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Judicial Review, Local Values, and Pluralism

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I.

"It is," the Twenty-Seventh Annual National Federalist Society Student Symposium program reports, "a basic assumption of federalism that individual communities can be different; they may have different values, and they will certainly have different laws."[1] This is true. Notwithstanding *American Idol,* Starbucks, *USA Today,* and chain restaurants, individual communities not only *can be* different, they *are* different. They often sit on opposite sides of what commentator David Brooks has called the "meatloaf line," which divides places with "sun-dried-tomato concoctions on restaurant menus" from those with "meatloaf platters."[2] Even before the 2000 election, and the explosion of "Red-versus-Blue"-themed social commen-

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* Professor of Law, University of Notre Dame Law School. I am grateful to the Federalist Society for the invitation to participate in the Twenty-Seventh Annual National Federalist Society Student Symposium, held at the University of Michigan Law School in Ann Arbor, Michigan. Portions of these remarks are taken from, or based on, some earlier works of mine, including Richard W. Garnett, *William H. Rehnquist: A Life Lived Greatly, and Well,* 115 YALE L.J. 1847 (2006); Richard W. Garnett, *Chief Justice Rehnquist's Enduring, Democratic Constitution,* 29 HARV. J.L & PUB. POL'Y 395 (2006); Richard W. Garnett, *Right On,* LEGAL AFF., Mar./Apr. 2005, at 34; Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations,* 85 MINN. L. REV. 1841 (2001) [hereinafter Garnett, *Henry Adams's Soul*].

1. *See* Posting of Richard W. Garnett to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2008/03/the-fed-soc-sym.html (Mar. 10, 2008, 10:13 EDT) ("The claims presented for the panel's consideration were, first, that 'it is a basic assumption of federalism that individual communities can be different'; second, that 'it is a benefit of federalism that free people can "vote with their feet" and migrate to communities that share their values'; and, third, that 'pervasive judicial review' can undermine this benefit, and this assumption, and 'destroy local identity by homogenizing community norms.'").

2. *See* David Brooks, *One Nation, Slightly Divisible,* ATL. MONTHLY, Dec. 2001, at 54, *available at* http://www.theatlantic.com/issues/2001/12/brooks.htm.

tary,[3] it should not have been controversial to note that the communities of San Francisco and Provo "have different values"—not entirely different, of course, but still different. And, if the legal enterprise involves, among other things, an effort to order our lives together in a way that reflects and promotes our understandings of human flourishing, then we should not be surprised that communities' "different values" often translate into "different laws."

The question presented to this panel was: Does pervasive judicial review threaten to destroy local identity by homogenizing community norms?[4] The short and correct, even if too quick, answer to this question is "yes." That is, *pervasive* judicial review certainly does *threaten* local identity. It does so, in part, because judicial review can homogenize community norms, either by dragging them into conformity with national, constitutional standards or, more controversially, by subordinating them to the reviewers' own commitments.

To say this is neither to criticize judicial review nor to celebrate excessively local identity; it is to identify neither the point at which judicial review becomes pervasive nor the point at which possibilities become threats. If we aspire to more than stating the obvious, we should reach for clarity about what are and are not the problems with and risks of judicial review, and also about what is and is not important about respecting community norms and protecting them from homogenization. We need to ask, for example, how much room the Constitution leaves for legal experiments that reflect local values.[5] When must legal expressions of local values give way to legal expressions of national ones? And who decides?

It is true that an important feature of our federalism is local variation in laws and values. It is also true, however, that some values have been homogenized, not by judicial review, pervasive or otherwise, but by the ratification of the Constitution,

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3. *See* Paul Farhi, *Elephants are Red, Donkeys are Blue*, WASH. POST, Nov. 2, 2004, at C1.

4. *See* Garnett, *supra* note 1.

5. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.").

which is the "supreme Law of the land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[6] Our federalism proceeds from the premise that individual communities can be different, but it also reflects a vision of national citizenship, some fundamental moral commitments, and a common project. It is a basic assumption of federalism that local communities may have different values. But it is also a basic assumption of federalism that the national Union is committed to *some* shared values, that separate communities are bound by *some* shared laws, and that there were and are *reasons* for America's distinct communities to come together and form, in the words of the Preamble, a "more perfect Union."[7] Our various local communities and political subdivisions are not merely next to each other in space; they do not simply share a continent and currency. They are meaningfully "united."

