California Law Review

VOL. 86 DECEMBER 1998 NO. 6

The Non-Retrogression Principle in Constitutional Law

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Recent and otherwise unrelated Supreme Court opinions take a peculiar approach to defining constitutional norms. According to these opinions, government acts unconstitutionally when it reduces pre-existing protection of some favored interest, but not when it arrives at the same place via a different route. The direction of movement takes precedence over the substantive content of the law. The authors call this approach "non-retrogression." In its purest form, the non-retrogression principle holds that government may extend protection beyond what the Constitution requires, but it cannot retreat from that extension once made. While variations on non-retrogression have been sensibly employed in statutory contexts—most prominently, under Section 5 of the Voting Rights Act—this Article questions non-retrogression as a principle of constitutional law. After locating the birth of non-retrogression as a constitutional principle in Warren Court race cases, the authors describe its renaissance in recent constitutional cases, most prominently Romer v. Evans *and the litigation over California's Proposition 209. This Article proceeds to explore the doctrinal, conceptual, and jurisprudential weaknesses of non-retrogression as a principle of constitutional*

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We are grateful to Mike Klarman, Mike Seidman, David Strauss, and Bill Stuntz for helpful comments, and to David Osswald and David Turk for research assistance.

law. It compares non-retrogression to other constitutional doctrines that confuse procedure and substance and juxtaposes it to the jurisprudence of traditionalism. Finally, the authors suggest that the recent reemergence of non-retrogression is symptomatic of broader problems with the current Supreme Court's approach to constitutional law. While the Rehnquist Court borrowed from the Warren Court both the non-retrogression principle and the habit of judicial activism, the authors argue, it lacks a comparable agenda that would give direction to non-retrogression by pointing to which way is forward.

In 1996, the Supreme Court issued two unrelated decisions reflecting a surprising common theme. In *Romer v. Evans*,[1] the Court struck down a Colorado constitutional amendment barring anti-discrimination laws based on homosexual orientation. In *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*,[2] the Court invalidated certain provisions of a federal statute regulating cable television. Though substantively dissimilar, both decisions take the same approach to the task of defining constitutional norms. In both cases, the Court insists that the constitutionality of a particular state of affairs depends on how we got there. Government acts unconstitutionally when it reduces pre-existing protection of some (presumably favored) interest but not when it arrives at the same place by a different route. The direction of movement takes precedence over the content of the law.

The archetype of this approach is non-retrogression: government can extend protection beyond what the Constitution requires, but it cannot retreat from that extension once made. The Constitution becomes a ratchet, allowing change in one direction only. Consequently, whether a given law will be judged constitutional depends on the state of affairs that existed before the change.

While no Supreme Court decision endorses non-retrogression pure and simple, *Romer* and *Denver Area Telecommunications* are variations on the theme. Under a plausible reading of these opinions, non-retrogression does the real work of constitutional analysis. Though the Court's effort to disguise its reliance on that principle requires the stripping away of extraneities, we think that some version of non-retrogression is fundamental to both decisions.

Our aim in this Article is to reveal non-retrogression as a conceptual foundation of *Romer* and *Denver Area Telecommunications*, to trace the lineage of that idea, and to expose its inadequacies as a

1. 517 U.S. 620 (1996).
2. 518 U.S. 727 (1996).

principle of constitutional law. We begin in Part I by considering an example of non-retrogression that makes sense—its use in the Voting Rights Act.[3] A brief look at this statute sets the stage for analysis of the troublesome use of non-retrogression as a constitutional principle. Part II's discussion begins with *Romer*'s intellectual antecedents in race cases and then moves to an extensive examination of *Romer*, *Denver Area Telecommunications*, and other modern developments. In Parts III and IV, we explore the doctrinal, conceptual, and jurisprudential weaknesses of non-retrogression as a principle of constitutional law. We conclude with broad-ranging comments on non-retrogression as symptomatic of more pervasive problems in the current Supreme Court's approach to constitutional law.

I
NON-RETROGRESSION IN THE VOTING RIGHTS ACT

As a legal strategy, non-retrogression is not necessarily incoherent. It is put to understandable use in Section 5 of the Voting Rights Act, which requires covered jurisdictions to seek federal preclearance of any change in voting procedures by showing that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ."[4] The Supreme Court has read this requirement to forbid changes that would "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[5] Preclearance thus depends on whether minority political power would decrease if the proposal went into effect. Existing minority political power constitutes the baseline, and non-retrogression describes the permissible direction of change. Section 5 does not require any absolute level of minority success or influence, nor does it condemn all disadvantageous electoral structures. Even the most burdensome of arrangements can remain in place if they predate the Act or a particular jurisdiction's inclusion in the coverage of the Act. Section 5 forbids only changes that would make minority success less likely.

3. 42 U.S.C. § 1973 (1994).

4. *Id.* § 1973(c). Only the Attorney General or the U.S. District Court for the District of Columbia can grant preclearance. Therefore, all proposed changes must flow through Washington, strategically bypassing both local officials and local federal courts. Virtually any practice or procedure that could be construed as relating to voting is subject to the preclearance requirement. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969) ("Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.").

5. Beer v. United States, 425 U.S. 130, 141 (1976).

Under the Voting Rights Act, Section 5 non-retrogression complements the Section 2 prohibition on vote dilution.[6] In some situations, however, non-retrogression is the only viable enforcement mechanism. For example, when black voters sought to replace a single-member county commission with five single-member districts, one of which would contain a black majority, the Supreme Court rejected this argument because it could find no principled benchmark for the size of government bodies.[7] Even the smallest minority population could elect the candidate of its choice if districts were multiplied indefinitely. Without some baseline of "normal" or "appropriate" commission size, the vote dilution claim failed. In such situations, non-retrogression comes to the fore. It does not eliminate existing single-member commissions, but it does prevent the creation of new ones. Counties with existing five-member commissions cannot reduce the size to three or one if that change would impair the ability of black voters to elect the candidate of their choice. Non-retrogression thus provides some protection to minority voters without threatening the wholesale federalization of the structure of state and local governments.

