

Symposium

Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics

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INTRODUCTION

Democracies can function without judicial review. Deliberation by elected legislators is more reliable and more legitimate in solving problems and accommodating groups than deliberation by unelected judges.¹ Under what circumstances, if any, can aggressive judicial review be defended? The traditional answer has been that judges enforcing our popularly ratified social contract (the Constitution) are not acting undemocratically.² But key constitutional provisions are open textured. Due process of law, equal protection, and freedom of speech are not determinate commands; their breadth and ambiguity assure judicial discretion.

The activism of the Warren Court (1953-1969) rendered this theoretical quandary politically urgent. If the Justices were simply imposing their own liberal values onto these open-textured clauses, why should Southern states, police departments, and state legislatures respect Warren Court decrees that invalidated settled practices and local customs? Academics searched for a theory that would resolve the tension between activist review and democracy. The most successful was the representation reinforcement theory developed by John Hart Ely in *Democracy and Distrust*.³

Ely's project was an elaboration and defense of footnote four of *United States v. Carolene Products Co.*⁴ Upholding an economic regulation, *Carolene Products* described circumstances where the strong "presumption of constitutionality" may not hold: (1) laws violating the clear commands of a "specific prohibition" in the Constitution, such as the Bill of Rights; (2) laws restricting "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; and (3) laws "directed at particular religious or national or racial minorities" or reflecting "prejudice against discrete and insular minorities."⁵ Judges should aggressively review such laws, Ely maintained, to ensure that the preconditions for the proper operation of democracy are in place: (1) the rule of law, (2) formal access to democratic processes, and (3) adequate representation.⁶

The representation reinforcement formula explained the Warren Court's jurisprudence as an effort to correct entrenched race-based democracy deficits. Under Ely's interpretation, that Court was not a bunch of result-

1. See JEREMY WALDRON, LAW AND DISAGREEMENT 212-13, 267-68 (1999) (arguing against judicial review altogether); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (urging deferential judicial review).

2. E.g., THE FEDERALIST NO. 78 (Alexander Hamilton).

3. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

4. 304 U.S. 144, 152 n.4 (1938).

5. *Id.* (citations omitted).

6. ELY, *supra* note 3, at 73-77, 87-103.

oriented liberals; it was a serious group of jurists dedicated to assuring neutral rules for the operation of America's democracy. The Court was a process-enforcing referee, not a superlegislature.⁷ And this is the role suggested by the structure of the Constitution itself. The Constitution's premise is democracy: All adults must have the right to vote and to engage in expressive activities; freely elected legislators are accountable to We the People and open to criticism; and legislatures cannot indulge in class legislation, censorship, an established church, or other activities that undermine the conditions for robust democracy.⁸ After reading the book, you want to believe that the theory was inherent in the Constitution. The social contract's rule of law coincides with justice and the civil rights revolution of the twentieth century. This is compelling stuff.

But Ely's theory provided a much better defense of judicial activism in the Warren Court's race cases than in the post-1969 sex, sexual orientation, and race cases. The newer cases expose the representation reinforcement model to charges that it understates the substantive commitments of the Constitution and lacks a political theory of democracy that courts ought to be "perfecting." These problems suggest that the theory is indeterminate, thereby deepening rather than solving the problem of unguided judicial activism.⁹ Part I of this article explores these criticisms in the context of the post-1969 cases.

The post-1969 cases not only reveal that Ely's theory does not work as a descriptive matter but also suggest that it is incomplete as a prescriptive matter. Part II outlines an understanding of the multicultural-pluralist democracy suggested by our experience with social movements such as the civil rights, women's rights, gay rights, and traditional family values movements. Under this conception of our democracy as multicultural and pluralist, Ely was right to criticize judicial review that hardwires a woman's near-absolute right to choose abortion into the Constitution. Contrary to Ely, lenient judicial review of sodomy laws illustrates equally misguided judicial passivity. What makes both lines of cases problematic is that the Supreme Court burdened American democracy by raising the stakes of politics. In its early abortion cases, the Court raised the political stakes by prematurely removing a fundamental and hard-to-resolve issue from ordinary politics. Suggesting that homosexuality might be a demonized status because of its tie to illegal conduct, the Court's sodomy jurisprudence

7. *Id.* at 73-75.

8. *Id.* at 88-100. *But see* Michael C. Dorf, *The Coherencism of Democracy and Distrust*, 114 YALE L.J. 1237 (2005) (critiquing the assumption that the premise of the Constitution is democracy).

9. *See, e.g.*, Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

raised the stakes by denying a group of citizens the protection of a neutral rule of law. Both lines of cases yielded immediate and longstanding political turmoil, and the Court has backed away from both.

Conversely, as Ely argued, a cautious judicial review can contribute positively to the democracy project. Part II suggests conditions under which judicial review can facilitate the operation of our pluralist democracy by lowering the stakes of politics. First, judges can encourage all groups to participate by assuring that neutral rules of an open political system are vigorously enforced. (This is a pluralism-facilitating justification for the first *Carolene Products* prong.) Second, judges can ameliorate politically destructive culture wars by denying groups state assistance in their efforts to exclude, demonize, or harm groups they dislike and by channeling intergroup politics away from appeals to prejudice and stereotypes. (This is a pluralism-facilitating extension of the second and third *Carolene Products* prongs.) Third, judges can help integrate successful new identity groups into the political process by clearing away obsolete laws that discriminate against these new partners assimilated into our multicultural pluralism. (This goes beyond the *Carolene Products* framework.)

Part III applies the foregoing model of pluralism-facilitating judicial review to several topics of current and future constitutional interest: the role of courts in monitoring the war on terror, state discriminations against language minorities, and state and federal bars to same-sex marriage. The pluralism-facilitating model addresses the concerns of women, pro-life persons, language minorities, and lesbians and gay men, but with procedural twists to avoid judicial stakes raising. For contentious issues that roil the nation, the Supreme Court should not impose national resolutions and should instead rely on dialogic techniques that essentially remand to the democratic process and leave it room to elaborate or respond. Introduced in Section II.C and applied in Part III, these techniques include avoidance of tough constitutional issues through procedural dodges (the passive virtues) or narrow statutory interpretations; incremental, case-by-case development of new constitutional principles; and use of constitutional doctrines such as void-for-vagueness and as-applied challenges, which allow the political process to respond.

I. SOCIAL MOVEMENTS AND REPRESENTATION REINFORCEMENT THEORY

During the 1964 Term, John Hart Ely clerked for Chief Justice Warren, whom he idolized.¹⁰ Ely recognized that the Warren Court was activist, but in the service of process and not values.¹¹ Defending such a process-serving activism, *Democracy and Distrust* laid out a constitutionally justified recipe for filling in the “open texture” of the Free Speech, Due Process, and Equal Protection Clauses. These provisions should be read most aggressively when legislative majorities lock out minorities from political power or adopt policies reflecting social prejudice. Thus, the Warren Court was legally (not just morally) right to protect religious minorities against compelled school prayers,¹² to require reapportionment and opening up of the franchise,¹³ to protect minority and political associations and public expression from censorship,¹⁴ and to insist on procedural protections for Latino and African-American defendants frequently railroaded through a white-dominated criminal justice system.¹⁵

What originally struck law professors as the Court’s most virtuous but least lawful decision, *Brown v. Board of Education*,¹⁶ was legally defensible once you understood the Constitution the way Ely did. His theory suggested two process-based defenses of *Brown I* that complemented—or avoided—justice-based objections to apartheid. The political process that yielded segregated public schools was not one where democracy-justified deference was appropriate, because people of color (the objects of segregation) were formally excluded from the democratic process in the South and because they were a discrete and insular minority who were marginalized even where they could formally participate (as in Topeka).¹⁷ Indeed, segregated education was a mechanism for ensuring the continuing marginalization of

10. *Democracy and Distrust* was dedicated, “For Earl Warren. You don’t need many heroes if you choose carefully.” ELY, *supra* note 3, at v.

11. See *id.* at 73-75; John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974).

12. ELY, *supra* note 3, at 100; see G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 338, 346 (1982) (reading the school prayer decisions as reactions to defects in the political process).

13. ELY, *supra* note 3, at 116-25 (criticizing some of the Court’s reasoning but fully agreeing with the outcome of the reapportionment cases).

14. *Id.* at 113-16; see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2334-40 (2002).

15. ELY, *supra* note 3, at 172-73; see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 763-68 (1991) (expanding on and strengthening Ely’s defense of the Warren Court’s criminal procedure decisions).

16. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

17. See ELY, *supra* note 3, at 136-40, 160-61 (defending the anti-apartheid decisions under the antiprejudice prong of *Carolene Products*); Klarman, *supra* note 15, at 788-819 (defending the decisions under the access prong).

minorities, because it inculcated racist stereotypes and prejudices in the minds of children.¹⁸

Its defense of the racial segregation decisions explains much of the acclaim academics have given to representation reinforcement theory. But Ely's theory has been at odds with the constitutional activism of the post-1969 Court.¹⁹ This phenomenon was partly a consequence of the Warren Court's success. After the Court and the Johnson Administration dismantled formal apartheid, purged the South of prejudice-dominated trials, and opened up the political process to minority voices and votes, the operation of democracy actually improved. At that point, it was not clear what more a referee Court should do. The Warren Court's success, however, ensured that there would be ongoing pressure on the Court to engage in activist review. The NAACP's Inc. Fund and its allies (such as the ACLU) were emboldened by their earlier triumphs and pressed for new ones. Other social movements copied and expanded on the Inc. Fund model to press their own causes upon the Court.²⁰

Although the Burger and Rehnquist Courts were staffed with strict constructionists, they proved no less activist than the Warren Court. Their activism was responsive to constitutional litigation campaigns conducted by various women's rights movements, the gay rights movement, and traditional values countermovements—all following the pattern of the civil rights movement.²¹ But their activism had no firmer support in original constitutional meaning. And unlike pre-1969 civil rights decisions, many of the identity politics decisions after 1969 can be criticized from a representation reinforcement perspective.

A. *Women's Rights*

In the 1970s, the Supreme Court's constitutionalization of women's rights went well beyond representation-reinforcing justifications. Feminists demanded that women have the right to choose abortions for unwanted pregnancies, and the Court accommodated their demands in *Roe v. Wade*.²² Feminists demanded invalidation of state discriminations based on sex, and

18. See *Brown I*, 347 U.S. at 493-94 & n.11.

19. See, e.g., Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1090-91 (1982) (expressing doubt that the principles of footnote four should be broadly applied).

20. See, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 97-101, 125-37 (1999) (gay rights); Serena Mayeri, Note, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045 (2001) (women's rights).

21. For an overview of the influence that constitutional litigation campaigns had on the evolution of constitutional jurisprudence, see Eskridge, *supra* note 14, at 2194-353.

22. 410 U.S. 113 (1973).

the Court accommodated them, striking down archaic sex discriminations in *Reed v. Reed*²³ and announcing a standard of quasi-strict scrutiny for all sex-based classifications in *Craig v. Boren*.²⁴

Such aggressive review finds little support in the *Carolene Products* framework. (1) There is no constitutional provision, apart from the Nineteenth Amendment (applicable just to voting), that specifically guarantees women's rights, and the history of the Fourteenth Amendment provides little support for abortion rights or heightened scrutiny of sex-based classifications.²⁵ (2) Since 1920, women have had formal access to the political process. There have been few state efforts to interfere with women's exercise of the franchise, political activity on behalf of their causes, or publication of their books and literature. (3) Women are neither insular nor a minority of the population. They are usually a voting majority, and there is no procedural reason why the political process should not take account of their interests.²⁶

Indeed, the democratic process was hard at work when the Court struck down abortion laws and sex-based classifications. Between 1964 and 1976, Congress enacted statutes protecting against sex discrimination in the workplace and educational institutions and adopted the Equal Rights Amendment (ERA),²⁷ while some state legislatures initiated the process by which old abortion restrictions were rethought and most sex-based classifications were purged from their codes.²⁸ Although feminist projects did not always prevail in the democratic process, they lost only when women as well as men opposed them.²⁹ Ely thus criticized the abortion and sex discrimination jurisprudence: It would be more legitimate for women's rights reforms to win in the legislative rather than the judicial process.³⁰

Ely's critique of *Roe* has proven particularly cogent, because that decision contributed to both the flourishing and the radicalization of the

23. 404 U.S. 71 (1971).

24. 429 U.S. 190 (1976).

25. *But cf.* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2001) (arguing for a more expansive reading of the Nineteenth Amendment).

26. *See* ELY, *supra* note 3, at 164-69.

27. *See* *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) (plurality opinion).

28. *See* ROSEMARY NOSSIFF, *BEFORE ROE: ABORTION POLICY IN THE STATES* 3 (2001).

29. *See, e.g.*, JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 6, 15 (1986) (arguing that the ERA failed in part because many women were lukewarm or opposed to it).

30. ELY, *supra* note 3, at 164-70 (arguing that *Carolene Products*'s third prong does not justify heightened scrutiny of sex-based classifications, except perhaps for laws adopted before 1920); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1973) (arguing that the decision whether to protect a woman's right to an abortion is a substantive value judgment for which there is no constitutional basis).

pro-life movement.³¹ Without generating as much controversy, the Court's sex discrimination jurisprudence may have been even more harmful from an Elysian³² perspective. In *Craig*, the Court gave the women's rights movement pretty much the same constitutional results that the failing ERA would have.³³ Not only was the ERA proof that women were not excluded from the democratic process, but *Craig* was a judicial signal to other social movements that the Article V process was no longer necessary for constitutional change, even for groups (like women) that had used it successfully in the past. It took two generations of sustained feminist activism to win the right to vote assured by the Nineteenth Amendment, but in less than a decade feminists had won a larger victory through the votes of six Justices.

