

1997

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### Recommended Citation

David L. Fitzgerald, *Let Justice Flow Like Water: The Role of Moral Arugument in Constitutional Interpretation*, 65 Fordham L. Rev. 2103 (1997).

Available at: <https://ir.lawnet.fordham.edu/flr/vol65/iss5/5>

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## Let Justice Flow Like Water: The Role of Moral Arugument in Constitutional Interpretation

### Cover Page Footnote

I would like to thank Erica for her endless patience. In addition, I would like to thank all my teachers, including my parents, who taught me, following St. Ignatius, to do all things Ad Majorem Dei Gloriam.

# LET JUSTICE FLOW LIKE WATER: THE ROLE OF MORAL ARGUMENT IN CONSTITUTIONAL INTERPRETATION

David L. Fitzgerald\*

## INTRODUCTION

The Supreme Court's right of privacy jurisprudence has generated significant controversy in the last thirty years.<sup>1</sup> Much of this controversy flows from the fact that this substantive right, although grounded in the Due Process Clause of the Fourteenth Amendment,<sup>2</sup> has little textual basis. Certainly, it can not be assumed to flow from the procedural terms of the Fourteenth Amendment itself.<sup>3</sup> This Note critiques the due process jurisprudence of the Supreme Court from *Griswold v. Connecticut*<sup>4</sup> to *Planned Parenthood v. Casey*<sup>5</sup> by focusing on a recent decision of the Ninth Circuit Court of Appeals, *Compassion in Dying v. Washington*,<sup>6</sup> which draws much of its legal and intellectual force from substantive due process precedents. *Compassion in Dying* extends these precedents and recognizes a substantial liberty

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1. See Robert H. Bork, *The Tempting of America* 97 (1990) [hereinafter Bork, *The Tempting of America*] (noting that the " 'right of privacy' has become a loose canon in the law"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920, 927-37 (1973) [hereinafter Ely, *The Wages of Crying Wolf*] (arguing that *Roe v. Wade*, 410 U.S. 113 (1973), lacks constitutional support); Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 *Wis. L. Rev.* 1305, 1306 (noting the inability of the Supreme Court to agree on a grounding for privacy rights).

2. U.S. Const. amend. XIV, § 1.

3. The Fourteenth Amendment states, "nor shall any state deprive any person of life, liberty, or property, without due process of law" *Id.*; see also John Hart Ely, *Democracy and Distrust* 15 (1980) [hereinafter Ely, *Democracy and Distrust*] (noting that, at the time of the Fourteenth Amendment's adoption, "[w]hat recorded comment there was . . . is devoid of any reference that gives the provision more than a procedural connotation").

4. 381 U.S. 479 (1965).

5. 505 U.S. 833 (1992).

6. 79 F.3d 790 (9th Cir.) (en banc), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996). The Supreme Court granted certiorari on October 1, 1996, and the case was argued on January 8, 1997. The Court's decision is expected early in the Summer of 1997. *U.S.L.W. (BNA-Daily Edition)* January 17, 1997. The case deals with the question of whether competent, terminally ill patients have a constitutional right to the assistance of their physician in terminating their own lives. *Compassion in Dying*, 79 F.3d at 793. As this Note will discuss, the resolution of *Compassion in Dying* will likely determine the future of substantive due process jurisprudence generally. See *infra* notes 17-29 and accompanying text. How the Supreme Court resolves the issue of physician assisted suicide will determine the legitimacy and vitality of its holdings in the abortion context. This Note will argue for a particular mode of legal reasoning which has the possibility of securing political legitimacy for substantive due process rights generally.

interest, grounded in the Due Process Clause, in controlling the time and manner of one's death.<sup>7</sup> Therefore, this decision provides fallow and topical grounds for criticizing the moral anthropology underlying substantive due process jurisprudence.

This Note looks at *Compassion in Dying*, and the Supreme Court's substantive due process cases upon which it rests,<sup>8</sup> through the spectrum of political legitimacy.<sup>9</sup> The goal is not to criticize the specific holdings in these cases; rather, this Note attempts to examine the method of argument in substantive due process cases and show why that method fails to secure political legitimacy for the specific due process rights which those cases protect.

This inquiry is necessary given the tentative footing on which substantive due process rests.<sup>10</sup> In the modern era, the Court has grounded substantive due process rights on two prongs.<sup>11</sup> The first prong was established in *Palko v. Connecticut*<sup>12</sup> in which Justice Cardozo found that a substantive due process right exists if the right in question is essential to the concept of "ordered liberty" such that "neither liberty nor justice would exist if [the right was] sacrificed."<sup>13</sup> In *Moore v. City of East Cleveland*,<sup>14</sup> the plurality opinion articulated the second prong of substantive due process inquiry: Substantive rights are protected if they are "deeply rooted in this Nation's history and tradition."<sup>15</sup> This second test requires that a substantive right have a historical pedigree in order to merit protection.<sup>16</sup> The Supreme Court, in *Bowers v. Hardwick*,<sup>17</sup> explicitly adopted this historical and "backward-looking" approach to substantive due pro-

7. *Compassion in Dying*, 79 F.3d at 816.

8. This Note examines *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Roe v. Wade*, 410 U.S. 113 (1973); and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

9. For a definition and discussion of this term see *infra* notes 46-47 and accompanying text.

10. See Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 Ind. L.J. 215, 216 (1987) (noting that, "[s]horn of any viable theoretical foundation, substantive due process may well be headed for its second death"); see also Brian C. Goebel, *Who Decides If There Is "Triumph in the Ultimate Agony?" Constitutional Theory and the Emerging Right to Die with Dignity*, 37 Wm. & Mary L. Rev. 827, 863-64 (1996) (discussing the confused nature of current substantive due process jurisprudence).

11. Anthony C. Cicia, Note, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 Fordham L. Rev. 2241, 2256 (1996).

12. 302 U.S. 319 (1937).

13. *Id.* at 326.

14. 431 U.S. 494 (1977) (plurality opinion).

15. *Id.* at 503.

16. See James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1, 57 (1995) [hereinafter Fleming, *Securing Deliberative Autonomy*].

17. 478 U.S. 186 (1986).

cess.<sup>18</sup> Such an approach effectively prevents using the Due Process Clause as a source of new rights because only traditional rights merit protection. The question facing constitutional theorists after *Bowers* was whether the Supreme Court, in that decision, precluded further use of the Due Process Clause as a source for recognizing new rights.<sup>19</sup>

Subsequent due process cases have not adequately answered that question. The Court in *Casey* upheld the "essential holding" of *Roe v. Wade*<sup>20</sup> and therefore refused to completely undermine a woman's right to an abortion.<sup>21</sup> It is possible, however, that *Casey* rested solely on *stare decisis* and not on substantive due process.<sup>22</sup> Therefore, its holding is unique, and the reasoning of *Casey* should not be extended beyond the limited context of abortion.<sup>23</sup> The Court's holding in *Cruzan v. Director, Missouri Department of Health*<sup>24</sup> also provides limited guidance for determining whether substantive due process remains a generative force for new substantive rights. The *Cruzan* Court held that a state may require clear and convincing proof of the wishes of a patient in a persistent vegetative state before doctors may discontinue life support.<sup>25</sup> In order to support this holding, however, the Court did not need to reach the question of whether there was a right to refuse unwanted medical treatment. The Court merely assumed that such a right existed.<sup>26</sup> It did not need to affirmatively hold

18. See Fleming, *Securing Deliberative Autonomy*, *supra* note 16, at 58.

19. See Conkle, *supra* note 10, at 216 (arguing that *Bowers* could be used as a mechanism for overturning all substantive due process cases); see also Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. Chi. L. Rev. 648, 652-54 (1987) (arguing that in deciding *Bowers* the Supreme Court abandoned earlier right of privacy precedents); Brett J. Williamson, Note, *The Constitutional Privacy Doctrine After Bowers v. Hardwick: Rethinking the Second Death of Substantive Due Process*, 62 S. Cal. L. Rev. 1297, 1297 (1989) (trying to distinguish *Bowers* from other substantive due process cases).

20. 410 U.S. 113 (1973).

21. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

22. *Id.* at 853 ("While we appreciate the weight of the arguments made on behalf of the State in the cases before us . . . the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.")

23. *Compassion in Dying v. Washington*, 79 F.3d 790, 848 (9th Cir.) (en banc) (Beezer, J., dissenting) (arguing that "*Casey's* reaffirmation of the abortion right is best understood as a decision that relies heavily on *stare decisis*; the abortion right, uniquely protected under the undue burden standard, is *sui generis*"), *cert. granted sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 37 (1996); Mark E. Chopko & Michael F. Moses, *Assisted Suicide: Still a Wonderful Life?*, 70 Notre Dame L. Rev. 519, 549 (1995) ("This underscores all the more that abortion now appears to occupy its own jurisprudential island, with no readily explainable relation to the remainder of the Court's substantive due process cases.")

24. 497 U.S. 261 (1990). This case dealt with the right of family members to withdraw life support from incompetent, terminally ill patients and what standard of proof about patient's wishes the state may compel such family members to meet before permitting the termination of life support. *Id.* at 265, 280.

25. *Id.* at 279.

26. *Id.*

that the Due Process Clause guaranteed this right because the state's interest in preserving the patient's life justified the high evidentiary requirement.<sup>27</sup>

Given this confusion, the Supreme Court's resolution of the substantive due process questions raised by *Compassion in Dying* will have profound ramifications for substantive due process doctrine generally. If the Court accepts the substantive due process basis for the Ninth Circuit holding, it will have to face the crisis of legitimacy engendered by current substantive due process jurisprudence. If the Court rejects outright the substantive due process reasoning of *Compassion in Dying*, it will effectively undermine the theoretical ground on which controversial decisions, especially the abortion decisions, rest.<sup>28</sup> Therefore, the Court will need to ground the right to an abortion on firmer footing in the future if it wishes to avoid resting a controversial right on a discredited and problematic doctrine. This Note explores a possible method of argument for the Court to follow in the future which could secure not only the right to an abortion, but also political legitimacy for that right.<sup>29</sup>

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27. *Id.* at 281-82; see Chopko & Moses, *supra* note 23, at 564.

28. This reasoning holds even if the Court finds a right to physician-assisted suicide in the Equal Protection Clause, as the Second Circuit held in *Quill v. Vacco*, 80 F.3d 716 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996), the companion case to *Compassion in Dying* in the Supreme Court. In *Quill*, the Second Circuit struck down a New York statute forbidding physician-assisted suicide on rather unusual grounds. The court refused to expand the list of substantive due process rights on its own authority. *Id.* at 724-25. Rather, the court found that New York law allowed terminally ill patients on life support to hasten their own deaths by terminating that life support. New York denied this ability to terminally ill patients who were not on life support, however, because they could not seek the aid of their physicians in terminating their lives. *Id.* at 719. The court reviewed equal protection doctrine and found that competent terminally ill patients are not part of a suspect class, nor do they have a fundamental right to die. *Id.* at 726. Accordingly, the court applied rational basis review to the statute. *Id.* at 727. Under this standard, state action which classifies similarly situated groups differently must bear some fair relationship to a legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The court found, however, that the distinction drawn by New York between competent, terminally ill patients on life support and competent, terminally ill patients not on life support failed to pass even this low standard of review and therefore violated the Equal Protection Clause. *Quill*, 80 F.3d at 727-29. If the Supreme Court follows the reasoning of the Second Circuit and strikes down all state statutes preventing physician-assisted suicide in states that allow competent persons to terminate life support, such a decision, of course, would not resolve the confusion in substantive due process jurisprudence.

29. Professor Cass Sunstein, whose general work is discussed *infra* in the text accompanying at notes 145-64, also attempts this project to some degree. He sees the Due Process Clause as essentially backward looking, offering protection only to traditional practices against short-term departures. See Cass R. Sunstein, *The Partial Constitution* 131-33 (1993) [hereinafter Sunstein, *The Partial Constitution*]; James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211, 263 (1993) [hereinafter Fleming, *Constructing the Substantive Constitution*]. Therefore, he argues for protection of non-traditional practices like abortion on equal protection grounds. See Sunstein, *The Partial Constitution*, *supra*, at 272. Professor Sunstein hopes to avoid the illegitimacy problem of the Due Process Clause by grounding substantive

This Note argues that the failure of substantive due process jurisprudence to secure legitimacy is the result of the philosophical presuppositions underlying those decisions. These decisions rest on a Rawlsian thesis that true moral agreement is impossible in a pluralistic society.<sup>30</sup> They argue therefore that it is futile to try to secure legitimacy in constitutional interpretation on moral agreement. This Note argues that such a belief in moral intelligibility is unfounded. Enough moral agreement is possible to legitimize constitutional rights. Furthermore, this Note demonstrates, drawing on the work of Michael Sandel, that the only way to secure widespread legitimacy for any constitutional right is to abandon the liberal project of toleration and look instead to ground the right in the moral good of the practice which the right in question protects.

To this end, part I examines what is meant by political legitimacy and outlines the types of arguments to which governmental actors, including judges, must appeal to secure it. It also reveals the judicial disagreement in recent substantive due process jurisprudence, and shows that this disagreement flows from the idea that moral agreement is not possible in a pluralistic society.

Part II closely explores the majority opinion of Judge Reinhardt in *Compassion in Dying*. Judge Reinhardt's reasoning clearly demonstrates the liberal<sup>31</sup> philosophical basis of substantive due process jurisprudence,<sup>32</sup> especially its dependence on the work of John Rawls. This part also raises questions with the anthropological presupposi-

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rights in the Equal Protection Clause. However, because Professor Sunstein shares the basic philosophical commitments of those who wish to ground unenumerated substantive rights on an expansive reading of the Due Process Clause, his method also fails to secure legitimacy for those rights. *See infra* part III.B.

30. This Note examines the significant influence of John Rawls on substantive due process jurisprudence. For an interesting discussion of Rawls's ideas about the possibility of moral agreement in a pluralistic society, see Paul F. Campos, *Secular Fundamentalism*, 94 Colum. L. Rev. 1814, 1823 (1994) (arguing that Rawls's concept of political liberalism requires an acceptance of what Rawls has described as the "practical impossibility of reaching reasonable and workable political agreement" on the truth of comprehensive moral doctrines).

31. This Note will point out that the philosophy of liberalism includes within it the modern American political spectrum characterized by the terms "conservative" and "liberal." For example both Newt Gingrich and Bill Clinton share the same basic philosophical presuppositions. Where they differ is in how best to effectuate this philosophy. *See Liberalism Defined*, *Economist*, Dec. 21, 1996, at 17-19. Obviously, this is a much different conception of liberalism than is generally understood in modern American popular political discourse. The popular press often uses the word "liberal" to describe those who were traditionally called "socialists." *See id.*

32. This Note will refer to the "aspirational" approach to constitutional interpretation as a way of describing those theorists who argue for a broad reading of the Constitution generally and the Due Process Clause specifically. These theorists are known for their belief that the judiciary must actively use the broad language of constitutional provisions to vindicate the moral aspirations of the people. *See* Sotirios A. Barber, *On What the Constitution Means* 10 (1984) (defending an aspirational approach to constitutional interpretation); James W. Ducayet, Note, *Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation*, 68

tions that this philosophy entails. Finally this part argues that liberalism's unsuccessful answers to these questions are responsible for the current crisis of legitimacy in substantive due process jurisprudence.

Part III examines originalist and progressive theories of constitutional interpretation which provide the traditional critiques of liberal substantive due process jurisprudence. It examines how these theories attempt to overcome the problems raised with aspirational approaches to constitutional interpretation. Largely because these theorists share the same liberal presuppositions of the aspirationalists about both the nature of the human person and the person's relationship with the state, both originalists and progressives also fail to secure legitimacy for substantive due process rights.

