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Morality as a Legitimate Government Interest

Daniel F. Piar¹

ABSTRACT

In recent years, the Supreme Court has taken inconsistent approaches to the question of whether morality can be a legitimate government interest sufficient to survive constitutional review. This article identifies three such approaches: (1) cases where morality is not considered as a legitimate government interest; (2) cases where morality is a legitimate government interest; and (3) cases where the Supreme Court has substituted its own moral judgment for those of the state actor under review. None of these approaches is wholly satisfactory. This article will argue that, in most cases, deferential review of morality-based state action fosters moral diversity, which is a social good to be sought through the law. In cases of certain minorities, however, a more searching review is justified, and the expression of public morality should be subordinated to the protection of minority rights.

I. INTRODUCTION

For at least the first century of American life, the validity of morals legislation was taken for granted. Courts routinely upheld morals legislation against constitutional challenges. Blasphemy could be punished; prayer required of schoolchildren; sexuality regulated; and other vices prohibited.² Much of this legislation was based on “public morality,” that is, widely shared moral sentiment given the force of law. But the deference given to these expressions of public morality was not to last. Beginning around the early twentieth century, the courts,

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2. See generally Daniel F. Piar, *Majority Rights, Minority Freedoms: Protestant Culture, Personal Autonomy and Civil Liberties in Nineteenth-Century America*, 14 WM. & MARY BILL RTS. J. 987 (2006); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 403-04 (1963); Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 69-70 (2000); Kimberly A. Hendrickson, *The Survival of Moral Federalism*, 96 THE PUB. INT. 101 (2002).

particularly the Supreme Court, began to treat morals legislation differently. In a variety of contexts, courts questioned public morality as a basis for law: state-required displays of patriotism were forbidden;³ laws regulating abortion and sexuality were invalidated;⁴ and moral disapprobation was said to be an insufficient basis for legislation.⁵ At the same time, vestiges of previous attitudes have remained. Although the Court has struck down morally based laws, it has also limited the scope of its decisions to preserve traditional mores against practices such as polygamy, incest, and same-sex marriage.⁶ In some cases, the Court has declared that the expression of public morality remains a legitimate state interest justifying certain laws.⁷ In other cases, the Court has gone so far as to substitute one moral view for another, striking down morals legislation in the name of what arguably is an opposing moral view.⁸

The picture that emerges from these decisions is a murky one from the perspective of public morality. The question remains as to the extent that public morality is a legitimate basis for law. Faced with this question in the twentieth and twenty-first centuries, the Court seems to have taken one of three approaches: (1) declared morality to be an insufficient basis for law; (2) declared morality to be a permissible basis for law; or (3) substituted one moral viewpoint for another. The result has been jurisprudential inconsistency; a deep and lingering uncertainty as to whether state action based on morality is permissible.

This article will argue that the Court's inconsistency with regard to morals legislation ill serves the goals of a pluralistic, federalist society. To the extent that the law prohibits morals legislation, it forecloses state experimentation and stifles expressions of community values. This prohibition has the effect of reducing moral diversity, which is a social good that should be encouraged. The moral diversity that a robust federalism would make possible has important implications in the development of an individual and collective moral sense. Thus, this article proposes that courts should treat the expression of morality as a legitimate state interest for purposes of rational basis review. The net effect of such treatment would be to allow greater moral pluralism in the law; greater fidelity to federalism and democracy; a healthy public discourse; and, ultimately, the development of morality itself.

3. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

4. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

5. *See* *Lawrence*, 539 U.S. at 577-78.

6. *See id.* at 578.

7. *See* *Gonzales v. Carhart*, 550 U.S. 124, 156-60 (2007).

8. *See* *Romer v. Evans*, 517 U.S. 620, 636 (1997) (Scalia, J., dissenting).

II. MORALITY DEFINED

As a threshold matter, it will be useful to define morality because this concept will be discussed throughout the article. The New Oxford American Dictionary defines “moral” as “concerned with the principles of right and wrong behavior.”⁹ Richard Posner, writing in a legal context, defines morality as “the set of duties to others . . . that are designed to check our merely self-interested, emotional or sentimental reactions to serious questions of human conduct.”¹⁰ Michael Perry refers to morality as “a system of normative commitments”¹¹ and to moral judgment as “a judgment about how some matter ought to be dealt with, about how it is good or right or just to deal with some matter.”¹² Drawing from these definitions, and keeping in mind that “morality” is difficult to define with precision, one might say, then, that morality is a set of normative principles about: (1) how humans should properly conduct themselves; and (2) how humans should treat one another, whether acting singly or in the aggregate.

The second part of this definition is especially important to this article. One might think of morals as a matter of personal conduct, but it is also appropriate to think of morals as dictating how the State should behave toward individuals. As this article will examine, in cases where the Court has imposed its own moral views on the law, it has effectively taken a normative position as to how the State should treat the individual or groups of individuals. State action is frequently constrained by moral principles. Thus, when this article refers to “morality,” it may refer to the normative dimension of individual behavior or to the normative dimension of government behavior, depending on the context.

This article does not take a position on the substance or application of any specific moral principles. Such a discussion is a matter for democratic exploration. Nor does this article either advocate or decry the use of law to enforce moral principles.¹³ The enforcement of moral principles is also a question for the democratic process to unravel. Instead, this article asserts that the judiciary should permit morality

9. THE NEW OXFORD AMERICAN DICTIONARY (Erin McKean ed., 2d ed. 2005).

10. Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639 (1998).

11. MICHAEL PERRY, *MORALITY, POLITICS AND LAW* 102 (1990).

12. *Id.* at 95.

13. The most famous debate to date on the enforcement of moral principles is that between H.L.A. Hart and Patrick Devlin. Compare PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1959) (arguing that law should be used to enforce morals), with H.L.A. HART, *LAW LIBERTY AND MORALITY* (1963) (arguing that law should not be used to enforce morals). For a more recent salvo in this debate, see ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1995) (arguing that law should be used to enforce morals).

based state action, regardless of whether the particular substantive results are ultimately advisable.

This article will now proceed in three main parts. Part III offers a brief discussion of *Lawrence v. Texas*,¹⁴ a case that purported to eliminate morals legislation. This article will argue that such a reading of *Lawrence* is not a reasonable interpretation of the case and, indeed, that the Court probably did not mean what it said about the role of morality in legislation. This article highlights *Lawrence* to demonstrate that the end of morals legislation is not truly upon us. Part IV will describe the Supreme Court's three approaches toward morality as a basis for legislation: (1) cases prohibiting it; (2) cases permitting it; and (3) cases wherein the Court imposed its own view of morality in place of local lawmakers' views. Part V will offer an argument for recognizing morality as a legitimate state interest in lawmaking, while highlighting the dangers to moral diversity posed by the constitutionalization of moral questions. It will also discuss both the benefits of moral diversity and some boundaries of this potential state interest. Part VI will offer some concluding thoughts; in particular, that the expression of morality is a legitimate state interest and that treating it as such will ultimately advance the moral development of citizens and society.

III. LAWRENCE V. TEXAS: NOT THE DEATH OF MORALS LEGISLATION

In *Lawrence v. Texas*,¹⁵ the Supreme Court sounded what some have described as the death knell of morals legislation. *Lawrence* involved a challenge to a Texas sodomy statute that criminalized certain sexual acts between same-sex partners. The Texas appellate court had upheld the Texas statute based on *Bowers v. Hardwick*,¹⁶ a 1986 case in which the Supreme Court upheld a similar Georgia statute based in large part on what it saw as the historic moral objections to sodomy. The Supreme Court, however, reversed the appellate court's ruling in *Lawrence*. In addition, Justice Kennedy, writing for the majority in *Lawrence*, overruled *Bowers*. He relied in part on language from Justice Stevens's dissent in *Bowers* to admonish that morality was an insufficient basis for this legislation: "[As Justice Stevens wrote], '[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . .' Justice Stevens' analysis, in our view,

14. *Lawrence v. Texas*, 539 U.S. 558 (2003).

