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Judicial Supremacy and Taking Conflicting Rights Seriously

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JUDICIAL SUPREMACY AND TAKING CONFLICTING RIGHTS SERIOUSLY

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ABSTRACT

The best arguments in favor of judicial supremacy rely on its essential role of protecting rights in a democracy. The doctrinal technique of strict scrutiny, developed to do the work of judicial supremacy, has been an important tool in our constitutional jurisprudence in the service of rights protection. When the Supreme Court reviews laws that themselves seek to enhance or preserve constitutional rights, however, strict scrutiny does not provide the right approach. Rather, the Court should consider very carefully the rights claims in favor of the statute as well as those launched by a challenger. In such cases of conflicting rights, the Court has not taken seriously enough the obligation that justifies judicial supremacy, taking rights seriously.

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INTRODUCTION

Judicial supremacy is more an attitude than a principle. At the end of the day, there is little space between the natural consequences of judicial review and a system of judicial supremacy, defined as "the obligation of coordinate officials not only to obey [a judicial] ruling but to follow its reasoning in future deliberations."[1] Although judicial supremacy posits deference by other government actors to judicial interpretations even when they think that courts are wrong,[2] the actual impact of any such disagreement is quite small. If the other branch is a party to a case, then the court's interpretation of the Constitution will necessarily prevail over that of any other branch of government.[3] For areas of constitutional meaning that are not potential cases, then even rhetorical hyperbole on behalf of courts' primacy would be tempered by the incapacity of federal courts to give advisory opinions,[4] so that most disagreements over meaning on matters not subject to judicial review would be largely hypothetical.

It is often said that the Court indulged in the great hubris of judicial supremacy in *Cooper v. Aaron*, but it is important to distinguish what the Court said in *Cooper* from what it did.[5] In *Cooper*, often touted as the high watermark of judicial supremacy,[6] the Court made some bold statements suggesting that the Constitution means only what the Court says it means.[7] But consider what the

1. Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POLITICS 401, 407 (1986).

2. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 7 (2007).

3. *See id.*

4. *See* Ashcroft v. Mattis, 431 U.S. 171, 172 (1977) (per curiam) ("For a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'" (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937))).

5. 358 U.S. 1 (1958). In *Cooper*, an Arkansas school board, as a party to the case, argued that the governor and legislature of the state, which had obstructed the board's compliance with a court order, were not bound by the Court's holding in *Brown v. Board of Education*. *Id.* at 15-17.

6. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 45 (7th ed. 2013) (reading *Cooper* to suggest a special and privileged role for courts in interpreting constitutional meaning).

7. *See, e.g.*, *Cooper*, 358 U.S. at 18 ("[T]he federal judiciary is supreme in the exposition

Court did. A party to the case was seeking relief from a federal court's order to desegregate on the ground that the State of Arkansas had interfered with its ability to comply;[8] it is hard to see any choice for the Court other than to rule against the legitimacy of the State's effort to undermine a court order issued to vindicate an individual right of injured plaintiffs. The Governor of Arkansas was not rebuked for merely articulating disagreement with a court in the abstract, but for claiming the power to disrupt fulfillment of a court's decree.[9] The Court did indulge in some far-reaching language, displaying an attitude which has been the subject of a great deal of criticism.[10] But keeping in mind that such language, coupled with the unique symbolic act of all nine Justices claiming authorship of the opinion,[11] was all the Court had to respond to an assault of words and violence on its authority to decide cases within its own sphere, the decision itself is surprisingly unremarkable. As *Cooper* demonstrates, attitude has played a significant role in the story of judicial supremacy.

The question then is why there has been so much debate about a concept of judicial supremacy that, in its most formalistic sense, has little impact on courts' legitimacy in deciding cases before them and applying their view of the law as precedent. There are other facets of the phenomenon of judicial supremacy that regard its rhetorical and political force within the government,[12] but with regard to the legal impact of judicial supremacy, I claim that the major complaints are not actually about courts having the final word at all. Although there are a few who would go so far as to take the Constitution away from the courts,[13] many concerns about judicial supremacy are more readily understood as concerns about whether

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of the law of the Constitution.").

8. *See id.* at 15.

9. *See id.* at 18-19.

10. *See, e.g.*, Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 986-87 (1987) ("[T]he implication of the dictum that everyone should accept constitutional decisions uncritically, that they are judgments from which there is no appeal, was astonishing.").

11. *See Cooper*, 358 U.S. at 4.

12. For an outstanding and rich examination of the matter from a largely political and historical perspective, see WHITTINGTON, *supra* note 2, which traces the struggles for interpretive authority over time.

13. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 163-65 (1999) (developing a case for popular constitutional law without judicial review).

the Supreme Court has interpreted the Constitution correctly in specific cases.

Part of the legal doctrine that contributes to judicial supremacy is the body of law in which the Court decides how much deference to give to other potential decision makers. I take some of the most strident attacks on judicial supremacy to be criticizing that body of law, suggesting that the Court should read the Constitution in ways that show more respect for the work of the other branches of government when there is a choice to be made in how to exercise its final interpretative authority.[14] That is why I consider judicial supremacy to be more a question of attitude than of principle. The mistake that the Court is accused of making is not necessarily a matter of legal obligation, but more of prudence—in failing to recognize appropriately the judiciary's place as one of three branches, as a part of a federal system, and as a fiduciary of public trust in interpreting a document that has strong populist roots and significant consequences for the people. By resolving constitutional disputes without due recognition to its own institutional limitations, the Court succumbs to the sin of supremacy. A sense of institutional role underlies, explicitly or implicitly, much of constitutional doctrine, but there is a legitimate concern that the Court has lost a sense of how doctrine should take account of different voices in the Republic.[15]

For example, Larry Kramer launched a broad-based historical attack on judicial supremacy that called the entire edifice of judicial review as we know it into question on the basis that it undervalues the role of popular constitutionalism in the implementation of our fundamental commitments.[16] But even in mounting so profound an external challenge to our judicial system, Kramer also devotes considerable effort to making an internal attack on specific cases in which the Rehnquist Court read the Constitution wrong in ways

14. *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111-28 (Yale University Press 2d ed. 1986) (1962) (suggesting the use of jurisdictional passive virtues to mitigate the "deviant" nature of judicial review).

15. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 251-53 (2004) (not seeking to eliminate judicial review, but arguing it has been seriously misunderstood and could exist without judicial supremacy); TUSHNET, *supra* note 13, at 163-65 (arguing to eliminate judicial review altogether).

16. KRAMER, *supra* note 15, at 207-09.

that "squeeze[d] 'the people' out of the Constitution."[17] A prime target of Kramer's attack was the Court's decision in *Bush v. Gore*, for undertaking judicial review of a matter that should have been left to Congress.[18] Kramer complained that "any notion that what the Constitution does or permits might best be left for the people to resolve using the ordinary devices available to express their will seems beyond the Rehnquist Court's compass.... This is judicial sovereignty."[19]

Framed this way, the problem of judicial supremacy is doctrinal, not structural. It can be solved by persuading courts to change their attitude. The problem, indeed, can be solved without sacrificing judicial supremacy or even compromising it, because a doctrinal solution does not challenge the Court's power to do the job of judicial review; rather, it tells the Court how to do that job. To the extent there are valid arguments raised in opposition to judicial supremacy,[20] some of them can be addressed within the system of robust judicial review itself. The frame of judicial overreaching that has animated the debates about judicial supremacy can, indeed, provide new appreciation to the values for which judicial review exists in the first place: the protection of a broad array of constitutional values and, more specifically, the protection of individual rights.

One particular place where judicial analysis could benefit from this kind of attitude shift toward humility is in cases where the Court considers a constitutional rights claim leveled against a statute that itself seeks to create or expand rights. I will explore in this Article how the rationales underlying judicial supremacy, as well as some of the attacks on it, should affect the contours of judicial decisions about the Constitution's meaning in the case of a conflict of rights. The best rationale for judicial supremacy is that it protects rights; when the Court uses its power of review to strike down rights-protecting legislation in the name of a conflicting individual right, therefore, it should give due regard to the possibility that rights claims can reasonably be made on both sides of the

17. Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 130 (2001).

18. *See* 531 U.S. 98 (2000) (reversing the Florida Supreme Court's judgment ordering manual recounts of votes in the 2000 presidential election).

19. Kramer, *supra* note 17, at 158.

20. *See, e.g.*, *id.* at 130.

dispute. Thus, the use of strict judicial scrutiny—developed to advantage rights claims when threatened by a law without rights-affirming goals—is inappropriate in this situation. The use of strict scrutiny under these circumstances gives inadequate deference to the legislative effort to further constitutional values and to the popular understanding of rights that such legislation represents. It thus exacerbates the deficiencies of judicial supremacy and compromises the principal justification supporting the Court's power to decide the case in the first place.

This Article will draw on the very powerful arguments leveled by Jeremy Waldron against judicial review as a way to consider how review of conflicting rights can be improved to further the underlying benefits and advantages of judicial review. Instead of reflexively employing strict scrutiny to assess all rights claims, the Court should develop an approach that gives more consideration to state interests that may be furthered by a rights-protecting law. By taking seriously the reasonable disagreements that legislatures acting in good faith may have about what the constitutional values of liberty and equality require, the Supreme Court will further the goals of judicial supremacy and mitigate its costs.

I. THE JUSTIFICATION FOR JUDICIAL SUPREMACY AND ITS PRINCIPAL WEAKNESS

The strongest argument for judicial supremacy is that it is a good way to preserve or promote rights and protect the politically powerless.[21] Judicial review promises "[a] good decision and a process in which claims of rights are steadily and seriously considered."[22] Perhaps this advantage in the task of considering claims of rights comes as a result of the Court's structural characteristics, such as electoral independence and an obligation to provide reasons, as

21. Other rationales have been propounded. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997) (arguing that judicial supremacy is needed to provide stability, consistency, and settlement by avoiding multiplicity of interpretations of fundamental law).

22. Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006) (adapting a phrase from RONALD DWORKIN, A MATTER OF PRINCIPLE 9-32 (1985)).

some have argued.[23] Perhaps it comes in the provision of a second layer of scrutiny for laws, first by legislatures and then by the courts, to assess conformity with rights guarantees, as others have suggested.[24] Perhaps it is a natural outgrowth of a commitment to limited or constrained government action, which has a clear implication for the enforcement of individual rights.[25] Erwin Chemerinsky in this volume nicely lays out the arguments for why the judiciary appropriately functions as the "moral conscience" best suited to hold the nation to its highest values by interpreting the Constitution.[26] I hope I do not do injustice to defenders of judicial review and judicial supremacy collectively by simplifying here what I believe to be the principal rationale behind those concepts: the judiciary's ability to take rights seriously.

This underlying rationale supports the idea that the courts should have the task of interpreting the Constitution but says little expressly to guide the courts in doing that task. As I argued above, many of the attacks on judicial supremacy have sounded more in how the Court has resolved particular legal questions under the Constitution than in its right to do so.[27] But the two are importantly linked.

The best attack on judicial review comes from Jeremy Waldron. I say this because Waldron meets the strongest argument *for* judicial review—the protection of rights—head-on and on its own terms. He argues that judicial review disserves the very goal to which defenders of judicial review insist it is essential: the protection of rights.[28] Although many challengers of judicial review have, in some cases justly, been accused of valuing rights too little,[29]

23. *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 71 (2001) (discussing life tenure, reasoning, and political appointment as allowing for judges to render impartial decisions on moral questions of justice).

24. *See, e.g.*, Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1576 (2000) (arguing that liberty is enhanced by adding an additional check on government action); Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1695 (2008) (agreeing with Cross's point and elaborating).

25. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513-15 (1991) (discussing links between structural constraint and rights).

26. *See* Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1470 (2017).

27. *See supra* text accompanying notes 14-19.