Even as used in the Voting Rights Act, non-retrogression has obvious shortcomings. It does not cure existing evils; it only forbids new ones. Moreover, there is something unsettling in the patchwork regime it creates. A one-, three-, or five-member commission may be lawful in one county but not in its neighbor. Notwithstanding these flaws, non-retrogression in the Voting Rights Act is neither illogical nor incoherent. By freezing beneficial procedures in place, it "shift[s] the advantage of time and inertia from the perpetrators of the evil to its victims."[8] Future movement must be toward the Act's goal of increasing minority political power. As used in the Voting Rights Act, non-retrogression is admittedly incomplete and perhaps unwise, but it cannot

6. Section 2 bars any voting practice or procedure that results in minorities having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Whereas the benchmark for non-retrogression is simply the existing electoral scheme (no matter what it looks like), the benchmark for Section 2 vote dilution is some hypothetical voting scheme under which minorities would enjoy "undiluted" political power. Section 5's non-retrogression provision, which focuses on changes, thus works in tandem with Section 2's non-discrimination approach, which focuses on present effects. In the absence of a non-retrogression provision, jurisdictions might thwart enforcement of Section 2 by substituting new discriminatory voting procedures as fast as the old ones were invalidated. *See* H.R. REP. NO. 94-196, at 57-58 (1994) ("Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down."). On the relationship between Sections 2 and 5 of the Act, see Reno v. Bossier Parish School Board, 117 S. Ct. 1491 (1997); Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439 (1996).

7. *See* Holder v. Hall, 512 U.S. 874, 885 (1994).

8. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

be condemned as irrational. In this context, non-retrogression makes sense.

It makes sense because—and only because—some authoritative institution has declared (or everyone has agreed upon) a substantive goal. Ratcheting change in one direction is a coherent legal strategy if and only if one knows which way to go.[9] Non-retrogression in the Voting Rights Act and in certain other federal statutes[10] makes sense precisely because, and only to the extent that, the desirability of moving in one direction rather than another has been authoritatively determined. While such a determination is not sufficient to justify a non-retrogression strategy, it is strictly necessary. Unless and until there has been a determination that the specified direction is normatively desirable, mandating non-retrogression would be analytically incoherent and substantively pointless.

II
NON-RETROGRESSION IN CONSTITUTIONAL LAW

A. The Race Cases

Non-retrogression got a foothold in constitutional law in race cases. Repeatedly, the Supreme Court struck down attempts to remove pre-existing legislative powers to extend fair housing or school desegregation protections. In each of these cases, non-retrogression was the operative rule; yet in each the Court tried to find some other basis for decision. Perhaps sensing the vulnerability of non-retrogression, the Court shied away from explicit reliance on the principle. Nonetheless, we think the use of non-retrogression in the race cases made practical sense. The story is complicated, but a review of the race cases reveals non-retrogression in service of an intelligible and defensible substantive agenda.

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9. This point is illustrated by current controversies surrounding the Voting Rights Act. After *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), a jurisdiction that purposefully draws majority-minority districts in order to avoid retrogression in minority political power resulting from demographic changes may violate the Equal Protection Clause. Here the idea of intentionally increasing the political power of racially-defined minorities has come into conflict with the opposition to race consciousness of any kind in government decisions. Where the substantive goals are disputed, non-retrogression will be also.

10. Another example of statutory non-retrogression comes from environmental law. For the past few decades, federal regulatory regimes controlling air and water pollution have implemented a nondegradation policy, freezing in place some historical baseline of air or water quality as a floor that must at least be preserved absent some compelling social or economic value in polluting above this level. *See generally* John Harleston, *What Is Antidegradation Policy: Does Anyone Know?*, 5 S.C. ENVTL. L.J. 33 (1996) (discussing nondegredation policy); N. William Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 IOWA L. REV. 643 (1977) (same).

First came *Reitman v. Mulkey*.[11] In reaction to fair housing legislation, California voters amended their state constitution to prohibit laws limiting an individual's right to refuse to sell, lease, or rent real property to "such person or persons as he, in his absolute discretion, chooses."[12] The Supreme Court held this amendment unconstitutional. The Court admitted that California was not constitutionally required to maintain fair housing laws and denied any intent to limit the "mere repeal" of such laws, but found that the amendment "encourage[d]" or "authorize[d]" private discrimination.[13] Of course, insofar as it permitted or constrained private behavior, the law in California after the constitutional repeal of fair housing was precisely the same as if such legislation had never been enacted in the first place. Consequently, *Reitman* left uncertain what, if anything, distinguished the invalid amendment to override anti-discrimination laws from the supposedly permissible "mere repeal" of such laws or, indeed, from the failure to enact them in the first place.

Hunter v. Erickson[14] purported to clarify this. When the Akron city council enacted a fair housing ordinance, the voters amended the city charter to require referendum approval of any ordinance addressing racial (or religious) discrimination in housing. The Supreme Court held the amendment unconstitutional, once again insisting that the ruling would not apply to the "mere repeal of an existing ordinance."[15] The real problem with the charter amendment, said the Court, was that it erected a special hurdle in the political process for racial (or religious) minority groups who were likely to support fair housing laws.[16] Unlike other groups seeking other kinds of legislation, minorities seeking anti-discrimination legislation had to initiate and prevail in a city-wide referendum. According to the Court, the charter amendment amounted to "an explicitly racial classifieation" treating anti-discrimination legislation differently from other matters.[17] *Hunter* thus seems to say that a state violates equal protection when it repeals measures beneficial to racial minorities if such measures can be re-enacted only at a higher and therefore more difficult level of the political process. Only such

11. 387 U.S. 369 (1967).

12. *Id.* at 371 (quoting CAL. CONST. art. I, § 26). The Constitution of California provided that

> [n]either the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Id. (quoting CAL. CONST. art. I, § 26).

13. *Id.* at 376.

14. 393 U.S. 385 (1969).

15. *Id.* at 390 n.5.

16. *See id.* at 389-91.

17. *Id.* at 389.

"higher-level" repeals would impose the political burden on minorities that the *Hunter* Court found dispositive.