After *Roe*, an invigorated pro-life movement expressed itself through direct contact with women seeking abortions. Judges limited the movement's advocacy through injunctions against speech outside abortion clinics. In *Madsen v. Women's Health Center*, the Court ruled that such injunctions must burden no more speech than necessary to serve a significant government interest in protecting patients and health care personnel against harassment.³⁴ Under this standard, the Court upheld a 36-foot buffer zone in front of the clinic but struck down bars to displaying images outside the clinic and to approaching patients within 300 feet of the clinic. *Hill v. Colorado* upheld a statute barring anyone within 100 feet of a health care facility from approaching another person to hand out leaflets or engage in conversation.³⁵ Ely's theory suggests skepticism of such stringent state regulation of a minority group's effort to present its perspective in public spaces. Echoing Ely, Justice Scalia's dissent charged that *Hill* was a classic case for judicial intervention, because the "ins" (pro-choice forces) were choking off protest from the "outs" (pro-life forces, who were precluded from legislative expression because of *Roe*).³⁶ In *Madsen*, judges were authors of the out-group censorship, which was maybe worse. In neither case did the Court bother to respond to Scalia's representation-reinforcing objections.

31. See, e.g., DALLAS A. BLANCHARD, *THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIERY PROTEST* 22-36, 44-46 (1994) (providing an institutional history of the pro-life movement and sketching its anti-*Roe* ideology).

32. See JOHN HART ELY, *ON CONSTITUTIONAL GROUND* 465 n.117 (1996) (expressing a preference for "Elysian" as the adjectival form of his name).

33. MANSBRIDGE, *supra* note 29, at 46.

34. 512 U.S. 753 (1994); see also *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (applying *Madsen*).

35. 530 U.S. 703 (2000).

36. *Id.* at 762-65 (Scalia, J., dissenting).

B. *White People's Rights*

Although its Justices struck down some state programs benefiting racial minorities, the Burger Court never achieved a majority position for constitutional evaluation of “benign” race-based preferences. It was the Rehnquist Court, ruling in *City of Richmond v. J.A. Croson Co.*³⁷ and *Adarand Constructors v. Peña*,³⁸ that first subjected government-contracting programs helping racial minorities to strict scrutiny to satisfy the Equal Protection Clause.³⁹ The University of Michigan decisions, *Grutter v. Bollinger*⁴⁰ and *Gratz v. Bollinger*,⁴¹ assure that judges will preside over line drawing by colleges and universities seeking diverse student populations.

Ely rejected aggressive judicial review of “reverse discrimination.” There is no clear constitutional bar to it, and the Equal Protection Clause should be reserved for those cases where majorities are suppressing minorities—and not where majorities are remedying minority underrepresentation.⁴² Ely was aware of Alexander Bickel’s argument that affirmative action reinforces negative stereotypes about people of color⁴³ but believed that Bickel was making the same kind of mistake that had been made in *Roe*—importing substantive values into the Constitution. So long as all sides have a fair opportunity to participate, the affirmative action debate should be left to the political process. Judges have neither the competence nor the legitimacy to make judgments that are essentially political choices.

37. 488 U.S. 469 (1989) (applying strict scrutiny to state and local affirmative action plans but suggesting that federal plans might be evaluated more leniently).

38. 515 U.S. 200 (1995) (applying strict scrutiny to federal affirmative action plans and overruling *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990)).

39. *Croson* contained an indirect bow to Ely. Justice O’Connor’s plurality opinion suggested that race-based affirmative action would be more acceptable from the federal government, whose handling of race issues inspired greater trust among the Framers (perhaps in part because Congress represents a more diverse constituency). See *Croson*, 488 U.S. at 490-98 (opinion of O’Connor, J.). The concession was retracted in *Adarand*, which struck down a federal program. See *Adarand*, 515 U.S. at 251-53 (Stevens, J., dissenting).

40. 539 U.S. 306 (2003) (upholding the law school’s deployment of race as a flexible plus factor, following *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.)).

41. 539 U.S. 244 (2003) (striking down the college’s deployment of race as a factor providing a determinate number of points in a more mechanical admissions process).

42. ELY, *supra* note 3, at 170-72; John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); see *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting) (making Ely’s argument for lenient review of minority-assisting preferences).

43. Brief of Anti-Defamation League of B’nai B’rith as Amicus Curiae in Support of Jurisdictional Statement or in the Alternative Petition for Certiorari at 24-25, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235).

Yet Ely endorsed *Shaw v. Reno*, where the Court followed *Croson* to rule that racial gerrymandering engineered to increase minority representation in the legislature is subject to strict scrutiny.⁴⁴ Ely himself saw state creation of majority-black districts as no different from political gerrymandering, the effort typically designed to entrench incumbents and established power alignments.⁴⁵ But Elysian *theory* supports Justice Stevens's *Shaw* dissent, which objected to the application of anti-apartheid precedents when a white majority was opening up the political process to minority representation.⁴⁶ As Pam Karlan puts it, the *Shaw* cases reveal a tension between the free-access and minority-protection prongs of *Carolene Products*, because "the protection of minority interests is now often best served not by judicial scrutiny of legislative outcomes but by judicial deference to plans that allocate power to politicians elected from minority communities."⁴⁷

C. *Gay Rights—and Beyond*

Representation reinforcement theory, as Ely presented it, is ambivalent about gay rights. Like people of color, lesbian, gay, bisexual, and transgendered (LGBT) people have been brutalized by the criminal justice system, censored by the state, and excluded from governmental benefits and obligations because of prejudice. These state policies pushed gays into the dispersed anonymity of the closet, leaving them politically defenseless as well as unable to refute stereotypes and prejudice by openly engaging with other Americans.⁴⁸ On the other hand, Ely felt that laws founded on a "sincerely held moral objection" to sodomy, and not reflecting "a simple desire to injure the parties involved," are substantive and beyond judicial review.⁴⁹

Given this framework, it is not completely clear how representation reinforcement theory should decide *Romer v. Evans*.⁵⁰ Gay people in Colorado are concentrated in Denver, Aspen, and Boulder; each city

44. 509 U.S. 630 (1993).

45. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607 (1998) (criticizing political gerrymanders, which Ely took to include race-based gerrymanders); see also John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489 (2002) (criticizing the Court's upholding of a majority-black district).

46. *Shaw*, 509 U.S. at 678 (Stevens, J., dissenting) (making this representation-reinforcing point); accord *Miller v. Johnson*, 515 U.S. 900, 947-48 (1995) (Ginsburg, J., dissenting).

47. Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1331 (2005).

48. ELY, *supra* note 3, at 162-64.

49. *Id.* at 255 n.92.

50. 517 U.S. 620 (1996).

adopted ordinances protecting against sexual orientation discrimination. The state as a whole is homo anxious, and in 1992 its voters amended the state constitution to preempt government policies protecting gay people against discrimination. Ely agreed with the Court that the initiative swept too broadly and seemed to deprive gay people as a class of a wide range of legal protections ordinary citizens take for granted.⁵¹ But the dissent also made a representation-reinforcing point: that “tolerant Coloradans” had been among the first to repeal their state sodomy law but felt that ordinances affirmatively protecting “homosexuals” against private discrimination promoted homosexuality and sodomy, contrary to their tolerant moral code.⁵²

In *Lawrence v. Texas*, the Court (shortly before Ely’s death) struck down Texas’s Homosexual Conduct Law.⁵³ Because the law made only “homosexual” and not heterosexual sodomy illegal, Ely would have objected to it. From a representation-reinforcing perspective, “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”⁵⁴ But only Justice O’Connor followed this reasoning.⁵⁵ Justice Kennedy’s majority opinion invalidated all consensual sodomy laws as a violation of the liberty guarantee of the Due Process Clause.⁵⁶ Ely would presumably have had some sympathy for Justice Scalia’s complaint, in dissent, that the Constitution is not committed to substantive protection of sexual liberty against government regulation and that sodomy reform is a matter of moral judgment better left to state political processes.⁵⁷

51. The “Scholars’ Brief,” which Ely joined, made an argument similar to the one the Court eventually made. *Compare id.* at 630-35, with Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as Amici Curiae, *Romer* (No. 94-1039). Ely might have made the stronger point that antidiscrimination laws are particularly important to assure public space for *openly* gay people.

52. *Romer*, 517 U.S. at 644-51 (Scalia, J., dissenting) (mobilizing the distinction, also drawn by Ely, between morals-based regulation of acts and animus-based discrimination against classes of people).

53. 539 U.S. 558 (2003).

54. *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

55. *Lawrence*, 539 U.S. at 579-85 (O’Connor, J., concurring in the judgment).

56. *Id.* at 574-79 (majority opinion).

57. *Id.* at 602-05 (Scalia, J., dissenting). Ely would have appreciated the difficulties LGBT people face in the political process, but by 2003 most states had in fact repealed their consensual sodomy laws. Even in Texas, “homosexual sodomy” was just a Class C misdemeanor for which a \$500 fine was the maximum punishment. TEX. PENAL CODE ANN. § 21.06 (Vernon 2003). In other venues where legislatures had left sodomy a crime, state judges (accountable to voters) had invalidated those laws. *E.g.*, *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

Representation reinforcement theory also raises questions about the Court's decision in *Boy Scouts of America v. Dale*.⁵⁸ Applying a state law barring sexual orientation discrimination by public accommodations, state courts ruled that the Boy Scouts could not categorically exclude gay men from being scoutmasters. The Supreme Court overruled this application as inconsistent with the First Amendment's protection of free association and speech. Ely would have been skeptical, because the Boy Scouts' antigay "expression" was found mostly in the briefs filed by their lawyers and because the law reflected no tendency of political insiders to suppress outsiders. As in the affirmative action cases, the disputed law was adopted by a legislature filled with straight people and presumably reflected an unprejudiced judgment about the social dangers of homophobia.⁵⁹ To the extent they felt otherwise, the Boy Scouts and their allies were amply represented in the state and national political process. The same could be said for *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, where the Court invalidated the application of Massachusetts's antidiscrimination law to the Boston St. Patrick's Day parade, which excluded openly gay marching groups.⁶⁰

As Dan Ortiz has argued, the gay rights cases illustrate the impossibility of avoiding substantive judgments in constitutional decisionmaking.⁶¹ In cases like *Romer* and *Lawrence*, the difference between antigay prejudice, which Ely would have judges monitor, and traditional morality, which he would not, is a substantive judgment. So even Ely's theory requires assessment of values. Indeed, one can easily conclude that the Constitution does as well.⁶² Its great structural innovations (federalism, separation of powers, a Bill of Rights) were advanced to subserve liberty. And the document is chock full of provisions directly protecting liberty.⁶³ Taking substance (liberty) out of the Constitution, or relegating it to the shadows as Ely does, is like taking God out of the Bible. Partly for these reasons, libertarian principles explain the Rehnquist Court's

58. 530 U.S. 640 (2000).

59. Thus, Ely would have followed the Court in rejecting First Amendment attacks on the application of antidiscrimination laws to all-male social clubs. *E.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). That the Court allowed the states to integrate women into social clubs but not gay people into parades and Scout troops would have struck Ely as backwards, given the continued political marginalization of gay people.

60. 515 U.S. 557 (1995).

61. Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991).

62. *E.g.*, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

63. *E.g.*, U.S. CONST. art. I, § 10, cl. 1 (Contracts Clause); *id.* amend. I (Speech, Press, and Religion Clauses); *id.* amend. V (Takings Clause); *id.* amend. XIII (antislavery); *id.* amend. XIV (Privileges or Immunities and Due Process Clauses).

jurisprudence—cases like *Lawrence*, *Dale*, *Hurley*, *Casey*, *Adarand*, and *Gratz*—much better than representation reinforcement theory does.

Consider a further problem with representation reinforcement theory that the gay rights cases, in particular, highlight. Ely assumed that democracy needs enhancing only when people are formally locked out of its processes (*Carolene Products* prong two) and that representation needs reinforcing only when prejudice is operating against discrete and insular minorities (*Carolene Products* prong three). Formal exclusion and open appeals to prejudice were urgent problems posed by the race cases, but the women's rights and gay rights cases suggest that representation reinforcement might be understood more functionally.⁶⁴ Democracy is less than perfect when out-group citizens have significant disadvantages in exercising political power as a practical matter (*Romer* and *Lawrence*), when the state interferes with the political activities of morality-based as well as minority groups (*Hill* and *Dale*), or when obsolete laws are perpetuated because of inertia and tradition more than affirmative public support (*Roe* and *Reed*). Representation may be defective not only because of prejudice against minorities (*Romer*) but also because of stereotypes regarding women or minorities (*Craig* and *Adarand*).⁶⁵

Functional theories of democracy and representation better explain the Burger and Rehnquist Court cases, but they have a normative problem. Ely's more formalist theory is tied to the Constitution, which is premised on the operation of a democratic process in which all adult citizens have an opportunity to participate and in which there are no permanent out-caste groups of citizens.⁶⁶ Functional theories of democracy and representation less easily tied to the Constitution might be less legitimate. Moreover, judges may be able to apply Ely's formal approach more objectively and predictably than they could apply a more functionalist approach. If this is so, functionally grounded judicial review will be more manipulable and vulnerable to the counter-majoritarian difficulty. Nevertheless, Ely's theory cannot be uncontroversially applied to the sex, sexual orientation, and race cases confronted by the Court since 1969.

64. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (arguing from a public choice theory of politics in favor of aggressive judicial review of laws discriminating against gays and poor people).

65. See ELY, *supra* note 3, at 155-64 (recognizing the disabling role of stereotypes).

66. *Id.* at 88-101.

