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It's the Constitution, Stupid: Two Liberals Pay Tribute to Antonin Scalia's Legacy

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Judicial review exists, in substantial part, to invalidate arbitrary and discriminatory laws that disfavor particular groups or interests. It is a check on majority rule. Importantly, however, unless minority groups can avail themselves of equal and accessible democratic processes, the majority rule problem will remain unsolved. The Fourteenth Amendment provides the constitutional framework, through the equal protection and due process clauses, to merge substantive and procedural rights protections into a coherent jurisprudence. But when the Court relies on nebulous liberty principles when it could have invoked equal protection guarantees, due process becomes a source of unenumerated substantive rights, and equal protection becomes an underused source of substantive and procedural equality, its potential never realized.

This leads to the very problem that living constitutionalists sought to remedy because unequal access in governance remains and majorities have no incentive to repair the power imbalance. For that reason, the Court naturally becomes the vehicle by which disenfranchised groups seek substantive rights protection. Often, however, the right at issue is not reasonably inferable from the enumerated rights provisions. Thus, when the Court decides such issues, it finds itself in a minefield laced with subjective value traps and surrounded by legal fictions. Results emerging from the latter source often carry the taint of arbitrariness and the sting of illegitimacy.

Justice Scalia’s jurisprudence of logic and textualism honors the historically paramount position of “The People” in America’s history and Constitution, while concomitantly proclaiming that no matter how sincerely one wishes or insists the Constitution’s penumbra’s contains this right or that, when the Constitution is expressly silent on that right, its existence and parameters are for The People and not the Court to decide; it’s the People’s Constitution, stupid!
We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide. But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

United States Supreme Court Justice Antonin Scalia¹

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Any society that relies on nine unelected judges to resolve the most serious issues of the day is not a functioning democracy. I just don't think that a democracy is responsible if it doesn't have a political, rational, respectful, decent discourse so it can solve these problems before they come to the Court.

United States Supreme Court Justice Anthony Kennedy²

INTRODUCTION

JUSTICE DOUGLAS, YOU MUST REMEMBER ONE THING. AT THE CONSTITUTIONAL LEVEL WHERE WE WORK, 90 PERCENT OF ANY DECISION IS EMOTIONAL. THE RATIONAL PART OF US SUPPLIES THE REASONS FOR SUPPORTING OUR PREDILECTIONS.3

Commentators have branded Justice Scalia as a racist, homophobic, right-wing ideologue whose opinions are more sympathetic to Jim Crow than they are to African-Americans, women, and same-sex couples.4 Some characterize Justice Scalia’s dissents as angry rants that drip with sarcasm and disdain for those who disagree with his view of constitutional interpretation.5 What has prompted so many to hurl such accusations at the country’s longest serving Supreme Court Justice, who attends the opera with Justice Ruth Bader Ginsburg and remembers fondly his intellectual battles with former Justice John Paul Stevens?6

Distrust—and fear—of the democratic process. Disregard for—and indifference to—the written Constitution. A belief that the Government knows better. An endorsement of judicial paternalism over self-determination. A conviction that the results of majority rule are more dangerous than the decisions of nine unelected justices. When non-textualist justices decide cases in these penumbral regions, their decisions are not based

5 See generally Terry A. Maroney, Angry Judges, 65 Vand. L. Rev. 1207, 1245 (2012) (Perhaps no one has perfected the art of the angry dissent better than Justice Antonin Scalia. Linda Greenhouse has described Scalia as ‘enraged’ and ‘dyspeptic,’ particularly when writing in dissent; another commentator describes Scalia’s writing as ‘equal parts anger, confidence, and pageantry,’ such that his opinions . . . ‘read like they’re about to catch fire from pure outrage.’” (citations omitted).
on higher truths or universal virtues. Subjective values, not legal principles, underlie them all.

No person—not a judge, legislator, or a president—has a right to define and impose personal values on another individual. The Constitution provides citizens, not the government, with liberty, autonomy, and equality. Citizens have the inalienable right, within the Constitution’s textual constraints, to make different policy choices, and to live under rules that arise from fair and meaningful debate. It is called democracy.

The authors present sixteen excerpts from Justice Scalia’s famous dissents and concurrences. They do not tell a story of racism, homophobia, or ideology. Justice Scalia’s words embrace the democratic process—not the so-called living constitution—as a source for change. They argue that, within the Constitution’s written constraints, citizens in each state have the freedom to make laws and define unenumerated rights from the bottom up. Ironically, though, many seem to bristle at the idea of the people, not courts, defining “one’s own concept of existence . . . and the mystery of human life.”

Why?

I.

THE OPERATION WAS A SUCCESS, BUT THE PATIENT DIED. WHAT SUCH A PROCEDURE IS TO MEDICINE, THE COURT’S OPINION IN THIS CASE IS TO LAW.8

Living constitutionalism may achieve “good” results, but with each Roe v. Wade9 and Bush v. Gore,10 the Constitution’s vision takes more shallow breaths, and democracy fades into elitism’s shadow.

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The debate over constitutional interpretation is, in many ways, reducible to this question: if a particular outcome is desirable, and the Constitution’s text is silent or ambiguous, should the United States Supreme Court (or any court) disregard constitutional constraints to achieve that outcome? If the answer is yes, nine unelected judges have the power to choose outcomes that are desirable. If the answer is no, then the focus must be on ensuring political and democratic equality. The Court’s jurisprudence should promote equal participation in the democratic process—and equal protection of the laws—because it enhances personal autonomy and provides citizens—particularly disenfranchised groups—a meaningful voice in self-governance.

Living constitutionalism advances the theory that the Constitution’s meaning changes over time in light of contemporary norms. Judging is outcome-dependent. That view, however, gives judges the authority to manipulate or even ignore the Constitution’s text to achieve those outcomes. Policy victories in the short-term, however, risk long-term and potentially irreparable effect on personal liberty and equality. It leads to a top-down system of governance that disenfranchises all citizens, including the minority groups—and rights—that living constitutionalism seeks to protect. No citizen is fully protected in a system that makes it more difficult for change to occur through bottom-up democratic processes. It is time for a new federalism that emphasizes democratic, not judge-made, equality.

In Schuette v. Coalition to Defend Affirmative Action, the Court’s decision suggested a renewed focus on democracy in upholding a referendum approved by 58%

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of Michigan’s voters that banned the use of race in college admissions.\textsuperscript{13} While reasonable people disagree about the wisdom of affirmative action, the Court emphasized that the citizens of Michigan—not the Justices—had the authority to determine state policy. Writing for a three-member plurality, Justice Kennedy stated as follows:

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters’ reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.\textsuperscript{14}

The plurality opinion also emphasized that, “unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.”\textsuperscript{15} In so doing, the plurality disagreed strongly with the living constitutionalism that Justice Sotomayor embraced in her dissent,\textsuperscript{16} and that would have removed affirmative action debate from the democratic process:

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign . . . [That position] is inconsistent with the underlying premises of a responsible, functioning democracy . . . [t]hat process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. \textit{It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.} The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this . . .

\textsuperscript{13} \textit{Id.} at 1629.
\textsuperscript{14} \textit{Id.} at 1638.
\textsuperscript{15} \textit{Id.} (quoting \textit{Sailors v. Board of Educ. of Cnty. of Kent, 387 U.S. 105, 109 (1967)}).
\textsuperscript{16} 134 S. Ct. at 1638-40, 1651 (Sotomayor, J., dissenting).
freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.\textsuperscript{17}

Indeed, “[o]ur constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure.”\textsuperscript{18} Those words were a rebuke to those who view citizens as needing protection and not empowerment, and paternalism rather than emancipation.

That is the price one must pay for a philosophy that believes less in its people and more in its government. That is a price citizens need not pay, however, because the Constitution’s de-centralized vision, along with the individual liberties contained in the Bill of Rights, promises that the people—not courts or legislators—have the right to self-determination.

