

FOREWORD: LEAVING THINGS UNDECIDED

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[W]e know too little to risk the finality of precision

Denver Area Educational Telecommunications Consortium, Inc.
v. FCC,
116 S. Ct. 2374, 2403 (1996) (Souter, J., concurring).

Because we need go no further, I would not here undertake the question whether the test we have employed since *Central Hudson* should be displaced.

44 Liquormart, Inc. v. Rhode Island,
116 S. Ct. 1495, 1522 (1996)
(O'Connor, J., concurring in the judgment).

This Court has begun to make a habit of disclaiming the natural and foreseeable jurisprudential consequences of its pathbreaking (*i.e.*, Constitution-making) opinions. Each major step in the abridgment of the people's right to govern themselves is portrayed as extremely limited or indeed *sui juris* The people should not be deceived.

Board of County Commissioners v. Umbehr,
116 S. Ct. 2342, 2373 (1996) (Scalia, J., dissenting).

The case most relevant to the issue before us today is not even mentioned

Romer v. Evans, 116 S. Ct. 1620,
1631 (1996) (Scalia, J., dissenting).

I. DECISIONAL MINIMALISM

Frequently judges decide no more than they have to decide. They leave things open. They make deliberate decisions about what should be left unsaid. This practice is pervasive: doing and saying as little as necessary to justify an outcome.¹

We might describe the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided,

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¹ Of course there can be disagreement about how much it is necessary to say; some maximalists think that it is necessary to say a good deal. For the moment I bracket that point and rest content with ordinary intuitions.

as "decisional minimalism."² One of my principal goals in this Foreword is to explain the uses of minimalism by the Supreme Court and to explore the circumstances under which minimalism is justified. I do so by pointing to the importance of reducing the costs of decision and the costs of mistake and also by examining the relationship between judicial minimalism and democratic deliberation. Thus minimalism can be evaluated by attending to such factors as the need for private and public planning, the costs of decision, and the costs of error. I hope in the process to illuminate a range of old ideas: courts should not decide issues unnecessary to the resolution of a case; courts should deny certiorari in areas that are not "ripe" for decision; courts should avoid deciding constitutional questions; courts should respect their own precedents; courts should, in certain cases, investigate the actual rather than hypothetical purpose of statutes; courts should not issue advisory opinions; courts should follow prior holdings but not necessarily prior dicta; courts should exercise the passive virtues associated with doctrines involving justiciability.

All of these ideas involve the *constructive uses of silence*. Judges often use silence for pragmatic or strategic reasons or to promote democratic goals. Of course it is important to study what judges say; but it is equally important to examine what judges do not say, and why they do not say it.

I offer two large suggestions about a minimalist path. The first suggestion is that minimalism can be democracy-forcing, not only in the sense that it leaves issues open for democratic deliberation,³ but also and more fundamentally in the sense that it promotes reason-giving and ensures that certain important decisions are made by democratically accountable actors. Sometimes courts say that Congress, rather than the executive branch, must make particular decisions; sometimes courts are careful to ensure that legitimate reasons actually underlie challenged enactments. In so doing, courts are minimalist in the sense that they leave open the most fundamental and difficult constitutional questions; they also attempt to promote democratic accountability and democratic deliberation. I am thus suggesting a form of

² This is a rough, preliminary definition. Complexities are discussed below in Part II. Of course minimalists do not endorse opinions that are obscure or obfuscating, or that reflect deliberate coyness. Minimalists enthusiastically respect the obligation to offer reasons; they attempt to offer reasons of an unambitious kind.

³ Democratic deliberation should not be identified with simple majoritarianism. Reliance on democracy, for purposes of an understanding of constitutional law, must specify the relevant conception of democracy, and not rely on the word itself. See RONALD DWORKIN, *FREEDOM'S LAW* 15-19 (1996). On the deliberative conception of democracy, consult, for example, AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 1 (1996); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 274-86, 304-28 (William Rehg trans., 1996) (1992); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17-39, 123-61 (1993); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17, 17 (Alan Hamlin & Philip Pettit eds., 1989).

minimalism that is self-consciously connected with the liberal principle of legitimacy.⁴

As we will see, democratic ideas associated with minimalism help explain many ideas in the cases. Consider, for example, the void-for-vagueness and nondelegation doctrines; the requirement that Congress issue a "clear statement" in order to bring about certain results; rationality review under the Due Process and Equal Protection Clauses; the requirement that certain laws be defended by reference to their "actual" rather than hypothetical purpose; the (largely implicit but still vibrant) doctrine of desuetude, banning enforcement of anachronistic law. All of these doctrines are connected with the basic foundations of the system of deliberative democracy.⁵ They serve to ensure against outcomes reached without sufficient accountability and reflecting factional power instead of reason-giving in the public domain.

My second suggestion is that a minimalist path usually — not always, but usually — makes sense when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise). The complexity may result from a lack of information, from changing circumstances, or from (legally relevant⁶) moral uncertainty. In such cases, minimalism makes sense first because courts may resolve the relevant issues incorrectly, and second because courts may be ineffective or create serious problems even if their answers are right. Courts should try to economize on moral disagreement by refusing to challenge other people's deeply held moral commitments when it is not necessary for them to do so.⁷

The two points can be linked by the suggestion that courts should adopt forms of minimalism that can improve and fortify democratic processes.⁸ Many rules of constitutional law attempt to promote polit-

⁴ See generally GUTMANN & THOMPSON, *supra* note 3, at 52–94 (discussing "deliberative reciprocity"); JOHN RAWLS, *POLITICAL LIBERALISM* 137 (2d ed. 1996) (discussing the liberal principle of legitimacy).

⁵ Also consult ROBERT BURT, *THE CONSTITUTION IN CONFLICT* 19 (1994), which similarly sees courts as part of a process of dialogue among branches and expresses wariness about judicial foreclosure.

⁶ Some moral considerations are a legitimate part of constitutional argument and others are not. By "legally relevant" I mean to refer only to the former.

⁷ On economizing on moral disagreement, consult GUTMANN & THOMPSON, *supra* note 3, at 84–85: "[C]itizens should seek the rationale that minimizes rejection of the position they oppose. . . . [T]his form of magnanimity tells citizens to avoid unnecessary conflict in characterizing the moral grounds or drawing out the policy implications of their positions."

⁸ Professor Michelman's famous *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986), is also concerned with deliberative democracy. Michelman urges that a self-consciously deliberative Supreme Court can "model" (and perhaps promote) a society with republican virtues. See *id.* at 16–17. The foundations of this Foreword — in deliberative democracy — are very close to the foundations of Michelman's. And it is possible that on certain assumptions about the likely nature of various institutions, Michelman's view is correct. I am suggesting a more modest and cautious judicial role, one focused on pro-

ical accountability and political deliberation. Minimalism need not be democracy-forcing by its nature; but it is most interesting when it promises to enhance accountability and deliberation in this way.

I apply these ideas to a number of issues of current controversy. I suggest that the Court took a reasonable route in the most controversial and highly publicized case of last Term, *Romer v. Evans*.⁹ The Court's puzzling and opaque opinion is not satisfying from the theoretical point of view; but this is not the only possible point of view. *Romer* combined a degree of caution and prudence with a good understanding of the fundamental purpose of the Equal Protection Clause and a firm appreciation of law's expressive function. Thus understood, *Romer* was a masterful stroke — an extraordinary and salutary moment in American law. It was a masterful stroke in part because it left many issues open. Thus *Romer* provides an especially fruitful case for an exploration of the uses of minimalism.

I compare *Romer* with *United States v. Virginia*,¹⁰ in which the Court invalidated the operation of a single-sex military college. *United States v. Virginia* contains a number of ambitious pronouncements about sex equality and produced a self-conscious shift in the applicable standard of review. But the decision was nonetheless minimalist in two ways. First, it addressed not single-sex education in general, but

moting legislative deliberation, perhaps because of different assessments of the likely capacities of different institutions, and because of a belief that self-government, as Michelman understands it, coexists uneasily with the role for the Court that he appears to envisage.

There is also an obvious connection between what I am saying here and what is said in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Here are some points of commonality: appreciation of passive virtues, endorsement of the doctrine of desuetude for the "privacy" cases, and an insistence on the need for the Court to think strategically and pragmatically about whether the nation is ready for the principles that the Court favors. But there are important differences as well. My argument finds its foundations in the aspiration to deliberative democracy, with an insistence that the principal vehicle is the legislature, not the judiciary; the judiciary is to play a catalytic and supplementary role. For Bickel, the Court was the basic repository of principle in American government; because of its insulation, it was the central deliberative institution. See *id.* at 30–50, 200–207. In addition, Bickel's belief in "prudence" was based on a generalized fear of political backlash, and not on social scientific evidence. We now know that it may be counterproductive for the Court to insist on social reform even if the Court is right. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE* 107–56 (1991). In his conception of the division of labor between courts and legislatures and in his absence of attention to empirical issues, Bickel is in his own way under the influence of the Warren Court. In brief, my treatment is more skeptical of judges and less so of majoritarian institutions. It is also in a sense more prudential and strategic (for better or for worse): Bickel was focussed on the decline of jurisdiction, with the apparent thought that, once assumed, jurisdiction should result in the most principled and full of opinions. See BICKEL, *supra*, at 130, 235–43. I am suggesting that opinions should be self-consciously narrow and shallow, at least some of the time.

Finally, there is an evident resemblance between what is said here and what is suggested in Guido Calabresi, *The Supreme Court, 1990 Term — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 80–86 (1991). See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 4 (1982).

⁹ 116 S. Ct. 1620 (1996).

¹⁰ 116 S. Ct. 2264 (1996).

single-sex education in the distinctive circumstances of Virginia Military Institute (VMI). Second, the Court found that Virginia did not establish or maintain VMI to diversify educational opportunities within the state, and in that sense the Court emphasized the absence of an actual purpose of promoting diversity and equality of opportunity. Because it stresses that sex discrimination at VMI is connected with second-class citizenship for women, *United States v. Virginia* is a natural sibling to *Romer v. Evans*. Both cases show a willingness to look behind enactments in order to see if they rest on constitutionally unacceptable "animus."

More briefly, I discuss several cases from the 1995 Term that raise questions about how much to say and how much to leave open. I suggest that a majority of the Justices erred in reaching broad new conclusions about the First Amendment in *44 Liquormart, Inc. v. Rhode Island*,¹¹ a major case involving the regulation of commercial advertisements. I endorse a surprising and tentative decision in which the Court — for the first time in its history — struck down an award of punitive damages.¹² I suggest that the unanimous Supreme Court was probably wrong to uphold the imposition of the death penalty on the basis of an open-ended grant of power from Congress to the President.¹³ In several places I indicate that the Court acted reasonably in offering a narrow rather than broad judgment about Congress's power to regulate speech in the emerging communications media.¹⁴ What is important, however, is not the particular conclusions, but the uses of minimalism in all these contexts.

I conclude by exploring three large issues for the future: affirmative action, the right to die, and same-sex marriages. These areas are the focus of intense political debate and in that sense are especially promising areas for minimalism. Thus I urge that the Court should continue Justice Powell's narrow, fact-specific approach in the area of affirmative action;¹⁵ that in cases involving the right to die, courts shall not invoke a still-new and highly abstract "right to privacy;" and that the Court should, in the near future, stay away from the issue of same-sex marriage, whatever it may think about the merits of the underlying constitutional claims. It should leave that issue undecided.

II. BASIC CONCEPTS

While this lack of focus does not deprive this Court of jurisdiction to consider a facial challenge to the Party Expenditure Provision as over-

¹¹ 116 S. Ct. 1495 (1996).

¹² See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996).

¹³ See *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996).

¹⁴ See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2381 (1996).

¹⁵ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-20 (1978) (opinion of Powell,

broad or as unconstitutional in all applications, it does provide a prudential reason for this Court not to decide the broader question, especially since it may not be necessary to resolve the entire current dispute.

Colorado Republican Federal Campaign Committee v. Federal Election Commission,
116 S. Ct. 2309, 2320 (1996).

I think that the *Buckley* framework for analyzing the constitutionality of campaign finance laws is deeply flawed. Accordingly, I would not employ it

Colorado Republican Federal Campaign Committee v. Federal Election Commission,
116 S. Ct. 2309, 2328 (1996)
(Thomas, J., concurring in the judgment in part and dissenting in part).

A. Theories

What is the relationship among the Supreme Court, the Constitution, and those whose acts are subject to constitutional attack? It is easy to identify some theoretically ambitious responses. Perhaps the simplest one is *originalist*.¹⁶ On this view, the Court's role is to invoke an actual historical judgment made by those who ratified the Constitution. The *Dred Scott*¹⁷ case is a vigorous early statement of this approach.¹⁸ Justices Scalia and Thomas have been enthusiasts for originalism, at least most of the time.¹⁹ Here the Court tries to bracket questions of politics and morality and embarks on a historical quest.

The second response stems from the perceived need for judicial deference to plausible judgments from the executive and legislative branches of government. On this view, courts should uphold such judgments unless those judgments are outlandish or clearly mistaken. James Bradley Thayer's great article, advocating a *rule of clear mis-*

¹⁶ The most well-known defense of originalism is ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

¹⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁸ See Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENTARY 37, 46-54 (1993).

¹⁹ See generally *MacIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring in the judgment) (urging an originalist interpretation of the First Amendment); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (preferring the originalist to the nonoriginalist approach to interpretation). Both make exceptions for certain areas of law. For Justice Thomas, commercial speech clearly merits an exception. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515 (Thomas, J., concurring in part and concurring in the judgment). Affirmative action and campaign finance laws are exceptions for both. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2323 (1996) (Thomas, J., dissenting in part, and concurring in the judgment); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2101, 2118 (1995).

take, is the classic statement of this position.²⁰ The position can be found as well in the writings of Justice Holmes,²¹ the first Justice Harlan,²² Justice Frankfurter,²³ and, most recently, Chief Justice Rehnquist.²⁴ Innumerable post-New Deal cases involving social and economic regulation have roots in Thayer.²⁵

The third response is that the Supreme Court should make *independent interpretive judgments* about constitutional meaning, based not on historical understandings, but instead on the Court's own view of what interpretation makes best sense of the relevant provision.²⁶ When the Court struck down maximum hour and minimum wage legislation in the early part of the twentieth century, it spoke in these terms.²⁷ It did the same thing when it created and vindicated a "right of privacy,"²⁸ as well as when it struck down bans on commercial advertising and restrictions on campaign spending.²⁹ Ronald Dworkin — Thayer's polar opposite in the American legal culture — is the most prominent advocate of this approach to constitutional law insofar

²⁰ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 139-52 (1893).

²¹ See, e.g., *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

²² See *id.* at 65 (Harlan, J., dissenting).

²³ See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597-98 (1940).

²⁴ See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result); *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

²⁵ See, e.g., *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240-43 (1984) (discussing the need for judicial deference to the legislature's determination of "public use" and the proper approach to achieving the legislature's purpose); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175-76 (1980) (refusing to strike down legislation under the Equal Protection Clause when the legislation is simply "unwise" or "unartfully" drafted); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (observing that the Court will not find a Due Process violation merely because a law is unwise).

²⁶ See generally DWORKIN, *supra* note 3, at 3 (discussing the Court's "moral reading" of the Constitution). There are many complexities in Dworkin's position and I do not claim that this thumbnail sketch is adequate to those complexities. An interesting contrast is provided by 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34-57 (1991). Ackerman urges courts to "synthesize" constitutional moments; thus the meaning of the equality principle in the late twentieth century comes from an understanding of the relationship between the Civil War and the New Deal. See *id.* Doubtless ideas of the sort urged by Ackerman help account for some aspects of Supreme Court decisions, and the theoretical underpinnings of large-scale social developments do have an impact on constitutional law. But thus far Ackerman has not discussed the weaknesses of the judiciary in thinking in such abstract terms, and an understanding of those weaknesses must play a role in any evaluation of the idea that courts are to synthesize constitutional moments. At least most of the time, constitutional law is narrower, shallower, more incremental, and based on analogies.

²⁷ See *Adkins v. Children's Hosp.*, 261 U.S. 525, 545-46 (1923); *Lochner v. New York*, 198 U.S. 45, 53 (1905). Consult RICHARD A. EPSTEIN, *TAKINGS* (1985), for a modern statement and defense.

²⁸ See *Roe v. Wade*, 410 U.S. 113, 153-54 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 482-86 (1965).

²⁹ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766-70 (1976); *Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976) (*per curiam*).

as he stresses the value of integrity, which calls for principled consistency across cases.³⁰

The fourth response characterizes one understanding of the Warren Court era.³¹ It is represented by the most famous footnote in all of constitutional law: footnote four in the *Carolene Products* case.³² On this view, the Court should act to improve the democratic character of the political process itself. It should do so by protecting rights that are preconditions for a well-functioning democracy, and by protecting groups that are at special risk because the democratic process is not democratic enough. Insofar as it stressed the need to protect political outsiders from political insiders, *McCulloch v. Maryland*³³ is probably the earliest statement of the basic position; more recent examples include *Baker v. Carr*,³⁴ *Reynolds v. Sims*,³⁵ and *Shaw v. Hunt*.³⁶ This conception of the judicial role, defended by John Hart Ely,³⁷ is based on the notion of *democracy-reinforcement*.

As an institution, the Supreme Court has not made an official choice among these four approaches. Even individual Supreme Court Justices can be hard to classify. Consider the current Court. Justices Scalia and Thomas are outspokenly originalist,³⁸ and certainly neither can fairly be accused of rampant inconsistency. But in last Term's *44 Liquormart* case, Justice Thomas interpreted the First Amendment with little reference to history. Indeed his opinion looked like a form of independent interpretive argument. Justice Scalia's views on campaign finance regulation and affirmative action do not appear to result from extended historical inquiry.³⁹ Chief Justice Rehnquist has often endorsed the rule of clear mistake, and he is probably the most consistent proponent of this view in recent decades. But in cases involving affirmative action,⁴⁰ the Chief Justice speaks in quite different terms; here his method is more like a form of independent interpretive judgment.

³⁰ See DWORKIN, *supra* note 3, at 10–11.

³¹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 4–7 (1980).

³² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

³³ 17 U.S. (4 Wheat.) 316 (1819).

³⁴ 369 U.S. 186 (1962).

³⁵ 377 U.S. 533 (1964).

³⁶ 116 S. Ct. 1894 (1996).

³⁷ See ELY, *supra* note 31, at 4–5. A variation on the same theme can be found in HABERMAS, cited above in note 3, at 261–86.

³⁸ See *supra* note 19.

³⁹ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520–28 (1989) (Scalia, J., concurring in the judgment).

⁴⁰ Note Chief Justice Rehnquist's votes against the constitutionality of affirmative action programs in, for example, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476 (1989); *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 657 (1987); and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 269 (1986).

No one need be charged with hypocrisy here. Perhaps different constitutional provisions are best treated differently. Thus the rule of clear mistake might make sense for the Due Process Clause, whereas the idea of democracy-reinforcement is appropriate for the First Amendment and the Equal Protection Clause. Indeed, the idea of democracy-reinforcement creates a great deal of space for the rule of clear mistake in those cases in which no democratic defect is at stake.⁴¹ Or the Court might adopt a presumption in favor of originalism but look elsewhere when history reveals gaps or ambiguities.⁴²

B. *Against Theories, Against Rules*

To resolve these abstract debates, a judge must take a position on some large-scale controversies about the legitimate role of the Supreme Court in the constitutional order. But let us notice a remarkable fact. Not only has the Court as a whole refused to choose among the four positions, or to sort out their relations, but many of the current justices have refused to do so in their individual capacities. Consider Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. These Justices — the analytical heart of the current Court — have adopted no “theory” of constitutional interpretation. It is not even clear that any of them has rejected any of the four approaches I have described. The most that can be said is that none of the Justices is an originalist in the sense of Justices Scalia and Thomas, and that none of them believes that any of these approaches adequately captures the whole of constitutional law.

In their different ways, each of these justices tends to be *minimalist*. I understand this term to refer to judges who seek to avoid broad rules and abstract theories,⁴³ and attempt to focus their attention only on what is necessary to decide particular cases. Minimalists emphatically believe in reason-giving, but they do not like to work deductively; they do not see outcomes as reflecting rules or theories laid down in advance. They also tend to think analogically and by close reference to actual and hypothetical cases. I believe (though I cannot

⁴¹ The *Carolene Products* Court thought that *Carolene Products* was itself such a case. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). But see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (arguing against *Carolene Products*).

⁴² See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring in part and concurring in the judgment) (writing that the absence of developed historical evidence compels him to follow existing precedent).

⁴³ There are intrapersonal parallels, quite outside the context of law. Sometimes people try to make narrow and shallow decisions in personal matters and to leave the broader and more deeply theoretical questions for another day. See Edna Ullmann-Margalit, *Opting, in THE 1985 YEARBOOK OF THE WISSENSCHAFTSKOLLEG ZU BERLIN* (discussing this phenomenon). Sometimes people try to leave things undecided because they seek to avoid the responsibility of decision or because they know that any decision, even the right decision, will cause injury to self or others. A great deal of work remains to be done on this important topic.

prove) that all of the justices named above understand themselves as minimalists in this sense, and that they have chosen to be minimalist for reasons that are, broadly speaking, of the sort discussed here.

Minimalism contrasts with maximalism, understood as an effort to decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes. At the opposite pole from maximalism is reasonlessness, as in a denial of certiorari, and close to reasonlessness is what might be called "subminimalism," found in decisions that are conclusory and opaque, and that offer little in the way of justification or guidance for the future. It is possible to imagine a rough continuum of this sort:

reasonlessness/silence → subminimalism → minimalism → ambitiousness → maximalism (complete rules/full theoretical grounding)

Of course, there can be much dispute over what is necessary to defend a decision. Maximalists might argue that minimalists consistently say less than necessary precisely because they avoid the full range of relevant theoretical arguments and the full range of hypothetical cases.⁴⁴ Minimalists, by contrast, seek to deal only with the closest of precedents and the most obvious of hypotheticals; they avoid dicta; they try to find grounds on which people can converge from diverse theoretical positions. Let me explain these ideas in more detail.

C. *Narrow Rather Than Wide*

Minimalists try to decide cases rather than to set down broad rules; they ask that decisions be *narrow rather than wide*. They decide the case at hand; they do not decide other cases too unless they are forced to do so (except to the extent that one decision necessarily bears on other cases).⁴⁵ Of course, narrowness is relative, not absolute. A decision that discrimination against the mentally retarded will face rational basis review⁴⁶ is narrow compared to a decision that discrimination on all grounds other than race will face rational basis review. But it is broad compared to a decision that holds for or against the mentally retarded without announcing a standard of review. Of course, narrowness may run into difficulty if it means that similarly situated people are being treated differently; this very fact can press the Court in the direction of breadth.⁴⁷

Currently, there is by no means a consensus that minimalism is the appropriate way for a court to proceed. Justice Scalia, for example, is

⁴⁴ This can be understood as the thrust of RONALD DWORKIN, *LAW'S EMPIRE* 5-30, 219-24 (1985).

⁴⁵ For an especially illuminating discussion, see Joseph Raz, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN* 261, 279-303 (1994).

⁴⁶ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985).

⁴⁷ Cf. DWORKIN, *supra* note 44, at 219-24 (1985) (discussing consistency).

no minimalist.⁴⁸ On the contrary, he is close to a maximalist, sharply opposing self-consciously narrow decisions. Justice Scalia has prominently argued that courts should create rules, because rulelessness violates rule of law values.⁴⁹ There is much force to his argument. It would be foolish to be a thoroughgoing minimalist; the case for breadth is strong in too many cases.⁵⁰ Indeed, the Supreme Court grants certiorari only when the issue has a high degree of national importance, so that the decision in the case at hand will affect other cases too.⁵¹

But this is only part of the story.⁵² Judges who refuse to set down broad rules can minimize both the burdens of making decisions and the dangers of erroneous decisions. Perhaps the Court will set out a rule that is wrong as applied to other cases not before the Court;⁵³ perhaps it would be too time-consuming and difficult to generate a decent rule. Hence it is best to decide the case on the narrowest possible ground. This idea is closely associated with the ban on advisory opinions, a ban that promotes minimalist goals by leaving things undecided and greatly reducing the occasions for judicial judgment.

As a first approximation, we might try to systematize the inquiry and the resulting disputes in the following way: good judges try to minimize the sum of decision costs and error costs.

1. *Decisions and Decision Costs.* — Decision costs are the costs of reaching judgments. Human beings incur these costs in all contexts, and they adopt a range of devices to reduce them.⁵⁴ In the legal setting, decision costs are faced by both litigants and courts. If, for example, a judge in a case involving the "right to die" attempted to generate a rule that would cover all imaginable situations in which

⁴⁸ Although Justice Scalia favors applying rules to subsequent cases, this preference is part of his maximalism, that is his effort to prevent highly particularistic, case-by-case judgments. Interestingly, Justice Scalia does not appear to believe in rigid principles of stare decisis. See, e.g., *United States v. Virginia*, 116 S. Ct. 2264, 2292-93 (1996) (Scalia, J., dissenting) (questioning much of the law of equal protection); *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting) (arguing in favor of overruling *Roe v. Wade*, 410 U.S. 113 (1973)). Justice Thomas may be the most consistent maximalist on the Court. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring in part and concurring in the judgment) (advocating the abandonment of the "commercial speech/political speech" distinction).

⁴⁹ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989). Rule of law values include predictability, control of official discretion, and minimization of arbitrariness.

⁵⁰ See *infra* pp. 28-33.

⁵¹ See ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GEILER, *SUPREME COURT PRACTICE* 165-67 (7th ed. 1993).

⁵² Justice Scalia himself seems to recognize this point. See Scalia, *supra* note 49, at 1186-89.

⁵³ The need for caution is one of the central arguments of Justices Breyer and Souter in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*. See 116 S. Ct. 2374, 2388-89 (1996) (opinion of Breyer, J.); *id.* at 2402-03 (Souter, J., concurring).

⁵⁴ See John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 669, 682-83 (1996) (discussing heuristics and other techniques).

that right might exist, it is likely that the case would take a very long time to decide. Perhaps these costs would be prohibitive. The high costs might arise from a sheer lack of information, or because of the pressures faced by a multi-member court consisting of people who are unsure or in disagreement about a range of subjects. Such a court may have a great deal of difficulty in reaching closure on broad rules. Undoubtedly, the narrowness of many decisions is a product of this practical fact. *Romer v. Evans*, failing to mention *Bowers v. Hardwick*⁵⁵ and otherwise leaving things undecided, is a recent example; the opinion may well be a product of the difficulty of achieving consensus among six diverse Justices. It is important to distinguish between cases in which minimalism is a practical necessity and those in which minimalism is affirmatively desirable because it reflects a court's appropriate modesty about its own capacity.

Quite apart from the pressures of inadequate information and internal disagreement, minimalism might make special sense when circumstances will change in large and relevant ways in the near future.⁵⁶ Facts and values can go in unanticipated directions, thus rendering anachronistic a rule that is well-suited to present conditions.⁵⁷

All of these points suggest that minimalism may be desirable because of the high costs of decision. But an inquiry into decision costs will not always support minimalism. A court that economizes on decision costs for itself may in the process "export" decision costs to other people, including litigants and judges in subsequent cases who must give content to the law. The aggregate decision costs associated with the court's narrow decision could be very high. When law is uncertain, decision costs can proliferate, as people invest in activities designed both to find out the content of law and to press the law's content in certain directions.⁵⁸ High decision costs are especially pernicious when planning is important; it is for this reason that stare decisis and broad rules are extremely valuable in cases involving the need to plan.⁵⁹

There is one group of people who will predictably do well when decision costs are high: lawyers. But high decision costs can be a

⁵⁵ 478 U.S. 186 (1986).

⁵⁶ I am focusing here on the use of minimalism to reduce decision costs, but there are other strategies. Courts might, for example, rely on presumptions to say that, in the face of uncertainty, a case will be resolved favorably to one or another side.

⁵⁷ See *Denver Area*, 116 S. Ct. at 2402 (Souter, J., concurring) ("[B]ecause we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.").

⁵⁸ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 564 (1992).