15. *Id.*

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

should have been controlling in *Bowers* and should control here.”¹⁷ In response, the dissent argued that the Court seemed to decree an end to all morals legislation:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable”—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. . . . [The Court] effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.¹⁸

Some scholars analyzing the opinion have come to the same conclusion.¹⁹ But there are reasons to think that the majority’s declaration was an overstatement and is not to be taken literally.

First, the Court itself sought to limit the scope of the *Lawrence* holding. Seeming to backpedal after the passage quoted above, the majority asserted that its opinion did not eliminate laws protecting minors, guarding vulnerable persons, regulating “public conduct” or prohibiting prostitution, nor did it sanction same-sex marriage:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.²⁰

Thus, Justice Kennedy left open for regulation a territory that would seem to be off-limits under a sweeping injunction against morals legislation, which suggests that a total ban was not what the Court truly had in mind.

17. *Lawrence*, 539 U.S. at 577-78 (Stevens, J., dissenting) (quoting *Bowers*, 478 U.S. at 216); see also *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring) (“Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause. . . .”).

18. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (citation omitted).

19. See Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. LAW & POL’Y 25, 69 (2004); see also Calvin R. Massey, *The New Formalism: Requiem for Tiered Scrutiny?* 6 U. PA. J. CONST. L. 945, 957-70 (2004).

20. *Lawrence*, 539 U.S. at 578.

Second, as will be discussed,²¹ Justice Kennedy wrote an opinion in *Gonzales v. Carhart*,²² four years after *Lawrence*, in which he indicated that Congress could ban partial-birth abortion based on the view that the procedure was morally repugnant.²³ Justice Kennedy's opinion on *Gonzales* may seem surprising in light of his majority opinion in *Lawrence*, but it is another indication that even the Justice who wrote the opinion did not mean for his words on morals legislation to be taken literally.

Finally, the Court's declaration in *Lawrence* can be viewed as an overstatement because it is practically impossible to divorce morality from the law in any case. A long litany of regulation, in both criminal and civil law, is morally grounded. In the criminal arena, proscriptions against murder, rape, robbery, incest, bestiality and drug use, to name a few, express society's moral sense that certain acts are intolerable. In civil law, rules against fraud, breach, and negligence reflect society's distaste for certain behaviors. Thus, when society believes that certain behaviors should be prohibited, it uses law to bring about what it views as morally correct or desirable actions or omissions.²⁴

For all these reasons, it seems like an oversimplification to say that *Lawrence* requires an end to all morals legislation. Yet, it does raise the question at the center of this article: is morality ever a legitimate state interest sufficient to justify government action?

IV. JUDICIAL REVIEW OF MORALS LEGISLATION: WHAT COURTS DO

In examining the question of whether morality is a legitimate state interest, it will be useful to survey how courts have treated this issue in practice. The clear trend has been to constitutionalize the subject. That is, courts generally analyze the legitimacy of morality-based state action in terms of its constitutional permissibility, whether as a matter of equal protection or substantive due process. The Supreme Court typically has taken one of three approaches: (1) morality is rejected as a basis for state action; (2) morality is accepted as a basis for state action; or (3) the court substitutes its own moral views for those of the relevant state actor.

A. Cases Rejecting Morality as a Basis

A few cases have rejected morality as a basis for state action. Illustrative of this approach is *United States Department of Agriculture v.*

21. See *infra* Part IV.B.

22. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

23. See *id.* at 157-60; see also *infra* Part IV.B.

24. See, e.g., Posner, *supra* note 10, at 1694.

Moreno,²⁵ a 1973 case that did not rest entirely on moral grounds but nonetheless set the stage for more explicit rejections of morality as a basis for state action in later years. *Moreno* involved the Congressional denial of federal food stamp eligibility to groups of persons living together with at least one unrelated person.²⁶ The Government had initially raised a moral justification for the law, which the district court rejected, and which the Government subsequently abandoned on appeal.²⁷ Nevertheless, the legislative history indicated that Congress designed the law to exclude “hippies” and “hippie communes” from the food stamp program.²⁸ Whether the congressional intent behind the law at issue in *Moreno* may be called a moral position or something else, the Supreme Court would have none of it. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”²⁹ Regardless of the underlying reasons for Congress’s anti-hippie stance, the principle articulated in *Moreno* that seemingly moral positions cannot constitute a legitimate governmental interest would reemerge in a more obviously moral context in later cases.

Indeed, the principle articulated in *Moreno* was addressed over 15 years later in *Romer v. Evans*.³⁰ In *Romer*, the Supreme Court addressed the validity of Colorado’s Amendment Two, which forbade laws protecting homosexuals against discrimination. Citing *Moreno*, the Court struck down the law and held that “[l]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. . . . A State cannot so deem a class of persons a stranger to its laws.”³¹ Justice Scalia, in dissent, thought that the Court had rejected what was apparently an expression of the State’s moral position. “The Court has mistaken a Kulturkampf for a fit of spite. . . . [Amendment 2 is] a modest attempt . . . to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”³² Thus, *Moreno*’s prohibition of class-based animus was extended to strike down an example of morals legislation, thereby implying that

25. U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528 (1973).

26. *Id.* at 529.

27. *Id.* at 535 n.7.

28. *Id.* at 534.

29. *Id.*

30. *Romer v. Evans*, 517 U.S. 620 (1996).

31. *Id.* at 634.

32. *Id.* at 636.

morality, or at least certain types of morality, was not a permissible basis for state action.

As previously mentioned, *Lawrence v. Texas*³³ is arguably the leading case for the proposition that public morality is an insufficient basis for lawmaking. This is especially so in light of the fact that *Lawrence* overruled *Bowers v. Hardwick*,³⁴ a 1986 case with nearly identical facts. In *Bowers*, the Supreme Court upheld Georgia's sodomy law and, in doing so, recognized morality as a legitimate state interest. As Justice White described for the *Bowers* Court:

[Respondent argues that public morality is] an inadequate rationale to support the [sodomy] law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree. . . .³⁵

Lawrence repudiated this thinking, instead quoting and adopting Justice Stevens' *Bowers* dissent. In his *Bowers* dissent, Justice Stevens declared, "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . ."³⁶

As previously noted, *Lawrence*'s prohibition on the use of morality as a legitimate government interest should not be taken too literally.³⁷ Nonetheless, other courts and commentators have cited the case approvingly as a signal of the end of morals legislation. For example, in *United States v. Extreme Associates, Inc.*,³⁸ the Western District of Pennsylvania struck down federal obscenity statutes. In *Extreme Associates, Inc.*, the court declared that the stated purpose of the statutes was to "protect[] unwitting adults from exposure to obscene materials" and was "grounded in the advancement of the public morality, which is no longer a legitimate, let alone a compelling, state interest" after *Lawrence*.³⁹ Similarly, in *Martin v. Zihlerl*,⁴⁰ the Virginia Supreme Court

33. *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

35. *Id.* at 196.

36. *Lawrence*, 539 U.S. at 577-78.

37. *See supra* Part III.

38. *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005).

39. *Id.* at 594. Note, however, that the U.S. Court of Appeals for the Third Circuit reversed the district court's ruling, holding that the commerce power allows Congress to prevent the use of commerce as "an agency to promote immorality." *U.S. v. Extreme Assocs., Inc.*, 431 F.3d 150, 161 (3d. Cir. 2005) (quoting *U.S. v. Orito*, 413 U.S. 139, 144 n.6 (1973)). The Third Circuit essentially ignored the implications of *Lawrence* in favor of more specific precedent on the issue of obscenity. *See id.*

drew on the holding of *Lawrence* to declare the Virginia fornication statute unconstitutional. The court noted that, after *Lawrence*, moral disapproval of a practice is an insufficient basis for state action.⁴¹ Some academic commentary has been in the same vein.⁴²

Collectively, these cases and their progeny stand for the proposition that the expression of morality is not a legitimate government interest. However, other lines of cases have seemingly repudiated this stance, as this article shall discuss next.