II. LOWERING THE STAKES OF POLITICS: A THEORY OF PLURALISM-FACILITATING JUDICIAL REVIEW

Appreciating that American constitutional governance is democratic, Ely did not deeply explore its pluralist dimensions. A pluralist political system is one whose goal is the accommodation of the interests of as many salient groups as possible, without disturbing the ability of the state and the community to press forward with collective projects.⁶⁷ In a pluralist democracy, social, economic, and ideological groups compete for the approval and support of representatives and the electorate. The polity, in turn, encourages groups to participate in the marketplace of politics.

The twentieth century saw an evolution of American pluralism, responsive to identity-based social movements. Those movements sought to change public opinion about norms involving race, gender, sexual orientation, and disability, and worked through the political process to change the law. But those movements also reflected a multicultural pluralism, in which an increasing array of groups or subgroups sought to create their own quasi-autonomous communities within the larger culture.⁶⁸

Although the Framers of the Constitution did not anticipate our modern pluralism, they appreciated the fragility of democracy when the “stakes” of politics get too high. Stakes get high when the system becomes embroiled in bitter disputes that drive salient, productive groups away from engagement in pluralist politics.⁶⁹ Groups will disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them or their perception that the process is stacked against them, or when the political process imposes fundamental burdens on them or threatens their group identity or cohesion. At the Founding of our nation, religion was the classic example of high-stakes politics; the Religion Clauses of the First Amendment sought to lower the stakes of

67. See ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 51 (2d ed. 1979) (describing “interest group liberalism”); Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734 (1983).

68. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

69. My discussion of the “stakes” of politics draws from ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 36-37 (1991). Because Przeworski focuses on protecting emerging democracies against collapse, his use of the term is more conservative (don’t rock the boat) than mine. Through the prism of identity-based social movements, the challenge for democracy is to adapt to new interests whose norms generate intense disagreement over time.

religion-based politics.⁷⁰ Today, issues such as abortion and same-sex marriage are the paradigm for high-stakes politics.

In an Elysian spirit, this Part develops a theory of pluralist democracy and the dangers faced by such democracies. The Constitution suggests principles for managing such dangers, what I call “pluralism-facilitating” judicial review. An important directive, derived from both political science and constitutional history, is that *the stakes of politics need to be kept reasonably low*. Three constitutional mechanisms for keeping stakes low are assuring each group that it has an equal opportunity in the polity, ameliorating culture wars and channeling identity politics into positive policies, and cleaning out normatively obsolescent laws. Such stakes-lowering tactics help us understand the cases in Part I.

A. *Pluralist Democracy and Its Discontents*

Pluralist democracy is dynamic and fragile. It is dynamic because the nature, composition, and balance of politically relevant groups shift over time. It is fragile because it depends on the commitment of all politically relevant groups to its processes. Political losers may exit the system unless they think their interests will be accommodated or their losses from exiting will exceed their gains.⁷¹ The exit problem is not mere theory. Democracies fail all the time, including those generating prosperity for their citizens. The birth of the United States is an example. In part because they were formally unrepresented in Parliament, the thirteen colonies believed that their interests were better served through independence from Great Britain—and so they declared independence. Additionally, the more heterogeneous the democracy, the greater its chances of failure.⁷² Our country is more ethnically, religiously, and ideologically heterogeneous now than at any previous time in its history—and that diversity is a source of potential instability.

The possibility of exit and collapse is not, however, the only or even the most important challenge. A pluralist democracy needs emerging groups to commit to its processes just as much as it needs established groups to stick to those processes. And there are positive reasons to encourage all groups—new and old—to work within the democratic system. Any government

70. Cf. STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 202-08, 222-27 (1995) (interpreting the Religion Clauses to support “gag rules” keeping combustible issues off the public agenda).

71. PRZEWORSKI, *supra* note 69, at 26-37; Miller, *supra* note 67, at 742.

72. Although the most significant variable is low per capita income, Adam Przeworski, *Why Do Political Parties Obey Results of Elections?*, in DEMOCRACY AND THE RULE OF LAW 114, 114-15 (José María Maravall & Adam Przeworski eds., 2003), cultural heterogeneity also, assertedly, contributes to democratic instability, *id.* at 128.

depends on the cooperation of citizens in the ordinary affairs of governance. Pluralist democracy potentially engages most citizens in the affairs of governance, and that engagement encourages cooperation across the board. If a lot of Americans drop out of or never drop into our system, it will lose much of that democracy bonus.

Relatedly, the engagement of diverse groups enriches democratic discourse. When advocates must articulate and defend their proposals to a variety of perspectives and not just to their core supporters, they are more likely to moderate and universalize those proposals. Multifaceted critique offers the possibility that enacted laws will better reflect the interest of all and not just the whim of a few. "Majority rule . . . suffers when it is not constrained by the need to bargain with minority interests."⁷³ If groups drop out of or fail to enter the political system, it will lose voices that would improve decisionmaking and render it more legitimate.

Identity politics exacerbates both the dynamism and the fragility of pluralist democracies. The twentieth century witnessed mass social mobilizations of black, ethnic, female, disabled, and gay Americans seeking to persuade their fellow citizens that their identifying trait or characteristic conduct is normal and not a mark of inferiority or degradation. Others mobilized to oppose these agendas, and their mobilization has yielded new "traditionalist" identities. America has witnessed an explosion of group consciousness and activism to forward an increasing array of normative agendas. For example, "homosexual" did not exist as a social category in the nineteenth century, but today it represents a polarizing identity that regularly pits gay Americans against those embracing traditional family values.

This dynamism—the infusion of new groups, the changing composition of established groups, and the shifting alliances and social credibility of various groups—also increases the fragility of our pluralism. Not only does the proliferation of identity groups increase the situses for conflict in our society, but it also adds to the intensity of those conflicts.⁷⁴ There is substantial intergroup misunderstanding, stereotyping, and hatred. For example, pro-choice and pro-life people see themselves engaged in a death struggle for America's soul, as do pro-gay and traditional-family-values people.

73. GUINIER, *supra* note 68, at 9; see STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990). Other theorists claim that the state owes minority groups social space as a matter of justice. See, e.g., WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP 2-4, 42 (2001).

74. See Iris Marion Young, *Together in Difference: Transforming the Logic of Group Political Conflict*, in THE RIGHTS OF MINORITY CULTURES 155, 162-65 (Will Kymlicka ed., 1995).

A major problem for the multicultural-pluralist polity is how to manage the emergence, conflict, and triumph of normative identity-based social movements. In the twentieth century, such movements followed this pattern: (1) Minority group challenges consensus that its distinguishing trait (color, sex, sexuality) is a malignant variation from the norm. → (2) Society revises consensus to allow that the minority trait is a tolerable variation but not as good as the norm (whiteness, maleness, heterosexuality). → (3) Society revises consensus to recognize that the minority trait is a benign variation and that there is no single norm.⁷⁵ At every stage, traditionalists resist; during the second stage especially, adherence to traditional status entitlements itself becomes central to many people's identities.

At each stage, the stakes of politics threaten to get too high. The stakes are raised, however, in different ways during each stage. (1) When a new group is emerging, the status quo will tend to suppress that group's message, disrupt its political mobilization, and perhaps attack its members through criminal laws. (2) If the new group achieves a foothold in the political process, it will engage in intense, perhaps furious, debates with empowered groups over what the prevailing social norm should be. (3) If the new group persuades Americans that its members deserve (roughly) equal treatment, it faces the difficult process of weeding out legal discriminations entrenched in the prior era. Consider these stages in greater detail.

1. *The Problem of Insider Lock-Ins and Outsider Suppression*

When a traditionally marginalized social group asserts its rights to participate in public life, the natural reaction of status quo groups is to reject the claim for participation. This is not just an abstract exercise in preserving the reins of power. Often this involves a politics of disgust, where members of society identify some features of the outsider group as a social "pollution" of society, especially of young people.⁷⁶ Because the insider groups control government processes, they may try to lock in their dominance and suppress the outsider group through voting exclusions, educational campaigns of vilification, censorship of minority perspectives, and the like. Sometimes these campaigns are successful; an example is the federal government's campaign to crush Mormon polygamy in the late

75. See Eskridge, *supra* note 14, at 2069-72.

76. See MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO 123-24 (1995) (arguing that the politics of disgust acts as social boundary maintenance to guard against social pollution).

nineteenth century.⁷⁷ More often, these campaigns are only successful in the short or medium term; examples are apartheid's reign of terror and the antihomosexual lavender scare.⁷⁸

Discouraging out-group dissent and participation in the political process is antidemocratic for reasons that Ely recognized.⁷⁹ It is also dangerously antithetical to a democratic pluralism, which depends on changing issues and alliances to assure all groups that they can achieve some of their goals through politics. If some groups are locked out or cannot present their perspectives, they have fewer incentives to advance their goals through democratic politics. Worse than dropping out, these new social groups might never join the system. Not only is the polity deprived of the minority's unique contributions, but groups unwelcome in the political process might revolt against it, engaging in acts of violence and seeking to overthrow the system.

There is also a more subtle way that outsider lock-outs undermine democratic pluralism. A stable pluralist system requires instability among the contending social groups.⁸⁰ If an insider group is able to freeze political alignments and identities, even in part, it can thereby reduce the incidence of cross-cutting loyalties, which yield political opportunities for minorities. For example, antigay public policies, such as the Texas Homosexual Conduct Law, are classic examples of a politics of disgust. An important object is to keep LGBT people in the closet or scare them away from the jurisdiction. The effect of such policies is not just to retard political power for gays but also to deny women and racial minorities potential allies.

2. *The Problem of Culture Wars*

If a minority gains enough social traction to become politically salient, its members will press their interests and their normative agenda in the political process—and will meet furious resistance from those who view minority rights as polluting society. The nation's debates over abortion and gay rights illustrate how assimilation of the minority into the pluralist system raises core identity issues on both sides: As a gay person, I deserve

77. See RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 115-23 (2d ed. 1989); Orma Linford, *The Mormons and the Law: The Polygamy Cases* (pts. 1 & 2), 9 UTAH L. REV. 308, 543 (1964-1965).

78. DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004).

79. ELY, *supra* note 3, at 110-25.

80. Robert A. Dahl, *Pluralism Revisited*, 10 COMP. POL. 191, 199 (1978); see also GUINIER, *supra* note 68, at 4; Miller, *supra* note 67, at 742; Michael Parenti, *Power and Pluralism: A View from the Bottom*, 32 J. POL. 501 (1970) (explaining that when political power is entrenched among dominant interests, protest groups are more likely to seek change through unconventional channels).

equal treatment from the state, which requires recognition of same-sex marriages. As a fundamentalist Christian, I deserve state respect for traditional family values, which requires nonrecognition of same-sex marriages. Identity politics gets intensely personal, and the stakes get high. What Clifford Geertz describes as “primordial” loyalties—one’s race, ethnicity, religion, sexuality—and what Mary Douglas describes as the politics of disgust are not matters that can be resolved or calmly evaluated through public deliberation.⁸¹ To the extent they become matters for political debate, they will be deeply divisive and acrimonious.

Once the politics of disgust moves from a one-sided battle, where the majority suppresses a minority, to a two-sided battle, society faces a culture war. Culture war issues that intensely and evenly divide society pose strong challenges for any democracy.⁸² But a badly managed democracy can deepen the dangers of culture wars. Specifically, there are three different ways the state can dangerously raise the stakes of politics in its response to these inherently contentious issues. All three ways represent the state’s premature abandonment of a relatively neutral stance toward fiercely contending cultural groups.

First, the state might force *assimilation* upon an unwilling minority, perhaps by requiring it to engage in conformist rituals antithetical to its members’ preferences or by commandeering subcultural institutions. Chancellor Bismarck’s Kulturkampf of the 1870s and 1880s sought to domesticate Germany’s Roman Catholic Church by jailing dissident clergy and monitoring the church’s doctrine.⁸³ The United States did much the same thing to the Church of Jesus Christ of Latter-Day Saints.⁸⁴ Requiring Jehovah’s Witness children to pledge allegiance to civil authority is a more recent example of this coercive politics of assimilation.⁸⁵ Where the minority is an established social group, as German Catholics were and Mormon polygamists were not, forced assimilation is a recipe for social turmoil.

Second, the state might support a campaign of *demonization* of the out-group from civil society, usually in support of separation, detention, or expulsion of the out-group’s members. The politics of demonization can

81. See DOUGLAS, *supra* note 76, at 122-24; CLIFFORD GEERTZ, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, in *THE INTERPRETATION OF CULTURES* 255, 259 (1973); see also HOLMES, *supra* note 70, at 202-35 (arguing for gag rules restricting political engagement on irresolvable primordial issues such as slavery and religion).

82. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 93-99 (1956) (suggesting that a stable “polyarchy” must avoid political divisions that are both intense and evenly matched).

83. Ronald J. Ross, *Enforcing the Kulturkampf in the Bismarckian State and the Limits of Coercion in Imperial Germany*, 56 J. MOD. HIST. 456 (1984).

84. See sources cited *supra* note 77.

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

involve stereotypes as well as prejudices against the group, and usually both. Examples include Spain's expulsion of the Jews in 1492 (after a partially successful campaign of assimilation)⁸⁶ and the post-Civil War apartheid regime in this country. As noted before, this is a dangerous strategy, one that assures social turmoil when the demonized minority or its friends include ordinary Americans.