To negotiate a solution to these interpretive difficulties, part IV closely examines the work of Michael Sandel. Professor Sandel calls for a theory of constitutional interpretation which honors the republican nature of our constitutional system. He argues that in order to secure legitimacy for substantive due process rights, it is essential that the polity, in both its legislative and judicial functions, take moral argument seriously. If they are to find widespread acceptance in our political culture, rights must be referenced to the end of cultivating the virtues necessary for good citizenship. Professor Sandel cites Justice Douglas's reasoning in *Griswold v. Connecticut*<sup>33</sup> as the type of argument necessary for securing legitimacy for due process rights.<sup>34</sup> This part also explores Professor Sandel's notion that the Court, by turning away from the reasoning of *Griswold*, has undermined the legitimacy of substantive due process generally.

The final part examines Sandelian arguments both for and against physician-assisted suicide. This part frames the issue by first exploring the aspirational attempt at moral agreement exemplified by the work of Professor Dworkin, and then shows why this attempt fails to secure legitimacy for substantive due process rights. It argues that Sandel's republicanism has a far better chance of securing political legitimacy than does aspirationalism. Whatever the final outcome of this contentious legal issue, the hope is that political and legal argument will take moral questions seriously, and hence have a better chance of securing legitimacy than the recent judicial attempts to secure rights on a conception of the human person as autonomous, inviolable, and under no obligation to justify personal actions.<sup>35</sup>

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N.Y.U. L. Rev. 821, 847-48 (1993) (arguing that originalism forecloses aspirational arguments).

33. 381 U.S. 479 (1965).

34. See *infra* part IV.

35. See Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 7-8 (1996) [hereinafter Sandel, *Democracy's Discontent*].



## I. SUBSTANTIVE DUE PROCESS AND LEGITIMACY

All right of privacy decisions, including *Compassion in Dying*, have produced serious criticism from political, legal, and academic circles.<sup>36</sup> This part examines the nature of judicial disagreement over substantive due process jurisprudence. It also discusses the relationship between moral agreement and political legitimacy and shows that some level of moral agreement is necessary to secure meaningful political legitimacy.

A. *Outlining Judicial Disagreement in Recent Substantive Due Process Jurisprudence*

Both the Supreme Court in *Casey* and the Ninth Circuit in *Compassion in Dying* were deeply divided over the existence of the right in question. The *Casey* Court could secure a majority only on its specific holding, which reaffirmed that a woman has a constitutional right to an abortion.<sup>37</sup> The extent and grounding of that right produced deep disagreement even among the Justices who voted to affirm that "essential holding"<sup>38</sup> of *Roe v. Wade*.<sup>39</sup> The *Casey* joint opinion also occasioned deep and biting dissents from Justices Rehnquist and Scalia.<sup>40</sup>

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36. See George C. Christie, *A Model of Judicial Review of Legislation*, 48 S. Cal. L. Rev. 1306, 1308 (1975) (outlining a model of judicial review which avoids the charge of judicial subjectivity in fashioning legal rules); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 Harv. J.L. & Pub. Pol'y 87, 98 (1984) (arguing that the more ambiguous a legal text is, the less power judges have to enforce compliance with their conclusions); Ely, *The Wages of Crying Wolf*, *supra* note 1, at 937-938 (showing how the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), is similar to its discredited decision in *Lochner v. New York*, 198 U.S. 405 (1905)); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L.J. 1501, 1513-18 (1989) (book review) (discussing some of the problems with the liberal political philosophy which undergirds modern substantive due process jurisprudence).

37. *Planned Parenthood v. Casey*, 505 U.S. 833, 845-46 (1992).

38. See *id.* at 922 (Blackmun, J., concurring) (worrying that the right to an abortion is now on weak footing).

39. 410 U.S. 113 (1973).

40. See *Casey*, 505 U.S. at 944, 954 (Rehnquist, C.J., concurring in part and dissenting in part) (noting that "[w]hile purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."); *id.* at 979 (Scalia, J., concurring in part and dissenting in part). Justice Scalia added:

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in these and other cases, the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.

*Id.* at 983.

Similarly, the history of the *Compassion in Dying* right to die litigation, which has recently dominated the substantive due process center stage, is long and divisive. The district court ruled that the Washington statute outlawing physician-assisted suicide was unconstitutional.<sup>41</sup> A three-judge Ninth Circuit panel voted two-to-one to reverse the district court.<sup>42</sup> On rehearing, the Ninth Circuit en banc reversed the decision of the three-judge panel and affirmed the district court's judgment, by a vote of eight-to-three.<sup>43</sup> Finally, a request for a rehearing before the entire Circuit was denied over strenuous dissent from three judges.<sup>44</sup> Such profound and lasting disagreement calls into question the legitimacy of the substantive due process line of cases both within the judiciary and among the public in general.<sup>45</sup>

### B. *Moral Intelligibility and Legitimacy*

Some level of moral agreement is necessary to secure legitimacy for political decisions. This section addresses the roots of the judicial disagreement over substantive due process jurisprudence and discusses

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41. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459-60 (W.D. Wash. 1994) (“[T]his court finds the reasoning in *Casey* highly instructive and almost prescriptive on the [issue of physician-assisted suicide].”).

42. *Compassion in Dying v. Washington*, 49 F.3d 586, 590-91 (9th Cir. 1995). The panel reflected that it would be impossible to reign in this practice if the right contemplated by the district court were accepted at face value:

The depressed twenty-one year old, the romantically-devastated twenty-eight year old, the alcoholic forty-year old who choose suicide are also expressing their views of the existence, meaning, the universe, and life; they are also asserting their personal liberty. If at the heart of the liberty protected by the Fourteenth Amendment is this uncurtailable ability to believe and to act on one's deepest beliefs about life, the right to suicide and the right to assistance in suicide are the prerogative of at least every sane adult.

*Id.*

43. *Compassion in Dying v. Washington*, 79 F.3d 790, 813 (9th Cir. 1996) (en banc) (“A common thread running through these [substantive due process] cases is that they involve decisions that are highly personal and intimate, as well as of great importance to the individual. Certainly, few decisions are more personal, intimate or important than the decision to end one's life . . . .” (footnote omitted)).

44. *Compassion in Dying v. Washington*, 85 F.3d 1440, 1440 (9th Cir.) (O'Scannlain, J., dissenting from denial of reh'g en banc), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37 (1996). Judge O'Scannlain noted:

By promulgating a new constitutional right, one unheard of in over two hundred years of American history, six men and two women—endowed with life tenure and cloaked in the robes of this court—have enacted by judicial fiat what the people of the State of Washington declined to do at the polls only five years ago.

*Compassion in Dying*, 85 F.3d at 1440.

45. See *Planned Parenthood v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (noting the confusion in post-*Roe* abortion decisions); see also Goebel, *supra* note 10, at 863-64 (noting that judicial disagreement on how to apply substantive due process cases and doctrine has tarnished the legitimacy of constitutional decisions); Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. Rev. 133, 142 (1991) (noting disagreements in substantive due process cases).

the relationship between legitimacy and moral agreement. It suggests that the current legitimacy crisis of substantive due process jurisprudence stems from the liberal presupposition that moral agreement in a pluralistic society is impossible.

Before analyzing the legitimacy of the Supreme Court's substantive due process jurisprudence, it is first necessary to discuss what is meant by legitimacy. A legitimate action is one that, even if one thinks it is wrong or foolish, can be accepted as comporting with a deeper sense of justice.<sup>46</sup> Legitimacy is about governmental action comporting with a shared sense of what is right, just, and fair.<sup>47</sup>

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46. There are, of course, competing versions of legitimacy. John Rawls, discussed in more detail *infra* in the text accompanying notes 79-101, provides a liberal definition of legitimacy:

[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.

John Rawls, *Political Liberalism* 137 (1993) [hereinafter Rawls, *Political Liberalism*]. One of the main goals of this Note is to point out that Professor Rawls's rationalist conception of legitimacy is too narrow. A people's sense of legitimacy is more instinctual and drawn from a broader ground of experience than is implicated simply by use of the reason. Legitimacy is primarily about a communal sense of justice, rooted in the imagination. Although imagination has a rational component, it is in many ways pre-rational in the sense that much of our imagination is inherited unquestioningly as a function of the myths which constitute our community. See J.P.M. Walsh, S.J., *The Mighty from Their Thrones* 8-10 (1987) [hereinafter Walsh, *The Mighty from Their Thrones*]. Hence:

The widow's plight triggers our sense of what is right, fair, just, seemly, reasonable, and so on: our sense of *sedeq* [translated as "justice"]. Our reaction has several aspects. There is our desire to stand up for what is right, to see [justice] vindicated. There is our desire to see the person who is in the right vindicated, as well.

*Id.* at 6; see generally Ellis Sandoz, *The Voegelinian Revolution: A Biographical Introduction* (1981) [hereinafter Sandoz, *The Voegelinian Revolution*] (discussing the work of Eric Voegelin). Voegelin argued for a recapturing of the tradition of thought, that had its roots in both Ancient Greece and Ancient Israel, which held that human spiritual development requires a discovery "that existence demands attunement to the truth of being." *Id.* at 119. The essence of a community for Voegelin is a recognition of participation in a greater whole and an attempt to render that whole intelligible through symbol and myth. *Id.* at 151. Voegelin identifies the modern crisis of philosophy generally and political philosophy in particular as a failure to realize that all our symbols, including our law, are divorced from their essentially divine ground. *Id.* at 185-87. For Voegelin, the category error which leads to illegitimacy is the classical fallacy that "man is the measure" of all things. *Id.* at 155 (citations omitted). Because legitimacy derives from an objective sense of what is just, it is possible to say that the best regime is one that educates its citizens in the virtues in order to secure the common good. This is directly antithetical to a liberal conception of legitimacy which holds that the only role of government is to secure a minimum order that leaves individuals alone to pursue their own freely chosen ends. Alasdair MacIntyre, *Whose Justice? Which Rationality?* 201 (1988) [hereinafter MacIntyre, *Whose Justice? Which Rationality?*].

47. See Walsh, *The Mighty from Their Thrones*, *supra* note 46, at 7 (noting that "[c]onversely, the established order and its ordinary exercise of *mispat* [translated as "power"] derive legitimacy from people's convictions about [justice]"); Richard

The philosophical ground and the mode of argument of substantive due process jurisprudence, exemplified by Judge Reinhardt's opinion in *Compassion in Dying*,<sup>48</sup> forecloses precisely the type of argument that would render legitimate the rights articulated in cases like *Casey* and *Compassion in Dying*. The liberal conception of the human person articulated by Judge Reinhardt makes it impossible to appeal to any shared conception of justice because jurists like Judge Reinhardt doubt that such a shared conception can exist in a pluralistic society.<sup>49</sup> Even if such a consensus does exist, no branch of the government may appeal to it to justify its actions because the Constitution requires governmental neutrality toward conceptions of the good.<sup>50</sup> If this is so, no governmental action—certainly not one taken by the anti-majoritarian judiciary—can be considered legitimate because there is no moral backdrop against which those actions can be defended.<sup>51</sup> Public actors have a hard time rallying the citizenry behind a decision because they are precluded from tapping into the very moral imagination that would lend weight and credence to their actions.<sup>52</sup>

## II. OUTLINING THE LIBERAL PHILOSOPHICAL GROUND OF *COMPASSION IN DYING* AND SUBSTANTIVE DUE PROCESS JURISPRUDENCE

As the previous part revealed, serious problems plague substantive due process jurisprudence and adversely effect the political legitimacy of judicial decisions. This part explores the roots of these problems by looking closely at the legal reasoning of Judge Reinhardt's majority opinion in *Compassion in Dying*.<sup>53</sup> In an attempt to understand the animating principles behind *Compassion in Dying*, this part explores

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Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. Ill. L. Rev. 535, 541-42 (arguing that governmental choices are based on norms of justice); Ron Replogle, Note, *The Scope of Representation-Reinforcing Judicial Review*, 92 Colum. L. Rev. 1592, 1602-03 (1992) (noting that if a decision is going to be considered legitimate it must in some way comport with a sense of justice).

48. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37 (1996); see *infra* notes 101-02 and accompanying text (noting that political decisions on a liberal model cannot be based solely on comprehensive conceptions of the good).

49. See *infra* notes 102-03 and accompanying text (discussing the affinities between Rawls and Reinhardt).

50. See *infra* notes 98-103 and accompanying text.

51. See *id.*

52. Michael Sandel notes:

[W]e are beginning to find that a politics that brackets morality and religion too completely soon generates its own disenchantment. A procedural republic cannot contain the moral energies of a vital democratic life. It creates a moral void that opens the way for narrow, intolerant moralisms. And it fails to cultivate the qualities of character that equip citizens to share in self-rule.

Sandel, *Democracy's Discontent*, *supra* note 35, at 24.

53. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37 (1996).

the work of John Rawls, demonstrating how Rawlsian political philosophy supplies the current theoretical underpinning for substantive due process jurisprudence.

### A. *The Legal Reasoning of Compassion in Dying*

For the purposes of this Note, Judge Reinhardt's majority opinion in *Compassion in Dying* serves as a foil for other cases decided on substantive due process grounds. The case is not chosen, at least not primarily, to examine the correctness of its holding. Rather, this Note explores the case in order to uncover the philosophical presuppositions inherent within it and other controversial substantive due process cases.<sup>54</sup> In order to understand these philosophical presuppositions, however it is necessary to dissect the legal context in which they come into play.

#### 1. The Mode of Inquiry

Washington enacted a statute making it a crime for any person to "aid" a terminally ill, mentally competent adult in hastening his own death through the use of medication prescribed by his doctor.<sup>55</sup> This practice is commonly referred to as physician-assisted suicide.<sup>56</sup> In order to determine whether terminally ill patients had a constitutional right to this practice, the Ninth Circuit framed the issue in substantive

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54. The goal of this Note is not to advocate a repeal of the rights guaranteed in substantive due process cases from *Griswold v. Connecticut* to *Planned Parenthood v. Casey*. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (guaranteeing the right of marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (guaranteeing the right of unmarried persons to purchase contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (protecting a woman's right to an abortion); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (protecting the right to refuse unwanted medical treatment); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming a woman's right to an abortion). What is important for this inquiry is not whether the defense of a particular right or practice is persuasive. Rather, this Note explores the Court's mode of argument and theoretical alternatives to that mode of argument in these volatile and divisive cases to determine if the practices, whether they are ultimately protected or left open to state regulation or prohibition, can ever be accepted by the polity as legitimate.

55. "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." Wash. Rev. Code Ann. § 9A.36.060(1) (West 1988); *Compassion in Dying*, 79 F.3d at 797.

