

# Elusive Morality: Why the Supreme Court Should Formally Disavow Moral Justifications for Burdening Liberty Interests, but Recognize its Importance for Expanding Rights

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**ABSTRACT**

*While state interests in "morality" have taken on different levels of significance in the Supreme Court's constitutional jurisprudence, the moderate and liberal justices have increasingly scrutinized these interests since *Bowers v. Hardwick*. Recent scientific studies confirm what many have known about morality's meaning—it varies significantly from person to person. This is not to say that its meaning is subjective in the way that the meaning of emotions such "happiness" are. Studies confirm that while different external and internal stimuli produce certain emotions for different people, those emotions correspond to the same state of mind across individuals. By contrast, studies reveal that the term "moral" or "morality" evokes different states of mind within one person and among different people. In other words, the term's meaning differs from person to person. For this reason, this article argues that the Supreme Court is correct to fear the use of moral interests to deprive marginalized groups of important rights—courts cannot carefully scrutinize a state interest in morality when they cannot confirm morality's meaning. However, the same fear is not justified when marginalized groups use moral interests to vindicate their rights. By tracing marginalized communities' histories of political engagement through languages of morality, this article argues that, in fact, moral interests are valuable because the post-reconstruction Constitution directs us to elevate the voices of the marginalized.*

**I. INTRODUCTION**

"The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."<sup>1</sup>

"State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices."<sup>2</sup>

While Scalia's statement is technically correct, the Supreme Court

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<sup>1</sup> *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

<sup>2</sup> *Id.*

has correctly questioned its wisdom in the past two decades. Recent scientific studies confirm what many have known about morality's meaning—it varies significantly from person to person. But this does not mean that morality is subjective the way that emotions like "happiness" are. Conventional wisdom tells us that emotions are subjective because different external and internal stimuli produce "happiness" for different people, despite each emotional term referring to the same state of mind. By contrast, studies demonstrate that the term "morality" evokes *different* states of mind within one person and among different people. In other words, morality's *meaning* constantly differs. For this reason, this article argues that the Supreme Court is correct to fear the use of moral interests to deprive marginalized groups of important rights—courts cannot carefully scrutinize a State interest in morality when they cannot confirm morality's meaning. However, the same fear is not justified when marginalized groups use moral interests to vindicate their rights. By tracing marginalized communities' histories of political engagement through languages of morality, this article argues that, in fact, moral interests are valuable because the post-reconstruction Constitution directs us to elevate the voices of the marginalized.

This article proceeds in four sections. The first provides a brief philosophical and scientific framework through which to understand "meaning." Section two Judith Butler and Slavoj Žižek's theories about the human unconscious to explain why words' meanings are difficult to confirm. Section three explains how studies using brain imaging can confirm the meaning of words across individuals but fail to do so for states of mind corresponding with morality. Section four uses these studies to trace and support the Supreme Court's disavowal of moral justifications for burdening constitutional rights. Finally, section five argues that while using morality to burden constitutional rights is dangerous, courts should elevate and consider moral interests in identifying and expanding constitutional rights because marginalized communities use morality in their liberation movements.

## II. THE MENTALIST THEORY: A FRAMEWORK FOR UNDERSTANDING MEANING

Because the philosophy of meaning has been the subject of rich debate that cannot be briefly explained, this article will proceed with the assumption that the recently popular mentalist theory of meaning that has

centered philosophical debates provides both a factually accurate and legally-coherent theory upon which to proceed.<sup>3</sup> This article will accordingly proceed with the assumption that the meaning of a word or expression refers to the speaker's *state of mind*—"features of the brain and central nervous system" and "cognitive states and processes [] constituted

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<sup>3</sup> The mentalist theory should be distinguished from another popular theory of meaning—the semantic theory. Semantic theory relies upon, but is not defined by, a "theory of reference." Jeff Speaks, *Theories of Meaning*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2019 ed.), <https://plato.stanford.edu/archives/win2019/entries/meaning/> [<https://perma.cc/RCL2-XY2F>]. This theory "pairs expressions with the contribution those expressions make to the determination of the truth-values of sentences in which they occur." *Id.* In other words, the meaning of the term is understood by determining how it makes a larger sentence true. *Id.* The following example is illustrative:

"Barack Obama is the 44<sup>th</sup> president of the United States.

"John McCain is the 44<sup>th</sup> president of the United States.

(1) is true, and (2) is false." *Id.*

The expressions, "Barack Obama" and "John McCain," correspond to references that have the "power to affect truth-value." *Id.* What explains the truth-value between the two terms? It is that "Barack Obama" "stands for the man who [i]s in fact the 44<sup>th</sup> president of the United States, whereas "John McCain" "stands for [the] man who [is in fact] not." *Id.*

While semantic theories go beyond a theory of reference by, for example, theorizing the contribution of a speaker's context and evaluative point of view to the meaning of expressions, what has been offered is sufficient to mark a point of departure to mentalist theories. Whereas semantic theories describe meaning according to an external reference, mentalist theories of meaning "aim to explain the nature of meaning in terms of the mental state of language users .†.†. ." *Id.* The "most well-worked out" mentalist theory is the Gricean program, named after its developer, Paul Grice. Grice proposes two claims: "(1) facts about what expressions mean are to be explained, or analyzed, in terms of facts about what speakers mean by utterances of them, and (2) facts about what speakers mean by their utterances can be explained in terms of their intentions." *Id.* These claims reduce meaning to the "contents of the intentions of speakers." *Id.*

Mentalist theories of meaning are best explained by distinguishing them from semantic theories. For example, when one says, "South Bend is not exactly New York City," a semantic theory describes the sentence's meaning by its expression of the true proposition that South Bend, Indiana, is not identical to New York City. *Id.* But what the speaker means according to the mentalist theory goes beyond the true proposition—it may refer to the two cities differences in quality of life, food, and economic opportunity. *Id.* Another way of describing the theory is to say that meaning is communicated through one's beliefs. *Id.*