B. *Cases Accepting Morality as a Basis*

While *Lawrence*, *Moreno*, and *Romer* seem to reject the idea of morality as a legitimate government interest, a number of cases signal the opposite view. These include cases in the context of obscenity, pornography, sexual conduct, and abortion.

Obscenity is a prime example of how the Supreme Court has recently allowed morality to influence the law. Regulations and statutes regarding obscenity have traditionally had a moralistic tone,⁴³ one that the Supreme Court has seemingly endorsed throughout its free speech jurisprudence. The Court directly addressed whether obscenity was entitled to constitutional protection in the jointly decided *Roth v. United States* and *Alberts v. California*.⁴⁴ In *Roth*, the Court upheld the validity of a federal statute criminalizing the mailing of “[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character.”⁴⁵ In *Alberts*, the Court also upheld a California statute prohibiting obscenity, which was defined as material having “a substantive tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire.”⁴⁶ The moral implications of such words as “filthy,” “deprave,” and “corrupt” seem clear; it therefore appears that the Court at least implicitly upheld the moral position of these statutes.

In a later obscenity case, *Paris Adult Theatre I v. Slaton*,⁴⁷ the Supreme Court openly endorsed the moral component of obscenity law:

40. *Martin v. Zierl*, 607 S.E.2d 367 (Va. 2005).

41. *See id.* at 371.

42. *See* sources cited *supra* note 19.

43. *See generally* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005); David A. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974-75); Henkin, *supra* note 2, at 391.

44. *Roth v. United States*, 354 U.S. 476 (1957).

45. *Id.* at 479 n.1.

46. *Id.* at 499 n.1 (Harlan, J., concurring in part and dissenting in part) (quoting *People v. Wepplo*, 178 P.2d 853 (Cal. App. Dep’t Super. Ct. 1947)).

47. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

“In an unbroken series of cases extending over a long stretch of this Court’s history it has been accepted as a postulate that ‘the primary requirements of decency may be enforced against obscene publications.’”⁴⁸ The Court’s opinion also noted with regard to obscenity:

[There] are legitimate state interests at stake in stemming the tide of commercialized obscenity. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. . . . As Chief Justice Warren stated, there is a “right of the Nation and of the States to maintain a decent society.”⁴⁹

Thus, in *Paris*, The Court upheld regulation in the name of “decency.” The *Paris* case marks a continuance in the Court’s endorsement of morality as a basis for legislation, at least in the context of sexual mores.

In the years after *Roth* and *Alberts*, the definition of “obscenity” remained notoriously elusive with legislators and courts following Supreme Court Justice Potter Stewart’s notorious “I know it when I see it” test for obscenity.⁵⁰ As a result of this difficulty, in *Miller v. California*,⁵¹ the Supreme Court adopted what remains the current test for obscenity—one that recognizes a role, albeit a bounded one, for local expressions of morality. The three-part *Miller* test for obscenity is as follows:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest. . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁵²

The first and second prongs of the *Miller* test permit the possibility of local moral variation. Community standards are relevant under the first prong, whereas state definitions of prohibited sexual conduct are relevant under the second prong. Furthermore, the second prong also envisions the role that a local jury will play in determining whether the depictions at issue are “patently offensive.” Thus, there is a role for local moral attitudes in the regulation of obscenity; however, the author does not intend to overstate the case. The third prong, the Court has held, is an

48. *Id.* at 57 (quoting *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931)).

49. *Id.* at 57-60 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, J., dissenting)).

50. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

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

52. *Id.* at 24.

objective one;⁵³ moreover, verdicts under the *Miller* test are subject to judicial review to ensure that overly sensitive juries do not employ some unspecified standard of hypersensitivity in declaring material obscene.⁵⁴ But in its structure and operation, the *Miller* test does indicate that what is morally repugnant in one community may not be in another, and the test permits obscenity standards to be adjusted, albeit within limits, to local moral reactions.

The so-called “secondary effects” cases also display a permissive attitude toward regulation based on local morality. The “secondary effects” cases involve the Supreme Court upholding laws regulating adult entertainment—typically theaters and bookstores purveying pornographic material. Such laws sometimes restrict adult entertainment venues to certain areas of town, or zone them away from residential areas, bars, and hotels. The standard theory behind such ordinances is that an adult entertainment establishment “tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.”⁵⁵ Accordingly, the Supreme Court has upheld municipal statutes and regulations seeking to prevent such “secondary effects,” so long as these statutes or regulations are content-neutral, meaning they do not directly regulate the content of the underlying speech.⁵⁶ Although the secondary-effects doctrine is supposedly content-neutral, at least one Supreme Court Justice has recognized such an application of the “content-neutral” label is “something of a fiction.”⁵⁷ At bottom, such laws surely proceed from moral objections to the business of pandering sex. The judicial allowance of morality-influenced zoning decisions, albeit under the guise of content-neutrality, represents a tacit endorsement of the enactment of local moral standards into law.

The presence of morality in the context of “secondary effects” laws was highlighted in *Barnes v. Glen Theater*,⁵⁸ in which a plurality of three Supreme Court Justices applied intermediate scrutiny to uphold a state ban on public nudity as applied to nude dancing. Central to the plurality’s reasoning was its view that the law legitimately expressed a moral position: “[T]he public indecency statute furthers a substantial

53. See *Smith v. U.S.*, 431 U.S. 291 (1977); *Pope v. Illinois*, 481 U.S. 497 (1987).

54. See *Jenkins v. Georgia*, 418 U.S. 153 (1974).

55. *Young v. Am. Mini Theatres*, 427 U.S. 50, 55 (1976); see also *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

56. *Young*, 427 U.S. at 62-63.

57. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

58. *Barnes v. Glen Theater*, 501 U.S. 560 (1991).

government interest in protecting order and morality.”⁵⁹ Justice Scalia, concurring, took a slightly more radical position, applying the lower standard of rational basis review—analyzing whether the law was rationally related to a legitimate government interest—and opining that “[m]oral opposition to nudity supplies a rational basis for its prohibition.”⁶⁰ Notably, the four dissenters did not entirely dismiss the possibility of morals legislation. Instead, they would have applied strict scrutiny—analyzing whether the law serves a compelling government interest—and overturned the statute because it targeted expressive activity in particular, rather than nudity more generally.⁶¹ Thus, in the dissenters’ view, “the plurality and Justice Scalia’s simple references to the State’s general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity.”⁶² Although *Barnes* did not generate a majority opinion, it is instructive for its recognition, among all the Justices, that laws of this type do have a moral basis.

In *Washington v. Glucksberg*,⁶³ the Supreme Court was more explicit in its endorsement of morality as a basis for state action. In *Glucksberg*, the Court upheld Washington’s ban on the rendering of assistance in committing suicide. The ruling was, in part, based on what the Court perceived as society’s moral disapproval of the act:

In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States’ assisted-suicide bans [are] longstanding expressions of the States’ commitment to the protection and preservation of all human life. Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal and cultural heritages.⁶⁴

Later in the opinion, the Court referred to the State’s “unqualified interest in the preservation of human life.”⁶⁵ Thus, the Court did not use the term “moral,” but it clearly considered the State’s moral concerns

59. *Id.* at 569 (opinion of Rehnquist, J.). The wording of the statute at issue was not particularly moralistic: “A person who knowingly or intentionally, in a public place: . . . (3) appears in a state of nudity . . . commits public indecency, a Class A misdemeanor.” The term “nudity” was clinically defined as “the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.” *Id.* at 569 n.2.

60. *Id.* at 580.

61. *See id.* at 587-96.

62. *Id.* at 590.

63. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

64. *Id.* at 710-11.