56. For further discussion of this topic, see Charles H. Baron et al., *A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 Harv. J. on Legis. 1 (1996); Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. Rich. L. Rev. 1 (1996); Goebel, *supra* note 10; Ronald S. Kaniuk, *European Perspectives Towards Euthanasia and Physician-Assisted Suicide*, 9 N.Y. Int'l L. Rev. 85 (1996); Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies*, 55 Md. L. Rev. 292 (1996); Paul J. Zwier, *Looking for a Nonlegal Process: Physician-Assisted Suicide and the Care Perspective*, 30 U. Rich. L. Rev. 199 (1996).

due process terms, inquiring: "[I]s [there] a liberty interest in choosing the time and manner of one's death . . . [i]s there a right to die?"<sup>57</sup>

The court quickly dispensed with the idea that the liberties contemplated by the Due Process Clause are only those specifically enumerated elsewhere in the Constitution.<sup>58</sup> Rather, the court, following recent Supreme Court precedent in substantive due process jurisprudence, chose to apply a test that balanced the contemplated rights of the individual against the interests of the state.<sup>59</sup>

## 2. Grounding the Liberty Interest

The *Compassion in Dying* court favorably cited Justice Brandeis's famous dissent in *Olmstead v. United States*<sup>60</sup> for the proposition that the Framers sought to "protect Americans in their beliefs, their thoughts, their emotions and their sensations" and that, as against the government, all people have "the right to be let alone."<sup>61</sup> Although *Olmstead* was decided under the Fourth Amendment, Judge Reinhardt's use of this language indicates his larger moral anthropology: Human beings exercise their "spiritual nature"<sup>62</sup> and render judgments about their "thoughts" and "beliefs" in solitude.<sup>63</sup> According to this view, at the very least, in our constitutional order, citizens must be free to decide moral questions apart from government interference. Judge Reinhardt also quotes Brandeis's notion that this "right" is "the most comprehensive of rights, and the right most valued by civilized men."<sup>64</sup> This language has serious implications for how Judge Reinhardt would adjudicate the legitimacy of government actions. According to Judge Reinhardt, rooted in the American consensus about what is just, and therefore, in the consensus about what the

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57. *Compassion in Dying*, 79 F.3d at 798-99; see also Marc Spindelman, *Are the Similarities Between a Woman's Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?*, 29 U. Mich. J.L. Ref. 775, 797 (1996) (noting that the right to die must be framed as a liberty interest).

58. See *Compassion in Dying*, 79 F.3d at 799.

59. *Id.*; see Kevin M. Stansbury, Case Note, 31 Land & Water L. Rev. 623, 632 (1996). For further discussion of the Court's use of balancing when confronted with a liberty interest see Chlapowski, *supra* note 45, at 144-45 (discussing the balancing approach in the fundamental rights context); Anne Marie Gaudin, Note, *Cruzan v. Director, Missouri Department of Health: To Die or Not to Die: That Is the Question—But Who Decides?*, 51 La. L. Rev. 1307, 1318-20 (1991) (discussing the Supreme Court's application of a balancing test in the context of the right to refuse life sustaining medical treatment); Michael W. Macleod-Ball, Note, *The Future of Zoning Limitations upon Religious Uses of Land: Due Process or Equal Protection?*, 22 Suffolk U. L. Rev. 1087, 1101-02 (1988) (discussing courts' willingness to balance personal liberty interests against state interests).

60. 277 U.S. 438 (1928).

61. *Compassion in Dying*, 79 F.3d at 800 (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

62. *Id.*

63. *Id.*

64. *Id.*

government may legitimately do, is the notion that there is no role for the state in the realm of the citizenry's moral decision making.<sup>65</sup>

The court next drew an analogy between the right of privacy contemplated by the abortion decisions and the right-to-die cases.<sup>66</sup> As in the abortion context, where the question of whether the state may interfere with the decision of the mother to terminate her pregnancy hinges on fetal viability,<sup>67</sup> the outcome of the balancing test in right-to-die cases might differ depending upon the point in the life cycle at which suicide is sought. Both situations raise issues of life and death, arouse similar moral concerns, and, in both contexts, the state has had only partial success in preventing the practices.<sup>68</sup> Most importantly for this inquiry, both cases present basic questions about an individual's right of choice.<sup>69</sup> Logically, then, the *Compassion in Dying* court looked to *Casey* as the controlling precedent and identified its central message: "[C]hoices central to personal dignity and autonomy [ ] are central to the liberty protected by the Fourteenth Amendment."<sup>70</sup> Furthermore, the court found that decisions concerning abortion and assisted suicide inflict too much personal suffering on the individual for "the State to insist, without more, upon its own vision of the [individual's] role."<sup>71</sup>

The court opted for an aspirational and evolving approach in determining which substantive rights are protected by the Due Process Clause, stating that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."<sup>72</sup>

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65. Judge Reinhardt sees the freedom to make the choice of physician-assisted suicide as flowing in continuum from other privacy rights earlier recognized by the Supreme Court. Hence, there is no novelty in his recognition of physician-assisted suicide. It, like the "right to be let alone" formulated by Brandeis, is essential to just government. See Christopher N. Manning, Note, *Live and Let Die?: Physician-Assisted Suicide and the Right to Die*, 9 Harv. J.L. & Tech. 513, 530 (1996).

66. *Compassion in Dying*, 79 F.3d at 800-01; see Stansbury, *supra* note 59, at 632.

67. See *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992) (concluding that the line for when a woman can no longer choose to terminate her pregnancy free of substantial state interference is the point of fetal viability).

68. The court noted that even when abortion was banned, back alley abortions flourished. The court made a similar argument in regard to physician-assisted suicide—many terminally ill patients, deprived by law of the help of their physicians, take their own lives, often with tragic consequences. *Compassion in Dying*, 79 F.3d at 801.

69. *Id.*

70. *Id.* (quoting *Casey*, 505 U.S. at 851).

71. *Id.* at 805 (quoting *Casey*, 505 U.S. at 852).

72. *Id.* at 806 (quoting *Casey*, 505 U.S. at 847-48). Constitutional interpreters who subscribe to the aspirational approach frequently cite favorably, as does Judge Reinhardt, Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961). See *Compassion in Dying*, 79 F.3d at 804. In *Poe*, Justice Harlan articulated the approach to substantive due process which has become the cornerstone of aspirational jurisprudence: "[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is a rational continuum, which broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . ." *Poe*, 367 U.S. at 543 (Harlan, J., dissenting). This approach posits that broad and abstract constitutional rights, like

The court noted that many unenumerated and historically unprotected practices have been protected on this theory of personal autonomy.<sup>73</sup> The common thread running through all the due process cases, the court found, is the basic premise that the individual deserves protection from state interference with respect to decisions of a personal and intimate nature.<sup>74</sup> Therefore, decisional autonomy is an aspirational principle undergirding our constitutional document.<sup>75</sup> Hence, the court argued that because few, if any, decisions are as important as the decision to end one's life, the cases provide strong general support for the proposition that there is a liberty interest in controlling the time and manner of one's death.<sup>76</sup>

None of the interests that the state could muster<sup>77</sup> to balance against the individual's interest in determining the time and manner of one's death were deemed sufficient to save the challenged portion of the statute. Accordingly, the court held that although the state may regulate assisted suicide, it may not totally ban it for terminally ill patients.<sup>78</sup>

### B. *The Liberal Presuppositions of Substantive Due Process Jurisprudence*

Having examined the legal reasoning in *Compassion in Dying*, it is appropriate to address the philosophical presuppositions upon which that reasoning rests. To accomplish this, it is necessary to examine the

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the right to make intimate personal decisions, must be extended equally to all people if there are no moral grounds for distinguishing among various groups. Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. Rev. Books, Aug. 8, 1996, at 44.

73. *Compassion in Dying*, 79 F.3d at 805-07. The *Compassion in Dying* court identified several cases in which unenumerated and historically unprotected practices have been secured on personal autonomy grounds, including: *Turner v. Safley*, 482 U.S. 78 (1987) (recognizing the right of prisoners to marry); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (recognizing the right of minors to purchase contraceptives); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing the right to interracial marriage); and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right of marital privacy).

74. See *Compassion in Dying*, 79 F.3d at 814-15 (quoting Chief Justice Rehnquist's majority opinion in *Cruzan v. Director, Missouri Dep't of Health*, 410 U.S. 261, 281 (1990), for the proposition that the ability to determine the time and manner of one's death flows from the personal nature of the decision).

75. *Id.* at 813; see also S.C., *Constitutional Law: Due Process of Law-Compassion in Dying v. Washington*, 22 Am. J.L. & Med. 135, 136 (1996) (noting that decisional autonomy is a vital liberty interest).

76. *Compassion in Dying*, 79 F.3d at 816.

77. The state's proffered interests included the interests in preserving life, preventing suicide, avoiding the involvement of third parties and preventing undue influence, protecting family and loved ones, protecting the integrity of the medical profession, and avoiding the adverse consequences which might ensue if the statute were declared unconstitutional. *Id.* at 817-32.

78. The court noted that "[i]f broad general state policies can be used to deprive a terminally ill individual of the right to make that choice, it is hard to envision where the exercise of arbitrary and intrusive power by the state can be halted." *Id.* at 837; see Stansbury, *supra* note 59, at 633-35.



political philosophy of John Rawls, upon whose philosophical theory Judge Reinhardt grounded the constitutionally protected right to physician assisted suicide.<sup>79</sup> Therefore, to understand the holding in *Compassion in Dying*, one must understand Rawls.

### 1. Rawlsian Conception of Justice and the Liberal State

In the classical tradition from Aristotle to Hobbes a polis was based on a shared conception of the good.<sup>80</sup> John Rawls argues that the goal of the Enlightenment project, particularly the moral/political philosophy of David Hume and Immanuel Kant,<sup>81</sup> was to free knowledge of the good from the dictates of revelation.<sup>82</sup> For the Enlightenment moral philosopher, the goal was to construct a conception of the good

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79. This Note discusses Professor Rawls's political philosophy as it is set out in two of his major works, *A Theory of Justice* (1971) [hereinafter Rawls, *A Theory of Justice*] and *Political Liberalism*, *supra* note 46.

80. Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 283-84. This Note does not attempt to resolve the conflict between those who argue that there is no objective conception of the good and those who believe that truth or the good has some objective knowable content. See Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry* 36 (1990) (discussing but not adopting Nietzsche's commitment to the notion that "all claims to truth are and can only be made from the standpoint afforded by some particular perspective"); Leo Strauss, "Relativism," in *The Rebirth of Classical Political Rationalism* 13 (Thomas L. Pangle ed., 1989) [hereinafter Strauss, "Relativism"] (discussing how relativism has crept into modern liberalism); *cf. id.* at 17 (claiming that every living being must of necessity take "an absolute stand in accordance with what he regards as the nature of man or as the nature of the human condition or as the decisive truth"). Rather, this Note argues that some communal conception of good, whether absolute or conventional, has almost always been enshrined as the basis for political judgments and that the basis for the legitimacy of political decisions has been referenced to that shared conception. See generally John Finnis, *Natural Law and Natural Rights* 407-08 (1980) (citing Plato for the proposition that knowledge of what is better rather than worse should be embodied in the laws of the polis).

Notions of legitimacy, in both Jerusalem and Athens, support this assertion that legitimacy is derived from a shared conception of the good. See generally 2 *Samuel* 12:1-19 (demonstrating the idea that King David is immediately aware of his sin and that he had violated Israel's conception of justice); Walsh, *The Mighty from Their Thrones*, *supra* note 46, at 23, 31 (noting that God has ultimate authority over the cosmos and that in accepting this God Ancient Israel was accepting a particular vision of justice which that God embodied); MacIntyre, *Whose Justice? Which Rationality?*, *supra* note 46, at 73-74 (noting that for Plato the virtue of justice was objective and outside the self and that both the soul and the polis should be referenced against this objective standard of justice).

81. "They [Hume and Kant] also believe that the knowledge or awareness of how we are to act is directly accessible to every person who is normally reasonable and conscientious." John Rawls, *Political Liberalism*, *supra* note 46, at xxvii.

82. *Id.* This idea flows from the Augustinian doctrine of Original Sin. For Augustine, both human will and human intellect were initially turned toward God, and therefore, human beings knew and could perform the good. Through the use of freedom, however, human beings turned away from God and, as an everlasting result, crippled both the intellect and the will such that knowledge of the good was at best dim and the ability to do the good non-existent. Only the grace of God, entering history in the person of Jesus Christ and our personal lives through receipt of the sacraments of the Church, restores humanity from this depraved condition and makes

based on reason alone and prior to any received conception of justice either from the religious, political, or social order.<sup>83</sup> This project has proved elusive and, some would say, illusory.<sup>84</sup>

Notwithstanding this skepticism, Professor Rawls, in his landmark work *A Theory of Justice*,<sup>85</sup> argued that justice consists of those guiding social principles that persons would choose, in a seminal state of equality, to govern their collective life.<sup>86</sup> In the Rawlsian scheme, justice has two first principles neither of which spring from a prior natural order. Rather these principles are grounded in the way citizens are to be regarded in the public political culture of a constitutional democracy.<sup>87</sup> Professor Rawls argues that the first principle of justice, the one relevant for this inquiry, requires that each person have a claim to a fully adequate scheme of equal basic rights and liberties.<sup>88</sup> Only if these liberties are guaranteed are freedom and equality possible, because these liberties are the precondition for the exercise of the two universal moral powers: the capacity for a sense of justice and the capacity to form a conception of the good.<sup>89</sup> Especially relevant in analyzing the philosophical ground for the *Compassion in Dying* deci-

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virtue possible. See Roger Haight, S.J., *The Experience and Language of Grace* 32-51 (1979); MacIntyre, *Whose Justice? Which Rationality?*, *supra* note 46, at 157.

It is Thomas Aquinas's great achievement that he managed to reinvigorate the natural integrity of both the human intellect and the human will and synthesize those conceptions with the Augustinian reliance on grace as essential to salvation. For an interesting reconstruction of the history of this synthesis see *id.* at 164-82. For further discussion of the general role of revelation in the history of political philosophy and politics in general, see Sandoz, *The Voegelinian Revolution*, *supra* note 46, at 116-42.

83. John Rawls, *Political Liberalism*, *supra* note 46, at xxvii.

84. See Alasdair MacIntyre, *After Virtue* 1-75 (1981) [hereinafter MacIntyre, *After Virtue*].

Hence the eighteenth-century moral philosophers engaged in what was an inevitably unsuccessful project; for they did indeed attempt to find a rational basis for their moral beliefs in a particular understanding of human nature, while inheriting a set of moral injunctions on the one hand and a conception of human nature on the other which had been expressly designed to be discrepant with each other . . . They inherited incoherent fragments of a once coherent scheme of thought and action and, since they did not recognise their own peculiar historical and cultural situation, they could not recognise the impossible and quixotic character of their self-appointed task.

*Id.* at 53.

85. See *supra* note 79.

86. *Id.* at 13-14.

87. See Rawls, *Political Liberalism*, *supra* note 46, at 13-14; Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 286.

88. Rawls, *A Theory of Justice*, *supra* note 79, at 60; Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 285. Rawls identifies what some of these rights and liberties are, including liberty of conscience and freedom of thought, liberty of the person, and equal political rights. See Rawls, *A Theory of Justice*, *supra* note 79, at 61. He notes, "the political system, which I assume to be some form of constitutional democracy, would not be a just procedure if it did not embody these liberties." *Id.* at 197-98.

89. Rawls, *Political Liberalism*, *supra* note 46, at 332; Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 287.

sion is the necessity of these liberties in order to secure the exercise of the second moral power.<sup>90</sup> As discussed previously,<sup>91</sup> the majority opinion in *Compassion in Dying* rests its holding on the dicta in *Casey* that the Fourteenth Amendment most strenuously protects choices central to our forming of moral conceptions.<sup>92</sup>

In light of the criticism leveled against his ideas,<sup>93</sup> Professor Rawls has recently backed away from this ambitious theory which grounds his conception of political justice, and therefore his conception of which types of government acts are legitimate, on a liberal conception of the human person as such.<sup>94</sup> Professor Rawls has sought a narrower ground for securing social agreement about principles of justice by retreating from a defense of comprehensive liberalism and moving instead toward a more limited political or minimalist liberalism.<sup>95</sup> Professor Rawls argues that a shared basis of political agreement cannot be grounded on a single conception of the good without intolerable state oppression.<sup>96</sup> Therefore, a political conception of justice accepts "the fact of reasonable pluralism," understood as irreconcilable yet reasonable moral doctrines that citizens may affirm.<sup>97</sup> Nevertheless, political agreement is possible if the citizens can come to some shared understanding—what Professor Rawls calls an overlapping consensus—concerning a political, as opposed to metaphysical, conception of justice.<sup>98</sup> This conception of justice constrains the polity's

90. Rawls, *Political Liberalism*, *supra* note 46, at 335 ("Liberty of conscience and freedom of association are to secure the full and informed and effective application of citizens' powers of deliberative reason to their forming, revising, and rationally pursuing a conception of the good over a complete life.").