Another mentalist theory, which will inform this article's discussion, is the mental representation-based theory. This "common view [from] the philosophy of mind and cognitive science" posits that "the propositional attitudes of subjects are underwritten by an internal language of thought, comprised of mental representations." *Id.* According to this theory, "cognitive states and processes are constituted by the occurrence, transformation and storage (in the mind/brain) of information-bearing structure (representations) of one kind or another." David Pitt, *Mental Representation*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2018 ed.), <https://plato.stanford.edu/archives/win2018/entries/mental-representation/> [<https://perma.cc/ZA6U-JBNB>]. "RTM defines such intentional mental states as relations to mental representations, [which] explains the intentionality of the former in terms of the semantic properties of the latter." *Id.* RTM "understands mental processes such as thinking, reasoning and imaging as sequences of intentional mental states." *Id.* Modern thinking has "typically supposed (or at least hoped) that the mind can be *naturalized*—i.e., that all mental facts have explanations in the terms of natural science." *Id.* This view "attempts to provide accounts of mental states and processes in terms (ultimately) of features of the brain and central nervous system." *Id.*

by the occurrence, transformation and storage . . . of information-bearing structure (representations) of one kind or another"—that can be captured by brain scans.<sup>4</sup> These scans are essential, as this article will argue, for any two or more individuals to confirm that they are experiencing the same or at least similar states of mind and therefore carry the same meaning behind words and phrases. By grounding meaning, and thus state of mind, in Michele Foucault, Judith Butler, and Slavoj Žižek's conceptions of the self and the unconscious, this next section will demonstrate that brain scans can provide opportunities to confirm common meanings.

### III. HOW JUDITH BUTLER AND SLAVOJ ŽIŽEK'S THEORIES OF THE MIND MAKE "MEANING" FRAUGHT

This section discusses Judith Butler and Slavoj Žižek's theories about the human unconscious (or subconscious) because they provide a framework for understanding why words' meanings are elusive and why brain scans are essential to confirming meaning.

While Butler's and Žižek's thoughts contradict each other at a structural level, both thinkers reach the important conclusion that a person's true identity is unknowable and unconfirmable.

For Butler, each person, or subject, has a state of mind that is vastly different and ever changing because of its unique relationship to its own set of cultural norms. In much of her thought, Butler's aim "is to outline subjectification, the way in which subjects are initiated into being and concurrently regulated by cultural norms."<sup>5</sup> Understanding Butler's thought on this subjectification requires some interrogation of Foucault's theories of the historical subject. According to Foucault, there is "no transhistorical subject, but one that exists and can give an account of oneself in relation to the historical time and discourse."<sup>6</sup> This discourse consists of norms that control individuals' thoughts, will, inclinations, passions, instincts, anomalies, infirmities, effects of environment, and heredity and to drive their desires and acts of aggression.<sup>7</sup> Butler agrees with Foucault that "being a reflexive subject is bound up with the existing norms and other people."<sup>8</sup> In her thought, "the norms and meanings of a social space give birth to the subject's psychic space, and the desires are

<sup>4</sup> Pitt, *supra* note 4.

<sup>5</sup> Jaana Pirskanen, *The Other and the Real. How Does Judith Butler's Theorizing of the Subject and Contingency Differ from the New Lacanian Thought?* 1 QUEERSCOPE ARTICLES 1 (2008).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> MICHEL FOUCAULT, DISCIPLINE AND PUNISH 17 (Alan Sheridan trans., 1979) (translation of Michel Foucault, *Surveiller et Punir* (1975)).

<sup>8</sup> Pirskanen, *supra* note 6, at 3.

formed in the chiasm of the personal and the social."<sup>9</sup> Thus, for Butler, the self is constantly transforming with its social space and context.

Butler uses the term *unconscious* to describe this ever-transformative and associational nature of the psyche that makes it "impossibl[e] [to] know[] oneself without the mediation of historical discourses and [] the difficulty of being a reflexive subject."<sup>10</sup> For Butler, "every subject is constituted differently through her or his contact with multiple norms and other people, and the various identification of a subject cannot be reduced to an identity."<sup>11</sup> Thus, the term "unconscious" acts "[a]s a synonym for opacity, non-narrativizable, inarticulable, irrecoverable, 'my foreignness to myself', 'failure to narrate fully', and the 'limit to self-understanding.'<sup>12</sup> Because Butler's subject is formed "in relations to the Other and others, both to cultural norms and actual other people,"<sup>13</sup> a person is "unable to narrate or know oneself fully"<sup>14</sup> and the "opacity or the unconscious are the result of one's passivity in relation to the conditions of one's existence as a subject, and this passivity persists through one's life."<sup>15</sup>

If, as Butler posits, one's state of mind—Butler's psyche and Foucault's thoughts, will, inclinations, passions, instincts, anomalies, infirmities, effects of environment, and heredity—is always transforming and also determined by each subject's unique "conditions of [] existence," then any two individuals will inevitably always experience different same states of mind. Indeed, even if two individuals' cultural norms are relatively similar, no two individuals could possibly experience the *exact* same mental state without having lived the exact same life—their different thoughts, wills, inclinations, passions, instincts, anomalies, infirmities, memories will inevitably result in at least some differences in their mental states, even if they are minimal. As a result, the language that any two different people use will inevitably refer to different states of mind.

Consider the following thought experiment to understand the implications of Butler's theory: Persons A is a Latina woman born and raised in Los Angeles, California. She was born to a family of refugees from Central America and has experienced homelessness, poverty, and inter-generational trauma. Growing up, her family subsisted on food stamps and her neighborhood's schools were severely underfunded and poorly

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<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* at 2 (internal citations omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

resourced. Her experiences inspired her to attend law school to become a public defender in order to provide a voice to her community. Person B is a white man from Boston, Massachusetts from an affluent and conservative family. He never wondered from where any of his meals will come, whether he will have a bed on any particular night, or whether he will be able to afford college. Nor has he ever questioned the power structures that have led to his privilege. Butler might argue that these two individuals' states of mind are vastly different at any given point in time because their life experiences have shaped their different thoughts, wills, inclinations, passions, instincts, anomalies, infirmities, and memories.