⁵⁹ The Supreme Court made a controversial statement to this effect in *Payne v. Tennessee*, 501 U.S. 808, 827-30 (1991).

disaster from the standpoint of society as a whole. It is probably for this reason that the ban on advisory opinions is relaxed in cases when uncertainty impedes necessary planning.⁶⁰

2. *Errors and Error Costs.* — Error costs are the costs of mistaken judgments as they affect the social and legal system as a whole. It is possible, for example, that any decision involving the application of the First Amendment to new communications technologies, including the Internet, should be narrow,⁶¹ because a broad decision rendered at this time would be likely to go wrong. A more evolutionary approach, involving the accretion of case-by-case judgments, could produce fewer mistakes on balance, because each decision would be appropriately informed by an understanding of particular facts. Lack of information is thus a crucial argument for decisional minimalism. Changed circumstances argue in the same direction; imagine the difficulties of designing good rules for a changing telecommunications market.⁶² The common law process prizes minimalism partly in order to reduce the error costs associated with incomplete information and changing circumstances; analogical reasoning, as distinct from rule-bound judgment, is a crucial part of the process.⁶³

On the other hand, a broad rule, even if over-inclusive or under-inclusive, may be better than a narrow judgment, because lower courts and subsequent cases would generate an even higher rate of error. Perhaps a broad rule would be privately adaptable and thus allow adjustments across circumstances, as in the basic rules of contract and tort.⁶⁴ Perhaps a refusal to issue rules now would seem "wise" or "prudent" but leave subsequent judgments to district courts whose decisions cannot be entirely trusted. Perhaps a maximalist Court can later change the rules if the rules turn out to be wrong. In this light it would be foolish to suggest that minimalism is generally a good strategy, or that minimalism is generally a blunder. Everything depends on contextual considerations.⁶⁵ The only point that is clear even in the abstract is that sometimes the minimalist approach is the best way to minimize the sum of error costs and decision costs, because the costs of producing even a plausibly accurate rule can be prohibitive. What

⁶⁰ Cf. William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 710-13 (1994) (describing the usefulness of advisory opinions in reducing the costs of legal errors).

⁶¹ See *Denver Area*, 116 S. Ct. at 2402-03 (Souter, J., concurring); Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1744-45 (1995).

⁶² Some of these difficulties might, however, be reduced with rules that allow private adaptation. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* *passim* (1995); Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 1016-20 (1995).

⁶³ See *Denver Area*, 116 S. Ct. at 2386-87 (opinion of Breyer, J.); *id.* at 2402 (Souter, J., concurring).

⁶⁴ See EPSTEIN, *supra* note 62, at xii-xiii, 307-12; Sunstein, *supra* note 62, at 972-75.

⁶⁵ See FREDERICK SCHAUER, *PLAYING BY THE RULES* 157 (1991).

seems especially important is that with an appreciation of this point, we can see links among seemingly disparate ideas and debates: the ban on advisory opinions, the rules-standards debate, the use of the passive virtues, the decision whether and when to grant certiorari, the question whether to rule broadly or narrowly, and the use of "clear statement" principles in statutory construction.

3. *Metrics*. — We can find these ideas useful without understanding the idea of "costs" in a fully economic manner. The various consequences of decisions or errors cannot easily be monetized or aligned along a single metric. Decision costs are qualitatively different from error costs, and the ingredients of both are qualitatively distinct. Consider the risk that a certain rule in constitutional law will produce excessive restrictions on political speech. This risk may be less well understood if we see it as a "cost" like all other costs. It is valuable to think about minimizing the sum of decision costs and error costs, but we should not proceed as if these various costs are qualitatively indistinguishable, or as if there is some metric along which they can be assessed.

4. *Democracy*. — One of the major advantages of minimalism is that it grants a certain latitude to other branches of government by allowing the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems.⁶⁶

Suppose, to return to our example, that the Supreme Court is asked to decide whether a certain attempt to regulate the Internet violates the First Amendment. This claim raises complex issues of value and fact, and it is important for the Court to have some information on both values and facts before it lays down a broad rule. A narrow decision, pointing to a range of factors in a particular case, is a way of allowing some breathing space for participants in the democratic process.⁶⁷ Similarly, the Court might (if it can) strike down a law as unconstitutionally vague and in the process refuse to decide exactly how much regulation would be acceptable under a sufficiently clear law. As another example, suppose that the Court is asked to hold that the Equal Protection Clause requires states to recognize same-sex mar-

⁶⁶ Insofar as the minimalist project stresses this goal, it is continuous with the post-New Deal, neo-Thayerian effort to limit the role of judges in political processes and forms part of the project of Justices Brandeis and Frankfurter. See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1447–52 (1988). This effort was democracy-permitting. But as I will suggest, certain forms of minimalism that I mean to approve here are democracy-forcing, and in that way continuous with *Carolene Products* footnote four, rather than with the Thayer-Brandeis-Frankfurter strand of constitutional law. And as noted above, some minimalists attempt to avoid theoretical disputes of this kind.

⁶⁷ See, e.g., *Denver Area*, 116 S. Ct. at 2385–86. Of course there are many different conceptions of democracy, and the word itself cannot justify deference to majorities. See DWORKIN, *supra* note 3, at 15–20; GUTMANN & THOMPSON, *supra* note 3, at 27–33.

riages. The Court might want to leave that issue undecided not only because it 1) cannot reach a consensus or 2) lacks relevant information, but also because it 3) is unsure about the (legally relevant) moral commitments, 4) thinks that people have a right to decide this issue democratically, or 5) believes that a judicial ruling could face intense political opposition in a way that would be counterproductive to the very moral and political claims that it is being asked to endorse.

In sum, minimalism can promote democracy because it allows democratic processes room to maneuver. Judges should allow such room because their judgments might be wrong and, even if right, their judgments may be counterproductive.

This democratic argument helps explain some prominent objections to *Roe v. Wade*⁶⁸ as it was originally written. In the Court's first confrontation with the abortion issue, it laid down a set of rules for legislatures to follow. The Court decided too many issues too quickly.⁶⁹ The Court should have allowed the democratic processes of the states to adapt and to generate sensible solutions that might not occur to a set of judges.⁷⁰ In this way, the democratic argument for minimalism invokes the need for prudence, social adaptation over time, and humility in the face of limited judicial capacities and competence.

D. *Shallow Rather Than Deep*

In addition to deciding the cases at hand narrowly, minimalists generally try to avoid issues of basic principle and instead attempt to reach *incompletely theorized agreements*.⁷¹ Such agreements may involve either particulars or abstractions. Participants in public life may thus unite behind a particular outcome when they disagree on abstractions, or they may accept an abstraction when they disagree on particular outcomes. The latter strategy is dominant in constitution-making, as people accept the principles of "freedom of speech" or "equality" despite their uncertainty or disagreements about what these principles specifically entail. In a parallel process, judges may adopt a standard in the form of a "reasonableness" test⁷² instead of deciding on the appropriate rule.

Here I emphasize the possibility of concrete judgments backed by unambitious reasoning on which people can converge from diverse foundations. Judges who disagree or who are unsure about the foundations of constitutional rights, or about appropriate constitutional

⁶⁸ 410 U.S. 113 (1973).

⁶⁹ See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385-86 (1985).

⁷⁰ See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 48-51 (1987).

⁷¹ For a more detailed treatment of this idea, see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35-61 (1996).

⁷² See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996).

method, might well be able to agree on how particular cases should be handled. For example, they might think that whatever they believe about the most complex free speech issues, a state cannot ban people from engaging in acts of political protest unless there is a clear and present danger. Thus judges who have different accounts of what the Equal Protection Clause is all about can agree on a wide range of specific cases. There can be little doubt, for example, that the Justices who joined the Court's opinion in *Romer v. Evans* did so from different theoretical perspectives. Agreements on particulars and on unambitious opinions are the ordinary stuff of constitutional law; it is rare for judges to invoke first principles. Avoidance of such principles helps enable diverse people to live together — thus creating a kind of *modus vivendi* — and also shows a form of reciprocity or mutual respect.

Incompletely theorized agreements are by no means unaccompanied by reasons. On the contrary, judicial decisions infrequently resolve foundational questions, and they are nonetheless exercises in reason-giving. Recall that minimalism is an effort to decide cases with the least amount necessary to justify the decision. Reasoned but theoretically unambitious accounts are an important part of that effort. Of course it is true that people sometimes hold to their commitments to particular cases more tenaciously than they hold to their theories. Sometimes it is the particular judgments that operate as “fixed points” for analysis. All I am suggesting is that when theoretical disagreements are intense and hard to mediate, the Justices can make progress by putting those disagreements to one side and converging on an outcome and a relatively modest rationale on its behalf.

In this way, minimalists try to make decisions *shallow rather than deep*.⁷³ They avoid foundational issues if and to the extent that they can. By so doing the Court can both model and promote a crucial goal of a liberal political system: to make it possible for people to agree when agreement is necessary, and to make it unnecessary for people to agree when agreement is impossible. Judicial minimalism is well-suited to this goal.

E. Kadi Justice and Anglo-American Analogues

Reasons are by their nature abstractions.⁷⁴ Any reason is by its nature more abstract than the case for which it is designed, and any

⁷³ Like narrowness, shallowness is a matter of degree. The clear and present danger test is shallow compared to a judgment that the First Amendment is rooted in a conception of autonomy. But it is deep compared to a judgment that, whatever the appropriate test, a political protest by members of the Ku Klux Klan is protected by the First Amendment.

⁷⁴ See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635, 665 (1995).

reason, if it is binding, will extend beyond that case.⁷⁵ From this point we can imagine the most extreme legal system: all judgments are unaccompanied by reasons, and no judgment has *stare decisis* effects. In such a system, the costs of decision would be quite low. In such a system, the error costs may be high if subsequent courts go wrong, but at least we can see that the decision in one case cannot possibly produce errors in subsequent cases.

An extreme system of this sort — what Max Weber called “Kadi justice”⁷⁶ — would undoubtedly seem a kind of bizarre nightmare world, the stuff of Kafka, Orwell, science fiction, Mao’s China. But the idea is not as unfamiliar to American law as it may seem, for there are important contexts in which a decision or an agreement is unaccompanied by any rationale at all.⁷⁷ This is typically a jury’s practice in giving a verdict. It is also the Court’s usual⁷⁸ practice when denying certiorari. Denials are reasonless. They are entirely rule-free and untheorized. Outcomes unaccompanied by reasons do not foreclose different outcomes in other cases. They also take relatively less time to produce, since it can be far easier to come up with a decision than to come up with an explanation. This is one reason for the Court’s usual failure to explain its decisions to deny certiorari. An unexplained denial has a practical advantage too, since judges with divergent rationales can converge on the outcome without converging on an account. These ideas also help account for the (controversial) practices of producing unpublished opinions and of affirming lower court decisions without comment.

Somewhere on the continuum between minimalist decisions and reasonless decisions are those that offer a rationale that is not, on reflection, adequate to justify the outcome. Dissenting opinions, of course, always make this claim, but sometimes opinions seem so conclusory that the accusation of subminimalism has force. As we will see, this is the accusation of Justice Scalia about the Court’s opinion in *Romer v. Evans*.⁷⁹ Opinions of this sort violate norms associated with legal craft. If an opinion is supposed to do anything, it is supposed to explain the outcome of the case. But if outcomes unaccompanied by any reasons have social uses, then outcomes accompanied by

⁷⁵ For a discussion of reasons and decisions from the standpoint of social psychology, with interesting implications for law, see Eldar Shafir, Itamar Simonson & Amos Tversky, *Reason-Based Choice*, 49 COGNITION 11 (1993).

⁷⁶ See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 976–78 (1968).

⁷⁷ See Schauer, *supra* note 74, at 634.

⁷⁸ See the revealing and unusual comments of Justice Ginsburg in connection with the denial of certiorari in *Hopwood v. Texas*, No. 95-1773 (U.S. July 1, 1996) (Westlaw, SCT database) (memorandum opinion of Ginsburg, J., with whom Souter, J., joins). See also *Hopwood v. Texas*, 116 S. Ct. 2581 (1996).

⁷⁹ See 116 S. Ct. 1620, 1629–30 (1996) (Scalia, J., dissenting).

subminimalist reasons might also have social uses. As we shall see, this is a possible response to Justice Scalia's complaint in *Romer*.

F. *Shallow and Narrow, Deep and Wide*

There are many possible interactions along the dimensions of depth and width. Consider the following table:

	NARROW	WIDE
SHALLOW	1 — denial of certiorari; <i>Romer v. Evans</i> ; ⁸⁰ <i>United States v. Lopez</i> ; ⁸¹ <i>Denver Area Educational Telecommunications Consortium, Inc. v. FCC</i> ⁸²	2 — <i>Brandenburg v. Ohio</i> (clear and present danger test); ⁸³ <i>Roe v. Wade</i> ⁸⁴
DEEP	3 — <i>44 Liquormart, Inc. v. Rhode Island</i> (plurality opinion); ⁸⁵ <i>United States v. Virginia</i> ⁸⁶	4 — <i>Reynolds v. Sims</i> ; ⁸⁷ <i>Dred Scott v. Sandford</i> ; ⁸⁸ Dworkin's Hercules ⁸⁹

A denial of certiorari is as narrow as can be — it does not affect any other case — and it is also entirely untheorized and hence as shallow as possible. The Supreme Court's decision in *Romer v. Evans* can be understood as very narrow, since it does not purport to touch other possible cases,⁹⁰ and also as shallow, since its rationale need not be taken to extend much further than its holding. *United States v. Lopez* was emphatically both narrow and shallow. It turned on a set of factors, not on a broadly applicable rule, and it gave no deep account of federalism.⁹¹ The same can be said of the *Denver Area* case, where the Court, emphatic about the complexity of new telecommunications technologies,⁹² left many issues open and gave no deep account of the underlying First Amendment principles.

⁸⁰ 116 S. Ct. 1620 (1996).

⁸¹ 115 S. Ct. 1624 (1995).

⁸² 116 S. Ct. 2374 (1996).

⁸³ 395 U.S. 444 (1969).

⁸⁴ 410 U.S. 113 (1973).

⁸⁵ 116 S. Ct. 1495 (1996).

⁸⁶ 116 S. Ct. 2264 (1996).

⁸⁷ 377 U.S. 533 (1964).

⁸⁸ 60 U.S. (19 How.) 393 (1857).

⁸⁹ Hercules is an idealized judge embodying Dworkin's conception of law as integrity. He is intended as a thought experiment and not as a real-world judge. See DWORKIN, *supra* note 44, at 239–40, 264–66.

⁹⁰ See *Romer*, 116 S. Ct. at 1629.

⁹¹ See *United States v. Lopez*, 115 S. Ct. 1624, 1630–32 (1995).

⁹² See *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 2374, 2385 (1996) (opinion of Breyer, J.).

We can also imagine decisions that are both deep and wide. *Reynolds v. Sims*, announcing the one-person-one-vote rule,⁹³ was very broad⁹⁴ and also fairly deeply theorized. The one-person-one-vote idea applied to many cases and depended on an account of political representation. Similarly, the *Dred Scott* case generated a broad ruling that rested on an exceptionally ambitious account of the Constitution's posture toward slavery and African-Americans.⁹⁵ For purposes of understanding legal reasoning, Ronald Dworkin has described an idealized judge, Hercules, who seeks to offer the "best substantive interpretation" of past legal practices.⁹⁶ This is Dworkin's notion of law as integrity.⁹⁷ For present purposes what is important is that Hercules is ambitious along both dimensions, attempting to make theoretically deep judgments while understanding how those judgments square with many other actual and hypothetical decisions.⁹⁸ Although real-world judges rarely seek both width and depth, it is possible to understand the claim that this is an appropriate aspiration for law.⁹⁹

Some judgments are shallow but wide. In *Brandenburg v. Ohio*, the Court adopted a form of the clear and present danger test that is very wide in the sense that it is used in a great range of cases. But the Court did not give a deep theoretical grounding for the test. It did not, for example, try to root its test in a conception of democratic deliberation, or explore the link between the interest in autonomy and the right to free expression.¹⁰⁰ The same can be said about *Roe v. Wade*.¹⁰¹ That decision was wide in the sense that it settled a range of issues relating to the abortion question. But it did not give a deep account of the foundations of the relevant right.

It is hardest to imagine cases in cell 3: those that are deeply reasoned but also narrow. A deep account will in all likelihood have applications other than that before the Court. If a court says that the Equal Protection Clause is rooted in a principle involving the (constitutionally relevant) immorality of using skin color as a basis for public decisions, its

⁹³ See *Reynolds v. Sims*, 377 U.S. 533, 568-71 (1964).

⁹⁴ The decision need not have been so broad. See *Reynolds*, 377 U.S. at 588-89 (Stewart, J., concurring in the judgment) (agreeing with the majority's finding that the apportionment violated the Equal Protection Clause on the ground that allocation of voting authority was random and lacked the support of any intelligible principle).

⁹⁵ See *infra* pp. 48-49.

⁹⁶ DWORKIN, *supra* note 44, at 225.

⁹⁷ See *id.* at 240.

⁹⁸ See, e.g., *id.* at 313-54 (exploring Hercules's application of law as integrity to statutory construction).

⁹⁹ Cf. *id.* at 265 (explaining that Hercules serves as an ideal judge who has the opportunity to engage in more thorough self-reflection and to aim for a more comprehensive theory of law than does an ordinary judge).

¹⁰⁰ See *Brandenburg v. Ohio*, 395 U.S. 444, 444-49 (1969) (per curiam) (adopting a version of the clear and present danger test).

¹⁰¹ 410 U.S. 113 (1973).

decision will be wide as well as deep, or more precisely wide because deep. But we can find some examples from the 1995 Term. The plurality's opinion in *44 Liquormart* may well be an example of a cell 3 decision, one that has depth without much width. There five Justices appeared to associate the First Amendment with a conception of autonomy, according to which it is illegitimate to regulate speech on the ground that people might be persuaded by it.¹⁰² But the five Justices did not suggest that this autonomy principle would alter the law in cases not involving regulation of truthful advertising of prices.¹⁰³ An even clearer example is *United States v. Virginia*. There the Court was careful to limit its decision to VMI, a "unique" institution. But the Court also ventured some ambitious remarks about the nature of the equality guarantee in the context of gender.¹⁰⁴

We are now able to see some complexities in the idea of minimalism. Suppose, for example, that the Court is asked to strike down a law regulating sexually explicit speech on the Internet on First Amendment grounds. Suppose that the Court says that the law is impermissibly vague, and in that way brackets the question whether sexually explicit speech on the Internet receives the same kind of protection as sexually explicit speech in the print media. The Court says, in other words: "We do not say exactly what speech is protected when it is found on the Internet. But this law is so unacceptably vague that it is unconstitutional whatever the standard." In an important sense, this is precisely the kind of democracy-forcing minimalism that I mean to endorse here. It is democracy-forcing because it requires legislatures to speak with clarity. It is minimalist in the sense that it leaves key questions open. But it is nonminimalist in some crucial ways, for a vagueness doctrine may also be broad (if the vagueness constraint applies to many contexts) and deep (if the doctrine depends on an articulated account of, for example, the rule of law). It may itself be generative of many other outcomes. Some opinions are minimalist in some ways but maximalist in others. Decisions are not usually minimalist or nonminimalist; they are minimalist *along certain dimensions*.

G. Of *Stare Decisis* and Clear, Democracy-Reinforcing Backgrounds

The effect of width and depth is not merely a function of what the Court says. It will depend a great deal on the applicable theory of *stare decisis*. If precedents receive little respect, even a wide and deep opinion will not control future cases. The familiar distinction between holding and dicta thus has everything to do with the extent of minimalism. A legal system that insists on this distinction will drive prior cases in the direction of minimalism, whatever courts say in the

¹⁰² See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996) (plurality opinion).

¹⁰³ See *id.*

¹⁰⁴ See *infra* pp. 72-79.

initial cases. Courts that attempt to be maximalist may be quite surprised by the conduct of subsequent courts, which characterize their language as "dicta." Thus if subsequent courts have a great deal of discretion to recharacterize holdings, they can effectively turn any prior decision into a minimalist opinion. But if subsequent courts perceive themselves as bound to take precedents as they were written, minimalism will be a creation of the court that decides the case at hand. Here are some possibilities:

	MINIMALIST OPINIONS	MAXIMALIST OPINIONS
STRONG STARE DECISIS	1 — Common law (conventional picture)	2 — <i>United States v. Darby</i> ; ¹⁰⁵ <i>Erie Railroad Co. v. Tompkins</i> ¹⁰⁶
WEAK STARE DECISIS	3 — Administrative adjudication	4 — Warren Court caricature

Cell 2 contains the strongest rule-like constraints. The great transformative opinions of the New Deal era are key examples. Cell 3 is the most rule-free. Administrative adjudication sometimes has this character. Cells 1 and 4 are the most interesting. Cell 1 probably captures the most ordinary picture of Anglo-American common law; courts narrowly decide the cases presented to them, but their decisions are given enormous weight in subsequent proceedings. Cell 4 is akin to caricatures of the Warren Court. Decisions in this cell set out broad and deep pronouncements that have little weight in subsequent cases. Although this approach may seem irresponsible, it can have certain advantages in promoting planning while, at the same time, allowing change if prior decisions go wrong. Of course we can see, on the two relevant dimensions, a continuum rather than a sharp division.

Stare decisis has dimensions of both breadth and strength. A legal system will move in the direction of minimalism if previous (maximalist) decisions will be abandoned when they seem plainly wrong. But it will also move in that direction if subsequent courts have flexibility to disregard justificatory language as "dicta" or to recharacterize previous holdings. A Supreme Court that is reluctant to overrule past decisions can accomplish much of the same thing through creative reinterpretation. Because courts have the power to recharacterize past decisions, they can turn originally minimalist decisions into maximalist decisions. *Reed v. Reed*,¹⁰⁷ for example, invalidated a law on grounds of sex discrimination¹⁰⁸ in a minimalist opinion, but subsequent courts have recharacter-

¹⁰⁵ 312 U.S. 100, 114-15 (1941) (upholding broad congressional powers under the Commerce Clause to regulate interstate commerce, regardless of the motive or purpose of the regulation).

¹⁰⁶ 304 U.S. 64, 78 (1938) (denying the existence of federal common law and holding that federal courts sitting in diversity must apply the statutory and decisional law of the forum state).

¹⁰⁷ 404 U.S. 71 (1971).

¹⁰⁸ See *id.* at 76-77.

ized this case as embodying a broad principle. The Court has begun to transform *Shaw v. Hunt*¹⁰⁹ in a similar way, broadening this narrowly written decision. The ultimate meaning of *Romer v. Evans* and *United States v. Virginia* — possible one-way tickets, possible seminal cases — will depend on the future.

More generally, courts deciding cases will have only limited authority over the subsequent reach of their opinions. A court that is determined to be maximalist may fill its opinion with broad pronouncements, but those pronouncements may subsequently appear as “dicta” and be disregarded by future courts. The converse phenomenon is also familiar. A court may write a self-consciously minimalist opinion, but subsequent courts may take the case to stand for a broad principle that covers many other cases as well.

A strong theory of stare decisis, especially in statutory cases, can create desirable incentives for participants in the democratic process. If courts do not alter their interpretation of statutes, even when their interpretation is wrong, Congress will have an especially clear background against which to work, knowing that Congress itself must correct any mistake. Thus a strong theory of stare decisis is part of a range of devices designed to create good incentives for democracy by providing a clear background for Congress. Consider the “plain meaning” rule in statutory interpretation, the refusal to consider legislative history, the unwillingness to “imply” private rights of action, and the refusal to impose constraints on jury awards of punitive damages. All of these devices can be understood as democracy-promoting, at least in aspiration.

This idea unites much of Justice Scalia’s work; it provides a strong connection between his opinions and the ideal of deliberative democracy. The traditional response is that Congress’s agenda is too loaded to support the view that congressional inaction, as against clear backgrounds, reflects considered judgments by Congress. On this view, more particularized judgments can lead to results that Congress would reach if it could consider every issue, or at least such judgments can give rationality and fairness the benefit of the doubt.¹¹⁰ This debate is hard to resolve in the abstract, but it points to a set of tractable, largely empirical issues on which progress might be made in the future.

There is a related point. The reception of a Supreme Court opinion may matter as much as the applicable theory of stare decisis. Public officials may take an opinion as settling a range of issues despite the

¹⁰⁹ 116 S. Ct. 1894 (1996).

¹¹⁰ See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1344–65 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (collecting cases on interpreting legislative silence and discussing their implications); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 438 (arguing that the institutional reality of Congress is not captured either by the view that legislative silence implies consent or by the view that the burden of making new law rests on those who propose it).

Court's effort to proceed narrowly; or such officials may take an opinion to be narrow, or distinguishable, despite the Court's effort at breadth. A full understanding of the topic of *minimalism* would have to extend far outside the judicial domain to the reaction of other branches to Supreme Court decisions.

Finally, there is a large difference between, on the one hand, forming a broad and deep judgment and, on the other hand, making that judgment public. Thus far I have treated the two cases as if they were the same. But we can readily imagine a situation in which a judge, or a majority on a multimember court, has decided (whether tentatively or not) in favor of a rule or a deep justification for an outcome, but nonetheless refuses to state the rule or justification in public. Judges might be publicly silent for a variety of reasons — for example, because they are not sure that they are right, because they fear public reaction, or because no majority can be obtained in favor of a rule or deep justification.

III. THE LIMITS OF MINIMALISM

Reviewing speech restrictions under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.

Denver Area Educational Telecommunications Consortium, Inc. v.
FCC,

116 S. Ct. 2374, 2401 (1996) (Souter, J., concurring).

A. *Against Minimalism*

A great deal can be said against minimalist judgments. Minimalism is appropriate only in certain contexts. It is hardly a sensible approach for all officials, or even all judges, all of the time.

As we have seen, the minimalist claims to reduce costs of decision and costs of error. The minimalist also claims to facilitate democratic deliberation in the period between the case at hand and future cases, a benefit because new facts and perspectives may come to light. But there may well be reasons to doubt these claims. The decision costs of issuing a narrow, shallow judgment in case *A* may be low for the judge in that case, but lead to dramatically increased decision costs for judges in cases *B* though *Z*.¹¹¹ Thus the minimalist judge may be "exporting" costs from her own court to others. Lowered decision costs on the Supreme Court may entail huge expenditures by lawyers and judges to resolve the unanswered questions later. Consider, for example, the contexts of homosexual rights and punitive damages, in which

¹¹¹ See Scalia, *supra* note 49, at 1178-83 (criticizing judicial reliance on the "totality of the circumstances" test).

the absence of clear standards will produce enormous complexity in subsequent cases.

Moreover, a narrow judgment in case *A* might not reduce aggregate error costs. Perhaps the Court in case *A* will be able to generate a rule or a decent and relatively elaborate account of its judgment. A minimalist judgment in case *A* might produce a range of mistakes in cases *B* through *Z*, because the lower courts will struggle unsuccessfully to make sense of case *A*. And if the rule in case *A* is a pretty good one, and if we lack confidence in the capacity of other institutions to produce a better one, we will get fewer rather than more errors through the maximalist route. This observation may help justify the rule-bound approaches of *Miranda v. Arizona*,¹¹² *Miller v. California*, and *Roe v. Wade*.

For similar reasons, minimalism may produce unfairness through dissimilar treatment of the similarly situated. It is true that rules may be unfair if they place diverse situations under a single umbrella. But it may be even worse to allow cases to be decided by multiple district court judges thinking very differently about the problem at hand. Minimalism might also threaten rule of law values; by impeding planning it does not ensure that decisions are announced in advance. It is often more important for people to know what the law is than for the law to have any particular content. When planning is necessary, minimalism may be a large mistake. Legislatures and agencies often do and should avoid minimalism for this reason. Indeed, courts may be minimalist largely because the adversary system limits judges' information to individual controversies; if so, minimalism is something for the law to avoid if lawmakers can possibly obtain the necessary information.

The minimalist's claim to advance democratic legitimacy may also be questioned. Notwithstanding the democracy-forcing consequences of forms of minimalism discussed below, the question remains whether increased democratic capacity is always desirable. The disputed issue may be ill suited to democratic choice, either because it should be off-limits to politics or because democratic deliberation is not functioning well. For example, well-organized interest groups might frustrate deliberative processes by taking advantage of collective action problems faced by their adversaries.¹¹³ This phenomenon may be especially true with constitutional issues relating to punitive damages, commercial advertising, and homosexual rights; in all these contexts, powerful groups may be producing unreasonable legislation or blocking desirable

¹¹² See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 196 (1988) (noting that a justification for *Miranda*'s prophylactic rule is that the absence of clear rules creates a danger of impermissible official action and might make it difficult for a reviewing court to detect such action).

¹¹³ See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 36-37, 72 (1991).

change. And if we are concerned only about the substance — about getting things right — minimalism may be a mistake; it is possible that participants in democratic processes will merely stumble their way toward the rule that courts could have adopted long ago, in some instances never arriving at the correct rule at all. The argument that minimalism is preferable when it promotes democratic deliberation is weakened if the deliberative process delays realization of desirable rules, or precludes those rules altogether.