91. *See supra* notes 70-71 and accompanying text.

92. *Compassion in Dying v. Washington*, 79 F.3d 790, 813 (9th Cir.) (en banc) (noting that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992))), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996).

93. *See infra* notes 105-06 and accompanying text.

94. "The general problems of moral philosophy are not the concern of political liberalism, except in so far as they affect how the background culture and its comprehensive doctrines tend to support a constitutional regime." Rawls, *Political Liberalism*, *supra* note 46, at xxviii.

95. *Id.* at xxvii; *see infra* notes 97-99 and accompanying text.

96. *See* Rawls, *Political Liberalism*, *supra* note 46, at xxiii-xxx, 134-37; Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 284.

97. Rawls, *Political Liberalism*, *supra* note 46, at 4; Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 284.

98. Rawls, *Political Liberalism*, *supra* note 46, at 10-11.

Political liberalism, then, aims for a political conception of justice as a free-standing view. It offers no specific metaphysical or epistemological doctrine beyond what is implied by the political conception itself. As an account of political values, a freestanding political conception does not deny there being other values that apply, say, to the personal, the familial, and the associational; nor does it say that political values are separate from, or discontinuous with, other values. In this case, citizens themselves, within the

pursuit of varying conceptions of the public good. Consequently, what is right or just, from a necessarily limited political perspective, is prior to and constrains any particular conception of the moral good.<sup>99</sup>

This final point is essential to understanding how Professor Rawls's conception of the person and the person's relationship to the state plays out in substantive due process jurisprudence. For Professor Rawls there is a clear split between what is good for the person (the proper subject of comprehensive moral philosophy) and what it is acceptable for the state to do to enforce any particular conception of the good (the subject of legitimate political philosophy).<sup>100</sup> The only particular conception of the good which the state may enforce is one shared by free and equal citizens and which does not presuppose any particular comprehensive conception of the good life as such.<sup>101</sup> The state, in order to be just, must accept what is right, the good notwithstanding.

## 2. Rawls and *Compassion in Dying*

It is easy to see in Professor Rawls's conception of political liberalism the seeds of the *Compassion in Dying* holding, as well as of Judge Reinhardt's reading of the entire scope of substantive due process jurisprudence. At its heart, *Compassion in Dying* is concerned with securing a sphere of decision making about fundamental moral questions where individuals are free to choose the good for themselves, unencumbered by the state. The decision, like Professor Rawls's conception of justice, sets restrictions on the grounds for political decisions. Political decisions must not be justified solely on collective conceptions of the good.<sup>102</sup> Rather, deciding the good is an individual choice wherein the state has a very limited place. If the state decides to restrict a practice which has its roots in some moral, philosophical, or religious conception of the good, the state must justify its restriction based on some compelling interest other than the majority's conception of the good. In short, the state must be neutral

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exercise of their liberty of thought and conscience, and looking to their comprehensive doctrines, view the political conception as derived from, or congruent with, or at least not in conflict with, their other values.

*Id.*; see also Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 284 (noting that "Rawls offers justice as fairness as an example of a political liberalism or a political conception of justice, as distinguished from a comprehensive religious, philosophical, or moral conception of the good").

99. Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 285.

100. Rawls, *Political Liberalism*, *supra* note 46, at 174-76.

101. *Id.* at 224. "This means that in discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines . . ." *Id.* at 224-25.

102. See Ronald Dworkin, *Life's Dominion* 157-72 (1993) [hereinafter Dworkin, *Life's Dominion*].

with regard to judging the moral worth, or ends, that a particular practice promotes.<sup>103</sup>

C. *Problems with the Politics that the Liberal Anthropology Espouses*

This section identifies the internal contradictions that liberalism must overcome if it is to remain a coherent ground for constitutional interpretation. Many political philosophers and constitutional theorists, notably Michael Sandel, have criticized the Rawlsian conception of both the human person and the politics which that conception entails.<sup>104</sup> The first challenge that Professor Sandel levels against Professor Rawls is the plausibility of the self-conception that liberalism requires.<sup>105</sup> Professor Sandel maintains that the liberal vision of the person cannot make sense of our moral experience because it fails to account for commonly recognized moral obligations.<sup>106</sup> This raises the question of whether individuals have any duties antecedent to ones that they choose.<sup>107</sup>

Professor Rawls would argue that all our moral obligations are a matter of choice.<sup>108</sup> This of course turns the classically conceived political/moral project<sup>109</sup> on its head. No longer is the goal of politics to conform the self to the good. Rather, respect for the self is prior to

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103. For example, Judge Reinhardt, in *Compassion in Dying*, cites the *Casey* decision for the proposition that the Fourteenth Amendment has at its heart the liberty to "define one's own concept of existence, of meaning." *Compassion in Dying v. Washington*, 79 F.3d 790, 813 (9th Cir.) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37 (1996). He continues by discussing the misery that terminally ill patients suffer in the period before death. *Id.* at 814. He does not argue whether it is good to allow these people to hasten their own deaths; indeed this type of argument is not available to a Rawlsian liberal because the Rawlsian scheme requires that the state be neutral toward questions of morality. Rather, Judge Reinhardt makes an argument about the limits of state action with respect to this practice, concluding that the state may not infringe upon this type of intimate choice. *Id.*

104. See Allan Bloom, *The Closing of the American Mind* 25-26 (1987) (noting that all modern students are relativists and that this belief is pre-rational); MacIntyre, *After Virtue*, supra note 84, at 2 (arguing that modern moral philosophy is in a state of grave disorder); Sandel, *Democracy's Discontent*, supra note 35, at 13-24 (critiquing predominant modern versions of liberalism); Michael J. Sandel, *Liberalism and the Limits of Justice* (1982); Charles Taylor, *Sources of the Self: The Making of the Modern Identity* 520 (1989) (arguing that adopting a secular outlook stifles deep human aspirations); Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *Pol. Theory* 81, 82 (1984) (discussing the failure of Rawlsian liberalism).

105. Sandel, *Democracy's Discontent*, supra note 35, at 13.

106. The liberal vision, for example, fails to account for solidarity, religious duties, and moral obligations that claim us for reasons unrelated to choice. *Id.*

107. See Michael J. Sandel, *Political Liberalism*, 107 *Harv. L. Rev.* 1765, 1768 (1993) (book review).

108. *Id.* at 1769 (noting that "[t]o base rights on some conception of the good would impose on some the values of others and so fail to respect each person's capacity to choose his or her own ends").

109. See supra note 80 (discussing classical political theory).

the ends which are affirmed by it. Professor Sandel counters that this liberal project "fails to capture" loyalties and responsibilities whose moral force does not flow from individual choice but rather flows from the fact that living by them constitutes our self-understanding.<sup>110</sup>

A less ambitious version of liberalism,<sup>111</sup> minimalist liberalism, argues that even if the liberal anthropology outlined above is fundamentally flawed, it does not follow that governments should cultivate particular virtues or abandon their commitment of neutrality toward ends.<sup>112</sup> This argument insists that in the public realm we should "bracket"<sup>113</sup> our individual moral commitments, given the fact that reasonable people differ about conceptions of the good. Therefore, questions about what political justice requires should be decided apart from moral obligations and commitments.<sup>114</sup>

Professor Sandel proffers a two-fold critique of this version of liberalism.<sup>115</sup> The first criticism involves a ranking of values problem. Rawlsian liberalism prohibits the state from enforcing<sup>116</sup> any value that is derivable solely from a comprehensive conception of the good life.<sup>117</sup> If it can be shown, however, that a value is morally correct, there is no good reason to tolerate not promoting and protecting it. Therefore, to accept minimalist liberalism, one would have to show that other values cannot be true in order to show that toleration of competing comprehensive conceptions of the good life is the preeminent political value.<sup>118</sup> This is not a minimalist claim at all. It is a comprehensive denial of the moral truth of certain doctrines. Such an exercise forces us to engage in just the type of metaphysical virtue ranking that minimalist liberalism seeks to avoid because it requires a denial of the possibility that other values, those based on comprehensive conceptions of the good life, could be true.<sup>119</sup>

110. Sandel, *Democracy's Discontent*, *supra* note 35, at 14. These loyalties include membership in families, cities, nations, and tribes. *Id.*

111. *See supra* notes 94-101 and accompanying text (discussing Rawls's most recent work on the concept of justice).

112. Sandel, *Democracy's Discontent*, *supra* note 35, at 17-19; *see supra* notes 94-101 and accompanying text (discussing Rawls's recent retreat from a comprehensive liberalism as the ground for our public political philosophy).

113. Bracketing, for purposes of this Note, refers to the method of constitutional interpretation which asserts that comprehensive and controversial moral and religious conceptions cannot be used to justify governmental actions. *See* Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521, 521 (1989) [hereinafter Sandel, *Moral Argument and Liberal Toleration*].

114. *See* Rawls, *Political Liberalism*, *supra* note 46, at 9.

115. *See* Sandel, *Democracy's Discontent*, *supra* note 35, at 19-24.

116. *See supra* note 101 and accompanying text.

117. Professor Rawls argues that there are certain "political" virtues which promote these goals. He argues that it is acceptable, indeed it is imperative, that the state promote these virtues because they "characterize the ideal of a good citizen of a democratic state." Rawls, *Political Liberalism*, *supra* note 46, at 194-95.

118. Sandel, *Democracy's Discontent*, *supra* note 35, at 19.

119. *Id.*

Second, when dealing with serious moral controversies, it may not be possible to discuss the value of toleration apart from a discussion of the morality of the practice being tolerated. To decide to bracket questions about the morality of slavery or the personhood of the fetus in the context of abortion is to come to a moral decision on those questions.<sup>120</sup> If one accepts the practices of holding human beings in bondage or terminating the life of fetuses as legally permissible, one has necessarily come to a judgment about the moral character of the practice in question. Anyone who finds these practices truly morally reprehensible could never tolerate legally protecting them.

Liberal theories of constitutional interpretation must answer these challenges if we are to continue “bracketing” moral argument in constitutional adjudication. The remainder of this Note argues that liberal attempts to overcome these challenges have been largely unsuccessful and are responsible for the current illegitimacy of constitutional adjudication.

### III. ORIGINALIST AND PROGRESSIVE ATTEMPTS AT LEGITIMACY

Having looked at the basic aspirational arguments in favor of an expansive reading of the substantive liberties protected by the Due Process Clause, this part discusses the traditional critiques of that jurisprudence. This part first explores the originalist answer to aspirationalism and shows how the debates between these two theories of interpretation are really debates within the liberal philosophical tradition.<sup>121</sup> As a result, neither the aspirational nor the originalist method is successful in securing political legitimacy for substantive due process rights. This part then discusses progressive constitutional theory as an alternative to aspirationalism and originalism. Although progressivism comes closer than its competitors to securing political legitimacy, it too eventually fails because, like aspirationalism and originalism, progressivism accepts the basic liberal philosophical presuppositions concerning human autonomy and the necessity of governmental neutrality toward conceptions of the good.

#### A. *The Originalist Response to Aspirational Jurisprudence*

This section discusses the countermajoritarian difficulty inherent in the practice of judicial review. It then explores the way in which aspirational jurisprudence exacerbates this problem and outlines the originalist response to aspirationalism. Finally, this section argues that aspirationalism and originalism both fail to secure legitimacy in constitutional interpretation because they share the same basic liberal

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120. *Id.* at 20; see also Michael J. Sandel, *The Hard Questions: Last Rights*, New Republic, Apr. 14, 1997, at 27 (arguing that those who argue for governmental neutrality really advocate a particular vision of “what makes life worth living”).

121. See *supra* note 31.

interpretive commitments which ultimately discount the role of moral experience in deciding constitutional questions.

### 1. The Traditional Critique of Aspirational Jurisprudence and the Countermajoritarian Difficulty

Judge Reinhardt's opinion in *Compassion in Dying* reflects a theory of interpretation that views the Constitution as a document that lays down general, comprehensive moral principles that government must respect.<sup>122</sup> The principle of judicial review under this model requires judges to decide when the majority has violated these abstract moral principles in particular circumstances.<sup>123</sup> Judges will be activist in the sense that they must continually determine what "the best, most accurate understanding of liberty and equal citizenship" requires.<sup>124</sup>

Judicial review poses a basic political quandary, however, because it is countermajoritarian.<sup>125</sup> The Court attempts to exercise control in opposition to the currently prevailing majority.<sup>126</sup> The practice of judicial review can avoid condemnation under democratic theory only if one accepts the "dualist" nature of constitutional democracies.<sup>127</sup> The will of "We the People" expressed in the Constitution is superior to the will of the legislature expressed in ordinary law.<sup>128</sup> When the Court relies on this justification to vindicate rights that are not readily traceable to the language or structure of the Constitution, as the aspirational approach often does because of its commitment to an evolving conception of what the constitutional tradition requires, the

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122. See *Michael H. v. Gerald D.*, 491 U.S. 110, 138 (1989) (Brennan, J., dissenting) (arguing that time-bound legal concepts do not have the final word about what the Constitution means); Dworkin, *Life's Dominion*, *supra* note 102, at 119 (arguing that we have created "a constitution of principle that lays down general, comprehensive standards that government must respect"); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L.J. 433, 436 (arguing that "it is the very purpose of our Constitution . . . to declare certain values transcendent, beyond the reach of temporary political majorities").

123. See Dworkin, *Life's Dominion*, *supra* note 102, at 119.

124. *Id.*

125. Alexander M. Bickel, *The Least Dangerous Branch* 19 (2d ed. 1986) [hereinafter Bickel, *The Least Dangerous Branch*]. Bickel argues that

[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.

*Id.*

126. See *id.* at 16-17.

127. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 464 (1989) (discussing the notion that the function of judicial review is to vindicate the judgments of the entire citizenry against momentary departures by political elites).

128. Bickel, *The Least Dangerous Branch*, *supra* note 125, at 16.



legitimacy problem resurfaces.<sup>129</sup> This countermajoritarian problem has led to the rise of the originalist school of constitutional interpretation. This school argues that courts should only consider the original understanding of the Framers in determining whether a statute violates the dictates of the constitution.<sup>130</sup>

## 2. Liberal Presuppositions Inherent in Originalist Jurisprudence

Both originalism and aspirationalism rely on basic liberal philosophical presuppositions about the nature of the human person and the human person's relationship to the law.<sup>131</sup> The originalists argue that their method of constitutional interpretation is far less countermajoritarian than the aspirational method because it is far more deferential to legislative action. The starting point of originalist inquiry is the substantive intent of the Framers; therefore, originalists limit their interpretive expansion of the textual language to the most specific level of generality politically possible.<sup>132</sup> This method of constitutional interpretation ensures that the sphere of individual rights

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129. See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

130. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 862 (1989) (arguing that originalism's difficulties are not as severe as other methods of constitutional interpretation). See generally Bork, *The Tempting of America*, *supra* note 1 (arguing for fidelity to the original understanding of the Framers). Professor Ronald Dworkin, the champion of the aspirationalists, rejects the idea that the broad provisions of the Constitution were intended to be limited by the original substantive understanding of the Framers. Professor Dworkin argues that a faithful reading of the language requires the interpreter to reject the originalist's Constitution of detail. The original drafters and ratifiers, who had very detailed convictions, did not choose to enshrine these convictions in the text. Rather, they opted for broad language of principle which captured their aspirations rather than their limited substantive commitments. See Dworkin, *Life's Dominion*, *supra* note 102, at 137-38. If Professor Dworkin's critique of originalism is persuasive, it might indicate a realization on the part of the Framers that it would be unwise to tie the legal hands of future generations too tightly. Originalists might have an optimism about the Framers' ability to solve problems of textual indeterminacy and capture complex principles of government within clear written provisions that the Framers themselves did not share. Adaptation to changing circumstances and attitudes by future generations is essential to good government. Originalism's commitment to rigid and formal rules of decision determined *a priori* prevents this type of adaptation. See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619, 667-68 (1994). Originalism, in the sense that its commitment to rigid *a priori* rules forecloses appeal to substantive moral debate, either at the legislative or judicial level, contributes to the crisis of legitimacy.