28. Waldron, *supra* note 22, at 1406.

29. *See* BICKEL, *supra* note 14, at 18 (concluding that "judicial review is a deviant

Waldron completely disavows rights skepticism; yet from the opposite vantage point, he still finds judicial review to be wanting in a democracy.[30] Why? His answer is that the strongest version of rights protection under the Constitution is understood as a scheme of moral rights imbedded into capacious text, structure, and history, and that people of good faith can and will necessarily disagree about what those rights are and what they entail.[31] The disagreement over what constitutes a right, he argues, may not be resolved by unelected judges without compromising principles of political equality among citizens.[32] For example, two people who disagree about whether a woman's right to terminate her pregnancy may be restricted can both accept the centrality of a right to life and a right to personal autonomy but have different "conceptions" of those rights[33]—both sincerely held and both held alongside a commitment to rights protection in general.[34] Waldron argues that relegating resolution of these differences to courts insults and disenfranchises the polity in violation of the basic terms of legitimate democracy.[35]

Although I do not accept Waldron's ultimate conclusion that judicial review is illegitimate, I do want to take seriously what I take from Waldron's provocative argument, which I see as an important insight that has been severely underappreciated in discussions about the legitimacy *vel non* of judicial review: the possibility of reasonable disagreement among people of good faith about what rights entail. In light of that insight, if we are to maintain a system of judicial review, what could or should courts do to mitigate the compromise of moral agency of the people, which Waldron identifies as the cost of such review?

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institution in the American democracy"). Robert Bork was a particularly strident rights skeptic. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971) (discussing the move toward constitutionalizing "gratifications" as rights).

30. *See* Waldron, *supra* note 22, at 1366.

31. *Id.* at 1406.

32. *Id.* at 1353.

33. Just as Waldron, *see id.* at 1367, this discussion uses "conception" as Ronald Dworkin did, meaning the way that an abstract concept of a right applies to a given situation. *See* RONALD DWORKIN, TAKING RIGHT SERIOUSLY 134-36 (1977) (discussing differences between a concept and differing conceptions of it).

34. *See* Waldron, *supra* note 22, at 1367 (offering an analogous example using the right to free speech).

35. *Id.* at 1353.

Waldron sets out the core case against judicial review based on certain important assumptions about the society at issue.[36] Significantly, two of Waldron's four assumptions are a working, democratically elected legislature and a society committed to protecting individual rights.[37] His case against judicial review depends on the existence of these characteristics in a society.[38] Accepting these conditions, my working hypothesis for purposes of this Article is that legislatures have passed and do pass laws in order to benefit the common good, sometimes to grant or expand rights, and that, while they may have dysfunctions, they are not infected with the particular brand of dysfunction identified by John Hart Ely in mid-century America in which legislation was passed intentionally to oppress those without legislative power.[39] That latter situation does not plausibly raise questions of *conflicting* rights (other than the "right" of majorities to enact their preferences into law despite their consequences to others, which is no right at all).[40] Rather, such

36. *Id.* at 1360 (listing four assumptions about society that underlie his theory).

37. *Id.*

38. *Id.* Underlying Waldron's antijudicial review theory are two additional assumptions: (1) a set of judicial institutions set up to uphold the rule of law; and (2) substantial good-faith disagreement about rights among the members of the society. *Id.*

39. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 135-36 (1980) (positing a representation-reinforcing theory of judicial review to justify invalidation of laws passed under conditions that constitute a democratic malfunction).

40. Apologies for the dismissive treatment of what has actually been a serious point of debate among some philosophers—the extent to which the right of popular sovereignty is compromised every time a court strikes down legislation on any ground, which would render any act of judicial review a conflict of rights. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 21-22 (1996) (refuting the argument that constitutionalism undermines the liberty of citizens to govern themselves); Evelyne Maes, *Constitutional Democracy, Constitutional Interpretation and Conflicting Rights*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 69, 84-85 (Eva Brems ed., 2008) (discussing Habermas's view on the co-original status of popular sovereignty and human rights). The idea that judicial review violates the rights of the proponents of the challenged law has not taken serious root in American law, although some theorists and judges have made nods in that direction at times. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting) (criticizing the Court's invalidation of "the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it"). And proponents of some laws challenged as discriminatory have raised the specific fundamental right of association to support the law. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34-35 (1959) (considering right of association as a neutral basis for deciding *Brown*). But courts have never treated the right of association as presenting a case of conflicting rights with respect to racial integration. The right of association was successfully raised, however, by an

situations present cases of a constitutional right on one side and restrictions on that right on the other without any credible corresponding constitutional value advanced by the law.[41] In such cases, there is little or no justification for deference to a legislature's denigration of the right, and judicial supremacy in interpreting that right absolutely is the right way to go.[42] Strict scrutiny evolved to address just that situation.[43]

But legislatures also protect rights and legislate in pursuit of a broad set of constitutional values such as democratic legitimacy and equal status. Indeed, legislatures sometimes pave the way for recognition of rights and values that courts later determine to be embodied in a constitutional right.[44] Lawrence Sager has urged a justice-seeking account of judicial review that explicitly contemplates a partnership between judges and legislatures in seeking a more just society.[45] He envisions a divided constitutional labor between Congress and the courts in protecting rights.[46] Other theorists posit an obligation of legislatures "to engage in coherent, responsible legislating with integrity" such that rights may be furthered even if originating in legislative, rather than judicial, sources.[47] Indeed, on one account, legislatures may have an advantage in rights protection because of their opportunity for public deliberation over

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organization seeking to resist a statutory obligation not to discriminate on the basis of sexual orientation. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (holding that applying state accommodations law to control Boy Scouts' membership decision violated the group's First Amendment right of expressive association). *Dale* is an example of a case in which it would have been fruitful for the Court to treat the matter as a conflict of rights rather than as one right being alleged against a restriction on rights. *See* Ofer Raban, *Conflicts of Rights: When the Federal Constitution Restricts Civil Liberties*, 64 RUTGERS L. REV. 381, 395-96 (2012) (discussing the Court's "quick dismissal" of the State's effort to advance its view of equality, a value recognized in both State and Federal Constitutions).

41. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270, 1275 (2007).