It seems clear that we cannot decide in the abstract whether and how much minimalism is appropriate. The choice between minimalism and the alternatives depends on an array of pragmatic considerations and on judgments about the capacities of various institutional actors. We could be confident in rejecting minimalism if the Supreme Court were excellent at developing both rules and theories, and if lower courts and other officials were very poor at both. Similarly, if democratic processes were not deliberative and failed at compiling and using information, the courts might be less reluctant to intrude into them. On the other hand, minimalism would be the right course if the Court were generally error-prone, and other institutions, deciding what the Court leaves undecided, were much better. But none of these general conclusions can claim much support. We need to answer more particular questions.

B. When Minimalism? When Maximalism?

From these observations we cannot come up with an algorithm to decide when minimalism makes sense, but some generalizations may be helpful. Anglo-American judges usually speak as if minimalism is the appropriate presumption, and of course if minimalism is the only possible route for a multimember tribunal, then minimalism will be inevitable. Minimalism becomes more attractive if judges are proceeding in the midst of factual or (constitutionally relevant) moral uncertainty and rapidly changing circumstances, if any solution seems likely to be confounded by future cases, or if the need for advance planning is not insistent. But the argument for a broad and deep solution becomes stronger if diverse judges have considerable confidence in the merits of that solution, if the solution can reduce costly uncertainty for other branches, future courts, and litigants (and hence decision costs would otherwise be high), or if advance planning is important. An inquiry of this kind can help us to assess decision costs and error costs in an intuitive way.

In any event, the case for minimalism is not separable from an evaluation of underlying substantive controversies. If judges are rightly convinced that same-sex schools always violate the Constitution, there will be little problem with a broad and deep judicial judgment to this effect. The cautious approach in *United States v.*

Virginia is more sensible if judges believe that same-sex schools may well be constitutional when they promote equal opportunity and educational diversity. If we examine the considerations referred to above, it is at least reasonable to think, for example, that *Roe* was a blunder insofar as it resolved so much so quickly; that *Loving v. Virginia* was wrong insofar as it rested on substantive due process as an alternative ground to the (sufficient and correct) equal protection holding; and that *Brown v. Board of Education* was right because it was hardly the Court's first encounter with the problem and the Court could have great confidence in its judgment.

Justice Breyer's opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*¹¹⁴ is a helpful illustration. One of the issues on which the Court split was whether Congress could (through section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992) grant cable operators "permission" to exclude indecent programming from the airwaves. Justice Thomas would have resolved this issue via simple rule: because the relevant First Amendment rights are those of the operators, of course Congress could do this; Congress was merely giving operators permission that they would have had without government regulation.¹¹⁵ Justice Kennedy also urged a simple rule: strict scrutiny should apply to any content-based law, and section 10(a) should be invalidated.¹¹⁶ The issue was tricky, and both of these approaches seem unsatisfactory. Even if Justice Thomas's premise is correct, it does not follow that any content-based permission is constitutionally acceptable: if Congress had granted cable operators the authority to exclude programming critical of the Congress, it would have been acting unconstitutionally. And contrary to Justice Kennedy's apparent suggestion, some content-based measures are unobjectionable; imagine a law that gives a bonus of some kind to educational programming. Instead of adopting any simple rules, Justice Breyer emphasized a set of factors.¹¹⁷ The regulation was based on content but not on viewpoint. It was designed to protect children, an important interest. It was reminiscent of a regulation banning indecent material that the Court upheld in *FCC v. Pacifica Foundation*,¹¹⁸ and thus was supported by an analogy. The regulation was permissive rather than mandatory. In any case it was relevant, even if not decisive, that without a regulatory system, programmers would have no guaranteed access to the operators' systems.¹¹⁹

¹¹⁴ 116 S. Ct. 2374 (1996).

¹¹⁵ See *id.* at 2424-25 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹¹⁶ See *id.* at 2404-05 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹¹⁷ See 116 S. Ct. at 2386-87.

¹¹⁸ 438 U.S. 726 (1978).

¹¹⁹ Strictly speaking this point is false. Some regulatory system is necessary to create property rights. Without a regulatory system of some kind, operators would have no right to exclude any-

Thus Justice Breyer avoided any rule and proceeded via a somewhat unruly set of factors. Was this a mistake? The answer depends largely on whether the Court could have confidence in a more rule-bound opinion; such an opinion could conceivably have lower aggregate decision costs (because it would leave less uncertainty for future judges) and much lower error costs (because future judges would be left with less room to make mistakes and the rule-bound opinion would be by hypothesis pretty good), while at the same time promoting planning, as Justice Kennedy indicated.¹²⁰ But Justice Breyer's position was quite reasonable. This is not an area where an absence of a clear rule seriously interferes with private planning; it is not as if the fundamental rules of contract and property are unclear. Some uncertainty at the margins about constitutional requirements is not likely to be devastating to cable operators and to lawmakers grappling with novel issues. In any case, regulation of "indecent" programming in the new electronic media raises issues for which old analogies may be treacherous.¹²¹ Rapid change in technology may produce less restrictive alternatives than a total ban, such as parental screening devices. In addition, we may soon have more information on how children are being affected by programming. It is sensible to think that the Court should at this early stage be cautious about possible rules.

But let me venture a more general hypothesis. The case for minimalism is especially strong if the area involves a highly contentious question that is currently receiving sustained democratic attention. In such areas, courts should be aware that even if they rely on their deepest convictions, they may make mistakes;¹²² *Dred Scott* and *Lochner* are simply the most famous illustrations. A mistake of this kind is hardly innocuous. As the two illustrations suggest, its consequences could be disastrous and hard to correct. Even if the question is not one of constitutionally relevant morality, it may involve informational deficits that should prompt the Court to proceed incrementally.

Of course the Court's resolution may be right, in the sense that the Court identifies the just result. But democratic self-government is one of the rights to which people are entitled, and unless the democratic process is not functioning well, judicial foreclosure may represent not a vindication of rights but a controversial choice of one right over an-

one. As stated, Justice Breyer's point is off the mark, and for this reason Justice Thomas's opinion is especially confused; operators have no natural or pre-legal right to exclude anyone from cable programming. Any right of exclusion is a creation of law.

¹²⁰ See *Denver Area*, 116 S. Ct. at 2406 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹²¹ See Lessig, *supra* note 61, at 1752-55.

¹²² I am speaking here against maximalist invalidations; maximalist validations, of the sort frequently favored by Justice Scalia, raise distinctive issues, partly because they are intended to spur democracy (as in the context of punitive damages). See *supra* pp. 26-27.

other. And even if the Court's resolution is right, things may go badly wrong. The Court may not produce social reform even when it seeks to do so.¹²³ It may instead activate forces of opposition and demobilize the political actors that it favors.¹²⁴ It may produce an intense social backlash, in the process delegitimizing both the Court and the cause it favors. More modestly, it may hinder social deliberation, learning, compromise, and moral evolution over time.¹²⁵ A cautious course — refusal to hear cases, invalidation on narrow grounds, democracy-forcing rulings — will not impair this deliberative process and should improve it.

These observations describe possibilities, or at most probabilities, and not by any means certainties. We can imagine cases in which one side in a moral debate is so palpably right from the constitutional point of view that the Court properly takes sides. We can imagine cases in which the Court is entitled to have confidence in its own account. The interest in democratic deliberation may itself push the Court away from minimalism and inspire the Court to decide highly contentious issues,¹²⁶ perhaps even more issues than it must. But such cases are rare. It is notable that the "official story" of Anglo-American adjudication is a minimalist one,¹²⁷ though the courts' actual practice is more complex, embodying, roughly speaking, a rebuttable presumption in favor of minimalism. The notion of a rebuttable presumption is cruder and less fine-grained than the inquiry I have suggested here; but it is a useful way of simplifying that inquiry and orienting judicial attitudes in light of the limited place of courts in a democratic constitutional order. A presumption in favor of minimalism might be rebutted when planning calls for breadth or depth,¹²⁸ when democracy is functioning poorly, or when a court is entitled to special confidence in its judgment.¹²⁹

IV. THE PLACE OF MINIMALISM IN LEGAL CULTURE

Mr. James' philosophy took shape as a deliberate protest against the monisms that reduced everything to parts of one embracing whole . . .

¹²³ See ROSENBERG, *supra* note 8, at 336-43.

¹²⁴ This happened in the abortion context. See *id.* at 185-202.

¹²⁵ See, e.g., GLENDON, *supra* note 70, at 24-50 (comparing the American and West German experiences over abortion as an illustration of this hindering effect).

¹²⁶ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1968) (holding that an Ohio statute, which prohibited advocacy or assembly for the purpose of advocacy of lawless actions, was unconstitutional under the First and Fourteenth Amendments, and reversing the conviction of a Ku Klux Klan group leader under that statute).

¹²⁷ See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 3-8 (1948).

¹²⁸ See Landes & Posner, *supra* note 60, *passim*.

¹²⁹ Possible examples include *Brown*, see *infra* pp. 50-51, and *United States v. Virginia*, along the dimension of depth, see *infra* pp. 75-79. The examples show that it is not possible to separate an assessment of minimalism from an assessment of the underlying substantive issues.

His was the task of preserving . . . respect for the humble particular . . . against the pretentious rational formula.

John Dewey, *William James*,
69 INDEPENDENT 533 (1910).¹³⁰

We address specifically and only an educational opportunity recognized . . . as 'unique,' . . . an opportunity available only at Virginia's premier military institute, the State's sole single-sex public university or college.

United States v. Virginia,
116 S. Ct. 2264, 2276 n.7 (1996) (citation omitted).

[A]ware as we are of the changes taking place in the law, the technology, and the industrial structure, relating to telecommunications, . . . we believe it unwise and unnecessary definitely to pick one analogy or one specific set of words now

[W]e are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area.

Denver Area Educational Telecommunications Consortium v. FCC,
116 S. Ct. 2374, 2385-89 (1996)
(plurality opinion) (Breyer, J.).

In this Part I discuss the role of minimalism in the practice of law and in debates over the proper outcomes of adjudication. Two points are of particular interest: the relationship between minimalism and case-by-case judgment; and the role of minimalism in making room for, and spurring, democratic deliberation.

A. Case Analysis and Analogies

It is a hallmark of legal reasoning to proceed by reference to actual and hypothetical cases.¹³¹ In constitutional and common law, a recurring question is how the case at hand compares with those cases that have come before it. Thus constitutional law has crucial analogical dimensions; most of the important constraints on judicial discretion come not from constitutional text or history, but from the process of grappling with previous decisions.¹³² This process is nonminimalist

¹³⁰ Reprinted in 6 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, at 91, 95 (Jo Ann Boydston ed., 1978).

¹³¹ See LEVI, *supra* note 127, at 1-7; SUNSTEIN, *supra* note 71, at 62-100; Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 983-1017 (1996); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741-49, 759-67 (1993). There is a detailed literature on the role of exemplars and prototypes, and judgments of similarity, in cognition generally. See, e.g., MASSIMO PIATTELLI-PALMARINI, *INEVITABLE ILLUSIONS* 147-60 (1994); Edward E. Smith, Eldar Shafir & Daniel Osherson, *Similarity, Plausibility, and Judgments of Probability*, 49 COGNITION 67, 67-93 (1993).

¹³² See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 905-13 (1996).

because the combined roles of *stare decisis* and analogical reasoning ensure that cases, once decided, will have a certain impact on the future.

This process is not, however, incompatible with the fundamental project of minimalism, because it reduces the need for theory-building and for generating law from the ground up by creating a shared and relatively fixed background against which diverse judges can work. The process of case analysis also allows judges to proceed incrementally when appropriate. The distinction between holding and dicta, and the power to recharacterize holdings, give subsequent courts the discretion to hold that earlier cases, properly understood, left many issues undecided. And the process of case analysis allows greater flexibility than the process of rule-following, and in that way absorbs the minimalist's concerns about the burdens of decision, the risks of error, and the need for latitude over time and changing conditions.

Even rule-interpretation has a large element of case analysis. People frequently understand rules by reference to the prototypical or exemplary cases that the rules call to mind.¹³³ When the case at hand differs significantly from the prototypical or exemplary cases, the project of rule-interpretation can become very difficult, and the process of rule-interpretation in these settings may well involve analogical reasoning. For example, a recent case involved legislation imposing a mandatory minimum sentence on any person who "uses or carries" a firearm "in relation" to a drug offense.¹³⁴ In *Smith v. United States*,¹³⁵ the Court held that this statute covered the sale of a firearm for drugs.¹³⁶ The Court responded affirmatively, in part because of its judgment that the use of a firearm as an object of barter raised the same problems created by the use of a firearm as a weapon.¹³⁷ In other words, the Court said that the use of the gun by Smith was relevantly similar to the use of the gun in the paradigm cases.

But another issue arose this Term in *Bailey v. United States*.¹³⁸ Police officers found a loaded pistol in the trunk of the defendant's car after they arrested him for possession of cocaine.¹³⁹ The circuit court held that the defendant had used the gun in relation to a drug trafficking crime.¹⁴⁰ The Supreme Court disagreed, holding that the statute required a demonstration of "active employment" of the firearm.¹⁴¹ It supported its conclusion partly by reference to the text of the statute

¹³³ See SUNSTEIN, *supra* note 71, at 62-100.

¹³⁴ 18 U.S.C. § 924(c)(1) (1994).

¹³⁵ 508 U.S. 223 (1993).

¹³⁶ See *id.* at 237-38.

¹³⁷ See *id.* at 239.

¹³⁸ 116 S. Ct. 501 (1995).

¹³⁹ See *id.* at 503-04.

¹⁴⁰ *United States v. Bailey*, 36 F.3d 106, 115-18 (D.C. Cir. 1994), *rev'd*, 116 S. Ct. 501 (1995).

¹⁴¹ See *Bailey*, 116 S. Ct. at 508-09.

and its legislative history,¹⁴² and partly by reference to an extended series of examples beginning with the obvious, defining cases of "use," and drawing lines based on analogy and disanalogy from those cases.¹⁴³ In this way, the Court gave meaning to the statutory rule by using a process similar to that of common law courts.¹⁴⁴

Case analysis has a large hold on the judicial mind partly because of the minimalism of this way of thinking.¹⁴⁵ Judges who rely on cases can reduce decision costs. Case analysis is generally far less time-consuming than efforts to uncover the deep foundations of various areas of law. Emphasis on cases can reduce error costs as well. A predetermined rule may not be well-suited to new circumstances, and case-by-case decisionmaking maintains flexibility for the future. Courts can distinguish past cases if they believe that these decisions are wrong as applied to new circumstances. In the abstract, it cannot be determined whether reliance on cases is better than the alternatives from the standpoint of reducing decision and error costs. We need to know about the alternatives and about the capacities of various social institutions.

B. Minimalism and Democracy, Spurs and Prods

In discussing the connection between minimalism and democracy, we must be maximalist in an important sense, for a full understanding of minimalism cannot itself be minimalist in character. We can imagine minimalists who seek to avoid theoretical controversies of any kind; I have suggested that some minimalists try to do precisely that. But let us explore the possibility of linking certain forms of minimalism with democratic aspirations, and thus of connecting minimalism with the project of *Carolene Products*, broadly understood.

The American constitutional system should be understood to signal an aspiration not to aggregation of "preferences" but to a system of deliberative democracy.¹⁴⁶ Electoral control is an important part of

¹⁴² See *id.* at 506-08.

¹⁴³ See *id.* at 505-06, 508-09.

¹⁴⁴ The lesson extends well beyond law. Human reasoning often works by reference to prototypical cases; human beings, lacking comprehensive rationality, approach new situations by comparing them with those that come most readily to mind. Goldman notes:

The exemplar theory suggests . . . that what moral learning consists in may not be (primarily) the learning of rules but the acquisition of pertinent exemplars or examples. This would accord with the observable fact that people, especially children, have an easier time assimilating the import of parables, myths, and fables than abstract principles.

Alvin I. Goldman, *Ethics and Cognitive Science*, 103 *ETHICS* 337, 341 (1993); accord GUTMANN & THOMPSON, *supra* note 3, at 204 ("By asking to what extent other violations of liberty resemble the paradigm cases, we seek to determine the extent to which they should count as basic and thereby enjoy the priority granted to basic liberty.")

¹⁴⁵ Cf. Itzhak Gilboa & David Schmeidler, *Case-Based Decision Theory*, 110 *Q.J. ECON.* 605, 609-12 (1995) (discussing minimalism of case-based decisions).

¹⁴⁶ See JOSEPH BESSETTE, *THE MILD VOICE OF REASON* 6-39 (1995); GUTMANN & THOMPSON, *supra* note 3, at 199-229; HABERMAS, *supra* note 3, at 287-328.

the system; representatives are to be accountable to the public. But the system also places a premium on the exchange of reasons among people having different information and diverse perspectives. A heterogeneous society welcomes deliberation precisely because of that pluralism.¹⁴⁷ In the absence of pluralism, deliberation would not be pointless; but it would have much less of a point.

Thus democracy is no mere statistical affair. It embodies a commitment to political (not economic) equality and to reason-giving in the public domain. For the deliberative democrat, political outcomes cannot be supported solely by self-interest or force. Legitimate reasons must be offered. Legislation cannot be supported on purely religious grounds, because citizens who contest the validity of those grounds do not consider them to be justificatory.¹⁴⁸ Nor can legislation be justified on grounds that deny the fundamental equality of human beings.¹⁴⁹ These constraints are part of the liberal conception of legitimacy; they embody an ideal of reciprocity, in which citizens are aware of and responsive to one another's interests and claims.¹⁵⁰ The relevant reasons should be offered publicly and subjected to processes of democratic deliberation.

Courts committed to deliberative democracy could support that commitment in nonminimalist ways. They could, for example, endorse some ambitious understandings of the First Amendment and the Equal Protection Clause, and use those understandings to push political processes in particular directions. They could also use rationality review to ensure that all decisions are supported by reasons of the right kind. Ideas and actions of this sort have an honorable place in American law; *United States v. Virginia* is the most recent example. If judges can converge on theoretically ambitious positions that are both correct (by the relevant criteria, whatever they may be) and possible to implement, it is hard to find a reasonable basis for complaint.

We can thus imagine a deeply theorized approach to judicial review, one that would call for minimalism in some areas and emphatically reject it in others. From the standpoint of deliberative democracy, however, courts should avoid foreclosing the outcomes of political deliberation if the preconditions for democratic deliberation have been met. In addition, courts should provide spurs and prods when either democracy or deliberation is absent. Some minimalist decisions reflect the Court's own desire to economize on moral disagreement, by refusing to rule off-limits certain deeply held moral

¹⁴⁷ See SUNSTEIN, *supra* note 3, at 18-25.

¹⁴⁸ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Those who reject the controversial *Lemon* "test" can nevertheless endorse the ban on legislation supported solely on religious grounds; another, less stringent test could certainly lead to the same ban.

¹⁴⁹ See RAWLS, *supra* note 4, at 430-31.

¹⁵⁰ See GUTMANN & THOMPSON, *supra* note 3, at 55.

commitments when it is not necessary to do so to resolve a case. Other minimalist decisions attempt to promote democracy and deliberation. It is thus possible to distinguish among democracy-forcing, democracy-foreclosing, and democracy-permitting outcomes. To avoid foreclosure and allow democratically accountable bodies to function, a court may either decline to hear a case or rule narrowly. Such democracy-permitting outcomes are especially desirable when considerations of democracy do not themselves call for a broad ruling. This is one reason why courts should act cautiously when they are in the midst of a "political thicket." Courts know that they may be wrong; they know too that even if they are right, a broad, early ruling may have unfortunate systemic effects. It may prevent the kind of evolution, adaptation, and argumentative give-and-take that tend to accompany lasting social reform.¹⁵¹

In contrast, some decisions are democracy-forcing because they trigger or improve processes of democratic deliberation. A deliberative democrat may also be a maximalist in the sense that he deems an aggressive judicial posture necessary to promote the goals of deliberative democracy. Maximalism can thus be democracy-forcing.¹⁵² But courts can also use minimalism to provide spurs and prods so as to promote democratic deliberation itself. For example,

- A court might strike down vague laws precisely because they ensure that executive branch officers, rather than elected representatives, will set the content of the law.¹⁵³
- A court might use the nondelegation doctrine to require legislative rather than executive judgments on certain issues.¹⁵⁴
- A court might interpret ambiguous statutes in such a way as to keep them away from the terrain of constitutional doubt, on the theory that constitutionally troublesome judgments ought to be made by politically accountable bodies, and not by bureaucrats and administrators.¹⁵⁵

¹⁵¹ This point helps to explain the minimalism of *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996) (opinion of Breyer, J.), *United States v. Virginia*, 116 S. Ct. 2264 (1996), and *Romer v. Evans*, 116 S. Ct. 1620 (1996).

¹⁵² Recall, as well, that a form of maximalism that broadly validates legislative outcomes can be urged on democratic grounds. See *supra* pp. 29-31.

¹⁵³ See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-70 (1972) (holding that an imprecise vagrancy ordinance placed too much discretion in the hands of the police).

¹⁵⁴ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 537 (1935) (holding that the "Live Poultry Code" resulted from an unconstitutional delegation of legislative power to the executive branch).

¹⁵⁵ See, e.g., *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (construing a statute narrowly to deny that legislative powers were delegated to the executive in the first place, while refusing to reach the constitutional issue). This "clear statement" idea is the post-New Deal version of the nondelegation doctrine; it shows that the doctrine is not really dead but is used in a more modest and targeted way to ensure that certain decisions are made by Congress rather than the executive branch.

- A court might invoke the doctrine of desuetude to require more in the way of accountability and deliberation.¹⁵⁶
- A court might require discrimination to be justified by reference to actual rather than hypothetical purposes, thus leaving open the question of whether certain justifications would be adequate if actually offered and found persuasive in politics.¹⁵⁷
- A court might attempt to ensure that all decisions are supported by public-regarding justifications rather than by power and self-interest; it might in this way both model and police the system of public reason.¹⁵⁸

All of these ideas call for approaches that are at least comparatively narrow and that leave open many of the largest questions. Thus we should contrast maximalists who are deliberative democrats with minimalists who proceed from the same foundation but prefer void-for-vagueness doctrines, as applied rather than facial challenges,¹⁵⁹ and the like.

At this point we should notice that minimalism can interact in diverse ways with the judicial validation or invalidation of statutes. In order to understand the relation between minimalism and democracy, consider the following table:

¹⁵⁶ See *infra* pp. 95-96 (discussing right to die).

¹⁵⁷ See *infra* pp. 71-79 (discussing *United States v. Virginia*, 116 S. Ct. 2264 (1996)); see also *Califano v. Goldfarb*, 430 U.S. 199, 212-17 (1977) (holding that an examination of the actual purposes behind the relevant statute contradicted the hypothetical justifications for gender-based discrimination).

¹⁵⁸ See RAWLS, *supra* note 4, at 231-40.

¹⁵⁹ The debate over when statutes may be challenged "on their face" is another example of a debate about minimalism. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 609-16 (1973) (holding that where conduct is involved, a statute's overbreadth must be real and substantial before a facial challenge may be permitted).

	VALIDATION	INVALIDATION
MAXIMALIST	1 — Scalia on punitive damages; <i>Hawaii Housing Authority v. Midkiff</i> ¹⁶⁰ ; <i>Ferguson v. Skrupa</i> ¹⁶¹ and other post- <i>Lochner</i> cases on economic due process (democracy-promoting rationale: clear background against which legislature and citizens can work)	2 — <i>Miranda v. Arizona</i> ¹⁶² ; <i>Loving v. Virginia</i> ¹⁶³ on substantive due process; <i>Roe v. Wade</i> ¹⁶⁴ ; Scalia on affirmative action; <i>New York Times v. Sullivan</i> ¹⁶⁵ ; Justice Thomas on commercial advertising
MINIMALIST	3 — Early punitive damages cases; <i>Denver Area Educational Telecommunications Consortium v. FCC</i> ¹⁶⁶ ; <i>Rostker v. Goldberg</i> ¹⁶⁷ ; <i>Korematsu v. United States</i> ¹⁶⁸	4 — <i>Romer v. Evans</i> ¹⁶⁹ ; <i>United States v. Lopez</i> ¹⁷⁰ ; <i>Kent v. Dulles</i> ¹⁷¹ ; <i>Hampton v. Mow Sun Wong</i> ¹⁷² ; <i>City of Cleburne v. Cleburne Living Center, Inc.</i> ¹⁷³ ; Powell on affirmative action; White on contraception; <i>United States v. Virginia</i> ¹⁷⁴

The maximum scope for democratic judgment emerges from cell 1: rule-bound decisions that broadly validate possible practices. Such decisions also have the advantage of giving a clear signal to other branches and of pressuring them to make corrections as necessary.¹⁷⁵ Of course from the standpoint of deliberative democracy, cell 1 outcomes may be nothing to celebrate, since the measures that are upheld may be problematic from the standpoint of deliberative democracy itself. The best defense of cell 1 involves the incentives it creates: a "clear background" against which legislatures and relevant interests can work. Thus cell 1 has been especially appealing to Justice Scalia, largely on democracy-

¹⁶⁰ 467 U.S. 229 (1984).

¹⁶¹ 372 U.S. 726 (1963).

¹⁶² 384 U.S. 436 (1966).

¹⁶³ 388 U.S. 1 (1967).

¹⁶⁴ 410 U.S. 113 (1973).

¹⁶⁵ 376 U.S. 254 (1964).

¹⁶⁶ 116 S. Ct. 2374 (1996).

¹⁶⁷ 453 U.S. 57 (1981).

¹⁶⁸ 323 U.S. 214 (1944).

¹⁶⁹ 116 S. Ct. 1620 (1996).

¹⁷⁰ 115 S. Ct. 1624 (1995).

¹⁷¹ 357 U.S. 116 (1958).

¹⁷² 426 U.S. 88 (1976).

¹⁷³ 473 U.S. 432 (1985).

¹⁷⁴ 116 S. Ct. 2264 (1996).

¹⁷⁵ This is an important part of Justice Ginsburg's argument in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1614-17 (1996) (Ginsburg, J., dissenting).

reinforcing grounds. This argument often seems attractive, but whether cell 1 outcomes can be justified as democracy-reinforcing depends on some contextual factors: Is there a structural obstacle to democratic deliberation in the context at hand? Does the legislature's failure to respond reflect interest-group pressures, myopia, or blockages of certain kinds? Is there a constitutional commitment that broad validation overlooks?¹⁷⁶

Cases that fall in cell 3 leave issues undecided, but not in a way that increases democratic space as much as cell 1. This is because cell 1 cases uphold a wide range of practices, whereas cell 3 cases leave room for invalidation. From the standpoint of closing off democratic processes, maximalists are simultaneously the best and the worst — the worst because cell 2 forecloses political deliberation. Thus among current Justices, Justice Scalia is the most generous to majoritarian processes in some settings and the least generous in others, like all consistent maximalists.¹⁷⁷ The rules are very clear, but often democratic processes find themselves broadly foreclosed. The foreclosure may be justified; *Miranda* may very well have made sense in light of the difficulty of proceeding case-by-case. But the foreclosure may also cause trouble. In *Loving v. Virginia*, for example, the Court ruled not only that the ban on racial intermarriage violated the Equal Protection Clause but also that — in an unnecessary, contentious, and potentially confusing alternative ground — it violated substantive due process by invading a fundamental "freedom to marry."¹⁷⁸

In cases in cell 4, courts attempt to promote two distinct goals of a deliberative democracy: political accountability and reason-giving. The goal of accountability is fostered by ensuring that officials with the requisite political legitimacy make relevant decisions. Hence the nondelegation and void-for-vagueness doctrines ensure legislative rather than executive law-making. Attempts to prevent continued rule by old judgments "frozen" by political processes belong in the same general category. Reason-giving, a central part of political deliberation, is associated with the control of factional power and self-interested representation, the

¹⁷⁶ Thus, for example, the case for a maximalist validation of punitive damage awards would be strongest if (a) it seems clear that legislatures will attend to the problem if it is a serious one, (b) the legislature's failure to attend to the problem is rightly taken to suggest that there is no problem at all, and (c) the due process clause cannot plausibly be brought to bear on extreme awards. On the other hand, a minimalist invalidation would be better if such an invalidation might spur legislative attention or if legislative inaction is a product of political blockages of some kind rather than a considered judgment on behalf of the status quo.

¹⁷⁷ Justice Black was a consistent maximalist. Compare *Griswold v. Connecticut*, 381 U.S. 479, 509–13 (1965) (Black, J., dissenting) (cell 1 view), with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–89 (1952) (cell 2 view). In a similar vein, Justice Black's view that the Fourteenth Amendment includes the Bill of Rights, and nothing but the Bill of Rights, may be understood as an effort to increase the rule-bound nature of Fourteenth Amendment doctrine.