Third, the state might impose *permanent defeat* upon a social group and seek closure of an important issue that divides the polity deeply but evenly. Queen Mary of England (1553-1558) did this when she imposed Roman Catholicism as the mandatory religion, over the objections of millions of Protestants. The best example in American history is the *Dred Scott* case, which ruled that the federal government could not constitutionally abolish slavery.⁸⁷ By hardwiring a primordially contentious issue into the Constitution and essentially removing it from politics, the Court's decision seemed like an effort to remove the unresolved slavery debate from political engagement and contributed to the breakdown of ordinary politics and, almost immediately, the national union.⁸⁸

Forced assimilation, demonization, and permanent defeat of robust social groups pose huge risks for the polity. They may be risks worth taking under some circumstances, but the state undermines its own viability when it adopts such stakes-raising policies. To begin with, stakes raising by the state is likely to be counterproductive once the out-group has become politically viable. State persecution may invigorate the out-group and attract allies to its cause. If that happens, assimilation is disrupted, previously closed issues are reopened, and separated demons invade the body politic. Second, and more important, stakes raising encourages the out-group to exit or lose interest in democratic pluralism, or not to work within the system from the beginning. This generates the problems discussed above: possibility of collapse, loss of synergistic cooperation, and impoverishment of discourse.

In addition, political contests will become dirtier and more bitter. Escalating status contests create large costs to the groups engaged in the conflicts and divert them from productive enterprises.⁸⁹ Even winners may be alienated from politics, and certainly losers will be. Culture wars fanned by the state sometimes become games of chicken. In a game of chicken,

86. See generally B. NETANYAHU, *THE ORIGINS OF THE INQUISITION IN FIFTEENTH CENTURY SPAIN* (1995).

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

88. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 3 (1978).

89. See Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1 (1992) (exploring the inefficiencies of status contests).

two young people with more hormones than brains drive junky cars at high speeds toward one another. The first to swerve loses. If both swerve they both lose. If neither swerves they both lose (big). When the stakes of politics get high, and especially when they involve primordial loyalties, warring groups are more likely to engage in games of chicken, where the goal of each group becomes imposing harm or status denigration on the other.

Games of chicken can take the form either of private feuds (played outside the state) or of punitive legislation (played inside the state). Abortion politics is an example. Some pro-life Americans have abandoned state processes and mounted campaigns of private economic warfare or even violence against abortion providers. A key justification for the Leviathan is to head off private games of chicken; if rising stakes drive cultural combatants into private feuds, the whole point of the state is lost. If one or more groups deploy the state in a public game of chicken, the result can be worse, because the state itself becomes the enemy from the perspective of the persecuted group.

3. *The Transition Problem: Obsolescent Legal Rules After a Normative Regime Shift*

Because of inertia built into our representative democracy, the law does not always change as social norms move from one stage to the next. Thus, even when our culture accepts a social movement's claim that its members' trait is not threatening to society, laws reflecting that norm might remain on the books. Changes in the law might never get onto the crowded legislative agenda. Even if they are on the agenda, determined (and freshly politicized) minorities can block legal change at any of various veto gates in that process. For example, the antihomosexual rules and statutes adopted between 1945 and 1996 marked LGBT people as the worst sort of outlaws and social threats. This legal regime was founded upon the consensus that homosexuality is a malignant variation from the norm (heterosexuality). Even though a new consensus has emerged that homosexuality is a tolerable variation, many antigay rules remain in place because legislators are squeamish about raising volatile issues of sexuality, because an intense minority of traditionalists vow revenge on any liberalization, or because a key legislator is simply stubborn and others are unwilling to rile him.⁹⁰

The perseverance of such obsolescent rules renders government less responsive to the changing relations of political forces, which is important

90. See ESKRIDGE, *supra* note 20, at 139-48 (discussing the perseverance of antigay laws in America).

to a stable democracy.⁹¹ These rules are also frustrating, sometimes greatly so, to the former out-group still stigmatized by them, and their continued existence may even help reignite or prolong culture wars at the local level. These phenomena may affect the commitment of minorities to the ongoing pluralist project of democratic engagement.

B. *How Judicial Review Can Strengthen Pluralist Democracy by Lowering Its Stakes*

According to Adam Przeworski, “Constitutions that are observed and last for a long time are those that reduce the stakes of political battles.”⁹² Such constitutions “define the scope of government and establish rules of competition, leaving substantive outcomes open to the political interplay.”⁹³ Although Przeworski does not apply his insight to judicial review, it readily supports a stakes-lowering role for judges: They can facilitate the operation of a pluralist democracy by countering or ameliorating some of the stakes-raising tendencies of the political process (insider lock-ins, culture wars, obsolete statutes).

Does such a political theory have any connection to our Constitution? Much as Ely argued for representation reinforcement theory, this Section demonstrates that a stakes-lowering theory is supported by the Constitution’s structure and the philosophy of its Religion Clauses, which provide general principles to guide courts applying the open-textured provisions of the First and Fourteenth Amendments. Unlike representation reinforcement theory, this pluralism-facilitating theory provides justifications for some of the Rehnquist Court’s most controversial opinions.

1. *Enforcing Neutral Rules of Political Engagement*

The Constitution lays down rules structuring a political process that invites social groups to participate. The Constitution of 1787 creates a national government with limited jurisdiction and residual authority left to the states,⁹⁴ thereby assuring a diverse array of local, state, and national politics and policies. Uniform national law is created only through specified

91. PRZEWORSKI, *supra* note 69, at 37.

92. *Id.* at 36.

93. *Id.*

94. U.S. CONST. art. I, § 8 (primary articulation of congressional powers); *id.* art. II, § 1, cl. 1 & § 2 (presidential powers); *id.* art. III, § 2, cl. 1 (judicial power).

procedures, requiring coalitions of diverse interests and perspectives.⁹⁵ The First Amendment guarantees that Congress cannot abridge freedom of speech, the press, assembly, or petition—broad liberties of political participation implicitly applicable to groups as well as individuals. Since 1791, one-third of the amendments to the Constitution have guaranteed voting rights to previously disenfranchised groups of Americans.⁹⁶ With ambiguities at the margins, most of these are bright-line rules that were expected to be enforced by the Supreme Court—and they should be, to the letter.

The first two *Carolene Products* prongs directly reflect this constitutional structure, and a primary role of pluralism-facilitating judicial review is to enforce those rules of the political game. Following Ely's referee analogy, judges should enforce these rules, regardless of the desirability of the outcomes reached outside the constitutionally prescribed process. Because strict enforcement invests the political process with greater neutrality, it contributes to lower stakes. Thus, *United States v. Lopez*, where the Court rebuked Congress for behaving as though there were no real limits on its power to legislate under the Commerce Clause, was an excellent decision.⁹⁷ In contrast, *United States v. Morrison*, where Congress was hewing to Article I's jurisdictional requirements and the Court essentially disagreed with Congress's substantive judgment, strikes me as less defensible.⁹⁸ A referee should whistle down even popular players who behave as though the rules don't apply to them (*Lopez*) but should give the players leeway to play the game when they are following the letter of the law (*Morrison*).

At least as important is strict judicial enforcement of the First Amendment. Long before the birth control and gay rights movements made much headway with mainstream America, federal courts had ruled that the government could not censor their public advocacy and informational publications.⁹⁹ The Supreme Court expanded this idea in the civil rights sit-

95. *Id.* art. I, § 7 (lawmaking through bicameral congressional approval and presentment to the President); *id.* art. II, § 2, cl. 2 (treaties through presidential initiative and assent of two-thirds of voting senators).

96. *Id.* amend. XV (nonwhites); *id.* amend. XIX (women); *id.* amend. XXIII (D.C. residents); *id.* amend. XXIV (no poll tax); *id.* amend. XXVI (eighteen- to twenty-one-year-olds); *cf.* *id.* amend. XVII (direct election of senators).

97. 514 U.S. 549 (1995); see Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1452-53, 1482-84 (1995) (praising *Lopez*).

98. 529 U.S. 598 (2000); see Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 111-15 (2001) (criticizing *Morrison*).

99. *E.g.*, *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (mem.) (reversing a lower court ruling that a postmaster could censor materials that discussed homosexuality sympathetically); *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930) (holding that the state cannot censor sex- and birth-control-education materials); see Nancy J. Knauer, *Homosexuality as Contagion: From The Well of*

in and marching cases. Even when engaging in expressive “conduct,” minority groups are entitled to significant First Amendment protection.¹⁰⁰ The marching cases, in particular, provided background support for *Hurley*, where the Court protected traditionalist expression in the context of a public parade while casually asserting that the state owes the same obligation to gay-friendly parades. A pluralist understanding of the First Amendment supports these broad readings. Not only does open and public advocacy advance public debate and individual autonomy (the traditional First Amendment values), but it also keeps old groups as well as new ones working within the pluralist system and affords them opportunities to create alliances with other groups by publicizing their cause.

For the same reasons, the First Amendment requires considerable leeway for pro-life Americans to express themselves, although the sometimes harassing nature of their speech requires a more complex balance. *Madsen* and *Hill* reflect the Court’s practical effort to keep pro-choice and pro-life groups from each other’s throats, but without depriving the latter of opportunities to educate women seeking abortions. I have no view as to precisely how that balance should be set, but Chief Justice Rehnquist’s approach in *Madsen*, followed in *Hill*, strikes me as most sensible.¹⁰¹ Buffer zones will not resolve the abortion wars, but they are a reasonable means of respecting pro-life expression without unduly burdening women’s exercise of abortion choice. They also offer the attractive possibility of keeping the stakes of abortion politics within acceptable limits.

2. *Ameliorating Culture Wars*

The Constitution’s Framers did not foresee our modern culture wars, but they did address the most important disgust-provoking loyalties of their era in the Religion Clauses.¹⁰² Those Clauses bar the state from raising the stakes of (primordial) religious disagreements, which occurs when the state takes sides in such disputes by assimilating, marginalizing, or demonizing

Loneliness to the Boy Scouts, 29 HOFSTRA L. REV. 401, 430-54 (2000) (discussing the unsuccessful state censorship of lesbian romance novels).

100. *E.g.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963).

101. The balance set in *Hill* is also attractive for a pluralistic reason: The majority included pro-life Chief Justice Rehnquist, pro-choice Justices Stevens and Ginsburg, pro-liberty Justice Souter, and pro-centrism-at-all-costs Justices O’Connor and Breyer.

102. For excellent introductions to the Religion Clauses and their history, see ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* (1990); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002); and Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

religious minorities. The Constitution has generalized each of those principles for management of group conflict in the First and Fourteenth Amendments. Those constitutional provisions should be read in light of the Religion Clauses when called upon to adjudicate primordial issues such as race, ethnicity, gender role, sexuality, and disability.¹⁰³

a. *No Forced Assimilation: The State Cannot Impose Identity-Based Conformity upon Minorities (Speech Clause)*

The Establishment Clause prohibits the government from coercing people to participate in religious exercises not otherwise congenial to their self-identification.¹⁰⁴ The Free Exercise Clause protects religious organizations against direct state regulation. The central idea is that “religious beliefs and religious expression are too precious,” or primordial and combustible, “to be either proscribed or prescribed by the State.”¹⁰⁵ The Speech and Press Clauses of the First Amendment generalize this insight to other deeply expressive matters.

The Court has applied the Speech Clause to assure that identity-based and other groups can form, develop their perspectives and messages, and proselytize.¹⁰⁶ This *group-protecting* mode of judicial review is an expansion of Ely’s admonition that the presumption of constitutionality does not apply when the “ins” try to block the “outs” from gaining political coherence and traction, through censorship, harassment, and the like. Group-protecting review draws Ely’s insight (based on the civil rights movement’s claims) forward into the modern era of women’s and gay rights.

This broader twist on *Carolene Products* provides a pluralism-facilitating justification for *Dale* and *Hurley*. If application of a public accommodations law to the Boston parade organizers or the Boy Scouts is an ideological prescription to those traditionalist groups, as Court majorities found in *Hurley* and *Dale*, then judicial review is warranted for pluralist-facilitating reasons such as those suggested by the Religion Clauses. Just as the state cannot tell religions how to choreograph their services and whom to ordain as their priests or rabbis, so it cannot tell traditionalists how they

103. See William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2427-30, 2441-47 (1997) (applying principles derived from the Religion Clauses to sexuality issues).

104. See *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *id.* at 609-31 (Souter, J., concurring) (analyzing the history of the prohibition of religious coercion).

105. *Id.* at 589 (majority opinion).

106. *NAACP v. Button*, 371 U.S. 415 (1963) (holding that expressive associations have independent First Amendment rights).

must choreograph their parades (*Hurley*) or whom they may present as leaders of their expressive associations (*Dale*). Just as *Romer* and *Lawrence* are important to reassure gay people that the state cannot impose traditionalist rules upon their expressive activities and associations, so *Dale* and *Hurley* are useful reassurances to traditionalists that the state cannot impose politically correct rules upon their expressive activities and associations.

b. *No Demonization: Channeling Political Discourse away from Prejudice and Stereotypes (Equal Protection Clause)*

The Free Exercise Clause directs that state regulations are invalid if they implement religious prejudice.¹⁰⁷ This constitutional rule reflects the wisdom of preventing inflammatory religious acrimonies from going public and of heading off religious wars, classic games of chicken. Such a constitutional rule also channels political discourse toward criteria that can be productively debated on terms that most people in the polity can appreciate. The Constitution generalizes this channeling principle in the Equal Protection Clause, which has been applied to invalidate laws inspired by other primordial loyalties and prejudices, including ethnicity,¹⁰⁸ race,¹⁰⁹ disability,¹¹⁰ and now sexual orientation, after *Romer*.