42. *See id.*

43. *Id.*

44. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564 (2005) (examining evidence of consensus among states in prohibiting juvenile death penalty); Lawrence v. Texas, 539 U.S. 558, 573 (2003) (examining emerging state trend toward decriminalizing same-sex conduct).

45. *See* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 7 (2004) (recommending judicial action "in service of the efforts of the nonjudicial actors to realize constitutional justice").

46. *See id.* at 102.

47. James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1385 (2005) (addressing the "doctrine of political responsibility" put forward by Dworkin but never developed fully).

moral and political principle, and in fact they now do better than courts when it comes to protecting the constitutional value of equality.[48]

Waldron warns that, although we are generally tempted to think of courts as better able to make decisions about rights because of their institutional characteristics, "there are also things about courts that make it difficult for them to grapple directly with the moral issues that rights-disagreements present."[49] The choice of which institution is the preferable repository of rights depends largely on important assumptions about the society making the laws.[50] If the legislature at issue is subject to malfunctions such as sectarian or racial prejudice, then a judicial check on laws is needed to remedy violations of rights that may have been undervalued by the lawmaking body.[51] But in a society with a robust culture of representation, political equality, and open debate, Waldron urges that legislatures are in at least as good a position as courts to consider rights and, moreover, are freed of some of the obsessions that he believes hinder courts from confronting the true moral implications of their decisions.[52] He contrasts, for example, the "rich" reasoning in legislative debates on important issues of controversial rights such as abortion with the relatively thin engagement with the moral issues at stake in the Supreme Court's opinion in *Roe v. Wade*.[53]

In my view, Waldron has not succeeded in establishing that eliminating judicial review is a good move, or one necessary to the fulfillment of self-determination of the people.[54] But his arguments do very strongly support a more modest position: even if legislatures are not sufficiently trustworthy to justify replacing courts as the

48. *See* Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 300, 312 (2002).

49. Waldron, *supra* note 22, at 1376.

50. *See id.* at 1386.

51. *See id.* at 1406.

52. *Id.* at 1383-84.

53. *Id.* at 1384-85.

54. I reject this ultimate conclusion in part for fear of the fragility of Waldron's essential assumptions, as well as for the reasons artfully put forward by Richard Fallon. *See* Fallon, *supra* note 24, at 1699 (arguing that, even if Waldron is right that courts may be no more likely to decide rights correctly, judicial review is still preferable to minimize errors of underprotection of rights).

arbiters of rights, at the very least they should be taken seriously when they demonstrate an intention to act as expositors of different understandings of rights. When legislatures pass laws out of a conception of what constitutional values such as equality or liberty require, those laws should come to a court with at least even odds on their constitutionality—not a presumption against constitutionality. Even one who believes in judicial supremacy because of its importance in upholding rights should acknowledge that there is no reason to think the courts have a monopoly on the demands of justice in a democracy.

My claim is that the Supreme Court has erred in reflexively applying strict scrutiny to conflicting rights claims, and in failing to examine such cases as an opportunity to mitigate the concerns associated with judicial supremacy and enhance the legitimacy of judicial review. In such cases, the legislature has made a determination that a constitutional value is in need of protection and has acted, not to oppress, but to further that value as the proponents of the legislation understand it.[55] This understanding does not, of course, offer the legislature a free pass to violate the Constitution. But when there are reasonable grounds for the Waldronian citizenry to maintain a good-faith difference of opinion about, on the one hand, the scope or conception of the constitutional right being invoked in opposition to the law and, on the other hand, the rights-enhancing goals of the law,[56] the Court should take seriously the views of the elected branch and apply a more deferential standard. Make no mistake, what I am suggesting is still an exercise in judicial supremacy. It is the Court that will ultimately decide the constitutional question whether the legislature's justifications are sufficient to defeat the conflicting claim of right. And there will no doubt be times when the Court would take the legislature's cause seriously but still rule that it has encroached on protected constitutional rights as conceived by the Court. However, this kind of case is an opportunity for the Court to build into its doctrine a mitigating

55. Some examples might include laws passed to limit hate speech or bullying; to limit campaign expenditures; or to restrict sexual harassment in the workplace, all subject to challenge under the First Amendment.

56. *See* Waldron, *supra* note 22, at 1406 (summarizing his theory of rights-based disagreements judicial review in "reasonably democratic societies" where citizens "disagree about rights").

approach that respects the people's reasonable disagreements about rights.

II. JUDICIAL SUPREMACY AND ITS SERVANT, STRICT SCRUTINY

There are a few doctrines that the Supreme Court has developed that explicitly call for deference to other branches in recognition of what the Court sees as appropriate limits on judicial reach. The political question doctrine is the most obvious of these, under which the Court decides whether a matter is committed by the Constitution to another branch or to the judiciary and proceeds to resolve the case accordingly.[57] If the Court decides the Constitution relegates a question to another branch, it will dismiss the challenges.[58] If the Court instead reads the Constitution to place a limit on the other branch's exercise of discretion, then it will view the challenge as presenting a legal question and decide whether the other branch acted within its designated authority.[59] As Tara Grove has documented, this itself is an exercise in judicial supremacy,[60] but it is one in which the Court is using its privilege of having final say on the Constitution's meaning in a way that may recognize a sphere of discretion in another branch.[61]

There are also less explicit doctrinal frameworks that build in a tacit acknowledgment of the institutional limitations on the courts, such as rational-basis review, which accords a degree of leeway to legislatures to implement reasonable policies without bearing a heavy burden of justification to the judiciary.[62] Again, this does not

57. *See* Baker v. Carr, 369 U.S. 186, 208-37 (1962) (setting forth the modern political question doctrine).

58. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1909 (2015).

59. *See id.* at 1964.

60. *See id.* at 1963-67 (discussing the Court's use of the political question doctrine as a reflection of its belief in judicial supremacy).

61. Examples are rare; most recently the Court declined to review the Senate's procedures for impeaching a judge because it saw that process as relegated to the Senate's discretion by the text of Article I. *See* Nixon v. United States, 506 U.S. 224, 237-38 (1993). But the Court made clear in *United States v. Nixon* that the question of *who decides* justiciability—the Court or some other government actor—is itself always a question for the Court. 418 U.S. 683, 703 (1974).