¹⁷⁸ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (citation omitted)).

framers' dual concerns.¹⁷⁹ Much of administrative law consists of an effort to ensure reason-giving by agencies, partly because of a fear that they lack sufficient political accountability and may be subject to factional influences.¹⁸⁰ Democracy-promoting minimalism can be understood in similar terms. Thus many judge-made doctrines are an effort to ensure reason-giving,¹⁸¹ and are, in the process, an effort to ensure that decisions are based upon legitimate reasons.¹⁸² The 1994 Term's controversial minimalist decision, *United States v. Lopez*,¹⁸³ may be most important as a signaling device to Congress. After *Lopez*, Congress must focus on the fact that the national government is one of enumerated, rather than plenary, powers. As a result, *Lopez* is likely to play a continuing role in executive and legislative deliberations about whether there is really a need for national action.

C. Beyond Rules and Standards

There is an established literature on the choice between legal rules and legal standards.¹⁸⁴ In the familiar formulation, a rule says that no one may drive over sixty-five miles per hour; a standard says that no one may drive at an excessive speed. A rule therefore operates as a full or nearly full ex ante specification of legal outcomes.¹⁸⁵ A standard leaves a great deal of work to be done at the moment of application.

This is an illuminating distinction, and often courts do choose between rules and standards. But the distinction captures only part of the picture. It is better to distinguish between minimalism and maximalism, and better yet to specify the ways in which rules and standards may fall in either camp. A standard is a good way to keep things open for the future, but things can be left undecided in other ways too. Consider, for example, a rule that has a narrow scope. Such a rule ("all people born on September 21, 1954, must obey a 55 mile-per-hour speed limit," or "Colorado's Amendment 2 is unconstitutional") does not resolve many cases. A rule unsupported by reasons

¹⁷⁹ See SUNSTEIN, *supra* note 3, at 17-39.

¹⁸⁰ See Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 185-86.

¹⁸¹ We shall see such efforts being made in connection with *Romer v. Evans*, 116 S. Ct. 1620 (1996), and *United States v. Virginia*, 116 S. Ct. 2240 (1996).

¹⁸² See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414-20 (1996) (discussing judicial attempts to ensure that legitimate reasons are given in the First Amendment context).

¹⁸³ 115 S. Ct. 1624 (1995).

¹⁸⁴ See, e.g., Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 *passim* (1974); Kaplow, *supra* note 58, *passim*; Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 *passim* (1993).

¹⁸⁵ See Kaplow, *supra* note 58, *passim*; see also Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 271 n.25 (1993) (setting forth some qualifications).

may have narrow coverage. And the goal of leaving things undecided may be accomplished not via a standard or a narrow rule but by a denial of certiorari, or a holding that a case is moot. So too with a decision accompanied by reasons that are both narrow and shallow. Those reasons may take rule-like form, and yet still have a limited domain. In fact, rules generally may leave a great deal undecided. Thus a court might hold that the sixty-five mile-per-hour speed limit applies to people trying to get to an important meeting on the job, without saying whether it also applies to police officers, ambulance drivers, or people who are speeding to the nearest hospital.

The range of devices for avoiding breadth and depth is very wide. Thus the considerations that underlie the rules-standards debate — the need for predictability, the value of flexibility, limits in information, the desire to maintain space for the future — may be brought to bear on a wide range of issues not ordinarily understood in these terms.

D. True Believers and the Spirit of Liberty

Those who favor narrow decisions and incompletely theorized agreements tend to be humble about their own capacities. They are not by any means skeptics;¹⁸⁶ but with respect to questions of both substance and method, they are not too sure that they are right.¹⁸⁷ They know that their own attempts at theory may fail; they know that both law and life may outrun seemingly good rules and seemingly plausible theories. It is for this reason that many judges have not settled on any general approach to constitutional law. Because of these doubts, many judges have not generated an "account" of the First Amendment, the Equal Protection Clause, the Takings Clause, and other provisions that form the staple of the Court's constitutional work.

To be sure, and importantly, cases cannot be decided without some understanding of the purpose or point of the legal provisions at issue. Reasons are by their very nature abstractions, and cases that depend on reasons will necessarily rest on an account of some kind. But some Justices attempt to decide cases in the hope and with the knowledge that several different conceptions of the point will facilitate convergence on a particular outcome. Their attempts stem from their understanding that some of their convictions may not be right and from

¹⁸⁶ Skepticism is not a coherent position in this context, because it would not lead to a commitment to any position at all. See Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 89-94 (1996).

¹⁸⁷ See Elliot L. Richardson, *The Spirit of Liberty Is Skeptical*, 75 B.U. L. REV. 231 (1995) (reviewing GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1995)).

their effort to accommodate reasonable disagreement. Minimalism is thus rooted in a conception of liberty amidst pluralism.¹⁸⁸

V. MINIMALISM IN ACTION: PROBLEMS AND PROSPECTS

Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.

Denver Area Educational Telecommunications
Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2402 (1996)
(Souter, J., concurring).

The plurality opinion . . . is adrift. . . . [I]t applies no standard, and by this omission loses sight of existing First Amendment doctrine.

Denver Area Educational Telecommunications
Consortium v. FCC, 116 S. Ct. 2374, 2404 (1996)
(Kennedy, J., concurring in part, concurring
in the judgment in part, and dissenting in part).

A. Four Cases

Let us now consider some prominent examples of minimalism in law.

1. — In *Kent v. Dulles*,¹⁸⁹ the Supreme Court was confronted with the Secretary of State's denial of a passport to someone who had long been a believer in Communism.¹⁹⁰ The relevant statute said that the "Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States."¹⁹¹ Several opinions would have been simple to write.

¹⁸⁸ There is an obvious and close relationship between what I am exploring here and the notion of an overlapping consensus as set out in RAWLS, *POLITICAL LIBERALISM*, cited above in note 4, at 133-72. Rawls's conception of liberalism is designed to bracket "comprehensive views" and to allow people to converge on liberal principles from diverse starting points. *Id.* In a crucial respect, political liberalism also leaves things undecided. There is, however, a difference. Political liberalism hopes to ensure convergence on a set of abstractions — the set of abstractions that constitute political liberalism. Narrow and shallow decisions often put abstractions of that kind to one side and attempt to ensure, for example, that political liberals and their adversaries can converge on a certain outcome. Cf. GUTMANN & THOMPSON, *supra* note 3, at 5 ("In politics the need is to find some basis on which to justify collective decisions here and now in the *absence* of foundational knowledge of the sort that would (presumably) tell us whether the fundamental premises of utilitarianism or contractarianism are correct."). Thus those who seek shallow decisions try to take the aspirations of political liberalism a bit further by bracketing (if they can) the very dispute between political liberalism and other conceptions of liberalism.

¹⁸⁹ 357 U.S. 116 (1958).

¹⁹⁰ *See id.* at 117-18.

¹⁹¹ *Id.* at 123 (alteration in the original) (quoting Act of July 3, 1926, 44 Stat., Part 2, 887 (codified as amended at 22 U.S.C. § 211a (1994))) (internal quotation marks omitted).

The Court could have invalidated the statute as an open-ended delegation of authority to the executive. It could have said that the denial of the passport violated the right to travel or the right to free speech. Or it could have said that the statute was valid and plainly authorized the Secretary's decision. The Court did none of these things. It refused to construe the statute, despite its open-ended language, in a way that would enable the Secretary to limit Kent's right to travel.¹⁹² The Court did not reach the question whether Congress could constitutionally empower the Secretary to limit this right. Proceeding in minimalist fashion, it merely said that a clear statement from Congress would be required.

2. — In *Griswold v. Connecticut*,¹⁹³ the Court posited a broad "right of privacy,"¹⁹⁴ the most controversial of modern constitutional rights. The dissenters thought that to find this right required implausible constitutional creativity.¹⁹⁵ Rejecting both the majority opinion and the dissents, Justice White wrote in very narrow terms.¹⁹⁶ He agreed with the dissents that a prohibition on premarital or extramarital activity would be legitimate.¹⁹⁷ He doubted, however, that the ban on the use of contraceptives within marriage "in any way reinforce[d] the state's ban on illicit sexual relationships."¹⁹⁸ Thus he concluded that the real problem with the law lay in the weak relationship between the state's justification and the particular prohibition at issue.¹⁹⁹

In so saying, Justice White suggested that the weakness of the connection between means and ends showed that the statute in fact rested on something other than the state's asserted justification. The statute was invalid because the statute's end did not justify the statute's means.²⁰⁰ In all likelihood, the belief that actually supported the statute when it was passed was that nonprocreative sex was immoral even within marriage (though Justice White did not press that point). That belief helped produce the enactment of the statute and probably helped ensure against its repeal. But the belief no longer reflected anything like the considered judgment of the Connecticut citizenry and hence would not support criminal prosecutions.²⁰¹ In essence, Justice White's opinion reflects both a refusal to speak about a broad right to privacy and a decision to focus narrowly on the actual absence of a

¹⁹² See *id.* at 127-30.

¹⁹³ 381 U.S. 479 (1965).

¹⁹⁴ *Id.* at 484-86.

¹⁹⁵ See *id.* at 508-10 (Black, J., dissenting); *id.* at 530 (Stewart, J., dissenting).

¹⁹⁶ See *id.* at 502-07 (White, J., concurring in the judgment).

¹⁹⁷ See *id.* at 505.

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* at 505-07.

²⁰⁰ See *id.* at 506-07.

²⁰¹ See *id.* at 505 ("There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself . . .").

plausible connection between the state's justification and the statutory prohibition. Justice White's opinion was both shallow and narrow.

3. — Justice Powell's famous opinion in *Regents of the University of California v. Bakke*²⁰² provides a more recent example of minimalism in action. In *Bakke*, four Justices thought that the Constitution required government color-blindness,²⁰³ whereas four other Justices thought that affirmative action programs should be upheld as efforts to undo the continuing effects of past discrimination.²⁰⁴ Justice Powell rejected both positions. His opinion rested instead on a close analysis of the relationship between the particular affirmative action program at issue and the justifications invoked on its behalf.²⁰⁵ In his view, the most important justification involved the medical school's need to ensure a racially diverse student body, not because racial diversity was an end in itself, but because racial diversity could promote the educational mission of the school.²⁰⁶ Justice Powell found the latter justification legitimate and significant, but concluded that the University of California program was not necessary to promote that interest. A system that treated race as a "plus," rather than a rigid, two-track admissions system, would have been adequate for the University's purposes.²⁰⁷ Thus Justice Powell rejected the view that all affirmative action programs would be illegitimate (essentially the view of Justice Stevens) and also the view that all such programs should be upheld as a response to past discrimination (not far from the view of the four

²⁰² 438 U.S. 265 (1978).

²⁰³ See *id.* at 416-18 (Stevens, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Burger and Justices Stewart and Rehnquist).

²⁰⁴ See *id.* at 355-79 (Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment in part and dissenting in part).

²⁰⁵ See *id.* at 305-20 (opinion of Powell, J.).

²⁰⁶ See *id.* at 311-20.

²⁰⁷ See *id.* at 316-19.

remaining Justices).²⁰⁸ In this way Justice Powell's opinion was very narrow; it left many questions open.²⁰⁹

4. — In *Hampton v. Mow Sun Wong*,²¹⁰ the Court addressed a constitutional challenge to a Civil Service Commission regulation barring most aliens from civil service positions.²¹¹ The plaintiffs, five legal, Chinese aliens, urged that the bar violated the equal protection component of the Due Process Clause.²¹² The government responded that it had several important interests in reserving positions in the federal civil service for American citizens.²¹³

The Supreme Court rejected both positions. It left open the possibility that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."²¹⁴ But it noticed that the ban had been issued by the Civil Service Commission, not by the President or the Congress.²¹⁵ The ban therefore faced a legitimacy deficit.²¹⁶ This was especially true insofar as the Civil Service Commission could be said to have relied on the interests in providing aliens an incentive to become naturalized and in allowing the President an expendable token for treaty negotiation.²¹⁷ These interests were far afield from the ordinary mission and competence of the Commission.²¹⁸

The Court said that if a class of people were going to be deprived of federal employment, it had to be as a result of a decision by politically accountable officials acting within their ordinary competence, and not by a decision of bureaucrats invoking considerations beyond

²⁰⁸ Consider in this regard intriguing findings on people's "extremeness aversion," and what might therefore be seen as the perils of seeking to be "moderate." See, e.g., Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Judgment*, 25 J. LEGAL STUD. 287, 287-95 (1996). When presented with two polar options, people like to avoid the extremes and hence to appear moderate. But whether they are moderate is intensely sensitive to framing effects. Whatever the options are, people try to be moderate as between them. But this may not be moderate in any normatively appealing sense, if the options are terrible, and if the most extreme option (say, the total abolition of slavery, as compared with continued slavery in the states that currently allow it) is much better on the merits. The search for moderation can thus be understood as a heuristic device that allows people to escape the normative issues and to "split the difference" between reasonable people. But this heuristic device can produce big mistakes when the people who frame the poles are not reasonable.

Minimalism should not be confused with moderation. Note also that minimalists are always minimalist in relation to some assumed background that has rule-ish features. This is certainly true for Justice Powell in *Bakke*.

²⁰⁹ It was not at the same time shallow, because it offered a number of relatively abstract judgments about the legitimate grounds for affirmative action programs.

²¹⁰ 426 U.S. 88 (1976).

²¹¹ See *id.* at 90-92.

²¹² See *id.* at 96.

²¹³ See *id.* at 103-04.

²¹⁴ *Id.* at 100.

²¹⁵ See *id.* at 103-05.

²¹⁶ See *id.*

²¹⁷ See *id.* at 105.

²¹⁸ See *id.*

their expertise.²¹⁹ In so saying, the Court declined to decide whether the President or Congress could make precisely the same decision.²²⁰ Thus the Court's decision was exceedingly narrow. And because the Court did not give much of a theoretical account of its judgment, the decision was shallow as well.

These examples have a great deal in common. They involve narrow judgments that leave the largest questions for another day. They also involve judgments on which people with diverse views may — certainly need not, but may — converge. They are highly particularistic. And they all have democracy-forcing functions. This point is most conspicuously true for *Kent v. Dulles* and *Hampton v. Mow Sun Wong*, for in both instances the Court's judgment was expressly founded on the idea that publicly accountable bodies should make the contested decision that was challenged in the case. But democratic considerations underlie Justice White's *Griswold* concurrence as well. We do not need to venture far from the text of Justice White's opinion to see that the poor match between articulated means and ends suggested that an unarticulated end, one that no longer matched public convictions, actually underlay the enactment under review. The fact that no democratically accountable body had in the recent past offered a reflective endorsement of the Connecticut law links *Griswold* closely with *Kent* and *Mow Sun Wong*. Justice White's opinion is centrally concerned with the absence of sufficient democratic support for the relevant statute.

Justice Powell's *Bakke* opinion was also influenced by some of these concerns. In particular, Justice Powell noted that the program in *Bakke* had received no democratic endorsement.²²¹ The narrowness of his opinion left the democratic process ample room to maneuver, adapt, and generate further information and perspectives. Thus Justice Powell's opinion can be understood as an effort to promote both democracy and deliberation.

B. Three Maximalist Decisions

It is useful to compare the preceding cases with three of the most important cases in American constitutional law, all of which reject minimalism. One of them, *Dred Scott v. Sanford*,²²² ranks among the most vilified decisions in the Court's history; another, *Brown v. Board of Education*,²²³ may well be the most celebrated; and a third, *Roe v.*

²¹⁹ See *id.* at 114-17.

²²⁰ In fact, following *Mow Sun Wong*, the President issued an Executive Order doing what the Commission had done, and a lower court upheld the President's decision. See *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978).

²²¹ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978) (Opinion of Powell, J.).

²²² 60 U.S. (19 How.) 393 (1857).

²²³ 347 U.S. 483 (1954).

Wade,²²⁴ is one of the most sharply contested. In saying a few words about the three cases here, I do not, of course, mean to offer full evaluations of the Court's opinions. My goal is to draw attention to the sheer ambitiousness of the three decisions and to see how that ambitiousness might be evaluated.

In *Dred Scott*, the Court decided several crucial issues about the relationship between the Constitution and slavery. Most importantly, the Court struck down the Missouri Compromise,²²⁵ which abolished slavery in the territories, and ruled that freed slaves could not qualify as citizens for purposes of the Diversity of Citizenship Clause of Article III.²²⁶ Of course the Court's decision was a disaster, helping to fuel the Civil War. But let us put the substance to one side. One of the notable features of the case was that far from deciding only those issues that were necessary for disposition, the Court decided every issue that it was possible to decide. If the Court had wanted to do so, it could have avoided the controversial issues entirely. After concluding that it lacked jurisdiction under Article III, the Court could have refused to discuss Congress's power to abolish slavery in the territories. Or the Court could have rested content — as it had first voted to do²²⁷ — with a narrow judgment holding that Missouri law controlled the question of Scott's legal status. In either event, the large issues in the case would have been left alone, and the *Dred Scott* decision would have been an unimportant episode in American law. Notably, the Court itself rejected its initial minimalist approach because it wanted to take the slavery issue out of politics and to resolve it once and for all time.²²⁸ This attempted course was a disaster, partly because of the moral judgment itself and partly because of the futility of the Court's attempt in light of the Court's limited institutional role. We cannot draw firm inferences from single cases. But the Court's abysmal failure in this regard is certainly a cautionary note. It is a cautionary note because it shows the possible unreliability of moral judgments from the Court, and also because it shows that judicial efforts to resolve large questions of political morality may well be futile.

In *Roe v. Wade*, the Court addressed for the first time whether a constitutional right of "privacy" protected the decision to have an abortion. An inspection of the pleadings in *Roe*, however, reveals a potentially important aspect of the case: Roe alleged that she had been raped. Of course *Roe* is known for the elaborate trimester system it established and for the complex body of rules and standards contained in that system. A minimalist court would have said more simply that the state may not forbid a woman from having an abortion in a case

²²⁴ 410 U.S. 113 (1973).

²²⁵ See *Dred Scott*, 60 U.S. (19 How.) at 404-06, 452-54.

²²⁶ See *id.*

²²⁷ See BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 113 (1993).

²²⁸ See *id.* at 114.

involving rape.²²⁹ Such a decision would have left the constitutional status of the abortion right to be determined by lower courts and democratic judgments. As noted earlier, the appeal of such a minimalist approach cannot be evaluated without analyzing the underlying issues of constitutional substance. Perhaps the *Roe* outcome was correct as a matter of substantive constitutional theory; perhaps an inquiry into decision costs and error costs would support the *Roe* opinion. But at least it seems reasonable to think that the democratic process would have done much better with the abortion issue if the Court had proceeded more cautiously and in a more dialogic and interactive way.²³⁰

Brown appears to be the strongest argument against the claim that I mean to defend here: that minimalism is the appropriate course for large-scale moral or political issues on which the nation is sharply divided. *Brown* may require the thesis to be qualified, perhaps for the most compelling cases in which the underlying judgment of constitutionally relevant political morality is insistent.²³¹ As I have indicated, the choice between minimalism and the alternatives depends on an array of contextual considerations, and it would be extravagant to say that minimalism is always better.

But before taking *Brown* as an exception to the general thesis, let us notice two important features of the *Brown* litigation. The *Brown* decision did not come like a thunderbolt from the sky. Along this dimension, it was entirely different from *Dred Scott* and *Roe*. The *Brown* outcome had been presaged by a long series of cases testing the proposition that "separate" was "equal," and testing that proposition in such a way as to lead inevitably to the suggestion that "separate" could not be "equal."²³² In short, *Brown* was the culmination of a series of (more minimalist) cases, not the first of its kind.

There is a further point. *Brown* itself was not self-implementing; it said nothing about remedy. *Brown II*, the remedy case, had a minimalist dimension insofar as it allowed considerable room for discussion and dialogue via the "all deliberate speed" formula.²³³ *Brown II* made clear that immediate implementation would not be required. In this way it had much in common with *Kent v. Dulles* and *Hampton v. Mow Sun Wong*. It left some crucial matters undecided. It allowed

²²⁹ Cf. Ginsburg, *supra* note 69, at 376, 382, 385-86 (arguing that the Court should have simply invalidated the state statute in question because it improperly made all forms of abortion absolutely criminal).

²³⁰ See *id.* at 381-82.

²³¹ I do not think it is promising to suggest that judgments of political morality can be left aside in favor of a purely historical inquiry into constitutional meaning. In any case, such an inquiry would not support *Brown*, despite the valiant, recent effort of Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1131-40 (1995) (defending *Brown* on historical grounds).

²³² See GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL CASES* 520-23 (3d ed. 1996).

²³³ *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

those matters to be taken up by other officials in other forums. *Brown* was thus more minimalist than *Dred Scott* both because it was the culmination of a long line of cases and because it left a good deal of room for future debate at the level of implementation.

There are of course reasons to question this degree of flexibility on both strategic and moral grounds.²³⁴ I do not mean to answer these questions here. Of course *Brown II* ended up placing courts in charge of complex implementation questions, and thus required managerial judgments for which courts are ill-suited.²³⁵ But it is at least relevant to the evaluation of *Brown* that the Court did not impose its principle all at once, and that it allowed room for other branches to discuss the mandate and to adapt themselves to it.²³⁶

C. *The Passive Virtues*

The project of the minimalist judge is easily linked with the project of exemplifying the "passive virtues," a project that is associated with a court's refusal to assume jurisdiction.²³⁷ Sometimes judges do not want to decide cases or issues at all, and even the minimal amount necessary to resolve a conflict seems to require them to say too much. A denial of certiorari might well be based on this understanding. Perhaps it is premature for the Court to participate in a certain controversy. Perhaps the Court wants to receive more information, is so divided that it could not resolve the case in any event, or is attuned to strategic considerations stemming from the likelihood of destructively adverse public reactions. In all these situations it may be prudent to wait. Of course a denial of certiorari reduces decision costs for the Court. It may reduce error costs as well, if the Court is not in a good position to produce a judgment about which it has confidence, or if the Court thinks that additional discussion, in lower courts and nonjudicial arenas, is likely to be productive. Thus the denial of certiorari can be seen as a form of minimalism and evaluated by reference to the criteria I have previously discussed.

Of course principles of justiciability — mootness, ripeness, reviewability, standing — can be understood as ways to minimize the judicial presence in American public life. It may be tempting to see these principles as rooted in positive law and as allowing no room for dis-

²³⁴ See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 340-42 (6th ed. 1995) (offering the strategic objection).

²³⁵ See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

²³⁶ For a contrasting approach, refer to *Reynolds v. Sims*, 377 U.S. 533, 587-88 (1964) (Clark, J., concurring in the affirmance), which announced the "one person/one vote" rule. Justice Stewart offered the more minimalist approach, see *id.* at 588-89 (Stewart, J., concurring), saying that the apportionment system at issue was irrational. Justice Stewart did not claim that "one person/one vote" was constitutionally mandated. The problem with Stewart's approach is that it would be less administrable than the "one person/one vote" rule.

²³⁷ See BICKEL, *supra* note 8, at 127-33.

cretionary judgments about when courts properly intervene.²³⁸ But realistically speaking, justiciability doctrines are used prudentially and in response to considerations of the sort I am discussing here.²³⁹ Thus, for example, a judgment that a complex issue is not ripe for decision may minimize the risk of error and preserve room for continuing democratic deliberation about the issue. It should not be surprising to find some pressure to find otherwise borderline cases "not ripe" or "moot" precisely because of the costs associated with deciding the substantive question.

The Supreme Court's general unwillingness to resolve questions involving sexual orientation may well stem from concerns of this sort. The same can be said about its caution until just this term about using the Due Process Clause to control the award of punitive damages. My suggestion is that the notion of the "passive virtues" can be analyzed in a more illuminating way if we see that notion as part of judicial minimalism, closely associated with the rules-standards debate, and regard it as an effort to permit more democratic choice and to reduce costs.

I now try to explore some of these points in detail through a discussion of several cases from the 1996 Term. My principal vehicles are *Romer v. Evans* and *United States v. Virginia*; I discuss 44 *Liquormart*, *BMW of North America*, and *Loving* as well. I conclude that *Romer v. Evans* is unsatisfactorily reasoned but that it is a legitimate and in many ways salutary exercise in judicial minimalism. *Romer* is especially salutary insofar as it connects with a correct and longstanding understanding of the function of the Equal Protection Clause. *United States v. Virginia* was theoretically ambitious, but it was also narrow rather than broad. The depth of the opinion was justified in light of the context and the Court's own experience; the narrowness makes sense in light of the diversity of same-sex programs in education.

More briefly, I endorse the narrow outcome of the *BMW* case, but criticize 44 *Liquormart* for unnecessarily renovating the law governing commercial advertising and, in the process, overruling recent precedent. I suggest that *Loving* might well have been treated as a modern-day *Kent v. Dulles*. The Court should have said that if the federal government is going to impose the death penalty on a member of the

²³⁸ See Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 1, 5 (1964).

²³⁹ See, e.g., *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961) (dismissing appeals concerning the dismissal of the complaints because the issues were inappropriate for the Supreme Court's decision, and because the "actual hardship" to the petitioners of denied relief was minimal); *Naim v. Naim*, 350 U.S. 985, 985 (1956) (per curiam) (denying motions to recall the mandate, to set the case down for argument, and to amend the mandate and noting the lack of a federal question); *Naim v. Naim*, 350 U.S. 891, 891 (1955) (per curiam) (refusing to consider the Virginia statute on miscegenation because the record inadequately addressed the relationship of the parties to the state).

United States military, it must do so pursuant to standards laid down by Congress. In the course of discussing these cases, it will be necessary to investigate the underlying substantive law and thus to venture afield from the particular issue of minimalism.

VI. MINIMALISM, ANIMUS, AND EQUAL PROTECTION: *ROMER V. EVANS*

A. *The Case*

Amendment 2 to the Colorado Constitution provided:

Neither the State of Colorado . . . nor any of its agencies . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall be the basis of or entitle any person or class of persons to have or claim any minority status, quotas preferences, protected status or claim of discrimination.²⁴⁰

In *Romer v. Evans*, the Court was asked to determine whether this provision violated the Equal Protection Clause. The Court had various obvious options:

— It could have concluded that the statute's prohibition was not a form of discrimination and hence that there was no equal protection issue.

— It could have concluded that the provision was a form of discrimination against homosexuals, but that this type of discrimination would be subject to "rational basis" review, and that Amendment 2, like almost all forms of discrimination subject to rational basis review, should be upheld.

— It could have concluded that discrimination on the basis of sexual orientation should be subject to special judicial scrutiny, like discrimination on the basis of race and sex, and that therefore Amendment 2 should be invalidated.

— It could have emphasized that some of the amendment was targeted not against conduct at all but against status, and that Amendment 2 was unconstitutional because it created a kind of status offense.

— It could have said that the amendment was unconstitutional because it involved a disability in the political process, as the Colorado Supreme Court had concluded.²⁴¹

The Court adopted none of these options. Instead it claimed that Amendment 2 violated rational basis review because it was based not on a legitimate public purpose but on a form of "animus," with the apparent suggestion that statutes rooted in "animus" represent core offenses against the equal protection guarantee.²⁴² This claim is more minimalist

²⁴⁰ COLO. CONST. art. II, § 30(b).

²⁴¹ See *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993) (en banc).

²⁴² See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

than any of the options listed above, but it also raises more complex issues.

The Court began its analysis by rejecting the view that Amendment 2 merely puts homosexuals in the same position as everyone else.²⁴³ It said that by enacting a special prohibition against any protective measures, the Amendment actually put homosexuals in a distinctive and disadvantaged position: "The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."²⁴⁴ Understood as a special disability, the amendment, in the Court's view, failed "rationality" review because it did not bear a rational relation to a legitimate statutory end.²⁴⁵ The Court offered two different (but evidently overlapping) explanations.

First, it said that Amendment 2 "is at once too narrow and too broad,"²⁴⁶ because it defines people by "a single trait and then denies them protection across the board."²⁴⁷ Thus the state failed to show an adequate connection between the classification and the object to be attained. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."²⁴⁸ A measure that disqualifies a class of people "from the right to seek specific protection from the law"²⁴⁹ violates the requirement of impartiality.

Second, the Court said that the law is too broad to be justifiable by reference to the reasons the State invoked on its behalf. Hence it "seems inexplicable by anything but animus toward the class it affects."²⁵⁰ Amendment 2, "in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that can be claimed for it."²⁵¹ The state invoked its desire to respect the associational liberty of other citizens, including employers and landlords; but this interest was too broad to justify Amendment 2.²⁵² The state also expressed concern that it wanted to

²⁴³ See *id.* at 1624-27.

²⁴⁴ *Id.* at 1625. The Court suggested that Amendment 2 might extend further, but for purposes of decision the Court assumed a relatively narrow reach; that is, it assumed that Amendment 2 would not prevent homosexuals from taking advantage of general civil and criminal law. See *id.* at 1626. This assumption undermines the argument of "per se" violation of equal protection, discussed below at pages 55-56.

²⁴⁵ See *id.* at 1627.