For Slavoj Žižek, language fails not because subjects have different life experiences, but because the subject's true identity exists outside of language. Žižek's thought is grounded in a substantially more structured topology of the psyche influenced by Lacanian psychoanalysis.<sup>16</sup> Whereas Butler's "theorising is deliberately sketchy and avoids forming an account of the structure of the psyche,"<sup>17</sup> Žižek's describes the subject through a "structural division" into three orders—the real, the imaginary, and the symbolic,<sup>18</sup> which describe "the psychoanalytical development story of a human individual . . . ."<sup>19</sup> Two orders are important to understand here: the symbolic and the real, both of which must be described in opposition to one another. In symbolization, "the child submits to the meanings that the symbolic order places and loses himself as a whole, and thus becomes alienated into language."<sup>20</sup> This "splits the subject" into the unconscious and the conscious by alienating the subject from its real being.<sup>21</sup> The symbolic order "creates the reality where the subject speaks and thinks" and "what is not in language does not exist, since language brings things into existence."<sup>22</sup> The real—or the unconscious—exists as a

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<sup>16</sup> Ali Yansori, *Introduction to Lacanian Psychoanalysis*, PSYCHOANALÝZA DNES (Dec. 12, 2016), <http://psychoanalyzadnes.cz/2016/12/12/introduction-to-lacanian-psychoanalysis/> [<https://perma.cc/6ATJ-2D7T>].

[E]mphasis on language is at the heart of Lacanian psychoanalysis, so much so that the lingual dimension comes to form one of the three 'elementary registers' which Lacan calls the Symbolic, the Imaginary and the Real. . . . To put it concisely, the Imaginary deals with appearances and our interpersonal relations with other people; for instance, our everyday interactions with other people are reliant on the imaginary order, and notions such as 'love' are more or less reducible to this order. The Symbolic forms the dimension of what has been signified and is meaningful to an individual – it is, in a sense, the lingual dimension; when you are born, you find yourself in a pre-established social structure and you adapt yourself to the specific culture of that society where people's interactions are mediated by a pre-given language; such structures are all parts of the symbolic order. The Real (which should not be confused with reality) is that which has remained un-symbolised; throughout our lives, there are things which resist symbolisation (meaning, we cannot make any coherent sense out of them that would ultimately agree with the picture we have of the rest of our reality) such as traumas; such un-symbolised gaps in the Symbolic belong to the Real. *Id.*

<sup>17</sup> Pirskanen, *supra* note 6, at 4.

<sup>18</sup> *Id.* at 4-5

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

paradox—it "describes the impossibility that is inherent in language."<sup>23</sup> Unlike Butler's unconscious, which is formed in its constant relationship to the symbolic norms, the real is a structural reality outside of the symbolic and imaginary—it is a "hole" in language. In other words, the subject is "the void that *precedes* subjectification."<sup>24</sup>

Thus, for Žižek, language cannot describe one's state of mind since a subject's true identity—the real—is always outside of language. Because a subject's understanding of itself is always formed by language, it is impossible for the subject to fully comprehend or express, through language, something completely outside of it. In the above thought experiment, Žižek might argue that even if Persons A and B had the exact same life experiences, language could not describe their mental states because those states are always inexpressible.

#### IV. BRAIN SCANS: A LENS INTO MEANING

Butler and Žižek's theories present the following conundrum: how can two individuals understand what the other *means*—i.e., what each other's state of mind is—when, for Butler, they will inevitably experience vastly different states of mind given their life experiences, and for Žižek, language cannot describe a person's state of mind? The answer, this section posits, comes from a mental representation theory. As stated above, this theory posits that meaning is constituted by "features of the brain and central nervous system" and "cognitive states and processes are constituted by the occurrence, transformation and storage (in the mind/brain) of information-bearing structure (representations) of one kind or another."<sup>25</sup> Recent research has revealed that brain scans can capture these brain and central nervous system (CNS) features.

Brain scans have occupied increasing significance both in the scientific and legal community. Recent studies provide a "proof of principle that brain imaging can determine, with high accuracy, on which side of a legally defined boundary a person's mental state lies."<sup>26</sup> One study sought to determine whether knowing and reckless mental states, as defined by the Model Penal Code, correspond to detectable different states in the human brain "[b]ased only on the corresponding brain-imaging data."<sup>27</sup> The study concluded that "knowing" and "reckless" are associated with distinct brain states and that it "is possible to predict which

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 6 (emphasis added).

<sup>25</sup> Pitt, *supra* note 4.

<sup>26</sup> Iris Vilares et al., *Predicting the Knowledge-Recklessness Distinction in the Human Brain*, 114 PROC. NAT'L ACAD. SCI. OF THE U.S. OF AM. 3222, 3222 (2017).

<sup>27</sup> *Id.* at 3225.

legally defined mental state a person is in based only on imaging data."<sup>28</sup>

Other studies have taken a further step and found that brain scans can consistently identify *emotional* mental states such as sadness, anger, and disgust. In these experiments, test participants had substantially similar brain activity when experiencing the same emotions, and a computer could predict how someone was feeling based solely on a brain scan.<sup>29</sup> The study's purposes were to "examine whether patterns of brain activity characteristic of specific emotions exist, and whether these patterns are to some extent common across individuals," and to "decompose neural activation signatures into factors which may represent core neural components of emotion representation."<sup>30</sup> The study revealed that "participants exhibited consistent patterns of neural activation for all emotion categories"<sup>31</sup> and that "the neural correlates of emotional experience share significant commonality across individuals."<sup>32</sup> It concluded that "specific emotions can be decoded from distinct patterns of activation that are distributed across brain regions . . . [and] from patterns of activation within a number of different individual brain regions."<sup>33</sup> In other words, when one individual said that they experienced "anger," the computer captured the corresponding brain scan and accurately predicted that another individual with the same brain scan was also experiencing anger.

These studies lead to the reasonable interpretation that, to the extent that patterns of brain activity specific to emotions exist, it can be said with relative confidence that two individuals who identify the same emotional experience do in fact experience substantially similar states of mind. In other words, the two subjects know, to a significant degree, what the other *means* when they refer to emotional states.