62. Rational-basis review—with its presumptions favoring constitutionality—is "a paradigm of judicial restraint." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993).

mean abdication of judicial review or diminution of judicial supremacy, but it is a tool used by the Court to achieve what it views as the correct allocation of decisional responsibility within the constitutional structure that we have.[63]

The Court also has employed strict judicial scrutiny on legislative acts in circumstances where there was little likelihood that the legislature had acted for reasons other than to oppress, exclude, denigrate, or otherwise subordinate politically powerless people.[64] This utterly nondeferential approach, developed by the Warren Court, was generally applauded as affording the appropriate protection to rights under circumstances in which deference did not appear justified, at the same time that it put the judiciary in the position of greatest strength and control with respect to legislatures passing the laws.[65] Certainly, the intuition is that if there is any place for judicial supremacy, slapping down intransigent and malicious legislatures is it.[66] The great strength of strict judicial scrutiny is its ability to smoke out invidious motivations by exposing pretextual state justifications for oppressive measures.[67] If the State has chosen to impose a burden on a vulnerable group or on the exercise of an important right, and cannot show why it was compelled by the public interest to do so, then the inference arises that the state was actually seeking to burden rights, which is not allowed.[68]

That model is less compelling, however, when either the rights in question are less clear or the objectives of the legislature are not as obviously invidious.[69] It is the confluence of those two factors that

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63. *Cf.* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 385 (2001) (Breyer, J., dissenting) ("To apply [rational-basis review,] a rule designed to restrict courts[,] as if it restricted Congress's legislative power is to stand the underlying principle—a principle of judicial restraint—on its head.").

64. *See* ELY, *supra* note 39, at 146 (arguing that strict scrutiny allows courts to throw out legislation designed with nefarious purposes).

65. *See id.* at 148.

66. *See* Jed Rubenfeld, Essay, *Affirmative Action*, 107 YALE L.J. 427, 436 (1997).

67. *See id.*

68. *See* ELY, *supra* note 39, at 146 (explaining that where actual state goals are impermissible, the law will have to be defended by other goals to which it relates more tenuously, which will be difficult to do).

69. *See* Rubenfeld, *supra* note 66, at 436-37. As Rubenfeld explains, strict scrutiny "makes good sense when a law singles out a particular class of persons for adverse treatment and there is reason to fear that the law seeks to achieve an impermissible purpose relating to this group." *Id.* at 436. But it does not make sense when the legislature's invidious purpose is

is the focus of this Article. That is, when the Court must determine whether an individual right is violated by a law that is itself an effort to advance or protect constitutional rights and values legislatively, how does a belief in judicial supremacy inform a decision on how the Court should respond?

This kind of accommodation to other branches has received insufficient consideration in the cases involving claims of conflicting rights. When the legislature acts to protect the interests of groups not enjoying majority status in the polity, the first thing to notice is that the paradigmatic indicia of legislative malfunction, in the Elysian sense, is missing.[70] John Hart Ely established the legitimacy of judicial intervention without deference in situations in which the "ins" are burdening the "outs" or are blocking the channels of political change.[71] The risk of illegitimate self-dealing, entrenchment, and externalization of burdens to out-groups justified the so-called "representation reinforcing" strict scrutiny of courts.[72] But in the opposite situation, when legislatures seek to benefit the vulnerable, as Waldron posits, the same suspect motivations are not apparent and a different justification for judicial intervention is called for.[73]

The Supreme Court, for the most part, has not been amenable to addressing these situations as a conflict of two sets of rights claims.[74] Rather, the Court appears captured by its own formalities—developed in eras of different needs—which dictate that if a fundamental right is claimed, strict scrutiny (and its lack of serious engagement with state interests) is the only option.

A good example of the Court's adherence to formality is the holding in *Buckley v. Valeo* in 1976, holding that the imposition of federal limits on contributions to a political candidate violates the

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uncontested.

70. *See* ELY, *supra* note 39, at 101-03, 135-36.

71. *See id.* at 101-03.

72. *See id.*

73. The same reasoning, tying the Court's power to resolve the constitutional conflict to its obligation to protect rights, would call for deference in cases in which rights-protecting statutes were challenged on structural—rather than rights—grounds, such as challenges to Congress's power to enforce the provisions of the Fourteenth and Fifteenth Amendments. *See* Fallon, *supra* note 24, at 1700-01.

74. *See* Raban, *supra* note 40, at 407 (suggesting rights conflicts have been "swe[pt] ... under the rug").

First Amendment.[75] The complex opinion, much simplified here, presented, among other issues, a constitutional challenge to limits on campaign expenditures, which Congress sought to justify on the ground that it was acting to "equalize the relative ability of all citizens to affect the outcome of elections."[76] Thus, Congress was seeking to protect the constitutional values of electoral integrity and political equality by limiting the amount of money that could be spent.[77] In opposition, the plaintiffs claimed an infringement of the First Amendment right to free speech.[78] Rather than confront the specific facts of the case at hand—that is, the centrality of expenditures to the core constitutional right of free speech; the law's design to place dollar limits on expenditures, but not to prohibit expression altogether or to target any particular point of view or idea; and the legislature's substantial compilation of evidence supporting the need for restrictions to support the goal of political equality—the *Buckley* Court rejected all calls to apply a lower level of scrutiny.[79] The analysis did not engage in any kind of effort to reconcile two competing constitutional claims: one by plaintiffs and one by the legislature on behalf of a larger class of public interests.[80]

Indeed, the *Buckley* Court dismissed any such reconciliation in one sentence: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[81] To have taken more seriously the possibility of reconciling the two constitutional values would have been an exercise in mitigating judicial supremacy. But, even though the case involved a topic area generally delegated to the Congress by the Elections Clause,[82] the Court appeared to see its role primarily as a defender of the individual claimant before it; seemingly, the Court saw no obligation to privilege in any way the wide notions of political equality or

75. 424 U.S. 1, 143 (1976) (per curiam).