Channeling provides support for Justice O'Connor's concurring opinion in *Lawrence*. Declining to join the overruling of *Bowers v. Hardwick*,¹¹¹ she would have invalidated Texas's Homosexual Conduct Law on equal protection grounds. "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."¹¹² Consistent with pluralism-facilitating judicial review, this stance lowers the stakes of politics by assuring gay people that they cannot be treated as outlaws and by removing from the political sphere divisive arguments that homosexuals should be stigmatized. Conversely, O'Connor's approach signals no disrespect to

107. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (holding that a city cannot create rules targeting a religious minority for unique disadvantage). For some healthy skepticism about taking motivation analysis too far, see John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160-61 (1978).

108. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a city cannot create and enforce rules targeting an ethnic minority for unique disadvantages).

109. *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that a state cannot disadvantage different-race couples to protect their children from social prejudice).

110. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that a city cannot create zoning rules targeting people with disabilities for unique disadvantages).

111. 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

112. *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring in the judgment).

traditionalists who oppose the “homosexual agenda” but suggests that their political arguments need to be constructive rather than animus filled.

Accordingly, traditionalists still have arguments to support some antigay policies. Soon after *Lawrence*, the Eleventh Circuit upheld Florida’s law barring gays from adopting children. Mindful of the O’Connor concurrence, the court found that the state law was not based on antigay animus but was, instead, a rational even if debatable judgment that lesbian and gay adoptions would not be in the best interests of adopted children, who flourish in traditional nuclear families.¹¹³ Dissenting from the denial of an en banc rehearing, Judge Barkett quarreled with the court’s conclusion that there is a sufficient connection between the welfare of children and the statutory discrimination—but she did not reject the majority’s assumption that some laws discriminating against gay people can survive *Romer* and *Lawrence*.¹¹⁴

As in *Craig*, the Court’s heightened scrutiny of sex-based classifications usually turns on whether the state is relying on gender stereotypes; rarely is the charge made that state laws reflect misogyny or prejudice against women. *Romer* was a state measure supported by appeals more to antigay stereotypes than to antigay prejudice.¹¹⁵ Should pluralism-facilitating judicial review monitor such legislation? It should, because prejudice and stereotyping are related, the latter often a cognitive manifestation of the former. Stereotype-monitoring judicial review helps ensure that prejudice does not sneak back into political discourse through the back door of stereotypes. (This may have been going on in the campaign that brought Colorado Amendment 2.) Additionally, political campaigns demonizing a group based on stereotypes about its members are almost as divisive as campaigns based on appeals to prejudice. Both raise the stakes of politics and invite political games of chicken. Stereotype-monitoring review subserves the channeling goal: Political discourse not only needs to focus on the overall public interest but also needs to maintain a modest accountability to the facts.

This take on *Craig* and *Romer* can also support O’Connor’s approach to affirmative action and majority-minority electoral districts. Consistent with Ely’s rejection of heightened scrutiny for programs where majorities are helping minorities, it would be a democratic tragedy for the Court to rule

113. *Lofton v. Sec’y of the Dep’t of Children & Family Servs. (Lofton I)*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

114. *Lofton v. Sec’y of the Dep’t of Children & Family Servs. (Lofton II)*, 377 F.3d 1275, 1290-313 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing en banc).

115. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1524-31 (2d ed. 2004) (displaying ballot materials demonstrating that the state amendment was touted as a response to predatory and diseased homosexuals, both unsupported stereotypes).

that the government can never create race-based remedial or diversifying programs. Such a ruling would remove a vigorously contested matter from the political process and would make it harder for some minorities to share in America's opportunities and for some government agencies to do their jobs.¹¹⁶ A pluralism-facilitating perspective, however, is open to O'Connor's view that unmonitored affirmative action tends to become race-based pork barrel that risks perpetuating racial stereotypes and, perhaps, prejudice. By engaging in heightened scrutiny of race-based affirmative action plans and electoral districts, the Court has channeled political discourse away from a racial spoils system and toward a national conversation about diversity in schools, legislatures and agencies, and the broadcast media.

O'Connor's opinion in *Grutter* is a pluralism-facilitating classic. Its most prominent feature is an endorsement of diversity and educational quality as important state interests justifying some consideration of race in law school (and university) admissions.¹¹⁷ This is a landmark holding, the first time the post-*Brown* Court has upheld a race-based classification in a nonremedial setting. O'Connor's reasoning avoids both a whites-only racial spoils system reflecting the status quo and a minority-favoring racial spoils system based on the politics of remediation. Her focus is on what is good government and good policy for *all* Americans, and the literature and amici she cites are strong evidence that what is good for democratic pluralism (all races included in important programs) is also good for modern governance (effective educational programs).

There is contrary evidence that O'Connor did not cite,¹¹⁸ and the matter remains fairly debatable. But this is precisely the circumstance where the Court should not lay down an absolute rule, as Justices Scalia and Thomas would have done. They predicted that O'Connor's approach will invite further litigation,¹¹⁹ as indeed it will—but it will also invite further affirmative action experiments and empirical or other studies as to how they work. That kind of channeling not only lowers the stakes of politics by focusing our attention on the pragmatic features of diversity rather than the

116. See Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield with Michal Kurlaender eds., 2001). Both of these sources were both cited and followed by Justice O'Connor's opinion for the Court in *Grutter*. *Grutter*, 539 U.S. at 330-31.

117. *Grutter*, 539 U.S. at 327-33; see also *Gratz v. Bollinger*, 539 U.S. 244, 268 (Rehnquist, C.J.) (following *Grutter* on this issue).

118. See *Grutter*, 539 U.S. at 364-65 (Thomas, J., concurring in part and dissenting in part) (surveying contrary evidence).

119. *Id.* at 348-49 (Scalia, J., concurring in part and dissenting in part).

primordial ones, but also generates information that has the potential to advance the interests of everyone.

c. *No Permanent Losers: Neutrality (Equal Protection and Due Process Clauses)*

The Establishment Clause says that the state cannot declare one official religion.¹²⁰ Even if the state does not suppress competing religions, it cannot lend its exclusive support to one orthodoxy, and it needs to avoid excessive entanglement with sectarian positions. This is a principle that can be generalized if done cautiously. The Equal Protection Clause was aimed at preventing what contemporaries called “class legislation.” Its drafters and contemporaries believed that it augured against an out-caste, a group of citizens who are permanent losers in politics.¹²¹ This notion is related to the Due Process Clause’s assurance that a neutral rule of law will be applied to all persons, which implies that the law will not be applied arbitrarily against a class of disfavored Americans.¹²² The no-permanent-losers idea, suggested by the Establishment Clause for the primordial issue the Framers did address and generalized in the Fourteenth Amendment, is a key feature of pluralism-facilitating judicial review.

This principle helped Justice Kennedy answer Justice O’Connor’s question in *Lawrence*: Why should the Court deploy substantive due process to purge Texas of its Homosexual Conduct Law when a narrower ground existed in the Equal Protection Clause? Even when state law makes all consensual sodomy a crime, it is deployed to transform lesbians and gay men into an outlaw class. While a straight woman is almost as likely to have engaged in consensual oral sex as a lesbian, Southern judges have stripped lesbians of their children on the ground that such mothers were presumptive criminals.¹²³ The federal government justified the statutory exclusion of gay people from the armed forces on the ground that such people were presumptive criminals because they have a “propensity” to commit sodomy.¹²⁴ These conduct-based disabilities have ensured marginalization for gay people as a group because they encourage most gay

120. See Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 1 (1996).

121. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988) (surveying the ratification debates).

122. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (stating that due process rule of law includes an anti-unreasonableness feature).

123. *E.g., Ex parte D.W.W.*, 717 So. 2d 793 (Ala. 1998); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

124. See 10 U.S.C. § 654(a)(4)-(15) (2000).

people to remain at least partly closeted and, hence, less politically cohesive.¹²⁵ “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”¹²⁶

Because consensual sodomy laws rendered gay people a politically marginal underclass of presumptive outlaws, *Bowers* raised the stakes of politics for gay people. For pluralist-facilitating reasons, it was important for the Supreme Court to purge the Constitution of *Bowers*’s disrespectful language, which would not have been accomplished by O’Connor’s equal protection dodge. This explains the tone as well as the result of Kennedy’s opinion. Realizing that enthusiastic support for consensual sodomy laws had all but disappeared, even in the South, Kennedy not only overruled *Bowers* but also disapproved of the earlier decision as a non-neutral application of constitutional principle. The suggestion, appreciated by LGBT people, was that gay people are no longer American outlaws and, indeed, are American citizens entitled to full respect.

3. *Reversing the Burden of Inertia for Obsolete Statutory Policies (Due Process Clause)*

The Due Process Clause requires that the government act according to the “law of the land,” that is, through generalized rules serving the public interest.¹²⁷ The Court has understood due process to require that criminal statutes, in particular, give clear notice of precisely what conduct is illegal; vague criminal laws are void.¹²⁸ Some of the void-for-vagueness cases also relate to the due process notion that there must be a rational connection between a law’s means and legitimate state goals. Thus, laws criminalizing conduct that everyone now engages in have lost the rational basis that once underlay them.¹²⁹

Many state laws harming women’s interests were adopted before women had the right to vote and were the result of a process in which

125. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485 (1998) (arguing that gay people’s relative invisibility and ease of passing undermine their political coherence).

126. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

127. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 580-82 (1819) (argument of Daniel Webster).

128. See [Anthony G. Amsterdam], Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (arguing that the void-for-vagueness doctrine not only assures people fair notice but also narrows police discretion in the enforcement of criminal laws).

129. Cf. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161-64, 169-71 (1972) (striking down an antiquated vagrancy law that criminalized activities, like hanging out with friends, now taken for granted by most Americans).

women's interests were not appropriately considered. Even though women's interests are better represented in today's politics, women face a high burden to weed out discriminatory laws adopted before they had the franchise. Because there are so many veto gates within the legislative process, it is notoriously easier for a group to block legislative action than to procure it. Ely considered pre-1920 sex discriminations ripe for invalidation, with the understanding that the legislature could reinstate them.¹³⁰ This is one way to interpret *Reed*, the Court's first sex discrimination kill. *Reed* was an application of rational basis review.

Although law professors treat *Reed* as a harbinger of heightened scrutiny, one can also read it for the following proposition: When the disadvantaged group is one that was not well represented when a statute was adopted, rational basis review requires the court to evaluate the law on the basis of its original purpose and bars the court from supplying rational but hypothetical purposes to save the law. The effect of such a doctrine is to *reverse the burden of inertia* as to obsolescent laws.¹³¹ Rather than requiring women to persuade the Idaho legislature to repeal the law, the Court properly imposed the burden of legislative action on the supporters of the apparently obsolete policy.

C. *What Judicial Review Should Presumptively Avoid: Do Not Drastically Raise the Stakes of Politics*

Courts can promote (multicultural) pluralistic democracy by enforcing neutral rules, ameliorating culture wars, and reversing the burden of inertia for obsolete statutes. But courts have the potential to undermine democracy as well. Judicial review can raise the stakes of politics by taking issues away from the political system prematurely; by frustrating a group's ability to organize, bond, and express the values of its members; or by demonizing an out-group. The Supreme Court has plenty of doctrinal tools that can keep it from fanning the flames of high-stakes identity politics issues. These include the "passive virtues," where the Court deploys procedural doctrines to avoid decisions that might settle controversial issues prematurely;¹³² a "minimalist" approach to constitutional law, in which decisions are reached on narrow case-specific grounds and expansive principles are announced

130. ELY, *supra* note 3, at 167-70.

131. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (proposing that courts be empowered to overrule obsolescent statutes the way they overrule obsolescent precedents).

132. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (arguing that the Court should often dispose of controversial cases on procedural grounds like ripeness, standing, and mootness).

only after considerable feedback from lower courts and the political process;¹³³ and doctrines such as void for vagueness and narrow statutory interpretations when constitutional values are implicated, which allow the political process to respond.¹³⁴

The *Brown* litigation exemplifies the tricky balancing act involved when high-stakes issues reach the Court. For half a generation before *Brown*, the Supreme Court overturned particular race-based discriminations, but without directly challenging apartheid. The Justices surmised that a broad ruling striking down racial segregation would rile Southern whites and would not be supported by the rest of the country. That balance changed after World War II, which had seen African Americans serve with valor in (sometimes integrated) combat. People of color grew more insistent that they not be treated like second-class citizens, and white support for segregation outside the South eroded. The stakes of segregation politics reached a boiling point in the early 1950s—yet the Court continued to issue narrow rulings, striking down segregation on either statutory or as-applied grounds.¹³⁵

Only after both the Truman and Eisenhower Administrations took firm anti-apartheid stands did the Court act, in *Brown I*.¹³⁶ In the short term, that decision raised the stakes of race politics in the South. Although civil rights struggles were already escalating, *Brown* gave them a push. For example, the Montgomery bus boycott of 1955-1956 was resolved in favor of civil rights advocates when a federal judge applied *Brown* to invalidate the city's busing rules.¹³⁷ Fearful of raising the stakes too much, the Court moderated its anti-apartheid mandate in *Brown II*, which required progress toward desegregation "with all deliberate speed."¹³⁸ Although *Brown* raised the stakes of race politics in the short term, the Court was tackling an issue that was already controversial, and it passively deferred to local and later

133. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (advocating a "minimalist" approach to judicial review where the Court rarely announces broad new principles and instead proceeds incrementally).

134. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) (arguing for the implementation of public values through statutory interpretations that can be reversed by the legislature).

135. *Henderson v. United States*, 339 U.S. 816 (1950) (finding segregated railroad cars inconsistent with the Interstate Commerce Act); *Sweatt v. Painter*, 339 U.S. 629 (1950) (requiring a segregated graduate program to admit a qualified black student). On the Justices' deliberations in these cases, see Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 14-30 (1979).

136. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

137. *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956); see ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 56 (1984).

138. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955). On the rise and fall of massive resistance to desegregation, see NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S*, at 338-39 (1969).

national political processes. In the segregation cases, the Court deployed all available mechanisms—judicial minimalism and provisional rulings at first, then passive virtues—to keep the political stakes from escalating out of control. The Court enforced *Brown* more aggressively only after the Johnson Administration provided legislative and executive support for desegregation. In the longer term, *Brown* was slowly implemented and the stakes of race politics receded in the South.¹³⁹

If the desegregation cases are a relative success story, other Supreme Court decisions, one assailed by Ely and the other superficially consistent with his theory, dramatically illustrate the Court's ability to raise the stakes of politics when it acts prematurely or carelessly.

1. *Scylla*: *Roe v. Wade*

Contrast *Roe v. Wade*¹⁴⁰ with *Brown*. In 1973, it was premature to lay down, as *Roe* did, a national policy that declared the pro-life position unconstitutional. It had taken the Court decades of litigation to accept the NAACP's position on apartheid, and the Court did so only after a consensus had developed outside the South and with a pragmatic approach to remediation. *Roe* was just the second abortion case the Justices had heard, and the country itself was not at rest on the issue—yet the Court announced a very broad libertarian rule, which it reaffirmed and expanded in 1976.¹⁴¹

Roe essentially declared a winner in one of the most difficult and divisive public law debates of American history. Don't bother going to state legislatures to reverse that decision. Don't bother trying to persuade your neighbors (unless your neighbor is Justice Powell). *Roe* was a threat to our democracy because it raised the stakes of an issue where primordial loyalties ran deep. Not only did *Roe* energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists. Pro-life Americans behaved as though they had been disowned by this country. And to a certain extent they had been.

In the early 1970s, state legislatures all over the country were in the process of revising their abortion laws. The matter was one of intense political debate, and the country was hardly at rest. Under such

139. See Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, LAW & CONTEMP. PROBS., Winter 1995, at 7.

140. 410 U.S. 113 (1973).

141. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (striking down a law that defined the fetus as a person and required both parental consent for minors and spousal consent for wives seeking abortions).

circumstances, the Court should have exercised its agenda-setting authority to deny review in *Roe* and other cases so that the issue could ripen. What normative lessons would different state experiences have provided?¹⁴²

If the Court was determined to decide *Roe*, a more appropriate resolution would have been one that reversed the burden of legislative inertia. The year before *Roe*, Judges Lumbard and Newman ruled Connecticut's 1860 abortion law invalid on due process obsolescence grounds. Lumbard focused on the changing role of women; Newman focused on medical advances. Both found that a law constitutional when enacted had lost its original rationale over time—there was no longer a rational basis for the restriction on women's liberty.¹⁴³ In *Roe* itself, Justice Blackmun's original draft opinion would have invalidated the aged Texas law on vagueness grounds: The law's allowance for abortions that would save the life of the mother gave insufficient guidance to doctors to know exactly when abortion was a serious crime.¹⁴⁴

The *Roe* Court ultimately rejected this initial draft, as well as the Lumbard-Newman approach, but either approach would have had the pluralism-facilitating advantage of sweeping off the statute books a woman-burdening law enacted before women could vote, without the disadvantage of raising the stakes of politics as much as the privacy opinion in *Roe* did. Pro-life forces could have returned to the Texas legislature and procured new legislation. But because the burden of inertia would have already been overcome, and because women's interests would have been represented, any new law would probably have been a more moderate burden on women's right to choose abortions.¹⁴⁵ It would also have been accompanied by a more complete examination of exactly what neutral state interests are advanced by prohibiting or regulating the right to choose abortions.

142. Compare *Washington v. Glucksberg*, 521 U.S. 702 (1997), especially the concurring opinions of Justices O'Connor, Souter, and Breyer, who rejected a general constitutional "right to die" but also concluded that it was premature to reject such claims under all circumstances.

143. *Abele v. Markle*, 342 F. Supp. 800, 801-05 (D. Conn. 1972) (three-judge court) (Lumbard, J.), *vacated*, 410 U.S. 951 (1973) (mem.); *id.* at 805-12 (Newman, J., concurring in the result).

144. Memorandum of Justice Harry A. Blackmun to the Conference (May 18, 1972) (on file with Blackmun Papers, Library of Congress, Madison Building, Manuscript Division, container 151, folder 6) (containing a draft of Blackmun's initial opinion in *Roe*, which would have struck down Texas's abortion law on vagueness grounds and reserved the plaintiff's privacy claim).

145. Compare *Doe v. Bolton*, 410 U.S. 179 (1973), where the *Roe* Court evaluated a more recent, and less burdensome, restriction on abortion. Under my approach, the Court would not have taken review in *Doe* (or would have disposed of the case on narrow procedural grounds), leaving the balance between women's choice and the asserted right to life to the political process (and the lower courts) for several years.

2. *Charybdis*: *Bowers v. Hardwick*

Ironically, *Bowers v. Hardwick*¹⁴⁶ was a judicial blunder in the same way as *Roe*—even though the Court upheld Georgia’s consensual sodomy law. When the Court rejects a constitutional challenge to state legislation, it does not have the effect of removing an important yet divisive issue from the political process, as *Roe* purported to do. But *Bowers* illustrates the dangers of validating outmoded laws, especially when executed by a judicial opinion violating the neutrality norm and reaffirming the outlawing of a class of Americans.

Justice White’s dismissive opinion in *Bowers* can be faulted for underestimating Americans’ constitutional commitment to sexual privacy and their assumption that the police could not monitor their bedrooms. Under a pluralism-facilitating model, *Bowers*’s bigger blunder was its ham-handed treatment of a sensitive primordial issue. Even though Georgia’s law applied to all kinds of sodomy, the Court obsessively focused on “homosexual sodomy” alone.¹⁴⁷ More alarmingly, the Court’s reasoning suggested that “homosexuals,” as people who engage in “homosexual sodomy,” can be considered an outlaw class of citizens. As amicus briefs informed the Court, consensual sodomy laws were almost entirely deployed to exclude LGBT people from state jobs, including positions in the public school system and the armed forces; to discriminate against lesbian and gay parents in child custody disputes and in adoption proceedings; and to support other antigay discriminations.¹⁴⁸ Like *Roe*, *Bowers* generated a firestorm of protest—it seemed like a declaration of war by the state against “homosexuals.” Millions of LGBT people, their families, and their friends were riled by the Court’s suggestion that these decent Americans were, essentially, outlaws.

The Court’s blunder was avoidable. Reversing the burden of inertia through the void-for-vagueness doctrine would have saved the Supreme Court the *Sturm und Drang* that accompanied its troubled sodomy law jurisprudence. Starting in the 1960s, several state courts ruled that “crime against nature” was too vague a concept to support prosecutions for oral or anal sex between consenting adults in private places.¹⁴⁹ It would have

146. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

147. *Id.* at 190-92, 196 (limiting the decision to “homosexual sodomy”); *see id.* at 215-16 (Stevens, J., dissenting) (arguing that the Court’s limitation was contrary to the evolution of the Georgia statute).

148. *See, e.g.*, Brief Amicus Curiae for Lesbian Rights Project et al., *Bowers* (No. 85-140).

149. *Harris v. State*, 457 P.2d 638 (Alaska 1969); *Franklin v. State*, 257 So. 2d 21 (Fla. 1971); *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974) (narrowing construction), *habeas granted sub nom.* *Balthazar v. Superior Court*, 428 F. Supp. 425 (D. Mass. 1977), *aff’d*, 573 F.2d 698 (1st Cir. 1978).

required no stretch of the Court's vagueness precedents to invalidate all crime-against-nature laws. Because the laws that reached the Court in the 1970s were nineteenth-century relics, it could also have concluded that application of such laws to private consensual conduct failed the rationality standard.¹⁵⁰ In the nineteenth century, crime-against-nature laws were codified in the "public decency" or "crimes against the person" (sexual assault) titles and were deployed only against public or nonconsensual conduct.¹⁵¹ These original goals were not served by application of sodomy laws to sexual activities between consenting adults in the home, the scenario in *Bowers*.

Either a void-for-vagueness or a rational basis analysis barring application of crime-against-nature laws to consensual activities would have been a legally cogent and politically safe way for the Court to have dealt with most of the sodomy challenges that came to it in the fifteen years before *Bowers*.¹⁵² Such a move would have had the advantage of overturning obsolescent laws that were deployed to harm gay people but without taking the issue away from the political process. Of course, the burden of inertia would have been reversed, and proponents of consensual sodomy laws would have faced many hurdles. After 1970, no state would have been willing to enact a general sodomy law, for it was widely understood that married and other straight couples engaged in that activity. State laws criminalizing only homosexual sodomy or sodomy outside of marriage would have been possible in some states, but such laws would then have faced the kinds of arguments Justice O'Connor found persuasive in *Lawrence*.

3. *Between Scylla and Charybdis*: *Casey and Lawrence*

Roe and *Bowers* were avoidable exercises in stakes-raising politics. Both cases could have been dismissed for lack of standing, an application of the passive virtues that would have allowed state legislatures and state

150. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) (mem.) (upholding Virginia's crime-against-nature law); *Rose v. Locke*, 423 U.S. 48 (1975) (per curiam) (upholding Tennessee's crime-against-nature law); *Wainwright v. Stone*, 414 U.S. 21 (1973) (per curiam) (upholding Florida's crime-against-nature law). For references to the original nineteenth-century crime-against-nature statutes that the states defended in these three cases, see ESKRIDGE, *supra* note 20, at 329, 335-36.

151. See Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 9-12, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

152. The Georgia law at issue in *Bowers* was not susceptible to either vagueness or rationality attack because it had been updated in 1968 to define the crime more precisely. 1968 Ga. Laws 1249. Hence, *Bowers* was the wrong case to invalidate state sodomy laws. The Georgia statute was ultimately invalidated under the state constitution, in a case involving heterosexual sodomy. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

courts to grapple with abortion and sodomy. The Court could easily have struck down Texas's abortion law and pre-*Bowers* crime-against-nature laws on vagueness grounds that would have allowed the political process to respond. Either strategy would have allowed the Court to proceed incrementally before announcing a broad constitutional principle—precisely the strategy followed in the segregation cases.

Such judicial blunders are not irremediable, however. The Rehnquist Court retreated from both *Roe* and *Bowers* in statesmanlike opinions designed to lower the stakes of abortion and gay rights politics. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* the joint opinion of Justices O'Connor, Kennedy, and Souter reaffirmed women's liberty interest in controlling their pregnancies but reduced *Roe* to a balancing test and upheld almost all of the procedural restrictions before the Justices.¹⁵³ While reaffirming the centrality of the mother's interest and decisionmaking capacity, *Casey* has partially returned abortion regulation to state and national political discussion. Pro-life advocates have engaged with this issue in the political process, which has proven fairly responsive to their arguments. (In *Madsen*, the Court smartly refused to take sides in this culture conflict and deployed buffer zones as a way to mediate the street-level clash between pro-life and pro-choice advocates.) In *Lawrence*, the Court overruled *Bowers*, ending that precedent's reign of error and freeing gay rights politics to focus on more relevant issues, such as state exclusions of lesbians and gay men from government employment, child rearing, and marriage.

Justice Scalia dissented in *Casey* and *Lawrence*. Both dissents accused the majorities of subverting the rule of law and imposing elitist value judgments unwelcome to popular majorities.¹⁵⁴ Scalia's denunciatory tone has no place in a pluralism-facilitating Court. Such emotionalism fuels anger around these primordial issues. Nonetheless, the dissents also contain excellent analysis. Scalia usefully questioned whether *Casey* and *Lawrence* are keeping the stakes of abortion and gay rights politics unacceptably high. By reaffirming *Roe*, *Casey* perpetuated its error of removing an important issue from public discourse and "intensifie[d] the anguish"¹⁵⁵ delivered by the "Imperial Judiciary,"¹⁵⁶ according to Scalia. By repudiating *Bowers* and suggesting homosexual equality, *Lawrence* opened up a Pandora's box: The entire "homosexual agenda" would soon be thrust down the throats of

153. 505 U.S. 833 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion).

154. *Lawrence v. Texas*, 539 U.S. 558, 586, 602-05 (2003) (Scalia, J., dissenting); *Casey*, 505 U.S. at 996, 1000-01 (Scalia, J., dissenting).

155. *Casey*, 505 U.S. at 1002.

156. *Id.* at 996.

traditionalist states.¹⁵⁷ Indeed, within a year of *Lawrence*, lesbian and gay couples from all over the country were getting married in Massachusetts.

Notwithstanding Scalia's critique, the majority Justices got it right in *Casey* and *Lawrence*. Neither opinion sweeps as broadly as Scalia claimed; the O'Connor-Kennedy Court will not remove partial-birth abortion or same-sex marriage from the political agenda.¹⁵⁸ Both decisions situate the Court as a relatively neutral arbiter, taking only the most extreme measures away from legislatures. Indeed, both decisions have a positive effect on our pluralist democracy, because they channel abortion and gay rights politics away from criminalization, which is a stakes-raising regulatory tool for these primordial issues, and toward civil policies, especially fact-based education. Thus, state law after *Casey* and *Lawrence* cannot make women seeking abortions or gay people presumptive criminals, but the state can engage in education, expressive politics, and genuine health regulation. The state can promote motherhood and heterosexuality to a certain extent, and there is even some room for the state to lobby against abortion and homosexuality. On the whole, this accommodation lowers the stakes of politics—and it is relevant that even Scalia's heated dissents have apparently not had the effect of helping the abortion and homosexuality pots boil over.