The Court applied the reasoning of *Hunter* to school busing in *Washington v. Seattle School District No. 1*.[18] In *Seattle*, the local school district voluntarily agreed to bus children to achieve racial balance in the city's schools, even though no finding of de jure segregation compelled such action. In response, Washington voters passed a statewide initiative prohibiting local school boards from busing to remedy de facto segregation.[19] Relying on *Reitman* and *Hunter*, the Court held the initiative unconstitutional. Justice Blackmun reasoned that desegregation "inures primarily to the benefit of the minority, and is designed for that purpose."[20] Although nothing barred the "simple repeal"[21] of constitutionally gratuitous desegregation, the initiative violated equal protection because it effected a "race-conscious restructuring"[22] of the political process "by lodging decision-making authority over the question at a new and remote level of government."[23] As in *Hunter*, the constitutional defect in *Seattle* apparently depended on the higher-level repeal of preexisting anti-discrimination policies.[24]

In each of these cases, the trigger of unconstitutionality was retrogression—movement from a position where some unit of state government could benefit minorities through open housing or school busing—to a position where it could not. In a sense, these cases involve double retrogression: first, withdrawal of some substantive entitlement (such as fair housing protections), and second, retreat to a higher and presumably less favorable level of political decision. Although these two levels

18. 458 U.S. 457 (1982).

19. *See id.* at 462-63 (citing WASH. REV. CODE §§ 28A.26.010-28A.26.900 (1981)). In Washington, an initiative is beyond legislative repeal for two years, although a supermajority vote may amend it. *See id.* at 462 n.4.

20. *Id.* at 472.

21. *Id.* at 483.

22. *Id.* at 485 n.29.

23. *Id.* at 485.

24. One might have thought that this reasoning would control in *Crawford v. Board of Education*, 458 U.S. 527 (1982). When the Supreme Court of California held that the state constitution barred even de facto segregation in public schools, California voters amended the state constitution to forbid state courts to order forced busing beyond that required to remedy de jure segregation. (They remained free to remedy de facto segregation by other means.) Just as in *Seattle*, the authority to order busing was removed from a sub-unit of state government by higher lawmaking. Yet the Court said that *Crawford*, unlike *Seattle*, involved a constitutionally permissible "mere repeal." *Id.* at 540. This conclusion rested on an exquisitely formal view of constitutional adjudication. According to the Court, the availability of a busing remedy for de facto segregation was granted in the first instance by the state constitution, not by the state courts. State courts did not create new rights; they merely enforced existing, if undiscernible, rights created elsewhere. On this view, amending the constitution to narrow the availability of busing was not a higher-level repeal but a same-level repeal. As the *Crawford* Court reiterated, "[T]he simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539.

of retrogression occurred in tandem, it apparently was the second that the Supreme Court found so objectionable. The Court took pains to stress that the "mere repeal" of constitutionally gratuitous laws is permissible, provided that the repeal is accomplished at the same level as the original action, without restructuring of the political process. Thus, it is constitutional for Akron to enact a fair housing ordinance and for Akron to repeal a fair housing ordinance, so long as the mechanism of repeal tracks the mechanism of enactment.

The Court's insistence on the constitutionality of mere repeal reflects an important assumption. The Court sees the mere repeal of laws or policies beneflcial to minorities not as racial discrimination but as a retreat to a permissible position of neutrality.[25] On that understanding, the defect in *Reitman*, *Hunter*, and *Seattle* is hard to spot.

One might speculate that the difference between a "inere repeal" and an unconstitutional one in these cases is the presence of a racially discriminatory purpose.[26] Indeed, at one point the Court suggested that even a mere, saine-level repeal would be unconstitutional if its purpose were "to disadvantage a racial minority."[27] Of course, if disadvantage is assessed relative to the status quo ante, then a purpose to disadvantage is tautologically present. If racial minorities are the chief beneficiaries of anti-discrimination laws or school busing, as the Court assumes, then the repeal of such laws will always disadvantage minorities, and the backers of such repeals will always intend that result.

Conceptually, it may be possible to distinguish intent from discriminatory motive or purpose. An individual might intend to take action with knowledge that such action will disadvantage minorities but without the motive to injure.[28] In this rather specialized sense, discriminatory purpose describes either overt animus or, in practical terms, the absence of legitimate reasons for the action taken. In most cases, the finding of discriminatory purpose would depend on the scrutiny of alternative motivations or concerns. Must they be merely plausible, or must they be convincingly shown? Does it suffice that the legitimate motivations are sincere, or do they have to meet some judicial standard of validity or importance?

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25. *See id.* at 538 ("[T]he Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters."); *Seattle*, 458 U.S. at 485 ("[Not] every attempt to address a racial issue gives rise to an impermissible racial classification.").

26. *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 980-81 (1989) (exploring the problematic inquiry into discriminatory intent in these cases).

27. *Crawford*, 458 U.S. at 539 n.21.

28. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (explaining that a finding of discriminatory purpose "implies that the [legislature]... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group").

Even at the level of an individual actor, such distinctions are paper thin. At the level of a referendum electorate, they are quite impossible. Some backers of fair housing repeals or anti-busing initiatives undoubtedly have a conscious objective to disadvantage minorities. Many more act without a purpose to injure but with a discounting of minority concerns that many would equate with such a purpose.[29] Even for those who assert good and sufficient reasons, questions of credibility remain. The prospect of a court trying to disentangle these strands to determine whether a referendum limiting fair housing laws reflected (predominantly? substantially? or to some degree?) a discriminatory purpose is truly daunting. The difference between valid and invalid actions would depend on a characterization which the facts would always allow but never compel.[30]

Moreover, if a discriminatory purpose makes repeal of beneficial legislation or the authority to enact it unconstitutional, then it should also make unconstitutional the failure to enact such legislation or to grant such authority in the first instance.[31] Indeed, on the same reasoning, one might say that the election of one candidate over another is unconstitutional if that result is found, by whatever means, to reflect racial bias in the electorate.

Of course, some difficulties of this sort are inevitable in a doctrinal regime that focuses on intentional discrimination. We have great sympathy for the difficulties that the Court would have faced had it tried to determine whether the barriers to fair housing legislation in *Reitman* and *Hunter* were somehow more reflective of discriminatory intent than the failure of other jurisdictions ever to enact such legislation. It would be interesting indeed to learn whether the *Seattle* Court really viewed the motivations of the voters in Washington state as somehow more diabolical than those of the voters in Massachusetts or Mississippi. Such inquiries would not have been easy and perhaps could not have been convincingly resolved, but at least we would have known what question the Court was asking and why.

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29. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection*, 39 STAN. L. REV. 317 (1987) (describing how racially discriminatory decisions can result from unconscious racial motivations).