Of course, to gesture toward the Supremacy Clause and our nation's name is hardly to answer the hard and interesting questions that the panel's topic prompts. Still, even this gesture is enough to remind us that the text, history, structure, and theoretical premises of the Constitution point toward the importance of *both* diverse local "laboratories of democracy"[8] *and* a larger, national community—a Union constituted by "We the People."[9] Vindicating the values and aims of this national community will sometimes require constraining, revising, or rejecting some laboratories' experiments and some expressions in law of local majorities' values.

Americans often talk and think about the potential conflict between judicial review and local values in terms common to the discussion of dual sovereignty. That is, we ask, "Which government's policy choice, the federal government's or the state's, wins out here?" in a way that invites an answer couched in a states' rights idiom. The Constitution's liberty-protecting structural features should, instead, be understood more in terms of limited and enumerated powers than in terms

6. U.S. CONST. art. VI, cl. 2.
7. U.S. CONST. pmbl.
8. *See New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).
9. U.S. CONST. pmbl.

of states' rights.[10] The Constitution appreciates, reflects, and incorporates pluralism and local values in a *particular way*, namely, by stating clearly that the national government and its various branches have only those powers that are "delegated to the United States by the Constitution."[11] And so, federal courts have the power—the "judicial Power of the United States"—to decide cases "arising under [the] Constitution."[12] They do *not* have the power to survey the national scene looking for local values and community norms in need of revision or homogenization, or to discover abstract rights and liberties in need of vindication.[13] That said, sometimes in the context of doing what it is authorized and supposed to do, a federal court will, and should, refuse to enforce a law that reflects the norms and values of a particular community. Such a refusal admittedly can appear to be a judicial interference with community values and will, in some cases, result in or aim toward the homogenizing of norms. But again, the Constitution itself makes *some* such judicial interference unavoidable because its text and structure both permit and call for it. The questions, then, are not so much *whether* federal courts may or should interfere with community values, but *when* and *how* they should do so.

Both the Constitution and sound political theory counsel deference and restraint on the part of federal judges.[14] It is, however, easy to imagine exasperation on the part of those scholars and commentators who insist that words like "deference," "restraint," and "activism" are not uncontested, and who warn that these terms can be, and sometimes are, misused in discussions about the Court and the Constitution.[15] This is true enough. The political use of "judicial activism" rhetoric is

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10. *See* Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003).

11. U.S. CONST. amend. X.

12. U.S. CONST. art. III, §§ 1, 2.

13. *Cf.* Kermit Roosevelt III & Richard W. Garnett, *Judicial Activism and Its Critics*, 155 U. PA. L. REV. PENNUMBRA 112, 126–27 (2006) ("Professor Roosevelt and I agree that, generally speaking, the job of 'weighing competing policies' is best 'left to the representative branches for reasons of democratic accountability.' I would also want to consider, though, the possibility that—putting aside concerns about competence and 'accountability'—the Court might not always be constitutionally authorized to take up the balancing task.").

14. *See id.* at 118 ("Clearly, appellate courts do and should 'defer' to lower courts and non-judicial officials all the time.").

15. *See, e.g., id.* (challenging Professor Roosevelt's definitions of deference).

often, as Professor Kermit Roosevelt and others have argued, "excessive and unhelpful."[16] Even if one wants to hold on to the view that the term is not *entirely* empty of content, and even if one is not ready to conclude that judicial activism (properly understood) is a myth, one can and should agree that the term today often serves as little more than a slogan or epithet. For present purposes, though, we can bracket the challenge of making the case that judicial activism is not merely code for "decisions with which I disagree." To say that federal judges can and should refuse to give effect to local laws and values that conflict with constitutional guarantees or that exceed constitutional limits is not to say that they should do so lightly, quickly, or too often. The Constitution commits us, as a national community, to certain values, which are reflected in and protected by certain specific provisions of that document. At the same time, an appreciation for the values associated with localism, and an appropriate humility when it comes to second-guessing political outcomes, will inspire wise judges to be cautious and to hesitate before declaring that a particular expression of local values must give way. Professor H. Jefferson Powell put it well in his Walter F. Murphy Lecture, *Constitutional Virtues*, in which he defined the virtue of "humility" as

> the habit of doubting that the Constitution resolves divisive political or social issues as opposed to requiring them to be thrashed out through the processes of ordinary, revisable politics. . . . The virtue manifests itself in the continuing recognition that the Constitution is primarily a framework for political argument and decision and not a tool for the elimination of debate.[17]

That is a good start.