Ultimately, living constitutionalism is not merely a theory of evolution. Instead, it seeks to undo the basic structure of lawmaking and thereby embed inequality into our democracy. The written Constitution, however, enables a participatory democracy, not judicial supremacy. As Justice Scalia said, “[o]ur Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind.”\textsuperscript{19}

\textsuperscript{17} Id. at 1637 (emphasis added).
\textsuperscript{18} Id. at 1636-37.
\textsuperscript{19} Virelli, supra note 11, at 11.
II.

LIVING CONSTITUTIONALISM IS NOT CONSTITUTIONALISM AT ALL

Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.20

Living constitutionalism “advocates a dynamic approach to constitutional interpretation, where contemporary notions of justice and societal needs inform constitutional meaning.”21 Put differently, constitutional meaning must resonate in the political, cultural, and social environment in which the interpreters live.”22 On its face, living constitutionalism appears sensible, pragmatic, and likely to result in more just results. Although that may be true, it is not the whole truth. It is not even the real truth. The devil is in the details—and in the continued disenfranchisement that results when the courts engage in normative decision-making.

Living constitutionalism is not a theory of interpretation. It is a theory of governance that, although well-intentioned, gives unelected judges—not legislators and certainly not citizens—the authority to define ambiguities in the Constitution’s text to reach normative policy results. Those results, however, coincide quite conveniently and unsurprisingly with living constitutionalists’ policy preferences. In short, outcomes are pre-determined. The trick is finding a way to get there after the fact.

In doing so, does living constitutionalism achieve political and democratic equality for traditionally disenfranchised groups? No. It empowers courts, not people, to create unenumerated constitutional rights, and prevents a jurisprudence that promotes

21 Virelli, supra note 11, at 11.
22 Id. at 12.
political equality at the state and local level. In the last fifty years, the path to judicial supremacy has been a messy one indeed, paved with legal fictions such as substantive due process and emanations that rise from the Constitution’s penumbras like a demon-possessed girl who levitates from the bed as mom and dad watch in horror.

Furthermore, living constitutionalists have argued that the Constitution is invisible, but have somehow been able to identify various unwritten rights that emerge from the darkness, and that courts—not citizens—are obligated to enforce. Justice Scalia and increasingly, the Supreme Court, have recognized living constitutionalism as an ugly form of intellectual dishonesty, where judges twist the Constitution’s meaning to achieve results that cannot currently be achieved through democratic debate. This wolf, indeed, comes as a wolf.

Justice Scalia has spent years exposing the undemocratic truths underlying living constitutionalism. In dissents that combine literary genius (and biting humor) with unassailable logic, Justice Scalia argues that nine unelected judges have no business resolving divisive policy issues where the Constitution is silent and reasonable people can disagree over outcomes. Giving courts that power results in paternalistic, not participatory governance. It also leads to structural and procedural inequality for all citizens, which prevents bottom-up lawmaking that autonomy and liberty demand.

Justice Scalia’s dissents speak to this ideal. He is not a conservative or liberal judge. Justice Scalia is a federalist. When did that become a four-letter word?

Put differently, to define “the liberty of all,” the Court should not define liberty at all. It should equalize the democratic and political process so that citizens can define liberty “in its more transcendent dimensions.” As Harvard Law Professor Lani Guinier states, the Court should embrace a new “demosprudence,” where it looks “beyond academics to the people themselves as a source of democratic authority and accountability.”

Democracy is similar to the stock market. If it functions properly, most injustices will correct themselves. Excessive regulation can lead to procedural—and substantive—inequality. Remediing this inequality is a goal that should unite both originalists and living constitutionalists.

III.

THE LEGITIMACY OF MAJORITY RULE DEPENDS ON POLITICAL EQUALITY

We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law.

Majority rule is only legitimate if lawmakers are truly accountable to their citizens. Accountability depends on achieving procedural equality, not equal results. In cases like

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29 Id.
31 Id. at 36.
Citizens United v. Federal Election Commission,33 McCutcheon v. Federal Election Commission,34 and U.S. Term Limits, Inc. v. Thornton,35 the Court did the opposite. In Citizens United, by a 5-4 margin, the Court invalidated statutes that placed limits on corporate campaign contributions and, therefore, prevented Congress from remedying corruption in the electoral and legislative process.36 In McCutcheon, the Court—again by a 5-4 margin—held that the aggregate limits enacted by Congress on individual campaign contributions violated the First Amendment.37 Likewise, in U.S. Term Limits, five Justices voted to invalidate laws in twenty-three states that imposed term limits on elected officials.38

After Citizens United and McCutcheon, corporations, lobbyists, and wealthy individuals, unlike those in middle and lower-income groups, can donate millions to political candidates and gain unequal access to lawmakers.39 When Congress recently considered gun control legislation, including restrictions on the sale of semi-automatic weapons, some legislators might have been influenced more by the National Rifle Association than families of the young children who died at Sandy Hook Elementary School.40 Money makes lawmakers accountable to a select group of people (and

34 134 S. Ct. 1434 (2014) (invalidating aggregate limits on individual campaign contributions).
35 514 U.S. 779 (1995) (holding that states cannot impose qualifications for Congressional candidates that exceed those provided in the Constitution); see also Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating passage of the line item veto, which addressed overspending.)
36 134 S. Ct. at 1438-40.
37 Id.
38 Id.
39 See Adam Lioz, Breaking the Vicious Cycle: How the Supreme Court Helped to Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out, 43 SETON HALL L. REV. 1227, 1231 (2013) (“the Court has turned the First Amendment into a tool for use by the wealthy to dominate the political process, and the key barrier to democratizing the role of money in politics”).
organizations) that do not represent the interests of average citizens. In effect, Citizens United and McCutcheon furthered inequality under the guise of equality.

IV.

DEMOCRACIES MAKE ENDURING LAWS

*The virtue of a democratic system [with a constitutionally guaranteed right to free speech] is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly.*41

When functioning properly, democracy is the best forum for rights-creation because it makes the right itself more secure and empowers marginalized voices.

United States Supreme Court Justice Ruth Bader Ginsburg supports abortion rights, but recognizes that courts should exercise caution when confronting divisive social policy issues. Justice Ginsburg criticized *Roe v. Wade,*42 which held that the Fourteenth Amendment’s unwritten right to privacy was “broad enough”43 to encompass the right to abortion.44 Liberals and conservatives alike have chastised *Roe* for its outcome-based reasoning, with John Hart Ely calling it “bad constitutional law, or rather . . . it is not constitutional law and gives almost no sense of an obligation to try to be.”45

More problematic was the backlash that *Roe* engendered, as “[t]he sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures.”46 After *Roe,* the trend “toward liberalization of abortion statutes”47 stopped, and legislatures adopted measures aimed at minimizing

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42 410 U.S. 113.
43 410 U.S. at 153.
44 Id.
47 Id. at 381-82.
the impact of the 1973 rulings, including notification and consent requirements, prescriptions for the protection of fetal life, and bans on public expenditures for poor women's abortions.”48 The Court’s decision not only halted democratic debate, but it made the right itself less secure:

The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.49

Justice Ginsburg believed that Roe “ventured too far in the change it ordered,”50 and gave “an incomplete justification for its action.”51 In addition, the Court’s reasoning failed to equate “abortion prohibitions with discrimination against women,”52 and base its decision on “woman's equality.”53

Of course, the likelihood of a backlash should not unduly influence the Court’s decision-making process. Indeed, Brown v. Board of Education54 was a historic moment for constitutional equality despite “a White backlash that disrupted racial progress being made through political channels.”55 Should the Court have allowed desegregation to work its way through the democratic process? Of course not. Segregation violated any reasonable construction of the equal protection clause and ended a dark era in history. As Justice Scalia explains, “[i]n my history book the Court

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48 Id.
49 Id. at 385.
50 Id. at 381.
51 Id. at 382.
52 Id. at 382.
53 Id. at 385.
was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sanford* ... an erroneous (and widely opposed) opinion that it did not abandon [until Brown].”

