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Inscribing Judicial Preferences into Our Fundamental Law: On the European Principle of Margins of Appreciation as Constitutional Jurisprudence in the U.S.

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INSCRIBING JUDICIAL PREFERENCES INTO OUR FUNDAMENTAL LAW: ON THE EUROPEAN PRINCIPLE OF MARGINS OF APPRECIATION AS CONSTITUTIONAL JURISPRUDENCE IN THE U.S.

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The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact – and must be regarded by the judges as – a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.[1]

I. INTRODUCTION

The recent constitutional jurisprudence of the United States Supreme Court appears to lend considerable support to advocates of the comparative law theories of legal convergence.[2] Among the more interesting clues to this convergence is the way in which some judges would have the

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1. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. The theories of convergence all posit, from somewhat different bases and with different consequences, that world legal systems are becoming more alike. For a discussion of convergence theories, *see, e.g.*, PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 475-97 (1999) (describing four philosophical bases of convergence – the return of the jus commune, legal evolution, natural law, and Marxist theory – and three strategies of convergence – active programs for unification, transplantation, and natural convergence). For an interesting comment touching on convergence and difference in constitutional interpretation, *see* Mary Ann Glendon, *Commentary*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 95 (Amy Gutmann ed., 1997).

American Supreme Court restructure itself to more closely resemble, in outlook and method, the constitutional courts of civil code countries. Indeed, the last decade of the twentieth century has seen the American Supreme Court begin to develop the tools of a civil law court. Among the most important of these has been the evolution of general principles of law analogous, in some ways, to general principles of law in civil law systems.[3] Like their European counterparts, these general principles of law serve four purposes in constitutional interpretation – to guide to interpretation of primary law, to guide to the exercise of power under the primary law, to provide criteria for determining the legality of acts, and to fill in gaps in primary or secondary law to prevent injustice.[4]

These general principles of law have begun to be applied in matters of American constitutional interpretation. Among them is the general constitutional principle of fairness.[5] This essay considers another, more problematic general principle of law, the general principle of "margin of appreciation."[6] The margin of appreciation is essentially a rule of deference.[7] The principle results in a rule of statutory construction which per-

3. To some extent, the common law has always recognized general principles in vastly diluted form – as canons of construction. For a succinct discussion of canons of constructions and presumptions in statutory interpretation, *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25-29 (Amy Gutmann ed., 1997). But general principles of law in the civil law context serve much more important purposes. General rules or principles work like doctrine "though they can be vindicated like any particular rule, they serve a dual purpose: as pointers to interpretation by the courts and as indication of policy to legislators." D. LASOK & J.W. BRIDGE, LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES 179 (5th ed., 1991)

4. NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 121 (1996).

5. *See* Larry Catá Backer, *Fairness as a General Principle of American Constitutional Law: Applying Extra-Constitutional Principles to Constitutional Cases in Hendricks and M.L.B.*, 33 TULSA L.J. 135 (1997).

6. For discussion of the margin of appreciation in context, *see, e.g.*, HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996); Laurence R. Helfer, *Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights* 65 N.Y.U. L. REV. 1044, 1052-59 (1990). "Although the margin of appreciation has now become a mechanism frequently employed by the Convention institutions, its origin lies in a very narrow context." Angela Thompson, *International Protection of Women's Rights: An Analysis of Open Door Counseling Ltd. and Dublin Well Women Centre v. Ireland*, 12 B.U. INT'L L.J. 371, 379 (1994) (the principle was developed to provide deference to state action in time of national emergency involving I.R.A. terrorists and fighting in Greece). The margin of appreciation began to be applied in a wider variety of cases starting with Handyside v. United Kingdom., 1 Eur. H.R. Rep. 737 (1976) (censorship).

7. The phrase itself "is borrowed from French administrative law, in which it is used to describe the extent to which a court will make allowance for the exercise of discretion by a person fulfilling an administrative responsibility." J.A. Andrews, *The European Jurispru-*

mits states a certain discretion "to decide whether a given course of action is compatible with" Constitutional requirements[8] unless such discretion departs from a generally accepted consensus of the community.[9] The margin of appreciation principle is a European innovation. It has been basic to the interpretation by the European Court of Human Rights of the European Convention of Human Rights.[10] It has also been used by the European Court of Justice in interpreting the obligations of Member States within the European Communities.[11] The principle is applied by analogy by Canadian courts.[12] Some have also suggested application of the principle in other contexts, for instance in the context of regulation of international trade.[13] Considering the development of an American constitutional principle of deference provides valuable context and perspective into the broad jurisprudential project of the Supreme Court liberated from the peculiarly provincial form in which discussion of the judicial role in constitutional interpretation is usually conducted.[14]

The basis of this remaking of the Court has been the increasing discomfort, at least among some of the Justices, that Constitutional jurisprudence and the common-law may be mutually exclusive, or at least that the broad methods of the common law must be diffidently applied to the in-

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dence of Human Rights, 43 MD. L. REV. 463, 496 (1984).

8. DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 215 (1996).

9. On the doctrine of consensus, *see* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 849-53 (1999). *See also* discussion *infra* Part III.

10 *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Human Rights Convention] (entered into force September 3, 1953).

11. For example, the European Court of Justice has permitted Member States a wide latitude in regulation which might otherwise impermissibly interfere with the free movement of goods where the uncertainties of scientific assessment prevents the creation of a consensus on the appropriate level of regulation within the European Community. *See, e.g.*, Case 174/82, Criminal Proceedings Against Sandoz BV, 1983 E.C.R. 2445 (prohibition of importation into one Member State from another of food containing addition of vitamins A and D); Case 94/83, Criminal Proceedings Against Albert Heijn BV, 1984 E.C.R. 3263 (regulation of vinchlozoline residue on fruit resulting in prohibition of importation into one member state of apples produced in another).

12. *See* Paul Michell, *Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter*, 23 YALE J. INT'L L. 141, 170-73 (1998) (arguing for the transposition of the margin of appreciation principle to international extradition).

13. *See, e.g.*, Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy* 39 HARV. INT'L L.J. 357 (1998).

14. For a defense of the comparative method in rights discourse, *see* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

terpretation of the fundamental law of the land.[15] Justice Scalia has been the most candid and enthusiastic advocate of the shift in the Court away from a common-law to a more civil law oriented approach to statutory and constitutional interpretation.[16] But the advocates of the civil law approach to American constitutional interpretation are nothing if not inconsistent. Leading the pack in this respect, perhaps, is Justice Scalia. While our civilian-friendly judges would like to purge constitutional interpretation of its common law elements, they tend to avoid a fuller embrace of the approach of civilian courts in constitutional construction. I argue here that what appears to judges like Justice Scalia to be a variant of the common law sin, in matters of constitutional interpretation, of permitting unelected judges to decide what the law is[17] may instead evidence the development of an American variant of the civil law general principle of margins of appreciation.[18] Ironically, the end result may not be different

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15. "Common-law courts performed two functions: One was to apply the law to the facts. All adjudicators – French judges, arbitrators, even baseball umpires and football referees – do that. But the second function, and the more important one, was to make the law." SCALIA, *supra* note 3, at 6. This represents a change from the stance of judicial conservatives of a prior era. *See, e.g.*, Norman Dorson, *John Marshall Harlan, in* THE WARREN COURT: A RETROSPECTIVE 236 (Bernard Schwartz ed., 1996) ("Harlan saw himself primarily as a judge deciding cases rather than as an ideological dispenser of general doctrine, as Rehnquist sometimes appears to be." *Id.* at 248).

16. *See* SCALIA, *supra* note 3. In advocating what he calls textualism and original understanding as the proper basis for judicial interpretation of statutes and the constitution, Justice Scalia argues that the methods and philosophy of the common law are dangerous. He suggests "that once we have taken this realistic view of what common law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers) becomes apparent." *Id.* at 10. As a result, interpretation of statutes and constitution cannot be treated "as simply an inconvenient modern add-on to the [judiciary's] primary role of common-law lawmaker. Indeed, attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation." *Id.* at 14.

17. Scalia states:

> [t]he ascendant school of constitutional interpretation affirms the existence of what is called the Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law.

Id. at 38.

18. I offer a small caveat here. I do not intend to write here about statutory or constitutional interpretation as such. The controversy over the appropriate approach to statutory interpretation has been a matter of a lively debate. The scope of that debate is hinted in Justice Scalia's work. For a good basic discussion of the issues, with good references to important studies in the field, *see* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION (2000); KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: TWENTY QUESTIONS (1999).

results in particular cases, but a more principled basis for reaching these results.[19]

Part II begins with a consideration of the pragmatic American approach to the problem of politics in constitutional construction. In the U.S. the discussion about judges, courts and constitutional interpretation revolves around the pragmatic concern with intervention in the political sphere. To focus the discussion, I examine this problem through Justice Scalia's critique in *Romer*.[20] Self-described traditionalist judges like Justice Scalia decry judicial interventionism in constitutional interpretation. The interpretive project is flawed to the extent that the techniques of the common-law are applied to a quintessentially political document like the federal Constitution, and therefore solely subject to change through the political process. Yet traditionalists, like their counterparts, the 'liberal elite,' are equally eager to exercise 'will' and not 'judgment' in their rush to capture the hermeneutical machinery of the judiciary.[21] Indeed, it has been common since the founding of the Republic for courts intervene in

19. This result should not be all that surprising. Perhaps the reason was best expressed somewhat cynically by Eric Heinze when he noted that "[w]hen the judge can draw upon six ancillary doctrines, with no clear rules dictating those doctrines' meanings, scope or hierarchy inter se, it matters not a whit what the judges' rationale is for reaching a decision, as one or another of these ancillary doctrines will justify any outcome." Eric Heinze, *Principles for a Meta-Discourse of Liberal Rights: The Example of the European Convention on Human Rights*, 9 IND. INT'L & COMP. L. REV. 319, 329 (1999). Compare the common-law classic critique of canons of construction, *see* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950) (arguing that canons exist to support both sides or any argument over interpretation).

20. Romer v. Evans, 517 U.S. 620 (1996) (amendment to state constitution effected through a statewide voter referendum which precluded all legislative, executive or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" violated the Equal Protection Clause of the federal Constitution). I do not attempt a detailed legal analysis of the case here. I focus here on the rhetorical value of the case, that is, the literary value of *Romer*. For a discussion of the construction of the law of *Romer* as black letter, *see, e.g.*, Larry Catá Backer, *Reading Entrails: Romer, VMI and the Art of Divining Equal Protection*, 32 TULSA L. J. 361 (1997); Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893; Tobias Barrington Wolff, Note, *Principled Silence*, 106 YALE L. REV. 247 (1996); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996); Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996); ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND THE AMERICAN DECLINE (1996); Cass R. Sunstein, *Foreward Leaving Things Undecided, The Supreme Court 1995 Term*, 110 HARV. L. REV. 4 (1996).

21. *See* Bernard Schwartz, *"Brennan v. Rehnquist" – Mirror Images in Constitutional Constructions*, 19 OKLA. CITY U. L. REV. 213 (1994).

this way without the slightest concern for a long time.[22] Every judgment is political, at least in the sense that it constitutes a pronouncement of what socio-culture mores *are*; not what it will be or might be or can be. *Que será* is a function for juries and the legislature in England, and for republican government in the United States. [23]

Part III recasts the American debate. Assuming that what appears to be a judicial debate about the propriety of the imposition of 'political' judicial solutions to particular problems is instead, a struggle over the application of a general principle of deference, a margin of appreciation, to state action, the article considers the development of the doctrine of margin of appreciation in Europe. The general principle of margin of appreciation has been well developed by the European Court of Human Rights (ECHR) which oversees the European Convention for the Protection of Human Rights and Fundamental Freedoms.[24] That approach also has been used effectively in the European Union.[25] The ECHR's sexual

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22. For an early example, *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (court has the power to review state and federal legislation for conformity to constitutional limitations). For a later example, *see* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 450 (1857).

23. For a discussion of lawmaking in the context of proscriptive norm making, *see* Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture*, 20 B.C. THIRD WORLD L.J. 291. The solution for traditionalist critics of intervention is originalism, substituting a political predilection of the enacting legislature for that of the interpreting judge. Originalism and intervention are the code words used by traditionalists to define the opposite poles of their interpretive universe.

24. Human Rights Convention, *supra* note 10. The enforcement proceedings can be complex. Complaints are first reviewed by the European Commission of Human Rights. Complaints not resolved by that body are usually (but not always) referred to the European Court of Human Rights. Sometimes complaints may be referred to the Committee of Ministers (although decisions of this body may also be appealed to the European Court of Human Rights). Decisions of these bodies are usually (but not always) given specific effect. *See* Helfer,supra note 6, at 1047-53. By March, 1994, all but one of the signatories of the Human Rights Convention had signed Protocol No. 11 pursuant to which the present system of enforcement will be replaced by a single permanent court modeled on the European Court of Justice. *See* Andrew Drzemczewski & Jens Meyer-Ludwig, *Principal Characteristics of the new ECHR Control Mechanism as Established by Protocol No. 11*, 15 HUM. RIGHTS L. REV. 81 (1994)

25. *See* Case 13/96, P. v. S. & Cornwall County Council, 2 C.M.L.R. 247 (1996) (termination of transsexual violated European Union's sex discrimination directive). For a discussion of this case within the context of the contradictions of the European Union's "constitutional" imperatives, *see*, Larry Catá Backer, *Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems*, 4 TULSA J. COMP. & INT'L L. 185 (1997). The European Court of Justice is currently considering whether sexual orientation discrimination in employment is sex discrimination prohibited by the organic law of the European Union. *See* Case 249/96, Grant v. South-West Trains, Ltd., 1 C.M.L.R. 993 (1998).

rights decisions, and in particular cases such as *Dudgeon*[26] and *Norris*,[27] provide a useful illustration of that approach.

