

DEFROCKING THE COURTS: RESOLVING “CASES OR CONTROVERSIES,” NOT ANNOUNCING TRANSCENDENTAL TRUTHS

MARK D. ROSEN*

Although primarily concerned with generic issues of argument strategies and the limits of rationality, and not with law, Richard H. Gaskins's recent book *Burdens of Proof in Modern Discourse* provides an insightful analysis of a cardinal characteristic of legal doctrine and legal reasoning. Gaskins's argument has implications regarding the role of law, and the moral content that should be imputed to judicial opinions, in a diverse pluralistic society.

After sketching Gaskins's thesis, and showing it to be fundamentally sound, this Article argues that the judiciary should be defrocked as the societal institution responsible for locating transcendental truths. Judicial opinions on controversial matters should be viewed merely as articulations of public rules that are consistent with the (generally) noncoercive governance of a pluralistic State. This perspective reflects the foundational justification for the liberal state, which is consent; adherence to law is not predicated on its being transcendently true, but on law being an expression of citizens' consent to being governed by public rules directed toward coexistence through respect for autonomy. The Article next observes how, as currently practiced, judicial transcendental inexpertise actually threatens liberalism's core project of allowing individuals to self-develop autonomously. Finally, the Article offers two possible alternatives to current practice, wherein constitutional adjudication of select controversies would be decentralized to either the states or to sub-state social groups.

* Clerk to The Honorable Bruce M. Selya of the United States Court of Appeals, First Circuit (1993-94). B.A., 1986, Yale College; Shapell's University (graduate work in Talmudic and Comparative Legal Studies, 1988-1990); J.D., 1993, Harvard Law School.

I wish to express my gratitude to Professors Mary Ann Glendon and Roberto M. Unger, whose classes at Harvard Law School stimulated much of the thought that led to this Article. I also owe a great debt to Professor Lisa E. Bernstein, who provided comments that immeasurably improved this piece. Finally, I wish to thank Michael Goldhaber and my wife, Dina Warner, whose probing suggestions and editing assistance were of great help. These expressions of appreciation should not be understood to suggest that any of the above agree with what I have written. Errors, of course, are mine alone.

I. ARGUMENTS-FROM-IGNORANCE AND
TRANSCENDENTAL DISPUTES

Gaskins's study of argument style is prompted by his observation of a growing polarization and entrenchment of positions among thinkers across diverse intellectual disciplines.¹ Accompanying the polarization and entrenchment, not surprisingly, has been a breakdown of productive dialogue among the arguing factions.² Gaskins takes upon himself the interrelated tasks of analyzing the styles of argument common to the disputants and then offering an alternative designed to recapture useful dialogue. This section of the Article will examine the first of Gaskins's tasks, which leads him to draw conclusions concerning not only the mode of disputation but also the types of subjects that are disputed.

Regarding the subjects of dispute, Gaskins adapts Kantian terminology, noting that the matters in controversy frequently are "transcendental" rather than "practical."³ Gaskins defines "practical" as referring to "factual knowledge," that is, those subjects classically considered to fall within the scope of scientific investigation. "Transcendental" topics, by contrast, are those issues not amenable to the empirical methods of science, but about which many people have strong convictions. The transcendental encompasses the realms of morality, values, and religion, concerning, for example, questions such as whether there is a soul, and, if so, what are the means by which it may be elevated or defiled.⁴

With respect to the style of argumentation that appears across diverse disciplines, Gaskins says the principal rhetorical maneuver is the "argument-from-ignorance."⁵ Advocates identify a default position and challenge their opponents to produce irrefutable evidence that their position is incorrect. When the opponents are unable to produce the evidence sufficient to overcome the proponents' high burden-of-proof—as is frequently the case with empirical matters and, according to most, is tautologi-

1. RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* xiii-xiv (1992). Gaskins notes escalating discord in the fields of environmental policy, *id.* at 138, medical ethics, *id.*, philosophy, *id.* at 32-34, and jurisprudence, *id.* at 111-13.

2. *Id.* at 113-14.

3. *Id.* at 4-6. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 10 (Norman Kemp Smith trans., Macmillan Books 1964) (1781).

4. GASKINS, *supra* note 1, at 7, 207, 210.

5. *Id.* at 1-4.

cally the case with transcendental matters⁶—the proponents declare their default positions victorious.

Gaskins uses legal argument and procedures as his primary illustration of the operation and consequences of arguments-from-ignorance.⁷ He observes that arguments-from-ignorance pervade the law; they are found both within the “primary” rules of legal doctrines themselves and within the “secondary” rules that determine through which institutions and methodologies law is identified.⁸ Within the primary rules of legal doctrine, the arguments-from-ignorance take the form of various presumptions, which necessitate default legal conclusions in the absence of complete information. Often the presumptions are explicit, as with the accused’s presumption of innocence absent a showing of guilt beyond a reasonable doubt.⁹ Other times, the arguments-from-ignorance are more subtly woven into the doctrine. Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), for example, environmental cleanup responsibilities are assessed by holding current landowners presumptively liable to finance the cleanup of their sites and allowing them to limit, or eliminate, their net obligations only by suing the other parties responsible for having polluted the land for contribution.¹⁰ The burden of demonstrating who polluted thus falls on the landowners rather than on the government, the traditional bearer of the burden-of-proof in imposing damages against citizens—a background legal norm that itself incorporates an argument-from-ignorance. In other words, the statute places the cost of factual ignorance (due to lack of documenta-

6. See *infra* notes 31-48 and accompanying text. See generally KANT, *supra* note 3; GASKINS, *supra* note 1, at 205-217.