As cases like *Brown* illustrate, the Court must invalidate laws that infringe on the textual rights protected by the Constitution. Legislative attempts to ban flag burning, allow prayer in schools, or to ban sodomy only among same-sex couples are textbook examples of arbitrary—and discriminatory—state action. In each case, the Court’s holding had a textual justification. Burning the American flag is a pure political speech. Atheists have a right to education that is free from state-sponsored religion. Likewise, states cannot ban sodomy for one group but allow it for another. In those cases, the Court is enhancing equality and liberty by acting within constitutional constraints. In *Roe*, however, penumbral guarantees that “emanated” from the Constitution text like steam from freshly baked apple pie drove the Court's decision. The steam, however, soon disappears. The “living” or “invisible” Constitution is no different. It is the equivalent of black ice: you think you see it, but it is just not there.

The backlash, therefore, was not surprising; the states reacted harshly to a perceived encroachment on their lawmaking power. The lesson from *Roe* is that the Court should embrace a bottom-up federalism that removes favoritism, corruption, and voter suppression—not policy disputes—from the democratic process. As such, the Court should ordinarily refuse to decide cases that: (1) divide its citizens; (2) do not facially violate the Constitution; and (3) are subject to reasonable disagreement. In addition, the Court should typically defer to Congress on matters involving inequality in the electoral

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process. Thus, in *Shelby County, Ala. v. Holder*,60 the Court erred when invalidating portions of the Voting Rights Act.61 The majority’s reasoning was certainly defensible,62 but reasonable people could have disagreed with that reasoning, as evidenced by the one-vote margin of victory.63 Deferring to Congress, therefore, particularly when the Senate voted 98-0 to renew the Act,64 made more democratic sense.

The Court should, however, invalidate laws that violate the Constitution’s text because “[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments.”65 Safeguarding each citizen’s constitutional rights, however, is not to same as creating new rights.66

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60 133 S. Ct. 2612 (2013)
61 Id. at 2631; see also Voting Rights Act of 1965, §4, 79 Stat. 438.
62 See *Shelby County*, 133 S. Ct. at 2626-27. As the majority explained, circumstances over the past 40 years had changed to such an extent that the original justifications no longer supported reauthorization of the Act.
66 See John P. Safranek & Stephen J. Safranek, *Licensing Liberty: The Self-Contradictions of Substantive Due Process*, 2 Tex. Rev. L. & Pol. 231, 240 (1998) (“The right to dignity, which the Court also has neglected to delineate precisely, even though it is integral to due process liberty, is indistinguishable from privacy, autonomy or liberty: it protects individual choice”).
V.

THE CONSTITUTION IS WRITTEN—AND IT MATTERS

IF YOU THINK AFICIONADOS OF A LIVING CONSTITUTION WANT TO BRING YOU FLEXIBILITY, THINK AGAIN. YOU THINK THE DEATH PENALTY IS A GOOD IDEA? PERSUADE YOUR FELLOW CITIZENS TO ADOPT IT. YOU WANT A RIGHT TO ABORTION? PERSUADE YOUR FELLOW CITIZENS AND ENACT IT. THAT’S FLEXIBILITY.67

The Constitution does not give people what they want. It gives people what they already have. That includes: (1) specific liberties enumerated in the Bill of Rights; (2) due process of law; and (3) the right to de-centralized self-governance.

Living constitutionalists disagree. So do some members of the Court.

A.

AMBIGUITIES IN THE TEXT

I THINK IT IS UP TO THE JUDGE TO SAY WHAT THE CONSTITUTION PROVIDED, EVEN IF WHAT IT PROVIDED IS NOT THE BEST ANSWER, EVEN IF YOU THINK IT SHOULD BE AMENDED. IF THAT’S WHAT IT SAYS, THAT’S WHAT IT SAYS.68

Some living constitutionalists view democracy as a dark cave where the boogeyman, otherwise known as a majority that disagrees with them, lurks.69 This belief might be legitimate if the processes that create majorities in a particular state are defective. Living constitutionalists, however, believe that democratic processes are inherently

problematic,\textsuperscript{70} thus justifying normative judicial decision-making. Textual ambiguities and strained interpretations of the text are warranted, therefore, to mitigate the evils caused by majority rules. When the Court relies on ambiguities in the text, however, to create rights that are “retained by the people,”\textsuperscript{71} and blocks efforts to limit improper influence in the democratic process, centralized governance replaces self-governance. Liberty and autonomy diminish in a real sense.

What does ambiguity mean? Also, why shouldn’t judges decide? Does the answer depend on history and tradition, or modern-day understandings of liberty? The answer depends in part on the words, and what the drafters intended those words to mean. The First Amendment prevents the Government from infringing on an \textit{individual’s} free speech rights. It says nothing, however, about whether corporations\textsuperscript{72} or money\textsuperscript{73} is speech. Where the Constitution is ambiguous, or entirely silent, the Court should hesitate before granting \textit{certiorari}, and certainly avoid broad rulings that undermine the democratic process.

Instead, the Court should exercise deference to laws that repair inequality in the political process, as Congress did when regulating corporate campaign contributions, provided that there are rational and non-arbitrary reasons for doing so. Otherwise, the Court will thrust itself into constitutional cases where its interpretation of ambiguous


\textsuperscript{71} See, e.g., U.S. Const. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”).


\textsuperscript{73} See Monica Youn, \textit{First Amendment Fault Lines and the Citizens United Decision}, 5 \textit{Harv. L. \\& Pol’y Rev.} 135, 136 (2011) (“it may be settled law that political spending is, under some circumstances, entitled to First Amendment protection, but few would argue that money is always speech”).
language depends on subjective values, and where its opinions, as in *Citizens United*, bring the wrong clarity.

Deferring to the democratic process, however, does not completely resolve the problem. The Fourth Amendment’s right against unreasonable searches and seizures,74 the Fifth Amendment’s right against self-incrimination,75 and the Sixth Amendment’s right to counsel,76 are all broadly phrased and inherently ambiguous. Should the Court also allow each state to define these words? Not entirely. The answer depends on the distinction between positive and negative liberties.77

The Court should actively promote *positive* liberty by creating a categorical baseline—or guarantee—that the States cannot transgress. In doing so, the Court should prohibit states from enacting laws that render the right meaningless. The right to counsel requires the *effective* assistance of counsel.78 The right against self-incrimination does not allow the state to imply guilt from silence.79 The Fourth Amendment requires law enforcement to obtain a warrant before searching a suspect’s

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74 See U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”).

75 See U.S. Const. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”).

76 See U.S. Const. amend. VI )”In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence”).


78 See McMann v. Richardson, 397 U.S. 759, 771 (1970) (“[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel”).

In each of these cases, the Court was setting an outer boundary—or limitation—on state power. It was not, however, interpreting ambiguous words or terms to invalidate policies that rested squarely in the middle of those limits. Citizens can reasonably disagree, for example, over whether it is cruel and unusual\textsuperscript{81} to execute a child rapist,\textsuperscript{82} and whether the death penalty itself is cruel and unusual.\textsuperscript{83}

This approach should also inform negative liberty formulations. The Court should invalidate legislation that facially violates the text, such as when a law infringes upon the minimum baseline (or outer boundary) that the Court has established. The Court should not, however, create rights based on implausible or entirely unsupportable interpretations of the text. That forces the Court to rely on extra-textual concepts, such as emanations that flow from constitutional penumbras, and substantive due process guarantees that originate from a clause that is designed to ensure fair procedures.

Ambiguity, therefore, is a justification for limiting, not expanding, judicial power. Although the definition of “cruel and usual punishment” will change based on “evolving standards of decency,”\textsuperscript{84} the definition of “decent” is invariably subjective. The individual Justices’ subjective values, however, cannot be the basis upon which to impose legal norms on an entire country. That is not judging in any sense, much less a constitutional one. It is policy-making, gobbledygook, or what Justice Scalia calls “argle-

\textsuperscript{80} See Camara v. Municipal Court of City and Cnty. of San Francisco, 387 U.S. 523, 528-29 (1967).

\textsuperscript{81} See U.S. Const. amend. XIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).


\textsuperscript{83} See Robert M. Bohn, Capital Punishment in a Global Context: A Statistical Update, 50 No. 2 CRIM. LAW BULLETIN ART 4 (2014) (discussing states that have abolished the death penalty).

bargle.” As Justice Scalia said in one dissent: “[t]he operation was a success, but the patient died.”