Recasting the American debate in terms of the general principle of deference represented by the margin of appreciation has great utility in the U.S. constitutional context.[28] I conclude in Part IV with an examination of two decisions, *Bowers* and *Romer*, in the tradition of the European civil law based courts. On that basis it is clear that *Bowers* is a decision in trouble (and much criticized *precisely* because Court refused to impose the now well established legal consensus on the limitations of the use of the criminal law to regulate the sexual activities of sexual minorities in the United States). On the other hand, the *Romer* court applied an established political consensus to prohibit Colorado's attempt to deviate from that consensus, rendering a decision far less problematic for the judicial culture. The Court shied away from any pronouncement on questions still very much open to cultural discussion,[29] limiting its pronouncements to

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26. Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981) (N. Ireland buggery and gross indecency laws applied to adult private consensual activities violated Art. 8(s) of the Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222). The court found that the governments reasons for justifying the legislation to be insufficient in that

> the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicants private life to such an extent. 'Decriminalization' does not imply approval and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.

Id. ¶ 61.

27. Norris v. Ireland, 13 Eur. H.R. Rep. 186 (1988) (Irish buggery and gross indecency laws applied to adult private consensual activities violated Art. 8(s) of the Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222). In determining that the Irish government had breached Article 8 of the Convention, the court extensively cites *Dudgeon* and concluded, as did the *Dudgeon* court, that "it cannot be maintained that there is a 'pressing social need' to make such acts criminal offenses." *Id.* ¶ 46.

28. Others have attempted to employ the reasoning of the European approach to American jurisprudence. *See, e.g.*, Markus Dirk Dubber, Note, *Homosexual Privacy Rights Before the United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies*, 27 STAN. J. INT'L L. 189 (1990) (differences in historical methodology can explain difference in approaches to privacy jurisprudence between the U.S. and Europe); James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33 (1995); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis* 41 HASTINGS L.J. 805 (1990).

29. Thus the wisdom of the majority's silence on *Bowers*, much criticized by Justice

explanations of basic rules for determining the ways our political society may determine the nature of participation in our Republic.

II. THE PROBLEM IN JURISPRUDENTIAL CONTEXT

Justice Scalia accuses the majority in *Romer v. Evans*[30] of crafting a political decision – of acting like a legislature. Justice Scalia bemoans the state of events in which "[t]he Court has mistaken a Kulturkampf for a fit of spite."[31] For him, as for some traditional liberals,[32] where culture is at the root of a case, the courts ought to stay their hand. Such *kampfen* are "left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions."[33] Justice Scalia here applies the arguments of twentieth century pragmatists,[34] but with a twist. The twist combines the realist assumption that all judging is the imposition of personal predilection with the idea that common-law judicial lawmaking is especially inappropriate when a court must interpret law made by a democratically constituted legislative body, to produce a principle of judicial interpretation based on the application of the understanding of the meaning of a legislative provision at the time of its making.[35] Only in this way, it is argued, can the court's avoid the personal and resist the temptation to revise the constitution through the law making art of common law judicial hermeneutics.

Justice Scalia has made this argument frequently, though usually only when he thinks he is on the losing side of the argument.[36] Justice

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Scalia in dissent. For a different perspective on the majority's silence respecting Bowers, *see, e.g.*, Jacobs, *supra* note 20.

30. 517 U.S. 620 (1996) .

31. *Id.* at 636 (Scalia, J., dissenting).

32. For a discussion of liberal incrementalism and minimalism, *see, e.g.*, Sunstein, *supra* note 20.

33. Romer, 517 U.S. at 636 (Scalia, J., dissenting).

34. For a comparison of legal realist and traditionalist views of statutory interpretation, *see* Kent Greenawalt, *Variations on Some Themes of a "Disporting Gazelle" and His Friend: Statutory Interpretation as Seen by Jerome Frank and Felix Frankfurter*, 100 COLUM. L. REV. 176 (2000) (comparing the approaches of Frankfurter and Frank). Justice Scalia accepts the core learning of the legal realists but for the purpose of rejecting their project of judging as essentially anti-democratic. *See, e.g.*, SCALIA, *supra* note 3 ("It is only in this century, with the rise of legal realism, that we came to acknowledge the judges in fact 'make' the common law, and that each state has its own." *Id.* at 10).

35. *See* SCALIA, *supra* note 3, at 37-39.

36. Thus, for example, in United States v. Virginia, 518 U.S. 515 (1996), a dissenting Justice Scalia scolded his colleagues for their constitutionalization of proscriptions of previously lawful single-sex state supported educational institutions. "The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-

Scalia is at least half right. Courts craft political decisions. Yet, Justice Scalia's jurisprudential project is no less political, or intrusive, than those of the decisions he so loudly decries. Every exercise of constitutional interpretation, including the determination that the Constitution does not forbid an exercise of state or federal governmental discretion, is a political pronouncement. Each shapes the way our society must gauge its adherence to the basic law of the land. Each such pronouncement is authoritative law in the United States, every bit as effective as legislative acts.[37] The battle over the propriety of courts serving as the ultimate interpreter of constitutional authority was determined within decades of the establishment of the Republic,[38] though only by judicial pronouncement backed ultimately by a successfully fought war that ended in 1865.

Like legislative pronouncements, judicial hermeneutics are not a permanent scar on the face of the eternal federal Constitution – not even when the mutilation is accomplished by as skillful an artist as Justice Scalia.[39] The emerging European Courts, charged with the interpretation of the fundamental law of that conglomeration, have increasingly demonstrated both the ease and necessity of judicial political hermeneutics.[40]

For Justice Scalia, *Romer* was a quintessential, and aberrational political case. It was not about law but about political power. The politics here, of course, was one of choice – that is a choice between two constitutional traditions. Justice Scalia is unhappy with the choice the majority made and calls it mere politics from which the court should flee. Perversely, he himself would not have hesitated to make a choice in that

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smuggled-into-law." *Id.* at 569. *See also* Lee v. Weisman, 505 U.S. 577 (1992) (religious invocations at school ceremonies prohibited under First Amendment; Justice Scalia in dissent scolded the majority for a decision based on their "changeable philosophical predilections." *Id.* at 632 (Scalia, J., dissenting)). On occasion, though, Justice Scalia is able to weave his own "changeable philosophical predilection" into the fabric of the constitutional jurisprudence of the court itself. *See* Employment Division v. Smith, 494 U.S. 872, 890 (1990) (use of peyote in ceremonial of native religious practice).

37. On the creation of a basic law of judicial construction through the imposition of general principles of constitutional law, *see* Backer, *supra* note 5.

38. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

39. Alexander Hamilton reminded us that

> it is not to be inferred from this principle [the power of the people to alter or amend the Constitution] that the representatives of the people, whenever a momentary inclination happens to lay hold of the majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had to proceeded wholly from the cabals of the representative body.

THE FEDERALIST NO. 78, at 469-70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

40. *See infra* Part III.

case. He makes that quite clear. That choice, however, he would no doubt have labeled jurisprudence. Yet, politics it remains. I examine the charge of politics hurled by Justice Scalia at the *Romer* majority, and use that argument from politics to interrogate the necessarily political nature of judicial decision making and the consequences of those politics.

Colorado's Constitution was amended by will of a majority of voters to provide that:

> "[n]either the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."[41]

In *Romer v. Evans*, six justices of the Supreme Court, speaking through Justice Kennedy declared the quoted provision invalid as a violation generally of our cultural "commitment to the law's neutrality where the rights of persons are at stake,"[42] and specifically of the Equal Protection Clause of the Federal Constitution. Amendment 2 impermissibly created a solitary class of people for the purpose of withdrawing from them specific legal protections against discrimination as well as forbidding the reinstatement of those legal protections.[43]

Humbug! vents Justice Scalia in dissent.[44]

> "There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. . . . The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, . . . those who engage in homosexual conduct . . . [seek to use their political power] to achiev[e] not merely a grudging social toleration, but full social acceptance, of homosexuality."[45]

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41. Romer v. Evans, 517 U.S. 620, 624 (1996) (quoting Colo.Const., Art. II, § 30b).

42. *Id.* at 623.

43. I leave discussion of the majority opinion for later. *See infra* note 84. *See also* articles cited *supra* note 2.

44. *See* Romer, 517 U.S. at 636-53 (Scalia, J., dissenting).

45. *Id.* at 645-46 (Scalia, J., dissenting). The focus, of course, was on what Justice Scalia characterized as the fruits of a political battle, that is, legislation benefiting one group at the expense of its political enemies and done within the basic process guaranteed under our republican form of government. In this case, the spoil of the democratic process was the elimination of a political rival from the field through the enactment of an amendment. Amend-

Justice Scalia, along with the Chief Justice and Justice Thomas, are understandably frustrated with the ramifications which the "liberal" decision to "decriminalize" homosexual conduct, taken a generation ago, has produced.[46] Like Chicken Little,[47] Justice Scalia inveighs against an interference by the Supreme Court in the political processes of Colorado. As Justice Scalia well knows, law is politics, and politics is a game in which the Courts ought not to interfere (except to preserve the status quo).[48] Indeed, the game becomes dangerous for our political system as the Court indulges its taste for a politics of change camouflaged with the high sounding language of constitutional theoretics. And besides, since when was it in appropriate to dislike 'homosexuals' even as a matter of law?!

In a sense, though, Justice Scalia is right. There is a "homosexual agenda" to which the good Justice apparently subscribes.[49] This "agenda"

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ment 2, after all, had been adopted by popular referendum. The Colorado Supreme Court struck down the amendment. *Id.* The U.S. Supreme Court granted certiorari, 513 U.S. 1146 (1995), and affirmed under the name Romer v. Evans, 517 U.S. 620 (1996). For a critical discussion of the use of initiatives as a means of expressing the popular will, *see, e.g.*, William R. Adams, *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny and Direct Democracy*, 55 OHIO ST. L.J. 583 (1994).

46. On the ramifications of the liberal approach to decriminalization of "homosexual" conduct and the limitations of that approach, *see* Larry Catá Backer, *Exposing the Perversions of Toleration: the Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755 (1993).

47. I refer, of course, to that barnyard animal who, having been hit on the head with a falling acorn, roused the community of his farm animal friends to action with the declaration that the sky was falling. As it turns out, the sky did not fall, but barnyard discipline was maintained, group norms affirmed, and the vigilance of the barnyard against any evidence of 'falling sky' increased.

48. I have elsewhere explored the way in which law, in the form of state constitutional interpretation, is used to build judgment into standardized characterizations of litigants, and use those constructed characterizations to resist constitutional reinterpretation. *See* Larry Catá Backer, *Constructing a 'Homosexual' for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996).

49. On the "homosexual agenda," *see, e.g.*, Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209 (examining the ways legislatures, in this case the Utah legislature, can act to mythologize homosexuals as a class deserving violent treatment). This agenda appears to be a favorite of so-called traditionalist legislators as Professor Kogan shows.

> Their social agendas, speaking of homosexuals, is clear. Destigmatize, legitimize and gain privilege. They say they seek equality, but the very nature of their existence only lends itself to contention as they move their way into the value system of middle America. They ask for something they can only achieve through despotism; forcing Americans to accept homosexual sodomy as they do their own heterosexuality. What begins as

seeks to "move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation."[50] While the relevance of this 'agenda' to the issue strictly before the court was questionable at best, Justice Scalia brings the issue to the forefront of the discussion in the opinions. Justice Scalia would subvert law through politics – where identifiable groups might benefit from a particular outcome, any decision by a court is political; and political decisions are nonjusticiable. It would follow that any objection to laws adversely affecting groups which have been traditionally the object of the disapproval of other groups invariably raises all issues affecting these denigrated groups to the level of politics, and therefore beyond the reach of the courts.[51]

The implications of this argument are even more appealing when applied to contain the habits and practices of groups at the margins of dominant society. Perversely, perhaps, I assert that it is even more appealing when applied to dominant group agendas. *Inverted,* Justice Scalia's arguments have great force. In the guise of tradition, the concerns and benefits accorded dominant groups have always masqueraded as law, even constitutional law.[52] For there is also a "traditionalist

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a call for equality will naturally lead to a call for privilege.

Id. at 223 n.83.

50. Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 NEB. L. REV. 723, 724 (1993). *See, e.g.,* SHANE PHELAN, GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS 57-75 (1994); RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW (1992); Patricia A. Cain, *Litigating for Gay and Lesbian Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).