30. On the unique difficulties of divining the intent of popular referenda, see Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1513-22 (1990); Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 123-47 (1995).

31. *See* Strauss, *supra* note 26, at 981 n.120. *But see* Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 160-61 (arguing that repeals are especially likely to reflect discriminatory purpose).

In fact, however, there is no indication that *Reitman*, *Hunter*, and *Seattle* are really about discriminatory intent.[32] Nothing in the Court's opinions suggests awareness, let alone acceptance, of the difficulties and implications of such an inquiry. Rather, the Court attempts to avoid both the inadequacies of simple non-retrogression and the implications of focusing on discriminatory purpose in the political process. The key, says the Court, is the greater difficulty of reversing a decision made at a "higher level." It is the withdrawal of political decision-making to a more remote and presumably less favorable level of government that violates minority rights.

Yet this reasoning has defects no less grave than those it seeks to avoid. The Court fails to explain the difference between restructuring the political process to deprive minorities of effective participation and simply defeating these minorities in a political process that was, and remains, open to all.[33] Proponents of anti-discrimination laws or school busing can attempt to reverse unfavorable referendum results at the same level and by the same process used to obtain those results. The real barrier facing racial minorities in the political process is that they may also be political minorities, unable to garner the votes to win.

The implications of the Court's reasoning reveal its fragility. If the burden of reversing a decision made at a higher level violated the Constitution, all higher-level decisions would be constitutionally suspect. The right of access to an unburdened political process is presumably enjoyed not only by those who support laws beneficial to racial minorities but also by those who oppose or support the death penalty, those who demand or resist equalization of school funding, those who favor or disfavor local control of real property taxes, etc. If the supposed unconstitutionality of the burden of higher-level repeals were taken seriously, it would impeach the validity of state constitutional provisions on a wide range of subjects.

Capital punishment is a particularly rich example. Four state constitutions affirmatively sanction capital punishment,[34] thus imposing the burden of higher-level political action on those who seek its abolition. In two of these states, California and Massachusetts, the provision was added to overrule state judicial decisions invalidating capital

32. If they were, *Crawford* would have required the same inquiry. The Court's reason for upholding California's override of constitutionally gratuitous busing would be wholly irrelevant to an inquiry into discriminatory intent. *See supra* note 24.

33. *See* Louis Michael Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1997 SUP. CT. REV. 67, 76 (1996).

34. *See* CAL. CONST. art. I, § 27; MASS. CONST. pt. I, art. XXVI; N.C. CONST. art II, § 2; OR. CONST. art. 1, § 40.

punishment, which is a form of retrogression.[35] On the other hand, at least one state constitution forbids capital punishment,[36] thus imposing the burden of higher-level political action on those who support it. So far as we know, no one seriously believes that these provisions effect an unconstitutional distortion of the political process. Yet that result is precisely the culmination of the *Reitman-Hunter-Seattle* logic and its focus on the unconstitutionality of higher-level repeals. Indeed, the Court's reasoning suggests that state constitutionalism itself should be unconstitutional. As Kenneth Karst and Harold Horowitz said of *Reitman* years ago, "They couldn't really have meant *that*!"[37]

Shortly after *Reitman* and *Hunter*, the Justices made plain that they did not really mean that. In *James v. Valtierra*,[38] the Court upheld a California constitutional amendment requiring local voter approval of public housing projects. The amendment overturned a state court decision that had insulated local authorities from initiatives and referenda on these issues. The Supreme Court could have said that a state constitutional amendment reversing a judicial interpretation of the state constitution is a same-level rather than a higher-level repeal and, therefore, does not restructure the political process, as *Hunter* prohibits. Instead, the *James* Court dismissed *Reitman* and *Hunter* for a less subtle reason. As Justice Black put it, "Unlike the Akron referendum provision [in *Hunter*], it cannot be said that California's [amendment] rests on 'distinctions based on race.'"[39] *James* was not about race, but about poverty. The Court ridiculed the notion that non-retrogression had constitutional meaning independent of race: "But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group."[40]

James confirms that the *Reitman-Hunter-Seattle* line of cases is primarily about race and only secondarily about non-retrogression. The doctrine they create is admittedly peculiar. States and localities are free not to enact laws against racial discrimination; if enacted, such laws may be repealed by the same political process that gave them birth; but,

35. *See* People v. Anderson, 493 P.2d 880 (Cal. 1972); District Attorney for Suffolk Dist. v. Watson, 411 N.E.2d 1274 (Mass. 1980).

36. *See* MICH. CONST. art. 4, § 46; *see also* James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1322-23 (1989).

37. Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 52 ("We have now examined all the individual reasons stated in the majority opinion, and with respect to each one it seems proper to conclude: 'They couldn't really have meant *that*!'").

38. 402 U.S. 137 (1971).

39. *Id.* at 141 (quoting Hunter v. Erickson, 393 U.S. 385 (1969)).

40. *Id.* at 142.

higher-level repeal of minority-protective legislation is unconstitutional. Logically and doctrinally, this modified non-retrogression is a terrible muddle, but politically and historically it makes some sense. The *Reitman* line of cases is of a piece with the Supreme Court's other, and often equally confusing, efforts to combat private racial discrimination. Beginning with *Shelley v. Kraemer*,[41] the Court began to stretch the requirement of state action to reach what had previously been considered purely private discrimination. *Reitman* followed more or less comfortably from *Shelley* and from such cases as *Burton v. Wilmington Parking Authority*,[42] which found state action in racial exclusion by a privately owned restaurant in a state-owned building.[43] These state action cases gestured toward the ultimate extension of equal protection to include state *omissions* to prevent private discrimination, at least in circumstances where the state would have acted had the conduct been comparably harmful to whites.[44]

Reitman was understood at the time as a state action case, and *Hunter* might have been as well but for the salience of an alternative approach. The Court in *Hunter* borrowed the "special political obstacle" rationale from Charles Black, who suggested it as a half-step toward an affirmative equal protection duty to combat private discrimination, at least in "public function" contexts such as housing.[45] The "special political obstacle" approach had the practical advantage of maintaining the state action requirement for all matters other than race, while allowing strategic judicial intervention to prohibit private racial discrimination. As the Sit-In Cases demonstrate,[46] the Warren Court was attracted to half-steps and contrivances in expanding state action to combat private discrimination. Of course, the Court preferred that the problem be addressed by legislation, but when Congress did not act soon

41. 334 U.S. 1 (1948) (holding that the Equal Protection Clause prohibits judicial enforcement of a racially restrictive real estate covenant).