III. APPLYING A PLURALISM-FACILITATING MODEL TO TODAY'S (AND TOMORROW'S) CONTROVERSIES

I claim three virtues for the pluralism-facilitating model of judicial review justified and elaborated in the previous Part. First, the model provides a sensible road map for judicial review that contributes to, rather than undermines, the central project of the modern Constitution—assuring orderly debate and (provisional) resolution of divisive political issues in our multicultural-pluralist democracy. Second, the model's principles are drawn from the Constitution and are faithful to its structure. Like Ely's project, mine is to develop a Constitution-based philosophy for interpreting the open-textured clauses of the First and Fourteenth Amendments. Third, the model provides a coherent framework for making sense of the constitutional jurisprudence of the Rehnquist Court in particular. This third feature suggests that, in the short term, a pluralism-facilitating model can provide guidance for thinking about the next generation of constitutional

157. *Lawrence*, 539 U.S. at 602-05.

158. See *id.* at 585 (O'Connor, J., concurring in the judgment) (stating that same-sex marriage bars rest on more than "moral disapproval of an excluded group"); *Stenberg v. Carhart*, 530 U.S. 914, 947-51 (2000) (O'Connor, J., concurring) (suggesting that states may regulate partial-birth abortions).

issues. This Part applies the model to some of the tough issues facing the Court in the first decade of the new millennium.

Accordingly, this Part applies the pragmatic strategies judges have followed to minimize their own tendency to raise political stakes (passive virtues, minimalism, provisional rulings). One feature of our constitutional order deepens the case for Supreme Court avoidance techniques—federalism. Sometimes, the United States Supreme Court should leave identity issues to state-by-state resolution for a period of time. This would have been a better strategy than *Roe*'s premature bar to abortion regulation or *Bowers*'s premature reaffirmation of sodomy laws. Different states will reach different resolutions, which provides an experimental diversity that will often lower the stakes and bring the country toward a rough consensus over time.

A. *Monitoring the Presidential War on Terror*

The executive branch is best able to respond to emergencies and has understandably taken an aggressive response to 9/11. For example, the Bush Administration has announced policies whereby American citizens as well as foreign nationals are detained indefinitely and subjected to irregular military proceedings because of suspected terrorist activities.¹⁵⁹ Its Office of Legal Counsel (OLC) has claimed that executive branch officials are immune from accountability for violating federal statutory and treaty rules making torture a crime.¹⁶⁰

Article II vests all "executive" power with the President and makes him Commander in Chief of the armed forces.¹⁶¹ From this structure and from historical practice, the Bush Administration maintains that it has plenary power to conduct (some) antiterrorist activities without congressional or judicial interference. Like the First and Fourteenth Amendments, Article II is open ended and therefore does not foreclose the Administration's interpretation. In *Hamdi v. Rumsfeld*, however, the Supreme Court rejected such a broad reading of Article II and ruled that citizens suspected of

159. *E.g.*, Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834, 57,833-34 (Nov. 16, 2001) (creating military commissions with exclusive jurisdiction to try foreign nationals for any prior or future "acts of international terrorism").

160. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>. *But see* Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf> (superseding and largely repudiating the earlier memorandum).

161. U.S. CONST. art. II, § 1, cl. 1 (Vesting Clause); *id.* art. II, § 2, cl. 1 (Commander-in-Chief Clause).

terrorism retain most of the liberties assured by the Bill of Rights.¹⁶² A pluralism-facilitating theory provides support for *Hamdi*, as well as for the Court's ruling in *Rasul v. Bush* that suspected terrorists have access to judicial review through the writ of habeas corpus.¹⁶³

Without qualification, the Fifth Amendment protects every "person" against federal deprivation of liberty "without due process of law"; the Sixth Amendment assurances of access to counsel, public trial, and confrontation of witnesses are delivered to an "accused" person of any citizenship; and the Eighth Amendment's bar on excessive bail is stated without qualification. The plain text sets the constitutional baseline—"a conservative bias against infringements of established standards of due process, equal protection, and basic dignity"—in the war against terror.¹⁶⁴ As a matter of constitutional text and tradition, the judiciary is the proper branch to enforce these obligations, typically through the writ of habeas corpus.¹⁶⁵

The Administration's actions pose risks to our multicultural-pluralist democracy. Because most detained citizens have been Arab Americans and noncitizen detentions have been overwhelmingly focused on people of Arab descent or Muslim faith, there has been a dangerous element of ethnicity targeting. The segregation (detention) of even a tiny percentage of Arab or Muslim Americans risks raising the stakes of politics by fostering an us-against-them attitude among this minority; this would also undermine the long-term campaign against terrorism.¹⁶⁶ It may be a risk worth taking when detention is short term and in response to an emergency, but Susan Akram's reading of the Japanese-American detainment cases of World War

162. 124 S. Ct. 2633 (2004); *compare id.* at 2635 (O'Connor, J., plurality opinion) (rejecting the Administration's broad interpretation of Article II), *with id.* at 2674 (Thomas, J., dissenting) (accepting the Administration's interpretation).

163. 124 S. Ct. 2686, 2692-93 (2004).

164. MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 9 (2004).

165. *Rasul*, 124 S. Ct. 2686 (holding that Congress, not the President, sets the terms for the Great Writ); *see also Hamdi*, 124 S. Ct. at 2660 (Scalia, J., dissenting); *Ex parte Merryman*, 17 F. Cas. 144 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487) (holding that the President cannot suspend the Great Writ).

166. As David Cole explains,

If authorities have reason to believe that there might be potential terrorists lurking in the Arab immigrant community, they would do better to work with the millions of law-abiding members of that community to obtain their assistance in identifying potential threats, than to alienate the community by treating many of its members as suspect because of their ethnicity

David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 958 (2002); *see also* Laura A. Dickinson, *Using Legal Process To Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002); Jeremie J. Wattellier, Note, *Comparative Legal Responses to Terrorism: Lessons from Europe*, 27 HASTINGS INT'L & COMP. L. REV. 397, 415-16 (2004) (concluding, from a survey of European experience, that punitive and ethnically targeted policies are ineffective and undermine the government's overall legitimacy).

It reminds us that even short-term detentions can raise the stakes and that emergencies can create conditions allowing racist acting out.¹⁶⁷

The Court was (modestly) lowering the stakes in the 2003 Term's terrorism cases. As a matter of symbolic inclusion, it was particularly important for the Court to enforce the Great Writ. Habeas has traditionally been a means by which members of unpopular groups, particularly racial and ethnic minorities, have been able to voice objection to their questionable incarceration.¹⁶⁸ Like African Americans before them, Arab Americans need reassurance that the rule of law protects them, and *Hamdi* and *Rasul* say that it does. Notwithstanding the OLC position, the judiciary must also enforce antitorture laws against executive abuse of detained persons. Indeed, Attorney General Alberto Gonzalez backed away from the OLC position during his confirmation hearings in January 2005.

It was also important for the Court to reaffirm a primary role for Congress in determining the procedures for dealing with enemy combatants in the United States and at Guantánamo Bay. Pluralism-facilitating judicial review ought to be skeptical of legislative attempts to "pass the buck" to the Executive and of executive claims that the buck was in fact passed. Important national decisions such as this one ought not be made without input from all relevant groups. Congress is the organ of government that best reflects our pluralist heterogeneity, and it is better situated than the courts to carry out sober public debate on how to balance national security and individual rights. It is generally harder for the political process to gang up on unpopular minorities in the group-deliberative Congress than in the fast-acting Presidency.

The Japanese-American detention cases of the 1940s suggest a further strategy by which a cautious Court can balance pluralism and security. In *Ex parte Endo*, the Court held that Congress had not authorized the armed forces to detain Japanese Americans indefinitely in internment camps and directed the government to release Mitsuye Endo.¹⁶⁹ Presuming that Congress is "sensitive to and respectful of the liberties of the citizen," the Court read the statute to impose "no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."¹⁷⁰ *Endo*'s

167. Susan Akram, *The Aftermath of September 11, 2001: The Targeting of Arabs and Muslims in America*, 24 ARAB STUD. Q. 61 (2002) (arguing that post-9/11 searches and detentions have been driven by guidelines that target Arabs and Muslims); see also Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 ALB. L. REV. 329 (2003).

168. See ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* (2001) (demonstrating that the Court's expansion of habeas remedies in the mid-twentieth century was responsive to unfair treatment of black defendants in the South).

169. 323 U.S. 283 (1944).

170. *Id.* at 300.

clear-statement rule assures pluralist input, because the President is on notice that he cannot detain people based on a general authorization and must prompt Congress to deliberate on the matter. This reassures ethnic minorities that their freedoms will not be lightly sacrificed. Though the *Hamdi* Court did not cite *Endo*, it found sufficiently targeted congressional authorization for detention of Taliban allies under some circumstances.¹⁷¹ This is an inquiry that should prove more critical in some future cases, because it allows judges to offer the political process—and the branch with primary authority under the Constitution’s text and structure—an opportunity to lower the stakes of security measures, or not.

B. *Language Minorities and the Constitution*

The United States has always been a nation where English is the operative language but others are spoken. The growth of our Latino population (now almost 14% of all Americans and projected to reach 20% by 2020) has made this phenomenon particularly important. About 77% of Latinos in America speak Spanish, and half of Spanish speakers do not speak English.¹⁷² The percentage of bilingual or non-English-speaking Americans will rise in the next generation. This fluid group of Americans has already begun to assert statutory and constitutional challenges to state discriminations against them.

A pluralism-facilitating approach urges judges to understand the First and Fourteenth Amendments from the perspective of language minorities and to lower the stakes of language politics that can be expected to flare up more often in the next generation. Language is constitutive of identity. As Cristina Rodríguez argues, language not only marks an important trait that can be a salient marker of cultural difference or commonality but is also the prism through which we understand as well as articulate the world around us.¹⁷³

171. Congress authorized the President “to use all necessary and appropriate force” against those involved in the September 11 attacks. Authorization for Use of Military Force, Pub. L. No. 107-40, 2001 U.S.C.C.A.N. (115 Stat.) 224, 224 (2001). *Hamdi* ruled that this statute authorized short-term detention of suspected “enemy combatants” involved in the war against al Qaeda and the Taliban. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639-41 (2004) (plurality opinion); *id.* at 2679 (Thomas, J., dissenting) (agreeing on this point). Justices Scalia and Souter criticized the Court’s willingness to find a congressional authorization in such open-ended language. *Id.* at 2656-57 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 2671-72 (Scalia, J., dissenting). A pluralism-facilitating theory would support their skepticism but would also emphasize that Justice O’Connor only found authorization for short-term—and not indefinite—detention.

172. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 359-60 & n.498 (1992).

173. Cristina M. Rodríguez, *Language and Participation* (Summer 2004) (unpublished manuscript, on file with author). For an excellent introduction to the constitutional dimensions of

In areas where English-speaking majorities feel threatened by bilingual or non-English-speaking minorities, the majorities may seek to exclude or segregate the minorities. Congress has imposed statutory obligations on governments to accommodate linguistic minorities in the schools and the voting booth.¹⁷⁴ A pluralism-facilitating theory suggests there is a constitutional dimension to this statutory principle.¹⁷⁵ For this reason, such statutes should be liberally construed and vigorously enforced.

A more common response is assimilative. Indeed, language is at the center of a politics of assimilation in much of this country. At least twenty-seven states have enacted some type of English-only law.¹⁷⁶ Most of the laws declare English the "official" language of the state without imposing specific legal rules to implement this symbolism.¹⁷⁷ These laws are, for the most part, constitutionally passable. A few have imposed pro-English requirements on private schools or businesses. These laws are constitutionally questionable.¹⁷⁸ As a formal matter, such laws present due process and free speech problems, because they deny people their freedom to speak in the language they choose; this is a fundamental, even primordial liberty even without the speech feature. To the extent such English-only rules are motivated by ethnic prejudice or stereotyping, they are vulnerable for equal protection reasons. As a functional matter, these laws also raise the stakes of politics. Spanish-speaking and bilingual citizens can reasonably see English-only regulations as marking them as an out-group, required to conform to majority language conventions that have an exclusionary effect not imposed on other groups. Some of the regulations can reasonably be interpreted as expressions of prejudice or stereotypes.

language politics, see Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133 (2001).

174. 20 U.S.C. § 1703 (2000) (schools); 42 U.S.C. §§ 1973b(f)(1), 1973aa-1a(b) (2000) (voting).

175. *Plyler v. Doe*, 457 U.S. 202 (1982), invalidated Texas's exclusion of the children of illegal aliens from its public school system. This decision was not dictated by the Court's traditional reservation of strict scrutiny to laws deploying suspect classifications or denying fundamental rights, but is a classic example of the pluralism-facilitating perspective: The Justices were concerned not only that the Texas policy penalized "innocent children," *id.* at 230, but most centrally that it put them at a "permanent and insurmountable competitive disadvantage," *id.* at 234 (Blackmun, J., concurring), a recipe for social strife.

176. Dennis Baron, Op-Ed, *No Translation Needed: 'Door Is Closed,'* L.A. TIMES, Mar. 14, 2004, at M5.

177. ACLU, ENGLISH ONLY (1996); Crystal Goodson Wilkerson, Comment, *Patriotism or Prejudice: Alabama's Official English Amendment*, 34 CUMB. L. REV. 253, 258-59 (2004).

178. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a statute barring foreign-language instruction in public schools); *Asian Am. Bus. Group v. City of Pomona*, 716 F. Supp. 1328 (C.D. Cal. 1989) (striking down a requirement that commercial establishments dedicate half of their sign space to English-language signs).

Most such laws strongly undermine the neutrality of the state from the perspective of disparaged language minorities.