51. Power, tradition, and the force to control both, thus, belong to those who can control the machinery of government. Jurisprudential niceties apply only at the margin, as the locus of protection for the exercise of legislative discretion within the black letter of the fundamental law. But tradition and traditional practice must necessarily remain supra-constitutional. The relationship of accommodation to power to control of the legislative function was clearly enunciated in *Employment Division*:

> But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Employment Division v. Smith, 494 U.S. 872, 890 (1990).

52. One of the better articulations of the notion that tradition is its own pedigree, is found in Burnham v. Superior Court, 495 U.S. 604 (1990). There Justice Scalia succinctly expressed his overarching hermeneutical premise: "The short of the matter is that jurisdiction

agenda" which Justice Scalia deliberately and consciously serves quite well. This agenda serves traditional culture as it is popularly understood by the 'common man.' These understandings are embodied in the "plebeian attitudes that apparently still prevail in the United States Congress."[53]

But traditionalism is a neurotic overlord.

> What seems to tell in favor of traditionalism, then, is the fact that it is simple to apply. When making political decisions in accordance with the traditional method we simply rely on our own habits and prejudices and on the habits and prejudices of people concerned by the decisions. However, ... [t]raditionalism . . . seems not to operate unless there is a unanimous opinion among people concerned about what are and are not relevant similarities. There is a traditional way of dealing with this problem, too, however. It is to narrow down the scope of those whom we consult before making a decision. In the limiting case the people who govern do not consult anyone at all besides themselves.[54]

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based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Id.* at 619. The danger, of course, is one that Justice Scalia ignores as he furthers his project of "inscribing one after another of [his] preferences . . . into our basic law." United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting). Scalia's formalism, like that of his ideological enemies, is equally able to stymie our "free[dom] to change." *Id.* As Justice Brennan noted, somewhat ironically in dissent in *Burnham*, "[a]lthough I agree that history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements, I cannot agree that it is the only factor such that all traditional rules of jurisdiction are ipso facto, forever constitutional." Burnham v. Superior Court, 495 U.S. 604, 629 (1990) (Brennan, J., dissenting).

53. Romer v. Evans, 517 U.S. 620, 653 (Scalia, J., dissenting).

54. TORBJÖRN TÄNNSJÖ, CONSERVATISM FOR OUR TIME 49 (1990). Critical Race theorists have long argued this point, but from the perspective of those who always fall outside the ambit of the group whose unanimous opinion constitutes "tradition." Thus, for instance, Richard Delgado has argued that traditional American notions of merit have no relevance to groups excluded from the process of creating the "meritocratic tradition." *See* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?* 89 MICH. L. REV. 1222 (1991). Like Justice Scalia's traditionalism, then, critical race theory understands that whiteness can be viewed as the place from which definition begins. Its legal ramifications have been explored as part of the project of critical race theory. *Cf.* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). It's regulatory potential as between subordinated groups has also been explored. *See* Lisa Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993) (using an analysis of the "white over colored supremacy" to understand the 1992 Los Angeles riots). The problem of definition was succinctly observed by Audre Lorde: "[f]or Black Women as well as Black men, it is axiomatic that if we do not define ourselves for ourselves, we will be defined by others for their use and to our detriment." AUDRE LORDE, *Scratching the Surface: Some*

And yet this is precisely what Justice Scalia tells us embodies the nefariousness of the interpretive follies of the non-elected (liberal) judicial elite sitting on the court!

One can see, then, that the courts serve the traditionalist agenda as well as it serves any other. Indeed, in the law constraining sexual minorities, the courts appear to better serve narrowly interpreted traditionalism than it serves any other interest. In this endeavor, the courts have served miserably as agents of the liberal elite in its efforts to impose its will on the unsuspecting and restive masses of the ignorant, including the ignoramuses in Congress. The courts *do* serve tradition, but a tradition which is the synthesized product of that small group of judge-priests who have anointed themselves as the only true speakers of tradition. *That* group necessarily includes Justice Scalia and the courts when it suits him; it apparently does not include any judicial adherents to other "systems of authority and allegiance."[55] The courts are meant to serve as guardians of the understandings of this *homo americanus* against an elite with culturally totalitarian habits. Courts err when they impose on "all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality . . . is evil."[56] And yet in this role of preserver of the tastes of the mythical 'common (straight) man' the courts have cultivated a distorting sexual totalitarianism far more perversive than anything attempted by the *Romer* majority.[57]

Thus, Justice Scalia moans overmuch about decisions like *Romer* as inhibiting the ability of *homo americanus* "to prevent the piecemeal dete-

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Notes on Barriers to Women and Loving, in SISTER OUTSIDER: ESSAYS AND SPEECHES 45 (1984).

55. TÄNNSJÖ, *supra* note 54. Tännsjö gives as an example "Polish society, where a conservative Catholic Church was facing a conservative Communist Party. However, in situations like these, it is to be expected that a *modus vivendi* will be obtained, if for no other reason, simply because both of these conservative bodies will fear a radical workers' movement." *Id.*

56. Romer v. Evans, 517 U.S. at 636 (Scalia, J., dissenting).

57. Indeed, the courts have used the narrative of sodomy, the aggregate of the stories of the sodomy litigants appearing before them, to construct a normative 'homosexual' type which can be used to construct a status quo of disgust largely resistant to jurisprudence.

> These images confirm the value of popular folklore about the essence of the "average" sexual non-conformist. As products of this (constructed) narrative, sexual non-conformists — objects of revulsion — are not worth judicial effort; so fundamentally disgusting, they provide the courts with a powerful source of resistance to the decriminalization of (homo)sexual conduct. Courts are certainly empathizing, but the result is the erection of narrative walls of antipathy towards sexual non-conformists.

Backer, *supra* note 48, at 536.

rioration of the sexual morality favored by a majority of [in this case] Coloradans."[58] Quite the opposite is true. As Justice Scalia himself observes, the "society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful."[59] In this sense there is a core of truth in Justice Scalia's observation: there is a problem when conduct is decriminalized but retains a strong social and moral taint. Decriminalization within the context of social and moral condemnation has created a means for regularizing the status of sexual minorities.[60] It provides a judicially tolerated basis "by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[61] But decriminalization has not disturbed cultural norms except perhaps at the margin. Indeed, decriminalization was meant to preserve, the vast power of society to impose substantial costs of those who belong to these sexual minorities. Here, politics is sanctioned by the imprimatur of a majority.[62]

Of course, that is the problem, for Justice Scalia chides the majority in *Romer* for doing precisely this. But, then, of course, he is unhappy with the *result* in *Romer* and not with the form of action undertaken by the courts generally. Justice Scalia is then forced to play politics himself. Taking the role of Caesar to the *Romer* majority's Pompey, Justice Scalia exclaims: "[w]hen the Court takes sides in the culture wars, it tends to be with the knights rather than with the villeins – and more specifically the

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58. Romer v. Evans, 517 U.S. at 653 (Scalia, J., dissenting).

59. *Id.* at 645 (Scalia, J., dissenting).

60. The notion applies to other minorities as well. As Justice Scalia noted in another context,

> [v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Employment Division v. Smith, 494 U.S. 872, 890 (1990).

61. Romer v. Evans, 517 U.S. at 636 (Scalia, J., dissenting). While outside the scope of this essay, it is interesting to note the hints of the techniques of plain, traditional, and old-fashioned Jew-baiting implicit in Justice Scalia's dissent. *See, e.g., id.* at 645. "[T]hey possess political power much greater than their numbers" and they enjoy "enormous influence in American media and politics." *Id.* at 652. For a discussion of the relationship between the techniques of classical Jew-baiting and those of gay-baiting, *see* DIDI HERMAN, NORMALCY ON THE DEFENSIVE: THE CHRISTIAN RIGHT'S ANTI-GAY AGENDA (Chicago 1996).

62. While outside the scope of this paper, consider the jarring antimonies between Justice Scalia's political majoritarianism and James Madison's anti-factionalism. For the latter, *see* THE FEDERALIST NO. 10 (James Madison).

Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."[63] Justice Scalia is particularly troubled by the manner in which judicial participation in the culture wars distort the level playing field of politics.[64]

Thus, the "game-stopping" arbitrariness of Supreme Court constitutionalism undermines "that fortress which is our Constitution," by resting on the quicksand of "the changeable philosophical predilections of the Justices of this Court;" constitutionalism "must have deep foundations in the historic practices of our people." As such, for Justice Scalia, the core fatality of constitutional hermeneutics is the result when the Court takes sides – pronouncements always tend to terminate the argument. That, after all, is his sense of the nature of Constitutional adjudication.

> The virtue of the democratic system with a First Amendment 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. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our basic law.[65]

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63. Romer v. Evans, 517 U.S. at 652 (Scalia, J., dissenting).

64. Thus, in Lee v. Wiesman, 505 U.S. 577 (1992), the Court was chided in terms similar to that used in *Romer*:

> [i]n holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court – with nary a mention that it is doing so – lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense. See Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954). Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.

Id. at 631-32 (Scalia, J., dissenting).

65. United States v. Virginia, 518 U.S. 515, 566 (Scalia, J., dissenting). This parallels similar views expressed in an earlier establishment clause case, where Justice Scalia, in dis-

But Justice Scalia is playing cute. Indeed, there is much of the anti-federalist in Justice Scalia's arguments.[66]

But such an argument ignores the vast hermeneutical possibilities within constitutional adjudication. It obliterates the knowledge that *Lochner*[67] and *West Coast Hotels*[68] flow from the same words. It ignores the reality that *Plessy*[69] and *Brown*[70] were products of the same Constitutional parent. It misunderstands the false traditionalism of *Reynolds*.[71] It misunderstands the political, jurisprudential, and interpretive facility of the judiciary. What could be more fundamentally political than the shift from *Swift*[72] to *Erie*?[73] Consider the normative shifts which produced *In-*

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sent rebuked the court for its constitutional hermeneutics, the direction of which was not to his taste. For him, such interpretiveness "continues, and takes to new extremes, a recent tendency in the opinions of this Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration." Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 752 (1994) (Scalia, J., dissenting).

66. Certainly, the mistrust of the judiciary is as old as the founding of the Republic. Consider the similarity of Justice Scalia's reservations with arguments made more than two hundred years earlier, arguments on the losing side of the ratification debate.

> They [the courts] will give the sense of every article of the Constitution that may come from time to time before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the Constitution.

Anonymous, *On the Power of the Judiciary*, *in* 3 THE ANNALS OF AMERICA (1968) (article first appearing under the pseudonym "Brutus" in the New York Journal and Weekly Register, January 31, 1788). For a discussion of the Anti-Federalist position on the judiciary, *see, e.g.*, JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788 125-26 (1961).

67. Lochner v. New York, 198 U.S. 45 (1905).

68. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (repudiating *Lochner's* construction of Constitutional restraints on state legislation in the course of affirming a Washington State wage law).

69. Plessy v. Ferguson, 163 U.S. 537 (1896).

70. Brown v. Board of Education, 347 U.S. 483 (1954) (the last formal repudiation of *Plessy* in the context of public education).

71. Reynolds v. United States, 98 U.S. 145 (1879) (upholding polygamy conviction of a Mormon).

72. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (federal courts were free to apply general law principles in diversity cases and courts were to follow the general law rather than state law in diversity cases where state law deviated form the general law). There was a time when judges believed that the law was a unitary substance, knowable but for the imperfection of the judges seeking it out. Case law represented a striving for this perfect and necessarily unitary conception of law.

73. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) (federal courts must follow state substantive law in diversity actions). "Experience in applying the doctrine of *Swift v. Tyson*

ternational Shoe[74] from the underlying world view encapsulated in *Pennoyer.*[75]

The hermeneutics of law is a function of the Courts – and it is a peculiarly political function. It is far too late in the day to carry on about our common law judges as interpreters of a dynamic text. That has been a function of judges in the Jewish and Christian traditions from the beginning of the dominance of that tradition.[76] And it certainly suits a traditionalist like Justice Scalia to "inscib[e] one after another of [his] current preferences [based solely on his singular interpretation of acceptable traditional normsl . . . of society . . . into our basic law."[77]

And so, it should be clear to us that Courts engage in the basic exercise of interpretation of our core political document all the time. All such interpretations are *necessarily* political. Most are not problematical because of the existence of a substantially singular view on the subject of the interpretation. In the usual course, it follows that in this endeavor the Court acts as the willing handmaid of the dominant ideology as expressed in the popular culture and to the detriment of sexual minorities seeking

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had revealed its defects, political and social." *Id.* at 74.

74. International Shoe Co. v. Washington, 326 U.S. 310 (1945) (adopting minimum contacts analysis for determining the constitutional limits of personal jurisdiction over 'absent' defendants).

> But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316. Justice Scalia is fond of emphasizing the last part of the quoted passage. Far more interesting is the first part of the sentence. "Traditional notions" tend to shift as society shifts, and the role of the Court as interpreter of the 'basic law' is to change along with it. The obligation to interpret, and adjust, is itself traditional in our Republic.

75. Pennoyer v. Neff, 95 U.S. (5 Otto) 714 (1877) (in accordance with general principles of international law; personal jurisdiction may be exercised only on persons or things within the territory of the forum).