65. *Id.* at 728 (quoting *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 282 (1989)).

when evaluating the ban's validity. The Court's references to the preservation of life, and its invocation of culture and philosophy, merely skirted what seems apparent: the Court was permitting a moral stance against suicide to stand as state law.

Finally, the Supreme Court's most recent abortion case also demonstrates an approval of morals legislation. In *Gonzales v. Carhart*,⁶⁶ the Court upheld a Congressional ban on so-called "partial birth" abortions. In an opinion laced with moral language, Justice Kennedy expressed the majority's approval of Congress's *disapproval* of the abortion techniques at issue. After a detailed and gruesome account of the relevant medical procedures—which itself seemed designed to reinforce the Court's negative moral attitude towards such procedures—the Court addressed Congress's intent in prohibiting the procedures:

A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." The Act expresses respect for the dignity of human life.⁶⁷

The Court then wrote, "[T]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman."⁶⁸ Aside from preventing the "coarsening" of attitudes toward humanity and "respecting" the "dignity" of human life—two moral positions if there ever were any—the law permissibly invoked a third moral concern:

Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide."⁶⁹

The prevention of infanticide, or at least procedures resembling infanticide, was another overtly moral position that the law permissibly furthered.

66. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

67. *Id.* at 156.

68. *Id.* at 157.

69. *Id.* at 158.

Finally, the Court held that the law served the moral purpose of protecting a woman from trauma that could ensue if she were to learn how her fetuses had been aborted:

The State has an interest in ensuring so grave a choice [as abortion] is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.⁷⁰

Gonzales thus acknowledged the permissibility of codifying several moral judgments: the inhumanity of partial-birth abortions, the dignity of human life, the prevention of infanticide or its look-alikes, and the need to protect aborting mothers from emotional distress. The fact that the Court upheld morals legislation only four years after its polar decision in *Lawrence*, and that the same Justice authored the two opinions, indicates that morals legislation is not so passé as some observers might think.

C. *The Judicial Substitution of Morality*

At times, the Supreme Court has concluded that morality is a sufficient basis for legislation, and, at other times, it has said just the opposite. A third option occasionally used by the Court is the substitution of the Court's own moral position for that of the state action under review. This approach can be seen in a variety of individual rights contexts, including privacy rights, First Amendment rights, and equal protection rights. In these situations, the Court has taken its own stance on what is right and wrong with respect to a particular state action. That is, the Court has seemingly dictating how governments must behave based on its own implicit or explicit notions of what is normatively right or wrong for government to do.

This approach has not gone unnoticed. In a book-length treatment of the issue, Stephen E. Gottlieb advances the idea that the Rehnquist Court imposed an essentially right-wing morality on the nation.⁷¹ Rejecting the principles of individual moral autonomy and the avoidance of harm as grounds for review, the Justices, in Gottlieb's view, have "substituted more personal views of a just world" by deciding cases in

70. *Id.* at 159-60.

71. STEPHEN E. GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA*, 29, 34, 62 (2000).

accordance with “conservative morality.”⁷² Similarly, Wojciech Sadurski has identified the process of moral substitution at work on the “liberal” side of the Court, particularly in the opinions of Justices Thurgood Marshall and William Brennan in *Furman v. Georgia*.⁷³ Nevertheless, this article is focused less on the imposition of a particular strain of morality and is instead concerned with the imposition of moral standards generally, whether labeled as “liberal,” “conservative,” or something else. It is the process of moral substitution itself that the author hopes to emphasize, not the particular camp from which the substitution originates.

Indeed, Gottlieb focuses on the imposition of “conservative morality,” but the practice of moral imposition is evident in some of the Supreme Court’s landmark “liberal” opinions. In privacy cases, one of the early examples is *Griswold v. Connecticut*,⁷⁴ in which the Court struck down a Connecticut statute prohibiting the use of contraceptives as applied to married couples. The statute, which dated back to 1879,⁷⁵ was defended by the state as “a legitimate exercise of the state’s police power to regulate public morals” by preventing extramarital sex.⁷⁶ The Court rejected this argument in part by substituting its own moral stance for that of the Connecticut legislature. Although much of the opinion concerned the infamous “penumbras” and “emanations” of the Bill of Rights,⁷⁷ the Court’s conclusion centered on the sanctity of marriage. In a passage with distinct moral overtones, Justice Douglas wrote:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁷⁸

In overturning the statute, the Court thus implicitly found that its moral view of the sanctity of marriage overrode Connecticut’s moral view that fornication and adultery should be prevented.

72. *Id.*

73. Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339 (1987) (“Justice Marshall’s appeal to popular sentiment must, therefore, be seen as a disguise for his own substantive morality.”).

74. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

75. *Id.* at 527 (Stewart, J., dissenting); Brief for Appellee at 7-8, *Griswold v. Connecticut*, 381 U.S. 479 (1965), 1965 WL 92620.

76. Brief for Appellee at 13, 15, *Griswold v. Connecticut*, 381 U.S. 479 (1965), 1965 WL 92620.

77. *Griswold*, 381 U.S. at 484.

78. *Id.* at 486.

A similar dynamic influenced the Supreme Court eight years later in *Roe v. Wade*.⁷⁹ In *Roe*, the Court made a moral choice among the conflicting claims of the unborn, the State, and the woman regarding an abortion law. The Court expressly rejected the State's moral position that life begins at conception and should be protected except to save the life of the mother. "[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."⁸⁰ Opposed to Texas's view was another moral position: that the woman's right to control her body precluded state intervention in the abortion decision.⁸¹ The Court generally sided with the woman's position, holding that the interests of the woman, at least for the first two trimesters, outweighed the State's interest in fetal life. The Court also held that a fetus was without rights in the matter because it was not a legal "person."⁸² Thus, the Court made a moral choice by throwing its weight behind the moral position advanced by the plaintiffs. In other words, the Court substituted its own moral views for those of the Texas legislature.

This process of moral imposition continued in *Planned Parenthood v. Casey*,⁸³ another Supreme Court abortion case. In *Casey*, the Pennsylvania legislature had passed a set of five abortion restrictions, some of which the Court upheld and others of which the Court struck down. In its opinion, the Court began by reiterating the moral judgment contained in *Roe*: "[The] essential holding [in *Roe* includes] a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."⁸⁴ The Court went on to examine the concept of "liberty," which it addressed in moral terms: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . . The destiny of the woman must be shaped to a large extent on her spiritual imperatives and her place in society."⁸⁵ The statement appears to be a moral proposition, denying the State the ability to influence a woman's freedom to make choices about her mode of living and her metaphysical obligations. This moral philosophizing highlights the Court's willingness to deploy its own moral reasoning in support of its judgments.⁸⁶

79. *Roe v. Wade*, 410 U.S. 113 (1973).

80. *Id.* at 162.

81. *Id.* at 129, 153.

82. *Id.* at 162.

83. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

84. *Id.* at 846.

85. *Id.* at 851-52.

86. It is significant in this context to note the erosion of the abortion right. Beginning with *Roe*, which placed the first trimester off-limits to state regulation, the

The Supreme Court has not limited its morality-based approach to decisions to abortion cases. In *West Virginia State Board of Education v. Barnette*,⁸⁷ the Court addressed whether a state school board could compel a student to salute the flag. Although the law at issue was not necessarily morals-based, the Court's response set a moralizing tone for adjudication that would resurface in later cases. In declining to uphold the law, the Court relied on its own judgment that one's spiritual and mental sanctity were more important than the instillation of patriotism. "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein . . . [this law] invades the sphere of intellect and spirit. . . ."⁸⁸ By setting up a spiritual barrier to state action, the Court endorsed the essentially moral position that certain realms of personal autonomy were off-limits to the State.