76. *Id.* at 26.

77. *See id.* at 25-26.

78. *See id.* at 24.

79. *See id.* at 18-19 (declining to view the limit as one on conduct or as a time, place, and manner restriction because it affected the amount of paid advertising a person could buy).

80. *See id.* at 48-49.

81. *Id.*

82. *See* U.S. CONST. art. I, § 4.

electoral integrity purportedly advanced by the law.[83] The doctrinal response of applying an "exacting" scrutiny inexorably followed.[84]

As an illustration of another approach to the same question, the lower court opinion in *Buckley* devoted nearly twenty pages in the Federal Reporter to the historic and critical need for a public response to a crisis in the integrity of the electoral system, quoting great figures from Abraham Lincoln to Franklin Roosevelt and finding much to say on the constitutional values at stake in the enactment of the federal law.[85] "What nourishes and invigorates democracy is the root of widespread popular participation," the D.C. Circuit sweepingly declared.[86] Because of what it saw as strong constitutional claims on the side of the statute, the D.C. Circuit, while agreeing that the standard should be exacting in evaluating the plaintiff's constitutional challenges, found that standard met.[87] It viewed the case as one of conflicting constitutional values: it found that the Act, while limiting some First Amendment rights, also "enhance[d] First Amendment values ... [b]y reducing in good measure disparity due to wealth."[88]

Consider, as another example, the argument that has been leveled in some law reviews to the effect that Title VII, the federal law prohibiting sexual harassment in the workplace, violates the First Amendment because the offending conduct could take the form of harassing words or images.[89] Thus, the argument goes, strict scrutiny should apply and it is unclear that Congress's goal of fostering equality in the workplace would be sufficient to allow the provision to survive. Although the Court has yet to address this claim, the argument is well within the bounds of the doctrinal precedent,[90] and

83. *See Buckley*, 424 U.S. at 44-45.

84. *See id.*

85. *See Buckley*, 519 F.2d 821, 835 (D.C. Cir. 1975) (en banc) (per curiam), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

86. *Id.*

87. *See id.* at 843-44.

88. *Id.* at 841.

89. *See* Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 OHIO N.U. L. REV. 563, 578-79 (2001) (arguing constitutional vulnerability of sexual harassment laws).

90. *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596-97 (5th Cir. 1995) ("[W]hen Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.").

some Justices have acknowledged its force.[91] This example illustrates the conflicting rights problem well. Once a reviewing court frames the issue posed by Title VII as an individual constitutional right pitted against infringing legislation, it will have already gone too far toward dismissing and undervaluing the valid rights claims of the legislature.[92] Instead, the courts should assess the situation more holistically by looking, first, to the degree and nature of the statute's interference with the right of speech and, second, to whether a legislature could reasonably hold an understanding of equality that is important enough to trade off this kind of limit on speech. If so, the courts should be out of strict scrutiny territory, which rests on an assumption of bad faith.[93] It is not my aim here to suggest an alternative doctrinal framework; my goal is to argue that the rights-protecting justification that gives courts their legitimacy is best served if courts engage with the actual conflict of rights and make a judgment based on having taken both seriously, without the distorting effects of strict scrutiny.

Whether intended or not, indiscriminately applying strict scrutiny enables the courts to give selective priority to some rights over others, without ever having to defend that choice. The nature of certain more individually salient rights (as well as rules of standing and justiciability) makes it more likely that beneficiaries of a rights-providing statute will not be able to claim the structural benefits of strict scrutiny, while individual objectors to the expansion of civil rights will. Courts should be alert to the unexamined consequences of this asymmetry.

Compare the difference in the treatment of laws prohibiting affirmative action in contrast to those permitting it. Most would say that the controversy about use of race for purposes of inclusion and increasing opportunity is a good example of the way that people can

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91. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 409-10 (1992) (White, J., concurring) (discussing hostile work environment claims under the majority opinion's analysis of the First Amendment).

92. Possibly this is not a good example because the actual sexual harassment policy was a creature of regulation rather than statute and that could affect the robustness of my critique. But for purposes of illustration, I will assume that the sexual harassment prohibition has been endorsed by Congress.

93. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (applying strict scrutiny and assuming bad faith in cases of racial classifications).

reasonably and in good faith think differently about what the right to equality requires. The Court itself has been closely divided on how to apply the concept of equality to the conception of affirmative action.[94] Yet the judicial treatment of the two points of view has not been symmetrical because the Supreme Court does not accept the idea that conflicting understandings of rights should be confronted squarely as such.[95] In *Schuette v. BAMN*, for example, the Court considered a challenge to the constitutionality of a state constitutional amendment prohibiting the preferential use of race in any of the state's operations.[96] Objectors had leveled a political process objection to that provision, arguing that the constitutional ban on any kind of racial preference imposed a special burden on racial minorities in violation of the Equal Protection Clause.[97] The Court upheld the provision without applying any scrutiny at all because a majority of the Justices did not consider the plaintiffs to have presented an injury on account of race.[98] What was remarkable was the plurality's additional observation that if the Court were to intrude on the decision of the people to resolve this sensitive matter for themselves after full debate, "that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common."[99] This comment recognizing a fundamental right in the people to resolve matters of public policy for themselves would seem to call into question the use of strict scrutiny any time there is a reasonable disagreement about rights, suggesting that policies enacted through popular legislative processes enjoy a presumption of legitimacy as the fruits of a right

94. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (plurality opinion). In *Bakke*, the Justices struggled to reach a consensus, issuing a fractured plurality opinion. *See id.* at 267-68.

95. Indeed, a bare majority of the Court has insisted that there can be no good-faith disagreement. *See Adarand Constructors, Inc.*, 515 U.S. at 229-30 (reasoning that whenever the government treats people unequally because of race the injury is the same regardless of motivation).

96. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1629 (2014) (plurality opinion).

97. *See id.* at 1651-53 (Sotomayor, J., dissenting).

98. *See id.* at 1635-36 (plurality opinion).

99. *Id.* at 1637.

of people to resolve difficult social conflicts through law.[100] Yet that is not at all the way the courts usually see the problem.