131. One of the main objectives of this Note is to show that the debate between the two schools is largely a debate within liberalism, see Young, *supra* note 130, at 662, and that this shared commitment to a liberal vision of the person is responsible for the current crisis of legitimacy in substantive due process jurisprudence.

132. See *Michael H. v. Gerald D.*, 491 U.S. 110, 148-49 n.7 (1989) (plurality opinion).

will not expand uncontrollably, leaving legislatures free to regulate in the broad area of unprotected conduct.

One of the fundamental problems with originalist theory is that, although it might secure democratic legitimacy in the sense that it would almost always allow numerical legislative majorities to have their way, it does not adequately address the problem of legitimacy, understood, as this piece has previously defined it, as judging governmental action against some shared conception of what is good.<sup>133</sup> The Framers were certainly aware of the possibility of tyranny of the majority.<sup>134</sup> It is quite possible, in the heat of the political moment, for majorities to pass legislation that violates the shared conception of what actions government may justly undertake. In this sense, majoritarian action, though perfectly democratic, is illegitimate.

Of course, originalists would argue that the actual text of the Constitution is the only limit on legitimate democratic action.<sup>135</sup> The originalists, however, must now answer the aspirational critique of their mode of textual analysis: that the originalists have no principled way of pinning down the level of generality at which they read the broad language of the Constitution.<sup>136</sup>

133. See *supra* note 46 and accompanying text.

134. "When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens." The Federalist No. 10, at 45-46 (James Madison) (George W. Carey & James McClellan eds., 1990). Commentators like Alexander Bickel have argued persuasively that it is to protect against this fear and to vindicate lasting values, as opposed to transient majoritarian impulses, that the countermajoritarian practice of judicial review was included in the constitutional scheme. Bickel, *The Least Dangerous Branch*, *supra* note 125, at 24-26.

135. Judge Bork, for example, argues that "in wide areas of life majorities are entitled to rule for no better reason [than] that they are majorities." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 2 (1971) [hereinafter Bork, *Neutral Principles*]; see generally Young, *supra* note 130, at 627-37 (1994) (discussing various originalist theorists and their views on the proper method of constitutional interpretation and the role of judicial review in a democratic society).

136. Professor Dworkin argues that originalism offers no cogent theory for deciding at which level of abstraction, other than the judge's own moral conviction, the broad language of the constitution is to be read. For example, Professor Dworkin asks how a judge is to interpret the Fourteenth Amendment's Equal Protection Clause. On its face the Clause admits of at least four possible interpretations:

- a. The Clause prevents all cases of discrimination against blacks that the authors specifically intended to condemn.
- b. The Clause forbids all serious discrimination against blacks, but only blacks.
- c. The Clause forbids all serious racial discrimination.
- d. The Clause establishes a general principle of equality that applies to all Americans.

Once a judge abandons the first reading—which she must do if she is to accept *Brown v. Board of Education*, 347 U.S. 483 (1954), because the Congress that ratified the Fourteenth Amendment also segregated the Washington, D.C. public schools—she "has no other means of checking the abstract language. [She] is in a kind of free-fall,

In support of this argument, Professor Dworkin charges that originalist judges do not simply interpret the text but interpret it in light of their own personal values.<sup>137</sup> Among the values that a judge brings to the interpretation of the constitutional text is a conception of the human person.<sup>138</sup> A review of the opinions of Justice Scalia, for example, reveals that originalist judges,<sup>139</sup> no less than their aspirational colleagues, have enshrined a liberal conception of the human person at the heart of their approach to constitutional interpretation.<sup>140</sup>

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in which originalism can mean anything and the only check on [her] judgment is [her] own political instinct." Dworkin, *Life's Dominion*, *supra* note 102, at 139-43.

137. Professor Dworkin cites Judge Bork for the notion that all judges, whether they are originalist or aspirationalist, must "interpret [the Constitution], as best they can, according to their own lights." Dworkin, *Life's Dominion*, *supra* note 102, at 142.

138. As Judge Bork himself has said, "There is no principled way to decide that one man's gratifications are more deserving of respect than another's . . . . There is no way of deciding these matters other than by reference to some moral or ethical values that has no objective or intrinsic validity . . . ." Bork, *Neutral Principles*, *supra* note 135, at 10.

139. Commentators have suggested that Judge Bork's writings also reveal this liberal conception of the person. He has argued that "judges must be pure relativists, remaining morally indifferent and inactive until required to implement whatever values legislatures or constitutions generate . . . ." James G. Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. Miami L. Rev. 913, 944 (1986). There are no limits that courts may impose on democratic government absent some clear textual warrant, so that, for example, prior to the Thirteenth Amendment's ratification, slavery was perfectly legal. *See id.* at 946. This Note argues that technical legality is not enough to vindicate a law's legitimacy. The law must, in some way, comport with the people's shared conception of what is right in order to be legitimate. Slavery is perhaps the best example of this position. Thousands fought and died to abolish the practice despite its apparent textual legality.

140. *See* Stephen E. Gottlieb, *Three Justices in Search of Character: The Moral Agendas of Justices O'Connor, Scalia and Kennedy*, 49 Rutgers L. Rev. 219, 233-35 (1996). Professor Gottlieb argues that Justice Scalia is not consistently devoted to a strict interpretation of the text of the Constitution. *Id.* at 233. For Justice Scalia, virtue is superfluous to the judicial process. *Id.* at 234. Therefore, Justice Scalia does not respect politics, because politics, especially in its democratic form, allows life's losers (democratic majorities), in the name of some supposed good, to overcome life's winners who succeed by following the neutral rules. *Id.* at 235. This faith in neutrality is what makes Justice Scalia a liberal, in the sense that the outcomes that his decisions engender are not justified against a conception of the good. Hence, his decisions, like Judge Reinhardt's, fail to appeal to any moral consensus and therefore lack legitimacy. Appeal to moral argument would be fruitless before Justice Scalia; all that matters to him is that neutral rules, which do not respect persons or outcomes, be applied regardless of the consequences. *Id.* at 234; *see, e.g.,* *Schlup v. Delo*, 115 S. Ct. 851, 874-75 (1995) (Scalia, J., dissenting) (arguing that consideration of evidence of death row inmate's innocence was foreclosed); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118-19 (1995) (Scalia, J., concurring) (applying strict scrutiny to federal affirmative action program); *Herrera v. Collins*, 506 U.S. 390, 428 (1993) (Scalia, J., concurring) (arguing that no constitutional basis exists to consider new evidence after conviction); *Employment Div. v. Smith*, 494 U.S. 872, 877-79 (1990) (holding, in Justice Scalia's majority opinion, that neutral laws prohibiting drug use foreclose free exercise claim to the use of peyote at Native American religious ceremony); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524-25 (1989) (Scalia, J., concurring)

Hence, Justice Scalia is perfectly willing, in his concurrence in *Cruzan*,<sup>141</sup> to leave the question of whether a terminally ill patient has a right to refuse unwanted medical treatment to the citizens of Missouri.<sup>142</sup> Whatever rule the citizens decide upon, as long as it is applied neutrally, is constitutionally acceptable.<sup>143</sup> This solution, however, does not adequately address the issue, essential to the question of legitimacy, of what happens if the majority adopts a rule which fails to comport with the polity's conception of justice. Nor does it provide any guidance as to how political deliberation should proceed concerning the nature of that conception of justice. To the extent that originalist jurisprudence in the physician-assisted suicide context will mirror Justice Scalia's argument in *Cruzan*, an originalist answer to the question proposed by *Compassion in Dying* will not secure legitimacy for the substance of that decision, whatever it may be.

Both the aspirational and originalist sides of this debate assume that the legitimacy problem of judicial vindication of constitutional rights lies in a flawed interpretation of the constitutional text itself or in how judges should go about interpreting it.<sup>144</sup> Each side fails to recognize that it is the lack of ends-focused justification for constitutional rights, not questions about the proper role of the judiciary or interpretive methods, that has led to the present crisis of constitutional legitimacy. Finally, until some acceptable form of moral argument, which does justice to the human person as a fundamentally moral agent, works its

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(agreeing that municipality's affirmative action program was void and urging that only actual prior discrimination justified remedial state action). The common thread running through these opinions is a celebration of neutrality. Justice Scalia believes that all that is required for legitimacy is a neutral application of a law, no matter how unjust. Moral argument, either before the judiciary (by Native Americans who feel that neutral drug laws do not trump their individual moral commitment to their religion) or the legislature (in the sense that affirmative action programs are passed to correct a past and ongoing moral wrong) cannot overcome Justice Scalia's firm commitment to neutrality.

141. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 292 (1990) (Scalia, J., concurring).

142. *Id.* at 293.

143. *Id.* at 300 (noting that the Equal Protection Clause requires the democratic majority to submit to whatever rules they establish for the minority).

144. Professor Robin West has persuasively demonstrated this point. See Robin West, *Reconstructing Liberty*, 59 *Tenn. L. Rev.* 441, 442-46, 444-45 nn.10 & 11 (1992) [hereinafter West, *Reconstructing Liberty*]. Professor West discusses the concept of ordered liberty articulated by Justice Harlan in *Poe v. Ullman*, see *supra* note 72, and identifies the central idea behind Justice Harlan's jurisprudence to be that no state goal can justify state infringement on these essential liberties. *Id.* at 443. She then criticizes this conception of "ordered liberty" as too constricted. *Id.* at 444. The problems of originalist substantive due process jurisprudence according to Professor West are similar to the problems of aspirational jurisprudence. They differ in degree but not in kind. Originalists also want to protect a sphere of ordered liberty, but they conceive of this sphere of liberty much more narrowly than the aspirationalists. *Id.* at 444-45. Professor West argues that the challenge of constitutional interpretation is to go beyond both constricting notions of liberty to a more expansive and progressive conception. *Id.* at 445.

way into constitutional adjudication, there will be no possible way of securing anything resembling political agreement on divisive moral issues like physician-assisted suicide.

### B. *Progressive Attempts at Legitimacy*

The foregoing discussion shows that both aspirationalism and originalism fail to secure legitimacy for constitutional decisions grounded on substantive due process principles. This section explores the progressive alternative and concludes that, like aspirationalism and originalism, progressive theory also fails to secure legitimacy in constitutional adjudication.

#### 1. Cass Sunstein and the Beginnings of a Morality-Regarding Politics

Progressive constitutional theory<sup>145</sup> tries to overcome the liberal presuppositions inherent in the originalist and aspirational methods of constitutional interpretation.<sup>146</sup> This theory attempts to avoid the charge that the originalists frequently level at substantive due process cases like *Roe*, *Casey*, and *Compassion in Dying*. Originalists claim that, in these cases, the Court engaged in *Lochnering*,<sup>147</sup> that is, the Justices made the same mistake as they did in *Lochner v. New York*<sup>148</sup> by enshrining their own values in the Constitution without any textual

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145. See generally Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich. L. Rev. 641 (1990) (contrasting progressive constitutional theory with conservative theories of constitutional interpretation). "Progressive constitutionalists . . . view the power and normative authority of some social groups over others as the fruits of illegitimate private hierarchy, and regard the Constitution as one important mechanism for challenging those entrenched private orders." *Id.* at 643. Essentially, progressivism is concerned with power and its distribution. They see the current distribution of power in our society as illegitimate and are concerned with finding ways of using state power, either through the legislative, executive, or judicial branches, to overturn those illegitimate power structures. *Id.* at 644. They also argue that the liberal project of neutrality is illusory and that it is impossible to derive favored outcomes from neutral principles. *Id.* Progressives maintain, therefore, that all governmental actions, including judicial ones, are "necessarily political—and hence necessarily grounded in some normative conception of the good." *Id.* Progressives view the fault line of modern constitutional theory being drawn between those who see the Constitution as "a vehicle to preserve existing social and private orderings against majoritarian political change" and those who see it as "a way as to facilitate continuous, inventive challenges to the dominant private and social order." *Id.* at 645; see also Robin West, *Reconstructing Liberty*, *supra* note 144, at 443-53 (criticizing the protection of only negative liberties in constitutional interpretation). For an interesting discussion of the progressive vision of democratic culture, see J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 Yale L.J. 1935, 1948 (1995) (book review). Professor Balkin notes that "[f]or progressives, democratic culture is a culture in which the progressive ideal of democracy can flourish. It is a culture in which people engage in rational deliberation about important public issues . . ." *Id.*

146. See *supra* note 144.

147. See Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 212.

148. 198 U.S. 45 (1905).

or structural warrant.<sup>149</sup> Progressive theories, in the name of democracy, strive to end the judicial bickering about which rights are protected and seek instead a more legitimate rendering of what type of political scheme our Constitution creates.

a. *Outline of the Liberal Republic*

Cass Sunstein, a noted progressive, sees our constitutional system as a deliberative democracy,<sup>150</sup> or alternatively, as a liberal republic.<sup>151</sup> Professor Sunstein attempts to recapture a republican tradition, which he traces to the Founding, that conceives of civic virtue as indispensable to free government.<sup>152</sup> According to Professor Sunstein, the goal of the Framers was to create a system that would ensure a virtuous politics but which at the same time would not indulge unrealistic assumptions about human nature.<sup>153</sup>

To understand how Professor Sunstein sees our constitutional system operating, one must look at his criticism of the Supreme Court's *Lochner* decision.<sup>154</sup> *Lochner* was wrong according to Professor Sunstein because it took a pre-existing power distribution, namely the rel-

149. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 797 n.5 (1986) (White, J., dissenting) (noting that "[w]hile constitutional adjudication involves judgments of value, it remains the case that some values are indeed 'extraconstitutional,' in that they have no roots in the Constitution that the people have chosen. The Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), was wrong because it rested on . . . an assessment of value that was unsupported by the Constitution"); Ely, *The Wages of Crying Wolf*, *supra* note 1, at 927 (noting that some interpreters are not troubled by the fact that nothing in the Constitution refers to certain due process rights, like abortion).

150. See Sunstein, *The Partial Constitution*, *supra* note 29, at 133.

151. *Id.* at 21, 24-25. For Professor Sunstein, the American polity, as the Framers conceived it, was to combine the most favorable aspects of both the classical and modern traditions of political philosophy. The Framers carried on the classical idea that the goal of government is to educate the citizens in what is good. *Id.* at 21. The Framers also wanted, however, to enshrine an anti-authoritarian principle in their mode of government. For this they turned to the Enlightenment notion that what is good could be justified on the basis of public-regarding reasons accessible to all rational citizens. *Id.* at 24.