Fifty years later, in *Lee v. Weisman*,⁸⁹ the Supreme Court struck down the practice of non-sectarian prayer offered at a middle-school graduation ceremony. Central to the Court's reasoning was its view that the offering of the prayers put "subtle coercive pressure" on the students either to stand in apparent assent or to sit in conspicuous disagreement.⁹⁰ Forcing schoolchildren to make this choice, the Court wrote, was an "unacceptable constraint" in favor of state-enforced "orthodoxy."⁹¹ In line with this reasoning, the Court recalled *Barnette*'s admonition against compelled displays of obeisance. The Court seemed concerned about the potential imposition of state-sponsored morality, though it failed to see that it had also taken a moral position: that individual freedom of mind, cast as freedom from embarrassment or difficult choices, is a good to be valued more highly than the widely shared mores of a community. This is also a moral "orthodoxy," although the Court would probably not admit it.

Court next decided *Casey*, which said that the state could regulate from conception so long as it did not impose an "undue burden" on the abortion decision. See *Planned Parenthood v. Casey*, 505 U.S. 833, 837 (1992). Then, in *Gonzales*, the Court for the first time upheld a ban on a particular abortion procedure, in the process lowering the standard of review from *Roe*'s (ostensibly) strict scrutiny to rational basis plus undue burden. See *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007). Therefore, one might wonder whether abortion is truly a fundamental right any longer. If it is not, and given the moral freight borne by *Casey* and *Gonzales*, one might well see this as a retrenchment of the abortion right and a consequence of increasing moral unease on the Court, coupled with increasing adjudicatory opportunities with respect to abortion.

87. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

88. *Id.* at 642.

89. *Lee v. Weisman*, 505 U.S. 577 (1991).

90. *Id.* at 592.

91. *Id.* at 594.

Finally, in *Romer v. Evans*,⁹² the Court struck down a Colorado constitutional amendment that would have denied special protections to anyone based on sexual orientation. As Justice Scalia noted in his dissent, the amendment was likely an expression of popular morality, an attempt by Coloradoans to “preserve traditional sexual mores.”⁹³ However, the majority of the Court, again led by Justice Kennedy, refused to accede to that moral choice. Citing *Moreno*,⁹⁴ the Court concluded that the amendment was “born of animosity toward the class of persons affected.”⁹⁵ The amendment would have deprived gays and lesbians of “protections against . . . an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”⁹⁶ Such laws, the Court wrote, are “not within our constitutional tradition.”⁹⁷ In striking down the amendment, the Court made its own moral choice. Running throughout the opinion is the assumption that our “free society” and “constitutional tradition” should be construed to prevent the hurtful exclusion of people based on sexual orientation. This assumption is an essentially moral position that inverts the one taken by Colorado’s voters.⁹⁸

Thus, this article shows that the Supreme Court has taken varying and conflicting positions on the role of morality as a legitimate state interest. Next, this article will focus on the question of how courts should approach the issue of morals legislation.

V. JUDICIAL REVIEW OF MORALS LEGISLATION: WHAT COURTS SHOULD DO

Having examined the Supreme Court’s inconsistent treatment of morality as a basis for state action, this part will consider an alternative approach. Standing on their own, each of Court’s three approaches seems to be unsatisfactory. The Court’s blanket acceptance of morality as a basis for state action raises the risk of enabling oppressive results

92. *Romer v. Evans*, 517 U.S. 620 (1996).

93. *Id.* at 636. Indeed, the leading proponents of the Colorado amendment have been documented as supporting the law as an effort to preserve sexual mores. *See Romer v. Evans*, DUKE UNIV. SCH. OF LAW, <http://www.law.duke.edu/voices/romer#> (last visited Aug. 12, 2012).

94. *U. S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

95. *Romer*, 517 U.S. at 634.

96. *Id.* at 631.

97. *Id.* at 633.

98. In this sense, the Court’s ruminations on “free society” and “our constitutional tradition” in *Romer* serve as a cover for substantive moral choice. *See, e.g., Sadurski, supra* note 73, at 395 (“Those who tell us what ‘the teaching of our tradition is’ appeal usually to a teaching of our tradition (not necessarily the prevailing one) which they happen to endorse.”).

and the possibility of tyranny of the majority. The substitution of morality makes the Court a moral arbiter, a role for which it is ill suited.⁹⁹ Furthermore, the rejection of morality as a basis for lawmaking seems potentially undemocratic and unduly dismissive, at least for a democratic society, of the desires of communities to assert their collective standards of behavior.

For these reasons, some alternative, or middle ground, among these three approaches should exist. This article will argue that the best approach gives communities free rein to express their moral beliefs in legal terms, but only to a certain point. In brief, this next part proposes that courts should treat morality as a legitimate state interest, applying rational basis review to morality-based state action except when it threatens a “discrete and insular minority” or the political process itself.¹⁰⁰

A. *In Praise of Moral Diversity*

Why should courts treat morality as a legitimate basis for state action? One answer is that enabling morals legislation will yield particular moral results that are of substantive benefit to individuals and society.¹⁰¹ Another answer is that judicial restraint in this area will support democracy by allowing majorities to have their way. Scholars have also argued that legislatures are inherently more competent to discern and implement public morality than judges, at least where the judges are unelected.¹⁰² Notwithstanding these are legitimate arguments, this article will explore a different justification for the state interest in morality: it fosters moral pluralism, or what the author calls “moral diversity.” Central to this article is the idea that moral diversity is a benefit to be pursued in society and in law.

The existence of differing moral views is one of the essential traits of modern American society. As stated by Andrei Marmor, pluralism is “the most significant moral aspect of the social-political world we live in.”¹⁰³ The reasons for honoring pluralism are many, and any constitutional regime that does not facilitate pluralism is seriously

99. For an exposition of this charge, see ANDREI MARMOR, *LAW IN THE AGE OF PLURALISM* 109-10 (2007); see also Posner, *supra* note 10, at 1709.

100. Footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), gave rise to the possibility of various levels of review for laws and their purported underlying state interests. For more on footnote four from *Carolene Products*, see *infra* Part V.C.

101. See, e.g., GEORGE, *supra* note 13.

102. See, e.g., Sadurski, *supra* note 73, at 350 (“[T]he presumption that, by and large, legislators are responsive to the moral sentiments in the community seems well founded.”).

103. MARMOR, *supra* note 99, at vii.

flawed, if not illegitimate.¹⁰⁴ In reviewing the reasons for encouraging moral diversity, we can better understand some of the consequences of this social good for the judicial review of morality-based state action.

One reason to respect moral diversity is the basic commitment of liberalism to a robust pluralism. “[I]t has been the benchmark of liberalism for centuries that there is a sense in which value pluralism, and not just plurality, is reasonable.”¹⁰⁵ If, under the influence of liberalism, we recognize the equality of individuals, freedom of thought, and freedom of speech, it is inevitable that moral disagreement will arise. Indeed, “moral and practical disagreement seems endemic to the human condition.”¹⁰⁶ Given the inevitability of such pluralism, liberalism seeks to foster, not impede, moral disagreement. This is especially true in a system where consent governs citizens rather than fiat, where citizens seek to operate by reason rather than by revelation. “Founded on consent rather than on a content-full account of moral rationality, limited democracies are morally constrained, not to be committed to all-encompassing, content-full accounts of justice, fairness, and/or equality.”¹⁰⁷ Thus, “rightly understood, liberalism is about the protection of diversity.”¹⁰⁸ Liberalism is not about the promotion of homogeneity in matters so squarely touching human independence and dignity.

Aside from honoring our liberal commitments, moral diversity can benefit society and individuals. Moral diversity can contribute to the solution of social problems, giving society a kind of hybrid vigor that is practically useful in overcoming obstacles. Warning against what he calls “the perils of uniformity,” Judge Richard Posner writes:

[G]iven the variety of necessary roles in a complex society, it is not a safe idea to have a morally uniform population. . . . We need kind, gentle and sensitive people, but we also need people who are willing to employ force, to lie, to posture, to break rules, to enforce rules, to fire people, to rank people. . . . A uniform judiciary would not be a national disaster; moral uniformity might well be.¹⁰⁹

Amelie Rorty echoes Judge Posner’s point: “Lacking the kind of variety on focus and in action-guiding priorities that most problem solving

104. *See generally id.* ch. 4.