Of course, a state cannot impose life imprisonment for stealing a loaf of bread; that would exceed the bounds of reasonableness just like obscenity exceeds free speech limits. Within those outer limits, democratic governance affords citizens the right to resolve their philosophical differences and in each state arrive at different conclusions. Sometimes it is better to be divided, not united.

This paradigm may lead to some unwise and silly laws, but they are not unconstitutional laws. As Justice Scalia states, “[a] law can be both economic folly and constitutional.” Some people may cringe, for example, at a law banning contraception, a law prohibiting fornication, or a law outlawing sex toys. These laws are, in many ways, absurd, but the Constitution gives citizens—and states—the right to be absurd. It allows citizens to hold their lawmakers accountable through elections, recalls, and referenda, and to organize, associate, and legislate for positive—and more enduring—liberty. The states cannot, however, enforce arbitrary laws. They cannot discriminate. They cannot infringe the Bill of Rights’ substantive guarantees.

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86 National Endowment for the Arts, 524 U.S. at 590 (Scalia, J., dissenting).
88 See Griswold, 381 U.S. 479.
91 See U.S. Const. amend. XIV, cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).
The Court’s role, therefore, is to ensure that the democratic process works efficiently and fairly. It is not to substitute its own judgment for policies deemed unwise or inconsistent with “liberty in its more transcendent dimensions.” Nor should the Court permit Congress to have such unwieldy power under the Commerce Clause or Taxing Power that it prompts Justice Scalia to surmise that Congress “can make people buy broccoli.” As one scholar explains, “constitutional law remains democratic [only] if judges do not impose substantive values on the nation, but rather safeguard the processes through which today’s citizens govern themselves.”

B.

MANIPULATION OF THE CONSTITUTION’S TEXT

NO MAN SHOULD SEE HOW LAW OR SAUSAGES [OR HOT DOGS] ARE MADE

Living constitutionalists also reject the “conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other.” The Court has authority to “define the liberty of all” and to manipulate the text where it will achieve the majority’s desired result.

Nowhere was this more evident than in Planned Parenthood v. Casey, where the majority upheld the “central holding” in Roe and tacitly admitted that it was

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92 See Guy Mundlak, Workplace—Democracy: Reclaiming the Effort to Foster Public and Private Isomorphism, 15 THEORETICAL INQUIRIES L. 159, 174 (2014) (“some of the justifications for workplace democracy seek to remedy the problems associated with representative democracy. This is best seen, for example, in the arguments favoring democracy at work for reasons of fostering self-fulfillment and drawing on the workplace as a laboratory of democracy”).
93 Planned Parenthood, 505 U.S. at 851.
95 Id. at 1752 (emphasis added).
97 Planned Parenthood, 505 U.S. at 851.
98 Id.
99 505 U.S. 833.
100 Id. at 912 (Stevens, J., concurring).
manipulating the Constitution’s text. Justice Kennedy, who wrote the majority opinion, acknowledged “a literal reading of the [Fourteenth Amendment] might suggest that it governs only the procedures by which a State may deprive persons of liberty.”101 As a result, it was “tempting . . . to suppose that the Due Process Clause protects only those practices,”102 and to apply the “conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other.”103 To avoid this undesirable result, however, the majority summarily declared that “[t]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.”104

The majority opinion relied on the judicially-created substantive due process doctrine, holding that the Fourteenth Amendment protects a “substantive sphere of liberty.”105 Part of “substantive” liberty included the “right to define one’s own concept of existence . . . and the mystery of human life.”106 Ironically, the majority construed the “right to define one’s own concept of existence,”107 allowing the Court to define existence for everyone:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.108

101 Id. at 846.
102 Id. at 847.
103 Id. at 851.
104 Id. at 848 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961)).
105 Planned Parenthood, 505 U.S. at 848.
106 Id. at 851.
107 Id.
108 Id. at 850 (emphasis added).
In defining the liberty of all, the majority stated, “[d]ue process [could not be] reduced to any formula; its content cannot be determined by reference to any code.” Properly translated, that meant going beyond the Constitution’s text while simultaneously claiming that it was relying on the text. In other words, the majority was trying to have it both because neither way—the text or its judicially-created penumbras—supporting the decision. They try to have it both ways when neither way will do. Ironically, the majority’s opinion began this sentence: “[l]iberty finds no refuge in a jurisprudence of doubt.” Doubt—and uncertainty—is precisely what the decision created.

VI.

VALUES ARE NOT LAW, AND LAWS NEED NOT REFLECT POPULAR VALUES

*I accept, for the sake of argument, that sexual orgies eliminate social tensions and ought to be encouraged . . . Rather, I am questioning the propriety, indeed the sanity, of having a value-laden decision such as that made for the entire society by unelected judges.*

Some decisions, value-laden or not, should not be made by judges. In a case involving the time it took to remove work gear, judges on the Seventh Circuit Court of Appeals decided on a rather interesting experiment:

One of us decided to experiment with a novel approach. It involved first identifying the clothing/equipment that the defendant’s plants use and buying it (it is inexpensive) from the supplier. Upon arrival of the clothing/equipment three members of the court’s staff donned/doffed it as

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109 Id. at 849 (quoting Poe, 367 U.S. at 543) (brackets added).
110 Planned Parenthood, 505 U.S. at 844.
111 Id.
they would do if they were workers at the plant. Their endeavors were videotaped. The videotape automatically recorded the time consumed in donning and doffing and also enabled verification that the “workers” were neither rushing nor dawdling.

The videotape reveals that the average time it takes to remove the clothing/equipment is 15 seconds and the average time to put it on is 95 seconds. The total, 110 seconds, is less than two minutes, even though the “actors” had never worked in a poultry processing plant and were therefore inexperienced donners/doffers of the items in question.\textsuperscript{113}

After reading this, one must ask, as Justice Scalia did in a different context, “[w]hy in the world would you have it interpreted by nine lawyers?”\textsuperscript{114}

The living constitution – and normative judging – leave victims of every political persuasion in its wake. Living constitutionalists recognize a right to privacy under the \textit{Fourteenth} Amendment,\textsuperscript{115} but under the \textit{Fourth} Amendment, where privacy is expressly protected, the living constitution allows laptops searches at the border\textsuperscript{116} and the taking of an arrestee’s DNA for storage in a national database.\textsuperscript{117}

The \textit{original} Constitution zealously safeguards the people’s right to political speech,\textsuperscript{118} but the living \textit{and} original constitution view corporations as people, and allows them to buy access and influence to the political process.\textsuperscript{119} The living constitution supports a woman’s right to terminate a pregnancy,\textsuperscript{120} but prohibits all citizens who are suffering from a terminal illness from terminating their own.\textsuperscript{121} The

\begin{itemize}
\item \textsuperscript{113} Id.
\item \textsuperscript{114} CFIF.org, supra note 27.
\item \textsuperscript{115} See Griswold, 381 U.S. 479.
\item \textsuperscript{117} See Maryland v. King, 133 S. Ct. 1958 (2013).
\item \textsuperscript{118} See Meyer v. Grant, 486 U.S. 414, 420 (1988).
\item \textsuperscript{119} See Citizens United, 558 U.S. 310; McCutcheon, 134 S. Ct. 1434.
\item \textsuperscript{120} See Roe, 410 U.S. 113.
\item \textsuperscript{121} See Cruzan v. Director, Missouri Dep’t of Pub. Health, 497 U.S. 261 (1990).
\end{itemize}
original constitution permits citizens to burn the American flag,\textsuperscript{122} and to protest outside of funerals for fallen soldiers,\textsuperscript{123} but the living and original constitution allow the Federal Communications Commission to prohibit television producers from using the word “bitch” on public television because it is “indecent.”\textsuperscript{124}

In *Kennedy v. Louisiana*,\textsuperscript{125} the living constitution blocked Louisiana from imposing the death penalty for all individuals under the age of eighteen, and from executing a man who raped and sodomized his twelve-year old child.\textsuperscript{126} The Court’s living constitutionalists claimed to rely on “national consensus”\textsuperscript{127} but were careful to note that “in cases involving a consensus, our own judgment is “brought to bear” by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”\textsuperscript{128}

Who is to say, though, whether executing a child rapist,\textsuperscript{129} or a seventeen-year old triple murderer, contravenes evolving standards of decency? More importantly, who should say? If the text is ambiguous and there is reasonable disagreement about its meaning, the Court should not have the power to say what the text means because the meaning can only change when the Justices’ minds—or the Court’s members—change. That is precisely the status of today’s “democracy.” Under the First Amendment, the Court can decide what is indecent, and under the Eighth Amendment, what is decent. Ironically, though, the Court has not defined decency in a workable manner. That, in a nutshell, is the point.

