to petitioners’ employees, through petitioners’ insurance companies, without any such notice from petitioners.”³⁶⁹

The employer-petitioners and the government confirmed that such an option was in fact feasible. The employers clarified that their religious exercise was not infringed where they “need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception,” even if their employees received cost-free contraceptive coverage from the same insurance company.³⁷⁰ The government confirmed that the challenged procedures “could be modified to operate in the manner posited in the Court’s order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage.”³⁷¹

The Court, therefore, remanded the case, affording the parties “an opportunity to arrive at an approach . . . that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’ ”³⁷² Several federal district courts and four circuit courts had issued inconsistent orders on the matter; apparently, it was not until the case reached the nation’s highest court that a principled compromise was encouraged.

James Madison, who receives much of the credit for the system of checks and balances on which we depend, nonetheless regarded the Constitution as only the starting point for collective discussion and compromise.³⁷³ Opportunities for the Supreme Court to promote principled compromise, as in *Zubik*, are few and far between; integrative solutions (or at least compromise) are more likely obtained earlier in litigation, or—through the political processes—more commonly employed in the legislative and executive branches of government. That is why we would like to see a little more deference on the part of the Court to carefully calibrated solutions in which the legislative process is used to accommodate a variety of interests.³⁷⁴ Hence, kudos to

368. *Id.* at 1559.

369. *Id.* at 1559-60.

370. *Id.* at 1560.

371. *Id.*

372. *Id.*

373. See BRUCE FROHNNEN, *THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM* 88-93 (1996) (ascribing this view of Madison to historian Garry Wills).

374. I hesitate to suggest the crafting of “Pareto-optimal” solutions; only on the rarest of occasions would these be within reach of the political process.

Sebelius (or at least its outcome); less enthusiasm for *Parents Involved*, *Citizens United*, *Heller*, and *Harris*.

IV. CONCLUSION: THE CENTER MUST HOLD

*We are greater than the sum of our individual ambitions, and we remain more than a collection of red states and blue states. We are and forever will be the United States of America.*³⁷⁵

We live in a racially, ethnically, and religiously diverse country. Political divisions are now so deep and so harsh that many Americans have difficulty speaking to one another. There is a sacred text—the Constitution—to which almost all of us subscribe, although we are divided, too, as to precisely what that text means. The United States Supreme Court stands as the ultimate arbiter and interpreter of that text. In a community of communities, it is the Court's role to articulate and explain the secular values embodied in the Constitution, while both differentiating and maintaining respect for the sectarian values espoused by many intermediate communities.

The Court is not and cannot be entirely divorced from politics. But lifetime tenure makes the judiciary the least political of the three branches of government. Unlike the other branches, it is not directly answerable to the popular will, and the political sympathies with which most Justices arrive at the Court tend to mellow over time. The Court functions as a micro-community within the intermediate community that we call the legal profession. That profession has its own rules and practices that create bonding and ultimately bridging social capital. I have said elsewhere:

Litigation may be combat, but it is orderly combat, involving rules of engagement. These rules require a degree of collaboration, even among adversaries. . . . Brother and sister lawyers, though adversaries in litigation, speak a common language, follow a common set of rules . . . attend the same meetings, dine at the same table. The bonding social capital thereby generated enables them to jointly encounter and resolve the many small difficulties encountered in the course of litigation. Cooperation . . . creates strands of social capital that enable attorneys to explore potential agreement regarding the "big things."³⁷⁶

So it is with the Supreme Court. The very *manner* in which the Court goes about its business is important to the building of strong social capital within American society as a whole. As the ultimate arbiter of constitutional rights and the limits of government power, the Court cannot allow itself to get swept into the partisan fray.

375. Barrack Hussein Obama, 2012 Reelection Speech (Nov. 7, 2012).

376. Ackerman, *Disputing Together*, *supra* note 12, at 60-61.

“Like a molecular bond, each conflict represents a strand of social capital that is either torn or repaired, depending on not just the result, but the process utilized for its resolution.”³⁷⁷ No matter how deep their philosophical differences, members of the Court need not and do not replicate the divisions of the more political branches; they indeed try not to behave as if they are in two armed camps.³⁷⁸

The deep personal friendship between Justice Ruth Bader Ginsburg and the late Justice Antonin Scalia was a healthy reminder of this. Of more substance was William H. Rehnquist’s moderating influence after his elevation to the Chief Justice’s seat, and prior to then, Chief Justice Earl Warren’s efforts to maintain unanimity in the Court’s school desegregation decisions.³⁷⁹ We have yet to see whether Chief Justice Roberts’ opinion in *Sebelius* was a genuine effort to find common ground or just an idiosyncratic gesture that temporarily spared an Obama Administration initiative. But we can hope that like some of his predecessors, the Chief Justice will help define and build a broad consensus regarding our essential values. *The center must hold.*

Mayer observes, “[C]onflict work is in large part about helping build and maintain a sense of community in a world in which many forces are trying to atomize us and disrupt the functioning of the natural communities in which we live.”³⁸⁰ The Supreme Court is the ultimate micro-community of conflict professionals. It has our undivided attention, and cannot help but act in a manner befitting our nation’s legal (and in some respects) social arbiter.

Professor Geoffrey Hazard has wisely noted:

The concept of communitarian ethics . . . reminds us that serious questions of right and wrong cannot coherently be considered apart from community, defined somehow. It also reminds us of the many and various connections we have with our fellow human beings. We are each members of many communities, have many

377. *Id.* at 42.

378. Justice Stephen Breyer has noted, “[t]here are good reasons . . . why judges should not hold their fingers up to political winds to see which way they blow. And, in my experience, the Justices do not do so. They do not base their decisions on politics – in any ordinary sense of that word.” Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2013 (2011).

379. The Warren Court “had always been unanimous in school cases, its strong commands to desegregate joined by every member. For fifteen years, the Justices had agreed that it was essential to let the South know that not a single Justice believed in anything less than full desegregation.” BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 40 (1979). As Warren Burger replaced Earl Warren as the Chief Justice of the United States, he struggled to maintain that unanimity in dealing with school desegregation cases. *Id.* at 42-56.

380. MAYER, *supra* note 24, at 261.

roles, and face many and inconsistent expectations as to what our “practices” should be.³⁸¹

Justice Anthony Kennedy, sitting at the Court’s ideological center, is often called upon to articulate our values in the midst of conflict. He is thereby subject to the many and inconsistent expectations of the legal profession and the American public. While one may sometimes disagree with his reasoning, no one can question either his devotion to the nation or his appreciation of community. And so, it is Justice Kennedy’s closing passage in *Obergefell* to which we return:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.³⁸²

Ours is not a country that allows or expects the government, on any level, to do everything for us. But neither are we a country in which we each lurch around as free agents, doing whatever suits us. None of us wish to be condemned to loneliness. Instead, more often than not, we seek out intermediate communities—the institutions of civil society—to give life to our aspirations. The family is the most basic unit of community. For the Supreme Court to recognize an expansive view of the family, as it has in *Obergefell*, is cause for hope that it will give due regard to community as we face an uncertain future.

381. Hazard, *supra* note 29, at 739-40.

382. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (Kennedy, J.).