105. *Id.* at 45.

106. Larry Alexander & Frederick Schauer, *Law’s Limited Domain Confronts Morality’s Universal Empire*, 48 WM. & MARY L. REV. 1579, 1583 (2007).

107. H. Tristram Engelhardt, Jr., *The Injustice of Enforced Equal Access to Transplant Operations: Rethinking Reckless Claims of Fairness*, 35 J.L. MED. & ETHICS 256, 262 (2007).

108. William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236 (1998).

109. Posner, *supra* note 10, at 1681-82.

requires, a homogeneous culture would have great difficulty managing its practical affairs.”¹¹⁰ In other words, a society made exclusively of saints could not thrive any more than one made exclusively of sinners. The entire spectrum of human proclivities must be tapped to meet the demands of a complex world.

Moral diversity is also a relatively safe option in a world where we have learned that ideology can be dangerous. The pluralism offered by moral diversity may reduce the risk of moral or social error. Simply put, the more moral views there are, the less likely an all-encompassing morality might overtake society that is erroneous or unworkable. As Robert Cover explains, “If there were a unitary source for norm articulation over a given domain, the costs of error or lack of wisdom in any norm articulation would be suffered throughout the domain.”¹¹¹ That is, the more we centralize morality, the more entrenched and far-reaching our mistakes will be. A morally diverse environment can minimize this risk and maintain a balance between the proponents and opponents of any controversial moral principle. “The multiplicity of centers means an innovation is more likely to be tried and correspondingly less likely to be wholly embraced. The two effects dampen both momentum and inertia.”¹¹² Society, therefore, can keep a relatively even keel while simultaneously searching for generally acceptable truths.

Moral diversity can likewise stabilize society by allowing the expression, rather than the suppression or repression, of inevitably divergent moral views. Justice Scalia has recognized this phenomenon in case law concerning the abortion debate. In a prominent dissenting opinion, Justice Scalia notes that the federalization of the abortion debate fanned the flames of conflict by polarizing the population, rather than by leaving people to work out their differences through the democratic processes of compromise and conciliation.¹¹³ Moral diversity can ease such conflicts by enabling all to be heard and to feel that they have had a hand in public decision-making. Thus, as Kimberly Hendrickson states, “We should be grateful to moral federalism as a vent for frustration.”¹¹⁴ Failure to provide such a vent can escalate conflict, leading to division or worse. “If . . . reasonable citizens are routinely thwarted in public decisions on matters deeply important to them, they may adopt

110. Amelie Oksenberg Rorty, *The Advantages of Moral Diversity*, 9 SOC. PHIL. & POL’Y 38, 43 (1992).

111. Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 WM. & MARY L. REV. 639, 673 (1981).

112. *Id.* at 674.

113. See *Planned Parenthood v. Casey*, 505 U.S. 833, 995-96 (Scalia, J., concurring in part and dissenting in part).

114. Hendrickson, *supra* note 2, at 109.

increasingly unreasonable strategies of resistance, or simply opt for exit, forging instead their own just polity in which their political conception of justice is authoritative.”¹¹⁵ Alternatively, instead of making a peaceful exit, frustrated people may decide that other, more harmful forms of action are required. The official centralization of morality “cuts off deliberation and debate . . . makes compromise impossible, and . . . eliminates political solutions and thereby drives opponents of the decision to non-political ‘direct action.’”¹¹⁶ One must only think of violence at abortion clinics or clashes between police and demonstrators in the Occupy movement to realize the perils of this course. Better to tolerate what William Galston calls “the messiness of politics,” thereby avoiding “a pernicious legalism that absolutizes competing claims and creates winner-take-all outcomes.”¹¹⁷

In addition to tempering frustrations, moral diversity can stave off conflict by moderating our expectations of society and its constituent groups. Those who accept that moral difference is a reality are less likely to become upset or alienated when their views fail to carry the day. Instead, this outcome can be accepted as an incident of a morally diverse populace. “[A]t least some principles are best left ambiguous, and some crucial moral and ethical conflicts are best understood, and best arbitrated, as failures of practical cooperation rather than as disagreements about the truth of certain general propositions or theories.”¹¹⁸ Indeed, the acceptance of moral diversity provides a realistic basis on which to found society:

The quest for agreement on a conception of the good (the aim, *e.g.*, of some communitarian theories) underestimates the significance and legitimate persistence of fundamental moral disagreement. In a pluralist society, comprehensive moral theories neither can nor should win the agreement of all citizens. A public philosophy for such societies must reject the unqualified quest for agreement because it must renounce the claim to comprehensiveness.¹¹⁹

115. Loren A. King, *The Federal Structure of a Republic of Reasons*, 33 POL. THEORY 629, 649 (2005); see also Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1540 (1989) (book review) (describing *Roe v. Wade* as a decision “that cuts off deliberation and debate, that makes compromise impossible, and that eliminates political solutions and thereby drives opponents of the decision to non-political ‘direct action’”).

116. McConnell, *supra* note 115, at 1540.

117. Galston, *supra* note 108, at 244.

118. Rorty, *supra* note 110, at 38.

119. Amy Gutmann and Dennis Thompson, *Moral Conflict and Political Consensus*, 101 ETHICS 64, 86 (1990).

A “public philosophy” that anticipates and embraces disagreement is likely to be more durable and flexible than one that seeks to achieve an unrealistic uniformity.

Moral diversity can also enhance interpersonal and inter-group relationships by encouraging respect for others. The continued encountering of moral perspectives different from one’s own can force a reevaluation of one’s position, thereby fostering an increased regard for those who differ from oneself. “[O]pen discussion of differences of opinion . . . is the best cure for the fallibility of narrow dogmatism; it presses for the refinement of crude and imprecise beliefs.”¹²⁰ For this reason, “enhanced interpersonal respect . . . tends to result from exposure to moral complexities.”¹²¹ Such respect is more than mere toleration: “It requires a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees.”¹²²

These kinds of “constructive interactions” can be of benefit in seeking and deciding on a shared course of action in a society. “[T]he very nature of reasonable disagreement . . . encourages vigorous debate that will likely challenge settled convictions about rights and the character of the public sphere within each distinctive community of reasonable beliefs.”¹²³ Such debate does a great deal to temper opposing views and to bring about support for the practical decisions that society must make about how citizens will govern themselves. “It is not only possible for various moral positions to co-exist, it is preferable. Without such friction, social reform would be impossible.”¹²⁴ Morally tolerant interaction can therefore guide society toward making the substantive moral choices that are necessary in a polity. “Mutual respect makes possible, at the level of political decision, the deliberate choice of substantive moral values for the society as a whole.”¹²⁵

At the same time that moral diversity promotes social goods, it can also enhance individual moral development. Contact with other moral beliefs in an atmosphere of mutual respect breeds moral insight. As explained by Amy Gutmann and Dennis Thompson, “[M]utual respect supports a political process that promotes moral learning. Citizens put their moral beliefs to the test of public deliberation and strengthen their convictions or change their minds in response to the arguments in which

120. Rorty, *supra* note 110, at 52.

121. Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 854 (2002).

122. Gutmann and Thompson, *supra* note 119, at 76.

123. King, *supra* note 115, at 646.

124. Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and Their Clients*, 23 HARV. WOMEN’S L.J. 1, 33 (2000).