²⁴⁶ *Id.* at 1628.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 1627.

²⁵¹ *Id.* at 1628-29.

²⁵² See *id.* at 1629.

conserve its resources to prevent other forms of discrimination.²⁵³ But Amendment 2 was far too broad to be justified by reference to that purpose. Thus it stands, and falls, as “a status-based . . . classification of persons undertaken for its own sake.”²⁵⁴

B. Preliminary Evaluation

At first glance, neither of the Court’s two arguments is convincing. If rationality review is the appropriate standard, Amendment 2 seems constitutional, as an effort either to discourage the social legitimation of homosexuality or to conserve scarce enforcement resources and protect associational privacy. The first interest may seem of doubtful legitimacy — I will discuss this possibility below — but rationality review by itself does not have the resources to declare it illegitimate; the legitimacy or illegitimacy of government interests is an independent issue. Colorado did not, to be sure, advance the interest in discouraging homosexuality, but under existing law that is not relevant to a rationality challenge.²⁵⁵ The second and third interests do seem to be crudely connected to the measure itself — they are both over-inclusive and under-inclusive. But this does not doom a statute under rational basis review; over-inclusive and under-inclusive legislation is perfectly acceptable, indeed quite common.²⁵⁶

The Court’s first argument — involving the elimination of “protection” — is a confusing amalgam of an argument based on means-ends scrutiny and an argument based on the “literal” meaning of the words “equal protection.” The means-ends concern seems identical to the Court’s second argument, to be taken up shortly, so let us focus on the Court’s suggestion²⁵⁷ to the effect that Amendment 2 is a “literal” denial of equal protection of the law. What does this mean? Perhaps Amendment 2 could be characterized as akin to a law declaring certain people to be *outlaws* — as in a provision that murderers, the elderly, felons, or people with blue eyes cannot claim the protection of the laws. Such a law would — it might be urged — amount to a *per se* or “literal” violation of the Equal Protection Clause, because it deprives some people of the power to seek state protection through the laws.

But there are serious problems with this argument. It is not at all clear that Amendment 2 is really akin to the hypothesized law. The amendment does not declare homosexuals to be outlaws. They continue to be protected by the ordinary civil (contract, tort, property)

²⁵³ See *id.*

²⁵⁴ *Id.*

²⁵⁵ See *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

²⁵⁶ See e.g., *id.* at 487–89.

²⁵⁷ The Court’s approach is a variation on one offered in an ingenious amicus brief. See Brief of Laurence H. Tribe, John Hartely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as *Amici Curiae* in Support of Respondents, *Romer* (No. 94-1039).

and criminal law. Amendment 2 says instead that homosexuals cannot claim the (unusual, in a sense "special") protection of antidiscrimination law simply by virtue of their status as homosexuals;²⁵⁸ it added the (unusual, in a sense "special" and admittedly somewhat bizarre) provision preventing homosexuals from getting such protection without amending the state constitution. But such provisions do not make anyone into an outlaw. If Colorado enacted a constitutional amendment saying that unwed mothers, or unwed mothers who refuse work, or unwed mothers who live with a man out of wedlock, may not claim the protection of the welfare statutes, Colorado would not be committing a literal or per se violation of the Equal Protection Clause. The fact that some people do not get statutory protection, while others do, is not decisive. To know whether there has been a violation of the right to "equal" protection, we must know about the grounds for differential treatment. The technical question would be whether the provision faced rational basis review or heightened scrutiny, and whether it was valid or invalid under the appropriate standard of review.

In other words, an act of this sort appears to be akin to one that makes certain people (constitutionally) unable to invoke the protection of laws granting welfare benefits. If the analogy is correct, the claim of "literal" denial of equal protection is really a kind of verbal trick, a play on the word "protection." It is a pun, not an argument. I conclude that the Court's first argument adds nothing and that the real argument is the second.

The state had two possible responses to the Court's second argument. The state could say:

1. "The interest in conserving enforcement resources is, to be sure, crudely connected to Amendment 2. But there is some connection. We believe that if a locality is spending its time on preventing discrimination against homosexuals, it will spend less of its time on preventing discrimination against blacks and women, which we think are more important concerns. In any case, many people have strong religious or other reasons to discriminate on grounds of sexual orientation. We want to respect their convictions. Amendment 2 may be imperfectly matched to our goals — we acknowledge that it covers many contexts in which those goals are not involved — but if rationality review is the appropriate standard, we think we have said more than enough."

2. "We do not want to legitimate homosexuality as a social practice. We are not tyrants, and we do not seek to subject homosexual acts to criminal punishment (as we are permitted to do under *Bowers v. Hardwick*). But we do want to make a statement that homosexuality is not officially sponsored. That is, homosexuals do not, as such, qualify for legal protection from discrimination. We are trying to express a

²⁵⁸ See *supra* note 243 (discussing the reach of Amendment 2).

widely held moral commitment that homosexuality is not to be approved even if it is to be tolerated. We choose to express that view through a prohibition on special protections against discrimination. True, our law applies to people with homosexual tendencies who do not engage in homosexual activity; but people with tendencies are likely to engage in acts. We do not punish through criminal law the tendencies alone; hence we think our basic goal is well enough matched to our amendment."

The Court did not offer much of a response to these possible arguments. The most troubling minimalism of the opinion lies in this failure; I will return to the problem below. Let us now turn to a question that received particular attention in the case: Was Amendment 2 a unique disability, or a denial of special privileges? And how, if at all, is this a relevant question?

C. Special Benefits and Unique Disabilities

We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them

Romer v. Evans, 116 S. Ct. 1620, 1627 (1996).

The Court thought that Amendment 2 was a unique disability because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."²⁵⁹ Justice Scalia thought that Amendment 2 forbade the creation of special privileges because most characteristics are not bases for statutory protection from discrimination. In Justice Scalia's view, Amendment 2 restored the status quo ante, in which only a few groups receive that protection.²⁶⁰

There is a sense in which both sides were right. Most group-based characteristics are not bases for statutory protection against discrimination. Short people, tall people, movie-makers, singers, horse-riding people, dog owners — all these and innumerable others receive no special legal protection against discrimination. In this sense it is fair to say that Amendment 2 simply restored homosexuals to a status like that of nearly everyone else. On the other hand, there is another sense in which Amendment 2 imposed on homosexuals a unique disability. Short people, tall people, movie-makers, singers, horse riders, dog owners — all these can petition relevant legislatures for protection against discrimination. Homosexuals are subject to a unique disability in the sense that only they are required to amend the Colorado Constitution to obtain such protection. In this sense there is indeed discrimination.

Thus Justice Scalia and the Court are both in a sense right. The weakness of Justice Scalia's opinion is that it does not see or come to

²⁵⁹ *Romer*, 116 S. Ct. at 1623.

²⁶⁰ *See id.* at 1629 (Scalia, J., dissenting).

terms with the respect in which Amendment 2 puts homosexuals at a special disadvantage. In the striking quotation at the beginning of this section, the Court seemed to embrace a baseline of nondiscrimination. But this special disadvantage is not necessarily fatal to the legislation. If, for example, Colorado said — in, say, Amendment 3 — that no governmental body may allow cigarette smokers to claim minority status, quota preferences, or protected status for any claim of discrimination, it would probably be acting constitutionally.²⁶¹ Amendment 3 would be constitutional because a state could legitimately decide that it wants to prevent itself and its subdivisions from giving special safeguards to smokers. It could make that decision because it is legitimate to think that smokers create serious risks to themselves and to others. It is possible that some localities would reject this position and want to treat smokers as the functional equivalent of blacks and women. But a state could reasonably choose to override this view. It seems clear that smokers thus disadvantaged would face a unique disability. This burden would not, however, fail rationality review, because it would be reasonably related to the state's legitimate interest in decreasing risks to life and health. It follows that a finding that Amendment 2 imposes a unique disability is not fatal to its constitutionality. The amendment's constitutionality will depend on whether there is a public-regarding justification for the imposition of the disability.

The only possible distinction between *Romer* and the smokers' case is that there is no legitimate reason to constitutionalize a judgment that homosexuals should not be protected from discrimination, perhaps because there is no legitimate reason to think that homosexuals pose a risk in the way that smokers do. Thus, the case does not turn on whether there is removal of a special benefit or imposition of a unique disability, but instead on whether the state has legitimate reasons for its action. An understanding of this kind seems to underlie the Court's suggestion that Amendment 2 is unconstitutional because it is undergirded by a "bare . . . desire to harm a politically unpopular group."²⁶²

On this point, however, Justice Scalia has a seemingly powerful response. In this context, the "bare desire to harm" can be translated into one side in a "culture war."²⁶³ Those who take this side believe that the state should not approve homosexuality through antidiscrimination law, and "surely it is rational to deny special favor and protection to those

²⁶¹ At least this assertion would be true if Amendment 3 were understood in the narrow way the Supreme Court was willing to understand Amendment 2. See 116 S. Ct. at 1626-27 (stating that Amendment 2 is unconstitutional even if construed not to prevent ordinary operation of the criminal and civil law).

²⁶² *Id.* at 1628 (alteration in original) (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

²⁶³ *Id.* at 1629 (Scalia, J., dissenting) (quoting *Romer*, 116 S. Ct. at 1628) (internal quotation marks omitted). "The Court has mistaken a Kulturkampf for a fit of spite." *Id.* Admittedly, "Kulturkampf" is a puzzling term of (apparent) approval.

with a self-avowed tendency or desire to engage in the conduct."²⁶⁴ The relevant animus here is not a bare desire to harm but a product of a widespread "moral disapproval of homosexual conduct."²⁶⁵ In Justice Scalia's eyes, this kind of animus is not objectionable from the constitutional point of view.

The majority must be saying the opposite: that any such animus is illegitimate at least if it is the source of an unusual, blunderbuss prohibition on antidiscrimination measures. Here, then, is the crux of the *Romer* case.

D. *The Moreno-Cleburne-Romer Trilogy*

[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.

Romer v. Evans, 116 S. Ct. 1620, 1628 (1996).

[T]he deliberative conception of democracy . . . restricts the reasons citizens may use in supporting legislation to reasons consistent with the recognition of other citizens as equals. Here lies the difficulty with arguments for laws supporting discrimination. . . . The point is that no institutional procedure without such substantive guidelines for admissible reasons can cancel the maxim "garbage in, garbage out."

JOHN RAWLS, *POLITICAL LIBERALISM*
430-31 (2d ed. 1996).

In a handful of cases, rationality review has actually meant something.²⁶⁶ Each of these cases has been minimalist in character. The Court has found an inadequate connection between statutory means and ends; in doing so, it has attempted to "flush out" impermissible purposes.

A number of the key cases have involved issues of federalism.²⁶⁷ The Court has struck down state statutes that purport to protect public-regarding goals but actually seem to reflect protectionism — a desire to protect in-staters at the expense of out-of-staters. If the federal system is understood to ban protectionism, these cases are not at all hard to understand. The Court looks beyond the articulated justifications, which typically bear a weak though not wholly implausible relation to the classification. These cases are not entirely minimalist — they depend on an account of a prohibited end, an account that leads to a degree of width and depth — but they tend toward the minimalist end of the continuum. They offer narrow, targeted bans on certain kinds of reasons for law.

²⁶⁴ *Id.* at 1632.

²⁶⁵ *Id.* at 1633.

²⁶⁶ See, e.g., *Romer*, 116 S. Ct. at 1629; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973).

²⁶⁷ See, e.g., *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985); *Zobel v. Williams*, 457 U.S. 55, 63 (1982).

But there is a more puzzling set of cases; we may now refer to them as the "*Moreno-Cleburne-Romer* trilogy." In these cases, the Court ruled off-limits a constitutionally unacceptable "animus" not involving federalism or discrimination on the basis of race or sex. The difficulty lies in identifying the impermissible goal that links the three cases. What precisely is "animus"?

The problem in *United States Department of Agriculture v. Moreno*²⁶⁸ arose from Congress's decision to exclude from the food stamp program any household containing any individual who was unrelated to any other member of the household.²⁶⁹ The Court said that the articulated justification — minimizing fraud in the food stamp program — seemed only weakly connected to the statutory classification.²⁷⁰ The Court noted that the legislative history suggested a congressional desire to exclude "hippies" and "hippie communes."²⁷¹ To this, the Court said, in words echoed in *Romer*: "[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 . . ."²⁷² Then-Justice Rehnquist dissented on the ground that Congress could reasonably decide that it wanted to support, with taxpayer funds, only those units that are a "variation on the family as we know it."²⁷³ Justice Rehnquist's strategy — like Justice Scalia's in *Romer* — was to describe what the majority characterized as the "bare . . . desire to harm"²⁷⁴ as an effort to promote a moral commitment by funding traditional rather than untraditional families.²⁷⁵

In *City of Cleburne v. Cleburne Living Center, Inc.*, a city in Texas denied a special use permit for the operation of a group home for the mentally retarded.²⁷⁶ The Court rejected the view that discrimination against the mentally retarded people should be subject to "heightened scrutiny."²⁷⁷ But applying rational basis review, it nonetheless found the city's requirement of the permit unacceptable.²⁷⁸ It appeared to think

²⁶⁸ *Moreno*, 413 U.S. at 528.

²⁶⁹ See Food Stamp Act of 1964, Pub. L. No. 91-671, § 3(e), 84 Stat. 2048 (1971) (current version at 7 U.S.C. § 2012 (l) (1994); *Moreno*, 413 U.S. at 529.

²⁷⁰ See *Moreno*, 413 U.S. at 536-37 (expressing "considerable doubt" that the "amendment could rationally have been intended to prevent" fraud).

²⁷¹ *Id.* at 534 (citing H.R. CONF. REP. NO. 91-1793, at 8 (1970), and 116 CONG. REC. 44,439 (1970) (statement of Sen. Holland)).

²⁷² *Id.*; accord *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

²⁷³ *Moreno*, 413 U.S. at 546 (Rehnquist, J., dissenting).

²⁷⁴ *Romer*, 116 S. Ct. at 1628 (quoting *Moreno*, 413 U.S. at 534).

²⁷⁵ See *id.* at 1636 (Scalia, J., dissenting) (characterizing the amendment as "a reasonable effort to preserve traditional American moral values"); *Moreno*, 413 U.S. at 546 (Rehnquist, J., dissenting) ("This unit provides a guarantee . . . that the household exists for some purpose other than to collect federal food stamps").

²⁷⁶ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985).

²⁷⁷ See *id.* at 442-47.

²⁷⁸ See *id.* at 450.

that the requirement was imposed on the basis of prejudice, or animus, rather than any legitimate public purpose.²⁷⁹ The city had pointed to the fears of elderly residents, the negative attitudes of property owners, the concern that students nearby might harass the residents, the size of the home and the number of people who would occupy it, and the fact that the home would be located on a floodplain.²⁸⁰ Unquestionably these concerns would satisfy ordinary rationality review as traditionally formulated. For purposes of that standard, it is not decisive — nor even relevant — that there was a poor fit between these ends and the means chosen by Cleburne.²⁸¹ But the *Cleburne* Court signaled its concern that something illegitimate underlay the city's decision when it admonished that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for" unequal treatment.²⁸² Thus the Court concluded that the discriminatory action under review was based "on an irrational prejudice."²⁸³

Each case in the *Moreno-Cleburne-Romer* trilogy partakes of decisional minimalism. None of the cases establishes a new "tier" of scrutiny. *Cleburne* and *Romer* are notable for having failed to do so. All three cases reflect the possible use of rationality review as a kind of magical trump card, or perhaps joker, hidden in the pack and used on special occasions. In these cases, rationality review, traditionally little more than a rubber stamp, is used to invalidate badly motivated laws without refining a new kind of scrutiny. In this way too, they are minimalist; they need have no progeny.

The trilogy is also linked with the federalism cases, for both sets of cases involved judicial disapproval of a constitutionally illicit purpose. But there is a substantial difference. In the federalism cases, the illicitness of the purpose (disfavoring citizens of other states) is easy to understand. But what is constitutionally illicit about the purposes in the trilogy? This is the question pressed by Justice Scalia in *Romer*. If the Court was to offer a theoretically adequate opinion, Justice Scalia should have received a better answer.

In both *Cleburne* and *Romer*, the Court was concerned that a politically unpopular group was facing discrimination as a result of irrational hatred and fear. As with homosexuality, many people appear to think that mental retardation is contagious and frightening for that reason. Antipathy toward the retarded is frequently rooted in an absence of empathetic identification, a belief that they are not entirely human and should be avoided and sealed off. The Court's invalidation of the law under rationality review depended on its explicit belief that irrational

²⁷⁹ See *id.* (expressing the belief that the city's position "rest[ed] on an irrational prejudice").

²⁸⁰ See *id.* at 448–49.

²⁸¹ See, e.g., *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592 (1979); *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

²⁸² *Cleburne*, 473 U.S. at 448.

²⁸³ *Id.* at 450.

fear was likely to be at work.²⁸⁴ And if *Cleburne* is to make sense, it must be because the state cannot discriminate against the mentally retarded simply because people are afraid of them.

But we have seen enough to be able to say that hatred and fear can always be translated into public-regarding justifications. Thus in *Cleburne* the city was able to point to neutral-sounding grounds, such as a potential drop in property values.²⁸⁵ Thus in *Romer* it might have been said that the state was attempting to protect associational liberty or not to legitimate homosexual behavior, just as in *Moreno*, the state was attempting not to promote nontraditional living arrangements. Along this dimension the trilogy cases are very close. In all three cases, there were poorly fitting but probably rational justifications (property values in *Cleburne*, discouragement of fraud in *Moreno*, conservation of resources and protection of association in *Romer*) and also well-fitting justifications whose legitimacy was in doubt (response to private fears in *Cleburne*, desire to exclude nontraditional families in *Moreno*, desire to avoid legitimizing homosexuality in *Romer*).

With this we come close to the heart of the matter. The underlying judgment in *Romer* must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior. The state must justify discrimination on some other, public-regarding ground. The underlying concern must be that a measure discriminating against homosexuals, like a measure discriminating against the mentally retarded, is likely to reflect sharp "we-they" distinctions and irrational hatred and fear, directed at who they are as much as what they do. Note that Amendment 2 involved status as well as conduct, a point emphasized by the Court.²⁸⁶ It would be hard to imagine a similar measure directed against polygamists, adulterers, or fornicators. Polygamists, adulterers, and fornicators are punished through law or norms because of what they do; homosexuals are subject to a deeper kind of social antagonism, connected not only with their acts but also with their identity. It is this status feature that links discrimination on the basis of sexual orientation with discrimination on the basis of race or sex. Here, as with the mentally retarded, we can find a desire to isolate and seal off members of a despised group whose characteristics are thought to be in some sense contaminating or corrosive.²⁸⁷ In its most virulent forms, this desire is rooted in a belief that members of the relevant group are not fully

²⁸⁴ See *id.* ("[R]equiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . .").

²⁸⁵ See *id.* at 448-50.

²⁸⁶ See *Romer v. Evans*, 116 S. Ct. 1620, 1625 (1996).

²⁸⁷ Justice Scalia's references to political power, see *id.* at 1634 (Scalia, J., dissenting), are not responsive. Blacks and women can elect people too. The real question is not whether members of the group have some electoral power (they always do), but whether illicit motives are likely to be at work.

human.²⁸⁸ On this count, *Cleburne* and *Romer* are at one. And because the proffered justifications were so weakly connected with the measures at issue, the Court was right to do what it did in both cases.

Moreno is a harder case, because there was less reason to believe that hatred and fear were at work. But the reference to "hippie communes," seen in the context of the time, may be taken to suggest a similar kind of "we-they" antagonism. Taken in these terms, the three cases are linked not only with each other, but also with the defining case of discrimination against the newly free slaves. *Moreno*, *Cleburne*, and *Romer* reflect an understanding that other groups, not only African-Americans, may be subject to unreasoning hatred and suspicion. Hence the *Romer* Court's opening reference to Justice Harlan's dissenting opinion in *Plessy v. Ferguson*.²⁸⁹

With this point we can see that the outcome in *Romer* was not minimalist in the less controversial way that *Kent v. Dulles*²⁹⁰ and *Hampton v. Mow Sun Wong*²⁹¹ were minimalist. *Romer* turned on a substantive judgment about what grounds for state law are legitimate. For this reason we can understand Justice Scalia's complaint that *Romer* did not promote but instead usurped democratic deliberation.²⁹² If *Romer* is to be defended, it must be because the grounds for Amendment 2 are, in a deliberative democracy, properly ruled off-limits, because the Amendment reflects a judgment that certain citizens should be treated as social outcasts. This argument for *Romer* associates Amendment 2 with measures like those in *Plessy* and *Bradwell v. Illinois*²⁹³ (which is not to suggest that the harms of Amendment 2 are the same in degree). *Romer* thus embodies a ban on laws motivated by a desire to create second-class citizenship, a point that connects the outcome with *United States v. Virginia*²⁹⁴ as well. This was the forbidden motivation that the Court described as "animus."

Should the Court have been clearer on these points? From the standpoint of traditional judicial craft, the answer is yes. Such an opinion would be more coherent. It need not be very broad, though it would be more deeply theorized. We could certainly imagine an opinion saying that if the government is going to discriminate against homosexuals, it must do so on some ground other than its dislike of homosexuals and

²⁸⁸ See, e.g., Avishai Margalit & Gabriel Motzkin, *The Uniqueness of the Holocaust*, 25 PHIL. & PUB. AFF. 65, 70 (1996) (explaining that the Nazis "denied the shared humanity of humankind").

²⁸⁹ See *Romer*, 116 S. Ct. at 1623 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

²⁹⁰ 357 U.S. 116 (1958).

²⁹¹ 426 U.S. 88 (1976).

²⁹² See *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting) ("Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means This Court has no business imposing upon all Americans the resolution [it favors]").

²⁹³ 83 U.S. 130 (1873) (upholding the exclusion of women from the practice of law).

²⁹⁴ 116 S. Ct. 2264 (1996).

homosexuality. We could certainly imagine an opinion linking this form of discrimination with discrimination on the basis of sex²⁹⁵ and race. If the argument I am offering is correct, it would be hard to object to its judicial adoption. But perhaps at this stage, it makes sense for the Court to have been even more minimalist than that — to have rendered an opinion lying somewhere between a denial of certiorari and a fully articulated defense. It may have made sense to do what the Court did partly because of the simple practical difficulties in obtaining a more ambitious majority opinion; partly because of the Justices' lack of confidence in their own understandings of exactly what the Constitution requires in this setting; and partly because of strategic considerations having to do with the timing of judicial interventions into politics.

What the Court did had the vice of its own distinctive brand of minimalism — the failure even to do what is minimally necessary for self-defense. This is a genuine vice. But if we consider the entire context, it may also be an act of statesmanship, reflecting a prudent awareness of the need for democratic rather than judicial conclusions on this topic. The narrow and shallow decision may turn out to be broader and deeper; ultimately analogical reasoning and principles of *stare decisis* will determine its scope. *Romer* imposes unusually few constraints on its own interpretation. One of the central issues here has to do with the fate of *Bowers v. Hardwick*.²⁹⁶

E. The Dog That Didn't Bark, or Equal Protection vs. Due Process

If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.

Romer v. Evans, 116 S. Ct. 1620,
1631 (1996) (Scalia, J., dissenting).

I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.

44 Liquormart, Inc. v. Rhode Island,
116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring
in part and concurring in the judgment).

We have not yet explored a central, indeed obvious question: What about *Hardwick*? Astonishingly, the Court did not discuss or even cite *Hardwick*.²⁹⁷ Its failure to do so is remarkable in light of the fact that *Hardwick* seemed to belie the argument just offered. That is, *Hardwick* seemed to say that it is legitimate for the state to express disapproval of

²⁹⁵ Cf. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 202 (1994) (treating discrimination on the basis of sexual orientation as a form of sex discrimination).

²⁹⁶ 478 U.S. 186 (1986).

²⁹⁷ The Court's omission is made only slightly less astonishing by the fact that Colorado did not invoke *Hardwick* either.

homosexual conduct, indeed that it is legitimate for the state to express that disapproval via the criminal law. If it is acceptable for the state to criminalize homosexual activity, why does it not follow that it is acceptable for the state to prohibit legal protections against discrimination against homosexuals? Criminal punishment is a far more severe response to moral opprobrium than a ban on antidiscrimination claims.

An important aspect of the Court's minimalism — indeed, sub-minimalism — consists in its failure to answer the question just posed, or indeed to say anything about how *Romer* and *Hardwick* fit together. We might even say that the Court's silence on *Hardwick* is under ordinary circumstances an unacceptable exercise of judicial power. An apparently relevant precedent ought to receive at least some discussion, especially if it is raised seriously in dissent.²⁹⁸

Why, as a matter of fact, did the Court say nothing about *Hardwick*? I speculate that the Court's silence about *Hardwick* stemmed from the fact that a majority could not be gotten to (a) distinguish *Hardwick*, (b) approve *Hardwick*, or (c) overrule *Hardwick*. If each of these options was unavailable, silence was the only alternative. The Court's silence probably resulted from the multimember tribunal's inability to converge on any rationale, a common explanation for minimalism.

But what, then, is the current status of *Hardwick*? This is a pressing question. Justice Scalia is correct to suggest that there is tension between the two cases. The tension lies in the fact that *Hardwick* says that disapproval of homosexual sodomy is a sufficient reason for criminal prohibition,²⁹⁹ whereas *Romer* denies that disapproval of homosexuality is a sufficient reason to bar use of antidiscrimination law.

If the *Romer* Court had chosen to address *Hardwick*, five alternative approaches were available. The Court could have (1) overruled *Hardwick* because it was wrongly decided; or it could have distinguished *Hardwick* because it involved (2) a due process challenge rather than an equal protection challenge; (3) a narrowly targeted prohibition on a particular act rather than a broad, blunderbuss ban aimed at a group; (4) a traditional, rather than a novel, legal rule; and/or (5) conduct (sodomy) rather than status (homosexuality).

Argument (4) is inadequate. The Court did refer to the novelty of Amendment 2, with the apparent thought that the novelty helped signal that something odd and perhaps untoward was at work. But novelty is not synonymous with unconstitutionality. Although tradition helps give content to the Due Process Clause, and although novelty may give rise to suspicion, tradition does not have the cross-constitutional weight that argument (4) attempts to give it.³⁰⁰ In any case the Court's emphasis on the unusual nature of Amendment 2 was doubtful. Only very recently have localities begun to forbid discrimination on the basis of sexual ori-

²⁹⁸ See *Romer*, 116 S. Ct. at 1629 (Scalia, J. dissenting).

²⁹⁹ See *Hardwick*, 478 U.S. at 196.

³⁰⁰ See Cass R. Sunstein, *Against Tradition*, 13 SOC. PHIL. & POL'Y 207, 226-27 (1996).

entation; tradition is hardly inconsistent with such discrimination; and thus Colorado might have said that it was restoring the traditional status quo ante by undoing those laws.

Argument (3) is more plausible. The law in *Hardwick* was hardly over- or under-inclusive, and this was the Court's objection to Amendment 2.³⁰¹ Hence it could be said that *Romer*, invalidating a badly fitting law, falls in the protectionism-*Moreno-Cleburne* line of equal protection cases, whereas *Hardwick*, upholding a nicely fitting law, is like any case upholding a statute against substantive due process attack. This is not an unreasonable position, but it seems unconvincing. The key question, uniting *Hardwick* and *Romer*, is whether it is permissible for the state to try to delegitimize, or to decide not to legitimate, homosexual relations. If it is, *Hardwick* is right and *Romer* is wrong, even if Amendment 2 was over- and under-inclusive. Thus it seems that argument (3) does not work unless it is accompanied by argument (2) or (5).

Argument (5) does connect with some of the Court's statements in *Romer*. Amendment 2 had the most peculiar feature of targeting people regardless of their actions.³⁰² *Hardwick* says that government can legitimately act against homosexual sodomy; but it does not follow that it can punish mere homosexual status. It would certainly be unconstitutional to make "homosexual status" a crime.³⁰³ But it is not clear that this is sufficient to support *Romer* and distinguish *Hardwick*. There was no criminal ban in *Romer*. The Court's opinion did not principally stress the status offense issue; if it had, it might well have invalidated Amendment 2 only insofar as it targeted the mere status of homosexual orientation, and preserved it insofar as it targeted homosexual conduct.

In any case, Justice Scalia argued that it follows from *Hardwick* not that government can make homosexual status a crime, but that government can prohibit the use of the antidiscrimination law to protect people who have an inclination to engage in conduct it disfavors.³⁰⁴ In other words, it is not clear that a government that is disabled from creating "status offenses" is also disabled from saying that people inclined to engage in disfavored activity cannot, because of that inclination, seek the protection of antidiscrimination laws. Consider a law defining as addicts people inclined to heavy drinking and smoking, and prohibiting them from claiming the protection of antidiscrimination laws. This form of discrimination would be status-based, in a sense, but it is not obviously unconstitutional. Now let us turn to argument (2), which points in promising directions.