When Congress or state entities have gone the other way and opted to use racial considerations remedially, the courts have responded with strict scrutiny.[101] Strict scrutiny, of course, affords a presumption of invalidity against the outcomes of popular debate on the very topic that the Court found in *Schuette* to be an effort toward "a constitutional order in which all persons are treated with fairness and equal dignity."[102] In *Adarand Constructors*, it was the Congress that had determined that federal contracts should be awarded in a way that benefited those historically disadvantaged.[103] Yet the Court gave no similar deference to a process of public policy-making that had viewed the dictates of fairness and equal dignity as supporting a race-conscious program. Rather, it employed a framework designed to protect individuals from legislative oppression. While that important task justifies judicial supremacy, a reasonable disagreement about what fairness and equality demand does not. By employing strict scrutiny in that circumstance, the Supreme Court has exacerbated the costs of judicial supremacy by supplanting an area of reasonable disagreement with its own view of the merits.

III. UNDERSTANDING ALTERNATIVES

Asking courts to take seriously the rights claims of legislatures acting in good faith on behalf of a public good is asking a lot. Without the architecture of strict scrutiny to frame the inquiry,

100. *See id.*

101. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (insisting on the use of strict scrutiny to analyze a minority-preference program because it imposed a distinction based on race).

102. *Schuette*, 134 S. Ct. at 1637. True, the gentle way the Court has sometimes applied strict scrutiny has reflected the Court's squeamishness about its presumptions of malice in some situations, as in *Grutter v. Bollinger*, where the Court explicitly gave "a degree of deference" to state university administrators in determining whether the interest they asserted was compelling enough to meet strict scrutiny. 539 U.S. 306, 328 (2003). Strict scrutiny is not a place for deference, and, conversely, situations calling for deference should not be distorted by the use of strict scrutiny. Fusing the two not only undermines the theoretical integrity of the doctrinal framework, but also does damage to the utility of strict scrutiny when it is indeed needed to smoke out invidious or malicious legislation.

103. *Adarand Constructors, Inc.*, 515 U.S. at 208.

there is no mechanical analysis to ease the discomfort of confronting conflicts directly.[104] No doubt this should raise concerns that important rights could be eroded. But there is ground for judgment in the reconciliation of conflicting rights that lies between the two extremes of the rights-as-trumps model, which may reflexively value rights too much, and the balancing away of rights, which values them too little. John Rawls, for example, called for the mutual adjustment of conflicting rights—which entails recognition of various factors such as the degree to which rights are being regulated rather than restricted—and protection of the central imperative underlying the rights.[105] He recognized that refinement of the scope of basic liberties was the foundation for a well-ordered society operating on the basis of consensus.[106] If the Supreme Court had considered these Rawls factors in *Buckley*, for example, it would have achieved a more deferential review of the federal election laws.[107] The Rawls approach, designed to recognize pluralism in a society, also has relevance to the concerns about the rise of judicial supremacy with its concomitant distancing from popular influences on the meaning of the Constitution.[108] A frank engagement with constitutional dilemmas, for all its complexities, is preferable to an ill-disguised resort to formulaic solutions that give cover to unprincipled and unacknowledged judicial preferences.

How to resolve conflicting claims of rights is a difficult matter, to say the least. The question has plagued philosophers.[109] But for the courts, in cases of conflicting conceptions of the scope of particular rights such as those presented in the cases I have discussed, the question does not arise in the abstract, as if a disembodied

104. *See, e.g.*, *id.* at 226-27 (discussing the necessity of strict scrutiny in reviewing cases of racial classification).

105. *See* JOHN RAWLS, POLITICAL LIBERALISM 331-33, 336 (1993) (discussing how a fully adequate scheme of liberties for a well-ordered society requires adjustment of basic liberties to allow essential conditions); Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemma*s, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS, *supra* note 40, at 19, 33. Consideration of specifics, such as those involved in adjustment, was not part of the analysis in *Buckley*. *See supra* notes 79-84 and accompanying text.

106. *See* JOHN RAWLS, A THEORY OF JUSTICE 250 (1971) (noting that "a less extensive liberty must strengthen the total system of liberty shared by all").

107. *See supra* notes 76-84 and accompanying text.

108. *See* RAWLS, *supra* note 105, at 331-32.

109. *See* DWORKIN, *supra* note 40, at 74.

fundamental right to liberty may be thought to be tragically compromised by another fundamental right to equality, for example. When a rights-enhancing statute is challenged for an alleged constitutional violation, one way or another, the courts must either strike down the law because it violates an individual's right, or uphold the law in derogation of the claim of a rights violation.[110] Either way, one view of rights gives way to another. But it is done in the context of a specific set of facts, circumstances, and values, which should give the courts insight into how to resolve the competing claims. When the courts delve right in with strict scrutiny, by contrast, it stacks the deck against the legislature and the understandings of the public good that the legislature's law reflects.

Ronald Dworkin has done the most convincing job, in my view, of addressing the question of how to judge specific conflicting claims to rights. He understands liberty as "freedom to do whatever you like so long as you respect the moral rights, properly understood, of others."[111] Notice that, in contrast to the competing definition of liberty as "freedom from the interference of others in doing whatever it is that you might wish to do,"[112] Dworkin's definition builds in additional judgments about when limitations may be justified by other factors.[113] Just as, for example, we understand liberty to stop short of entitling us to inflict harm on others, we might understand other rights, such as free speech, to stop short of entitling a speaker to inflict certain kinds of harm.[114] Dworkin provides a basis to resist the idea that a conflict in values inevitably "involves some genuine and important damage," because in the end reconciliation comes from addressing and refining the social values implicit in restrictions of liberty, which affect what we understand

110. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 311 (2003).

111. Ronald Dworkin, *Do Liberal Values Conflict?*, *in* THE LEGACY OF ISAIAH BERLIN 73, 84 (Mark Lilla et al. eds., 2001).

112. *Id.* (referring to Berlin's view of liberty).