125. *Id.* at 77.

they engage under conditions governed by the principles of accommodation.”¹²⁶ This process of moral learning in turn promotes individual moral virtue:

[M]utual respect can contribute not only to social good but also to individual virtue. Persons who practice mutual respect are disposed against the premature moral skepticism, and the concomitant ennui and indecision, that afflict those who treat the existence of conflicting opinions as proof of the arbitrariness of all moral judgments. . . . They are also less inclined toward moral dogmatism, and its accompanying anger and arrogance, that is common among those who treat moral disagreement as a sure sign of the ignorance or depravity of their opponents.¹²⁷

In addition to making people less dogmatic, moral diversity can help them achieve self-actualization. Reed Elizabeth Loder explains: “Moral diversity is a potential pathway to personal betterment. This developmental stake helps to ensure that changes in attitudes are not easy or arbitrary fluctuations, but well-examined steps toward a higher image of self. A personal search for moral wisdom drives the ideal process.”¹²⁸ In other words, exposure to other moral ideas, with an accompanying introspection, can aid the search for personal growth.

Moral diversity therefore offers the benefits of realism, toleration, political stability, and individual development. For all of these reasons, “Moral cultivation in a liberal state cannot insist on a uniform morality.”¹²⁹ This sentiment should caution against the process of judicial moralizing as opposed to judicial deference.

One might argue that, if moral diversity is such an important good, citizens should not tolerate *any* codification of morality. Surely, a local legislative enactment can have the same totalizing effect as a judicial decision, thereby squelching moral diversity just as effectively. Several responses to this point exist. First, insofar as judicial decisions in this area are constitutional ones, they are very difficult to overturn if courts get them wrong. Legislative enactments have the virtue of quicker reversibility, which allows for greater moral flexibility and for moral growth over time. Second, there are reasons to suggest that legislatures would more accurately reflect the moral positions of communities than would courts, thereby making legislation a truer channel through which moral diversity can flow. While electoral politics are assuredly flawed—

126. Gutmann and Thompson, *supra* note 119, at 86-87.

127. *Id.* at 77.

128. Loder, *supra* note 121, at 854.

129. Mark Hager, *Why the Boy Scout Case Was Rightly (But Wrongly) Decided*, 35 CONN. L. REV. 129, 150 (2002).

compromised as they may be by lobbyists, interest groups, campaign money and problems of scale—they are nonetheless more democratic and more accountable to the electorate than are unelected federal judges. As Sadurski notes, “[A]ssuming a well-functioning democracy, the presumption that, by and large, legislators are responsive to the moral sentiments in the community seems well founded.”¹³⁰ Third, differences exist between local legislators codifying morals and judges imposing moral views on the population. Especially in regards to the Supreme Court’s jurisprudence, judicial moralizing has a widespread effect, which may be regional or national in scope. Local legislatures, by contrast, affect only smaller political units, thus ensuring that mistakes are confined. Finally, laws that are the product of smaller political units offer a greater hope of assent than those embracing a more widespread population. As Andrei Marmor observes, “At least from the vantage point of respect for value pluralism, a regular democratic process, that is, basically a majority vote, has this moral advantage: It is importantly egalitarian.”¹³¹ If morality is virtually unavoidable in the law, then it makes sense to leave this codification to the most flexible, localized government units possible, which are local legislatures rather than centralized courts.

B. The Perils of Constitutionalism

The Constitution, wrote Oliver Wendell Holmes, “is made for people of fundamentally differing views.”¹³² It is also “a means for peaceable collaboration in the face of intractable moral difference.”¹³³ However, as discussed above, constitutional decisions often attempt to impose a uniform morality, resting legal decisions on moral grounds that may not allow moral diversity to express itself sufficiently through law. This outcome occurs whenever the Supreme Court or some lower federal court either rejects local morality as a basis for state action or substitutes its own moral views for those of the legislature or electorate. The constitutionalization of morality in such cases is inimical to moral diversity and is therefore morally and politically suspect. Understanding the perils of constitutionalism can help to assess more clearly “the threat that unmediated state power poses to moral diversity.”¹³⁴

130. Sadurski, *supra* note 73, at 350.

131. MARMOR, *supra* note 99, at 101.

132. *Lochner v. New York*, 198 U.S. 45, 76 (Holmes, J., dissenting).

133. Engelhardt, *supra* note 107, at 262.

134. Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 959 (1993).

Over the course of the last century, constitutional adjudication has had a homogenizing influence on American life, particularly regarding questions of civil rights, which often invoke moral issues. The rules proclaimed by the courts have regional or national application, which tends to push all local governments in the same direction with respect to what they may or must do in promulgating laws in areas of moral dimension. By entrenching a judicially desired moral response in constitutional law, the courts solidify their preferred moral regime at the expense of local expressions of morality. Andrei Marmor observes, "Constitutional entrenchment of values, or of conceptions of the right and the good, necessarily favors certain conceptions over others by essentially shielding some favored moral-political conceptions from the democratic decision-making process. It is very difficult to see how this shielding is compatible with respect for pluralism."¹³⁵ Kimberly Hendrickson makes the point more succinctly: "Federal courts have been active in stamping out moral diversity in the pursuit of national ideals, at least since Reconstruction."¹³⁶

Consequently, many of the benefits of moral diversity are being eroded or lost. Michael Perry expresses a sentiment typical of those who support this trend toward uniformity:

As a practical matter, the public welfare limit calls for a national and not a local standard for determining the scope of the public morals. Of course, the constitutional basis of the limit, the fourteenth amendment, is national in its operation. But beyond that, it simply would not do to have one constitutional rule for abortion legislation in California and another in, say, Rhode Island.¹³⁷

Perry does not explain why this "simply would not do," nor do most other proponents of national uniformity. Is variation really so distasteful in a federal system? After all, society tolerates a wide variety of laws in the commercial realm and in civil areas such as tort law. Why should laws with moral dimension be any different? In light of the various benefits of moral diversity, why should society be subject to a unifying morality based on a perceived constitutional mandate?

To the contrary, there are several reasons why society should not tolerate any tendency toward moral homogeneity. First, as noted above,¹³⁸ there are various benefits of moral diversity. The more morality is centralized, the more society will lose the social flexibility,

135. MARMOR, *supra* note 99, at 100.

136. Hendrickson, *supra* note 2, at 106.

137. Michael J. Perry, *Abortion, the Public Morals and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 732 n.201 (1976).

138. See discussion *supra* Part V.A.

political stability, and individual moral opportunity that moral diversity can provide. Lacking these ideals, society will drift farther from classic liberalism toward a sort of moral totalitarianism.

Further, the centralization—that is, the constitutionalization of morals—may actively discourage the kinds of moral growth that moral diversity can bring, both in the individual and within political units. To the extent that courts dictate moral positions of law, there is little reason for the populace to grapple with the relevant moral questions. Simply put, why should society engage in moral thought and dialogue if the courts are going to do the thinking for it? “[N]ot only do Supreme Court opinions contain little serious moral reflection, but they serve as an excuse for dispensing with moral reflection at other levels of government. . . . Constitutional adjudication is not a supplement to moral-political deliberation; it is often a substitute.”¹³⁹ As discussed above, the loss of localized moral deliberation exacts costs in political conflict and a stultifying of individual moral sense.

This point is not a full-scale attack on judicial review, a matter well outside the scope of this article. With respect to moral diversity, however, it is uncertain whether judges are better suited than the people or their elected representatives to make moral decisions. Judges are rarely appointed or elected for their moral wisdom; more often, judges are chosen for their political connections, practical acceptability to some Senate members, or legal acumen. To find this process acceptable as a source of moral rights and principles makes it necessary “to assume that . . . we can be sufficiently confident that a judicial determination of those rights and principles is going to yield *better results* than its democratic alternative.”¹⁴⁰ Evidence for such an assumption is sparse. In fact, it requires a degree of prescience not normally associated with human nature to think that people can know in advance when democracy will get it wrong and judges will get it right.¹⁴¹ According to Marmor, a presumption in favor of democratic action is “importantly egalitarian,”¹⁴² and it is more consistent with liberalism and a “moral concern about the need to respect value pluralism.”¹⁴³ If the author may to dare dream a democratic dream, “it is . . . possible that citizens do not need constitutional ideals or constitutional text to pursue their preferred views. Perhaps their own ideals will do the trick.”¹⁴⁴

139. McConnell, *supra* note 115, at 1537.

140. MARMOR, *supra* note 99, at 99.

141. *Id.* at 109-10.