152. *Id.* at 20. Civic virtue is defined as "a commitment to the general good rather than to self-interest or the interest of private factions." *Id.* at 21.

153. *Id.* at 20-21.

154. At issue in *Lochner* was a New York statute which prevented any employee of a baking establishment from working more than sixty hours per week. *Lochner v. New York*, 198 U.S. 45, 46 (1905). Justice Peckham, writing for the Court, held that liberty of contract is part of the liberty contemplated by the Due Process Clause of the Fourteenth Amendment. *Id.* at 53. The question therefore, was whether the state, in a proper exercise of its police powers, could limit this liberty. The Court held that a limitation on personal liberty was improper in this case. *Id.* at 58. Justice Holmes in a blistering dissent argued that the state's exercise of police power in this context was completely legitimate:

The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for pur-

ative bargaining positions of bakers and their employers, which common and statutory law had created, and rendered this power distribution constitutionally sacrosanct.<sup>155</sup> The Court mischaracterized the statute at issue in *Lochner* as an impermissible governmental intervention into a voluntary and law-free private sphere.<sup>156</sup> Rather, the New York legislature quite properly tried, by regulating the hours of bakers, to alter the existing, law-created, and unequal bargaining positions of the respective parties in the name of the public good.<sup>157</sup> This intervention, according to Professor Sunstein, was a completely acceptable legislative function because the constitutional document creates and protects a system where the common good can be politically realized.<sup>158</sup>

Judicial review in the liberal republic is more limited than under an aspirational model or in originalist judicial practice.<sup>159</sup> Courts should act only to secure the preconditions of deliberative democracy. To this end, courts should limit themselves to policing the preconditions for political deliberation<sup>160</sup> and to protecting those who are unable to receive a fair hearing in the political arena.<sup>161</sup> This is not the entire

poses thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

*Id.* at 75 (Holmes, J., dissenting).

155. Professor Sunstein argues, "In all likelihood, the Court thought that the illegitimate motive actually at work was the impermissible redistributive one: to transfer resources from employers to employees." Sunstein, *The Partial Constitution*, *supra* note 29, at 47.

156. *Id.* at 50.

157. The majority in *Lochner* assumed that neutrality was what the Due Process Clause commanded. The only way the statute could be saved would be to defend the law as necessary to preserve public health, for only then could it qualify as neutral. The law at issue, according to the Court, could not be justified in this way because it was not neutral. The law was simply a naked exercise of political power by one group—employees—over another—employers. What the Court in *Lochner* never considered, however, and this is where it went wrong, was that the existing power distribution itself was not, and never had been, neutral. The law, in fact, attempted to neutralize an inherently unequal, law-created power structure. *See id.* at 47-48.

158. *Id.* at 20. Such a system, according to Professor Sunstein, needs certain basic commitments in order to sustain it. The central governmental requirement in the liberal republic is respect for an "impartiality principle." *Id.* at 17. Majoritarian political power is not self-validating. *Id.* at 29. The government must always provide public-regarding reasons for its actions. Professor Sunstein imagines a system where "outcomes are justified by reference not to raw political power, but to some public value that they can be said to serve." *Id.* at 27. This impartiality principle is achieved through four core commitments. *Id.* at 134-41. First, political decisions should be the result of discussion about the common good. Second, this deliberation must be the product of widespread political participation by a citizenry committed to the common good. Third, agreement on public matters should be the goal of politics in the liberal republic. Finally, there must be political equality. Large disparities in political influence among different individuals and social groups is unacceptable. *Id.*

159. *Id.* at 140.

160. *Id.* at 144.

161. *Id.*; *see also* Ely, *Democracy and Distrust*, *supra* note 3, at 73-179 (arguing that courts should limit themselves to keeping the political process open).

scope of the constitutional mandate to government, however. Indeed, it is precisely when the Court ties the hands of the political branches on constitutional grounds when the above situations are not present that the Court comes closest to illegitimacy.<sup>162</sup> Securing the four core commitments<sup>163</sup> of deliberative democracy requires positive action by the political branches that goes beyond the power of the judiciary. Professor Sunstein thus has a strong sense of the Constitution outside the courts.<sup>164</sup>

b. *Why Deliberative Democracy Is a Beginning for Securing Legitimacy in Constitutional Adjudication*

Professor Sunstein's main contribution to the goal of securing legitimacy for constitutional interpretation is his recognition of a public-regarding end to politics. This realization restores the notion, integral to the political craft, that politics is a community building endeavor. The liberal conception of the person, and the mode of constitutional interpretation which enshrines it, has precipitated a retreat from public spaces to a concern only for the individual's private sphere.<sup>165</sup> Such a politics makes the construction of a community nearly impossible, leaving human beings feeling alone, disempowered, and discontented.<sup>166</sup>

Professor Sunstein's limited role for judicial review, coupled with his republican commitment to public deliberation by a committed citizenry, allows participants in our democracy to argue about the justice and the good in their respective positions. Deliberative democracy calls on us to make moral arguments about why a specific policy should be permitted or prohibited. This, in turn, reinforces the sense that we are truly self-governing agents, not mere creatures who rely on a shifting judiciary to protect the few rights we have from an encroaching leviathan state. Decisions which are the result of this type

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162. Good examples of judicial overreaching are apparent in the Court's *Lochner* decision, *see supra* notes 154-58 and accompanying text, and in its treatment of campaign finance reform in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See* Sunstein, *The Partial Constitution*, *supra* note 29, at 84-85.

163. *See supra* note 158.

164. For example, Professor Sunstein discusses *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), where the Court refused to strike down San Antonio's school financing mechanism based on property taxes which produced large disparities in funds between rich and poor districts on equal protection grounds. Sunstein, *The Partial Constitution*, *supra* note 29, at 140. Without really discussing whether or not the case was rightly decided, Professor Sunstein argues that, even if equal educational financing is not a judicially enforceable constitutional mandate, this does not resolve the question of whether the political branches have a constitutional obligation to promote that goal. *Id.*; *see also* Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 244 (noting that Sunstein stresses the idea that the judicially enforceable Constitution is not coterminous with the Constitution that binds the political branches).

165. Sandel, *Democracy's Discontent*, *supra* note 35, at 331.

166. *See id.* at 3-4.



of spirited political debate are far more likely to be regarded as legitimate.<sup>167</sup>

## 2. Professor Sunstein's Lack of Commitment to a True Morality-Regarding Politics

Despite Professor Sunstein's contributions to establishing meaningful moral and political dialogue in the context of identifying substantive due process rights, this subsection argues that Professor Sunstein's liberal republic also fails to secure legitimacy in constitutional interpretation because it shares the basic liberal anthropological presuppositions of the aspirational and originalist schools.<sup>168</sup> Professor Sunstein, rather than advocating a strong republicanism, attempts, as the name liberal republicanism suggests, to synthesize the liberal and republican strands within the American constitutional tradition.<sup>169</sup> In fact, his theory of "public-regarding" reasons implies an acceptance of the Enlightenment goal of honoring in the public sphere only those moral commitments that appeal to a universal rationalism.<sup>170</sup>

For instance, Professor Sunstein, like Professor Rawls, argues that deep religious and moral commitments should be removed from political debate as a prerequisite to republican deliberation.<sup>171</sup> The impossibility of high-level moral agreement, in Professor Sunstein's conception, forces him to accept the Rawlsian/liberal/autonomous vision of the person as a precondition to deliberative democracy.<sup>172</sup>

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167. See generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893) (arguing that a strong theory of judicial review cheapens democracy).

168. See *supra* part III.A.2.

169. Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 249-50.

170. Sunstein, *The Partial Constitution*, *supra* note 29, at 24.

171. Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 256.

172. *Id.* at 259. For example, Professor Sunstein contrasts his view that liberal constitutionalism is neutral "as among different possible human natures" with the view that liberal republicanism actually corresponds to human nature. Sunstein, *The Partial Constitution*, *supra* note 29, at 141. He argues that his vision does not require government to attempt a revision of human character; such efforts, he feels, "are usually doomed to failure, and often they end up in tyranny." *Id.* Rather, he defends his conception of liberal constitutionalism on the ground that such a conception has healthy effects on the human character. "Democracy," argues Professor Sunstein, "tends to inculcate valuable characteristics in human beings." *Id.* (citing John Stuart Mill and John Rawls for support).

In another time and place, those "valuable characteristics" would have been called virtues. See Gertrude Himmelfarb, *The De-Moralization of Society* 3-18 (1994) (discussing how our language has changed the way we think about the concept of virtue). Professor Sunstein, however, offers no principled account of why "characteristics" associated with peculiarly religious or moral traditions do not develop the type of character necessary to be a member of a democratic society. The only justification for this omission would be a showing that peculiarly religious convictions do not develop those characteristics. Such a showing, however, would require an engagement of religious argument in the public square, with the attendant possibility that those advocat-

Professor Sunstein's attempted synthesis brings the inquiry full circle. We are left with a liberal conception of the person as the baseline for constitutional decision, with all of the problems such a conception entails. As with Professor Rawls, Professor Sunstein does not offer a convincing rebuttal to the charge that "bracketing" moral controversies for political purposes often requires passing judgment on the morality of the practice in question.<sup>173</sup> Moreover, Professor Sunstein fails to secure the autonomy rights essential to the liberal conception of justice due to his relatively weak theory of judicial review.<sup>174</sup> In short, Professor Sunstein leaves us with a weak republicanism, that fails to take seriously the place of moral argument in political life, and weak liberalism, that provides few devices to protect the autonomy that is central to liberalism's political culture.

#### IV. MICHAEL SANDEL: A STRONG REPUBLICAN CONCEPTION OF CONSTITUTIONAL ADJUDICATION

While offering a fundamental starting point for an inquiry into the legitimacy of substantive due process rights, Professor Sunstein's synthesis ultimately fails because he neglects his own essential insight toward the creation of legitimacy in constitutional interpretation. When constitutional decision makers debate the permissibility of a practice, they must inquire whether the practice promotes or retards the proper functioning of our type of republican government. If the government promotes the necessary virtues in the citizenry, they will be able to adequately shape, in the context of public discourse, a vision of the human good as such. Republican theory requires, of all governmental actors, but especially of judges, a type of ends-focused practical reasoning.

This part sets forth the basics of Michael Sandel's strong republican theory. It discusses what Professor Sandel sees as the core commitments necessary to secure the proper functioning of a republican regime. This part then discusses how these commitments have been undermined by the turn in substantive due process jurisprudence from its initial grounding in the beneficial societal institution of marriage in *Griswold v. Connecticut*<sup>175</sup> toward a grounding in the problematic liberal conception of the human person discussed in the previous parts of this Note. Finally, this part considers where Professor Sandel would ground substantive privacy rights.

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ing the religious position might actually win. Professor Sunstein, however, claims that religious argument should be removed from republican politics. See Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 256.

173. See Sandel, *Democracy's Discontent*, *supra* note 35, at 20.

174. See Fleming, *Constructing the Substantive Constitution*, *supra* note 29, at 256-59 (arguing that Sunstein's theory of securing deliberative democracy fails to secure autonomy rights contemplated in due process cases like *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and their progeny).

175. 381 U.S. 479 (1965).

### A. Outline of Professor Sandel's Republicanism

This section outlines the basics of Professor Sandel's republican theory. In addition, this section contrasts the republican conception of the relationship between the individual and the state with that of liberalism.

Rather than attempt a Sunstein-like synthesis between the competing traditions of liberalism and republicanism, Professor Sandel argues that the liberal political project has made real constitutional legitimacy impossible. Liberalism has rendered American politics unable to take the task of community building seriously.<sup>176</sup> Consequently, Professor Sandel advocates scrapping the liberal model of governance in favor of a republican public philosophy.<sup>177</sup>

Like liberalism and progressivism, republicanism possesses certain core commitments that are essential to the proper and just functioning of the polity.<sup>178</sup> First, there is no necessity that government be neutral toward conceptions of the good.<sup>179</sup> Second, government has the power, indeed the responsibility, to cultivate the virtues in the citizenry necessary to preserve that particular type of government.<sup>180</sup>

176. See Sandel, *Democracy's Discontent*, *supra* note 35, at 3-4.

177. See *id.* at 321-24.

178. Because this Note attempts to use Professor Sandel's mode of political argument as the basis for securing legitimacy in substantive due process jurisprudence, the foregoing discussion of the commitments of republicanism will largely reflect Professor Sandel's conception. For further discussion of the core commitments of republicanism, see Mark Tushnet, *Red, White, and Blue, A Critical Analysis of Constitutional Law 274* (1988) (discussing the role of religion in the republican tradition); Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. Pa. L. Rev. 801, 834-41 (1993); Cass Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1548-58 (1988) (arguing that republicanism's core commitments are deliberation, political equality, universalism, and citizenship).

179. Republican theory does not interpret rights either in a vacuum or judged against metaphysical notions of the human person and what is due to it. Rather, rights are interpreted in light of a particular conception of the good society, i.e., the self-governing republic. Sandel, *Democracy's Discontent*, *supra* note 35, at 25. Republicanism rejects the liberal attempt to define liberty in opposition to government. In the liberal conception, individual liberty is a constraint on the powers of government. See *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (noting that in our society "we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies"). An individual is free in so far as rights that he possesses insulate his choices from majority regulation. See Sandel, *Democracy's Discontent*, *supra* note 35, at 26. In contrast, under the republican conception, an individual is free in so far as she is a member of a political community that controls its own fate and a participant in the decisions that govern its affairs. *Id.* There can be no liberty pursuant to this model without "self-government and the civic virtues that sustain it." *Id.*

In a sense, Professor Sandel's conception of republicanism is a minimalist conception. He does not argue that a republic is objectively the best type of government. Rather, he argues that a republican form is the type of government our Constitution establishes and that rights, which inevitably protect practices from state interference, must be referenced to promoting virtue in the citizenry necessary to sustain this type of polity. *Id.* at 25.

180. Sandel, *Democracy's Discontent*, *supra* note 35, at 25.

Republicans do not believe that respect for self-government, as opposed to self-determination, espoused by liberal theorists, leaves individuals overly susceptible to tyranny of the majority.<sup>181</sup> Republicans are willing to accept the idea that some form of state sponsored instruction in civic virtue is permissible, and perhaps necessary, for the preservation of liberty because liberty requires citizens who possess the virtues necessary for self-government.<sup>182</sup> To view citizens primarily as objects of governmental treatment, rather than as full participants in the governing project, is to concede individual dependence and disempowerment. Such disempowered persons are incapable of self-government and are therefore vulnerable to loss of liberty.<sup>183</sup>

### B. *Professor Sandel and Substantive Due Process Jurisprudence*

This section examines Professor Sandel's analysis of the Supreme Court's substantive due process jurisprudence and identifies a few of the problems for legitimacy that this jurisprudence raises. First, this section discusses the turn in substantive due process jurisprudence between *Griswold v. Connecticut*<sup>184</sup> and *Eisenstadt v. Baird*.<sup>185</sup> This section then discusses where Professor Sandel would ground substantive due process rights.