\textsuperscript{125} 554 U.S. 407.
\textsuperscript{126} See *Kennedy*, 554 U.S. 407.
\textsuperscript{129} See Bachmann, *supra* note 84, at 232.
To be sure, even if all but one state had outlawed the execution of child rapists, it would not mean, as a constitutional matter, that the practice itself was cruel and unusual. A consensus may prove that there is a general agreement about something, but not necessarily the punishment’s cruelty. Uniformity is not a proxy for constitutionality, and it disrespects each citizen’s constitutional autonomy. To be sure, this argument is about citizen autonomy, not states’ rights.

States should not, for example, be permitted to enact legislation that discriminates against a particular person or group when the underlying motivation is moral disapproval. Personal value judgments belong to the person—not a legislator, a court, or in some cases, not even a majority. Indeed, the doctrines that support these types of decisions—evolving standards of decency, substantive due process, and penumbral rights to privacy—are rationalizations to give them the pretense of textual legitimacy. They are not, however, legitimate. They are like sausage. They taste good—until one sees how they are made.

To be fair, every decision involves value judgments. Judges have different philosophies, for example, regarding the scope of executive power, the authority of Congress to regulate intrastate activities, and the degree to which a law infringes upon an individual’s religious practices. Interpretive philosophies from originalism to intratextualism reflect different views about the Constitution’s meaning and purpose, and of the Court’s role in resolving disputes over unenumerated rights. Having personal values that inform the decision-making processes, however, counsels for restraint, particularly when divisive social policies arise and the Constitution’s text is ambiguous or silent. In fact, some issues are so divisive and depend to such a degree on value

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130 Lawrence, 539 U.S. at 582 (O’Connor, J., concurring).
judgments that they should be left to the democratic process—and even be considered non-justiciable—when the Constitution’s text does not compel a particular result.

VII.

LIVING CONSTITUTIONALISTS AND POST-HOC RATIONALIZATIONS

Judges who find constitutional rights the framers never intended take important issues out of the public space of democratic debate and suspend them in a sort of legal formaldehyde.\(^{131}\)

Living constitutionalists try mightily to ground decisions such as Planned Parenthood in the Constitution’s text. They embrace substantive due process, which John Hart Ely described as “green pastel redness,”\(^{132}\) grand theories such as intratextualism,\(^{133}\) and outcomes that define liberty “both in its spatial and in its more transcendent dimensions.”\(^{134}\)

Proponents of intratextualism, for example, argue that the Constitution is a harmonized document where “inferences [are] drawn from parallel provisions [and used] to trump localized arguments based on text, history, and precedent.”\(^{135}\) Intratextualism rejects “clause-bound interpretation, in which interpreters proceed by examining the local text, history, and precedent of particular constitutional provisions, without attempting to read the Constitution in a holistic, coherent manner.”\(^{136}\) Thus, if a particular state practice is not “cruel and unusual,” under the Eighth Amendment, living


\(^{134}\) Lawrence, 539 U.S. at 562.

\(^{135}\) Vermeule & Young, supra note 133, at 731-32.

\(^{136}\) Id. at 732 (emphasis added).
constitutionalists look to judge-made penumbras,\textsuperscript{137} or foreign courts, but not to the Constitution.

Living constitutionalism also transforms the law into a turbulent political enterprise. The results of presidential elections and the judicial nomination process devolve into battles over ideology, where people try to predict which nominees might vote to overrule \textit{Roe} or eliminate the penumbral right to privacy. This process shows the dark side to living constitutionalism’s aspirational worldview: judicial paternalism. It should surprise no one, therefore, that the confirmation process has become so hotly contested. We are choosing our parents. The spoiled brat might love this arrangement, but the disfavored child will yearn for emancipation.

VIII.

\textbf{THE COUNTER-MAJORITARIAN RATIONALE IS MERE PRETENSE}

\textit{It is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "more perfect Union" (a criterion only slightly more restrictive than a "more perfect world") can impose its own favored social and economic dispositions nationwide.}\textsuperscript{138}

Living constitutionalists correctly argue that majority rule can leave minority rights unprotected.\textsuperscript{139} Judicial review exists, in substantial part, to invalidate arbitrary and discriminatory laws that favor particular groups or interests. Importantly, however, unless democratic minorities can avail themselves of equal and accessible processes, the majority rule problem remains unsolved. Indeed, the Fourteenth Amendment provides the constitutional framework, through the equal protection and due process clauses, to

\textsuperscript{137} See \textit{Griswold}, 381 U.S. at 484.
\textsuperscript{139} See \textit{Chemerinsky}, Interpreting the Constitution, \textit{supra} note 70, at 21 ("pure democracy is . . . an invitation to tyranny").
merge substantive and procedural rights protections into a coherent jurisprudence.\textsuperscript{140} When the Court relies on nebulous liberty principles when it \textit{could have} invoked equal protection guarantees,\textsuperscript{141} due process becomes a source of unenumerated \textit{substantive} rights, and equal protection becomes an underused source of \textit{substantive} and \textit{procedural} equality.

Thus, living constitutionalism leads to the very problem it seeks to remedy. Unequal access in governance remains and majorities have no incentive to repair the power imbalance. For that reason, the Court naturally becomes the vehicle by which disenfranchised groups seek substantive rights protection. Often, however, the right at issue is not reasonably inferable from the enumerated rights provisions. Thus, when the Court decides such issues, it finds itself in a minefield laced with subjective value traps and surrounded by legal fictions.\textsuperscript{142} Results emerging from the latter source often carry the taint of arbitrariness and the sting of illegitimacy.

Living constitutionalists sidestep this problem by vilifying majority rule to such an extent that outside observers would think democracy is little more than the whimsical decisions of a modern-day lynch-mob.\textsuperscript{143} Process-based equality, however, is not the goal. Rather, a normative policy outcome is the tail that wags living constitutionalism’s theoretical justifications dog.\textsuperscript{144} Unfortunately, after \textit{Citizens United} and \textit{McCutcheon},

\textsuperscript{140} U.S. Const. amend. XIV, cl. 1, supra note 91.
\textsuperscript{141} \textit{Lawrence}, 539 U.S. at 582 (O’Connor, J., concurring).
\textsuperscript{143} Id.
\textsuperscript{144} See Thomas L. Jipping, \textit{From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection}, 4 TEX. REV. L. & POL. 365, 381 (2000) (“[t]he judge’s own “moral evolution” leads him to see the Constitution as he wishes, whether as a “sparkling vision of the supremacy of the human dignity of every individual” or something more concrete. In each case, though, the activist judge is imposing his
procedural inequality is more pronounced and substantive rights protection, at least through democratic means, is less attainable.

Furthermore, living constitutionalists look to the Court to achieve what the Court itself made less achievable on a local level.

But only sometimes.

In Alabama, a statute authorizes judges to overturn a jury’s unanimous verdict for a life sentence\(^{145}\) and say “Nah, I am imposing death.” At least one Supreme Court Justice has questioned this statute’s constitutionality.\(^{146}\) They are perfectly content with majority rule (the jury’s decision) in this situation because it reflects their evolving vision of wise policy. That is precisely the point. Living constitutionalists envision the Court as a policy-driven institution, and capable of permanently removing many issues from democratic debate.