142. *Id.* at 101.

143. *Id.* at 100.

144. Cass R. Sunstein, *Second Order Perfectionism*, 75 *FORDHAM L. REV.* 2867, 2870 (2007).

The benefits of moral diversity and the perils of judicial moralizing suggest that courts should treat the expression of morality as a legitimate government interest to foster such diversity and limit judicial centralization. This idea dovetails with the well-known rational basis scrutiny standard, the default level of scrutiny for reviewing government action, under which courts will uphold a law unless its challenger can show that it is not rationally related to some legitimate government interest.

Two difficulties are now left to discuss. First, how will courts know when a law is an expression of morality sufficient to trigger this deferential review? Second, how will this rule prevent the oppression of minorities? As to the first question, the glib answer might be that courts will know it when they see it. To cite an extreme example, an ordinance imposing weight limits on trucks obviously does not have the same moral content as a law forbidding polygamy. Generally, judges and citizens will be able to distinguish a morals law from another type of law. When the distinction is less clear, the risk of error is minimal. Absent some clear legal defect, such as discrimination against a legally protected class,¹⁴⁵ these instances are likely to involve laws in which reasonable people might differ. Withholding judicial action still leaves open the safety valve of further democratic action. If citizens demand a more precise accounting, the purpose of the law can be discerned in several other ways, consistent with current legal practices. One method would be to examine the legislative history, which may reveal evidence of legislative intent.¹⁴⁶ Another would be to rely on inferences drawn from the plain language of the statute as to its actual purpose. A third method would be to look to any plausible purpose that can be derived from the face of the law or the arguments of counsel, which is the most common practice in cases under rational basis review.¹⁴⁷ At any rate, the courts have experience dealing with questions of purpose, whether that purpose is a moral one or something else.

A more pressing question, though, is what to do when faced with a situation like *Romer*: a law that relies on ostensibly moral concerns as a cover for animus against a disadvantaged group that society might wish to protect. The next section will discuss some potential solutions.

C. *The Protection of Minorities*

This article proposes that rational basis review is and should remain the default standard of review, even in cases of morality-based state

145. See *infra* Part V.C.

146. See, e.g., *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

147. See, e.g., *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

action.¹⁴⁸ However, there should be three exceptions that would justify heightened review: (1) the law on its face violates “a specific prohibition of the Constitution, such as those of the first ten amendments,” (2) the law “restricts the political process which can ordinarily be expected to bring about repeal of undesirable legislation,” or (3) the law is directed at particular “religious,” “national,” “racial,” or “discrete and insular” minorities.¹⁴⁹ This article will not discuss the first category in detail because that category is more easily identified than the second two. Moreover, the second concept, that of political disenfranchisement, has been well explored by John Hart Ely, among others.¹⁵⁰ Thus, the remainder of this article will focus on the third category: laws directed at minorities of various kinds.

The first three types of minorities are readily identified: racial, religious, and national, which may be taken to mean “ethnic.” One might quibble about whether a group or a person is actually of a particular ethnicity or race,¹⁵¹ or whether a particular belief system truly qualifies as a “religion,”¹⁵² but it seems an uncontroversial proposition to say that generally such minorities should be protected. It is part of our “constitutional tradition” to do so.¹⁵³

In terms of the present discussion, however, it seems evident that some morality-based state action could be used to improperly disadvantage certain minorities. Which groups should receive extra protection? That is, which groups are “discrete and insular,” and what do those terms mean? The *New Oxford American Dictionary* defines “discrete” as “individually separate and distinct.”¹⁵⁴ The *American Heritage Dictionary* describes it as “constituting a separate thing.”¹⁵⁵ Note that these definitions are not terribly helpful. Taking “distinct” as a synonym, one could argue that almost any identifiable minority could claim the title. Child molesters and Ponzi schemers are “distinct” from most people, but no one would suggest giving them special protections. Defining “insular” does not provide any further clarification. The *New Oxford American Dictionary* defines “insular” as “ignorant of or

148. Much of what follows is drawn from the famous footnote four in *United States v. Carolene Products Co.* See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The author must also acknowledge the influence of Wojciech Sadurski’s book, *Moral Pluralism and Legal Neutrality*, particularly chapter five. See WOJCIECH SADURSKI, *MORAL PLURALISM AND LEGAL NEUTRALITY* 133-48 (1990).

149. *Carolene Products*, 304 U.S. at 152 n.4.

150. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

151. See, e.g., *Rice v. Cayetano*, 528 U.S. 495 (2000).

152. *United States v. Seeger*, 380 U.S. 163 (1965).

153. *Romer v. Evans*, 517 U.S. 620, 633-34 (1996).

154. THE NEW OXFORD AMERICAN DICTIONARY, *supra* note 9, at 483.

155. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 516 (4th ed. 2006).

uninterested in cultures, ideas or peoples outside one's own experience,"¹⁵⁶ while the *American Heritage Dictionary* defines the word as "suggestive of the isolated life of an island."¹⁵⁷ If one takes Justice Harlan's words literally, then, "discrete and insular" means distinct, willfully ignorant, or provincial groups. This interpretation hardly seems helpful in determining who should receive constitutional protection.

Something more metaphorical is therefore required, and here one should consider the spirit of footnote four in *United States v. Carolene Products*.¹⁵⁸ Footnote four states:

There may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.¹⁵⁹

It may be that the words "discrete and insular" were not chosen with dictionary precision, but are instead meant to designate powerlessness: a propensity for being taken advantage of in ways that are inimical to our liberal respect for alternative behaviors, characteristics, and visions of the world. The idea of insularity also implies an inability or unwillingness to muster popular support for a group's own cause, thereby leading to easier victimization by the majority.

Such a reading of footnote four suggests that "discrete and insular" is synonymous with "respectable and powerless." In this context, then, "respectable" means deserving of the respect we accord others in our liberal, morally diverse society. For example, such a reading would

156. NEW OXFORD AMERICAN DICTIONARY, *supra* note 9, at 875.

157. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 155, at 909.

158. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added).

159. *Id.*

exclude child molesters and Ponzi schemers, but would include Nazis, Communists, and the mentally disabled.¹⁶⁰ The author does not suggest that these things are equivalent, but rather that they are all deserving of some respect and tolerance if society is to be truly pluralistic and protective.¹⁶¹

The point is not to render an undisputable list of protected categories. Instead, it is to suggest that there is warrant in the law, and in a system of liberal morality, for constitutionalizing the treatment of certain groups, provided that courts can determine exactly what those groups are to be. Thus, the regime that the author proposes will not give entirely free play to majorities, though it might tend to do so in the “normal” case. In this view, the result in *Romer* was correct because gays and lesbian are a “discrete and insular minority,” whereas the result in *Roe* was incorrect because women are not a minority, much less a “discrete and insular” one.

VI. CONCLUSION

As discussed above, moral diversity yields numerous moral benefits to individuals and to the society that they constitute. To resist the proliferation of moral diversity is to deny that we are a pluralistic society. If we are to remain true to our liberal commitments, we must acknowledge—and accept—that the world is full of matters on which people of reason and good will are apt to disagree. A productive moral diversity then may flourish, to the betterment of each of us and our society.

The law, however, has trod a more dangerous road, threatening to suppress diverse responses to moral issues through a homogenizing constitutionalism. If society is to retain the social and personal benefits of moral diversity, society will need to be attentive to the points at which the law impedes it, as well as to the opportunities in law for sustaining it. The author hopes that this article provides at least a starting point for further dialogue on this important issue.

160. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

161. Perhaps more controversially, the author thinks this logic would also rule with respect to gays, lesbians, and transsexuals. However, this subject is worthy of another article.