However, another study reveals that "morality" cannot be pinned to any specific state of mind and that in fact, "morality" corresponds to vastly different states of mind between individuals and even within one person. The study found that, when presented with different moral dilemmas, participants who were asked to think of the morally appropriate response approached the problem with different mental processes and thus different states of mind. In one study, researchers gave two groups of nine people a battery of sixty questions while they underwent MRI scanning.<sup>34</sup> The questions regarded two classic sets of moral problems.

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<sup>28</sup> *Id.*

<sup>29</sup> Karim S. Kassam et al., *Identifying Emotions on the Basis of Neural Activation*, 8 PLOS ONE 1 (June 2013).

<sup>30</sup> *Id.* at 1–2.

<sup>31</sup> *Id.* at 9.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> PRINCETON UNIV., *Brain Imaging Study Sheds Light on Moral Decision-Making*, SCIENCEDAILY (Sept. 14, 2001), <https://www.sciencedaily.com/releases/2001/09/010914074303.htm>

The first, known as the trolley problem, involves a runaway train that is about to kill five people.<sup>35</sup> The dilemma is whether it is appropriate for a bystander to throw a switch and divert the trolley onto a different track: killing one person to save five.<sup>36</sup> The second problem, known as the footbridge problem, involves a runaway train, again, heading toward five people but this time there is no spur.<sup>37</sup> Instead, the dilemma is whether it is appropriate for one bystander, who is on a bridge above the tracks, to push another bystander in front of the train: killing one person to save the five.<sup>38</sup> Although both cases involve killing one person to save five, they evoked very different responses and philosophers have not been able to find a principle rule to explain why. The researchers determined that one reason for the difficulty was "that the two problems engage different psychological processes—some more emotional, some less so—that rely on different areas of the brain."<sup>39</sup> The study found that "there is no set of consistent, readily accessible moral principles that captures people's intuitions concerning what behavior is or is not appropriate in these and similar cases."<sup>40</sup> The "crucial difference between the trolley dilemma and the footbridge dilemma lies in the latter's tendency to engage people's emotions in a way that the former does not."<sup>41</sup> The study concluded that there "are systematic variations in the engagement of emotion in moral judgment."<sup>42</sup>

This study demonstrates that the state of mind corresponding with morality varies significantly from person to person. This is not to say that the meaning of morality is subjective the way that emotions are subjective. As previously reviewed, studies confirm that while different external and internal stimuli produce emotions such as "happiness" for different people, these people still experience the same state of mind. By contrast, the study on morality demonstrates that different people who evoke the term "moral" or "morality" experience *different* states of mind.<sup>43</sup> In other words, the term's *meaning* differs from person to person. Thus, when an individual uses the term "morality," it is almost impossible for the listener to understand the state of mind the speaker is experiencing because for both the speaker and listener, the state of mind could be one of many. The meaning of morality is therefore fleeting between people—there is no consistent state of mind that captures morality within one person, let alone among multiple people.

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[<https://perma.cc/55DF-72VP>].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105, 2106 (2001).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2107.

<sup>43</sup> Greene, *supra* note 41.

If morality fails to invoke any consistent state of mind, but instead engages different cognitive and emotional states, then it would be impossible for one to know what the other *means* when they describe something as "moral" or "immoral." The listener who hears the word becomes victim to Butler's unconscious and Žižek's real—they will find great difficulty in understanding the speaker's state of mind. The word's meaning would be lost in a vast enigma of uncertainty and relativism. This conclusion confirms what most of us already and intuitively know, and is extremely significant to Supreme Court jurisprudence around the permissible government rationales for depriving individuals of their rights.

## V. THE HISTORY OF MORALITY IN THE SUPREME COURT

The morality brain scan study should raise fear about its use in the Supreme Court's substantive due process jurisprudence, which has shifted dramatically in the past five decades. For years, morality was a staple of state police power, serving as a strong justification for almost any usurpation of non-fundamental rights not deeply entrenched in history and tradition. But with the Kennedy court's expansion of liberty interests in the past decade and a half, the Supreme Court has generally disavowed morality's propriety as a justification for depriving individuals of their rights. This section will trace this shift and its underlying reasoning followed by a discussion of the wisdom for this shift in light of the above cited brain science.

### A. The Supreme Court's disavowal of moral interests

Based on federalism principles, states have historically had a broad sweep of power to "protect the health, safety, welfare and *morals* of its community . . . ." <sup>44</sup> Most significantly, states could "invade rights guaranteed by the Fourteenth Amendment" when the legislation bore "a real and substantial relation to the public health, safety, [or] morals . . . ." <sup>45</sup> But the notion that rights guaranteed by the Due Process Clause can be deprived and justified by ambiguous references to morality is quite distant in current-day jurisprudence. This radical shift toward a new anti-morality framework is traceable to a tension between the majority and dissenting opinions in *Cruzan by Cruzan v. Director, Missouri Dept. of*

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<sup>44</sup> *Ginsberg v. State of N. Y.*, 390 U.S. 629, 636 (1968) (emphasis added); *see, e.g., Ex parte Garland*, 71 U.S. 333, 357 (1866) ("The duty of government comprehends the moral as well as the physical welfare of the state.").

<sup>45</sup> *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111–12 (1928).