7. Gaskins’s keen interest in law can be traced to two causes. First, because the legal system is an institution that explicitly utilizes arguments-from-ignorance in the forms of burdens of persuasion and burdens of proof, it is a particularly good showcase for this form of argument. *Id.* at 103. Second, Gaskins suggests more attention must be paid to understanding judicial procedures’ strengths and weaknesses because other disciplines increasingly are incorporating judicial-type procedures to facilitate resolution of their disputes. *Id.* at 7.

8. See H.L.A. HART, *THE CONCEPT OF LAW* 89-96 (1961) (the classic discussion of the distinction between primary and secondary rules).

9. Another example is the doctrine of *res ipsa loquitur*, under which a party is presumed to be liable for negligence unless she can show that the legal blame lies elsewhere. GASKINS, *supra* note 1, at 27.

10. See 42 U.S.C. § 9607(a)(1) (1988) (imposing liability for costs of removal on owner of a site where a hazardous substance has come to be located); 42 U.S.C. § 9613(f)(1) (allowing owner to bring an action against other potentially liable persons for contribution). The presumption of liability also can be reversed by establishing one of the enumerated defenses. See 42 U.S.C. § 9607(b).

tion or conflicting evidence) concerning the source of the pollutants upon current landowners. An example of arguments-from-ignorance in the law's secondary rules are the much-beleaguered, but still-breathing, canons of statutory interpretation, which identify default outcomes in the face of ignorance as to a statute's meaning.¹¹

Gaskins persuasively argues that a significant part of constitutional argument and doctrine, in particular, is based upon arguments-from-ignorance. For example, Gaskins argues that under the Warren Court, the presumption of constitutionality, which the Supreme Court had adopted in *United States v. Carolene Products*¹² in reaction to *Lochnerism*,¹³ was reversed in the select contexts of equal protection and due process;¹⁴ the Warren Court's revolutionary equal protection and due process lines of jurisprudence were accomplished simply by switching the burdens-of-proof. This shifted the costs of ignorance as to whether certain laws really did violate equal protection or deprive citizens of due process from the citizens to the government.¹⁵

The burden-shifting strategy characteristic of arguments-from-ignorance can be seen clearly in *Bolling v. Sharpe*,¹⁶ the decision accompanying *Brown v. Board of Education*.¹⁷ One of the two bases of the *Bolling* Court's holding was that "[s]egregation in public education is *not* reasonably related to any proper governmental objective."¹⁸ This is markedly different from requiring segregation's challengers to demonstrate that the governmental policy was affirmatively unreasonable—as would have been required under a presumption of constitutionality.¹⁹

11. For example, under the presumption against extraterritoriality, when a statute is silent as to whether it applies outside the United States, courts are to decide that the statute was intended to have only a domestic focus. See *The Supreme Court, 1990 Term — Leading Cases*, 105 HARV. L. REV. 177, 369-79 (1991) (reviewing operation of this canon in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991)).

12. 304 U.S. 144 (1938).

13. In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court found unconstitutional a law that capped at 80 hours per week the number of hours bakers were permitted to work. "Lochnerism" came to refer to the Court's striking down legislation due to its disagreement with the legislature's policy judgment, an overreaching of courts' appropriate role. See, e.g., Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987). One method to counter *Lochnerism* was to presume legislation to be constitutional. Cf. GASKINS, *supra* note 1, at 50.

14. GASKINS, *supra* note 1, at 54-57.

15. *Id.*

16. 347 U.S. 497 (1954).

17. 347 U.S. 483 (1954).

18. *Bolling*, 347 U.S. at 500 (emphasis added).

19. GASKINS, *supra* note 1, at 56-57.

Although Gaskins's argument that *Brown* employed the identical burden-shifting strategy is less convincing,²⁰ his suggestion that the Warren Court's subsequent equal protection jurisprudence rests on arguments-from-ignorance is compelling: the tripartite doctrinal framework of strict, intermediate and rational scrutiny within equal protection jurisprudence²¹ is a quintessential paradigm of shifting the burden-of-proof from constitutionality to unconstitutionality, forcing the government affirmatively to show that policies that implicate protected classes or fundamental rights are constitutional.²² Similarly, the Court's far-reaching developments in due process under the Fifth and Fourteenth Amendments were based on a reversal of the presumption that the government's procedures provide due protections that ensure fair and unbiased results.²³

II. DISTINGUISHING FINALITY FROM LEGITIMACY

Gaskins offers a compelling explanation for the ubiquity of these arguments-from-ignorance in the law. American society, like most others, desires finality from its judicial institutions.²⁴

20. Gaskins suggests that *Brown* inaugurated the Warren Court's employment of arguments-from-ignorance. According to Gaskins, the *Brown* Court "did not directly overrule [*Plessy's* doctrine of 'separate but equal'] but instead raised to an unbearable weight the burden on states to prove that their segregated services were, in truth, equal." *Id.* at 55. Gaskins also says that the social science evidence alluded to in *Brown* was "extraneous." *Id.* at 56. This reading of *Brown*, however, does not square with the Court's affirmative finding that separate education "generates a feeling of inferiority" and "has a tendency to [retard] the educational and mental development of negro children." *Brown*, 347 U.S. at 494. Nor does Gaskins's interpretation fit with the Court's unambiguous holding that "[w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495. At best, *Brown* can be understood as having utilized an embryonic argument-from-ignorance where the Court no longer found the "tangible factors" of equal school budgets and equivalent curricula to be sufficient evidence of equality and demanded that schools demonstrate that all "intangible considerations" be equal as well—an impossible burden to sustain. *Id.*

21. GERALD GUNTHER, CONSTITUTIONAL LAW 606 (12th ed. 1991).

22. Not surprisingly, dissenting opinions during the Warren era often were based on the presumption of constitutionality. *See, e.g., Baker v. Carr*, 369 U.S. 186, 334 (1962) ("there is nothing in the Federal Constitution to prevent a State, acting not irrationally, from choosing any electoral legislative structure . . .") (Harlan, J., dissenting) (emphasis added).