Perhaps the living constitutionalists are “right” on certain matters of policy. Being right, however, does not mean that everyone state must be forced to do the “right” thing. That is the difference between dumb or silly laws, and unconstitutional laws. Moreover, the living constitutionalists’ view does not protect minority rights in the true sense because it makes every citizen a minority, all of whom are subject to the policy predilections of a judiciary unconstitutionally acting as a super-legislature. An elitist


\[^{146}\text{See Woodward v. Alabama, 134 S. Ct. 405, 408 (2013) (Sotomayor, J., dissenting). In her dissenting opinion from the Court’s denial of certiorari, Justice Sotomayor stated as follows:}\]

\text{The only answer [explaining the high number of judicial overrides to impose a death sentence] that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system” Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral politics. Id.}\]
democracy, however, is neither representative nor participatory. It leads to inequality for all citizens and is a recipe for a backlash.

IX.

**EQUAl OUTCOMES ARE NOT GUARANTEED—AND JUDICiALLY CREATED RIGHTS DO NOT GUARANTEE EQUAlITY**

*THE STORY IS TOLD OF THE ELDERLY JUDGE WHO, LOOKING BACK OVER A LONG CAREER, OBSERVES WITH SATISFACTION THAT, WHEN I WAS YOUNG, I PROBABLY LET STAND SOME CONVICTIONS THAT SHOULD HAVE BEEN OVERTUNED, AND WHEN I WAS OLD I PROBABLY SET ASIDE SOME THAT SHOULD HAVE STOOD; SO OVERALL, JUSTICE WAS DONE. I SOMETIMES THINK THAT IS AN APPROPRIATE ANALOGY TO THIS COURT’S CONSTITUTIONAL JURISPRUDENCE, WHICH ALTERNATELY CREATES RIGHTS THAT THE CONSTITUTION DOES NOT CONTAIN AND DENIES RIGHTS THAT IT DOES.*147

Some living constitutionalists argue that an outcome-based jurisprudence ensures equal *liberty* for all citizens.148 *Equal liberty*, however, is an inherently anti-democratic (and undefinable) phrase because it assumes that: (1) equal outcomes are a constitutional entitlement; (2) inequality can never be justified or even preferred; and (3) citizens cannot make different policy choices in different states yet still be equal in a constitutional sense. At its core, equal liberty stands for the proposition that the Court should create substantive, extra-textual rights that make everyone equal *in fact*. The result, ironically, is not equality. It creates a pseudo-oligarchy run by the Court’s philosopher kings.

Equal liberty would be on stronger footing if it emphasized equal *access* to the democratic process and equal *protection* of the laws. Equal access—what Professor Guinier calls “demosprudence,”149—requires the Court to sever the connection between

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money and influence. The Court must safeguard textual rights—such as the right to counsel—more aggressively, particularly for indigent defendants. A single standard should replace rational basis, intermediate, and strict scrutiny review and invalidate all arbitrary classifications.\(^{150}\) Put differently, leveling the playing field does not mean that everyone gets to hit a home run. It means that every citizen, regardless of background, gets the same number of at-bats.\(^{151}\) When that happens, Justice Breyer’s “active liberty,”\(^ {152}\) is realized.

Additionally, equal liberty proponents erroneously assume that equal outcomes are possible or even desirable, or that inequality is always a bad idea. If the Court eventually holds that same-sex marriage bans are unconstitutional—as it should—polygamists and other unions will still be subject to marriage bans. Likewise, those who peddle obscenity are not entitled to freely advertise photos depicting bizarre sexual fetishes.\(^ {153}\) The Court has also rejected a religious group’s argument that smoking peyote is a religious exercise warranting exemption from a generally applicable law,\(^{154}\) even though it exempted another group for animal cruelty laws to engage in ritual killings.\(^{155}\) These decisions create inequality, but some might argue that this is “acceptable” inequality. Whatever one’s view, there is no doubt that, in each of these cases, the Court’s decision focused on negative liberty by identifying the limits (outer boundaries) on text-based rights. It did not, however, create positive rights from penumbras derived from judicaily crafted notions of liberty.

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\(^{151}\) See U.S. Const. amend. XIV, cl. 1, *supra* note 91.


\(^{153}\) See Miller v. California, 413 U.S. 15 (1973) (holding that obscenity was not protected by the First Amendment, and setting forth a four-part test defining obscenity).


The point is this: *how you get there* matters. Roads that are paved with dishonesty lead to destinations that are littered with non-sequiturs. Fairness and due process of law are judicially-enforceable rights, but equal outcomes—in the face of textual ambiguities—are democratic choices. 156 Ultimately, just like an impartial jury presides over every criminal trial no matter how heinous the alleged crime, every citizen, no matter how poor or marginalized, should participate equally in selecting the leaders who make law. Procedural equality—and justice—is the prerequisite to liberty, and to even-handed majority rule.

X.

**The Democratic Process Is the Proper Venue to Create—and Enforce—Positive Rights**

*Robert F. Kennedy used to say, “Some men see things as they are and ask why. Others dream things that never were and ask why not?”; that outlook has become a far too common and destructive approach to interpreting the law.* 157

The Court is not institutionally situated to define unenumerated rights. Nine judges—or one judge who casts the deciding fifth vote—should not define unenumerated rights for 300 million people, or compel policies that the Constitution’s text merely allows. 158 Indeed, judicial supremacy removes an issue permanently—and often prematurely—from the legislative process, and erodes democracy. In short, it is one thing to invalidate laws that deprive people of life, liberty, or property without due process of law, but quite another to say that due process prevents every state from defining—within constitutional constraints—life and liberty itself.

156 See U.S. Const. amend. XIV, cl. 1, supra note 91.
158 See Schuette, 134 S. Ct. at 1639 (Scalia, J., concurring).
Additionally, the Court is too removed from state and local government processes to police rights-enforcement. Even where the Court has rightfully protected and, in some cases, expanded basic textual rights, it has often led to little more than a Pyrrhic victory. In *Gideon v. Wainwright*,\(^\text{159}\) for example, the Court held that indigent criminal defendants have a Sixth Amendment right to adequate counsel. Many indigent defendants, however, continue to receive substandard legal representation, and face substantial obstacles when pursuing ineffective assistance of counsel claims.\(^\text{160}\) In *Atkins v. Virginia*,\(^\text{161}\) the Court correctly held that the Eighth Amendment exempts intellectually disabled defendants from execution. Many states, however, through burden-shifting and burden-heightening laws,\(^\text{162}\) make it extraordinarily difficult for these defendants to prove that their disability qualifies for *Atkins’* exemption.

Of course, *Gideon* and *Atkins* were landmark rulings and based on enumerated rights. The point is merely that, when the Court ventures further into the *unenumerated* rights-making process, desirable results do not always lead to good outcomes. After *Roe*, where the Court held that the penumbra-based right to privacy encompassed abortion,\(^\text{163}\) some states—like Texas—enacted laws making it difficult, if not impossible, for a woman to receive an abortion.\(^\text{164}\) It is almost as if some states are ignoring—or trying to constructively overrule—Supreme Court precedent. If not, they are trying to

\(^{159}\) 372 U.S. 335 (1963).

\(^{160}\) See Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1204 (2013) (“the Sixth Amendment suffers from several doctrinal limitations that prevent it from functioning as an effective tool for indigent defense reform, particularly in the current climate where funding presents the largest obstacle to reform”).

\(^{161}\) 536 U.S. 304 (2002).

\(^{162}\) See, e.g., GA. CODE ANN. §§ 17-7-131(c)(j) and (j) (1988) (Georgia requires a defendant to provide intellectual disability beyond a reasonable doubt, and is among only a handful of states that implement such a high standard).

\(^{163}\) See *Roe*, 410 U.S. at 153.

give the right as little recognition as possible. Constitutional rights, however, should not be contingent on any State’s acquiescence.

Might the democratic process yield different results? With respect to *Roe*, the answer is probably yes. Justice Ginsburg recognized that broad rulings like *Roe* can limit the progressive change they order. When Justice Scalia stated, “[y]ou want a right to abortion? Persuade your fellow citizens and enact it,” he was saying that the process matters. That process envisions liberty being defined by the citizens of each state, not by Justice Anthony Kennedy, or by a 5-4 margin that relies on penumbras to make policy for the entire country. Put differently, the living constitution can lead to no constitution and fracture the delicate balance between state and federal governments. In the process, the Court can lose its institutional legitimacy.