Other states have adopted measures requiring state services to be rendered in English alone. The Arizona Constitution says, “As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.”¹⁷⁹ Such provisions affect the day-to-day interaction between language minorities and the state. On the one hand, they require assimilation, whereby bilingual minorities must always give up their “other” language in dealing with the state. On the other hand, they have an exclusionary effect for persons who do not speak English proficiently; monolingual minorities lack effective access to state officials. Both forced assimilation and effective exclusion drive wedges between language minorities and the state, as well as their fellow citizens.

These are pluralism-facilitating reasons, if any are needed, to apply the First Amendment aggressively. As the Ninth Circuit held in *Yniguez v. Arizonans for Official English*, the state should be acting in precisely the opposite manner—encouraging language minorities to bring their grievances and aspirations to state officials.¹⁸⁰ Judge Kozinski, himself a convert to English, responded that the state ought to have discretion to require conformity in order to inculcate a common language and, implicitly, a common culture.¹⁸¹ I am not sure he is wrong, though state-imposed language conformity is coerced speech that violates the plain meaning of the First Amendment as well as its pluralism-facilitating goal. And there are gentler ways for the state to promote a common language than the blunt instrument chosen by Arizona.

Kozinski’s point is more cogent in the context of schools. The Arizona provision allowed other languages as part of an educational program to train schoolchildren in English.¹⁸² Courts should be chary of becoming involved in thorny substantive debates over the appropriate form of English instruction in public schools. While many educators and other citizens believe that bilingual education (instruction in both languages) is the best approach, others believe that immersion in English is preferable. Unless one program is chosen for the purpose of demeaning language-minority

179. ARIZ. CONST. art. XXVIII, § 1, cl. 2 (invalidated 1998).

180. 69 F.3d 920, 923, 936-37, 940-41 (9th Cir. 1995) (en banc), *vacated on other grounds sub nom.* *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). The Arizona Supreme Court struck down the law in *Ruiz v. Hull*, 957 P.2d 984 (1998) (en banc).

181. *Yniguez*, 69 F.3d at 960-63 (Kozinski, J., dissenting).

182. Arizona allowed the use of other languages “[t]o assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.” ARIZ. CONST. art. XXVIII, § 3, cl. 2(a) (invalidated 1998).

students, this is an area where judges have little to contribute. Intervention without a sophisticated understanding of educational theory in this unsettled area runs the risk of raising the stakes of politics, quite unnecessarily.

C. *Same-Sex Marriage*

As a matter of formal equal protection doctrine, one can argue that state bars to same-sex marriage constitute unconstitutional discrimination.¹⁸³ This is not just technical discrimination against lesbian and gay couples but the denial of hundreds of state benefits and rights and, arguably, a deep denial of equal citizenship. And the discrimination is held in place by antigay prejudice and stereotypes that impede gay people's efforts to achieve state recognition. For these reasons, Ely's representation-reinforcing approach strengthens the formal case for judicial intervention.¹⁸⁴

Expansively applying a state equal rights amendment for these Elysian reasons, the Hawaii Supreme Court in *Baehr v. Lewin* ruled that the same-sex marriage bar is sex discrimination that must be strictly examined under the Hawaii Constitution.¹⁸⁵ We the People responded immediately and negatively to this exercise in perfecting democracy. *Baehr* generated a constitutional train wreck. Moderates joined outraged traditionalists all over the country in opposing same-sex marriage. Dozens of states adopted laws refusing to recognize same-sex marriages. Congress by huge margins adopted the Defense of Marriage Act (DOMA), which assured those states that the Full Faith and Credit Clause would not require them to recognize same-sex marriages and provided that more than 1000 federal laws and regulations using the terms "spouse" or "marriage" will never be applied to same-sex couples¹⁸⁶ (a degree of linguistic conformism unprecedented in the U.S. Code). After a vitriolic campaign, tolerant Hawaiians voted 70%-29% to amend their state constitution to allow the legislature to bar same-sex marriages.¹⁸⁷ The Hawaii Supreme Court meekly dismissed the same-sex marriage lawsuit,¹⁸⁸ leaving gay people feeling as disenfranchised as traditionalists had felt right after *Baehr*.

183. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 123-82 (1996); ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002).

184. I am assuming that one rejects or does not find applicable Ely's own caveat that the state can deny same-sex marriage on grounds of traditional morality and not antigay animus. As noted above, this is a substantive judgment.

185. 852 P.2d 44 (Haw. 1993).

186. Defense of Marriage Act, Pub. L. No. 104-199, 1996 U.S.C.C.A.N. (110 Stat.) 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)).

187. WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 22-42 (2002).

188. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (mem.).

The Hawaii experience suggests why a pluralism-facilitating approach would counsel much greater judicial caution on this issue, because primordial loyalties are so deeply implicated on both sides of this still-intense culture war. Many gay people view same-sex marriage as essential to their equal citizenship, while many traditionalists view it as an abrogation of theirs. Under these circumstances, a final pronouncement by the U.S. Supreme Court requiring nationwide recognition of same-sex marriage would repeat the error of *Roe v. Wade*. It would not only toss down a gauntlet to many religious Americans, but would also foster antigay sentiment supporting a constitutional amendment banning same-sex marriage. On the other hand, a decision dismissing same-sex marriage claims as “at best, facetious”¹⁸⁹ in light of the longstanding definition of marriage as one man and one woman would repeat the error of *Bowers v. Hardwick*. It would signal to LGBT Americans and their increasing array of allies that tradition can justify marriage-based discriminations against them that would provoke pious judicial outrage if applied against different-race couples, people with disabilities, or even convicted prisoners.

Is there any way for the judiciary to avoid the Scylla of *Roe* and the Charybdis of *Bowers* on this issue? The Vermont Supreme Court did so in *Baker v. State*,¹⁹⁰ an opinion that reflects a pluralism-facilitating approach to judicial review. As in *Baehr*, the *Baker* plaintiffs were lesbian and gay couples using the state constitution’s equality guarantee to challenge the state’s same-sex marriage bar. The court ruled that the state was acting unconstitutionally in discriminating against lesbian and gay couples. Rather than directing an immediate remedy, however, the court remanded the matter to the legislature. The intended effect of the remand was to reverse the burden of inertia: Same-sex marriage was forced onto the legislative agenda with the burden shifted to traditionalists to justify doing little or nothing to recognize lesbian and gay families. In early 2000, the Vermont legislature agonized over the normative and practical issues and enacted a law reaffirming marriage as between one man and one woman, but also creating civil unions, separate from marriage but accorded all the legal benefits and duties that Vermont conferred on married (different-sex) couples. The stakes of this political debate were high, but the process lowered them somewhat. Through public hearings and one-on-one conversations, the legislators listened attentively to all groups and made a

189. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

190. 744 A.2d 864 (Vt. 1999).

genuine effort to accommodate the deepest normative needs of their different constituents.¹⁹¹

If *Baehr* was a disaster and *Baker* a relative success, was the Massachusetts Supreme Judicial Court wrong to require same-sex marriage licenses six months after announcing its decision in *Goodridge v. Department of Public Health*?¹⁹² From a pluralism-facilitating perspective, *Goodridge* raised the stakes of politics in the short term, and it might well have been better for the court to have followed *Baker*. The counterargument is that Massachusetts in 2004 was “ready” for same-sex marriage in ways that Vermont in 2000 was not—in part because of what Vermont had done. Thousands of same-sex couples joined in civil unions there, and even many traditionalists accepted these new legal families.¹⁹³ Traditionalists’ cries of wolf went unrealized, which surely prepared the way for a more receptive climate in Massachusetts.

If the people of Massachusetts accept the result in *Goodridge*, should the U.S. Supreme Court then invalidate DOMA and state nonrecognition statutes? As a formal matter, they are constitutionally vulnerable, but a pluralism-facilitating theory would urge that the Supreme Court say as little as possible for as long as possible. The United States is not Massachusetts and Vermont. In those states LGBT people are accepted as normal citizens by most of their neighbors—and that degree of acceptance was necessary for judges in those states to insist on homo equality. In most other states, much of the public still considers gay people disgusting or, at best, misfits. Under such circumstances, it would be a mistake of *Roe*-like proportions for the Supreme Court to make *Goodridge* or even *Baker* the law of the land in 2005. And it would be a mistake of *Bowers*-like proportions to definitively rule that the state owes no equality obligations to lesbian and gay couples.

Scylla and Charybdis, therefore, threaten the Supreme Court. The Justices’ salvation, from a pluralism-facilitating point of view, is federalism.¹⁹⁴ In the short term, different states will reach different accommodations on this issue. States in the Northeast and the West Coast are likely to recognize same-sex unions of some sort, either as a matter of their own law or through recognition of out-of-state marriages or unions.

191. ESKRIDGE, *supra* note 187, at 57-82 (providing an account of the legislative deliberations leading to the civil union law).

192. 798 N.E.2d 941 (Mass. 2003).

193. *E.g.*, Nancy Remsen, *Call for Ban on Gay Marriage Stirs Up Memories of Vt. Debate*, BURLINGTON (Vt.) FREE PRESS, Feb. 29, 2004, at 1A.

194. The Establishment Clause was originally a federalism guarantee. It barred a national establishment of religion but assertedly allowed statewide establishments: One state could promote Religion X, and the next could promote Religion Y. See GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 13-20, 113-14 (1987).

States in the South, the Great Plains, and the Rocky Mountains are unlikely to recognize same-sex unions. States in the Midwest may recognize out-of-state marriages or unions or, later, create their own institutions. For the time being, this is fine. First, it allows states or regions to sort out a divisive issue in ways most congenial to their own balance of opinion and identity investment. If the more liberal blue states can recognize same-sex civil unions or marriages and traditionalist red states can refuse, a large majority of Americans will feel validated by their state's choice. Second, federalism gives the nation a safety valve, because the minority group in each state can vote with their feet. LGBT people who feel disrespected by Oklahoma's refusal to recognize their unions can move to Massachusetts. Devout traditionalists who feel disrespected by Massachusetts's recognition of what they consider "unnatural" unions can move to Oklahoma.

The first two reasons do present one risk: The nation may become even more polarized—the blue states bluer and the red states redder. This would be a big pluralism problem, but it will probably be ameliorated by a third virtue of federalism: It creates laboratories of experimentation and new opportunities for the falsification of stereotypes. Gay rights advocates say that marriage will encourage lesbian and gay family formation and be good for children reared in such households. Traditionalists say that lesbian and gay marriages will be bad for children and will destroy marriage as an institution. Well, same-sex marriage is now on trial in Massachusetts. That state's experience will provide useful information.

CONCLUSION

Ely's representation-reinforcing project was to draw from the Constitution principles for perfecting democracy. This article's pluralism-facilitating project draws from theories of democratic pluralism principles for perfecting the Constitution. Some corollaries of my theory are that constitutional "change" ought to come slowly and with input from legislators, administrators, and voters; that the efficacy of judicial review depends on its pluralist prudence more than its originalist pedigree; and that constitutional change cannot come from judges alone.

The same-sex marriage cases illustrate all these features. Decisions like *Goodridge* and *Baker* would have been neither possible nor advisable in a state whose public policies did not already signal acceptance of LGBT people as worthy citizens. The legislatures in both Massachusetts and Vermont had enacted sweeping laws barring discrimination against gay people (the Massachusetts antidiscrimination law was the one struck down as applied in *Hurley*). Both states offered same-sex domestic partnership

benefits to state employees. Lesbian and gay families were flourishing in both states before marriage lawsuits were even filed.

Yet the Vermont justices were right to move slowly in *Baker*, and the Massachusetts justices were taking a bigger risk in *Goodridge*. One feature of both state constitutions made their risk taking more acceptable from a pluralist perspective. The Vermont and Massachusetts Constitutions can be amended by simple majority votes of two successive sessions of the legislature and then by popular referendum. Thus, same-sex marriage has not been taken out of politics even by *Goodridge*. In April 2004, the Massachusetts legislature took the first step toward amending the constitution to limit marriage to different-sex couples, with civil unions for same-sex couples. This is democratic pluralism in action: The court reversed the burden of inertia, but not in such a way that the political process was powerless to debate it meaningfully.

This constitutional structure is in striking contrast to the clunky process of Article V, which requires two-thirds majorities in each chamber of Congress and ratification by three-quarters of the states. A 2005 U.S. Supreme Court decision requiring same-sex marriage across America would create three kinds of intense anger: Traditionalists would be furious that gay marriage was a constitutional right; most Americans would be unhappy that an important policy issue had been resolved by unelected Justices; and both groups would be tremendously frustrated by a constitutional amendment process that got stuck on state number thirty-six.¹⁹⁵ This kind of result would be a pluralism nightmare.

In contrast to Ely's representation reinforcement approach, a pluralism-facilitating perspective helps us evaluate mechanisms for constitutional change. The elaborate Article V process makes such change too difficult, thereby depriving Americans of a mechanism for responding to Supreme Court mistakes like *Roe v. Wade*. We should amend Article V to reduce the ability of one group or one region to veto constitutional change. My own inclination would be to adopt the amendment process of the Massachusetts and Vermont Constitutions. If this renders constitutional amendment too easy, the gentle reader might consider retaining a less onerous supermajority requirement, perhaps something like a three-fifths vote by each chamber of two successive Congresses, followed by a national referendum, also requiring a three-fifths majority of votes cast.

195. This could happen to a federal gay marriage amendment, just as it happened to the ERA. (Any thirteen of the sixteen states of the Northeast and Pacific Rim could defeat a gay marriage amendment. Nor is it an Article V "gimme" that all of the Great Lakes and Midwest states would ratify.) The ERA's narrow defeat, of course, was softened by the Supreme Court's substantial absorption of its principle into the Equal Protection Clause.