23. GASKINS, *supra* note 1, at 81-84, 87.

24. GASKINS, *supra* note 1, at 20, 29. Interestingly, as a response to the lack of complete information on which legal determinations inevitably rest, some other societies' juridical institutions contain legal rules and norms that encourage the parties to come to negotiated settlements. *See, e.g.,* BABYLONIAN TALMUD SANHEDRIN 6b (Soncino Press 1935) (6th Century C.E.); MOSES MAIMONIDES, MISHNA TORAH SANHEDRIN 22:4 (HaMisura Press, 1982) (13th century C.E.); JOSEPH CARO, SHULCHAN ARUCH, CHOSHEN MISHPAT 12:2 (Hidur Press, 1980) (15th century C.E.) (Jewish law).

Not allowing courts the option of declaring uncertainty—judges and juries cannot give verdicts of “I do not know”—requires that certain default conclusions be chosen so that determinacy can be generated even when the evidence is inconclusive.²⁵

The capstone of Gaskins’s argument is his recognition of the distinction between finality and what he calls “legitimacy,” by which he means objective correctness.²⁶ Gaskins accurately observes that juridical determinations usually are treated as not only final but as legitimate. The judicial decision frequently is reified as the transcendently correct outcome—within the judicial decisions themselves, by the legal academe,²⁷ and by the public.²⁸

But to what extent are the judiciary’s institutional procedures, which guarantee finality, also the appropriate tools for discovering Truth? The short answer, according to Gaskins, is “not very.” Although it is true that the possibility of locating the Truth exists where the subject matter is “empirical,” the costs of acquiring the information, evidentiary procedures that frequently bar the allowance of helpful evidence, and the (ever-present and inevitable) default presumptions all work against the convergence of juridical outcomes and Truth.²⁹ Indeed, it is more accurate to label judicial outcomes concerning disputed empirical matters as determinations of “legal” guilt or “legal” liability, rather than “factual” guilt or liability.³⁰

The divergence between juridical outcomes and Truth is even more stark when transcendental issues are at stake, where there is debate not only concerning the methodology for locating such values,³¹ but also as to whether such values exist and, assuming their existence, whether they are universal or culture-specific. It is at this juncture that Gaskins pauses longest, taking his readers

25. GASKINS, *supra* note 1, at 28, 36, 38. While an argument can be made that the political question doctrine, general jurisdiction requirements, and “hung juries” are legal stratagems utilized by courts to avoid answering questions to which they do not have clear answers, these doctrines are only seldomly utilized. The vast majority of the time courts and juries offer resolute determinations to underdetermined issues.

26. *Id.* at 128, 136.

27. See, e.g., RONALD M. DWORIN, *A MATTER OF PRINCIPLE* (1985); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (arguing that the judiciary should intervene when society is transcendently divided and seek to forge a moral consensus).

28. GASKINS, *supra* note 1, at 9, 136-37.

29. *Id.* at 22-25, 28-29.

30. *Id.* at 79-80. See generally HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 166 (1968) (distinguishing between “legal guilt” and “factual guilt”).

31. GASKINS, *supra* note 1, at 38.

on a whirlwind tour of modern thinkers' views as to whether and how the contents of the transcendental can be located.

At issue is no less than the limits of human reasoning, and Gaskins identifies two general schools of thought. Members of the first school—which he labels as “neo-Aristotelians,” including thinkers such as Mortimer J. Adler,³² Alasdair MacIntyre,³³ Owen Fiss,³⁴ and Ronald Dworkin³⁵—assert that the true nature of transcendental things can be ascertained by various reasoning processes. Gaskins reviews several philosophers' suggested methodologies for ascertaining the transcendent.³⁶ Gaskins also is attentive to jurists Fiss and Dworkin, who claim that judges and lawyers are uniquely equipped to identify the “true” and “proper meaning” of American values³⁷ through recourse to the constitutional text, history, and social ideals.

Gaskins provides two responses to the neo-Aristotelians. First, the continued presence of significant dispute, even among these thinkers, as to the appropriate investigative methodologies and the content of the transcendental values they purport to identify, casts doubt on their claims.³⁸ Second, Gaskins persuasively argues that these thinkers' theories rest on arguments-from-ignorance and thus rely on nonaxiomatic default presumptions. Gaskins shows that each thinker presumes the efficacy of his proposed methodology for identifying the transcendent in the absence of irrefutable evidence otherwise. For example, after noting Dworkin's position that judicial decisions identify transcendent categorical legal rights, Gaskins leads the reader to confront critically the reason Dworkin offers as to why judges are the appropriate articulators of public morality: “There is *no reason* to credit any other particular group with better facilities of moral argument.”³⁹ As Gaskins wryly observes, “[u]nless we are prepared to prove to Dworkin's satisfaction that someone else is better able

32. See, e.g., MORTIMER J. ADLER, *DIALECTIC* (1927).

33. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

34. See, e.g., OWEN M. FISS, *The Forms of Justice*, 93 HARV. L. REV. 1, 29, 30 (1979).

35. See, e.g., RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). Gaskins recognizes that although Dworkin would object to having his project described as transcendental, there are strong reasons to characterize Dworkin's thought-system in transcendental terms. See GASKINS, *supra* note 1, at 171, 324; see also Thomas D. Perry, *Dworkin's Transcendental Idea*, in *SOCIAL AND POLITICAL PHILOSOPHY* 255-69 (Peter A. French et al. eds., 1982) (elaborating the transcendental character of Dworkin's jurisprudence).