*Health ("Cruzan")*.<sup>46</sup>

While not the first case to condemn the use of morality as a justification for depriving constitutional rights, *Cruzan* is a good starting point because it captures what brain scans tell us—once we reveal that a State's articulated interests logically fall short of justifying its action, or when the court rejects the State's proffered interests as unconstitutional, the meaning behind the remaining interest in morality becomes insufficiently amorphous and ambiguous for the court to understand. *Cruzan* presented the controversial question of whether liberty includes the right to refuse lifesaving medical treatment. Nancy Cruzan sustained severe injuries in an automobile accident and at the time of the case laid in a hospital in a "persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function."<sup>47</sup> Because Cruzan had "virtually no chance of regaining her mental faculties," and had previously expressed her desire to be taken off of life support in that situation, her parents asked hospital employees to terminate the artificial nutrition and hydration procedures.<sup>48</sup> When the hospital refused to comply absent a court order, Cruzan's parents sought authorization from the state trial court for termination of life support.<sup>49</sup>

While both the majority and Justice Brennan's dissenting opinions held that a liberty interest in refusing life support exists, the point of disagreement centered around the strength of that right compared to the State's interest in promoting life. Relying on the common law right to freedom from unwanted touching and the constitutional privacy right, the majority and Justice Brennan's dissent ("Brennan's dissent") largely agreed that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.<sup>50</sup> The majority described the State's interest as one in providing patients the ability to "make an informed and voluntary choice" to maintain "the protection and preservation of human life."<sup>51</sup> The majority held that the State's interest was permissibly advanced with a requirement of clear and convincing evidence of incompetent persons' wishes to withdraw life-sustaining treatment.<sup>52</sup> Because there will "be some unfortunate situations in which family members will not act to protect a patient," heightened evidentiary requirements "guard against potential abuses in such situations."<sup>53</sup> By increasing the difficulty of withdrawing life-saving treatment, the Court reasoned, the requirement decreases the "risk of an erroneous decision"

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<sup>46</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

<sup>47</sup> *Id.* at 266.

<sup>48</sup> *Id.* at 267.

<sup>49</sup> *Id.* at 265.

<sup>50</sup> *Id.* at 279.

<sup>51</sup> *Id.* at 280.

<sup>52</sup> *Id.* at 282.

<sup>53</sup> *Id.* at 281 (quoting *In re Jobes*, 108 N.J. 394 at 419 (1987)).

to terminate treatment that is "not susceptible of correction."<sup>54</sup> An erroneous decision not to terminate, on the other hand, leaves open the "possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent . . ."<sup>55</sup>

Brennan's dissent's point of contention evolved from its disagreement with the majority's framing of the State's interest. To them, the State's interest lacked teeth: "there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so[,] . . . society as a whole will [not] be benefited[,] . . . [n]o third party's situation will be improved and no harm to others will be averted."<sup>56</sup> Because, in Justice Brennan's view, enough evidence had been presented to demonstrate that Nancy Cruzan would have wished to be taken off of life support, "[t]he only state interest asserted here is a general interest in the preservation of life . . . completely abstracted from the interest of the person living that life . . . ."<sup>57</sup>

Assuming that Brennan's dissent was correct that the petitioners presented sufficient evidence to conclude that Cruzan wanted to be taken off of life support, the dissent pointed out an interesting dilemma. Keeping Cruzan on life support would not have furthered the State's interest in ensuring her ability to "make an informed and voluntary choice" to preserve her life nor, as the dissent pointed out, would it have benefited society or any third party. Following this logic, the State's interest unraveled, making it difficult for the State to articulate an interest that supported keeping Cruzan on life support. While one might be able to posit that the State had a general interest in preserving life abstracted from the interest of the person, the State did not put forth that interest. Of course, numerous interests could theoretically have supported its position, whether they consisted of emotional or cognitive states of mind, but the State did not advance any other than those already reviewed. What, then, was that interest?

One explanation for why it was so difficult to identify the State's interest, this article suggests, is that the State had a *moral* interest in keeping Cruzan on life support. As the brain scan study demonstrates, morality corresponds to multiple different states of mind, which prevents a listener from understanding the speaker's interest. Here, the State's brief argued that the petitioner's insistence on a third-party consent rule

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<sup>54</sup> *Id.* at 283.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 312-13 (Brennan, J., dissenting).

<sup>57</sup> *Id.* at 313.

"bypass[es] constitutional, *ethical, and moral* questions . . . ."<sup>58</sup> Moreover, the State Supreme Court that heard the case stated, "[t]his State has expressed a strong policy favoring life. . . . [T]he exercise of these powers is particularly appropriate where issues invoke . . . *morality* . . . ."<sup>59</sup> And the Supreme Court's majority opinion explained that "these cases demonstrate both similarity and diversity in their approaches to decisions of what all agree is a perplexing question with usually *strong moral and ethical* overtones."<sup>60</sup> Indeed, from the Brennan's point of view, neither of the articulated, non-morally-based interests logically supported the action.<sup>61</sup> The State insisted that *something* justified its action but found it difficult to articulate the interest in a manner the dissent could understand. This was because the State's interests were grounded in morality.

While *Cruzan* is subject to other reasonable interpretations, the case very well could be one of the first times that Supreme Court justices rejected the use of an un-articulable moral interest to justify the deprivation of a constitutional right. The Supreme Court more explicitly rejected of the use of moral interests to justify bans on same-sex relationships and abortion.

Four years before *Cruzan*, the Justice Blackmun's dissent ("Blackmun's dissent") in *Bowers v. Hardwick* rejected a State's moral interest in criminalizing same-sex sodomy.<sup>62</sup> That case, overturned over a decade later in *Lawrence v. Texas*,<sup>63</sup> presented the question of whether a State could constitutionally criminalize the act of same-sex sodomy in the privacy of the home.<sup>64</sup> The majority held that there is no fundamental constitutional right to engage in same-sex sodomy and accordingly applied rational basis review. It concluded that the Georgia legislature's interest in morality met the standard because the law "is constantly based on notions of morality . . . ."<sup>65</sup> Blackmun's dissent, much like Brennan's dissent in *Cruzan*, first demonstrated that the State's morally neutral interests in preventing "serious adverse consequences for 'the general public health and welfare,' such as spreading communicable diseases or fostering other criminal activity" were not logically tied to the criminal ban<sup>66</sup> because the record was "barren of any evidence to support [the State's] claim."<sup>67</sup> Nor could the ban "be justified as a 'morally neutral' exercise

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<sup>58</sup> Brief for Respondents Harmon and Lamkins at 42, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990) (No. 88-1503), 1989 WL 1128135, at \*42 (emphasis added).

<sup>59</sup> *Cruzan v. Harmon*, 760 S.W.2d 408, 426 (Mo. 1988) (en banc).

<sup>60</sup> *Cruzan*, 497 U.S. at 277 (emphasis added).