76. As I have elsewhere explained, there is a Biblically derived normative core to Anglo-American notions of judging.

> The Biblical resonance is inescapable: "And when the Lord raised them up judges, then the Lord was with the judge, and delivered them out of the hand of their enemies all the days of the judge: for it repented the Lord because of their groanings by reason of them that oppressed them and vexed them."

Backer, *supra* note 48, at 543 (quoting Judges 2:19).

77. United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting). For a trenchant analysis of the radicalism of the new so-called judicial conservatives, *see* Schwartz, *supra* note 21.

"to use the legal system for reinforcement of their moral sentiments [to which they are entitled] as are the rest of society."[78] The great ally of the sexual majority continues to be an aggressive *court* system.

The enforcement of a legalized code of moral and social disapprobation has traditionally provided the sexual majority with the means to impose their will on sexual minorities *through law*.[79] There is a consensus in this country that sexual moral standards can be enforced, and thus, government ought to be given a wide margin of discretion in the construction and enforcement of these conduct codes. Justice Scalia fears this margin of appreciation has been lost in the law crafted by *Romer*.[80] But what Justice Scalia understands and (from his perspective, quite correctly) forgets is that the majority of Supreme Courts,[81] including the federal Supreme Court much of the time,[82] continually involve themselves in what Justice Scalia characterizes as the political process by declaring that states retain a wide latitude to declare that animus toward homosexuality is good, and on that basis to act. The courts *have* acceded to the pronouncement that sexual deviance is evil, and will continue to do so. Courts have used that pronouncement, that disapprobation, in acts not of "judicial judgment, but of political will."[83]

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78. Romer v. Evans, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting).

79. Justice Scalia correctly expresses the common view:

> [i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct. . . . And a fortiori it is constitutionally permissible for a State to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protection upon homosexual conduct.

Id. at 641 (Scalia, J., dissenting).

80. This point is nicely articulated by Andrew Jacobs:

> gay rights advocates and gay litigants attempted to litigate around Bowers by arguing that the due process holding of Bowers was unrelated to whether the Equal Protection Clause sheltered gays as a class. Gay rights advocates lost this argument, as antigay litigants persuaded courts of the wisdom of Justice Scalia's a fortiori argument [517 U.S. at 641]. Now, however, those precedents switch teams, and become gay law: if it is constitutionally impermissible under the rational basis standard for a state to adopt a civil law which does not even greatly directly burden homosexual conduct, because moral disapprobation of gays is a form of bigotry against the powerless, then a fortiori, criminal laws targeting gays for greater social disadvantage should also be impermissible.

Jacobs, *supra* note 20, at 962-63.

81. For a discussion of the jurisprudence of disapprobation inherent in the sodomy law rulings of state supreme courts over the last thirty years, *see* Backer, *supra* note 48.

82. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986).

83. Romer v. Evans, 517 U.S. at 653 (Scalia, J., dissenting).

What follows is not what Justice Scalia fears – the ability of this minority to undermine the sexual moral order of the majority *through law*. Instead, the *Romer* majority reasserted the American consensus that preserving the sexual moral order may not be furthered by endangering the foundations of the majority political order. Indeed, the *Romer* majority did not suggest that social animus toward homosexuality was bad – it merely indicated that *mere* social animus is an insufficient basis on which to restrict the ability of people (with shared characteristics or shared political goals) to resort to the legislative process for self-interested political ends.[84]

III. A COURT OF DEFERENCE AND ENFORCED CONSENSUS

Politics is thus not the dirty word Justice Scalia have it be when attached to the work of the American courts. Consciousness of the political function of courts induce no national trauma nor induce a rush to constitutional therapy for our judiciary. We expect our judges to be impartial in a particular case. [85] We find little cause for concern about the politics of

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84. That is not to say that this, in itself, was not an important jurisprudential insight. Indeed, the Romer majority clearly could be read to indicate a willingness to reconceive the concept of "rational basis." *See* Backer, *supra* note 20. Perhaps taking a hint from several appellate court cases in the "military" cases, the *Romer* majority appeared to follow a more rigorous approach to what constitutes a rational basis for legislation, at least legislation affecting the ability of people to participate in the political process. In this sense, Part III of the majority opinion breaks substantial new ground. What had once been a mindless test of (ir)rationality suddenly has acquired teeth. Thus, the majority suggests that in order to determine constitutional rationality there must exist not only some link between the classification and the object to be obtained, but that objective must now be independent of that classification and serve legitimate legislative ends. Romer, 517 U.S. at 632. Well, so far nothing special. But the majority then goes on to suggest that an illegitimate legislative end is "[animosity] toward the class [of persons] affect[ed]." *Id.* This is new in its baldly stated form, and important. The creation of specific categories of illegitimacy provide the court with a means to discredit the rationales offered by the state in support of the Amendment. This is striking. At least in cases in which economic regulation is not at issue, it appears that the majority has sanctioned a more searching analysis of regulatory rationales "if the law seems unwise or works to the disadvantage of a particular group, or if the rationale seems tenuous." *Id.* The freedom the majority apparently gives the courts to discredit regulatory rationales where broad statutes have a substantial adverse affect on (targeted) groups provide litigants with an opportunity to challenge policy in the courts in a way which was not credibly possible before.

85. *But see* Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996). Our concern seems to be far more with financial or family involvement. *See, e.g.*, 28 U.S.C. § 455 (1996); Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) (appearance of impropriety where judge was a trustee of a party with an interest in the litigation then before him).

judicial decisions when, for example, an African-American female judge must pass judgment on disputes between an African-American female and a white male; we expect our judges to do their duty. [86] Yet we are troubled when Courts interpret our fundamental law in ways which have readily apparent normative or political consequences. In these cases, for both 'progressives' and 'traditionalists,' all hope of impartiality, of the avoidance of the imposition of judicial personal preference, disappears.[87]

The question of politics is unproblematic when interpretations of core cultural norms are relatively similar. "Politics" becomes an issue when large interpretive differences exist in our understanding of those norms. As such, Courts find it 'easiest' to speak for the political when its function is purely interpretive. It finds its voice far less authoritative when it plunges into battles over the identification and implementation of 'definitive' cultural norms. It finds its authority weakened still more when it speaks to end debate by a definitive pronouncement during the course of such a debate. A certain 'margin of appreciation,'[88] a political space, must be maintained for society to know its own mind. Courts serve as a place where that socio-political space is maintained. Courts also serve as a place where the boundaries of this margin may be contested. Such contestation is the essence of modern understanding of the value of courts in the constitutional or big picture, sphere.[89] However, courts cannot be the place where such battles are settled. During the course of the

86. The question of judgment motivated or compelled by religious belief is a more subtle, and increasingly problematical question. For a provocative view of the relationship between religion and governing, *see* John H. Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849 (1993) ("But the dilemma for the observant Catholic . . . is real. The solution is not, as Justice Brennan once suggested, to set aside his religious beliefs. It is to recuse himself, if that is possible, or resign if it is not." *Id.* at 875.).

87. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 261-65 (1990) (traditionalist argument); GIRARDEAU SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1995) ("progressive" perspective).

88. For a discussion of the 'margin of appreciation' as a term of art in the law of the European Union, *see infra* at notes 97-102. For a general discussion of the concept of margin of appreciation, *see, e.g.*, Pieter van Dijk, *The Treatment of Homosexuals Under the European Convention on Human Rights, in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE: ESSAYS ON LESBIAN AND GAY RIGHTS IN EUROPEAN LAW AND POLICY 179 (Kees Waaldijk & Andrew Clapham eds.,1993).

89. *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (case studies of judicial intervention effecting fundamental change in policing, juvenile law, education and the nature of suffrage); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 35 (1991) (on the limitations of the courts' power over social change); LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., 1998) (passim., critical analysis of the power of the courts to effect social and political change).

battle, courts may police 'fairness'[90] but their voice is considerably smaller when they presume to speak for a political unit which has not yet made up its mind.

The real political power of courts as gatekeepers on cultural change through a power of deference and enforced consensus is illustrated in the writing of the European Court of Human Rights. It is a jurisprudence which the European Court of Justice, the judicial organ of the European Union, has subscribed. This has become especially apparent as the European Court of Justice continues an increasingly important project of crafting general principles of law applicable to the European Community legal order.[91]

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90. In this sense, process oriented jurisprudential writers may be right. *See, e.g.,* Jurgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 776 (1996). A number of thoughtful analyses of Habermas' proceduralism can be found in *Habermas on Law and Democracy: Critical Exchanges*, 17 CARDOZO L. REV. 767 (1996). Important, also, in this regard, is the process oriented jurisprudence, increasingly discredited among those with definitive political agendas to further (whether liberal, conservative or 'other'), is Herbert Wechler's classic interrogation of *Brown v. Board of Education. See* Herbert Wechler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-35 (1959). For criticisms of that process centered approach on the basis of various (and opposing) political perspectives, *see, e.g.,* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (politics necessary as the expression of lived historical experience and popular culture expressed as shared social meanings); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988) (process is itself a political choice, and perhaps not a happy one). For a critique of the sort of false hope encouraged by hortatory norm-changing decisions, in the context of the U.S. race cases, *see* Girardeau A. Spann, *Pure Politics, in* CRITICAL RACE THEORY: THE CUTTING EDGE 21-34 (Richard Delgado ed., 1995) (arguing that the Supreme Court retards rather than enhances the ability of subordinated groups to advance their rights based agendas).

91. The issues of the origin, use and limitations of the concept, "general principles of Community law" remain controversial in Europe. I do not discuss those questions here. For a general discussion of the genesis of principles of Community law, *see, e.g.,* EMILIOU, *supra* note 4, at 115-33 (1996); JOXERRAMON BENGOETXEA THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE 71-79 (1993); Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103 (1986). Emiliou suggests four applications of general principles in constitutional interpretation: (i) to guide to interpretation of primary law, (ii) to guide to the exercise of power under the primary law, (iii) to provide criteria for determining the legality of acts, and (iv) to fill in gaps in primary or secondary law to prevent injustice. EMILIOU, *supra* note 4, at 121.

For an example of the enunciation of general principles of law withing the European Community legal order, *see, e.g.,* Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel, 1970 E.C.R. 1125 ("In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions

Political or ethical principles sometimes enter into the legal system disguised as supra-systemic principles allegedly referred to or implied by valid norms of the system or by formal interpretive consequences of these. If such principles are incorporated into the legal system, e.g., through court decision, they might be considered as reasons guiding further decisions, for principles are regarded as general norms having an explanatory and justificatory force in relation to particular decisions or to particular rules for decisions.[92]

The jurisprudence of the European Court of Human Rights, the supreme judicial tribunal established under the Convention for the Protection of Human Rights and Fundamental Freedoms (Human Rights Convention),[93] is based on the perceived utility of regularizing the status quo within the normative framework of the Human Rights Convention. That framework protects, among other things, the right to respect for private and family life (Art. 8), and the freedom to enjoy protected rights without discrimination (Art. 14). The Human Rights Convention, however, permits a state to limit protected rights under a number of circumstances. Art. 8 rights may be limited in the interest of public safety, public order, national security, the protection of health or morals, or the protection of the rights of others, but only if such limitations are "prescribed by law" and "necessary in a democratic society."[94] The European Court of Human Rights had previously stated that: "the requirements of morals varies

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common to the Member States, must be ensured within the framework of the structure and objectives of the Community." *Id.* ¶ 4). Leo Flynn has recently noted the political nature of the interpretive enterprise of the European Court of Justice in connection with the development of the 'constitutional' principle of equal treatment.

> Certain writers have supported such moves [to ignore when necessary the intent of the original legislators] to ensure full protection of minorities' rights, noting that a major ethical challenge for the Community's judicature is the 'realization that vindicating human rights may strain the perception of the Court's legitimacy in judicial, political and social circles', all the while recognising that this task only properly arises when the personnel of the Court are "exercising the discretion the law allows them."

Leo Flynn, *Case C-13/94, P. v. S. and Cornwall County Council, 30 April 1996, Judgement of the Full Court, [1996] ECR I-2143*, 34 COMMON MKT. L. REV. 367 (1997) (citing, in part, J.J. Weiler & Lockhart, *"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence*, 32 COMMON MKT. L. REV. 51-94, 579-627, 627 (1995)).

92. *See* BENGOETXEA, *supra* note 91, at 75 (citing D.N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 260 (1978)).

93. *See* Human Rights Convention, *supra* note 10.

94. Human Rights Convention, *supra* note 10, art. 8. Art. 14, by contrast, supplements the substantive rights accorded by the Human Rights Convention and has no independent existence. *See, e.g.*, N. v. Sweden, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 206 (1985).

form time to time and from place to place, especially in our era."[95] As a consequence, "State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements."[96] Under this interpretive regime, the Human Rights Court imposes a particular interpretation of the signatory states' obligations under the Human Rights Convention only when a clear consensus emerges in the constitutional orders of the signatory states.[97]

The doctrine of deference has been criticized on a variety of grounds. Some commentators have noted that the essence of the principle results in an inevitably arbitrary application of the principle.[98] Others have asserted that the principle is incompatible with the concept of the supremacy of

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95. Handyside v. United Kingdom, 1 Eur.H.R. Rep. 737, ¶ 48 (1976).