³⁰¹ See *Romer*, 116 S. Ct. at 1628 ("It is at once too narrow and too broad.").

³⁰² The point is stressed by Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. (forthcoming Oct. 1996).

³⁰³ Cf. *Robinson v. California*, 370 U.S. 660, 666 (1962) (holding unconstitutional a California law that made the status of narcotics addiction a crime).

³⁰⁴ See *Romer*, 116 S. Ct. at 1631-32 (Scalia, J., dissenting).

The Equal Protection and Due Process Clauses have very different offices, and *Hardwick* is not in tension with *Romer* so long as those different offices are kept in mind. The *Hardwick* Court was careful to say that plaintiffs had raised no equal protection challenge, and this is important, for the category of legitimate state interests is provision-specific rather than Constitution-general.³⁰⁵ Perhaps the rights protected by the Due Process Clause must grow out of longstanding practices. But as it has come to be understood, the Equal Protection Clause is tradition-correcting, whereas the Due Process Clause is generally tradition-protecting.³⁰⁶ The Equal Protection Clause sets out a normative ideal that operates as a critique of existing practices; the Due Process Clause safeguards rights related to those long-established in Anglo-American law. In view of the different constitutional provisions at issue, *Romer* leaves *Hardwick* untouched, simply because different provisions were at issue. And on this view, Justice Scalia is wrong to think it anomalous that the state can prohibit homosexual sodomy while being barred from enacting Amendment 2. The validity of state action depends on the particular constitutional challenge being mounted and the particular provision being invoked. For example, the Equal Protection Clause makes animus against African-Americans constitutionally unacceptable, even though there is nothing specifically objectionable about that animus under the Due Process and Contracts Clauses.³⁰⁷

³⁰⁵ It is notable that the *Hardwick* Court explicitly created a distinction between heterosexuals and homosexuals. The plaintiffs attacked the sodomy law in a way that was neutral with respect to sexual orientation. It was the Supreme Court that made the distinction, by upholding the law as applied to homosexuals (while, in good minimalist fashion, leaving undecided its status as applied to heterosexuals). See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). Because the Court in *Hardwick* discriminated on the basis of sexual orientation, it may seem odd to suggest that the Equal Protection Clause draws discrimination on the basis of sexual orientation into doubt. The best response is that *Hardwick* did not involve an equal protection claim. See *id.* at 196 n.8. The Court gave the minimal answer necessary to decide the due process attack. It should not seem terribly odd if the Court's distinction turns out to raise problems when an equal protection challenge is raised. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174-76 (1988).

³⁰⁶ See *United States v. Virginia*, 116 S. Ct. 2264, 2269 (1996) (holding that the maintenance of an all-male military college violated the Equal Protection Clause); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (holding that requiring a home for the mentally retarded to obtain a special use permit violated the Equal Protection Clause); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (holding that segregation based on race violated the Equal Protection Clause). Interestingly, Justice Scalia contends in his dissenting opinion in *United States v. Virginia* that the Equal Protection Clause should be understood by reference to tradition. See *United States v. Virginia*, 116 S. Ct. at 2291-92 (Scalia, J., dissenting).

The historical understanding of due process has long roots. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J. concurring); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Murray's Lessee v. Hoboken*, 59 U.S. (18 How.) 272, 277 (1855).

³⁰⁷ Consider as an illustration the maximalist opinion in *Loving v. Virginia*, 388 U.S. 1 (1967), in which a ban on miscegenation was struck down on both equal protection and due process grounds. If the ban had been upheld against due process attack in *Loving*, it would not have followed that an equal protection challenge would have been unavailable. Indeed, if the *Loving*

Thus *Romer* might be seen to hold that the Equal Protection Clause forbids states from discriminating against homosexuals as a class (regardless of their behavior), unless the discrimination can be linked to some goal other than the bare desire to discourage homosexuality. *Romer* stands for the proposition that any discrimination against homosexuals must rest on a public-regarding justification; the goal of preventing or delegitimizing homosexual behavior is not by itself sufficient to support discrimination. This holding leaves open questions involving discrimination in education or the military. On this view, it remains possible that the Due Process Clause allows states to punish homosexual behavior. In view of the reasonable distinction identified in argument (2), especially when linked with argument (5), it was appropriate for the Court to reject argument (1) and decline to overrule *Hardwick* at this stage. And if the distinction between equal protection and due process is maintained, *Romer* may be right even if *Hardwick* remains good law.

Notwithstanding what I have just said, it may well be that *Hardwick* is now very fragile and that eventually argument (1) will prevail. We could certainly imagine worse outcomes than the overruling of *Hardwick*, a casually written (subminimalist) opinion and one of the most vilified decisions since World War II.³⁰⁸ But the Court should be cautious about overruling its own decisions, even those a majority thinks wrong, and perhaps *Hardwick* is not so egregiously wrong as to be overruled ten years later. On the other hand, there is good reason to think that *Hardwick* was indeed wrong; at least it is unlikely that the present Court would uphold a law imposing an actual jail sentence on someone for engaging in consensual sexual activity. Probably *Hardwick* should have been decided (if it was to be decided by the Court at all³⁰⁹) the other way and very narrowly — as a case involving the old and nicely minimalist idea, with democratic foundations, of desuetude.³¹⁰ A challenge of this sort was not raised or passed on by the Court, and hence that challenge could be accepted without overruling *Hardwick*'s substantive due process holding.

To summarize a lengthy discussion, a minimalist (as opposed to sub-minimalist) opinion in *Romer* would have said the following:

Court had held that the Due Process Clause is purely procedural, the equal protection attack would not have been affected in the least.

³⁰⁸ See, e.g., WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 250 n.31 (1996); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 770, 799–801 (1989); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 52 U. CHI. L. REV. 648, 655–56 (1987).

³⁰⁹ The thoroughgoing minimalist would want the Court to have dismissed that case as moot. Although I have not defended thoroughgoing minimalism here, I do think that dismissal would have been best, all things considered.

³¹⁰ See *infra* p. 96. In his curious concurring opinion, Justice Powell characteristically groped toward a minimalist solution. See *Hardwick*, 478 U.S. at 197 (Powell, J., concurring) (suggesting that a jail sentence for *Hardwick* might violate the Cruel or Unusual Punishment Clause).

Hardwick held only that the ban on homosexual sodomy did not violate the Due Process Clause, whose content has been defined at least partly by reference to tradition. This case involves the Equal Protection Clause, which was not at issue in *Hardwick*. The content of the Equal Protection Clause is not given by tradition; that Clause is rooted in a principle that rejects many traditional practices and in any case subjects them to critical scrutiny. Our narrow conclusion today is that when the state discriminates against homosexuals, the Equal Protection Clause requires that the discrimination must be rational in the sense that it must be connected with a legitimate public purpose, rather than fear and prejudice or a bare desire to state public opposition to homosexuality as such. In this case, Colorado has been unable to show any such connection. Its reference to associational liberty is an implausible justification for its broad ban, a judgment fortified by Amendment 2's reference to 'orientation' as well as 'conduct.' To reach this conclusion, it is unnecessary for us to say whether and when other, less unusual forms of discrimination on the basis of sexual orientation are connected with legitimate public purposes.

F. A Note On Meaning and the Expressive Function of Law

Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that can be claimed for it.

Romer v. Evans, 116 S. Ct. 1620,
1628-29 (1996).

[T]he constitutional claim before us ultimately depends for its success on little more than speculative judicial suppositions about the societal message that is to be gleaned from race-based districting.

Shaw v. Hunt, 116 S. Ct. 1894, 1910
(1996) (Stevens, J., dissenting).

It is sometimes observed that the Supreme Court's decisions have educative effects.³¹¹ The nature and extent of these effects raise serious empirical questions. But short of an empirical investigation, it can at least be said that Supreme Court decisions have short-term effects in communicating certain messages containing national judgments about what is and is not legitimate. Official pronouncements about law — from the national legislature and the Supreme Court — have an expressive function.³¹² They communicate social commitments and may well have major social effects just by virtue of their status as communication. Consider, for example, recent debates about whether the Constitution should be amended to allow criminalization of flag-burning, or whether universities should be permitted to regulate "hate" speech. Such mea-

³¹¹ See Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 962 (1992).

³¹² See Amar, *supra* note 302 (discussing the social meaning of Amendment 2).

tures are debated largely because of their expressive effects, rather than their more direct consequences. By communicating certain messages, law may affect social norms. It may also humiliate people, or say that people may not be humiliated.

Much of the debate about measures relating to equality, or about "animus," concerns the law's expressive function. We do not get an adequate handle on such debates by asking about the empirically observable consequences of the law. There are, for example, vigorous debates about the impact of *Brown v. Board of Education* and the Civil Rights Act of 1964.³¹³ These debates are extremely illuminating, but part of the importance of *Brown* and the Civil Rights Act of 1964 lay in their expressive effects. When *Brown* was announced, it had an immediate impact on the attitude of black Americans toward the nation and their role in it. Similarly, the Civil Rights Act of 1964 had immediate importance for what it said, quite apart from what it did, or from what it would turn out to do. This is not to say that "statements" are most of what matters, or that law should be celebrated if it makes good statements regardless of what else it does. But one of the things that law does is to make statements, and these statements matter, partly because of their potential effects on social norms and partly because of their immediate effects on both self-esteem and self-respect.

What did the *Romer* Court mean by its assertion that the "general announcement" in Amendment 2 inflicts on gays and lesbians "immediate, continuing, and real injuries"?³¹⁴ The answer may well lie in the expressive content of the amendment. How could the injuries otherwise be an "immediate" function of the mere "announcement"? And if the Court is understood in this way, *Romer* is important in large part because of its own expressive effects, which are directly counter to those of Amendment 2. This observation explains the immediate, intense public reaction to *Romer*.³¹⁵

Similarly, the importance of *Bowers v. Hardwick* does not lie in its direct effects on the criminal law. The decision probably has not spurred many prosecutions of homosexuals. But it can be counted as one of the few genuinely humiliating decisions in American constitu-

³¹³ See, e.g., ROSENBERG, *supra* note 8, at 49-106 (arguing that *Brown* did not desegregate the schools); John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2603-10 (1994); John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1715-22 (1991) (discussing the impact of the Civil Rights Act of 1964 and other federal civil rights policies).

³¹⁴ *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996).

³¹⁵ See Barbara Vobejda, *Gay Rights Ruling Highlights Society's Fault Lines*, WASH. POST, May 22, 1996, at A13; George F. Will, "Terminal Silliness", WASH. POST, May 22, 1996, at A21; Editorial, *The Supreme Court Overreaches*, CHI. TRIB., May 21, 1996, §1, at 16.

tional law,³¹⁶ joining *Plessy v. Ferguson*³¹⁷ and *Bradwell v. Illinois*.³¹⁸ At least in the short run, the importance of *Romer v. Evans* may lie more in its expressive function than in its concrete effects on law and policy.³¹⁹ It says something large about the place of homosexuals in society. Whatever the doctrinal complexities, it claims, and is understood to claim, that they are citizens like everyone else. In fact this may be the meaning of the Court's stunning first sentence: "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'³²⁰ Attention to the expressive function of law thus shows how even a minimalist opinion may have social effects by "making statements" about the legitimacy or illegitimacy of certain widespread social attitudes and practices.³²¹

Acknowledgement of the *Romer* decision's beneficial expressive effects does not imply approval of its technical analysis. Perhaps the Court should have made clearer that a state may not defend discrimination solely by reference to a desire to discourage, to delegitimize, or not to legitimate homosexuality. But some sort of minimalist approach seems right in this context. Indeed, the Court's inadequate treatment of the technical issue may actually be a virtue. An adequate treatment would have required the Court to write with a breadth and a depth that could not easily have commanded a majority opinion, and that may have foreclosed democratic debate about a series of issues currently engaging the nation and deserving, broadly speaking, a democratic rather than judicial solution.

³¹⁶ See AVISHAI MARGALIT, *THE DECENT SOCIETY* 9-27 (1996). Of course, there are many complexities in the term "humiliation." To be usable for purposes of political or legal theory, the term must depend on a substantive account of some sort, not just on people's subjective feelings. See *id.* at 9-10.

³¹⁷ 163 U.S. 537 (1896), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

³¹⁸ 83 U.S. (16 Wall.) 130 (1873).

³¹⁹ See Adam Nagourney, *Affirmed by the Supreme Court*, N.Y. TIMES, May 26, 1996, § 4, at 4.

³²⁰ *Romer*, 116 S. Ct. at 1623.

³²¹ At this point it is worthwhile to say something about the tone of Justice Scalia's dissenting opinion. His opinion in *Romer*, like others in this and recent Terms, has not merely a harsh quality but a high degree of sarcasm and contempt. See, e.g., *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2361 (1996) (Scalia, J., dissenting); *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2361-62 (1996) (Scalia, J., dissenting); *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1436 (1994) (Scalia, J., dissenting). Thus Justice Scalia accuses the majority opinion of "terminal silliness" and says that the Court's analysis is "nothing short of preposterous," "nothing short of insulting," "facially absurd," and (for that matter) "ridiculous." *Romer*, 116 S. Ct. at 1630, 1634, 1637 (Scalia, J., dissenting). Aggressive dissenting opinions are of course nothing new. But Justice Scalia has on occasion resorted to something new and different, often amounting to an attack on his colleagues' motives and competence. See *id.* Civic magnanimity, however, is an important democratic virtue: "Citizens who respect one another as moral agents are less inclined toward the moral dogmatism, and its accompanying attitude of arrogance, that is common among those who take moral opposition as a sign of ignorance or depravity." GUTMANN & THOMPSON, *supra* note 3, at 80. It is a judicial virtue as well.

VII. VMI AND "ACTUAL PURPOSE"

There is no caste here.

Plessy v. Ferguson, 163 U.S. 537,
559 (1896) (Harlan, J., dissenting)³²²

It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms "widow" and "dependent surviving spouse." . . . I am therefore persuaded that this discrimination . . . is merely the accidental byproduct of a traditional way of thinking about females.

Califano v. Goldfarb, 430 U.S. 199, 222-23 (1977)
(Stevens, J., concurring in the judgment).

It will certainly be possible for this Court to write a future opinion that ignores the broad principles of law set forth today, and that characterizes as utterly dispositive the opinion's perceptions that VMI was a uniquely prestigious all-male institution, conceived in chauvinism, etc., etc. I will not join that opinion.

United States v. Virginia, 116 S. Ct. 2264,
2307-08 (1996) (Scalia, J., dissenting).

At first glance, the Court's decision in *United States v. Virginia*³²³ seems to be at the opposite pole from *Romer*. In *Virginia*, the Court said a great deal about the appropriate approach to sex equality and the foundations of sex equality doctrine. But *United States v. Virginia* had distinctive minimalist dimensions, and it can be understood as democracy-forcing as well.

A. What the Court Said

The Virginia Military Institute (VMI) was the only single-sex school among Virginia's public colleges and universities. After the Fourth Circuit found that VMI's single-sex organization violated the Constitution,³²⁴ Virginia proposed to create a parallel program for women. The Supreme Court held that the operation of VMI as a single-sex school was unconstitutional, and [that] the parallel program would be an inadequate remedy.³²⁵

The Court's opinion, written by Justice Ginsburg, came in three simple steps. First, the Court said that those who seek to defend gender-based discrimination must show an "exceedingly persuasive justification."³²⁶ Before *Virginia*, it had seemed well settled that gender discrimination would face "intermediate scrutiny,"³²⁷ that is, the state

³²² Overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

³²³ 116 S. Ct. 2264 (1996).

³²⁴ See *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992).

³²⁵ See *United States v. Virginia*, 116 S. Ct. at 2287.

³²⁶ *Id.*

³²⁷ *Id.* at 2293 (Scalia, J., dissenting) (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

would have to show that the classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."³²⁸ *Virginia* heightens the level of scrutiny and brings it closer to the "strict scrutiny" that is applied to discrimination on the basis of race.³²⁹ The Court said that the state must at least meet the requirements of intermediate scrutiny, and it placed a great emphasis on the need for an "exceedingly persuasive justification,"³³⁰ which seems to have become the basic test for sex discrimination.

Second, the Court said that the state could not justify VMI's exclusion of women by pointing to the educational benefits of single-sex schooling or to the unique VMI "adversative" approach and its suitability for men alone.³³¹ In perhaps the most interesting part of the opinion, the Court acknowledged that "[s]ingle sex education affords pedagogical benefits to at least some students."³³² The Court, however, emphasized that it was the state's burden to show that it had actually sought to promote this purpose.³³³ The Court's historical inquiry revealed no evidence that the state had this intention.³³⁴ The Court observed that the state initially considered higher education too "dangerous for women,"³³⁵ a sentiment that reflected "widely held views about women's proper place."³³⁶ With respect to Virginia, "the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation."³³⁷ Despite its rejection of Virginia's assertions, the Court suggested that a self-conscious effort to promote educational diversity through same-sex schools, at least if it was committed to equality of opportunity, could be constitutional.³³⁸

After assuming for the purposes of the decision that most women would not choose VMI's adversative method of training,³³⁹ the Court also rejected Virginia's argument that the adversative method is in-

³²⁸ *Id.* at 2294 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted).

³²⁹ *See id.* at 2292-96.

³³⁰ 116 S. Ct. at 2287.

³³¹ *See id.* at 2276-82. An illuminating discussion of the VMI culture may be found in Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189, 218-68 (1996).

³³² *United States v. Virginia*, 116 S. Ct. at 2276.

³³³ *See id.* at 2277-79.

³³⁴ *See id.*

³³⁵ *Id.* at 2277.

³³⁶ *Id.*

³³⁷ *Id.* at 2278.

³³⁸ *See id.* at 2276-78.

³³⁹ *See id.* at 2280.

compatible with the presence of women.³⁴⁰ In reaching this conclusion, the Court pointed to the absence of sufficient evidence to support that argument.³⁴¹ The Court added that the same argument historically has been made in a number of other contexts, including admission of women to the practices of law and medicine.³⁴² Thus the Court referred to past "self-fulfilling prophec[ies]" once routinely used to deny rights or opportunities" to women.³⁴³ Even if many women were ill-suited to the VMI method, the same would be true for many men, and VMI would have to rely on individualized assessments about applicants, not on sex-based classifications.³⁴⁴

Third, the Court rejected Virginia's remedial plan.³⁴⁵ The parallel program would be inferior in academic offerings, methods of education, and financial resources.³⁴⁶ The Court especially criticized Virginia's decision to exclude the adversative method from the sister school, dismissing Virginia's stereotypical generalization that women are ill-suited for that method.³⁴⁷ The Court concluded that the new program would be separate and unequal and thus inadequate.³⁴⁸

The continued existence of an all-male military school in Virginia may have been more significant for its expressive effects than for the actual deprivation of educational opportunities. The public debate over the case becomes more intelligible if we examine the debate in its expressive capacity, as raising questions about the extent to which nature prescribes gender roles. And the outcome of the case, together with its language, is important in large part because of the general statements the Court made about the relationship between government and sex-role stereotyping. By invalidating a practice rooted in old stereotypes rather than contemporary convictions, the Court can be taken to have promoted democratic deliberation, indicating that single-sex institutions must be rooted in an effort to promote educational diversity and equal opportunity.

B. Deep But Narrow

In several ways, *Virginia* is an ambitious opinion. First, it offers a distinctive understanding of sex equality. The problem with the Virginia system was not that the state noticed a difference between men and women, but that it turned that difference into a disadvantage.³⁴⁹

³⁴⁰ See *id.* at 2279-82.

³⁴¹ See *id.* at 2280.

³⁴² See *id.* at 2280-82.

³⁴³ *Id.* at 2280 (alteration in original) (citation omitted) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982)) (internal quotation marks omitted).

³⁴⁴ See *id.* at 2280-82.

³⁴⁵ See *id.* at 2282-87.

³⁴⁶ See *id.*

³⁴⁷ See *id.* at 2284.

³⁴⁸ See *id.* at 2285-86.

³⁴⁹ See *id.*

"Inherent differences remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."³⁵⁰ The Court understood the equality principle to mean that the state cannot use gender as a basis for deprivation of educational opportunities.³⁵¹ Similarly, the Court noticed that some "differences" may be a product of past practices, and thus sometimes differences become a kind of "self-fulfilling prophec[y]."³⁵²

Second, the Court did not merely restate the intermediate scrutiny test but pressed it closer to strict scrutiny. After *United States v. Virginia*, it is not simple to describe the appropriate standard of review. States must satisfy a standard somewhere between intermediate and strict scrutiny.³⁵³

By setting out an ambitious account of equality along with this new standard, the Court said more than it needed in order to justify its decision in the case (while the *Romer* Court said less than it needed for that purpose). This new standard, however, is not a dramatic innovation. The revision of the standard of review is unlikely to produce different results from those that would have followed under the intermediate scrutiny standard, which has operated quite strictly "in fact." The Court has deepened the foundations of sex equality law by giving a clearer sense of its basic purpose, but what it said is broadly consistent with what has been said in the recent past.³⁵⁴

What is the reach of *Virginia*? It would be incorrect to conclude, as Justice Scalia does in his dissent, that the Court has by its rationale committed future courts to invalidation of all educational programs, public and private, that separate the sexes.³⁵⁵ The Court was careful to base its decision on Virginia's failure to prove that it had been attempting to promote educational diversity and that its programs provided equality of opportunity.³⁵⁶ Significantly, the Court left open the possibility that a new legislature, acting on the basis of a concern for the well-being of both men and women, could separate the sexes so long as it provided equal opportunity.³⁵⁷

In this way *Virginia* shares a common theme with both *Romer* and *Kent*. It is linked with *Romer* insofar as it harbors skepticism about the state's articulated justification for single-sex education and seeks to discover the actual, illegitimate motivation — here, the state's belief that it can regard women as a class as less well-suited for certain educational practices than men. *Virginia* is linked with *Kent* insofar as it requires a current legislative judgment — here, that same-sex educa-

³⁵⁰ *Id.* (internal quotations omitted).

³⁵¹ *See id.*

³⁵² *Id.* at 2280 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)).

³⁵³ *See id.* at 2286–87.

³⁵⁴ *See, e.g.,* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

³⁵⁵ *See* *United States v. Virginia*, 116 S. Ct. at 2305–09 (Scalia, J., dissenting).

³⁵⁶ *See* 116 S. Ct. at 2276–79, 2282–86.

³⁵⁷ *Cf. infra* note 487 (noting that the VMI case might even be seen as one of desuetude).

tion is necessary to promote educational diversity. *Virginia* certainly does not invalidate the state's decision to separate men and women in the interest of ensuring equal opportunity. Such a separation may well promote, rather than undermine, equal opportunity. If the state reached its decision deliberatively and without infection from stereotypes about gender roles, and the decision promoted rather than undermined equal opportunity, the Court might uphold the program. It follows that federal funding of private, same-sex educational institutions may well be constitutional after *Virginia*. A general funding program may itself be neutral and therefore nondiscriminatory even if some funded institutions discriminate.³⁵⁸ Even if private institutions are for statutory reasons subject to constraints parallel to those imposed by the Equal Protection Clause, it is not clear that they must admit both men and women. In particular, educational institutions for women alone have potential benefits for women, benefits that are connected with the promotion of equality.³⁵⁹

For these reasons, the Court's decision is far more minimalist than it seems, and properly so. The Court did not decide a number of future questions about same-sex programs; in view of the diversity and possible legitimacy of such programs, it was right to leave things open. The decision is also democracy-forcing insofar as it makes "actual purpose" crucial to the legitimacy of sex discrimination.

C. *Depth Defended*

The depth of the Court's opinion in *United States v. Virginia* can be found in the Court's understanding of the principle of gender equality. The Court emphasized that there are indeed biological and social differences between men and women, and that these differences are to be "celebrat[ed]," not turned into a source of inequality.³⁶⁰ The opinion suggests that the problem of gender inequality is a problem of second-class citizenship, in which the state uses women's differences from men as a justification for prescribing gender roles in a way that deprives women of equal opportunity.³⁶¹ Significantly, this conception of gender equality avoids a claim that women are not biologically or socially different from men. It also avoids a claim that those differ-

³⁵⁸ Cf. *Washington v. Davis*, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justifications, if in practice it benefits or burdens one race more than another . . . would raise serious questions about, and perhaps invalidate, a whole range of . . . statutes that may be more burdensome . . . to the average black than to the more affluent white."). But see *Norwood v. Harrison*, 413 U.S. 455, 463-68 (1973) ("A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.").

³⁵⁹ See *United States v. Virginia*, 116 S. Ct. at 2276 & n.7 (citing Brief for Twenty-Six Private Women's Colleges as *Amici Curiae* 5).

³⁶⁰ See *id.* at 2276.

³⁶¹ See *id.*

ences justify unequal treatment. Finally, it avoids a claim that equal treatment is necessarily required in all contexts. In short, the Court left open the possibility that it would uphold a law that promotes both educational diversity and equal opportunity.

Would it be possible to criticize the Court for adopting a controversial understanding of the equality principle when a less controversial understanding would have sufficed? A thorough-going minimalist would certainly support this criticism. And if we think that the Court's understanding was misconceived, we might also think that it was hubristic for the Court to announce it. But a deep understanding of a constitutional provision is nothing to lament when diverse Justices can converge on it and when they (and we) have good reason to believe that it is correct. Both of these conditions were met in *Virginia*. This was hardly the first constitutional case involving sex discrimination; after so many encounters with so many such cases, the Court was entitled to have confidence in its understanding of the point of the equality guarantee. The particular situation of a wholesale exclusion of women from a top-flight military academy provided a good occasion on which to announce that point. This was a relatively rare occasion when it was appropriate to give an ambitious account of the underlying constitutional principle. It is parallel to *Brown v. Board of Education*, when the Court also spoke ambitiously after encountering the underlying problem for a period of years; the difference is that *Virginia* was properly narrow, while *Brown* was properly broad in view of the differences between sex and race segregation in education.

D. Equal Protection Now

It should be clear by this point that the 1995 Term has modified traditional equal protection doctrine. *Romer* suggests that rationality review will not always result in validation; its form of rationality review is far more like the intermediate variety. *Virginia* suggests that intermediate scrutiny no longer applies in cases involving gender discrimination, and it moves closer to a strict scrutiny standard. Finally, last year's decision in *Adarand Constructors, Inc. v. Peña*³⁶² holds that strict scrutiny is not "fatal in fact"³⁶³ and in that way treats strict scrutiny as if it were similar to intermediate scrutiny. The hard edges of the tripartite division have thus softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests.

This development is reminiscent of Justice Marshall's famous argument in favor of a "sliding scale" rather than a tiered approach to equal protection issues,³⁶⁴ and of Justice Stevens's reminder that there

³⁶² 115 S. Ct. 2097 (1995).

³⁶³ *Id.* at 2117.

³⁶⁴ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting).

is "only one Equal Protection Clause."³⁶⁵ But a general movement in the direction of balancing would be nothing to celebrate. The use of "tiers" has two important goals. The first is to ensure that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work. "Strict scrutiny" is based on a presumption of distrust, to be rebutted only in the extreme cases. By contrast, "rational basis" review is rooted in a presumption of good faith, rebutted only in rare instances. The second goal of a tiered system is to discipline judicial discretion while promoting planning and predictability for future cases. Without tiers, it would be difficult to predict judicial judgments under the Equal Protection Clause, and judges would make decisions based on ad hoc assessments of the equities. The Chancellor's foot is not a promising basis for antidiscrimination law.

Understood in this way, a tiered approach has all of the advantages and disadvantages of rule-bound law, while balancing has the corresponding vices and virtues of open-ended standards. If the Court simply were to balance all relevant factors in all equal protection cases, the rule of law would be at excessive risk. To avoid this risk, we should understand the recent cases in the following ways. *Romer* is part of the *Moreno-Cleburne* line, using rationality review "with bite" when prejudice and hostility are especially likely to be present. *Adarand* recognizes that some affirmative action programs are supported by sufficient public-regarding justifications. *Virginia* is a vigorous insistence, generally consistent with prior law, that if a government draws lines between men and women, it ought not to be perpetuating old stereotypes about appropriate roles. Thus conceived, the three cases have limited applications and do not mark a general movement in the direction of open-ended balancing. They retain the basic structure of "tiers" with modest modifications, allowing rationality review occasional "bite," modestly strengthening scrutiny of sex discrimination, and recognizing that affirmative action poses special questions.