42. 365 U.S. 715 (1961).

43. *See also* Evans v. Newton, 382 U.S. 296 (1966) (holding municipal park created by private trust cannot be segregated by race); Terry v. Adams, 345 U.S. 461 (1953) (striking down a whites only pre-primary election scheme as implicating unconstitutional state action).

44. *See* Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 100 ("Time and thought will make it even clearer that [the state action] requirement is always satisfied in the case where substantial racial discrimination is tolerated."); Karst & Horowitz, *supra* note 37, at 55-56 (finding "implicit in the *Reitman* decision" an affirmative constitutional obligation on States to prevent private race discrimination).

45. Black, *supra* note 44, at 100.

46. *See generally* Monrad G. Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137 (describing the series of cases brought by civil rights demonstrators from 1960 to 1963 challenging criminal trespass, breach of peace, and disorderly conduct convictions stemming from sit-in demonstrations; the Court reversed each of the convictions without ever reaching the equal protection race discrimination challenges raised by the petitioners).

enough or broadly enough, the Court resurrected Reconstruction Era laws and announced that the problem had been solved a century ago when no one was looking.[47]

Against this background, the non-retrogression approach of *Reitman* and *Hunter* (and arguably *Seattle*[48]) can be seen as another means of making inroads on private discrimination. Here again the Court tried to rely on legislation. These cases simply prevented the states from undoing what they had already done to protect fair housing, seemingly a less intrusive step than an outright constitutional prohibition on private discrimination.[49]

Our intention here is not to defend the reasoning in these cases, but only to point out the strength they draw from the connection to race. Given a substantive agenda of eliminating private racial discrimination by whatever means, *Reitman* and *Hunter* made practical sense. Of course, one may disagree with judicial pursuit of that agenda, argue that the costs of doctrinal incoherence outweigh any substantive benefits, or doubt the efficacy of non-retrogression as a strategy. However weighty such concerns may be, they do not show that non-retrogression is illogical. So long as one accepts the underlying substantive agenda, non-retrogression might make sense. Only when non-retrogression takes on a life of its own, decoupled from a substantive goal, does it become truly incoherent.

B. Proposition 209

The litigation over California's Proposition 209 well illustrates the dangers of non-retrogression divorced from a substantive constitutional agenda. The California Civil Rights Initiative, which appeared on the ballot as Proposition 209, amended that state's constitution to bar

47. *See* Jones v. Mayer Co., 392 U.S. 409 (1968) (construing 42 U.S.C. § 1982 as a comprehensive law against racial discrimination in housing); Runyon v. McCrary, 427 U.S. 160 (1976) (following *Jones* in construing 42 U.S.C. § 1981 as a comprehensive law against racial discrimination in contracts).

48. In *Seattle*, the effect of non-retrogression was to reinstate busing as a remedy for de facto segregation. Although the Warren and early Burger Court desegregation cases had eroded the wall between de jure and de facto in much the same way as the state action cases had blurred the line between public and private, by the time *Seattle* was handed down the Court had plainly rejected the idea that de facto segregation alone violated equal protection. *See, e.g.*, Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). Even so, the Court required jurisdictions guilty of de jure segregation to eliminate racially identifiable schools by busing, even where racial identifiability did not result solely or even primarily from de jure misconduct. *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 306-07 (1994). In essence, the Court imposed busing to remedy both de jure and de facto segregation, but only where de jure was present. To that extent, *Seattle* is aligned with the Supreme Court's willingness to support more busing than a strictly de jure concept might have required.

49. Of course, one might still wonder why the Court declined to go all the way with non-retrogression and forbid even same-level repeals of civil rights laws. *See* discussion *supra* note 24.

preferential treatment on the basis of race or sex.[50] At the urging of the United States, that provision was preliminarily enjoined as a probable violation of equal protection.[51] The Ninth Circuit reversed the preliminary injunction[52] and ultimately approved the initiative. Despite appeals by the Solicitor General and leading law professors, the Supreme Court denied certiorari.[53]

The federal government's attempt to extend non-retrogression to Proposition 209 turns reason on its head. Today, for better or worse, affirmative action is constitutionally suspect. The Supreme Court has held that racial preferences favoring minorities trigger strict scrutiny and that only the most narrowly tailored remedial plans will be tolerated.[54] By this standard, the racial preferences that Proposition 209 prohibits may well have been unconstitutional. Even if the particular affirmative action programs invalidated by Proposition 209 were not constitutionally impermissible, they were at least constitutionally suspect. Whatever one thinks of Proposition 209 as public policy (and we are not enthusiastic), it steers the state away from, rather than toward, a constitutional danger zone.

It is astonishing, therefore, to learn, as the Department of Justice claimed, that California's retreat from constitutionally suspect racial preferences is itself unconstitutional. Relying on *Hunter* and *Seattle*, the United States argued that Proposition 209 violated equal protection because it removed affirmative action "from the *normal* political process and thereby place[d] a *special* burden on people seeking to overcome discrimination."[55] Generally, of course, the Constitution is entirely indifferent to the level of state government at which decisions are made. It is true that the proponents of affirmative action face a steeper hill than they did before the state constitution was amended, but that results from a state political structure (i.e., the existence of a state constitution) that is constitutionally unobjectionable and open to all. The opponents of affirmative action simply took advantage of the normal political process to amend the constitution. Affirmative action

50. Proposition 209, in relevant part, provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(a).

51. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal.), *vacated*, 110 F.3d 1431 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 397 (1997).

52. *See* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 397 (1997).

53. *See* Coalition for Econ. Equity v. Wilson, 118 S. Ct. 397 (1997).

54. *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995).

55. Brief for the United States as Amicus Curiae in Opposition to the Motion for Stay Pending Appeal at 12, Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1996) (Nos. 97-15030, 97-15031) (emphasis added).

proponents are free to use the same, normal process to amend it back. The only reason that they cannot do so is because they lack the votes.