<sup>61</sup> *Id.* at 330 (Brennan, J., dissenting).

<sup>62</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>63</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>64</sup> *Bowers*, 478 U.S. at 187-88.

<sup>65</sup> *Id.* at 196.

<sup>66</sup> *Id.* at 208 (Blackmun, J., dissenting) (internal citation omitted).

<sup>67</sup> *Id.*

of Georgia's power to 'protect the public environment'<sup>68</sup> or prevent "interference with the rights of others . . . ."<sup>69</sup> Thus, like the State in *Cruzan*, Georgia could not articulate a principle that logically justified the criminalization. Instead, the "core of [the State's] defense" was that the criminalized acts, "for hundreds of years, if not thousands, have been uniformly condemned as immoral . . . ."<sup>70</sup>

Over a decade later, Justice Kennedy's rise as the swing vote in the Supreme Court created full majority support behind Blackmun's *Bowers* dissent's views on morality. For example, *Planned Parenthood of Southeastern Pennsylvania v. Casey* presented the recurring issue of whether the Due Process Clause protects the right to abortion.<sup>71</sup> The Court reaffirmed *Roe v. Wade*'s holding that liberty includes the right to an abortion.<sup>72</sup> Once again, the Court discussed the State's interest in morality after holding that the State's other interests in human life: showing respect to the fetus and protecting the health and safety of the mother did not justify a complete prohibition on abortion prior to viability.<sup>73</sup> The Court rejected the State's interest in morality, noting that "[s]ome of us as individuals find abortion offens[ive] to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."<sup>74</sup> Justice Kennedy expressed this same stance on morality in *Lawrence v. Texas*.<sup>75</sup> *Lawrence* presented an almost identical question as *Bowers*: whether a State can make it a crime for two persons of the same sex to engage in certain intimate sexual conduct.<sup>76</sup> Referring to Justice Stevens's dissent in *Bowers*, Justice Kennedy held that "the fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."<sup>77</sup>

To be sure, the Supreme Court's stance on the use of moral interests to burden constitutional rights has remained inconsistent. For example, in *Planned Parenthood v. Casey*, the Supreme Court upheld a State's requirement that unemancipated minors obtain parental consent before they receive an abortion.<sup>78</sup> The Court reasoned that "the waiting period . . . may provide the parent or parents . . . to discuss the consequences

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<sup>68</sup> *Id.* at 212.

<sup>69</sup> *Id.* at 213.

<sup>70</sup> *Id.* at 210 (internal quotation marks omitted).

<sup>71</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

<sup>72</sup> *Id.*

<sup>73</sup> *Casey*, 505 U.S. at 869-71.

<sup>74</sup> *Id.* at 850.

<sup>75</sup> *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).

<sup>76</sup> *Id.* at 562 ("The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct."); *Casey*, 505 U.S. at 562.

<sup>77</sup> *Lawrence*, 539 U.S. at 560.

<sup>78</sup> *Casey*, 505 U.S. at 899-900.

of her decision in the context of the values and *moral or religious* principles of their family."<sup>79</sup> The Court further held that "the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy . . . ."<sup>80</sup> These holdings make clear that the State can feed its moral beliefs to people seeking abortions by placing substantial administrative burdens on the right. Similarly, in *Gonzales v. Carhart*, the Supreme Court upheld a ban on the much safer intact dilation and evacuation ("D&E") abortion procedure on the grounds that the that prohibition "implicates additional ethical and *moral* concerns that justify a special prohibition."<sup>81</sup>

**B. The Supreme Court should continue to reject morality as a justification for burdening constitutional rights.**

The morality brain scan study supports a return to the Supreme Court's insistence that governmental actors be barred from burdening constitutional rights under the guise of morality. Strict scrutiny "is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker" for burdening constitutional rights.<sup>82</sup> But if, as the morality study demonstrates, the meaning of the term morality varies significantly from person to person such that it cannot be pinned down, courts cannot truly understand what governmental actors *mean* when they evoke morality. Accepting moral interests would therefore prevent courts from carefully scrutinizing the interest as required by law. Thus, if moral justifications were deemed sufficient, they would become dangerous tools that government actors could use to burden constitutional rights in any and all situations without careful scrutiny.

This does not mean that governmental actors cannot introduce interests based in morality as justifications to burden constitutional rights. So long as those actors articulate their interests in clear language that does not invoke the term "morality," and courts can understand and scrutinize the nature of the interest, they should not be rejected on a *per se* basis.

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<sup>79</sup> *Id.* (emphasis added).

<sup>80</sup> *Id.* at 872.

<sup>81</sup> *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (emphasis added).

<sup>82</sup> *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

## VI. WHEN MORAL INTERESTS ARE SUFFICIENT JUSTIFICATIONS IN THE LAW: LIBERATION THEOLOGY

While morality is a dangerous tool for burdening constitutional rights, marginalized communities have historically used it as tool for hope and liberation by weaving it into the fabric of their movements for radical change and liberation. This section will argue that under an abolitionist reading of the Reconstruction Amendments, liberation theology—the historical use of morality as a language of radical political change—must be given special weight to properly elevate marginalized voices.

Liberation theology "generally refers to a theology applied to the core concerns of marginalized communities in need of social, political, or economic equality and justice."<sup>83</sup> During the mid-20<sup>th</sup> century, clergy members and members of the oppressed classes of Latin America united to "reclaim religion towards the pursuit of social justice"<sup>84</sup> in response to the Catholic Church's alignment with upper classes.<sup>85</sup> Liberation theology encouraged people to become active agents of their own destiny and in effect to liberate themselves from the confines of injustice.<sup>86</sup> Authors have written that "liberation theology reminded Christians, and continues to remind them at every turn, that morality should give primary to social concerns . . . ."<sup>87</sup>

In the United States, marginalized communities have engaged in Liberation Theology to articulate moral justifications for anti-racist, feminist, and anti-capitalist changes. Feminist theologians argued that while other theologians were focused primarily on class and black theologians were focused primarily on race, none of these male liberationists focused on gender oppression. Some feminist theologians read biblical texts to uncover misogyny embedded in theology that has been used to further gender oppression. Today, for example, the Feminist Liberation Theologians' Network is a cross-faith educational center that links U.S. and

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<sup>83</sup> Anthony B. Bradley, *Liberation Theology*, OXFORD BIBLIOGRAPHIES (last modified Jun. 28, 2016), <https://www.oxfordbibliographies.com/view/document/obo-9780190280024/obo-9780190280024-0019.xml> [<https://perma.cc/N65U-JJML>].