One issue remains: What is the substantive evil at which the Equal Protection Clause is aimed? There is an answer in the conception of "animus"³⁶⁶ in *Romer* and the concern about sex-role stereotyping in *Virginia*. Both cases seem inspired by Justice Harlan's suggestion in *Plessy v. Ferguson* that "[t]here is no caste here,"³⁶⁷ an idea recalled explicitly by the opening words of *Romer*³⁶⁸ and implicitly by the *Virginia* Court's discussion of "volumes of history" demonstrating "official action denying rights or opportunities based on sex."³⁶⁹ In the case of

³⁶⁵ *Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451-55 (1985) (Stevens, J., concurring)).

³⁶⁶ See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

³⁶⁷ 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

³⁶⁸ See *Romer*, 116 S. Ct. at 1623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

³⁶⁹ *United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996).

homosexuals, "animus" typically takes the form of hatred and fear, whereas the motivation for discrimination against women has more often been a kind of "chivalry" associated with perceptions of women's appropriate role.³⁷⁰ In both cases, however, the central equality concern is that government ought not to be permitted to turn a morally irrelevant characteristic into a basis for second-class citizenship. This was the basic problem in both *Romer* and *Virginia*; in the end it unites the two cases.

VIII. PUNITIVE DAMAGES, COMMERCIAL ADVERTISING, AND DEATH

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern[er] of reasonableness . . . properly enter[s] into the constitutional calculus.

Pacific Mutual Life Insurance v. Haslip,
499 U.S. 1, 18 (1991)³⁷¹

This section pursues the theme of minimalism by focusing on three cases from the 1995 Term. The cases involve constitutional limits on punitive damages, the constitutional status of commercial advertising, and the interaction between death penalty law and the nondelegation doctrine.

A. Punitive Damages

In recent years, the Court has been asked to set aside punitive damages awards as inconsistent with the Due Process Clause.³⁷² Although the Court refused to do so, it left open the possibility that in an extreme case an award could be constitutionally unacceptable.³⁷³ In short, the Court refused to endorse the rule, proposed by Justice Scalia,³⁷⁴ that the Constitution imposes no constraints on a jury's punitive damages award.

In *BMW of North America, Inc. v. Gore*,³⁷⁵ the plaintiff sought punitive damages because BMW failed to inform him that it had repainted his new automobile prior to sale.³⁷⁶ The jury granted an

³⁷⁰ The significance of this difference should not be overstated; fears of contamination and contagion play a role in both settings and indeed help explain the forms of discrimination in both *Romer* and *Virginia*. See Koppelman, *supra* note 295, at 267-70.

³⁷¹ Quoted in *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1602 (1996) and in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993).

³⁷² See *TXO*, 509 U.S. at 446; *Pacific Mut.*, 499 U.S. at 7-8. The author is now engaged in an empirical study of punitive damages awards, with Daniel Kahneman and David Schkade. The study is funded but not subject to restrictions by Exxon Corporation. The purpose of the study is to test the sources of variability in jury judgments.

³⁷³ See *TXO*, 509 U.S. at 458; *Pacific Mut.*, 499 U.S. at 18.

³⁷⁴ See *BMW of N. Am., Inc.*, 116 S. Ct. at 1610-11 (Scalia, J., dissenting).

³⁷⁵ 116 S. Ct. 1589 (1996).

³⁷⁶ See *id.* at 1593.

award of punitive damages that was one thousand times the compensatory damages awarded in the case.³⁷⁷ Presented with this disparity, the Court ruled for the first time that a grossly excessive award of punitive damages violated the Due Process Clause.³⁷⁸ There was, however, a sharp division within the Court. The opinion of the five-member majority, written by Justice Stevens, spoke in terms of a form of "substantive due process."³⁷⁹ Justice Breyer's concurring opinion was procedurally oriented; it involved the lack of constraint on jury discretion. Four Justices seemed to believe that no punitive damage award could ever violate the Due Process Clause.³⁸⁰ One of the purposes of these opinions was to provide incentives for the democratic branches of government to confront the issue of punitive damages.³⁸¹

In finding the award grossly excessive, the Court emphasized three points: the degree of reprehensibility of the nondisclosure, the disparity between the harm incurred and the punitive damages award, and the difference between the remedy and the civil penalties assessed in comparable cases.³⁸² First, the Court held that nothing about BMW's behavior was particularly reprehensible or egregious.³⁸³ The presale refinishing of the car had no effect on performance or safety, and "BMW evinced no indifference to or reckless disregard for the health and safety of others."³⁸⁴ Second, the ratio of punitive damages to compensatory damages was especially high: over five hundred to one.³⁸⁵ Third, the civil and criminal penalties that could be imposed for comparable misconduct were far more limited; for example, the maximum civil penalty authorized by Alabama law for deceptive trade practices was two thousand dollars.³⁸⁶ The punitive damage award was thus inconsistent with judgments about the relevant conduct in other areas of the law.³⁸⁷

In his concurrence, Justice Breyer stressed some different points. He suggested that the most serious problem was not the sheer exces-

³⁷⁷ See *id.* at 1593-94.

³⁷⁸ See *id.* at 1604.

³⁷⁹ See *id.* at 1611-12.

³⁸⁰ See *id.* at 1610-14 (Scalia, J., dissenting, joined by Thomas, J.); *id.* at 1614-18 (Ginsburg, J., dissenting, joined by Rehnquist, C.J.).

³⁸¹ Compare this goal to the idea of a "penalty default" in the law of contracts and statutory construction. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87-95 (1989). Maximalist validation (cell 1 in the table on page 40 above) can be understood as part of the same family of rules designed to impose good incentives on the other branches of government. Minimalist invalidation can also be understood as part of this family of rules. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116-17 (1976); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958).

³⁸² See *BMW of N. Am., Inc.*, 116 S. Ct. at 1598-99.

³⁸³ See *id.* at 1599.

³⁸⁴ *Id.*

³⁸⁵ See *id.* at 1602.

³⁸⁶ See *id.* at 1603.

³⁸⁷ See *id.*

siveness of the award but the absence of legal standards that could minimize decisionmaker caprice.³⁸⁸ Here the relevant standards were "vague and open-ended to the point where they risk[ed] arbitrary results."³⁸⁹ Justice Breyer noted that the jury had not operated under a statute with standards distinguishing among permissible punitive damage awards.³⁹⁰ The jury had not applied the seven factors used to constrain punitive damage awards in a way that actually constrained the decision-making process.³⁹¹ Finally, the state courts had not made any effort to discipline the use of those factors in such a way as to generate a legally constraining standard.³⁹² According to Justice Breyer, the problem lay in the violation of the rule of law.³⁹³ Understood in this way, Justice Breyer's opinion connected *BMW of North America, Inc.* both with void-for-vagueness cases³⁹⁴ and with the constitutional attack on the death penalty in *Furman v. Georgia*.³⁹⁵ A central problem lies in unconstrained discretion; *BMW of North America, Inc.* is not best understood simply by reference to excessiveness.

Both the Stevens approach and the Breyer approach are minimalist. They depend on a range of variables, not on a rule. They set aside an extreme outcome but do not provide much guidance for future cases. Both approaches are shallow and narrow, though Justice Breyer's is deeper insofar as it recalls the aspirations of the rule of law. In short, both opinions leave a great deal undecided. The very fact that Justice Breyer's argument is so different from the Court's adds to the rule-free quality of the outcome.

With respect to punitive damages, a minimalist approach of some kind is probably the wisest course for the present time. The appropriate constraints on such awards are very hard to announce in advance, for it is still not clear what factors should be relevant to a judgment of excessiveness. Certainly there is reason to consider the relationship between compensatory damages and punitive damages, and an enormous disparity between the two is a signal that something may have gone wrong. But punitive damages may justifiably be awarded for deterrence purposes in situations in which the probability of detection is low; when this probability is low, it makes economic and legal sense to

³⁸⁸ See *id.* at 1605 (Breyer, J., concurring).

³⁸⁹ *Id.*

³⁹⁰ See *id.*

³⁹¹ See *id.* at 1606.

³⁹² See *id.* at 1607.

³⁹³ See *id.* at 1609.

³⁹⁴ See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169-71 (1972).

³⁹⁵ 408 U.S. 238, 255 (1972). The *Furman* approach is a form of minimalism as compared with the Brennan-Marshall approach, and, insofar as it is designed to require legislative clarity, it is of a piece with *Kent v. Dulles*, 357 U.S. 116 (1958), and the nondelegation doctrine.

award punitive damages that far exceed compensatory damages.³⁹⁶ In view of the complexity of the underlying issues, it is best for the Court to pursue a minimalist course in which it invalidates only the most extreme outcomes. To return to our basic theme, minimalism can be seen as a way of reducing decision costs and error costs, and the Court is not now in a good position to generate anything like clear rules to constrain punitive damages.

If this is right, Justice Breyer's approach seems best of all. It centers the inquiry on some procedural questions, avoids judicial judgments about substance, and thus links the due process inquiry with its most time-honored and uncontentious function, the control of discretion through procedural safeguards. Because of its procedural character, Justice Breyer's approach can be connected with many of the cases discussed thus far, including *Kent v. Dulles* and *Hampton v. Mow Sun Wong*. Most importantly, it requires state officials to set out criteria on their own and is in that way democracy-forcing. Like the void-for-vagueness doctrine, it is intended to catalyze and improve, rather than to preempt, democratic processes.

B. Commercial Advertising

Until recently, commercial advertising was not thought to be protected by the First Amendment. Since its 1976 ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³⁹⁷ the Court has analyzed restrictions on commercial advertising in a highly minimalist, rule-free fashion.³⁹⁸ Clear guidelines have yet to emerge.

The question in the 44 *Liquormart* case seemed very narrow: whether Rhode Island could bar the advertisement of retail liquor prices except at the place of sale.³⁹⁹ The guiding legal standard came from *Central Hudson Gas & Electric Corp. v. Public Service Commission*,⁴⁰⁰ which suggested a kind of balancing test for evaluating restrictions on commercial advertising.⁴⁰¹ But the most obvious precedent was *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*,⁴⁰² where the Court had upheld a ban on advertisements for casino gambling. In *Posadas* the Court reasoned that the state's greater

³⁹⁶ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 160-63 (1987).

³⁹⁷ 425 U.S. 748 (1976).

³⁹⁸ See, e.g., *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2376 (1995); *United States v. Edge Broad. Co.*, 113 S. Ct. 2696, 2703 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 552, 566 (1980); *Virginia State Bd. of Pharmacy*, 425 U.S. at 770-71.

³⁹⁹ See 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1501 (1996).

⁴⁰⁰ 447 U.S. 557 (1980).

⁴⁰¹ *Central Hudson* provided that a state must assert a substantial interest in regulating commercial communication that is neither misleading nor related to illicit conduct. Moreover, the regulation must be directly related to the state interest, see *id.* at 564, and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive," *id.*

⁴⁰² 478 U.S. 328 (1986).

power — to ban the sale — included the lesser power to ban advertisements for the underlying product.⁴⁰³ Also necessary to the Court's decision was its judgment that the state had a substantial interest in preventing an increase in casino gambling.⁴⁰⁴ *Posadas* suggested that the government had broad power to prevent advertising for products that it deemed harmful — gambling, drinking, tobacco smoking, and more.⁴⁰⁵

Despite *Posadas*, the Court unanimously struck down the Rhode Island law. The most remarkable and characteristically nonminimalist opinion came from Justice Thomas.⁴⁰⁶ Writing for only himself, Justice Thomas rejected the balancing test set out in *Central Hudson*⁴⁰⁷ and announced instead that government may never regulate truthful, nonmisleading commercial advertising.⁴⁰⁸

It is worthwhile pausing over Justice Thomas's opinion. In just a few pages, he would (a) abandon the First Amendment distinction between commercial and noncommercial speech, a breathtakingly large step,⁴⁰⁹ (b) reject the *Central Hudson* test,⁴¹⁰ used by the Court in many cases and not questioned in *44 Liquormart* by any of the parties, and (c) overrule *Posadas* even though this did not appear necessary to the outcome in the case. It is possible that Justice Thomas was ultimately right on all three points. But because his opinion proposes to do so much so quickly, and in a case in which none of this was necessary, it is fair to say that his is a most surprising opinion. There are many historical and philosophical reasons for distinguishing between commercial and noncommercial speech.⁴¹¹ Perhaps none of them is convincing, but before they are rejected, the Court should give them attention in a case that genuinely presents them.⁴¹² Certainly an originalist should investigate the historical record.

⁴⁰³ See *id.* at 345–46.

⁴⁰⁴ See *id.* at 341.

⁴⁰⁵ Cf. *id.* at 346 (agreeing that legislatures may respond to harmful products by restraining the stimulation of demand for them).

⁴⁰⁶ See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515–20 (1996) (Thomas, J., concurring).

⁴⁰⁷ See *id.* at 1515–16.

⁴⁰⁸ See *id.* at 1520. In Justice Thomas's view, government may never "suppress information in order to manipulate the choices of consumers." *Id.* at 1517.

⁴⁰⁹ "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 1518.

⁴¹⁰ See *id.* at 1515–16.

⁴¹¹ See generally C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 197–206 (1989) (claiming that commercial speech is disconnected from the individual liberty and self-realization that are essential to constitutional freedom of speech); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979) (arguing that the values of the First Amendment are not threatened by regulation of commercial speech).

⁴¹² Justice Thomas's opinion in *44 Liquormart* parallels his opinion in *Colorado Republican*, which called on the Court to overrule *Buckley* even though that issue had not been briefed or

At the opposite pole was Justice O'Connor's concurring opinion, in which she spoke for four Justices.⁴¹³ Justice O'Connor argued that the statute failed the *Central Hudson* test and was invalid for that simple reason.⁴¹⁴ The Rhode Island restriction was more intrusive than necessary to promote the state's interest. The state invoked the goal of keeping prices high in order to keep consumption low. But the less restrictive way to promote this goal would be through mandatory minimum prices or increased sales taxes.⁴¹⁵ Although Justice O'Connor acknowledged that the Court had employed a far less stringent level of scrutiny in *Posadas*, she observed that post-*Posadas* cases⁴¹⁶ had looked more carefully at the state's justification.⁴¹⁷ That more careful look, signalled by *Central Hudson* itself, was sufficient to doom the Rhode Island law.

The most distinctive feature of Justice O'Connor's argument is its narrowness. The opinion answers only those questions that are necessary to the disposition of the case. It leaves First Amendment law very much as it was. And unlike the opinion in *Romer v. Evans*, Justice O'Connor's opinion answers the questions it raises.

Justice Stevens's plurality opinion steered a course between Justice O'Connor and Justice Thomas. It did signal an important departure from previous understanding: in the plurality's view, a flat ban on truthful commercial messages — if that ban is imposed for reasons unrelated to the preservation of a fair bargaining process — should henceforth meet rigorous judicial review.⁴¹⁸ The plurality explained that commercial speech generally receives less protection because of the state's interest in protecting consumers against commercial harms.⁴¹⁹ The Rhode Island law, however, was unrelated to consumer protection.⁴²⁰ And when consumer protection is not at stake, the government is likely to be acting "on the offensive assumption that the public will respond 'irrationally' to the truth."⁴²¹ The state was therefore required to demonstrate that the advertisement ban would advance a legitimate state interest "to a material degree."⁴²² (The Court did not address and in that sense left open important questions about

argued, and the case could be decided without addressing it. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2323 (1996).

⁴¹³ Chief Justice Rehnquist and Justices Souter and Breyer joined Justice O'Connor's opinion.

⁴¹⁴ "Because Rhode Island's regulation falls even the less stringent standard set out in *Central Hudson*, nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation." 44 *Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., concurring).

⁴¹⁵ See *id.* at 1521-22.

⁴¹⁶ See, e.g., *Florida Bar v. Went for It, Inc.*, 115 S. Ct. 2371, 2376 (1995); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1590 (1995).

⁴¹⁷ See 44 *Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., concurring).

⁴¹⁸ See 116 S. Ct. at 1508.

⁴¹⁹ See *id.*

⁴²⁰ See *id.*

⁴²¹ *Id.*

⁴²² *Id.* at 1509 (citation omitted).

protection of children and teenagers, or protection of a large class of people including children and teenagers.)

The Rhode Island law did not pass the rigorous scrutiny that the plurality demanded. There was no evidence that the speech prohibition would have a *significant* effect on marketwide consumption,⁴²³ the stated goal of the advertisement ban. In any case, alternative means of regulation that did not suppress speech could promote this goal.⁴²⁴ The plurality also rejected *Posadas*: "[A] state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes"⁴²⁵ The plurality appears to have adopted what David Strauss has called the "persuasion principle": the principle that the government may not regulate speech solely on the ground that it will persuade some people to engage in conduct that the government sees as harmful.⁴²⁶

In *Posadas*, the Court had reasoned that because the state had the greater power to ban casino gambling within its borders, it must also have the lesser power to ban the advertisement. The 44 *Liquormart* Court responded that such reasoning ignores the command of the First Amendment:

The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.⁴²⁷

But as Justice O'Connor's opinion illustrates, and as the plurality itself seems to concede,⁴²⁸ it was not necessary to reject any aspect of the *Posadas* opinion. The Court might have preserved the greater-includes-the-lesser principle in this context but kept that principle in check with a "substantial interest" and "reasonable fit" test.

In sum, the plurality opinion is narrow and deep; Justice Thomas offers an approach that is both broad and deep; Justice O'Connor's is

⁴²³ See *id.*

⁴²⁴ See *id.* at 1510.

⁴²⁵ *Id.* at 1511.

⁴²⁶ David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991).

⁴²⁷ 44 *Liquormart*, 116 S. Ct. at 1512-13.

⁴²⁸ See *id.* at 1510-11.

narrow and shallow. Should the plurality have signed Justice O'Connor's narrower opinion? If we have full confidence in the plurality's reasoning, and full confidence that *Posadas* was wrong, the judicial adoption of the reasoning should not be cause for alarm. But if the reasoning seems questionable in particular applications, and if *Posadas* seems plausibly correct, the reasoning should not have been announced in a case that did not require its announcement.⁴²⁹

For the moment let us rest with some simple suggestions. Even truthful and technically nondeceptive commercial advertising may mislead people. The real question is whether many people will be misled by it and whether many more people will not be.⁴³⁰ Moreover, the idea that commercial speech should be treated the same as political speech is historically unsupported. It is also doubtful in principle. The protection of commercial speech has a great deal in common with the protection of market arrangements in the *Lochner* era, and it has similar pitfalls.⁴³¹ In this light, the Court's general caution has made a great deal of sense, and in *44 Liquormart* the best course was Justice O'Connor's. The plurality's broader principle may create difficulties for the future, as in easily imaginable cases involving protection of teenagers from cigarette advertising or violent programming.⁴³² In *44 Liquormart*, there was no reason for the Court to create this risk.

C. Death and Delegation

Dwight Loving killed two taxi drivers.⁴³³ Because he was in the Army, he was tried for murder under Article 118 of the Uniform Code of Military Justice (UCMJ).⁴³⁴ He was subject to the death penalty because the court-martial found that aggravating factors were present.⁴³⁵ What made his case complicated was the fact that the set of aggravating factors had been identified not by Congress but by the President. The relevant statute said only that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by" the Code.⁴³⁶

⁴²⁹ Justice Stevens conceded that the Court could have reached the same decision without applying the stricter standard laid out in the plurality opinion: "[E]ven under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a 'reasonable fit' between its abridgment of speech and its temperance goal." *Id.* at 1510.

⁴³⁰ See Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 681-82 (1985).

⁴³¹ Cf. Jackson & Jeffries, *supra* note 411, at 25-40 (arguing that notions of economic liberty do not justify according commercial speech full First Amendment protection).

⁴³² See, e.g., 21 C.F.R. § 897.25 (West, WESTLAW through Oct. 1, 1996).

⁴³³ See *Loving v. United States*, 116 S. Ct. 1737, 1740 (1996).

⁴³⁴ 10 U.S.C. § 918(1), (4) (1994).

⁴³⁵ The court-martial found three aggravating factors: (1) premeditated murder committed during a robbery; (2) triggerman in a felony murder; and (3) two murders rather than one. See *Loving*, 116 S. Ct. at 1740.

⁴³⁶ 10 U.S.C. § 856 (1994).

Loving contended that the death penalty was unconstitutional in his case because it had been issued under an unconstitutional delegation of legislative power to the President.⁴³⁷ The Court rejected the contention. It reasoned that the Commander-in-Chief Clause entrusted the President with the authority to superintend the military, and that the delegated duty applied in an area that the Constitution already had assigned to the President.⁴³⁸ Congress had authority to delegate to the President broad discretion to prescribe conditions on the use of capital punishment in military courts.⁴³⁹

Loving is a useful foil to the cases discussed thus far; it is a minimalist validation that might have been better as a minimalist, democracy-promoting invalidation. The Court could have issued a minimalist opinion ensuring that the death penalty would be imposed on American soldiers only pursuant to decisions made by Congress, not (realistically speaking) by bureaucrats. Viewed through the perspective afforded by three lines of precedent, the *Loving* case seems much harder than the Court acknowledged.

The first set of cases imposes stringent procedural protections on the imposition of the death sentence. In *Furman v. Georgia*,⁴⁴⁰ the key opinions came from Justices who were not willing to strike down the death penalty in its entirety, but who followed the more minimalist path of requiring constraints on jury arbitrariness. They required a death penalty process that would limit discretion in imposing death sentences.⁴⁴¹ The second set of cases involves the delegation of discretionary authority to the executive branch. In two cases in 1935, most prominently *Schechter Poultry Corp. v. United States*, the Court struck down delegations that it considered open-ended.⁴⁴² These cases say that Congress may delegate its legislative powers to other officers only when such delegation is restrained by meaningful guidelines.⁴⁴³

In the third and in some ways most interesting line of cases, the Court has narrowly construed statutes in order to avoid constitutional questions.⁴⁴⁴ These cases have become especially controversial in light

⁴³⁷ See *Loving*, 116 S. Ct. at 1743-44.

⁴³⁸ See *id.* at 1750-51.

⁴³⁹ See *id.* at 1751.

⁴⁴⁰ 408 U.S. 238 (1972) (per curiam).

⁴⁴¹ See, e.g., *id.* at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

⁴⁴² See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 414-20 (1935).

⁴⁴³ See *Schechter Poultry*, 295 U.S. at 529-31; *Panama Ref.*, 293 U.S. at 421-30. The nondelegation doctrine has played a modest but explicit role in a few more recent cases, if only in the context of statutory construction. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 645 (1980) (construing an act that delegated to the Secretary of Labor authority to promulgate occupational safety and health standards).

⁴⁴⁴ See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988); *American Petroleum Inst.*, 448 U.S. at 645-46; *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958).

of claims that they authorize courts to "bend" statutes even though there may be no constitutional defect.⁴⁴⁵ But we can make more sense of such cases if we see that they reflect a concern about the exercise of open-ended executive discretion produced by an absence of congressional guidance on important questions. Such cases suggest that the nondelegation doctrine is not entirely dead; on the contrary, these cases *are* (modest and targeted) nondelegation cases, vindicating the doctrine where it is most important. They require a "clear statement" from Congress, thus prohibiting Congress from delegating to the executive, through ambiguously drafted statutes, the power to invade constitutionally sensitive domains. Congress itself must make that decision in a focused and particularized way. Thus *Kent v. Dulles* is directly related to *Schechter Poultry*.⁴⁴⁶

There is an additional point. A minimalist court is reluctant to reject focused and deliberate congressional judgments that a certain course is constitutionally acceptable. A court may uphold such judgments because of principles of deference and, in that way, "under-enforce" the Constitution. In the "clear statement" cases, the Supreme Court has recognized a domain in which it might not invalidate a deliberative congressional judgment but in which a broad delegation of authority will pose constitutional problems.⁴⁴⁷ By steering ambiguous statutes away from that domain, the Court informs Congress that any intrusion will have to be supported by a focused legislative judgment, and not by an ambiguous delegation of discretionary authority to the President.⁴⁴⁸

When combined, the three lines of cases support the following argument on Loving's behalf. The Court will ordinarily allow Congress to grant a considerable amount of discretionary authority to the President; the modern delegation cases prove the point. But the death penalty decisions show that special procedural safeguards are necessary in capital sentencing. The factors that justify a decision of death should be chosen by the legislature, not by the President (in this context, bureaucrats of some kind, realistically speaking). Congress may not grant open-ended discretion to impose the death sentence to someone who is not, under the constitutional regime, the national law maker.

⁴⁴⁵ See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74.

⁴⁴⁶ Compare *Schechter Poultry*, 295 U.S. at 529-42 (invalidating an overly broad delegation of authority), with *Kent*, 357 U.S. at 129-30 (narrowly construing an ambiguous delegation of congressional power).

⁴⁴⁷ See, e.g., *Kent*, 357 U.S. at 129 (holding that all delegations of power to regulate the right to travel will be narrowly construed).

⁴⁴⁸ Frederick Schauer offers a valuable criticism of the approach I am suggesting here. See Schauer, *supra* note 445, at 71. Schauer suggests that clear statement principles often operate to foreclose congressional judgments without requiring the Court to take on the responsibility associated with a constitutional ruling. See *id.* at 87-88, 94-96. The dangers of an excessive judicial role via principles requiring clear statements from Congress are real. But in the above cases, the application of the "clear statement" approach was guided by a genuine constitutional preference for nondelegation and thus was, I think, legitimate.

The authority for this proposition comes from the clear statement cases, which show that there is a problem from the standpoint of legitimacy when certain constitutionally sensitive decisions are made by the executive.

It therefore makes sense to say that if death is to be imposed on a member of the United States military, it must be as a result of a deliberate and specific decision by Congress, rather than by the President and his subordinates pursuant to a standardless, open-ended grant of power. Nothing in the Commander in Chief Clause compels otherwise, for nothing in that clause authorizes the President to impose criminal penalties without statutory authority.⁴⁴⁹ The *Loving* case was not simple. But the Court might have done better to have issued a modern equivalent of *Kent v. Dulles*.

IX. THE FUTURE

What is not ready for decision ought not to be decided.

Quill v. Vacco, 80 F.3d 716, 732
(2d Cir. 1996) (Calabresi, J., concurring in the result).⁴⁵⁰

Rather than seeking an analogy to a category of cases, . . . we have looked to the cases themselves.

Denver Area Educational Telecommunications
Consortium v. FCC, 116 S. Ct. 2374, 2388 (1996)
(plurality opinion) (Breyer, J.).

This section attempts to apply the central ideas of this Foreword to three subjects of unusual importance with which future courts will inevitably grapple. These subjects are affirmative action, the right to die, and same-sex marriages. I do not mean to settle these issues here. Instead I mean to suggest, in a tentative way, how the project of leaving things undecided might bear on judicial treatment of these controversies. In all three contexts, I will be arguing for an approach that is narrow and shallow. The central factors in the first two cases are (1) the existence of a currently vibrant democratic debate, (2) the informational deficit faced by the courts, and (3) the wide variety of situations for which a simple constitutional rule makes little sense. In the case of same-sex marriage, unlike the first two, strategic or tactical considerations are especially important.

A. Affirmative Action

The nation is in the midst of a large debate over race-conscious programs. Although much of this debate is occurring in democratic

⁴⁴⁹ See U.S. CONST. art. II, § 2, cl. 1.

⁴⁵⁰ Cert. granted, 65 U.S.L.W. 3218 (U.S. Oct. 1, 1996) No. 95-1858).

arenas,⁴⁵¹ many people have vigorously urged the Supreme Court to resolve the controversy by invalidating such programs on constitutional grounds.⁴⁵² For the most part, the Court has taken a narrow and incompletely theorized course.⁴⁵³ Very recently, the Supreme Court has been more ambitious, construing the Equal Protection Clause to require the most careful judicial scrutiny of any race-conscious program.⁴⁵⁴ But the Court said that this form of scrutiny would not lead to automatic invalidation. It would not be "strict in theory, but fatal in fact."⁴⁵⁵

1. *Case-by-Case Analysis vs. Rules.* — Despite this cautionary note, it might be concluded, as the Fifth Circuit recently did in *Hopwood v. Texas*,⁴⁵⁶ that the Court has come to understand the Equal Protection Clause to embody a principle of race neutrality.⁴⁵⁷ All affirmative action programs might well be held to violate this principle,⁴⁵⁸ including those in the educational system. In its remarkable decision striking down an affirmative action plan for the University of Texas Law School, the court of appeals held that race consciousness was acceptable only to remedy present effects of past discrimination.⁴⁵⁹ Otherwise public universities must proceed on a race-neutral basis. Through Title VI, this view may extend to private universities as well.⁴⁶⁰

⁴⁵¹ In November, 1996, Californians will vote on Proposition 209, which would change and largely eliminate many affirmative action programs. See *California Ballot Pamphlet: General Election November 5, 1996* (visited Oct. 26, 1996) <<http://Vote96.ss.ca.gov/Vote96/html/BP>>, see also S.26, 104th Cong. (1996) (sponsored by Sen. Helms) (seeking to amend the Civil Rights Act of 1964 to make preferential treatment based on race, color, sex, religion, or national origin an unlawful employment practice); H.R. 3190, 104th Cong. (1996) (sponsored by Rep. Franks) (seeking to prohibit federal agencies from requiring or encouraging preferences based on race, sex, or ethnic origin in connection with federal contracts).