In any frame of reference other than Supreme Court precedent, the government's attack on Proposition 209 would fail the straight-face test. Yet the unconstitutionality of Proposition 209 follows mechanically (if mindlessly) from the announced rationales of *Hunter* and *Seattle*.[56] As the District Court said, "Proposition 209 singles out an issue of special concern to minorities and women—race- and gender-conscious affirmative action—and alters the political process solely with respect to this issue . . . ."[57] In other words, it effects a higher-level repeal of local affirmative-action initiatives, making it harder for minorities (and women) to obtain policies beneficial to them—which is exactly what *Hunter* and *Seattle* say is unconstitutional.

The Ninth Circuit's refusal to follow these precedents was nevertheless entirely sound.[58] The problems with invoking *Reitman*, *Hunter*, and *Seattle* non-retrogression against Proposition 209 are not limited to the defects of those decisions (which are grave enough). In the earlier race cases (perhaps especially *Seattle*) non-retrogression at least pointed in the "right" direction. *Reitman* and *Hunter* effectively extended protection against racial discrimination to certain private conduct. So used, non-retrogression was of a piece with Supreme Court decisions expanding state action doctrine and broadening Reconstruction Era civil rights statutes to reach purely private conduct. *Reitman* and *Hunter* reflect, and may be thought justified by, an emerging national consensus, codified by federal civil rights statutes banning race discrimination in employment, education, housing, public accommodations, and other "private" settings. The underlying substantive issues in *Reitman* and *Hunter* are effectively moot and their factual results uncontroversial.

In Proposition 209, by contrast, there is nothing approaching a consensus supporting affirmative action. On the contrary, non-retrogression in affirmative action would prevent movement in what the Supreme Court says is the constitutionally right direction. Here, non-retrogression would lock-in laws that not only are not dictated by constitutional decisions but that are also, if anything, in conflict with

56. And perhaps from the rationale of *Romer* as well. The petition for certiorari argued that *Romer* stands for a constitutional bar agains the "selective denial of opportunity to seek protection against discrimination" that would also invalidate Proposition 209. *See* Petition for Writ of Certiorari, Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1996) (No. 97-369).

57. *Wilson*, 946 F. Supp. at 1508.

58. We do not find convincing, however, the panel's attempt to distinguish these precedents on their own terms. The panel struggled to distinguish the right to "equal" treatment protected in *Hunter* and *Seattle* from the right to "preferential" treatment sought by the opponents of Proposition 209. *See Wilson*, 110 F.3d at 1444-46. It is not clear to us why the affirmative action programs at stake in Proposition 209 are any more or less preferential than *Seattle*'s busing to overcome de facto segregation.

them. In this context, non-retrogression is worse than silly; it is constitutionally perverse.

C. Romer v. Evans

Romer v. Evans[59] struck down Colorado's Amendment 2, which prohibited state and local governments from enacting or enforcing "any minority status, quota preferences, protected status or claim of discrimination" based on homosexual "orientation."[60] Amendment 2 effectively repealed local ordinances against discrimination on the basis of sexual orientation in housing, employment, education, and other contexts. At the same time, it prohibited the enactment of similar anti-discrimination laws or policies absent another constitutional amendment.[61] In other words, Amendment 2 effected a higher-level repeal of anti-discrimination laws, making *Romer* precisely analogous to the *Reitman* line of cases, except for the one fact that sexual orientation, not race, defined the disadvantaged class.

But that one fact is Mount Everest. For half a century, race has been the central preoccupation of American constitutional law. No other concern has ranked higher on the nation's agenda nor been more generative of constitutional and subconstitutional change.[62] Sexual orientation, by contrast, has been declared constitutionally insignificant. According to the Supreme Court in *Bowers v. Hardwick*,[63] even felony punishment of consenting adults for sexual relations in private raises no constitutional concern. In light of *Bowers*, *Romer*'s non-retrogression lacks substantive foundation, and the analogy to the race cases fails.

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59. 517 U.S. 620 (1996).

60. COLO. CONST. art. II, § 30(b). Amendment 2 provided,

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status, or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id.

61. *See Romer*, 517 U.S. at 624. The Court declined to accept an implausibly broad reading of the amendment that would have denied to homosexuals general legal protections available to everyone else. On that reading, the case would have been easy, as Akhil Reed Amar demonstrates in *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203 (1996). Of course, on that reading, the case stands for nothing of importance, as the supposed constitutional defect could be cured by an inconsequential change in phrasing.

62. A footnote in support of this statement would reach essay length, and include not only desegregation but also the piecemeal expansion of state action, the criminal proeedure revolution, the (now curtailed) judicial expansion of federal habeas corpus, the revivifieation of Reconstruction Era civil rights statutes, the constitutionalization of the death penalty, the vagueness doctrine, and some aspects of free speech.

63. 478 U.S. 186 (1986).

Absent some normative premise, which *Bowers* emphatically disavows, there is no way to tell the difference between progress and regress. One direction is as good as another.

For this reason, partisans on both sides have viewed *Romer* as impeaching *Bowers*.[64] This may well be the best way to read *Romer*, and it is a conclusion we would cheerfully accept. It is no part of our argument that *Bowers* was correctly decided. If *Bowers* were overruled and sexual orientation declared a suspect class, *Romer* and *Reitman* would be precisely aligned. Non-retrogression would make as much sense in the one context as in the other. The problem is that *Romer* did not purport to overrule *Bowers*. In a remarkable act of intellectual evasion, the Court did not even cite that decision. If one takes the Court at its word, *Romer* leaves *Bowers* intact. On that assumption, the most plausible reading of *Romer* rests on non-retrogression, and the Court's reliance on that principle (again given *Bowers*) is indefensible.

Any attempt to understand *Romer* requires some creativity in reading the Court's opinion. Our approach is no exception. The Colorado Supreme Court rested its invalidation of Amendment 2 squarely on the extension of *Reitman*'s progeny to non-race cases.[65] Perhaps foreseeing the pitfalls in that approach, the United States Supreme Court purported to affirm on a different ground. According to the *Romer* majority, although Amendment 2 neither burdens a fundamental right nor targets a suspect class, it flunks equal protection minimum rationality review, or perhaps it constitutes the first ever per se violation of the Equal Protection Clause.[66] Justice Kennedy's opinion for the Court never pins down precisely what is wrong.[67] At each crucial

64. Compare *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago . . . ."), with Seidman, *supra* note 33, at 82 (finding it "difficult to see how *Bowers*'s validation of same-sex sodomy laws survives the Court's analysis"); Thomas C. Grey, Bowers v. Hardwick *Diminished*, 68 U. COLO. L. REV. 373 (1997). *But see* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 64-69 (discussing how *Romer* and *Bowers* might be reconciled).