96. *Id.* This passage was recalled in Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149, ¶ 52 (1981).

97. Dr. Heinze explains:

> [a] compression of the margin of appreciation and its ancillary doctrines to one sentence would result in something resembling the following: [t]he State enjoys a margin of appreciation to place a restriction on the exercise of an individual right, but subject to European supervision, in light of that restriction's necessity, and of the legitimacy of its aim, and of the proportionality of the restriction to that aim, with regard to the practice of other Convention States.

Heinze, *supra* note 19, at 330. For a discussion of the mechanics of determining consensus under the principle, *see, e.g.,* Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133 (1993). Hilary Charlesworth has noted that

> [a] review of the approximately two hundred cases of the European Court permits the following generalizations. A wide margin of appreciation of judicial restraint is applied in the following contexts: (1) the law deals with economic policies; (2) the law is in transition; (3) the aim of the law is to protect public morals; (4) the subject matter of the law is the design of electoral systems; or (5) great diversity of approach currently exists among the contracting parties. On the other hand, a narrow margin of appreciation of judicial activism is applied where (1) the individual right is particularly important. . . ; (2) the infringement of the right is great or the essence of the right is affected; (3) the aim of the law is the protection of the authority of the judiciary; or (4) a great uniformity of approach exists among the contracting parties.

Hilary Charlesworth et al., *Resolving Conflicting Human Rights Standards in International Law*, 85 AM. SOC'Y INT'L L. PROC. 336, 339 (1991).

98. *See, e.g.,* Thompson, *supra* note 6, at 398; Heinze, *supra* note 19, at 329 (1999) ("The margin of appreciation doctrine amounts to nothing more than its application in any particular case."); Natalie Klashtorny, *Ireland's Abortion Law: An Abuse of International Law*, 10 TEMP. INT'L & COMP. L.J. 419, 441-42 (1996) (decrying the selective and arbitrary manipulation of the margin of appreciation to deny states the right to criminalize homosexual activity but not to deny states the right to prohibit abortion).

international human rights norms.

> Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights. If applied liberally, this doctrine can undermine seriously the promise of international enforcement of human rights that overcomes national policies . . . . Inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards.[99]

Even in the original area of its application, the principle of deference has been criticized as inappropriate.[100]

Though these arguments raise legitimate points, a strong case can be made that on balance the arguments do not ultimately persuade that the doctrine should be abandoned. First, the arguments point perhaps to bad judging in particular cases rather than bad principles incapable of being used to reach a just or legitimate or authoritative result. Bad or illegitimate judging, like bad or illegitimate legislating, can always transcend the ability of any set of rules to contain it.[101] Moreover it is not clear that the principle of margin of appreciation thwarts the universalizing project of human rights.[102] The better defense of the principle, however, is centered on legitimacy, critical to the work of any court.

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99. Benvenisti, *supra* note 9 (citing Fionnula Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L L.J. 101, 114, 119 (1995) (suggesting that democratic states are given a wider margin of deference than those suffering a democratic deficit)).

100. *See, e.g.*, Oren Gross, *"Once More Unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L 437 (1998) (a critical analysis of the normalcy-rule emergency exception basis of derogation because, in part, states of emergency has become the norm in many places).

101. This perhaps is a central lesson that Fionnuala Ni Aolain draws in her study of the rise of divergence within the theoretically universalist jurisprudence of human rights. "[W]hile we seek to standardize the wording of Human Rights Instruments as a means of universalizing rights, we fail to pay sufficient attention to the role of the interpreters of those standards and the structures that enforce them." Fionnula Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L L.J. 101, 141-42 (1995).

102. *See, e.g.*, Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43 (1998) (the doctrine "does not support a relativist position; it cannot be relied upon to negate particular rights, or even to afford an interpolated meaning to the general concept of human rights or to any of its particular manifestations. . . . [it] simply affords a limited discretion . . . as to how the limitation of Convention provisions . . . can best be imposed under the prevailing circumstances . . . ." *Id.* at 50). *But see* Helfer, *supra* note 13, at 357 n.217) ("What is most striking about the margin of appreciation is that it expressly contemplates that international treaty obligations originating from a unitary text may be interpreted in different ways in different states." *Id.* at 357.).

> Seeking to ground its decisions, especially the more controversial ones, in the actual practice of the Member States helped [the Human Rights Court] establish its political legitimacy over time and helps it maintain legitimacy in the midst of expanding the scope of the Convention=s coverage. By apparently displacing the source of the developing norms from the judges on the Court to the other states of the European region, the comparative exercise protects the Court from charges of overreaching judicial activism. It thus helps maintain the viability of the system, making it less likely that either the Convention organs will act contrary to the will of a large number of the constituent states, or that a divergent state will abandon the system out of protest over the Court's intrusion into national political morality.[103]

Moreover, especially in the difficult area of contextualizing the words of provisions granting fundamental rights and delimiting the fundamental relationship between the State and its citizens, the margin of appreciation represents the type of principle of judicial restraint which seeks to strike a reasonable balance between the interpretive role of the judge and the need to preserve the democratic principle which vests legislative power in the elected representatives of the people.[104] These are notions at the core of Justice Scalia's interpretive project,[105] though there are implications.[106]

On the basis of this principle of self restraint, of legitimacy through deference and of enforced consensus, the Human Rights Court recently established a European-wide right to private consensual sexual activity

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103. Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1227 (1998).

104. For an argument along these lines, *see* Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57 (1990). For an attempt to apply the principles to the 1997 Russian Freedom of Conscience and Religious Associations Law, limiting protections for religions to those sects which could be registered with the state, *see* Joseph Brossaart, *Legitimate Regulation of Religion? European Court of Human Rights Religious Freedom Doctrine and the Russian Federation Law "On Freedom of Conscience and Religious Organizations"*, 22 B.C. INT'L & COMP. L. REV. 297, 317-20 (1999).

105. *See* SCALIA, *supra* note 3, at 9-14 (arguing that common-law lawmaking is essentially anti-democratic and more so when the techniques of the common law are applied to the interpretation of statutes). "I do question whether the attitude of the common-law judge . . . is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statuary law." *Id.* at 14.

106. *See id.* at 37-47 (arguing that looking to modern practice fosters a cult of the judge and cannot be based on any standards other than judicial personal predilection).

between males.[107] A consideration of two of the early principal cases in which this right was delineated[108] demonstrates the power of *politics* as the vehicle for determining *law*, and the utility of explaining the *law* in terms of the concurrence of jurisprudence and politics. These cases are the expressions of judicial hermeneutics of core political documents in which the decisions are rendered with full consciousness of the politics of the task of judging within the confines of a document. "Legal norms can never be drafted in such a way as to guarantee that they will always be capable of a literal application to all fact situations which may arise; as such a degree of uncertainty in inherent in legislation and a need for interpretation cannot be eliminated."[109] How much truer this is in connection with the hermeneutics of our fundamental law; this law, our founding parents were quite clear in reminding us, were written to be deliberately general.[110]

The political nature of "private life" decisions, as in other areas of social flux, was incorporated in the Court's jurisprudence through the doctrine of the 'margin of appreciation.' The doctrine essentially permits courts to arbitrate between competing normative claims in multi-state organizations, from federations to regional treaty associations. For some, it is part of the revolution in the balance of power between coordinate branches of government, and between local and general governments. "The problem, for constitutional lawyers, is to find acceptable criteria by which to define the new balance of power. This leads, for want of better,

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107. *See* Human Rights Convention, *supra* note 10. Understand that the right of a person "to respect for his private and family life," art. 8(1), is limited by state interests in the protection of morals. *Id.* art. 8(2). Handyside v. United Kingdom, 1 Eur. H.R. Rep. 737 (1976) (states are permitted a wide degree of discretion in legislating to protect the morality of its citizens). The rights of sexual non-conformists are private rights; they are rights which end at the point that the window shades are open, or the public is permitted to become conscious of the act. *See, e.g.*, Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981); *see generally*, Helfer, *supra* note 6, at 1054-62. On the internationalization of human rights, *see* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235 (1993); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).

108. *See* Norris v. Ireland, 13 Eur. H.R. Rep. 186 (Ser. A No. 142)(1988) (Irish buggery and gross indecency laws applied to adult private consensual activities violated Art. 8(s) of the Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222); Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981) (same considering the law of N. Ireland).

109. "Indeed, the process of engaging in a literal application of a legal provision to a straightforward case itself requires interpretation; in this sense even 'easy cases' presume an understanding of the purpose of the legislation." Flynn, supra note 91, at 373 n.12 (citing TOTH, 2 LEGAL PROTECTION OF INDIVIDUALS IN THE EUROPEAN COMMUNITIES 227 (1978)).

110. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

to the use of imprecise phraseology (such as 'the margin of appreciation' enjoyed by the Member States or the institutions). . . ."[111] This rebalancing results from the need to mediate between competing norms both vertically (among coordinate units of government) and horizontally (between local and general governments).[112]

Within the context of the Human Rights Treaty, the doctrine of the margin of appreciation is simple enough. A state may interfere with a right protected under the Treaty if it can demonstrate the necessity of that interference. That demonstration usually requires proof of the existence of a 'pressing social need.' But "it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly a margin of appreciation is left to them" subject to review by the Court.[113] It must also demonstrate that the restriction is proportionate to the legitimate aim pursued.[114]

As I have elsewhere argued in connection with the expansion, by the European Human Rights Court, of the rights of transsexuals against sex discrimination:[115]

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111. David A.O. Edward, *What Kind of Law does Europe Need? The Role of Law, Lawyers and Judges in Contemporary European Integration*, 5 COLUM. J. EUR. L. 1, 13 (1998-99).

112. For Judge Edward, this need for mediation has resulted in what is for him an advance of "fuzzy logic" in law.

> International norms, Community norms, national norms and sometimes (with the trend towards devolved government) regional norms compete for precedence, without always having a clearly defined hierarchy between them. . . . Someone must then determine what are to be the criteria for identifying the applicable norm and for applying it to the case at hand. In the absence of legislative texts defining which norm is to be applied, that task falls to the judge.

Edward, *supra* note 111, at 12.

113. Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149, ¶ 52 (1981); *see also* Handyside v. United Kingdom, 2 Eur. H.R. Rep. 245, ¶ 48 (1978).

114. *See* Handyside v. United Kingdom, 2 Eur. H.R. Rep. 245, ¶ 49 (1978).

115. *See* Cossey v. United Kingdom, 13 Eur. H.R. Rep. 622 (1991); Rees v. United Kingdom, 9 Eur. H.R. Rep. 56 (1987). In *Cossey*, a person, born male, who underwent gender reassignment surgery and lived as a woman challenged the denial, by the United Kingdom, of her request to obtain a birth certificate indicating she was female, and the legal restriction on her ability to marry a man. The European Court of Human Rights, held, over vigorous dissents, that there had been no violation of either Articles 8 or 12. In *Rees*, a person, born female, who underwent medical treatment and lived as a man challenged the denial, by the United Kingdom, of his request to obtain a birth certificate indicating he was male. The European Court of Human Rights, held, over vigorous dissents, that there had been no violation of either Articles 8 or 12.

> [w]here there exists "little common ground between the Contracting States," national entities enjoy "a wide margin of appreciation." Thus, "[a]lthough some contracting States would now regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concepts of marriage." [However], the very lack of consensus which gives the margin of appreciation its widest [ambit also serves as the political vehicle for changes in] the Human Rights Court's [ability to interpret the Human Rights Convention to foreclose the use of the margin of appreciation, especially where the Court] becomes "conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review." [What this requires is a balancing of] interests of the community and the individual "the search for which balance is inherent in the whole of the Convention." However, when the balance tilts in favor of the individual the margin of appreciation disappears. That was the essence of the Court of Human Rights's holding in the "homosexual sodomy" cases.[116]

The politically pivotal 'homosexual sodomy' case was *Dudgeon.* The parallels to *Bowers* are striking. The differences in approach and result between *Dudgeon* and *Bowers* reveal much about the utility of political consciousness in constitutional decision-making.

Jeffrey Dudgeon, then a 35 year old resident of Northern Ireland, admitted to being "consciously" homosexual from the age of 14. He had been involved in a campaign to bring the laws of Northern Ireland in line with those of other parts of the United Kingdom – to provide "that private acts of buggery and gross indecency between consenting males over 21 . . . should not be criminal offenses."[117]

In 1976, police went to Mr. Dudgeon's house to execute a warrant pursuant to the Misuse of Drugs Act of 1971. During their search, some of Dudgeon's personal papers and diaries were confiscated. Contained within these items were descriptions of homosexual activities. "As a result he was asked to go to a police station where for about four-and-half hours he was questioned, on the basis of these papers, about his sexual life."[118] Some time later he was released, as the Director of Public Prosecutions felt it would not "be in the public interest" to bring proceedings. Mr. Dudgeon's papers were returned more than a year later, complete

116. Backer, *supra* note 25, at 201.

117. Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981).

118. *Id.* ¶ 33.

with written notes.