Some may argue that this is overly simplistic, fails to account for the complexities that each case presents, and takes an idealistic view of democratic governance. First, it is one thing to distinguish case-specific nuances, and to recognize that the Bill of Rights does not enumerate every conceivable right. It is quite another to endorse judicial jujitsu. The Court’s Fourth Amendment jurisprudence, for example, has parsed more legal hairs than an actress before the Academy Awards. Using terms like “lunging area” and “immediate control,” the Court has expanded the search incident to arrest doctrine—which was created due to concerns for officer safety and evidence

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166 See, e.g., David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 San Diego L. Rev. 227, 230 (2005) (“Mainstream Fourth Amendment discourse provides both that the Fourth Amendment prefers searches pursuant to a warrant, and that the amendment imposes a reasonableness requirement on warrantless searches”).
168 *Gant*, 556 U.S. at 339.
preservation\textsuperscript{169}—to uphold warrantless searches of the passenger compartment of an arrestee’s automobile.\textsuperscript{170}

Thus, even if no exigencies exist, and an arrestee is confined to the back of a police car, officers may rummage through the passenger compartment for evidence of a crime. Why? The arrestee might unlock the handcuffs, escape from the locked backed door, and enter the vehicle. Justice Brennan described this view as “a [legal] fiction.”\textsuperscript{171} One commentator added that it was a fiction “of comic-book superhero proportions.”\textsuperscript{172} In \textit{Planned Parenthood}, Justice Scalia chastised the majority for using stare decisis like an evil mistress to distort constitutional realities.\textsuperscript{173}

Furthermore, it is not idealistic to argue that the democratic process should resolve constitutional ambiguities—\textit{if} those processes are fair and allow meaningful citizen participation. Currently, however, wealth and corporate power undermine the democratic process. Fixing that process is a desirable outcome in and of itself.

\textsuperscript{169} \textit{Chimel}, 395 U.S. at 760-63.
\textsuperscript{171} \textit{Belton}, 453 U.S. at 466 (Brennan, J., dissenting).
\textsuperscript{172} Foley, \textit{supra} note 170, at 277.
\textsuperscript{173} 505 U.S. at 986 (Scalia, J., dissenting).
XI.

**STARE DECISIS NO LONGER APPLIES TO STARE DECISIS**

*Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last term, was, to be sure, not fully six feet under.¹⁷⁴*

The Court has applied stare decisis in such an inconsistent—and unprincipled—manner that stare *indecisis* is more accurate. In several landmark decisions, stare decisis has been invoked to uphold precedents that *should* have been overruled, but abandoned stare decisis to reject precedents that should *not* have been overruled. The explanation has been anything but coherent.

In a few telling cases, the Court has made stare decisis seem like the evil mistress that the Court finds irresistible every so often, but also has little trouble discarding when something better comes along. Justice Kennedy’s majority opinion in *Planned Parenthood*¹⁷⁵ is a perfect example of the Court’s on-again, off-again, relationship with stare decisis. He relied on the evil mistress—in a “sometimes-on, sometimes-off” way. As discussed above, Justice Kennedy’s majority opinion adhered to Roe’s “central holding”¹⁷⁶ but rejected its trimester framework in favor of an undue burden test.¹⁷⁷ In his dissent, Justice Scalia recognized that this test is “as doubtful in application as it is unprincipled in origin,”¹⁷⁸ and “really more than one should have to bear.”¹⁷⁹

¹⁷⁵ 505 U.S. 833.
¹⁷⁶ Id. at 912 (Stevens, J., concurring).
¹⁷⁷ Id. at 986 (Scalia, J., dissenting) (discussing the majority opinion).
¹⁷⁸ Id.
¹⁷⁹ Id.
The majority’s selective reliance on stare decisis also led Justice Scalia to conclude that “stare decisis ought to be applied even to the doctrine of stare decisis, [as] I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version.”\(^\text{180}\) Indeed, the Court’s “reliance upon stare decisis can best be described as contrived.”\(^\text{181}\)

While conceding that “[m]any favor all of those developments [the right to abortion], and it is not for me to say that they are wrong,”\(^\text{182}\) Justice Scalia believed that the Court’s institutional legitimacy favored restraint:

> [The American people's] belief in themselves as . . . a people [who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court’s legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals.\(^\text{183}\)

Ultimately, the Court’s attempt to portray Roe as the statesmanlike “settlement of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian,”\(^\text{184}\) and proof that “[t]he Imperial Judiciary lives.”\(^\text{185}\)

In *Citizens United*, the Court abandoned stare decisis altogether and invalidated a law that banned corporate independent expenditures within sixty days of a general election, and thirty days of a primary election.\(^\text{186}\) The majority opinion overturned *Austin v. Michigan Chamber of Commerce*,\(^\text{187}\) which held, “corporate wealth can

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\(^{180}\) Id.
\(^{181}\) Id. at 993.
\(^{182}\) Id. at 995.
\(^{183}\) Id. at 868.
\(^{184}\) Id. at 995 (Scalia, J., dissenting).
\(^{185}\) Id. at 996.
\(^{186}\) 558 U.S. at 418 (Stevens, J., dissenting).
unfairly influence elections,” and partially overruled *McConnell v. Federal Election Commission* where the Court had upheld a sixty-day ban on corporate independent expenditures. In so doing, corporate giants like AT&T and Citigroup continue to pour money into state and national elections, thereby gaining access and leverage in the lawmaking process. Not to worry, the Court assured us, because “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.” The Court thought differently in *Austin* and *McConnell*, and the average citizen might also disagree.

XII.

**RIGHTS SHOULD NOT CHANGE BECAUSE THE COURT CHANGES**

*It’s not a living document, it’s a dead document . . . OH, DON’T PUT IT THAT WAY. IT’S AN ENDURING DOCUMENT. IT’S A MEANINGLESS DOCUMENT IF ITS MEANING CHANGES ACCORDING TO WHATEVER THE SUPREME COURT THINKS.*

Judicially-created rights are vulnerable to changes in the Court’s composition. Indeed, rights that originate from and rest upon the fragile foundation of judicial supremacy are neither natural nor inalienable. They are *political* rights in every sense, and their continued existence depends on who sits on the bench, not what the Constitution says. What the Court gives, no one—except the Justices—can take away.

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188 *Id.* at 661.
191 *Citizens United*, 558 U.S. at 360.
XIII.

**RIGHTS VIOLATIONS SHOULD NOT BE CONDITIONED ON THE HARMLESSNESS OF THE ERROR**

*I BELIEVE THAT DEPRIVING A CRIMINAL DEFENDANT OF THE RIGHT TO HAVE THE JURY DETERMINE . . . EVERY ELEMENT OF THE CRIME CHARGED . . . CAN NEVER BE HARMLESS. . . . WHEN THIS COURT DEALS WITH THE CONTENT OF [A CRIMINAL’S JURY TRIAL RIGHT,] IT IS OPERATING UPON THE SPINAL COLUMN OF AMERICAN DEMOCRACY.*

Many have argued that Justice Scalia has not been among the most strident supporters of the rights of criminal defendants. That assessment must acknowledge, however, that he has stood four-square in favor of criminal defendants when there has been structural error in the trial process, at least when that structure is expressly protected by the Constitution’s text. When the Court’s majority in *Neder v. United States*, allowed the trial judge to “fill in” the court’s own finding on an element upon which the court had failed to instruct the jury, Justice Scalia cried foul, emphasizing that the criminal jury’s central role has always resided at the core of our constitutional protections:

“[Trial by jury is] the only [trial guarantee] to appear in both the body of the Constitution and the Bill of Rights. . . . The right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter.”