36. GASKINS, *supra* note 1, at 109-12.

37. *Id.* at 111, 176.

38. *Id.* at 109.

39. *Id.* at 178 (emphasis in original), citing DWORKIN, *supra* note 35, at 130.

to perform these Herculean tasks, we are admonished to leave them with the self-appointed Herculeses of the judicial system."⁴⁰ Indeed, many would take issue with Dworkin's claim that "lawyers or political philosophers"⁴¹—rather than theologians, for example—are best suited to undertaking transcendental inquiries.⁴² In the end, one is left with each thinker's assertion of faith that the transcendental can be located via his suggested actors and methodology.

Adherents of the second school—to which Habermas⁴³ and Hegel⁴⁴ belong—postulate that transcendental matters cannot be definitively identified and demonstrated. Nonetheless, these thinkers seek to identify conditions that can produce either a workable transcendental consensus or continual refinement of our understanding of the transcendental. Hegel's dialectical logic, where transcendental conclusions are to be treated as provisional and are to be subject to further scrutiny to determine their nonaxiomatic presumptions,⁴⁵ is an example of the latter.⁴⁶ Habermas exemplifies the former. Habermas postulates the need for a "preunderstanding" of common, albeit nonaxiomatic, premises that can resolve disputes.⁴⁷ According to Habermas, it is the "preunderstanding" that actually constitutes the community and makes agreement among them about transcendental matters possible: "a preunderstanding . . . is not at [the specific group's or culture's] disposal but constitutes and at the same time circumscribes the domain of the thematized validity claims [to values]".⁴⁸

40. *Id.*

41. DWORKIN, *supra* note 35, at 215.

42. GASKINS, *supra* note 1, at 176.

43. *See, e.g.*, JURGEN HABERMAS, THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., Beacon Press 1984) (1981).

44. *See* GEORG W. F. HEGEL, SCIENCE OF LOGIC (W.H. Johnston & L.G. Struthers trans., London 1929) (1816).

45. GASKINS, *supra* note 1, at 263.

46. Gaskins believes the second school to be correct, and ultimately seeks to resolve the deadlocked dialogue across the many intellectual disciplines he identifies through employing a model of discourse derivative of Hegel's dialectics as the means of advancing transcendental knowledge. *Id.* at 262-72. Gaskins attributes the current intellectual polarizations to the arguments-from-ignorance that current thinkers adapt for the short-term strategic advantages that accrue to the party able to shift the cost of ignorance onto the other side. Gaskins suggests an argument strategy that involves giving up these strategic advantages, honestly confronting ignorance, and tolerating the inability to generate determinate answers. *Id.* at 262-64. This type of methodology, however, is not readily transferrable to law, which requires maintenance of the presumptions to generate ever-desired finality.

47. *Id.* at 134-36.

48. HABERMAS, *supra* note 43, at 1:42, quoted in GASKINS, *supra* note 1, at 136.

Significantly, most of the proposed methodologies for locating transcendental truths do not resemble the techniques used in judicial argument. Although Gaskins does not take up the invitations issued by Fiss and Dworkin to seek (and inevitably fail) affirmatively to disprove their default assumption that the judiciary is the appropriate agent to locate transcendentalisms, Gaskins has convincingly laid bare Dworkin and Fiss's argument strategies. Though their positions have not been affirmatively demonstrated to be incorrect, it appears that Gaskins's argument cannot but unalterably undercut one's confidence that the judiciary's methods are appropriate to discerning transcendental values that are to be held by the diverse members of today's population. The rest of this Article will explore the ramifications of defrocking the judiciary as the institutional voice of public morality.

III. DEFLATING THE JUDICIARY'S ROLE IN IDENTIFYING TRANSCENDENTAL TRUTHS

A. *Reasons Behind Transcendental Reification*

Why are court determinations morally reified? First and foremost, judges often believe themselves to be arriving at moral conclusions. But since it is axiomatic that merely believing does not make something so, we can dispense with this as a proof of the moral truth of judicial decisions.

Another reason for placing the moral crown upon the judicial brow is that large sections of society apparently desire that the country be of one mind on transcendental issues.⁴⁹ The very nondemonstrative nature of transcendental matters, coupled with the lack of a common "preunderstanding" (due in part, at least, to our country's diversity), however, renders this aspiration quixotic.⁵⁰ How can there be substantive transcendental consensus between secularists and the religious community, for example, where among the disputes is the fundamental question of what are the appropriate evidentiary sources (the Bible or reason) that are to be consulted? Indeed, underlying Revelation is a premise that is incongruent with the secular transcendental methodologies:⁵¹ Revelation presumes that Divine direction was

49. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* (1984).

50. Cf. GASKINS, *supra* note 1, at 137.

51. See, e.g., GASKINS, *supra* note 1, at 128-38, 240-72; Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (see discussion *infra* note 63).

necessary because transcendental truths are beyond the powers of man's reasoning.⁵² The discord between the secular and clerical transcendental methodologies is only heightened by the mystical doctrines in which the Scriptural doctrines often are enshrouded. After all, concerns as to the consequences, in a hidden other-world, of Biblically-proscribed actions are almost entirely unamenable to "rational" discourse. Of course, unbridgeable differences are not confined to those of differing religious convictions. Indeed, the corollary of renouncing the project of cultural homogenization and embracing multiculturalism is that differences among cultural groups will remain. It is clear that different Americans' dissimilarities go beyond dress and musical tastes and extend among cultural groups to transcendental matters as well.