On May 22, 1976, Dudgeon applied to the European Commission of Human Rights claiming that Northern Ireland's prohibition of private, consensual male homosexual activity and the investigation pursuant to the January 21 search of his papers "constituted an unjustified interference with his right to respect for his private life. . . ."[119] Dudgeon further maintained that as a result of the law in Northern Ireland, "he suffered unjustifiable discrimination on sexual grounds and also on grounds of his residence because the offences in question were not part of the law in other regions in the United Kingdom."[120]

The task for the Human Rights Commission, in *Dudgeon*, for example, was to place the practices of Britain (in Northern Ireland) within a European context of settled notions of the treatment of gay men. On the basis of the proffered evidence, it was clear in proceedings before the Commission that the statute was rarely enforced; indeed, the United Kingdom argued that the case ought to be dismissed on that basis.[121] It was also clear that "public opinion" frowned on sexual acts between men.[122] And yet the Commission explained that neither was sufficient to impose restrictions on the *private* sexual liberty of *sexual minorities* in the absence of proof that the law makes "any contribution of the moral climate of society which could, within a reasonable relationship to proportionality, justify or counter-balance the inevitable negative effects which it has on the private lives of homosexuals."[123] The Commission reached this conclusion as a matter of *politics*. First there is the right to private life which extends to sexual acts in private between people of the same sex.[124] But that right is not unlimited.[125] It may be restricted by the needs of a democratic society to protect the morals of its citizens.[126] But in this case the "majority opinion of the population as a whole is not in

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119. *Id.* ¶ 34.

120. Dudgeon v. United Kingdom, 3 Eur. H.R. Rep. 40, ¶ 5 (1981).

121. *See id.* ¶ 89-91.

122. *See id.* ¶¶ 111-15.

123. *Id.* ¶ 115.

124. *See id.* ¶ 97.

125. *See id.* ¶ 98.

126. The Commission explains:

> [i]n assessing the requirements of the 'protections of morals' in Northern Ireland, the Commission considers that it must examine the measures in question in the context of Northern Irish society, taking into account the information before it as to the climate of moral opinion in that particular society. The fact that similar measures are not considered necessary in other parts of the United Kingdom, or in other European countries does not mean that they cannot be necessary in Northern Ireland.

Dudgeon v. United Kingdon, 3 Eur. H.R. Rep. 40, ¶ 111 (1981).

fact known."[127] And on that basis the moral judgment of society as expressed through its law may be imposed on all as the *default* position of law.

While these conclusions were largely accepted by the European Court of Human Rights, it also affirmed the paramount importance of changes in the popular culture as the basis for action. These changes were to be gleaned from the *political* developments in the signatory states, and that consensus would then be imposed on all.

> As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behavior to the extent that in the great majority of the member-States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member-States.[128]

In this light, the peculiar moral standards of Northern Ireland and the fear that relaxation of the criminalization of private homosexual conduct would further erode moral standards, without proof that this would, in fact be so within the peculiar confines of Northern Ireland, cannot justify resistance to the reiterated popular cultural approaches to sexual nonconformity fashioned within the polity (the member-states of the Council of Europe) as a whole. And here Northern Ireland had failed to adduce such proof.

It is to political developments, too, that the court looks to limit the possible reach of its determinations. There were real limits to the changes in popular perceptions of homosexual conduct. Beyond those limits the court would not go. These limits touched on popular conceptions of the necessity of protection from those vulnerable to the indiscriminate blandishments of the 'homosexual.' These include the young, the 'weak-minded', the inexperienced, or those vulnerable because of dependance on a potential sexual exploiter.[129] The reality of courts of politics is the recognition of the limitations of the 'bad' as well as the affirmation of the 'good.'

The *Norris* case brings these themes out in sharper focus. *Norris* provided a way for the Court to upend in Ireland the same prohibition against private, consensual, male homosexual activity that they had done

127. *Id.* ¶ 112.

128. Dudgeon v. United Kingdom 4 Eur. H.R. Rep. 149, ¶ 60 (1981).

129. *See id.* ¶ 49.

years earlier in Northern Ireland. Norris sought out the confrontation with the Irish Government and ultimately the European Court of Human Rights to reform the legislation that "interfered with his right to respect for private life."[130] Again, as was noted in *Dudgeon*, the court and the Irish government acknowledged that there were no public prosecutions of homosexual activities during the relevant time period.[131]

Before proceeding to the European Court of Human Rights, Norris's case was dismissed by the Irish High Court. There, Justice McWilliam found that "[o]ne of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasion, to depression and the serious consequences which can follow from that unfortunate disease."[132] On appeal to the Supreme Court, Norris's dismissal was upheld on several grounds familiar to the courts of the United States. These considerations included: that homosexuality is morally wrong and "has been regarded by society for many centuries as an offense against nature and a very serious crime";[133] that homosexuality can lead to "great distress and unhappiness" possibly leading to suicide.[134] The Court also gave great weight to its notion that homosexual conduct has lead to the spread of various venereal diseases which have caused a significant health problem in England and that homosexuality is detrimental to the institution of marriage.

Before the Human Rights Court, the government argued that the "moral fibre of a democratic nation is a matter for its own institutions and the Government should be allowed a degree of tolerance, . . . a margin of appreciation that would allow the democratic legislature to deal with this problem in the manner which it sees best."[135] The Court rejected this ar-

130. Norris v. Ireland, 13 Eur. H.R. Rep. 186, ¶ 25 (1988).

131. *See id.* ¶ 20.

132. *Id.* ¶ 21.

133. *Id.* ¶ 24(1).

134. *Id.* ¶ 24(2).

135. *Id.* ¶ 42. In a manner reminiscent of Justice Scalia's arguments about the role of the Court in matters of morals set out in *Romer*, the Irish government argued that:

> [t]he application of these criteria [pressing social need and proportionality] emptied the 'moral exception' of meaning. In their view, the identification of 'necessity' with 'pressing social need' in the context of moral values is too restrictive and produces a distorting result, while the test of proportionality involves the evaluation of moral issue and this is something that the Court should avoid if possible. Within broad parameters the moral fibre of a democratic nation is a matter for its own institutions and the Government should be allowed a degree of tolerance in its compliance . . . that would allow the democratic legislature to deal with this problem in the manner which it sees best."

Id. ¶ 43.

gument citing that to make such a determination, "the reality of the pressing social need . . . must be proportionate to the legitimate aim pursued."[136] The court rebuffed the Government's attempt to preclude it from review of Ireland's obligation not to interfere with an Article 8 right when such deals with the interests of the 'protection of morals'. The Court also noted that serious reasons must exist before government interference can be legitimate for purposes of Article 8.[137] Applying the analytical framework developed in *Dudgeon*, the Court found that the evidence showed that Ireland no longer enforced the relevant law, and that there appeared no strong public demand for stricter enforcement. Neither had been detrimental to the moral standards of the Irish people. Nor was the existence of the law proportional to the detrimental effects on the private lives of individuals caused by the continued validity of this (currently) unenforced law. On that basis the Court held that "it cannot be maintained that there is a 'pressing social need' to make such [homosexual] acts criminal offenses."[138] "Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."[139]

Norris defined the parameters of the newly recognized political reality. Thereafter, the cases were not hard. In Europe, popular cultural norms, the habits of ordinary *European* citizens makes it exceedingly difficult to find particularly serious reasons creating a pressing social need to criminalize sexual activity between men. *Modinos v. Cyprus*[140] is a case in point. In that case, a statute criminalizing private sexual activity between adult men was determined to violate the Human Rights Convention even though the Cypriot Attorney General had as a matter of policy declined prosecutions under the act. The Cypriot act violates the protections of the Human Rights Convention not as a matter of high principle, but because Europeans *in fact* treat those statutes as of no effect. Because its only continuing effect, then, was (gratuitously) negative, its existence could not be supported under the Human Rights Convention's Article 8 guarantee of protection from interference with the right to respect of an

136. *Id.* ¶ 44.

137. Thus, the Court noted that "[t]he Government is in effect saying that the Court is precluded from reviewing Ireland's observance of its obligations not to exceed what is necessary in a democratic society when the contested interference with an Article 8 right is in the interests of the 'protection of morals.'" The Court cannot accept such an interpretation. Norris v. Ireland, 13 Eur. H.R. Rep. 186, ¶ 45 (1988).

138. *Id.* ¶ 46.

139. *Id.*

140. 16 Eur. H.R. Rep. 485 (1993).

individual's private life.[141]

But note that political reality has limitations – *that* is the part of politics which is always dangerous. Indeed, that is the reality which, in distorted form, is raised by Justice Scalia's suggestion in *Romer* that "homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well."[142] For example, in *Dudgeon* the Court noted both that political reality in Europe evidenced increased toleration for 'homosexual' behavior, but also evidenced no desire to 'approve' of homosexuality so that regulation of such conduct beyond that perhaps permitted in the case of heterosexual conduct and which "may even extend to consensual acts committed in private" would not violate the Human Rights Convention's norms.[143]

Thus the margin of appreciation is not a weapon in the arsenal of the adherents of any particular social or political or moral creed. This general principle of law, like all useful principles is amoral, at least in the sense of serving as a vehicle for the advancement of politically expressed social goals. The margin of appreciation is a conservative principle of law; it limits the range of political intervention of courts in interpreting fundamental law. The principle is meant to lead courts to an interpretive pro-

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141. In the words of the Human Rights Commission as reported in the opinion of the Court of Human Rights:

> the Government's admission that the challenged provisions are contrary to the Cypriot Constitution, combined with the position of the Attorney-General not to prosecute persons in the situation of the applicant, show that, in comparison with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behavior in Cyprus, as it is in the great majority of the member-States of the Council of Europe.
>
> . . . In this respect it should be noted that the retaining of the law in force unamended on the ground that members of the public in Cyprus may be offended or disturbed by the commission by others of private homosexual acts . . . is outweighed by the detrimental effects which the very existence of the impugned provisions can have on the life of a person with a homosexual tendency like the applicant."

Modinos v. Cyprus, 16 Eur. H.R. Rep. 485, ¶¶ 45-46 (1993).

142. Romer v. Evans, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting). Justice Scalia has been consistent in his view of the rights process as essentially political. *See, e.g.*, Employment Division v. Smith, 494 U.S. 872 (1990) ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 890).

143. Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149, ¶ 49 (1981).

nouncement of what *is*. It cannot be used to interpret the fundamental law to impose a court's personal version of what *could be*. It dampens not merely the temptation to use the courts for legislative purposes by the 'left' but also the same temptation by the 'right.' This can prove frustrating for those who would rely on the courts to move beyond the role of imposing political reality.[144] The principle, perhaps legitimately, results in the return to the political arena those issues with respect to which there is no constitutional consensus among a polity.[145]

But it also limits the ability of originalists and traditionalists to murder our fundamental law by embalming it in the musty memory of what can never be recaptured. Alexander Hamilton understood this quite well when he defended the construction of an independent judiciary of life-tenured judges.[146] Justice Scalia continues to contest this argument at his peril – it makes his reliance-on-tradition argument suspect, standing alone;[147] it also reduces his arguments about subjectivity in constitutional interpretation as questionable as well. Changing societal reality changes the enduring jurisprudence of courts, and not the other way around.

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144. *See, e.g.*, Clarice B. Rabinowitz, Note, *Proposals for Progress: Sodomy Laws and the European Convention on Human Rights*, 21 BROOK. J. INT'L L. 425, 455-68 (1995) (proposing a more aggressive interpretative stance on the basis of the Court's own acknowledgment of its political role to interpret the Convention "in light of present day condition." *Id.* at 457 n.170).

145. That this effect is real can be demonstrated by the Human Rights Court refusal to find a consensus in the area of abortion rights. For people seeking change in that area, then, the result is a recognition that the only means of effecting change within the democratic order is political, mobilizing democratic forces to enact changes to the black letter of the fundamental law of the polity. *See, e.g.*, Klashtorny, *supra* note 98, at 441-42.

146. Hamilton argued, of course, that this argument was self-defeating.

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.

THE FEDERALIST NO. 78, at 468-69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

147. Consider a pristine form of this argument, Burnham v. Superior Court, 495 U.S. 604 (1990).

IV. APPLIED POLITICS – ROMER AND BOWERS AS POLITICAL EXPRESSION

When the Supreme Court acts like a 'court of politics, like a *Dudgeon* or *Norris* court, its decisions will be given more deference than when the Court appears to pronounce a law which does not mirror the cultural reality at the time of its pronouncement. I would assert that the *Romer* case is a good example of a decision of 'politics.' On the other hand, *Bowers* is an excellent example a pronouncement not in sync with core social reality. It is problematical and likely not to last long in its present form.

Romer demonstrates the power of *politics* as the vehicle for determining *law*, and the utility of explaining the *law* in terms of the concurrence of jurisprudence and politics. *Romer* was a case of dirty pool. *Romer* illustrates the authority of decisions which recognize that sex is politics. In a sense, the Court merely confirmed what our political society had long held true – that everyone should be allowed to 'play' the game of republican politics. "Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection only by enlisting the citizenry of Colorado to amend the state constitution."[148] The majority sought to do little more than to identify the basic rules within which republican principles of politics works in this country. These are not new rules, or rules with no connection to actual practice.