#### 1. The Turn from *Griswold* to *Eisenstadt*

Professor Sandel argues that *Griswold* is not the substantive due process watershed that many suppose it to be.<sup>186</sup> At issue in *Griswold* was a Connecticut statute banning both the use and the counseling in the use of contraceptives.<sup>187</sup> Justice Douglas, writing for the Court,

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181. Professor Sandel accepts the possibility that tyranny may result in this type of polity, but "[r]epublican politics is risky politics, a politics without guarantees. And the risks it entails inhere in the formative project. To accord the political community a stake in the character of its citizens is to concede the possibility that bad communities may form bad characters." *Id.* at 321. He also argues that there is no alternative for the state but to accept the formative project. The liberal conception of the human person as an unencumbered self does not do justice to the complexity of human duties. The minimalist notion of liberalism does not allow "political deliberation [to reflect] our best understanding of the highest human ends." *Id.* at 322. This, of course, leads to the critique of aspirational jurisprudence that it is a tyranny of the judiciary. Without accepting Judge Bork's notion that the ground for fundamental rights can only be the words of the text as the Framers conceived it, his attack on the tyranny of aspirational jurisprudence is sobering—the "Supreme Court['s] departures from the original meaning of the Constitution are advocated *precisely because* those departures are not correctable democratically. The point of the academic exercise is to be free of democracy in order to impose the values of an elite upon the rest of us." Bork, *The Tempting of America*, *supra* note 1, at 145.

182. Sandel, *Democracy's Discontent*, *supra* note 35, at 26.

183. *Id.* at 322-23.

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

185. 405 U.S. 438 (1972).

186. Sandel, *Moral Argument and Liberal Toleration*, *supra* note 113, at 527.

187. *Griswold*, 381 U.S. at 480.

found that this statute operated "directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."<sup>188</sup> Justice Douglas reasoned that the problem with the statute was that it had a destructive impact on a *relationship* which lies in a zone of privacy created by certain fundamental constitutional guarantees, such as the Third, Fourth, and Fifth Amendments.<sup>189</sup> Justice Douglas was repulsed by the idea that police could search the marital bedroom.<sup>190</sup> Hence the Court struck down the statute, holding that it impermissibly and unconstitutionally intruded upon a quintessentially private relationship.<sup>191</sup>

The *Griswold* right of privacy, according to Professor Sandel, was not grounded in some notion of human autonomy. The *Griswold* Court did not hold that people should be free to choose what type of sexual life they will lead. Rather, the right was grounded in the notion that, to protect the social institution of marriage, an institution that secures human goods essential to the proper functioning of the republic, some measure of reproductive and sexual privacy is necessary.<sup>192</sup> Professor Sandel labels this conception of privacy "old privacy."<sup>193</sup>

For Professor Sandel, the true watershed event in substantive due process jurisprudence came in *Eisenstadt v. Baird*.<sup>194</sup> In *Eisenstadt*, the Court struck down a statute regulating the sale of contraceptives.<sup>195</sup> This law did not violate old privacy notions because enforcement did not require governmental surveillance of intimate activities.<sup>196</sup>

The *Eisenstadt* Court departed from the reasoning in *Griswold* in two key respects. First, it prescinded the right of privacy from the social institution of marriage to the individual.<sup>197</sup> Second, it shifted the conception of privacy from its old form to a "new privacy."<sup>198</sup> Privacy was no longer conceived of as freedom from surveillance or disclosure of intimate affairs that have a direct effect on an institution

188. *Id.* at 482.

189. *Id.* at 484-86.

190. *Id.* at 485-86.

191. *Id.* at 485.

192. Justice Douglas noted in *Griswold*:

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

*Id.* at 486.

193. Sandel, *Moral Argument and Liberal Toleration*, *supra* note 113, at 525-27.

194. 405 U.S. 438 (1972).

195. *Id.* at 454-55.

196. Sandel, *Moral Argument and Liberal Toleration*, *supra* note 113, at 527.

197. *Eisenstadt*, 405 U.S. at 453 (noting that "[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible").

198. Sandel, *Moral Argument and Liberal Toleration*, *supra* note 113, at 527-28.

that promotes goods essential to the functioning of the polity. Privacy, after *Eisenstadt*, is conceived of as protecting the freedom to engage in certain activities, regardless of the ends which they promote, without governmental restriction.<sup>199</sup>

*Roe v. Wade*,<sup>200</sup> the first Supreme Court decision to find that women have a fundamental right to an abortion, reaffirmed the *Eisenstadt* privacy principle and expanded on it. After *Roe*, the right of privacy became the right to make certain choices autonomously, free of state interference.<sup>201</sup> Later, the dissenters in *Bowers v. Hardwick*,<sup>202</sup> in seeking to analogize the sexual choices of heterosexuals protected in *Griswold* to the sexual choices of homosexuals, relied solely on the right of privacy as grounded in an autonomous conception of the human person.<sup>203</sup> These later cases demonstrate that the institutional and ends-focused reasoning of the *Griswold* Court had disappeared entirely.

## 2. Professor Sandel and the Substantive Ground for Privacy Rights

Professor Sandel takes issue with two analogous philosophical assumptions presented by the right of privacy cases after *Griswold*. The first assumption is the ambitious one articulated by the dissenters in *Bowers* and the majorities in *Compassion in Dying* and *Eisenstadt*. These judges reasoned that persons bear privacy rights as individuals, prior to their social or political attachments.<sup>204</sup> Furthermore, human

199. *Eisenstadt* emphasized that

the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

*Eisenstadt*, 405 U.S. at 453.

200. 410 U.S. 113 (1973).

201. Justice Blackmun noted:

The right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.

*Id.* at 153.

202. 478 U.S. 186 (1986).

203. Sandel, *Moral Argument and Liberal Toleration*, *supra* note 113, at 530. This can be seen by noting the language of Justice Blackmun's dissenting opinion:

I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "abominable crime not fit to be named among Christians."

*Bowers*, 478 U.S. at 199-200 (Blackmun, J., dissenting).

204. See Sandel, *Moral Argument and Liberal Toleration*, *supra* note 113, at 527, 534-35.

dignity itself requires that government respect the individual's intimate choices.<sup>205</sup>

Professor Sandel criticizes this first assumption in two respects. First, Professor Sandel argues that grounding judicial protection of the practices in question on such an assumption does little to secure legitimacy for the decision. It is not clear that social cooperation can be secured strictly on the basis of autonomy rights without first arriving at some agreement on the moral permissibility of the practice at issue.<sup>206</sup> Furthermore, the quality of respect for the practice that autonomous privacy secures is, at best, grudging and fragile.<sup>207</sup> If the choice to protect the practice does not comport with the community's sense of what is good, at some level, the community has to support the decision despite itself.

This leads to Professor Sandel's second criticism of grounding privacy rights purely on a liberal conception of the person. Professor Sandel argues that the goal of those seeking to protect what has historically been considered a morally dubious practice should be to challenge the prevailing assumption of dubiousness that gave rise to the legislation prohibiting it.<sup>208</sup> Only then can true acceptance and legitimacy be achieved.<sup>209</sup>

The second philosophical assumption, inherent in the post-*Griswold* privacy cases, stems from the minimalist approach taken by the majority in *Roe*.<sup>210</sup> As this Note has previously discussed, the minimalist seeks to bracket all controversial moral and religious issues for the sake of securing social cooperation.<sup>211</sup> Professor Sandel objects to this approach on two grounds. First, the *Roe* Court claimed to be bracketing the controversial question of when life begins<sup>212</sup> but implicitly held that it began at viability.<sup>213</sup> Otherwise, how could it have accepted abortion prior to viability without sanctioning murder? Second, Pro-

205. *See id.* at 524.

206. *Id.* at 536-37.

207. *Id.* at 537.

208. *Id.* Professor Sandel argues that "[t]he problem with the neutral case for toleration is [that] it leaves wholly unchallenged the adverse views of homosexuality itself. Unless those views can be plausibly addressed, even a Court ruling in their favor is unlikely to win for homosexuals more than a thin and fragile toleration." *Id.*

209. *Id.* "The justice or injustice of laws against abortion and homosexual sodomy may have something to do with the morality or immorality of these practices after all." *Id.* at 538.

210. Justice Blackmun, in his majority opinion, sought to avoid as best he could the religious and philosophical controversy inherent in the abortion question. Therefore, he sought to ground the abortion holding on a medical and historical footing. *See Roe v. Wade*, 410 U.S. 113, 116-17 (1973).

211. *See supra* notes 113-14 and accompanying text.

212. "We need not resolve the difficult question of when life begins." *Roe*, 410 U.S. at 159.

213. *Id.* at 164-65 (holding that "[f]or the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion").

fessor Sandel questions what counts as “bracketing.” Do we bracket these moral issues by returning them to the political branches and letting them decide, or does bracketing involve taking the issue out of politics altogether and leaving it to individual choice? Professor Sandel believes that the only way to secure lasting protection for all these rights and achieve some measure of legitimacy for them is to argue from the goods which the practices realize.<sup>214</sup>

Professor Sandel’s theory provides a framework for securing legitimacy for substantive due process jurisprudence on republican grounds. The final part explores how this legitimacy-securing theory functions in the context of physician assisted suicide.

## V. MORAL ARGUMENT, LEGITIMACY, AND *COMPASSION IN DYING*

This final part explores the application of Professor Sandel’s reasoning to the question of the constitutionality of the right to physician assisted suicide in an attempt to render that issue, and substantive due process jurisprudence generally, politically legitimate. This part begins with a discussion of Professor Ronald Dworkin’s attempt to ground substantive moral agreement on principles of Rawlsian liberalism. This part then discusses why, according to Professor Sandel, Professor Dworkin’s vision of the place of moral argument in our constitutional democracy is too limited and constricted. Next, this part explores Sandelian arguments both for and against physician assisted suicide. Professor Sandel, as this Note has previously discussed, is a strong republican.<sup>215</sup> In the republican model of democratic government, state action must be referenced against some conception of the good life in order for that action to be legitimate.<sup>216</sup> By exploring the moral arguments on both sides of the question it is hoped that political legitimacy can be secured for the judicial resolution of the issue of physician-assisted suicide, whatever the substantive outcome. Finally, this part explores Professor Sandel’s conception of judicial review and examines when it may be exercised to secure legitimacy for a constitutional right.

### A. *Dworkinian Arguments and Compassion in Dying: The Aspirational Attempt to Take Moral Argument Seriously*

Ronald Dworkin, in *Life’s Dominion*, seriously addresses moral arguments concerning questions of life, death, and sexuality. Professor Dworkin, much like Professor Sandel, argues that attempts to bracket moral argument about questions of life and death are ultimately futile because it is impossible for people to compromise about fundamental

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214. Sandel, *Moral Argument and Liberal Toleration*, *supra* note 113, at 524.

215. See *supra* notes 179-83 and accompanying text.

216. See *supra* note 192 and accompanying text.



moral questions.<sup>217</sup> Like Professor Sandel, Professor Dworkin admits that some form of moral agreement is essential before legitimacy in constitutional interpretation can be secured.<sup>218</sup> Professor Dworkin ultimately posits that a moral solution to the problems surrounding life and death issues is possible without forcing anyone to compromise their most fundamental beliefs.<sup>219</sup>

Professor Dworkin finds, in a search for common ground between conservatives and liberals, that they both agree that life is sacred and that premature death is always a waste and a shame.<sup>220</sup> They can also agree that abortion and euthanasia are, at least, always morally problematic.<sup>221</sup> But, “people disagree about the best answer to the question of whether avoidable premature death is always or invariably the most serious possible frustration of life.”<sup>222</sup> The real philosophical question at issue in these cases (and one where there is hope for moral agreement because there is agreement on the starting point—that life is sacred) is whether the frustration of a biological life, although a waste, is sometimes justifiable because there is an even greater human waste if that life is permitted to continue.<sup>223</sup>

Professor Dworkin, after constructing the moral argument, continues by analyzing the state’s role in it. He argues:

[I]n Western political culture . . . the most important feature of that culture is a belief in individual human dignity: that people have the moral right—and the moral responsibility—to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and convictions.<sup>224</sup>

Thus, the real legal question for Professor Dworkin, in both the abortion and physician-assisted suicide cases, is whether the states have a compelling reason to restrict or prohibit individual autonomous decision making in life or death situations based on a general responsibility to protect the intrinsic value of human life.

Professor Dworkin concedes that the state does have an interest in protecting the sanctity of life.<sup>225</sup> The state may effectuate this interest in two ways. It may promote the goal of responsibility by requiring that its citizens treat decisions concerning questions of fundamental life and death as matters of moral importance, not simply as matters

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217. Dworkin, *Life’s Dominion*, *supra* note 102, at 10 (discussing the moral ramifications of the personhood of the fetus).

218. *See id.*

219. *Id.* at 10-11.

220. *Id.* at 84.

221. *Id.*

222. *Id.* at 90.

223. *Id.* at 94.

224. *Id.* at 166.

225. *Id.* at 150.

of convenience.<sup>226</sup> Alternatively, the state may try to promote the goal of conformity and require its citizens to obey majoritarian answers to the question of how best to protect the intrinsic sanctity of life.<sup>227</sup>

Professor Dworkin argues that human dignity requires government to take a detached approach to moral decision making on such fundamental questions.<sup>228</sup> Freedom, according to this conception, is defined as the right to make these decisions for oneself, free from majoritarian and democratic coercion. As Professor Dworkin puts it, "a constitution that permits a majority to deny freedom of conscience is democracy's enemy, not its author."<sup>229</sup> Professor Dworkin, in the tradition of the classical liberal project, argues for the right before the good. Respecting individual autonomy is the only moral choice for democratic government because human dignity, according to Professor Dworkin, requires it. Professor Dworkin argues that the state is morally and constitutionally required to leave these decisions to the individual.<sup>230</sup> This right to choose moral answers to fundamental moral questions is at the heart of Professor Dworkin's conception of liberty of conscience.<sup>231</sup> Accordingly, Professor Dworkin makes a sophisticated argument for bracketing moral issues. True morality, which respects human dignity and autonomy, requires that government leave citizens free to choose the good for themselves.<sup>232</sup> Hence, Professor

226. *Id.*

227. *Id.* Professor Dworkin notes:

If we aim at responsibility, we must leave citizens free . . . to decide as they think right, because that is what moral responsibility entails. But if we aim at conformity, we demand instead that citizens act in a way that might be contrary to their own moral convictions; this discourages rather than encourages them to develop their own sense of when and why life is sacred.

*Id.* at 150-51. Professor Dworkin further argues that the state cannot employ the second option; it may not curtail liberty in the name of an intrinsic value if "the effect on one group of citizens would be special and grave, when the community is seriously divided about what respect for that value requires, and when people's opinions about the nature of that value reflect essentially religious convictions that are fundamental to moral personality." *Id.* at 157.

228. *Id.* at 239.

229. *Id.*

230. *Id.*

231. *Id.*

232. See Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. Rev. Books, Mar. 27, 1997, at 41 (reprint of the Brief for Amici Curiae in Support of Respondents, *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.) (en banc) (No. 95-1858) submitted to the Supreme Court by renowned moral and political philosophers in favor of protecting a right to physician-assisted suicide) (noting that "every competent person has the right to make momentous personal decisions which invoke fundamental religious or philosophical convictions about life's value for himself"). Judge Reinhardt, in *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.) (en banc), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996), does not attempt a comprehensive Dworkinian moral defense for the permissibility of physician-assisted suicide. One similar moral argument that Judge Reinhardt does suggest is that assisted suicide should be allowed because it is more humane to allow

Dworkin, in the guise of permitting public moral arguments, has merely argued for a minimalist liberal position in a nuanced way.