65. *See* Evans v. Romer, 854 P.2d. 1270, 1281 (Colo. 1993), *aff'd*, 517 U.S. 620 (1996) ("[W]hile *Hunter* and *Seattle* are indeed cases which involved racial minorities, the principle articulated in those cases clearly is not one that can logically be limited to the 'race' context alone.").

66. Picking up on an argument made by Professors Laurence Tribe, John Hart Ely, Gerald Gunther, Philip Kurland, and Kathleen Sullivan as Amici Curiae in Support of Respondents, Justice Kennedy suggests that Amendment 2 is uniquely problematic because, by imposing a "broad and undifferentiated disability" on homosexuals, the amendment "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." 517 U.S. at 634.

67. *Romer* has been received by numerous commentators as an invitation to fill in the missing justification for an agreeable result. Prominent among the early examples of this genre are Amar, *supra* note 61, at 203 (relating *Romer* to the art. I, § 10 attainder clause); Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387 (1997) (attempting to reconcile *Romer* with *Bowers* and discussing the state's plenary power over its political subdivisions); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996)

point, a vague epithet takes the place of a comprehensible reason: Amendment 2 is "unprecedented in our jurisprudence,"[68] "not within our constitutional tradition,"[69] "a denial of equal protection of the laws in the most literal sense,"[70] "a classification of persons undertaken for its own sake,"[71] and "inexplicable by anything but animus toward the class that it affects."[72]

Certainly Amendment 2 was in some sense mean-spirited. Animus toward homosexuals likely motivated many, perhaps most, supporters of this provision. But that must have been true in *Bowers* as well. If it is unconstitutional to supersede special protections because of dislike, disapproval, aversion, animus, or the like, surely it would be unconstitutional to put people in jail for the same reason. Yet *Bowers* upholds felony punishment. We find it almost impossible to condemn Amendment 2 as reflecting an impermissible moral judgment without impeaching the validity of *Bowers*.[73]

We say "almost" impossible to take account of the suggestion by distinguished scholars[74] that Amendment 2 be condemned as resting on the pure status of homosexual orientation, as distinct from any resulting behavior or conduct. On this reading, *Romer* becomes an equal

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(arguing that *Romer* is premised on the pariah principle, which "forbids the government from designating any societal group as untouchable").

68. *Romer*, 517 U.S. at 633.

69. *Id.*

70. *Id.*

71. *Id.* at 635.

72. *Id.* at 632.

73. *See Romer*, 517 U.S. at 641 (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."); Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. OF BOOKS, Aug. 8, 1996, at 44, 50; Grey, *supra* note 64, at 375-76.

At times, the *Romer* majority seems to suggest that Amendment 2 evinces a qualitatively different and more nefarious animus than that which underlies criminal sodomy statutes. *See* 517 U.S. at 633-35. The majority states that

> Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.

Id. at 635.

This intuition seems quite implausible. Certainly, there is nothing about the breadth of the provision that suggests a different and darker purpose than that endorsed by the Court in *Bowers*. Amendment 2 simply applies the same value judgment to several different contexts, refusing in each setting to legitimate homosexual conduct by extending the protection of the state to those who indicate a propensity to engage in it. If implementing disapproval of homosexuality is a legitimate public purpose, as *Bowers* says, then the scope of Amendment 2 is suitable to its objective, and there is no basis for declaring it irrational. *See* Seidman, *supra* note 33, at 122.

74. *See* Amar, *supra* note 61; Farber & Sherry, *supra* note 67.

protection version of *Robinson v. California*.[75] Homosexual acts can be punished as felonies under *Bowers*, but the mere status of homosexual orientation cannot be the predicate of legal disadvantage. There are problems with this approach, of course, including the fact that all anti-discrimination legislation is based on status, which means that any repeal or preclusion of such laws would be also. Moreover, this reconciliation of *Romer* and *Bowers* reduces *Romer* to triviality. If the whole of the problem is legislation based on pure status, Amendment 2 could be rephrased and reenacted without constitutional complaint. We think it unlikely that the Supreme Court was in high moral dudgeon over a case of sloppy drafting or that rewriting Amendment 2 to bar special protection for persons who have engaged in homosexual conduct would resolve the deeply-felt antipathies to this provision.

If one takes the Court at its word, or rather its silence, on *Bowers*, *Romer* seems most nearly understandable as an extension of the *Hunter* ban on higher-level repeals to laws protecting homosexuals.[76] The opinion emphasizes that Amendment 2 not only erased existing laws but also barred enactment of new laws by any means short of constitutional amendment. It stresses the "special" political burden consequently imposed on homosexuals.[77] In the Court's view, Amendment 2 denied homosexuals "the right to seek specific protection from the law"[78] and offended the "central" equal protection principle "that government and each of its parts remain open on impartial terms to all who seek its assistance."[79] For the *Romer* Court, Amendment 2 was unconstitutional because it elevated the political level at which the permissibility of private discrimination would be decided.[80] In practical terms, Amendment 2 shifted decision-making from municipalities (and the state legislature), where proponents of gay rights were enjoying some success, to a state-wide referendum, in which they lacked the numbers to prevail.[81]

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75. 370 U.S. 660 (1962) (holding that criminal liability for being addicted to the use of narcotics constituted cruel and unusual punishment).

76. *See* Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 296-97 (1997) (comparing *Romer* to *Hunter v. Erickson*).

77. *See Romer*, 517 U.S. at 633 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

78. *Id.* at 647 (Scalia, J., dissenting).

79. *Id.*

80. *See id.* at 639 ("The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others.").

81. *See id.* at 647 ("[Amendment 2] sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides.").