There are at least two additional explanations for the widespread moral reification of the law. First, identifying judicial outcomes with the transcendent undercuts the criticism that judicial determinations of heavily disputed matters involve arbitrary applications of the State's coercive powers.⁵³ It is popularly believed that by removing any sense of arbitrariness, law's reification hones citizens' respect for, and willingness to follow, the law.⁵⁴ Additionally, ascribing a moral backbone to law is seen as a way of sidestepping legal positivism's dangers of cultivating a society of automatons who mindlessly follow any rule sired by "legitimate" legislative processes.

Although these latter two concerns certainly are legitimate, it does not follow that packaging the law in a wrapper of morality transforms it into the appropriate elixir for ridding the body politic of these ills. Quite the opposite: reifying the law *cannot* be the right approach if there is not adequate reason to equate legal outcomes with correct moral decisions. With respect to the first concern, law in fact becomes the paradigm of coercion if it misrepresents itself as morality in order to enhance citizens' adher-

52. This is an understanding that is shared by nearly all religious traditions and that has been observed by many secular thinkers. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *42 (arguing that man's limited reasoning ability and lack of objectivity, due to his "passions . . . prejudice . . . disease [and] . . . intemperance" mandated that there be a revelation, because "the knowledge of these truths was [not] attainable by reason").

53. See DWORKIN, *supra* note 35, at 281 (1977) (arguing that "[i]f the litigants in a hard case can have no [single] right to a particular decision, it is both pointless and unfair to let the case between them be decided by a controversial (or for that matter uncontroversial) decision about the rights they have").

54. Cf. *Baker v. Carr*, 369 U.S. 186, 267 (1962) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.") (Frankfurter, J., dissenting).

ence. Regarding the second aforementioned apprehension, law actually poses the same threats as legal positivism by wrongly arrogating to itself the language and persuasive powers of moralism: in making moral claims, law encourages unthinking reliance on its conclusions as being not only the operative rules but the transcendental truth. If legal institutions are not constituted in a manner appropriate to their being exponents of transcendent values, and if we want people's actions to be governed by morality to avoid positivism's automaton-generating dangers, then people should be encouraged to turn to other institutions that might utilize methodologies more suitable to accessing the transcendent. Moral philosophers and theologians are some possibilities.⁵⁵

B. *Grounding Commitment in Consent*

But what would lead citizens to respect a morally defrocked judiciary? Consent—people's agreement to live in accordance with rules that permit coexistence—is the answer. Indeed, consent to live in accordance with the rules necessary for coexistence has a long lineage in Western political thought. For example, it is the moral force of consent, rather than belief that Athens' laws themselves were moral, that led Socrates to accept his death sentence with equanimity and refuse Crito's offer of escape.⁵⁶ Similarly, the various justifications for the State put forth by Mill⁵⁷

55. Further, because state laws are no longer viewed as ready proxies for moral edicts, society should anticipate that some citizens will engage in acts of civil disobedience. Such is the cost of escaping legal positivism's two morality-undermining perils: the possibility of civil disobedience (1) allows obeying the law to be a moral decision, for only an act of free will can be moral, and (2) avoids the emasculation of moral contemplation that would result from relegating actions driven by moral conviction solely to the field of activities not proscribed by state law. The extent of civil disobedience would be limited by the moral constraint of "consent" to live in accordance with the laws that citizens implicitly give merely by continuing to live in a state. See *infra* notes 56-60 and accompanying text.

56. PLATO, CRITO, in PLATO AND ARISTOPHANES: FOUR TEXTS ON SOCRATES 99 (Thomas G. West & Grace Starry West trans., 1984) (5th century B.C.E.). Speaking in the name of the laws of Athens, Socrates argues that

to whoever of you stays here and sees the way that we reach judgments and otherwise manage the city, we say that he has already agreed with us in deed to do whatever we bid, and when he does not obey, we say that he does injustice in . . . that although he agreed to obey us, he neither obeys nor persuades us if we do something ignobly, although we put forward an alternative to him . . . [and] permit either of two things—either to persuade us or to do it—but he does neither of these.

Id. at 110-11.

57. See JOHN STUART MILL, ON LIBERTY 141 (Gertrude Himmelfarb ed., Penguin Books 1985) (1859) ("everyone who receives the protection of society owes a return for the bene-

and Rousseau⁵⁸ are founded on images of people consenting to live in accordance with rules that permit cooperation and coexistence, not on the laws being transcendently true.⁵⁹ And this approach is not limited to the political theorists of times past. Rawls's justifications for the State also do not include the claim that the political and judicial institutions must be, or are, capable of locating transcendental truth.⁶⁰ In sum, under all these justifications for the State, adherence to the State's laws is not predicated on the legislature's or court's capacities to identify the transcendently correct law.

As a practical matter, a consent-based approach is the only tenable option in today's America. While one can conceive of constructing an Aristotelian State that is based on common ideals and that promotes a particular vision of the good life,⁶¹ such an effort appears to be unachievable, absent significant coercion, in our diverse, pluralistic country. Habermas's suggestion that consensus on transcendental matters requires common "preunderstandings" is compelling,⁶² and the possibility of achieving a sufficient common "preunderstanding" seems slight in a pluralistic society that respects diversity and has abandoned its former

fit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest").

58. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (G.D.H. Cole trans., 1973) (1762). Rousseau asserts:

The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.' This is the fundamental problem of which the social contract provides the solution . . . *Each of us puts his person and all his power in common under the supreme direction of the general will . . .* (emphasis in original).

Id. at 191.

59. While Mill and Rousseau seek to delimit the appropriate powers of the State, they do not claim that the polity's laws will coincide with what is morally imperative and transcendently true. See MILL, *supra* note 57, at 68, 145, 151 (arguing that "the only purpose for which [societal] power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others," and that law is not to be based on moral determinations); ROUSSEAU, *supra* note 58, at 210, 212 (arguing that humans cannot discern "universal justice", which "comes from God", and that, instead, "[l]aws are, properly speaking, only the conditions of civil association").

60. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (arguing that "[a] law or policy is sufficiently just [to require that it be obeyed], or at least not unjust, if when we try to imagine how the ideal procedure would work out, we conclude that most persons taking part in this procedure and carrying out its stipulations would favor that law or policy," *id.* at 357, and maintaining that "[t]he justice of a social scheme depends essentially on how fundamental rights and duties are assigned and on the economic opportunities and social conditions in the various sectors of society," not on whether the social institutions encourage behaviors coinciding with moral and transcendental imperatives. *Id.* at 7).

61. See, e.g., MACINTYRE, *supra* note 49, at 23-35 (articulating such a vision of the State).

62. See HABERMAS, *supra* note 43, at 1:42.

homogenizing ethic of the melting pot.⁶³ More persuasive are those who argue that transcendental metaphysics cannot be pursued at the level of society-at-large,⁶⁴ and that the project of coexistence is the most that can be collectively pursued at the national level in a noncoercive pluralistic State. The rejoinder to those who protest that such a State fails to provide for key communal needs necessary for the full development of persons is not to aver that the liberal State can fulfill those needs, but is to acknowledge that such are the costs of a noncoercive, pluralist State.⁶⁵

C. *Toward a Change of Contemporary Practice*

Given the sharp conflict over transcendental matters that pervades our pluralistic society, it is curious to observe the role that the judiciary has assumed. Coincident with the movement from the classical model of discrete cases or controversies to "public law litigation," where system-wide prospective and corrective relief rather than retrospective compensatory relief is sought,⁶⁶ has been a growing tendency to submit to the courts issues with respect to which society is irreconcilably divided. Part of the reason

63. The recent project of Civic Republicanism is predicated on locating a method for generating Habermas-like preunderstandings. Its shortcoming, however, is that it either requires a broader preunderstanding than actually exists or posits a preunderstanding insufficiently strong to support any meaningful transcendental conclusions. Frank Michelman, one of Civic Republicanism's leading proponents, writes that he seeks to harmonize democracy's dual aspirations of self government and a government of laws by producing a society that has substantive consensus to the extent that "the [legislative] process and its law-like utterances must be such that everyone subject to those utterances can regard himself or herself as actually agreeing that those utterances, issuing from that process, warrant being promulgated as law." Michelman, *supra* note 51, at 1526. This remarkable consensus is to be achieved through dialogue among members of the "political community"—the term through which Habermas's notion of preunderstanding is imported. The "political community" is to be shaped by members of each generation, and it is defined by the agreed-upon "values" that are to be the wellspring of political agreement. *Id.* at 1513-15. The goal of "Republican constitutionalism" is to constantly "revis[e] . . . the normative histories that make political communities sources of contestable value and self-direction for their members" by "tinkering with those histories [so as to] extend political community to persons in our midst who have as yet no stakes in 'our' past because they had no access to it." *Id.* at 1495. Such a program, however, either discards the cultural differences among different communities or begets a commonality so banal as to fail to yield meaningful transcendental agreement.

64. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEG. STUD. 1, 1-8 (1987).

65. See Book Note, *How Communal are Reasonable People?*, 104 HARV. L. REV. 1943 (1991) (reviewing STEPHEN MACEDO, *LIBERAL VIRTUES* (1990), which sought to argue that pluralist liberal states can satisfy people's communal needs, and arguing that Macedo's project is unsuccessful).

66. See Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4-5 (1982).

why the courts have become such battlegrounds with respect to issues such as abortion, gay rights, and medical ethics is that society generally looks to the courts as the final *and legitimate* arbiter of these disputes.⁶⁷ Advocates of both sides of these issues know that judicial resolutions are viewed not merely as determinations of the narrow rules at stake in a given litigation, but as judgments of the transcendental merits of these issues. The fight over abortion, for example, is not viewed merely as concerning the extent to which the State can interfere with a person's privacy. Abortion is also, and often primarily, cast as a question of whether abortion is a woman's "right"⁶⁸—terminology that invokes the persuasive powers of transcendental justification. The Gay Rights Movement similarly understands its court battles as more than mere efforts to secure protection from employment discrimination or to gain medical insurance for the partners of gay workers. The Movement accurately views the courts as a potential pulpit for delivering the message that homosexuality is transcendently legitimate.⁶⁹

To the extent that we are moved to question the possibility of achieving noncoercive transcendental consensus or, at the very least, to doubt the institutional competence of the judiciary as the institution relied on to identify the transcendental,⁷⁰ dressing the judiciary with the garments of transcendent authority is simply erroneous. Misplaced reliance on the judiciary's transcendental competence also threatens to lead people astray (unless the judicial pronouncement happens to coincide with the transcen-

67. Cf. DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF Roe v. Wade* (1993) (attributing much of the radical shift in American attitudes about premarital sex, abortion, homosexuality, and contraception over the last 30 years to Supreme Court and lower court determinations).

68. See, e.g., *Thornburgh v. American College of Obst. & Gyn.*, 476 U.S. 747, 772 (1986) (noting that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental").

69. See, e.g., *Evans v. Romer*, 1993 WL 518586, at *9, *10 (D.Col. 1993) (noting that plaintiffs brought philosophers, political scientists, historians, and scientists to show that homosexuality "is irrelevant to individual merit" and is inborn rather than developed); see generally Jeffrey Rosen, *Sodom and Demurrer: Should the Courts Deliver Gay Civil Rights?*, *THE NEW REPUBLIC*, Nov. 29, 1993, at 16 (reporting that witnesses at the *Evans* trial testified regarding whether there is "something wrong with being gay," whether making homosexuality respectable would "undermine human civilization," and how "tolerance," the adjective describing homosexuality used by Plato, should be translated).