B. *Professor Sandel and Compassion in Dying: A Republican Confrontation with Public Moral Argument*

While Professors Dworkin and Sandel agree on the need for moral argument in the public sphere, they differ in fundamental ways. Professor Sandel would embrace Professor Dworkin's attempt to bring moral argument to the fore of constitutional interpretation. Professor Sandel would take issue, however, with Professor Dworkin's conception of the manner and place of moral argument in constitutional democracy. Professor Dworkin's reasoning demonstrates, as discussed in the previous section,<sup>233</sup> that there are moral arguments, as opposed to merely toleration arguments, for "bracketing" comprehensive moral questions in the public sphere and defending the privacy rights he conceives as essential to both assuring human dignity and the proper functioning of democratic government.<sup>234</sup> Professor Sandel would argue, however, that Professor Dworkin's underlying liberal conception of the human person causes him both to misconceive the

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terminally ill individuals to die with the aid of their physicians through suicide than it is to force them to suffer a painful and undignified end. *Id.* at 812. Judge Reinhardt argues that technological advances make it possible for human beings in a state of terminal illness to linger longer than ever before. *Id.* As a result, Judge Reinhardt argues that there is less dignity in dying today than in the past. *Id.* He claims the Supreme Court in *Cruzan* recognized a constitutionally protected right to refuse unwanted medical treatment. *Id.* at 815. Judge Reinhardt views *Cruzan* as a first step toward enhancing the fading dignity of modern death. *Id.* at 816. The right to physician-assisted suicide, in Judge Reinhardt's conception, extends this dignity-enhancing right to terminally ill patients who, like those who require unwanted medical treatment to continue living, wish to end their pain and suffering. *Id.*

Dignity in *Compassion in Dying* however, is defined strictly in terms of individual autonomy. *See id.* at 820 (noting that "[w]hen patients are no longer able to pursue liberty or happiness and do not wish to pursue life, the state's interest in forcing them to remain alive is clearly less compelling"). Judge Reinhardt, in the Dworkinian tradition, argues that the constitutional scheme protects this autonomous conception of the human person. *Id.* at 800. The only moral standard against which the state's interest may be judged is the overriding precedence of individual autonomy. *Id.* at 805. The state's interest in preventing suicide flows from the senselessness of life prematurely taken, *id.* at 817, but in the case of life bereft of dignity, as Judge Reinhardt conceives it, the assisted suicide is not senseless and death does not come too early. *Id.* at 821.

Judge Reinhardt argued that the state's interest in protecting the poor and minorities from undue influence, *id.* at 825, extended only to ensuring that they could exercise their own autonomous decisions. The state has a duty to ensure that the poor, along with the rich, are able to obtain the means to end their lives with dignity. *Id.* The role of the state here is not to advocate one moral position over another. Rather, Judge Reinhardt views the state as under an obligation to empower all citizens with the ability to exercise autonomous moral judgment privately.

233. *See supra* part V.A.

234. Dworkin, *Life's Dominion*, *supra* note 102, at 14-15.

essence of liberty of conscience and forces him to accept an existential moral intractability where none exists.

For Professor Sandel, liberty of conscience is not the right to choose certain beliefs over others, but rather, the right to hold and express certain beliefs and duties that are part of who we are prior to any choices that we make.<sup>235</sup> The Constitution protects religious duties, not because we choose them, but because they have a "tendency to promote the habits and dispositions that make good citizens."<sup>236</sup> The Constitution does not prescind moral argument from the public square. To the contrary, the very goal of republican government is to make policy as the result of good moral argument.<sup>237</sup> The Constitution wisely enshrines certain beliefs and duties, like religious duties or loyalty to family, as inviolable not because they are necessarily the result of moral deliberation or argument but because, even though they may be impervious to rational argument, they nonetheless tend to promote the virtues necessary for republican citizenship.<sup>238</sup> Under Professor Sandel's reasoning, decisions about the morality of abortion, homosexuality, and physician assisted suicide have nothing to do with freedom of conscience precisely because they are moral *decisions*. Thus, these moral decisions, in contrast to potentially pre-moral convictions like religious duties, are the proper subject of rational, public moral debate. Political legitimacy for decisions on these moral questions, in a republican scheme, flows from resolution of these questions in reasoned public deliberation.

### C. Sandelian Arguments for and Against Physician Assisted Suicide

One can envision Sandelian arguments both for and against protecting the right to physician-assisted suicide. This section explores both possibilities and argues that, whatever the substantive outcome, moral argument must be taken seriously to secure legitimacy for the decision. This is so because the starting point, in our republican constitutional scheme, for the argument about whether a substantive due process right exists is not whether such a right would guard autonomy. Rather, the constitutional interpreter must ask whether the right in question protects a practice which makes good citizens.<sup>239</sup> This type

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235. Sandel, *Democracy's Discontent*, *supra* note 35, at 66.

236. *Id.*

237. *See id.* at 127 (noting that "[t]he point of politics was not to broker competing interests but to transcend them, to seek the good of the community as a whole . . . . [I]ndependence would be a source of moral regeneration . . . and renew the moral spirit").

238. *Id.* at 321-23. Professor Sandel argues that liberalism, far from protecting individuals from tyranny of the majority, so limits the political debate that intolerance and simple moralisms of weak-minded majorities now threaten our ability to govern ourselves and sustain our moral independence.

239. *See id.* at 5-6 (noting that "[t]o share in self-rule therefore requires that citizens possess, or come to acquire, . . . civic virtues . . . . The republican conception of

of reasoning is ends-focused because it connects constitutional protection of a practice with the life and health of the polity conceived specifically in republican terms. Such ends-focused reasoning renders constitutional decisions legitimate because it avoids the intractable character of arguments about the essential dignity of the human person and what it requires contemplated by the aspirational model of constitutional rights. Finally, this section discusses Professor Sandel's conception of when judicial review can be legitimately exercised to protect a constitutional right.

### 1. Sandelian Moral Arguments for and against Legal Protection of Physician-Assisted Suicide

To protect a right to physician-assisted suicide, Professor Sandel would ground the right in some relationship that secures goods necessary to the proper functioning of the polity. Here, an analogy to how he would argue the case for protection of homosexual relationships may be instructive. Unlike the dissent in *Bowers*, Professor Sandel would not rely on some autonomous notion of privacy with regard to sexual decisions. Rather, Professor Sandel would rely heavily on the *Griswold* precedent.

The privacy protected in *Griswold* was closely tied to the virtues that marriage cultivates in the spouses.<sup>240</sup> Those virtues are also necessary to the functioning of the republic. Some measure of sexual privacy is necessary to cultivate those virtues. Therefore, use of contraceptives in marriage, free from state surveillance, is constitutionally protected.

An interpreter who wanted to take moral argument seriously could argue that the virtues which the marriage relationship cultivates are also present in homosexual intimacy, and thus, homosexual intimacy should be similarly protected.<sup>241</sup> It is not hard to see that someone wanting to protect the right to physician-assisted suicide might analogize the practice protected by that right to the practice of marital intimacy protected by the *Griswold* right to privacy. In the physician assisted suicide context the necessary relationship is the physician/patient relationship. This relationship is traditionally protected and secures certain human goods, such as trust, physical and psychological health, and planning for the future of one's family and oneself. Privacy in this relationship is essential to its proper functioning and to securing the virtues for society that the relationship creates.<sup>242</sup> There-

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freedom . . . requires a . . . politics that cultivates in citizens the qualities of character self-government requires").

240. See *supra* note 192 and accompanying text.

241. See Sandel, *Moral Argument and Liberal Toleration*, *supra* note 113, at 535.

242. See Cheryl K. Smith, *What About Legalized Assisted Suicide?*, 8 Issues L. & Med. 503, 511-13 (1993) (arguing that trust in the physician/patient relationship requires allowing physicians to help terminate the lives of terminally ill patients); T.

fore, how a physician and patient plan the treatment of illness is a matter which the state should not police, at least not to the point of taking the decision away completely from the protected relationship. To do so would unnecessarily burden the relationship and constitute impermissible surveillance.

The case for physician-assisted suicide, however, is much harder to make than the case for marital privacy or even homosexual intimacy. Initially, it is much harder to see what concrete virtues the physician/patient relationship cultivates, much less how these virtues are essential to full participation in self-government. Furthermore, the physician/patient relationship is not the only relevant relationship, or necessarily the most intimate. Should not the patient's responsibility to his/her family, emotionally as well as financially, play into the decision? Could the state require some consultation with family before allowing the patient to take some final, drastic action? Finally, as the recent death of Joseph Cardinal Bernadin makes clear,<sup>243</sup> does not the polity benefit from witnessing suffering well borne and also from having to care for those who suffer? Is there no virtue to be found in suffering, both for those who suffer and for those of us who should care for them?

Democratic resolution of these fundamentally moral questions in republican political debate is the best way to secure legitimacy for political decisions. As noted earlier, however, these moral questions should be resolved in terms of whether protecting physician-assisted suicide or prohibiting it will help promote the virtues in the citizenry necessary for the proper functioning of this particular type of polity.<sup>244</sup> Only this type of ends-focused justification will result in legitimacy for the substantive decision.

## 2. Outlining Sandelian Objections to Judicial Protection of a Right to Physician-Assisted Suicide

The previous subsection outlined the political/moral arguments for and against physician-suicide and argued that resolution of these arguments based on republican public moral debate was the only way to secure legitimacy for the substantive decision. This does not answer

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Howard Stone & William J. Winslade, *Physician-Assisted Suicide and Euthanasia in the United States: Legal and Ethical Observations*, 16 J. Legal Med. 481, 483 (1995) (arguing that the law should not interfere with the private physician/patient relationship); Lori D. Pritchard Clark, Comment, *Rx: Dosage of Legislative Reform to Accommodate Legalized Physician-Assisted Suicide*, 23 Cap. U. L. Rev. 689, 710-14 (1994) (arguing that developing models of the physician/patient relationship allow for physician-assisted suicide). *But see* Paul Wilkes, *The Next Pro-Lifers*, N.Y. Times, July 21, 1996, (Magazine) at 22 (arguing that physician-assisted suicide could destroy the traditional doctor/patient relationship).

243. Joseph Cardinal Bernadin, *The Gift of Peace* (1997) (reflecting on the integral nature of human suffering).

244. See *supra* note 182 and accompanying text.

the question, however, of whether the judiciary should leave the resolution of the moral question of physician-assisted suicide to the political branches. This subsection explores Professor Sandel's conception of judicial review and when it can be exercised to secure legitimacy for substantive moral outcomes.

In the republican conception, judicial review of legislative action should be limited, especially if that action is the result of profound and sustained debate about the moral value of the practice in question.<sup>245</sup> An overly aggressive judiciary retards the creation of virtue in the citizenry because it limits the results of the deliberative process.<sup>246</sup>

Judge O'Scannlain, in his dissent from the Ninth Circuit's majority decision denying a rehearing en banc<sup>247</sup> of the decision in *Compassion in Dying*, attacked, in Sandelian terms, the analogy between physician assisted suicide and abortion. At the same time, he showed the logical futility of grounding fundamental rights strictly on notions of human autonomy. The majority in *Compassion in Dying* drew a parallel between a person's decision to enlist a doctor's aid in the termination of her own life and a woman's decision to terminate a pregnancy,<sup>248</sup> based on a notion that the holding in *Casey* enshrines the woman's right to choose as the most sacredly guarded constitutional value.<sup>249</sup> Because of the intimacy of the decision and the need to guard the choice from state interference, the right to an abortion is "like" the right to assisted suicide. This ends-divorced reasoning, however, leaves open to constitutional protection all types of choices, like po-

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245. See generally Jeffrey Rosen, *What Right to Die?*, New Republic, June 24, 1996, at 28 (discussing the problems of aggressive judicial review).

246. See Sandel, *Democracy's Discontent*, *supra* note 35, at 117 (noting that, "According to [republican] tradition, liberty depends on self-government, and self-government depends on the members of a political community's identifying with the role of citizen and acknowledging the obligations that citizenship entails"). Judge O'Scannlain has nicely articulated the republican objection to aggressive judicial review. As he conceives it, the proper arena for moral argument in a republican regime is the legislature, duly elected by the people. *Compassion in Dying v. Washington*, 85 F.3d 1440, 1442-43 (9th Cir.) (O'Scannlain, J., dissenting) ("[T]he Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary." (quoting Judge Kleinfeld in dissent in the en banc decision, *Compassion in Dying v. Washington*, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, J., dissenting))), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996). The majority in *Compassion in Dying*, he argued, appropriated the power of the legislature and cut off moral debate on the question of physician-assisted suicide. Physicians in favor of assisted suicide presented a strong moral case for allowing the practice; however, Judge O'Scannlain argued that these arguments should have been presented to the legislature. *Id.* at 1443.

247. *Compassion in Dying*, 85 F.3d at 1440 (O'Scannlain, J., dissenting).

248. *Id.* at 1444.

249. *Id.*

lygamy, prostitution, and the use of illicit drugs, regardless of their connection, if any, to the life of the polity.<sup>250</sup>

Although Professor Sandel does not adopt the strictly backward looking notion of substantive due process as articulated by the majority in *Bowers*, such that there are no fundamental rights if they are not "deeply rooted in the Nation's history and tradition,"<sup>251</sup> he does argue that only those rights which "are implicit in the concept of ordered liberty"<sup>252</sup> are protected. Professor Sandel would argue that practices which promote the virtues necessary for a republican regime are implicit in the concept of ordered liberty. Those wishing to protect such practices must demonstrate that connection. The difference between Professor Sandel and a strictly backward looking substantive due process model is that Professor Sandel acknowledges that the argument for protecting more modern practices, like homosexuality, can be made.<sup>253</sup>

Absent a showing that physician-assisted suicide is a practice that promotes virtues necessary for self-government, such a practice is not entitled to heightened judicial protection. Thus, those in favor of the practice must make that case in the legislature, confronting those who muster compelling moral arguments against the practice.<sup>254</sup> It is the elected representatives of the people who should make the final decision about the necessity for the right.

#### CONCLUSION

Political argument is about morality. People differ on what it is good for us to do as a polity. *Compassion in Dying v. Washington* provides the Supreme Court with the opportunity to revisit its substantive due process jurisprudence and to render that jurisprudence politically legitimate. This Note has explored the traditional attempts by aspirationalism and originalism to secure legitimacy for substantive due process rights. These attempts have cheapened our political discourse and robbed the Supreme Court's opinions of legitimacy. Republican theories of constitutional interpretation, on the other hand,

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250. *Id.* The problem with the majority's reasoning is that there is no place to draw the line about which practices are constitutionally protected and which are not. An ends-focused reasoning, one where rights are protected only if they promote virtues necessary to sustaining republican regimes, has a built-in stopping point for determining which practices merit constitutional protection. *See id.* (noting that "[t]he majority's method of constitutional interpretation lays the foundation for the discovery of an endless parade of protected liberty interests involving choices that could be cast as 'intimate' and 'personal'").

251. *Compassion in Dying v. Washington*, 79 F.3d 790, 849 (9th Cir.) (Beezer, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996).

252. *Id.* at 848-49 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

253. *See supra* note 241 and accompanying text.

254. *Compassion in Dying*, 79 F.3d at 851-55 (Beezer, J., dissenting) (outlining the moral arguments against physician assisted suicide).



may help us to regain our sense of self-government and aid us in re-creating an American political community because they take moral argument seriously. This is so because the difficult moral argument, if convincingly made, can secure legitimacy for either the permissibility or prohibition of morally questionable practices. But, even those who find certain practices morally problematic might be able to accept such practices if they are persuaded that a particular practice promotes civic virtue and contributes to a healthy polity.

Accordingly, courts should engage in an ends-focused, practical reasoning in making determinations about the existence of constitutional rights. Such reasoning is practical, rather than metaphysical, because it focuses the participants on a common starting point, namely, the republican polity. There is more hope for reaching a consensus concerning the type of polity our Constitution establishes and what that polity needs to sustain it than there is for reaching agreement on abstract philosophical questions of human dignity and what rights that dignity demands. Only through this type of moral consensus-building can true legitimacy for fundamental political decisions be achieved.