II.

So, how do we get it right? How should the conscientious federal judge, or American citizen, go about trying to find the place where responsible exercise of the judicial power of the United States ends and unwarranted, offensive, intrusive, homogenizing overreaching begins? The task is not easy. Cer-

16. *Id.* at 112.

17. H. Jefferson Powell, *Constitutional Virtues*, 9 GREEN BAG 2D 379, 388 (2006).

tainly, the line will not always be clear, and there is no point in pretending otherwise. Certainly, it is not enough to merely attach "activist" or "restrained" to decisions one likes or dislikes. Certainly, the effort cannot be separated from the larger project of figuring out the on-the-merits answers to questions of the Constitution's meaning. All that said, the judicial philosophy of my former boss, the late Chief Justice William Rehnquist, is relevant and helpful here.

As the confirmation hearings for Chief Justice Roberts and Justice Alito reminded us, tracking down nominees' judicial philosophies is tiring, tricky work.[18] Senate staffers, pundits, journalists, and bloggers scour an ever-expanding range of sources, including college research papers, job applications, appellate briefs and opinions, and even thank-you notes[19] looking for clues (or smoking guns). As it happens, though, Chief Justice (then Justice) Rehnquist provided a reflective and revealing sketch of his philosophy just a few years after joining the Court in a short essay called *The Notion of a Living Constitution*.[20] This notion, often associated with Justice William Brennan,[21] was, in Chief Justice Rehnquist's view, to be resisted—but not out of pious reverence for the Founders' insight into the

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18. *See, e.g.*, Mike Allen & R. Jeffrey Smith, *Judges Should Have 'Limited' Role, Roberts Says: Statement to Panel Cites Need for Restraint on Bench; Prior Documents Question 'Right to Privacy,'* WASH. POST, Aug. 3, 2005, at A5 ("Roberts echoed the views of President Bush in describing his judicial philosophy. Roberts said that he views the role of judges as 'limited' and that they 'do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law.'"); Senator Charles Schumer, Remarks of the Nomination of Samuel Alito to the Supreme Court (Oct. 31, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100707.html ("A preliminary review of his record raises real questions about Judge Alito's judicial philosophy and his commitment to civil rights, workers' rights, women's rights, and the rights of average Americans which the courts have always looked out for.").

19. *See* Charles Babington, *Miers Hit on Letters and the Law*, WASH. POST, Oct. 15, 2005, at A7.

20. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976), *reprinted in* 29 HARV. J.L. & PUB. POL'Y 401, 410 (2006).

21. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) ("[T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers."); William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985) ("[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.").

moral, economic, and social challenges facing late-twentieth-century society.[22] Nor did his critique purport to be the product of a tight deduction from premises relating to the very nature of a written constitution. He was not, to use Professor Sunstein's term, a "fundamentalist,"[23] or even a thoroughgoing, principled originalist. He did not fail to observe and absorb the obvious fact that ours is a very different world from the Framers'.

Chief Justice Rehnquist's aim in critiquing the notion of a living Constitution, and in so doing, appearing to assume the unenviable "necrophil[iac]" position of playing partisan for a "dead" Constitution,[24] was to insist and ensure that "We the People," the "ultimate source of authority in this Nation,"[25] acting through our politically accountable representatives, retain the right to serve (or not) as the agents of and vehicles for constitutional change. What animates the essay is not so much a misplaced attachment to *stasis*, or a slavish adherence to ideological formulae, but a clear-eyed appreciation for the tension that can exist between the "antidemocratic and antimajoritarian facets" of judicial review and the "political theory basic to democratic society."[26]

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22. *See, e.g.*, Rehnquist, *supra* note 20, at 699 ("It seems to me that it is almost impossible . . . to conclude that [the Founders] intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations."); *cf.* Carey v. Population Servs. Int'l, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting) ("Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.").

23. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 119–20 (2005) (discussing Chief Justice Rehnquist's "fundamentalist" views regarding the right to marry).

24. Rehnquist, *supra* note 20, at 693 ("At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution.").

25. *Id.* at 696.

26. *Id.* at 705. For a recent, powerful exploration of this tension, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

And so, Chief Justice Rehnquist contended, it is one thing to note that the Constitution is, in many places, "not a specifically worded document"; it is one thing to concede that "[t]here is . . . wide room for honest difference of opinion over the meaning of general phrases in the Constitution."[27] It is another, however, to authorize "nonelected members of the federal judiciary"—functioning as "the voice and conscience of contemporary society" and "as the measure of the modern conception of human dignity"[28]—to serve as a "council of revision"[29] armed "with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country."[30]

Chief Justice Rehnquist's big-picture view of the Constitution, the government that it constitutes, and the task of federal judges that it authorizes can be well and efficiently captured through two short quotations from his opinions. First, from his opinion for the Court in *United States v. Lopez*:

> The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[31]

Second, is this passage from his dissent in *Texas v. Johnson*:

> The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were

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27. Rehnquist, *supra* note 20, at 697.

28. *Id.* at 695.

29. *Id.* at 698.

30. *Id.*; *cf.* Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) ("[T]his Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass 'arbitrary,' 'illogical,' or 'unreasonable' laws.").

31. 514 U.S. 549, 552 (1995) (citations omitted).

> truant schoolchildren has no similar place in our system of government.[32]

These two passages go a long way in presenting the vision or, at least, the disposition that plausibly can be said to have animated Chief Justice Rehnquist's work and career on the Court, and that could also be of some use, even comfort, to federal judges wrestling with the questions presented by this Symposium.

Chief Justice Rehnquist was a federalist, in the Madisonian sense, and, within limits, a conservative majoritarian. He believed that "We the People," through our Constitution, had authorized our federal courts, legislators, and administrators to do many things, but not everything. The nation's powers are vast where they exist, but they are also divided, separated, "few and defined."[33] As a result, the national government may not pursue every good idea, smart policy, or worthy end, nor are local governments forbidden to enact all foolish or immoral ones. The point of this arrangement is not so much to hamstring good government as to "ensure the protection of our fundamental liberties"[34] by dividing, enumerating, and structuring powers. The Constitution's freedom-facilitating structural features, Chief Justice Rehnquist believed, should not be left entirely to the care of those branches that might not have, or might not perceive clearly, an interest in their health. The structure of government, as he emphasized in *Lopez*, matters to the well-being and flourishing of persons, and it is appropriate for courts of law to enforce the boundaries inherent or involved in those structural features.[35]

The *Texas v. Johnson* dissent underscores a companion commitment to judicial modesty with respect to moral controversies and debatable policies.[36] True, many regard Chief Justice Rehnquist's "Platonic guardian" line,[37] along with similar calls for judicial modesty, restraint, and deference, as little more than a disingenuous cover for his own conservative brand of activism. But this charge is misplaced. It is neither arrogant nor

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32. 491 U.S. 397, 435 (1989) (Rehnquist, C.J., dissenting).
33. THE FEDERALIST NO. 45, at 137 (James Madison) (Roy P. Fairfield ed., 1981).
34. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (internal quotation marks omitted).
35. *Lopez*, 514 U.S. at 552.
36. *See* 491 U.S. at 430–31 (Rehnquist, C.J., dissenting).
37. *Id.* at 435.

illegitimate for a judge to enforce the Constitution's structural features, nor is it disingenuous for such a judge to believe that federal courts should only rarely employ judicial review as an "end run around popular government."[38] Running through Chief Justice Rehnquist's opinions in cases involving a broad spectrum of policy questions is not opportunistic conservative activism but reasonably consistent fidelity to the idea that our Constitution leaves many important, difficult, and even divisive decisions to the People or, for our purposes, to local communities. It is possible and reasonable to distinguish between votes to invalidate the policy choices of state legislatures as inconsistent with the Constitution's substantive individual-rights provisions, on the one hand, and votes to invalidate regulatory measures enacted by Congress as outside Congress's enumerated powers, on the other. It is one thing to invalidate federal laws for reasons having to do with the distribution of power; it is another to strike down local laws as misuses of power.