70. Cf. Richard H. Fallon, Jr., *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 U. CHI. L. REV. 1523, 1543 (1989) ("A judge should seek to interpret the community's values and bring them to bear on constitutional interpretation, not because this is the way to moral truth, but because it is her job to do so.").

dent). Further, as a practical matter, upping the ante of judicial battles containing transcendental ingredients entrenches the opposition, and thus may hinder achieving the practical public policy outcomes to which the adjudications are properly directed. Moreover, to the extent that court pronouncements are viewed as moral pronouncements rather than practical accommodations, the danger grows that the State will assume the role of advancing a State orthodoxy. For example, grounding the Supreme Court's jurisprudence concerning citizens' freedom of speech and conscience on transcendental bases⁷¹ runs perilously close to challenging the common transcendent claims held by Judaism, Christianity, and Islam that blasphemous speech, variously defined, is transcendently problematic. It should be recalled that it is the principle of consent to live in a generally noncoercive, coexistence-dedicated State that prevents the State from proscribing such speech, and not the Court's determination that people have a transcendental right to blaspheme.

The courts should be divested of their generally-perceived authority to identify transcendental truth. This does not mean that the courts can avoid adjudicating public policy questions containing transcendental ingredients, for refusing to adjudicate would leave in place some substantive outcome. Nor does this mean that law is wholly divorced from moral considerations; indeed, courts and legislatures often give expression to the transcendent conclusions of other institutions. This does mean, though, that courts and politics should not be viewed as the vanguards of identifying the transcendent. Consequently, courts should avoid using transcendental arguments to justify their resolution of issues about which there is not at least near unanimity among the institutions that employ more suitable methods of transcendental exegesis. Indeed, people should view judicial decisions as containing an implicit disclaimer:

The justification for allowing/proscribing the activity in question is merely that this outcome is consistent with society's consensus that a diverse citizenry should coexist without un-

71. See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970) ("First, freedom of expression is essential as a means of assuring individual self-fulfillment. [It also] is an essential process for advancing knowledge and discovering truth."); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

due coercion. This is a practical resolution that makes no claims to clarify disputed transcendental issues.⁷²

IV. PROVIDING SPACE FOR COMMUNITIES TO LIVE IN ACCORDANCE WITH THEIR TRANSCENDENTAL VALUES

Creating a "neutral" state that pursues only "practical" matters at the level of politics and law, and that leaves the transcendental to the private sphere,⁷³ however, is an impossibility.⁷⁴ First, as an empirical matter, it is unlikely that merely depriving judicial rhetoric of the language of moralism will counter the prestige that implicitly accompanies all uses of State power. Second, under many theories of economics and sociology, *all* State laws advance substantive visions of the Good by encouraging certain types of social behaviors and simultaneously discouraging others. This is true because there is no obvious neutral baseline with respect to which a State can claim that it is not advancing a particular mode of behavior.⁷⁵

More fundamentally, the very objective of "neutrality" proceeds from one camp of a vehement debate on the role of the community, where each side rests on different antecedent fundamental views of the nature of humankind. What could constitute "neutrality" to an adherent of a religious tradition that takes unambiguous transcendental positions on "public" issues (such as

72. For example, constitutional judgments concerning the scope of the Eighth Amendment's ban on cruel and unusual punishment offer no guidance regarding the transcendental status of Islam's corporal punishments for the *hudud* crimes of theft and adultery. See QUR'AN 5:38 (Muhammad Marmaduke Pickthall trans., Muslim World League 1977) ("Now as for the man who steals and the woman who steals, cut off the hand of either of them. . . ."); 24:2 (instructing that adulterers should be flogged publicly one hundred times).

The implicit subtext mentioned in the text, moreover, offers substantive guidance as to how constitutional dilemmas should be resolved, though space limitations preclude further elaboration of this here.

73. See RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1991) (arguing that politics should concern itself only with nontranscendental matters).

74. The rest of this Article proceeds on the assumption that politics also is an unsuitable forum for uncovering transcendentalisms. While self-evident to some (perhaps most), I offer here some reasons for this thesis' tenability. First, political decisionmaking processes for the most part bear little relation to the transcendental methodologies hypothesized by the thinkers examined by Gaskins. Second, even if legislatures functioned to bring into effect a hypothetical will of the people, it would be a leap of faith to assert that popular desires coincide with transcendentalisms. Third, recent academic analyses that describe factors unrelated to policy (such as legislative procedures, agenda-setting, and cycling) that play decisive roles in legislative outcomes throw further doubt on the relationship of legislation to any normative baselines, let alone transcendentalisms. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991).

75. Cf. Cass R. Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1 (1992).

homosexuality and abortion) and that links an individual's ultimate fate not just to her own behavior, but to the actions of others—a concept that might be called “Interconnected Salvation”?⁷⁶ To the extent people's fates are interconnected, a person can be expected to be as “neutral” to others' life-choices as to her own. In short, Interconnected Salvation undermines the very logic and appeal of neutrality.

Moreover, the concept of “neutrality” is actually *incoherent* to the extent that people's ideas and expectations are products of socialization—of which State prestige, state-secured economic incentives, and other citizens' actions are considerable ingredients. This is a notion that might be called “State Socialization.” For example, the gay community correctly asserts that laws prohibiting same-sex marriages are an impediment to, and communicate State disapproval of, the gay lifestyle. The paradox for the purposes of public policy, of course, is that the religious right is equally correct that allowing same-sex marriages facilitates leading a gay life and bears the imprimatur of State acceptance. Simply put, there is no neutral position that government could take on an issue such as this.