<sup>84</sup> Olivia Singer, *Liberation Theology in Latin America*, in MODERN LATIN AM. WEB SUPPLEMENT FOR 8TH EDITION (ebook), <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-15-culture-and-society/essays-on-culture-and-society/liberation-theology-in-latin-america/> [<https://perma.cc/TXJ8-G95R>].

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> M. Cathleen Kaveny & James F. Keenan, *Notes on Moral Theology 1994: Jesus and Christian Ethics*, 56 THEOLOGICAL STUDIES 92, 108 (1995).

Canadian feminist scholars, ministers, and activists dedicated to eco-feminist work.<sup>88</sup>

Black slaves rooted their liberation in religion and morality well before the coining of an official liberation theology movement. Although most Africans brought to the U.S. to be slaves were not Christians when they arrived, many of them and their descendants "embraced Christianity, finding comfort in the Biblical message of spiritual equality and deliverance"<sup>89</sup> likely because the church was the only institutions in which slaves were allowed to partake.<sup>90</sup> Religion signified freedom and salvation—"[slaves] saw the story of Moses freeing his people from captivity and related it to their struggles."<sup>91</sup> In the 19<sup>th</sup> century, black churches focused on abolition, with ministers and community members organizing the Underground Railroad.<sup>92</sup> After abolition and during reconstruction, churches continued to serve as "community centers where people could come together and voice their political concerns . . . ."<sup>93</sup> Churches were also used as school-houses, banks, insurance companies, and business enterprises and they also founded hospitals, nursing homes, and orphanages.<sup>94</sup>

The origins of an official Black liberation theology can be traced to James Hal Cone, who drew inspiration from 1960s civil-rights activism and specifically Martin Luther King Jr. and Malcolm X, both of whom inflected their own notions of morality into their philosophies of liberation and change. For example, for Malcolm X, the Nation of Islam provided "an essential foundation for the black power movement [and] emphasized black pride, economic independence, and the rejection of American popular music and entertainment."<sup>95</sup> Both Dr. King and Malcolm X "used churches as mobilization centers in their attempts to equip African Americans with political information and the frame of minded needed for political change."<sup>96</sup> Reverend Cone, now a professor at the Union Theological Seminary in New York, says that liberation theology is "mainly a theology that sees God as concerned with the poor and the

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<sup>88</sup> *Feminist Liberation Theologians' Network*, WATER WOMEN'S ALLIANCE, <https://www.water-womensalliance.org/feminist-liberation-theologians-network/> [<https://perma.cc/Z4LP-3A2R>].

<sup>89</sup> David Masci, *5 Facts About the Religious Lives of African Americans*, PEW RES. CTR. (Feb. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/02/07/5-facts-about-the-religious-lives-of-african-americans/> [<https://perma.cc/3PU9-L35M>].

<sup>90</sup> Chansé Jamal Travis, *The Political Power of the Black Church 6* (Aug. 2015) (Ph.D. dissertation, University of Mississippi), <https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1787&context=etd> [<https://perma.cc/8WNW-CASL>].

<sup>91</sup> *Id.* at 7.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 8.

<sup>94</sup> *Id.*

<sup>95</sup> *Religion and Black Power*, NAT'L MUSEUM OF AFRICAN AM. HISTORY & CULTURE, <https://nmaahc.si.edu/blog-post/religion-and-black-power> [<https://perma.cc/8YG6-A7PB>].

<sup>96</sup> Travis, *supra* note 91, at ii.

weak"<sup>97</sup> and "a survival theology, because it helps blacks navigate white dominance in American culture."<sup>98</sup>

Today, Black churches are immersed in political issues they view as central to liberation of Black communities. For example, some churches hold special services with the theme "Black Lives Matter," and faith groups have been calling for a new national dialogue about race under the justification that churches should "choose[] to show up intentionally against all given societal values of supremacy and superiority or common-sense complacency."<sup>99</sup> Other churches have expressed support for affirmative action because "it is in fact a *moral* obligation to racial equity."<sup>100</sup> Indeed, one study on the influence of Black churches on their congregations' political involvement found that attendance at an electorally active church made members more likely to support affirmative action and abortion rights.<sup>101</sup>

Donald Trump's election sparked a resurgence of Christian leftism in the U.S.<sup>102</sup> For instance, the Poor People's Campaign is a movement built on moral activism committed to direct action through waves of non-violent civil disobedience that confront systemic racism, poverty, ecological devastation, militarism, and the war economy.<sup>103</sup> The movement views morality as the vehicle through which to "lift the voices and faces of poor and low-wealth Americans and their moral allies."<sup>104</sup> The Red Letter Christians issues blogs, newsletters, and podcasts, and it holds gatherings to teach anti-capitalist, radical Christian values.<sup>105</sup>

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<sup>97</sup> Barbara Bradley Hagerty, *Black Liberation Theology, in its Founder's Words*, NPR (Mar. 31, 2018), <https://www.npr.org/templates/story/story.php?storyId=89236116> [https://perma.cc/TYZ4-R8QP].

<sup>98</sup> Anthony B. Bradley, *The Marxist Roots of Black Liberation Theology*, ACTION INST. (Apr. 02, 2008), <https://acton.org/pub/commentary/2008/04/02/marxist-roots-black-liberation-theology> [https://perma.cc/ULC7-EL6D].

<sup>99</sup> See, e.g., *Why "Black Lives Matter"*, UNITED CHURCH OF CHRIST, [https://www.ucc.org/justice\\_racism\\_black\\_lives\\_matter](https://www.ucc.org/justice_racism_black_lives_matter) [https://perma.cc/RQY9-7STD].