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196 *Id.* at 30-31 (Scalia, J., concurring in part & dissenting in part) (quoting U.S. Const. amend. VI, and referencing the jury trial guarantee at U.S. Const. art III, § 2, cl. 3).
This is the key to Justice Scalia’s approach to harmless error. Where the particular error precluded the criminal defendant from enjoying a right at the textual core of the Constitution, that error can never be deemed harmless. In equal parts mocking and instructive, Justice Scalia explained:

[A]bsent voluntary waiver of the jury right, the Constitution does not trust judges to make determinations of criminal guilt. Perhaps the Court is so enamored of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution . . . the people reserved the function of determining criminal guilt to themselves, sitting as jurors. It is not within the power of us Justices to cancel that reservation.\(^{197}\)

Constitutional errors only became subject to harmless error analysis in federal courts when *Chapman v. California* was decided in 1967.\(^{198}\) Indeed, one of the two questions presented for decision in *Chapman* was “whether there can ever be harmless constitutional error.”\(^{199}\) And Justice Potter Stewart, at the time, deemed the question already answered – in the negative: “[I]n a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were ‘harmless’.”\(^{200}\)

The *Chapman* case was decided just forty-seven years ago, yet the principle that “there can never be a harmless constitutional error” seems to have faded into history. Perhaps Justice Scalia’s perspective is the strongest foothold for what remains of that old principle – when the error at trial precluded the defendant from enjoying the protection of trial rights guaranteed in the Constitution’s text that can never be deemed

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\(^{197}\) *Id.* at 32 (Scalia, J., concurring in part and dissenting in part) (italics in original).

\(^{198}\) 386 U.S. 18 (1967).

\(^{199}\) *Id.* at 20.

\(^{200}\) *Id.* at 42 (Stewart, J., concurring).
harmless error. As Justice Scalia lamented in *Neder*, “The recipe that has produced today’s ruling [affirming a conviction although the jury had been precluded from deciding on one element of the crime of conviction] consists of one part self-esteem, one part panic, and one part pragmatism. . . . Formal requirements are often scorned when they stand in the way of expediency. This Court, however, has an obligation to take a longer view.”201

XIV.

**THE INTRASTATE FOCUS: SOMETIMES, IT’S BETTER TO HAVE THE DIVIDED STATES OF AMERICA**

*YOU COULD HAVE 50 DIFFERENT STATES HAVING 50 DIFFERENT REGULATIONS . . . UNTIL THEY WERE ALL LITIGATED OUT.*202

Uniformity of process, or the guarantee that each state will adhere to due process of law, is vital to equality. Uniformity of outcome, however, particularly when it is judicially imposed, undermines individual autonomy and self-determination. Liberty affords each state—and citizen—the right to create different laws *and* rights, provided they are within the Constitution’s textual framework. When the Court makes policy judgment calls and thereby removes those policy issues from the democratic process, liberty and equality are undermined.

Thus, instead of a national federalism, where one decision—and even a single vote—can make policy for all fifty states, courts should, in some areas of social and economic policy, emphasize only *intrastate* effects. Narrower decisions promote autonomy and de-centralization because a state’s interests, in some cases, may depend on unique


factors that are not present in other areas. A one-size-fits-all solution threatens to ignore the cultural, geographic, and economic interests that impact each state’s policy considerations, and undermine the autonomy of those who are best situated to make those determinations.

XV.

THE COURT SHOULD ENFORCE TEXTUAL RIGHTS MORE AGGRESSIVELY

IT HAS BEEN RENDERED THE SOLEMN DUTY OF THE SUPREME COURT OF THE UNITED STATES, LAID UPON IT BY CONGRESS IN PURSUANCE OF THE FEDERAL GOVERNMENT’S POWER “[T]O REGULATE COMMERCE WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES,” TO DECIDE WHAT IS GOLF.203

Often, the Court intervenes in the wrong places. It has, however, denied certiorari in cases where state laws raised serious constitutional questions.204

In PGA Tour, Inc. v. Martin,205 for example, the Court considered whether a golfer’s disability entitled him to use a cart despite the Association’s walking requirement.206 The Court held that Title III of the Americans with Disabilities Act required the PGA to accommodate this disability, stating that it would not “fundamentally alter the character of the competition.”207

204 In Georgia, for example, defendant Warren Hill was sentenced to death despite a determination by at least one court—and seven experts—that Hill was intellectually disabled. The lower court’s finding, however, was based on the preponderance of the evidence standard. Georgia, along with only a handful of states, requires that intellectual disability be proved beyond a reasonable doubt, even though some commentators have stated that this places a nearly insurmountable burden on defendants. See, O.C.G.A. §17-7-131(c)(3) and (j) (1988); see also Hill v. Humphrey, 662 F.3d 1342, 1374-75 (11th Cir. 2013) (Barkett, J., dissenting) (“although the state habeas court ultimately found that Hill was probably mentally retarded, it was precluded from granting Atkins relief because Georgia limited this constitutionally guaranteed right to only those individuals who could establish mental retardation beyond any reasonable doubt, a standard that cannot be met when exerts are able to formulate even the slightest basis for disagreement”).
205 532 U.S. 661.
206 Id. at 664-65.
207 Id. at 663.
Regardless of whether one agrees with the Court’s decision, one must wonder why the Court granted certiorari, considering that the lower courts arrived at the same conclusion. In his dissent, Justice Scalia stated as follows:

I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would someday have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer?208

Indeed, “[e]ither out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question.”209

The Court has not been vigilant, however, about protecting basic textual rights. For sixteen years after deciding Strickland v. Washington,210 where it established a two-pronged standard for assessing ineffective assistance of counsel claims, the Court did not find a single case of ineffective assistance.211 During this period, glaring examples of ineffective representation of counsel arose, particularly among indigent defendants.212 Similarly, despite Roe, the Court recently declined to intervene in a case involving a Texas law that forced the closure of several abortion clinics and severely restricted a woman’s access to abortion.213

If rights are to have meaning, the Supreme Court should not stand by and allow states to underfund public defender systems or constructively outlaw abortion. Although

208 Id. at 700 (Scalia, J., dissenting).
209 Id.
211 Id.

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rights are not necessarily self-executing, they are categorical guarantees. Policy makers cannot eviscerate rights based on mere disagreements with the Court’s decision, and courts should hesitate more before deeming an individual rights violation “harmless.” Constitutional rights are not contingent. They are absolute.

XVI.

THE POLITICIZATION OF THE CONSTITUTION

Now the Senate is looking for “moderate” judges, “mainstream” judges. What in the world is a moderate interpretation of a constitutional text? Halfway between what it says and what we’d like it to say? Labeling judges as “moderate” or “mainstream” is a coded way of saying that constitutional law has become a political enterprise, where judges’ personal values—along with predictions about how they will rule on important cases—are considered more important their judicial philosophy. Confirmation hearings have often degenerated into the single-question “Will you overturn Roe?” fiasco, with nominees fending off questions with analogies to balls and strikes, sarcastic humor, and stock responses that promise to follow the rule of law. Why has this happened? The Court often decides hotly contested social issues and splits along ideological lines. As Justice Scalia notes, “[a]s long as judges tinker with the Constitution to ‘do what the people want,’ instead of what the document actually commands, politicians who pick and

214 Harry T. Edwards, To Err is Human, but Not Always Harmless: When Should Legal Error Be Tolerated, 70 N.Y.U. L. Rev. 1167, 1170 (“When we hold errors harmless, the rights of individuals, both constitutional and otherwise, go unenforced”).
confirm new federal judges will naturally want only those who agree with them politically.”

**CONCLUSION**

*THE COURT MUST BE LIVING IN ANOTHER WORLD. DAY BY DAY, CASE BY CASE, IT IS BUSY DESIGNING A CONSTITUTION FOR A COUNTRY I DO NOT RECOGNIZE.*

As Justice Scalia nears the end of his career, he might wonder whether his judicial philosophy has had an enduring impact on American jurisprudence. It has. The Court is steadily moving toward institutional restraint, and its recent decision in *Schuette* respected the people’s right to make difficult policy decisions. The Court’s next chapter should focus on making that process—and democracy—truly participatory, and free of the unfair access that money generates.

Justice Kennedy is wrong. There is a code—the Constitution. The Court should invalidate legislation that violates the Constitution’s text, regardless of how fair the processes were that led to its adoption. Like obscenity, unconstitutional laws leap off the page. Usually, they discriminate against a particular group, are motivated by animus, circumvent an already-guaranteed right, or involve Congress trying to go a little further in its power to regulate state conduct. Invalidating these laws promotes equality. Creating rights from thin air, however, and removing them from democratic debate, places judges above the Constitution, and people below the equality line. It is a reality from which every citizen should “respectfully, and indeed diffidently, dissent.”

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