The problem, of course, as the majority saw, and as Justice Scalia's ideology could not fathom, is that our popular political culture does not permit the use of the democratic process to push any participant *out of the game*. And that is what the amendment at issue in *Romer* effectively did. The Justices spent some time considering this point at oral argument, where the issue was crystallized.[149] Members of what became the majority devoted some time to an inquiry of the way in which Americans traditionally played the political game of republicanism in this century.[150]

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148. Romer v. Evans, 517 U.S. 620, 631 (1996). Justice Scalia, in dissent, had a far narrower view of what sort of political participation would be enough. Homosexual political advances are subject "to being countered by lawful, democratic countermeasures as well." *Id.* at 646 (Scalia, J., dissenting). This includes "the democratic adoption of provisions in state constitutions." *Id.* at 636 (Scalia, J., dissenting).

149. *See* Official Transcript of Oral Argument at 51-56, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), *available in* 1995 WL 605822. As Jean E. Dubofsky argued on behalf of respondents, the question was whether the referendum process constituted a prohibited "restructuring of the political process." *Id.* at 51.

150. This was made quite apparent in oral argument. Thus, for instance, Justice Ginsburg drew analogies to the political give and take of the suffragists at the turn of the twentieth century. *See* Official Transcript of Oral Argument at 14-17, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), *available in* 1995 WL 605822 ("I was trying to think of something comparable to this, and what occurred to me is that this political means of going at the local

Thus, properly understood, the *Romer* majority relies on tradition to support their decision.

> It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.[151]

Justice Scalia, in dissent, correctly states (though he seems to fail to understand) the strength of that argument.[152] Scalia's dissent, ironically, is also based on tradition, but of a different kind,[153] the kind afforded preeminence in *Bowers*.[154]

In the end, Justice Scalia's traditional values had to give way to those championed by the majority, and sensibly so – Colorado's legislature is as capable of protecting traditional moral values as is the population it represents, and the former, not the latter, has been designated the primary site of law making. This is a case in sync with core social realities. Our founders chose for our political home Republican Rome, not democratic Athens.[155] That choice imports with it a sense of the dignity of each of the citizens of that polity. *Romer* is a case in sync with that core social reality. It will survive.

The more interesting question, however, is what precisely about *Romer*, beside its particular holding, will survive to govern future cases. *That* question requires consideration of the relationship between *Romer* and *Bowers*. *Romer* was written in the shadow of *Bowers*. Yet nowhere in the majority opinion is the *Bowers* opinion mentioned. The *Romer* majority was deliberately silent on *Bowers*. That silence has opened a tremendous hole – not because the members of the majority do not know their

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level first is familiar in American politics." *Id.* at 14).

151. Romer v. Evans, 517 U.S. at 633.

152. "Lacking any cases to establish that facially absurd proposition [that the sort of statewide constitutional amendment through referendum at issue in the case], it simply asserts that it must be unconstitutional, because it has never happened before." *Id.* at 647 (Scalia, J., dissenting). That is precisely the point. Tradition militates against this sort of fundamental wrenching of political culture in the absence of evidence of a substantial amount of acceptance of these rules in fact.

153. "The Court today . . . employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values." *Id.* at 651.

154. As Justice Scalia noted in dissent in *Romer*, "[i]f it is constitutionally permissible for a state to make homosexual conduct criminal, surely it is a constitutionally permissible for a state to enact other laws merely disfavoring homosexual conduct." *Id.* at 641.

155. *See* THE FEDERALIST NOS. 10, at 81-84, 39, at 240-46, 63, at 385-88 (James Madison) (Clinton Rossiter ed., 1961).

own minds on the question, but because they chose to throw the question back to the litigating community.

> The problem with *Romer*, of course, is in its meaning. It is exceedingly difficult to search for meaning in *Romer* with any degree of confidence. It is even harder to divine the utility of the case. As a rhetorical device, the majority opinion is a study in majesty. It is Handelian in its oratory, truly the voice of the Divinity speaking to its children. . . . As *rhetoric* it works well to camouflage the ambiguities inherent in the stately procession of the words of that opinion. More importantly, Justice Kennedy's Olympian tone effectively casts the dissent, not in the role of Milton's Lucifer, but rather in that of the archetypal mad heroine of *opera seria*. . . . So reduced, the power of its argument is lost in the "mad" lust of its rhetoric, and it can be avoided by that large number in the Academy with a taste for the antiseptic.[156]

The ambiguity of the majority position in *Romer* also brands that decision as essentially political. It does so in a way that serves to highlight the political inadequacy of *Bowers*. Those who want to draw positive value from the decision for this or that ideological, cultural or political program have been far less reticent about the importance of *Romer* to *Bowers* in the months since the decision has come down. Some have argued that *Romer* is a "seminal decision in the jurisprudence of equal protection for gay people."[157] It is also possible to argue that the Court employed what has been described as new tier of equal protection analysis – rational basis with teeth.[158]

Others take a more cautious approach to the language of the majority opinion, arguing that the majority opinion merely applied the rarely invoked by fundamental principle that the law may not be used to create a class of "untouchables" – the pariah principle.[159] The narrowest reading

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156. Backer, *supra* note 20, at 380.

157. Wolff, *supra* note 20, at 248. The notion is that, like Reed v. Reed, 404 U.S. 71 (1971), did for females, *Romer* will lead to some sort of heightened scrutiny for laws which adversely impact gay people. *Id. See also* Bobbi Bernstein, *Power, Prejudice, and the Right to Speak: Litigating 'Outness' Under the Equal Protection Clause*, 47 STAN. L. REV. 269 (1995).

158. For example, Andrew Jacobs argues that "Romer heralds: (1) a muscular rational basis review that may invalidate civil laws aimed at the class of gays; (2) a significant possibility of overruling Bowers; and (3) a greater solicitude for gay claims in many areas of the law." Jacobs, *supra* note 20, at 963. For a critique of rational basis with teeth as an additional category, *see* Gayle Lynn Pettinga, Note, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779 (1987).

159. Daniel Farber and Suzanna Sherry have recently argued that the case merely articulates a far-reaching but narrow principle which they christen the pariah principle. "This prin-

suggest that the majority opinion reflected the rejection of a law imposing unprecedented disabilities on a group with little in the way of reason to support it. Animus may well be a *result* and even a permissible result of reason, but reason must support the animus; this might well be one of those cases where rational basis actually suffices to invalidate a statute.[160]

Traditionalists admit what the majority in *Romer* could not – that *Romer* effectively silenced *Bowers*. Foremost among these commentators has been Robert Bork.[161] Unhappily to be sure, traditionalists have recognized the new tradition being forged for the equal protection jurisprudence of the Court. "Moral objections to homosexual practices is not the same thing as animus, unless all disapprovals based on morality are to be disallowed as mere animus."[162]

And yet, animus was at the heart of *Bowers*. The story *Bowers* really related was one of social and moral disapprobation, and the weight such disapprobation was to be accorded in law. The tradition of animus, predating the federal Constitution, could not be overcome by evolving notions of Constitutional hermeneutics. So, what of *Bowers*? *Romer* makes it clear that *Bowers* is at least suspect. It confirms the vulnerability of

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ciple, in a nutshell, forbids the government from designating any societal group as untouchable, regardless of whether the group in question is generally entitled to some special degree of judicial protection, like blacks, or to no special protection, like left-handers (or, under current doctrine, homosexuals)." Farber & Sherry, *supra* note 20, at 258. In a similar vein, Akil Amar has reconfigured this pariah principle more formally as a constitutional event implicating the ancient attainder principles of the federal Constitution. Amar, *supra* note 20; *but see* Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 MICH. L. Rev. 236 (1996). This is a minimalist approach to the potential inherent in the hortatory expressions of majority opinion, which seeks to avoid the problems which a broad interpretation of the majority's "rational basis" analysis might pose.

160. *See, e.g., Constitutional Law Scholars Attempt to Distill Recent Supreme Court Term*, 65 U.S.L.W. 2274, 2277 (October 29, 1996) (quoting Jesse H. Choper). Here, a variant of this reasoning goes, the state was unable to offer reasons even arguably connected with the disability and (more importantly) its breadth. *See* Hills, *supra* note 162 (arguing that Amendment 2 met its demise on the basis of the breadth of the disabilities it imposed). Passion, alone, is insufficiently rational to support the disability. In the future, the state will be more careful.

161. He finds no "logical or constitutional foundation for the majority's decision." BORK, *supra* note 20, at 114. Taking his cue from the dissent, he finds in *Romer* little more than naked politics. The decision reflects the power and ability of the homosexual elite and their worldwide conspiracy to substitute their culture for that which preceded it. For Bork, *Romer* does for gay people what Roe v. Wade, 410 U.S. 113 (1973) rehearing denied 410 U.S. 959 (1973), did for heterosexual morality. In both, the "Court, without authority in the Constitution or any law, has forced Americans to adopt the Court's view of morality rather than their own." BORK, *supra*.

162. BORK, *supra* note 20, at 113.

decisions that ignore changes in the politics of judgment in core areas of human behavior. Tradition is valuable if it is current; tradition cannot be used in the service of politics if it assumes a substantially historical role. *Bowers* amounts to an effort to blind our jurisprudence to the changing social realities of the criminal regulation of private adult consensual activity in the states. As an effort to vaunt theory (or, better, rhetoric) over reality, the case positioned itself for oblivion from the time of its pronouncement. The ideological traditionalists responsible for *Bowers* might have done well to heed the warning of that great *conservative*, Lord Devlin, who warned that "[i]t will not in the long run work to make laws about morality that are not acceptable to 'those from whom the moral judgments of society are ascertained.'"[163] Those who argue for the utility of decisional minimalism,[164] maintain that because *Bowers* speaks strongly to a tradition different from that invoked in *Romer*, it is possible to carve out a small space in which *Bowers* might still speak authoritatively. In the more traditionalist language of Professor Sunstein: "The Equal Protection and Due Process Clauses have very different offices, and *Hardwick* is not in tension with *Romer* so long as those different offices are kept in mind."[165]

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163. Patrick Devlin, *The Enforcement of Morals, in* MORALITY AND THE LAW 31 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988) (reprinted in edited form from PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965)).

164. *See, e.g.,* Sunstein, *supra* note 20. Thus, "the case for minimalism is especially strong if the area involves a highly contentious question that is currently receiving sustained democratic attention." *Id.* at 32. And, yet, there is more than a whiff of Scalia in Professor Sunstein's view. Consider an earlier articulation of Professor Sunstein's reticence on such delicate issue as same sex marriage and referenda such as that at issue in *Romer*:

> [u]nder contemporary conditions, a judicial holding of this sort [requiring states to allow same sex marriage] would probably be a large mistake, even though the basic principle is sound. It would be far better for the courts to proceed slowly and incrementally. I have suggested that they should build on 'rationality review' in the most egregious cases and also invalidate measures that combine restrictions on the democratic process with discrimination. Broader rulings should be avoided. Elected officials, including the president, have somewhat more flexibility in carrying out their own independent constitutional responsibilities.

Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 27-28 (1994).

165. Sunstein, *supra* note 20, at 67. Professor Sunstein suggests that

> Romer combined a degree of caution and prudence with a good understanding of the fundamental purpose of the Equal Protection Clause and a firm appreciation of the law's expressive function. Thus understood, Romer was a masterful stroke – an extraordinary and salutary moment in American law. It was a masterful stroke in part because it left many issues open.

Id. at 9, *see also id.* at 53-71. I do agree that the porousness of *Romer* was a masterful stroke.

However, the tradition invoked in *Bowers*, while historically true enough, had lost much of its potency by the time the *Bowers* majority sought to invoke it. Defending a tradition that was no longer coherent, *Bowers* stands both as a misinterpretation of the conservative approach to politics, and the intrusive proactive intervention of a court in a cultural dispute. Much like Justice McWilliam speaking for the Irish High Court in *Norris*, the *Bowers* majority cast about myopically around a tradition which had lost its force within the nation as a whole. The Court, to use the margin of appreciation's language of deference, chose to permit a broad margin of appreciation in where the constitutional traditions of the Member States of the United States and their actual practice now attested to a solid consensus against the validity of the legislation under attack in that case. The *Bowers* majority thus lost sight of the nature of judicial traditionalism – both its basic political contextualism[166] and its necessary hermeneutics.[167] As both politics and traditionalism, the *Bowers* majority

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I am not so sure that, as Professor Sunstein characterizes it, that stroke was good.

166. Traditionalism has rightly been characterized as having "been cast in vague terms." TÄNNSJÖ, *supra* note 54, at 47. Vagueness can only be resolved in political context. "The standard resolution is as follows. When assessing a suggested political reform we have to decide whether it is faithful to a well-established existing idiom of conduct or not." *Id.* That determination must be made by "[t]he people concerned; I think the conservative [would] answer." *Id.* In particular, the people concerned must decide if there exists the requisite similarities between the prior state of affairs and the proposed state of affairs. *See id.* But *Bowers* seems to do just the opposite, and in the name of traditionalism! The problem, of course, is that the idiom – a unified and coherent understanding of the response of society to homosexuality and homosexual "acts" – was no longer singular or coherent. That is certainly true among "those concerned." As such, unity of opinion, and tradition as such unity, could be achieved, and the decision supported, by narrowing the scope of those whose voices would count in the determination. But isn't this (informally to be sure) precisely what the *Romer* court suggested was dirty pool when done formally by invoking the constitutional process of the state? Clearly the answer is yes. *Bowers* in this sense is both faulty traditionalism and bad politics.