⁴⁵² See, e.g., William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 778 (1979).

⁴⁵³ See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 556–57, 589, 598 (1990) (upholding an FCC policy of awarding a "plus" for minority ownership in comparative proceedings for new licenses where the FCC considered six additional race-neutral factors, and upholding an FCC policy allowing licensees to transfer their licenses without a hearing to FCC-approved minority enterprises where the policy was not a fixed quota and applied to only a small fraction of licenses), *overruled in part* by *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 277–78, 283–84 (1986) (holding that societal discrimination alone was insufficient to justify a race-conscious state layoff policy, where there was no evidence of prior discrimination in hiring practices and where other less drastic means were available); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–20 (1978) (holding that a state university could not totally exclude nonminorities from a percentage of seats in an entering class, but that a race-conscious admissions process was not per se unconstitutional).

⁴⁵⁴ See *Adarand*, 115 S. Ct. at 2113.

⁴⁵⁵ *Id.* at 2117 (citation omitted).

⁴⁵⁶ 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

⁴⁵⁷ See *id.* at 939–40.

⁴⁵⁸ See *Adarand*, 115 S. Ct. at 2118–19 (Scalia, J., concurring).

⁴⁵⁹ See *Hopwood*, 78 F.3d at 949.

⁴⁶⁰ See 42 U.S.C. §§ 2000d to 2000d-4a.

A court opinion outlawing affirmative action would invalidate the largely voluntary practices of thousands of educational institutions. What would be the basis for such an outcome? There are two possibilities. First, originalists might urge that an actual historical decision⁴⁶¹ should be used to foreclose democratic experimentation with race-conscious programs. The legacy of the Civil War, historically understood, is a ban on governmental use of race as a basis for the distribution of benefits and burdens.

Second, a general principle ("color blindness") might be rooted not in history but in an independent judicial judgment about constitutional meaning. On this view, the ban on race consciousness does not reflect a specific judgment of the Framers. Indeed, the Supreme Court opinions most antagonistic to affirmative action have not purported to be originalist, but instead have reflected a judicial understanding of the moral principle for which the Constitution is best taken to stand.⁴⁶² Such opinions are far removed in form and substance from the narrower, fact-intensive, minimalist approach characteristic of Justice Powell in the *Bakke* case.⁴⁶³

The conclusion that emerges from the discussion thus far is that this is a context in which the Supreme Court would be singularly ill-advised to issue a broad ruling. There are many kinds of affirmative action programs. These programs are exceptionally diverse, and from the standpoint of both policy and principle, some are far better than others. A blanket ban would make little sense. This is especially so in light of the fact that this is an area in which democratic institutions are far from inattentive. On the contrary, the nation has embarked on a large-scale debate about such programs.⁴⁶⁴ That debate raises complex issues of both morality and fact. In this way the affirmative action problem is quite similar to the problem raised by single-sex programs. In both instances the wide range of potentially relevant issues is hard to handle through a simple, rule-like constitutional decree.

⁴⁶¹ There is, however, no evidence that the Equal Protection Clause was intended to stop affirmative action, and considerable evidence to the contrary. In fact, those who ratified the Fourteenth Amendment engaged in race-conscious remedial programs. See generally Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-88 (1985) (discussing the legislative history of the race-conscious programs of the Reconstruction era). It would be refreshing if some of the originalist Justices on the Court, who tend to oppose affirmative action on constitutional grounds, would either invoke some historical support for their views or acknowledge that although they do not approve of affirmative action in principle, they find no constitutional judgment that prohibits it.

⁴⁶² See, e.g., *Adarand*, 115 S. Ct. at 2112-13; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 631-33 (1990) (Kennedy, J., dissenting), *overruled in part by Adarand*, 115 S. Ct. 2097 (1995); *Fullilove v. Klutznick*, 448 U.S. 448, 522-26 (1980) (Stewart, J., dissenting).

⁴⁶³ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁴⁶⁴ Cf. *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (arguing that the Court should not determine whether gender is a suspect classification, because submitting the Equal Rights Amendment to the states for ratification had created an opportunity for the issue to be decided via democratic institutions).

Ultimately the place of affirmative action programs should and will be decided democratically, not judicially. The history does not support an originalist attack on race-conscious programs.⁴⁶⁵ And in view of the diversity of affirmative action programs, no clear-cut principle of (constitutionally relevant) political morality dooms all race consciousness. It would be an extraordinary form of judicial hubris for courts to invoke the Equal Protection Clause to require color blindness.

2. *The Passive Virtues*. — In the 1995 Term, the Court declined an opportunity to settle a significant part of the affirmative action controversy by refusing to hear the University of Texas's appeal in *Hopwood*. In an unusual concurring opinion, Justice Ginsburg, joined by Justice Souter, explained the grounds for denying certiorari.⁴⁶⁶ Justice Ginsburg said that the University of Texas Law School had changed its admissions procedures from those involved in the case and that it did not seek to defend the program that the lower courts had invalidated.⁴⁶⁷ The University of Texas complained not of the court of appeals' judgment but of its rationale. This was insufficient: "[W]e must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."⁴⁶⁸

Was the Court correct to deny certiorari in *Hopwood*? The answer is not simple. On the one hand, because the issue of affirmative action is not clearly settled by constitutional history or principle and is at the center of current political deliberations,⁴⁶⁹ the Court does well to avoid an authoritative judicial ruling. On the other hand, the lower court's opinion appears to foreclose a range of possible programs in a large part of the country. Perhaps the Court should have taken the case to make clear that race neutrality is not required. But Justice Ginsburg was correct to say that it would have been inappropriate for the Court to confront the question in a context in which the very program at issue was not being defended.⁴⁷⁰

The broader point is that some of the Justices have undoubtedly been aware of the difficulty and variousness of the affirmative action problem and have chosen a minimalist approach for this reason. When it confronts race-conscious admissions policies in education, the Court should continue in this way. It should look for guidance to Justice Powell's *Bakke* opinion. It should proceed narrowly, looking

⁴⁶⁵ See Schnapper, *supra* note 461, at 785–88. The constitutional attack on affirmative action programs by Justices Scalia and Thomas, without any investigation of history on their part, is one of the most disturbing features of their purported originalism.

⁴⁶⁶ See *Texas v. Hopwood*, No. 95-1773 (U.S. July 1, 1996) (Westlaw, SCT database) (memorandum opinion of Ginsburg, J., with whom Souter, J., joined).

⁴⁶⁷ See *id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ See *supra* note 451.

⁴⁷⁰ The *Hopwood* context is a good one for recalling the ban on advisory opinions. Because the University of Texas would not be defending its own program, any judgment by the Court would have an advisory quality.

closely at the details. It should economize on moral disagreement, refusing to resolve large-scale moral issues unless it is necessary to do so. This proposition does not suggest any particular outcome in any particular case. What it does suggest is that it would be a democratic disaster if the Court were to issue a broad ruling that foreclosed democratic debate.

B. *The Right to Die*

We are in the midst of a constitutional attack on laws that forbid physician-assisted suicide.⁴⁷¹ But the right to die debate is in one sense significantly different from the debate over affirmative action. In the former context, the relevant laws have been on the books for a long time, and in some states they have not been revisited by recently elected officials.⁴⁷²

Do such laws invade a constitutional "right to privacy"? Many people and some courts think so.⁴⁷³ Under *Roe v. Wade*, it might be urged that the government cannot legitimately interfere with self-regarding choices about what people should do "with their bodies," and that therefore the choice is for the individual, not for the state. Several courts have recently gone in this direction.⁴⁷⁴

Thus stated, the argument for a constitutional right to die raises many questions. For familiar reasons, the idea of substantive due process is textually awkward.⁴⁷⁵ Even if there is a right to "substantive due process," it is not clear that this right encompasses or should encompass a right to die. Of course the individual interest can be very strong. But the situations in which a right to die might be asserted are widely variable, and legitimate considerations argue against recognizing a constitutional right. Perhaps some people choosing death would be confused, panicked, or myopic. Perhaps they would, in a relevant number of cases, choose irrationally, and in a way that reflects predictable short-term pressures. Perhaps some doctors would overbear their patients; the most appealing cases for physician-assisted suicide might be unrepresentative. Perhaps some families could not entirely be trusted, especially in view of possible conflicts of interest

⁴⁷¹ See, e.g., *Quill v. Vacco*, 80 F.3d 716, 727 (2d Cir. 1996), cert. granted, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996) (No. 95-1858); *Compassion in Dying v. Washington*, 79 F.3d 790, 837 (9th Cir. 1996), cert. granted, 64 U.S.L.W. 3785 (U.S. Oct. 1, 1996) (No. 96-110).

⁴⁷² See *Quill*, 80 F.3d at 732, 735 (Calabresi, J., concurring).

⁴⁷³ Cf. *Compassion in Dying*, 79 F.3d at 838-39 (stating that the liberty interest, which has roots in the privacy cases, prohibits the government from intruding into realms integral to personal autonomy).

⁴⁷⁴ See *id.* at 801, 838-39; see also *Quill*, 80 F.3d at 727 (describing the longstanding right to refuse medical treatment in New York).

⁴⁷⁵ See generally ELY, *supra* note 31, at 14-20 (arguing that the Supreme Court has erroneously invested the Due Process Clause with substantive content).

among family members.⁴⁷⁶ Perhaps a prohibition on doctor-assisted death would have desirable effects on the norms of the medical profession, by inculcating the strongest possible pro-life culture. In any case, there are complex moral issues and contested empirical questions for which courts are unlikely to have clear answers.⁴⁷⁷

In view of the difficulty of the underlying issues — our now-familiar theme — courts should be extremely reluctant to resolve this issue with any broad rule. At this stage of the debate, they lack the necessary factfinding expertise and policymaking competence. Recent court decisions announcing a large-scale “right to die” are versions of the *Hopwood* case — a form of judicial hubris.⁴⁷⁸ They contrast sharply with the Court’s own minimalist approach in the *Cruzan* case, where the Court, proceeding in good common law fashion, refused to do more than was necessary to resolve the concrete controversy.⁴⁷⁹

Does this mean that courts should leave the question to politics? Perhaps; that would hardly be an unreasonable view. This is probably an area for democracy-allowing maximalism or instead use of the passive virtues through a refusal by the Court to become involved. But there is an alternative, and it bears on the principal difference between the affirmative action controversy and the controversy over the right to die. Recall the claim that a court charged with making a constitutional decision in the midst of a highly charged issue of political morality should attempt not to preempt but instead to improve and catalyze democratic deliberation. In this context, Judge Calabresi has suggested an inventive solution⁴⁸⁰ in a self-conscious attempt to promote a kind of dialogue between courts and the public. With Judge Calabresi, let us notice first that some of the relevant laws were enacted long ago. They were designed not to prevent doctor-assisted termination of certain medically hopeless cases but instead to prevent people from being accessories to suicide.⁴⁸¹ In the relevant period, sui-

⁴⁷⁶ Consider the recent vote of the American Medical Association to continue its policy opposing doctor-assisted suicides. See *AMA Keeps Its Policy Against Aiding Suicide*, N.Y. TIMES, June 26, 1996, § C, at 9.

⁴⁷⁷ For a good discussion, see RICHARD A. POSNER, *AGING AND OLD AGE* 335–61 (1995).

⁴⁷⁸ It is therefore revealing that in *Compassion in Dying*, the court refers to Justice Brandeis’s dissenting opinion in *Olmstead v. United States* as “the second most famous dissent in American jurisprudence,” with a footnote saying that “[t]he most famous dissent, of course, was that of the first Justice Harlan in *Plessy v. Ferguson*.” *Compassion in Dying*, 79 F.3d at 800 & n.12 (citation omitted) (citing *Olmstead v. United States*, 277 U.S. 438 (1928)). The ranking seems odd, as does the “of course”; Justice Holmes’s attack on substantive due process in *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting), vies with Justice Harlan’s opinion for the most honored position, and Justice Holmes’s opinion — “[t]he 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics” — raises questions about substantive due process as used in *Compassion in Dying*.

⁴⁷⁹ See *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 277–78 (1990).

⁴⁸⁰ See *Quill v. Vacco*, 80 F.3d 716, 743 (2d Cir. 1996) (Calabresi, J., concurring).

⁴⁸¹ See *id.* at 732 (suggesting that it is unclear whether these laws addressed physicians).

cide was genuinely considered a crime.⁴⁸² But this reason for the statutes no longer holds much weight, since enforcement of the anti-suicide laws has fallen into near-desuetude.⁴⁸³ In any event, the current right to die cases are not simple cases of suicide, and human technology has developed a great deal, making possible forms of euthanasia that would have been unimaginable when the laws were first enacted.⁴⁸⁴

The central point, for those interested in democratic deliberation, is that in some states there may have been no recent or thorough legislative engagement with the underlying moral and technological issues. Does this bear on the constitutional question? It may well. A court might decide not to invalidate any and all legislative efforts to interfere with private choice, but to say more modestly that a state invoking old laws has not demonstrated an adequate reason to interfere with a private choice of this kind — unless and until a recent legislature is able to show that there is a sufficiently recent commitment to this effect to support fresh legislation.

Understood in this way, some imaginable right to die cases are reminiscent of *Griswold v. Connecticut*,⁴⁸⁵ as that case is seen through the minimalist's lens. Recall that in *Griswold* the Court embarked on the task of taking large-scale positions on matters of political morality by speaking of the constitutional "right of privacy."⁴⁸⁶ That right is both highly controversial and notoriously difficult to define. Instead, the Court in *Griswold* might have taken a very narrow approach. It might have said that laws that lack real enforcement and that appear (for that reason) no longer to reflect current political convictions cannot be used against private citizens with respect to decisions of this kind. A Court could so conclude without resolving the question whether a recent democratic judgment, supported by more than episodic or discriminating enforcement efforts, would be unconstitutional. In the fashion of *Kent v. Dulles*, *Hampton v. Mow Sun Wong*, and even *United States v. Virginia*, it could leave that question undecided.

The underlying, time-honored principle involves desuetude.⁴⁸⁷ That principle has strong democratic foundations. It means that when an old law is practically unenforced because it does not receive sufficient public approval, ordinary citizens are permitted to violate it. In that way, they are permitted to call democratic attention to the space between the law as popularly conceived and approved and the law as it exists on the books.

⁴⁸² See *id.* at 732-33.

⁴⁸³ See *id.* at 734-35.

⁴⁸⁴ See RICHARD A. POSNER, *AGING AND OLD AGE* 235-37 (1995).

⁴⁸⁵ 381 U.S. 479 (1965).

⁴⁸⁶ *Id.* at 485.

⁴⁸⁷ See BICKEL, *supra* note 8, at 148-56.

I have suggested that in this way *Griswold* and the desuetude question can be linked with *Hampton v. Mow Sun Wong*. As we have seen, the problem in that case was the absence of sufficiently demonstrated public support for the enactment at issue; hence the Court effectively remanded the question to the President and Congress for fresh consideration. In other words, the Court objected to a legitimacy deficit; the solution consisted of an insistence that a decision of this kind, to be valid, required the support of a democratically accountable body. The same thing can be said for the question of desuetude. Here of course the problem is temporal rather than bureaucratic; it involves the absence of recent support rather than the absence of decision by a democratically accountable institution. But the basic problem — the legitimacy deficit — is the same.⁴⁸⁸

It is not at all clear that the idea of desuetude is well-suited to the right-to-die context; New York and Washington, for example, have grappled with the issue in the recent past. But the general idea has much potential.⁴⁸⁹ It does not involve judicial prohibition. It puts the burden of deliberation on representative bodies accountable to the people. Probably the right to physician-assisted suicide should be rejected, but the notion of desuetude, if inapplicable on the facts, might be held in reserve for an appropriate occasion.

C. Same-Sex Marriage

Does *Romer v. Evans* have implications for the current debate over same-sex marriage? Should courts pursue a minimalist path? As a practical matter, it is surely more likely that the Court would overrule *Hardwick* than that it would take the dramatic (and maximalist) step of saying that same-sex marriages must be allowed under the Equal Protection Clause. But after *Romer*, it is not altogether clear how a court should deal with an equal protection challenge.

To press especially hard on the institutional issues, let us make some very controversial assumptions. Let us assume that an equal protection challenge to the ban on same-sex marriages has a great deal of force.⁴⁹⁰ Let us assume that *Romer v. Evans*, rightly understood

⁴⁸⁸ Thus understood, the right to die cases can be closely linked with "actual purpose" review in *United States v. Virginia*. Recall that the central problem there was the absence of a showing that a recent legislature, acting without discriminatory motivations, had produced single-sex education for educational purposes. The Court refrained from deciding how it would handle a similar policy adopted by a legislature with an actual educational purpose in mind. By doing so, *United States v. Virginia* attempts to promote democratic deliberation in a way that is closely connected with the notion of desuetude; as I have noted, the case can even be understood as one of desuetude. A general discussion is Cass R. Sunstein, *The Right to Die*, 107 YALE L.J. (forthcoming Jan. 1997).

⁴⁸⁹ See *Quill v. Vaco*, 80 F.3d 716, 734-35 (2d Cir. 1996) (noting recent discussions in New York); *Compassion in Dying v. Washington*, 49 F.3d 586, 590 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3785 (U.S. Oct. 1, 1996) (No. 96-110).

⁴⁹⁰ For a general discussion, see WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 128-33 (1996).

and supplemented by the due process and equal protection holdings in *Loving v. Virginia*,⁴⁹¹ gives a great deal of support to such a challenge.⁴⁹² Of course this is not a necessary assumption. Perhaps the Court would say that the prohibition on same-sex marriage is certainly rational because it has been so longstanding. Perhaps the Court would say that marriage is legitimately reserved for relations between men and women. But let us assume that all of these responses are not, simply as a matter of substantive argument, convincing on the merits. If this is so, should the Court endorse the constitutional attack on the ban on same-sex marriages? There is a large question whether it should — not (we are now assuming) because the Court should be uncertain about the underlying principle, and not because the plurality of possible contexts confounds any simple rule, but because of the need for prudence in asserting even a correct principle against a democratic process that is not ready for it.⁴⁹³

As it operates in the courts, constitutional law is a peculiar mixture of substantive theory and institutional constraint.⁴⁹⁴ Even if judges find the challenge to the ban on same-sex marriages plausible in substance, there is much reason for caution on their part. Immediate judicial invalidation of same-sex marriages could well jeopardize important interests. It could galvanize opposition and (predictably) lead to a strong movement for a constitutional amendment overturning the Court's decision. It could weaken the antidiscrimination movement itself as that movement is operating in democratic arenas.⁴⁹⁵ It could provoke increased hostility and even violence against homosexuals. It would certainly jeopardize the authority of the judiciary.

⁴⁹¹ 388 U.S. 1 (1967).

⁴⁹² Congress has recently enacted a Defense of Marriage Act, S. 1740, 142 Cong. Rec. H7480-05, which allows states to deny recognition to same-sex marriages consummated in other states. The Act raises many issues. See *Hearing on S. 1740 Before the Senate Comm. of the Judiciary*, 102d Cong. (1996) (statement of Cass R. Sunstein, Professor of Law, University of Chicago). For present purposes the most interesting issue involves the reach of *Romer v. Evans*. Congress has never enacted a statute authorizing states not to recognize marriages made in other states; in fact Congress has never enacted a statute allowing states not to recognize any judgments of other states. The issue of marriage has been sorted out by traditional common law principles, allowing states to deny recognition in certain circumstances on the basis of their own policy judgments. Congress's decision to allow nonrecognition here — unaccompanied by a decision to allow nonrecognition in other contexts including marriages involving minors or incestuous marriages — appears to be a form of impermissible selectivity of the sort found in *Romer*. A minimalist Court could reach this conclusion without concluding that same-sex marriages must be recognized under the Equal Protection Clause. See also Letter from Laurence H. Tribe to Sen. Edward Kennedy (May 24, 1996), in 142 CONG. REC. S5931 (1996) (regarding constitutionality of Defense of Marriage Act).

⁴⁹³ To be sure, the Court might have difficulty in making the predictive judgments. Those judgments depend on speculative assessments of evolving social norms, and courts have no special expertise in making those assessments. But some cases raise clear concerns, and this observation is sufficient support for the argument that I am making here.

⁴⁹⁴ See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1263 (1978).

⁴⁹⁵ Cf. ROSENBERG, *supra* note 8, at 182-89 (discussing the reaction to *Roe v. Wade*).

Is it too pragmatic and strategic, too obtusely unprincipled, to suggest that judges should take account of these considerations?⁴⁹⁶ Surely not. Prudence is not the only virtue; it is certainly not the master virtue. But it is a virtue nonetheless. At a minimum, courts should generally use their discretion over their dockets to limit the timing of intrusions into the political process. It also seems plausible to suggest that courts should be reluctant to vindicate even good principles when the vindication would compromise other interests, especially if those interests include, ultimately, the principles themselves. It would be far better for the Court to do nothing — or better yet, to start cautiously and to proceed incrementally.

Following *Romer v. Evans*, the Court might find — as some lower courts have done⁴⁹⁷ — that government cannot rationally discriminate against people of homosexual orientation, without showing that those people have engaged in acts that harm any legitimate government interest. Following *Romer*, the Court might look with some care to test whether something other than hostility and animus are the basis for discrimination. Narrow rulings of this sort would allow room for public discussion and debate⁴⁹⁸ before obtaining a centralized national ruling that preempts ordinary political process.

We can go much further. Constitutional law is not only for the courts; it is for all public officials. The framers' original understanding was that deliberation about the Constitution's meaning would be part of the function of the President and legislators.⁴⁹⁹ Of course the Court's judgments are final in litigated cases, but all officials have a duty to maintain fidelity to the founding document. The post-Warren Court identification of the Constitution with the decisions of the Supreme Court has badly disserved the traditional American commitment to deliberative democracy. And in that system, elected officials should have a degree of interpretive independence from the judiciary, certainly outside of the context of litigated cases. They should sometimes fill the institutional gap created by the courts' inferior factfinding ability and policymaking competence.⁵⁰⁰ For this reason, the Court may go less far than other branches even if all branches are acting in the name of the Constitution. Similarly, other branches may

⁴⁹⁶ See Marc Fajer, *With All Deliberate Speed? A Reply to Professor Sunstein*, 70 IND. L.J. 39, 39–40 (1994).

⁴⁹⁷ See *Steffan v. Aspin*, 8 F.3d 57, 67 (D.C. Cir. 1993); *Watkins v. United States Army*, 875 F.2d 699, 728–29 (9th Cir. 1989).

⁴⁹⁸ Of course, discussion and debate can be promoted by maximalist decisions that broadly foreclose majoritarian outcomes. A public outcry often follows such decisions. Consider the responses to *Dred Scott*, *Lochner v. New York*, *Brown v. Board of Education*, and *Roe v. Wade*. The public deliberation that followed such decisions might provide a reason for applauding the decisions on democratic grounds. See DWORKIN, *supra* note 3, at 344–46 (discussing Learned Hand). But in such cases the discussion is by hypothesis futile, and for deliberative democrats, deliberation is best when accompanied by the power of decision.

⁴⁹⁹ See SUNSTEIN, *supra* note 3, at 9–10.

⁵⁰⁰ See Sager, *supra* note 494, at 1263–64.

conclude that practices are unconstitutional even if the Court would uphold them. In the area of same-sex marriages, this would be a good way to proceed.

CONCLUSION

The upshot of appreciating the fluidity of the subject that Congress must regulate is simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology, and that a proper choice among existing doctrinal categories is not obvious. . . . Justice Breyer wisely reasons by direct analogy rather than by rule

Denver Area Educational Telecommunications
Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2402 (1996)
(Souter, J., concurring).

In this Foreword, I have explored the practice of minimalism in law. Minimalism is best understood as an effort to leave things open by limiting the width and depth of judicial judgments. Minimalist judges try to keep their judgments as narrow and as incompletely theorized as possible, consistent with the obligation to offer reasons. They are enthusiastic about avoiding constitutional questions; they like to use doctrines of justiciability, and their authority over their docket, to limit the occasions for judicial intervention into politically contentious areas; the ban on advisory opinions guides much of their work. They try to reduce the burdens of judgment for Supreme Court justices, to minimize the risks of error introduced by broad rules and abstract theories, and to maximize the space for democratic deliberation about basic political and moral issues. Minimalist courts also respond to the sheer practical problem of obtaining consensus amidst pluralism. This problem can produce minimalism in the form of incompletely-specified abstractions and incompletely-theorized, narrow rulings.

The question whether to leave things undecided helps to unite a number of seemingly disparate issues and problems in public law. Examples include doctrines of justiciability; the grounds for granting certiorari; the rules-standards debate; the "tiers" of constitutional scrutiny; "clear statement" principles in statutory construction; the void-for-vagueness and nondelegation doctrines; the uses of dicta; and so-called balancing vs. so-called absolutism. In each of these areas, minimalists and maximalists sharply diverge, in part because of different assessments of which route is most likely to minimize both the mistakes and the burdens of decision, in part because of competing judgments about what is required by democracy, properly understood.

Sometimes minimalism is a blunder; sometimes it can produce great unfairness. Whether minimalism makes sense cannot be decided in the abstract. The answer has a great deal to do with costs of decisions and costs of error. The case for minimalism is strongest when courts lack information that would justify confidence in a comprehensive ruling; when the need for planning is not especially insistent; when the decision

costs of an incremental approach do not seem high; and when minimalist judgments do not create a serious risk of unequal treatment. Thus minimalism is usually the appropriate course when circumstances are changing rapidly or when the Court cannot be confident that a broad rule would make sense in future cases.

There were important instances of minimalism in the 1996 Term. *Romer v. Evans* was insistently minimalist; the case may have planted a seed for future development, but it may not have. The Court's stated prohibition on measures based on "a bare desire to harm a politically unpopular group"⁵⁰¹ raises many questions, but it gets at the heart of what was wrong with Amendment 2. This idea also links the *Moreno-Cleburne-Romer* trilogy with a reasonable understanding of the Equal Protection Clause, one that bans state efforts to create a form of second-class citizenship. But the Court left this idea incompletely theorized, not least because the Court did not mention *Bowers v. Hardwick*. For the future, the best approach may well be to ground the Due Process Clause in tradition and the Equal Protection Clause in a tradition-correcting norm of civic equality. If things are understood this way, *Hardwick* was not overruled by *Romer v. Evans*. And if *Hardwick* was wrong, it is because it was a case of desuetude, and in that sense linked with *Kent v. Dulles* and *Hampton v. Mow Sun Wong*.

With this idea we can see an important strand in constitutional doctrine and an important form of minimalism: decisions that are not simply democracy-foreclosing or democracy-authorizing, but instead democracy-forcing. Such decisions promote both reason-giving and accountability. Implementing the liberal principle of political legitimacy, they attempt to model and to police the system of public reason. This idea connects the "clear statement" cases, the concern with desuetude, the void for vagueness and nondelegation doctrines, rationality review, and the requirement that certain forms of discrimination be justified by actual rather than hypothetical purposes.

With respect to affirmative action, the right to die, and same-sex marriages, the Court should eschew broad rules and proceed in a way that complements and does not displace democratic processes.⁵⁰² The Court should certainly avoid a broad rule of "color blindness"; this would be a singular form of judicial hubris. Nor should the Court at this stage create a broad-ranging right to die or say that same-sex mar-

⁵⁰¹ *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1995) (quoting United States Dep't of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

⁵⁰² It may be tempting to think that democracy-forcing invalidation is an oxymoron. Invalidation might appear undemocratic by its very nature. As I have suggested, however, we should not identify outcomes of political processes with democracy, properly understood. For example, the process may have lacked sufficient accountability, see *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-05 (1976); *Kent v. Dulles*, 357 U.S. 116, 130 (1958), or sufficient deliberation and reason-giving, see *United States v. Virginia*, 116 S. Ct. 2264, 2276-82 (1996); *Romer v. Evans*, 116 U.S. 1620, 1628-29 (1996).

riages must be recognized. Instead it should proceed cautiously and incrementally.

Nothing I have said here denies that rules may make a good deal of sense and that in some cases diverse judges can and should converge on theoretically ambitious abstractions. These are some of the most glorious moments in any nation's legal culture. An inquiry into decision costs and error costs will sometimes argue against minimalism. I am stressing a narrower point. When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation. It is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary. But the Court can certainly increase the likelihood that those solutions will be good ones. Sometimes the best way for the Court to do this is by leaving things undecided.

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