113. *See id.*

114. *See* Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 954 (2016) (exploring the implications of this understanding of free speech). To be clear, this particular example is not an application that Dworkin would embrace. *See, e.g.*, Ronald Dworkin, *Even Bigots and Holocaust Deniers Must Have Their Say*, GUARDIAN (Feb. 13, 2006, 9:02 PM), https://www.theguardian.com/world/2006/feb/14/muhammadcartoons.comment [https://perma.cc/23F3-8UM2] (arguing that free speech should not be adjusted to accommodate a conflicting right not to be insulted or offended).

liberty to be.[115] Thus, although all would profess a shared belief in the importance of liberty, equality, and democracy, Dworkin calls for "an account that shows us what is good about liberty or equality or democracy, so that we can see why any compromise of these values is not merely inconvenient but bad."[116] He does not accept that all compromises of basic rights are wrong; rather, it must be shown whether alleged violations of liberty "are really breaches of some special responsibility for which a state should feel remorse."[117] This inquiry necessarily calls for an assessment of state objectives and context, beyond a formalistic conclusion that a liberty has been compromised. It is ironic to invoke Dworkin's argument in defense of a call to weaken the scrutiny given to laws challenged for constitutional rights violation. But his view of rights—as conceptions whose bounds are shaped by societal commitments—provides at least nascent support for acknowledging the possibility of reasonable disagreement about what rights entail in particular circumstances and what incursions are justified by those circumstances.[118]

This background provides the beginning of a judicial approach to conflicts among constitutional rights. Factual circumstances of cases, an examination of exactly the degree and nature of the infringement, and the concrete interests served by a law can all help courts to hone their understanding of the right at stake in light of societal demands and make a reasoned judgment about whether the right has been infringed.[119] Strict scrutiny is at odds with that careful engagement with specifics.

The Court has tried something like this once. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court struggled to take account of a possible reasonable disagreement about what rights entail when it retreated from its fundamental rights approach to abortion.[120] In that case, a plurality of the Court

115. Dworkin, *supra* note 111, at 79-80.

116. *Id.* at 87.

117. *Id.* at 88.

118. *See id.* at 87-88.

119. *See* Raban, *supra* note 40, at 405. Raban's article offers a nice demonstration of how "[e]ven when genuine conflicts among constitutional rights actually arise, rational deliberation has much to say on their proper resolution." *Id.*

120. 505 U.S. 833 (1992).

abandoned the doctrinal posture of suspicion called for by *Roe v. Wade* for the acknowledged purpose of giving greater credit to state interests in protecting the life of a fetus.[121] The fundamental rights approach—requiring a state to supply a compelling interest for its restrictions on the right—was not compatible with a true belief in the legitimacy of the values that the state restrictions on abortion were seeking to further under *Casey*.[122] Significantly, in coming to this view, the plurality did not accept the framework of strict scrutiny, but still tinkered with the rigor of its demands in order to relax the burden on the state.[123] In fact, the opinion declined to apply strict scrutiny at all.[124] I take that choice as a recognition that the entire edifice of strict scrutiny as a basis for judicial inquiry is incompatible with any serious valuation of state interests and motivations.[125] Once the Justices had made the decision to respect the differences that exist on the question of the proper scope of a woman's liberty in this regard, they saw rejection of strict scrutiny as a necessary way to give meaning to that belief system.[126] The undue burden test leaves a great deal to be desired, and I am not here to sing its praises as it has been understood so far in the cases. My point, though, is that even the *Casey* opinion recognizes that strict scrutiny is incompatible with the courts giving the kind of serious regard to good-faith disagreements about rights that Jeremy Waldron's powerful argument demands.[127] *Casey* stands as a rare example of a forthright acceptance of the Court's obligation to accommodate competing claims of rights.[128]

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121. *See id.* at 876 (plurality opinion) (discussing Roe v. Wade, 410 U.S. 113 (1973)).

122. *Id.* at 950-52 (Rehnquist, C.J., concurring in judgment in part, dissenting in part).

123. *Id.* at 871, 876 (plurality opinion).

124. *See id.* at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

125. *See id.* at 873 (reasoning that the *Roe* framework as applied "undervalues the State's interest in potential life").

126. *See id.* at 871, 876.

127. *See supra* Part I.

128. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357-59 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part, dissenting in part) (arguing that because no fundamental right and no suspect class was involved, and race was not irrelevant to the State's legitimate objectives, remedial racial programs should be subjected to an intermediate standard of review); JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 62-68 (2013) (discussing *Casey* as an effort to achieve balance between liberty and responsibility).

If the courts were to adopt this kind of approach as a norm, it would go a long way toward mitigating the concerns about judicial supremacy as a threat to democracy.[129] Among these concerns is the loss of moral accountability outside the courts, which can be a consequence of courts claiming for themselves the role as arbiters of moral truth.[130] Opponents of judicial review have long warned of the deadening of the people's sense of moral responsibility when judicial review reserves all important choices of principle for the courts alone.[131] The courts can still provide rigorous protection of rights when circumstances call for it, while forging a partnership with the people by respecting their efforts to make society more just through the representative process of lawmaking.

CONCLUSION

Judicial supremacy is tolerated in a democracy because the Supreme Court stands as a "forum of principle" to ensure that the conditions of democracy are met.[132] As a forum of principle, the judiciary must be sensitive to its obligation to respect the self-determination of the people and to ensure that when elected legislatures act to enhance justice for the people, those legislatures act in concert with courts and not at their mercy. Strict scrutiny has no place in the review of laws passed in good faith by people acting out of different beliefs about what justice requires. Those laws deserve to be assessed with respect afforded to all of the constitutional values implicated in the case at hand. Anything less silences the call to take conflicting rights seriously. Anything less does an injustice to judicial supremacy itself.

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129. *See generally* BICKEL, *supra* note 14, at 21-23 (discussing how judicial review weakens the democratic process and contradicts democratic theory).

130. *See id.* at 21-22.

131. *See id.* (discussing JAMES BRADLEY THAYER, JOHN MARSHALL 103-04, 106-07 (1901)).

132. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 71 (1985) (contrasting judicial focus on questions of justice from the legislature's "battleground of power politics").