167. The traditionalism of *Bowers* is hard to square even with the traditionalism of a conservative like Roger Scrouton. Scrouton would have conservatives foster traditions which satisfy three criteria. ROGER SCROUTON, THE MEANING OF CONSERVATISM 42 (1980). It must first have "the weight of a successful history." *Id.* It is not at all clear that the history of the suppression of sexual expression by sexual minorities has ever been successful or wholehearted. *Cf.* JAMES A. BRUNDAGE, LAWS, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987); DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY (1988). It must also "engage the loyalty of their participants, in the deep sense of moulding their idea of what they are or should be." SCROUTON, *supra*, at 42. Here, loyalty was assured by some but all participants. *See* discussion *supra* note 109. Division significantly weakens the hold of tradition as a basis for action. Lastly, for Scrouton, "they must point to something durable, something which survives and gives meaning to the acts that emerge from it." SCROUTON, *supra*, at 42. By 1986, it was exceedingly difficult to make that argument except with respect to a limited segment of the population.

failed.

Other than as a matter of ideology, *Bowers* does not reflect the practice, the reality of the relationship of culture to the private consensual sexual practices of sexual minorities. A large number of American states had decriminalized the sexual acts at issue in *Bowers de jure* by the time the case was heard by the Court. The remaining states had largely decriminalized sodomy *de facto*.[168] These states enforced the criminal sex laws, not in cases of private consensual sexual activity between people of the same sex, but where the *consensual* conduct or its solicitation occurred in public.[169] This was a reality of long standing at the time *Bowers* was before the Court. It constituted a significant reason for the "decriminalization" of sodomy written into the Model Penal Code in the late 1950's and early 1960's.[170] It was a reality which confronted the English as well at about the same time.[171] Even traditionalists recognized this.[172]

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168. For a case study of the evolution of such de facto decriminalization, at least where the act occurred in private between two consenting adults, *see, e.g.*, Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37, 89-95 (1993).

169. While, as this essay demonstrates, this approach is also highly problematical, for purposes of the determination before the Court in *Bowers*, it was powerful evidence of cultural practice which should not have been ignored. As Markus Dirk Dubber noted that the European court

> focused its attention on recent developments in public perceptions of the limits of acceptable government interference as reflected in legislative developments in the member states. The Supreme Court chose both a wider focus and a more static method . . . [scanning] only the long term American legislative landscape but also disregarded trends by searching for distinct manifestations of a right to engage in homosexual sodomy.

Dubber, *supra* note 28, at 210-11.

170. This is recounted in Backer, supra note 48. For a contemporary report, *see, e.g.*, Morris Ploscowe, *Sex Offenses: The American Legal Context*, 25 COLUM. J.L. & CONTEMP. PROBS. 217, 218, 221 (1960) (the author was the associate reporter of the Model Penal Code during the 1950's).

171. The notion that the costs of enforcement were hardly worth the benefits, sporadic at best, figured prominently in the calculus of the drafters of the Model Penal Code and the Wolfenden Report. There is something quite unseemly about enforcement focusing on private sexual conduct. *See* COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT, THE WOLFENDEN REPORT (Auth. American ed. 1963) (¶¶ 109-13 (blackmail), ¶¶ 121-23 (police misconduct)).

172. Thus, for example, Justice Scalia notes in *Romer*, that "abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens." Romer v. Evans, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting). David Garrow noted that:

> [m]any conservative constitutional scholars, however, were loathe to embrace the *Bowers* majority. *Roe* critic and Reagan administration Solicitor General Charles Fried subsequently disparaged "White's stunningly harsh

This reality governs even the continued criminalization of public expressions of same sex desire in states which have decriminalized its private consummation.[173]

The political reality of the emerging tradition was plain for all to see. A court applying the principles of consensus, restraint and deference, a *Dudgeon* or *Norris* court, might have understood

> there is now a better understanding, and in consequence an increased tolerance, of homosexual behavior to the extent that in the great majority of the . . . states of the [Union] it is no longer considered to be necessary or appropriate to treat homosexual practices . . . as in themselves a matter to which the sanctions of the criminal law should be applied.[174]

A court which adheres to the principles of deference and consensus in its necessarily political decisions, decisions involving the application of the fundamental law, "cannot overlook the marked changes which have occurred in this regard in the domestic law of the . . . member-States."[175] To do so is to be left in the position of the Irish High Court in *Norris* – out of touch with the polity whose laws the court is under an obligation to say what the law is.

All of this history was known, and yet ignored, in the *Bowers* opinion. The result is both odd and politically reckless.[176] But then, the *Bow-*

> and dismissive opinion" and characterized Hardwick's conduct as first and foremost "an act of private association and communication. The fact that sexuality is implicated seems an anatomical irrelevance." Legal pundit Bruce Fein, conservative even by Reagan administration standards, admitted that "the political case for judicial rescue of homosexuals from the legislative process was greater than for the *Griswold* intervention on behalf of married couples," and warned that in light of the doctrinal contradictions between *Bowers* and previous holdings, the American public would "correctly" conclude that the Court's privacy decisions were based on simply "the varied personal policy predilections of the Justices" themselves.

DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 666 (1994).

173. *See, e.g.*, Baluyut v. Superior Court, 911 P.2d 1 (Cal. 1996) (assertion that California solicitation statute was used to target gay men in a California city; the Supreme Court holding that proof of specific intent to discriminatorily target a specific group need not be proven in order to prevail; California has decriminalized private sexual activity between people of the same sex).

174. Dudgeon v. United Kingdom 4 Eur. H.R. Rep. 149, ¶ 60 (1982).

175. *Id.*

176. The political recklessness of this case began with the road to the decision to hear the case in the first place. For a description of the politics of the determination to hear the case,

ers majority refused to stay tied to *facts*; it saw no need to. The *Bowers* opinion, instead, builds a decision on a sea of rhetoric. The opinion makes a nice sermon; it does not reflect the political realities, the practicalities, of American popular culture in the latter part of the twentieth century and will either be ignored or swept aside sooner or later.[177]

V. CONCLUSION

Decisions like *Romer*, then, highlight the reality that though *courts intervene all the time*, they only rarely intervene to *change* the perceived status quo. The nature of that intervention in the United States tends t be traditional, with a marked deference to the elected branches of government. The general principle of law underlying the American approach to judicial deference to the legislature represents an American variation on the European margin of appreciation principle. American principles of deference are best illustrated by cases highlighting the limits of deference. In the United States, as in Europe, that limit is marked by consensus. The Supreme Court's opinions in *Romer*[178] illustrate both the application of the principle and the difficulties involved in the translation of the conceptfrom a civil law to a common-law system. The *Romer* majority rose to the defense of a political consensus on the nature of the electoral process. The generally accepted status quo marks the limit of deference to the elected branches in the practice of statutory interpretation. This normative status quo was far more stable and unchallenged than the contentious and amorphous tradition of the *political* suppression of sexual minorities.[179] The margin of deference accorded Colorado, in this regard, would have to be quite small. The judicial act in *Romer*, from the perspective of the margin of appreciation, appears quite conservative.

Bowers, on the other hand, illustrates the consequences of deviation

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see GARROW, *supra* note 172, at 656-57.

177. Indeed, this seemed to concern the dissenters in Romer a great deal, as evidenced by their dissent, as well as by their questions at oral argument. *See* Official Transcript of Oral Argument at 53-54, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), *available in* 1995 WL 605822.(Question: "Ms. Dubofsky, do you contend that – are you asking us to overrule Bowers v. Hardwick? Answer: "No, I am not."). In the dissent, itself, Justice Scalia first states that the majority's opinion "contradicted" the decision in *Bowers*. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Then he reminds us that states have been permitted to make homosexual conduct a crime "from the founding of the Republic." *Id.* at 640. On that basis he then makes his a fortiori argument. *Id.* at 641 (quoted *supra* note 79). Unfortunately for the dissent, this misses the point entirely.

178. *See* text *infra* Part IV.

179. While the criminal suppression of sexually deviant behavior has been a staple of the criminal law in the West, the suppression of sexual minorities in the political sphere has not. *See* Backer, *supra* note 168.

from the principle of judicial restraint along the lines of the margin of appreciation. When courts *do* appear to intervene to set or settle the status quo in an area of conduct in which no social consensus exists, such decisions will invariably be less authoritative.[180] In such circumstances, a greater margin of appreciation, of deference to the state's political settlement of the issue within its territory, is required. To use language more comfortable to American lawyers, in these circumstances the courts should stay their hand, and leave resolution of the issue to the political process. Ultimately such decisions become so much litter on the socio-political landscape. They provide greatest value either by the ceremonial act of their repudiation,[181] or by the hortatory significance of their rhetoric. As Justice Scalia, himself, has explained: "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."[182] The emphasis for Justice Scalia, of course, is on the words 'long,' 'tradition,' and 'open.' He minimizes the importance of the word 'unchallenged.' A state's power to continue to impose traditional restrictions when a new and contradictory consensus has arisen in the great majority of other states is not protected through a constitutionalization of history. Decisions such as *Bowers v. Hardwick*[183] well highlight Justice Scalia's notions of the limitations of courts as vehicles for the imposition of change. The deference principles of the margin of appreciation teaches us that while the *Bowers* decision might have been correct at

180. *See generally,* Backer, *supra* note 23.

181. Thus, for example, Plessy v. Ferguson, 163 U.S. 537 (1896) (legislative requirement of racial segregation in public transport does not violate the equal protection clause) and Lochner v. New York, 198 U.S. 45 (1905) (striking down statute regulating working hours) have retained significant value precisely because they so well crystalize now repudiated judicial construction of our fundamental law. *See, e.g.,* United States v. Fordice, 505 U.S. 712 (1992) (separate but equal construction of federal constitution no longer has a place in the field of public education; the courts role now is to determine and apply standards under which states must meet their affirmative obligations to dismantle de jure segregated schools) and United States v. Lopez, 514 U.S. 549 (1994) ("Unlike *Lochner* and our more recent 'substantive due process' cases, today's decision enforces only the Constitution and not 'judicial policy judgments.'" *Id.* at 600 n.9, Thomas, J., concurring).

182. United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (quoting Rutan v. Republican Party of Illinois, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)). Justice Scalia points out that VMI comes from a long line of such tradition. Scalia also points out that all of the federal military colleges were single sex until 1976 – when the people, through their elected representatives, changed that. *See id.* at 569. "The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law." *Id.* at 569.

183. 478 U.S. 186 (1986).

one time, but by the time of the decision a consensus had formed respecting the nature of society's toleration of sexual minorities. That consensus, evidenced by the rise in states in which sexual practices had been decriminalized, or in which the state had ceased to prosecute such activities, mirrored that which supported the decision in *Dudgeon*.

Romer was not about conduct, but identity. It was not about the power to criminalize conduct, but the way in which republican principles developed at the time of the founding of the Republic would be exercised in practice and could be limited in fact. In contrast, the *Bowers* court concern with homosexuals and their 'practices,' this obsession with the need to bolster a *politically* weak opinion, caused them to miss the point of subsequent cases. *Romer* was not *Bowers*, and yet to Justice Scalia's *Bowers*-obsessed dissent in *Romer*, there was no difference. Political decisions, properly understood are both good and necessary functions of a Court. As constitutional monitor or interpreters of our core legal norms, the Court serves as a mouthpiece of our normative status quo.

Romer and *Bowers* were about politics – about the judicial declaration of the normative status quo as then currently practiced within common (popular) culture. Neither case can escape this characterization – no decision construing the federal Constitution can. All such decisions are necessarily political because they involve the hermeneutics of political conventions. Judicial hermeneutics, in the form of Constitutional interpretation, like its counterparts in the legislative and administrative branches, is imbued with a great degree of cultural freedom, which courts use liberally, if sometimes incorrectly.

I end with a paraphrase of Justice Scalia, corrected to invert his meaning in the context in which he spoke. "So to counterbalance [traditionalist] criticism of our ancestors [and the common law courts they bequeathed us], let me say a word in their praise: they left us free to change."[184] I celebrate what Robert Bork finds so distressing (when he is on the wrong end of interpretation): "[t]he Court will change the Constitution as politics and culture change."[185] Of course, he is wrong – the Court will change the interpretive potential of the words of the Constitution. The Constitution itself remains unchanged – ever ready for modulated readings to suit the times, and all based, if you like, on the original intent of the founders! The political enterprise of the Courts, like those of our legislature, is written in malleable stone. Hermeneutics provides the tools for writing on that stone. Hermeneutics works because, when used to write without changing the basic character of the stone, it appears to affect no change at all. In this manner have those who in every society are charged with the priestly function stayed true to the eternal verities of the

184. United States v. Virginia, 518 U.S. at 567 (Scalia, J., dissenting).

185. BORK, *supra* note 20, at 109.

authoritative word while molding those words to suit the needs of the moment. Thus does our Court provide the eternal words of the federal Constitution with a form and substance which can be implemented and reimplemented to suit the needs of every generation.