To be sure, the Constitution has countermajoritarian features. It effectively removes certain questions (such as "Should we criminalize seditious libel?"[39] or "Should Congress select the Russian Orthodox Archbishop of New York?"[40]) from the political arena. At the same time, it is a document that reflects strong commitments to popular sovereignty and that relies at least as much on constitutional structure and institutional design as on judicial review to constrain majorities' resolutions of challenging moral questions.[41]

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38. Rehnquist, *supra* note 20, at 706; *see* Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (observing that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.").

39. *See* U.S. CONST. amend. I; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (discussing the unconstitutionality of criminalizing seditious libel).

40. *See* U.S. CONST. amend. I; *cf.* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (striking down New York law purporting to transfer control of Russian Orthodox churches from the governing hierarchy of the Russian Orthodox Church to the governing authorities of the Russian Church in America).

41. It is incorrect to conclude, as Professor Chemerinsky does, that Chief Justice Rehnquist's willingness and ability to enforce the Constitution's structural features represents a departure from, or is in tension with, his "majoritarianism." *See* Erwin Chemerinsky, *Understanding the Rehnquist Court*, 47 ST. LOUIS U. L.J. 659, 662–63 (2003).

III.

This panel's focus has been on the homogenizing threat that judicial review can pose to local communities' distinctive values and legal experiments. We have been considering the worry that when federal judges second-guess local-values-reflecting policies, it can be difficult to hold the line between enforcing the Constitution's trumping commitments—*our* shared commitments—and imposing their own preferences. This worry is not frivolous, but there is no easy way to soothe it.

Although judicial review of local legislation *does* threaten to undermine local identity by homogenizing community norms, such review is both helpful and necessary to the task of protecting the institutions, groups, associations, and communities that generate, nurture, test, express, and advocate for those norms. In a case like *Romer v. Evans*,[42] for example, the Supreme Court's exercise of judicial review can be seen as homogenizing local norms by subordinating their expression in local ordinances to the requirements of the Equal Protection Clause.[43] In a decision like *Boy Scouts of America v. Dale*,[44] on the other hand, the Court's invalidation of a law reflecting local values can perhaps be seen as protecting the existence and independence of competing and diverse sources of meaning.[45] Put simply, to the extent that one cares about values-pluralism, judicial review can be a friend as well as a foe.

As it happens, this point also finds support in the work and views of Chief Justice Rehnquist. As Professor John McGinnis has explored in some detail,[46] a powerful and pervasive theme in the Rehnquist Court's decisions is recognition and even celebration of the place and function of mediating institutions in civil society.[47] The landscape that is created, regulated, and reflected by the Constitution includes more than a federal gov-

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42. 517 U.S. 620 (1996).

43. U.S. CONST. amend. XIV, § 1.

44. 530 U.S. 640 (2000).

45. *See generally* Garnett, *Henry Adams's Soul*, *supra* note *.

46. *See generally* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

47. *See, e.g.*, *Boy Scouts*, 530 U.S. at 648 (noting that the freedom of association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority" (internal quotation marks omitted) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984))).

ernment and states, and more than persons and governments. The structural features of that charter both preserve and clear out the space of civil society in which associations and mediating institutions work to safeguard political liberty and constrain political authority. Associations, therefore, serve a number of critical purposes:

> [A]ssociations have a structural, as well as a vehicular, purpose. They hold back the bulk of government and are the "critical buffers between the individual and the power of the State." They are "laboratories of innovation" that clear out the civic space needed to "sustain the expression of the rich pluralism of American life." Associations are not only conduits for expression, they are the scaffolding around which civil society is constructed, in which personal freedoms are exercised, in which loyalties are formed and transmitted, and in which individuals flourish.[48]

The same judicial review that we might fear could impose unwelcome moral uniformity is, it turns out, sometimes necessary to preserve the freedoms of associations upon which a healthy moral conversation depends.

48. Garnett, *Henry Adams's Soul*, *supra* note *, at 1853–54.