<sup>100</sup> *Affirmative Action*, UNITED CHURCH OF CHRIST, [https://www.ucc.org/justice\\_racism\\_affirmative-action](https://www.ucc.org/justice_racism_affirmative-action) [https://perma.cc/JGX6-5XSG].

<sup>101</sup> Chanese Jamal Travis, *The Political Power of The Black Church* (Aug. 2015) (unpublished Ph.D. dissertation, University of Mississippi) (<https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1787&context=etd>) [https://perma.cc/Y6B8-FAK5].

<sup>102</sup> Eric C. Miller, *The Radical Rise of Liberation Theology: An Interview with Lilian Calles Barger*, RELIGION & POLITICS (Sept. 25, 2018), <https://religionandpolitics.org/2018/09/25/the-radical-rise-of-liberation-theology-an-interview-with-lilian-calles-barger/> [https://perma.cc/8G5M-9SR2] (observing that, since Donald Trump has taken office, "[g]roups like the Poor People's Campaign and the Red Letter Christians have taken to the streets, crowding into state houses and getting arrested, harkening all along to the civil rights movement.").

<sup>103</sup> See generally *About the Poor People's Campaign: A National Call for Moral Revival*, POOR PEOPLE'S CAMPAIGN, <https://www.poorpeoplescampaign.org/about/> [https://perma.cc/R334-6763].

<sup>104</sup> *Id.*

<sup>105</sup> Missions & Values, RED LETTER CHRISTIANS, <https://www.redletterchristians.org/mission-values/> [https://perma.cc/C2TR-JBWN].

In addition to serving as a call for radical political changes, morality also serves a function of translation. To better understand this function, consider for example that the experiences of marginalization, such as racism, are often disavowed by those who have not experienced these systems or who otherwise benefit from their existence.<sup>106</sup> The Black Lives Matter movement faces extreme pushback from those who are quick to proclaim that we live in a post-racial world after Barack Obama was elected president. "Morality," as a word that carries meanings that are often unknowable and unconfirmable, can be a vehicle of understanding because it is still given considerable weight. Thus, the very fact that morality is so subjective and amorphous is what allows a listener to acknowledge and affirm the reality of experiences of marginalization that give meaning to the speaker's invocation of morality, even while the listener cannot fully comprehend those experiences. In this way, morality can serve as a translation device between marginalized and non-marginalized communities.

An abolitionist reading of the Constitution instructs courts to give added weight to marginalized communities' moral calling to justice and liberation. Past freedom activists interpreted the Constitution as an abolitionist document: "many antislavery activists viewed the Constitution as a foundation for their arguments and for developing an alternative reading that called for freedom and democracy."<sup>107</sup> Professor Roberts argues that even while courts have interpreted the Reconstruction Amendments as retreating from slavery's eradication, "abolitionists need not be shackled to the prevailing constitutional jurisprudence in advancing the unfinished freedom struggle."<sup>108</sup> Roberts puts forward that "abolitionists can affirm the aim of antebellum abolitionists to radically dismantle the institution of slavery and also demonstrate, with the benefit of historical hindsight and sustained abolitionist theorizing, that this objective requires abolishing prisons altogether by replacing them with new institutions that incorporate black people fully into a free society."<sup>109</sup> Abolition constitutionalism should use "the Constitution to build a society based on principles of freedom, equal humanity, and democracy."<sup>110</sup>

Justice Thomas has at times endorsed a kind of abolitionist reading of the Constitution. In a concurring opinion upholding a state program providing tuition for "inner-city" Black students' attendance at religious

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<sup>106</sup> See, e.g., Afua Hirsch, *I've Had Enough of white People Who Try To Deny My Experience*, THE GUARDIAN (Jan. 24, 2018), <https://www.theguardian.com/commentisfree/2018/jan/24/white-people-tv-racism-afua-hirsch> [<https://perma.cc/7PZ5-BNS7>] ("To be black, in a society that invented race for the specific purpose of dehumanising people who are black, and then invented an equally formidable system of denial, is to carry the burden of history that others would rather forget.").

<sup>107</sup> Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 8 (2019).

<sup>108</sup> *Id.* at 105.

<sup>109</sup> *Id.* at 109.

<sup>110</sup> *Id.* at 110.

schools, Justice Thomas emphasized that Black liberation was one of the "core purposes of the Fourteenth Amendment."<sup>111</sup> Thomas argued that the Fourteenth Amendment gave States greater latitude in dealing with matters of religion and education because "[a]t the time of Reconstruction, blacks considered public education a matter of personal liberation and a necessary function of a free society."<sup>112</sup>

Under an abolitionist reading of the Constitution, the history of marginalized communities' engagement with morality as a tool for liberation should add constitutional weight to their moral interests. Insofar as these moral callings are based on principles of freedom, equal humanity, and democracy for marginalized communities, an authentic reading of the Reconstruction Amendment requires their prioritization. Thus, moral support for affirmative action from marginalized communities must be given overwhelming weight, even if affirmative action should be subject to constitutional scrutiny. The Supreme Court's overbroad and un-nuanced disavowal of moral interests in its Fourteenth Amendment jurisprudence therefore belies the amendment's abolitionist purposes. By disavowing *any* claims to morality, the Justices effectively shut down the moral stances the amendment meant to centralize abolition, preventing marginalized communities from importing their moral interests in politics and effectively dismantling many of their political voices.

## VII. CONCLUSION

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>113</sup>

State justifications for burdening liberty interests are as central to freedom as liberty itself. Courts therefore have an obligation to consider new insights that reveal the impropriety of these justification. This article contends that courts should recognize that the use of moral interests to

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<sup>111</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 682 (2002) (Thomas, J., concurring).

<sup>112</sup> *Id.* at 681-82 (internal quotation omitted).

<sup>113</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

burden liberty undermines the jurisprudence the court established to protect liberty. The meaning of "morality" oscillates too greatly between individuals for courts to closely scrutinize, making it a dangerous tool for constricting constitutional rights. and further that moral factors courts should be consider instead to recognize and expand liberty interests.