Residual State prestige and incentives, which would survive sanitizing judicial decisions of transcendentalism and educating the public concerning courts' lack of transcendental jurisdiction, are an unavoidable byproduct of coexistence in a largely “noncoercive,” democratic, pluralist State. The toxicity of this byproduct depends on one's views of the aforementioned factors of Interconnected Salvation and State Socialization. It could be argued that fairness dictates that political losers be bound to live by the results of even those public policy questions implicating transcendental issues, where resolution of such issues is left to politics. On the other hand, to the extent that State Socialization is real, such that political outcomes significantly shape citizens' ideas, laws touching upon transcendental matters may threaten the First Amendment's values of preserving the individual's autonomy to direct her own development,⁷⁷ even where such laws

76. See, e.g., BABYLONIAN TALMUD SHABU'OTH 39a (Soncino Press 1935)(6th Cent. C.E.) (explaining that people “are as sureties for each other” in spiritual matters) (Jewish thought). “Interconnected Salvation” is a clerical analogue to Duncan Kennedy's “altruist” tendency. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

77. Cf. *Roe v. Wade*, 410 U.S. 113, 211 (1973) (enumerating some of the substantive liberties guaranteed by the 14th Amendment and noting that “[f]irst is the autonomous control over the development and expression of one's intellect, interests, tastes, and per-

are not technically constitutionally deficient. Further, the argument that fairness binds the losers is significantly weakened with respect to public policy issues containing transcendental ingredients that are constitutionalized and thereby removed from politics. With regard to such issues, the liberal State, by its very foundational structure, violates its cardinal norm of neutrality toward various visions of the Good so as to allow people to self-determine and self-develop noncoercively.⁷⁸

One possible solution is to channel from the Supreme Court to state courts the constitutional adjudication of issues containing transcendental ingredients. Such an approach is perfectly consistent with this country's constitutional structure. Article III permits Congress to carve out "exceptions" to the Supreme Court's appellate jurisdiction.⁷⁹ While some commentators have argued that Article III's Exceptions Clause does not encompass jurisdictional deprivations emanating from congressional hostility to rights found by the Supreme Court,⁸⁰ this Article's suggestion does not run afoul of such a limitation; this solution is motivated not from a hostility to rights but an aspiration for developmental autonomy. If constitutional adjudication consists not merely of mechanical reading but active interpretivism that proceeds from antecedent values, and if society has diverse preunderstandings, why should constitutional uniformity across this country, with respect to all issues, be the aspiration? Adjudication of select constitutional issues could be routed to state courts, which, under the Supremacy Clause, are obligated to give supremacy to federal law and the Constitution, and to interpret the federal Constitution in good faith. Heterogeneous constitu-

sonality. These are rights protected by the First Amendment and in my view they are [absolute]" (Douglas, J., concurring).

78. See *id.*

79. See U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law or Equity, arising under this Constitution . . . In [such] Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . with such *Exceptions*, and under such *Regulations* as the Congress shall make.") (emphasis added). See also *Ex Parte McCordle*, 74 U.S. 506, 514 (1868) (holding that "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words."); Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (noting that "[t]he state courts. . . [i]n the scheme of the Constitution . . . are the primary guarantors of constitutional rights"); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965); but see Leonard Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982).

80. See, e.g., Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

tional interpretations of select issues should not be confused with untrustworthiness.

A second, more radical, resolution proceeds on the assumption that the citizens of the states are too diverse to share common preunderstandings. This second solution is willing to expand the community of authoritative constitutional interpreters even beyond state courts. Under this second approach, self-defining sub-state communities would be permitted to interpret select constitutional provisions that advance substantive visions of the Good. Since most social scientists believe that socializing forces' powers are directly related to their proximity to the socializing force, this compromise would largely address the concerns of State Socialization by allowing communities more latitude in determining the character of their local environments. Though not directly accommodating the concerns of Interconnected Salvation, such an accommodation at least would allow communitarian-minded people the opportunity of setting up model communities which, if successful, might persuade others of the merits of their designs.⁸¹

Here, then, is the challenge of liberalism: to embrace decentralization of select constitutional adjudications as an affirmative good rather than a begrudging accommodation. Those committed to a pluralistic, difference-respecting, noncoercive polity should not seek, through legislation and court decisions, to foist a transcendental orthodoxy on citizens who think differently than they.

V. A BRIEF CONCLUSION

Scrutiny of judicial argument reveals the unsuitability of the judiciary as the exponent of transcendental truths. This should not be surprising. Since the diversity of this country's population probably precludes the common preunderstandings that are the prerequisites to consensus on transcendental matters, ongoing transcendental dissension is the corollary of living in a noncoercive pluralistic society that eschews cultural homogenization. This transcendental disharmony need not disrupt liberalism's

81. Either of the two aforementioned methods of decentralization could be effectuated by carefully crafted federal legislation that permitted highly deferential review of the state or sub-state constitutional determination, so as to ensure that the federal constitution is not rendered a dead-letter through bad-faith application. The author currently is working on a comprehensive doctrinal elaboration of these methods.

project, for our polity is premised on consent to coexist and the desire to self-govern, not on its laws approximating transcendental truths. In fact, rather than unsettling liberalism, acknowledging transcendental differences and refusing to reify a single State institution as the articulator of transcendental orthodoxy would allow liberalism to remain true to its foremost aspiration of allowing people to self-develop freely. Finally, since transcendental matters cannot be kept out of politics, the particular vision of the Good that State policies inevitably will advance should be counterbalanced by decentralizing constitutional decisionmaking of select issues.