If one assumes that the Court means to preserve *Bowers*, the logical inference would be that the Court views preempting local decision-making with a statewide referendum as rigging or biasing the political process against gays. It is essential to this understanding that the pre-existing political process be taken as the baseline. Only relative to the pre-existing state of affairs could the regime enforced by Amendment 2 be thought discriminatory. In short, this is *Hunter* non-retrogression: once Colorado cities have enacted anti-discrimination laws, the state cannot then elevate the decision-making locus to a statewide referendum and thereby "dilute" the political power of gays relative to their political power immediately prior to Amendment 2.[82] As in *Hunter*, the retrogression in *Romer* has a double aspect: existing anti-discrimination laws are removed, and the opportunity to reenact such laws is withdrawn from the reach of local government. In the final analysis, the constitutional violation in *Romer* apparently rests on the fact that the state is taking away an entitlement, even though that entitlement was, when granted, constitutionally gratuitous.[83]

82. *See* Karlan, *supra* note 76, at 301 ("The court essentially assumed that the pre-existing level of gay political power in Colorado reflected an equal opportunity 'to seek specific protection from the law.' [Citing *Romer* at 647.] The retrogression in the status of gays and lesbians drove home their present inequality before the law.").

83. Admittedly, some parts of the *Romer* opinion cast doubt on this understanding. For example, the Court takes note of an "emerging tradition" of statutory protection against discrimination on the basis of "an extensive catalogue of traits . . . including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation." *Romer*, 517 U.S. at 629. Against this statutory background, the Court suggests, Amendment 2 does something more than take away "preferential treatment" on the basis of sexual orientation (as Justice Scalia characterized the municipal anti-discrimination ordinances). By singling out homosexuals and denying them alone protection against "exclusion from an almost limitless number of transactions and endeavors that constitute the ordinary civic life in a free society," Amendment 2 imposes a "special disability" on gays and lesbians. *Id.* at 631. The *Romer* majority thus suggests that the equal protection violation inheres in the differential treatment of homosexuals and other groups especially vulnerable to discrimination.

This reading of *Romer* would be very radical indeed. It would disavow the deeply entrenched principle that social reform may proceed one step at a time and create disincentives for anti-discrimination legislation generally. Moreover, if the unconstitutionality of withdrawing protection for homosexuals lies in the fact that they are treated less well than others who are afforded such protection, the case cuts a very wide swath. Under this reading, the constitutional violation would exist whether Colorado selectively repealed anti-discrimination protection for homosexuals or never enacted such laws in the first place, so long as otherwise comprehensive anti-discrimination laws were in place. *See* Seidman, *supra* note 33, at 82 (arguing that the logic of the *Romer* opinion entails an affirmative constitutional obligation on states to protect gay people from discrimination). Under this reasoning, the failure of "progressive" communities—say, any town in Massachusetts—to enact anti-discrimination legislation for homosexuals would be unconstitutional, but failure of more benighted communities in Oklahoma or Virginia to enact such laws would be perfectly acceptable. Given the difficulties of the opinion, we cannot be entirely sure what the *Romer* Court meant, but we are reasonably confident that they did not mean that.

Again, if homosexuality were constitutionally equivalent to race, *Romer* would follow directly from *Hunter*. That is not to say that the decision would then be unproblematic. Even if *Bowers* were overturned, *Romer* would still be subject to difficult, perhaps unanswerable, objections. Even if governmental discrimination against gays were declared unconstitutional, one might still ask: on what ground is the government required to prevent private discrimination? If the government is not required to forbid private discrimination in the first place, why can it not repeal a law that does so? And if the government can repeal such a law at the same level at which it was enacted, why can it not accomplish the same thing by action at a higher level? Since when did the federal Constitution impose an order of preference on the various components of state government, particularly one that turns the usual hierarchy of decision-making upside down?

Even if *Bowers* were overruled, these questions would remain. We do not mean to slight their difficulty by saying that *Romer* embraces a new and additional confusion. Whatever practical sense the non-retrogression principle may have had in race cases derives directly and entirely from the constitutional policy against racial discrimination. Absent a comparable policy against discrimination on the basis of sexual orientation, *Romer* seems to us hopelessly confused.

D. Denver Area Educational Telecommunications Consortium v. FCC

Romer is analytically so similar to *Hunter v. Erickson* that the revival of non-retrogression was not entirely surprising. It is much more jarring to find that non-retrogression has also invaded the First Amendment. Here the Court's emphasis on the status quo ante is not only substantively indefensible but also analytically and doctrinally unsupported by any prior decision.

Denver Area Educational Telecommunications Consortium v. Federal Communications Commission[84] involved First Amendment challenges to two virtually identical provisions of the Cable Television Consumer Protection and Competition Act of 1992.[85] The Court struck down one and upheld the other, based on nothing more than an accident of recent history. Both provisions allowed cable system operators, who generally are barred from exercising editorial control, to prohibit "patently offensive" programming. One provision, Section 10(a), applied to leased access channels, which according to federal law must be reserved by cable operators for commercial lease by third parties. The other provision, Section 10(c), applied to public access channels, which

84. 518 U.S. 727 (1996).

85. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.). The case also involved a third provision not relevant here.

must be reserved for public, educational, or governmental use. Federal law does not directly mandate public access channels, but it does authorize localities to require them "as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way."[86] The two provisions give cable operators precisely the same control under precisely the same substantive standard, but the Supreme Court found one unconstitutional and the other not.[87]

The basis for this curious divergence of results was the status quo ante. Section 10(a), the provision on leased channels, returned to cable operators a discretion that, "but for a previous Act of Congress," they would have had.[88] More fully, Section 10(a) restored to cable operators a fraction of the previously complete programming control enjoyed before Congress required them to offer leased access channels free from editorial supervision. In contrast, Section 10(c) gave cable operators editorial control over locally mandated public access channels that they had not previously possessed. As Justice Breyer phrased the point, Section 10(c) governed "channels over which cable operators have not historically exercised editorial control. Unlike Section 10(a) therefore, Section 10(c) does not restore to cable operators editorial rights that they once had . . . ."[89]

This is non-retrogression in a limited time frame. The Court focused not on the state of affairs at the instant the statute took effect, but on a comparison between the statutory provisions and the state of affairs existing ten to fifteen years before its enactment. Why the Court chose this longer time frame is anyone's guess, but if one accepts it, the role of non-retrogression becomes plain. Consider the perspective of cable programmers. It was their First Amendment rights the editorial discretion of cable operators was said to have infringed. From the programmers' point of view, the Section 10(c) provision on public access channels was a step backward. The programmers of public access channels had previously been given editorial autonomy, which this legislation took away. For that reason, said the Court, Section 10(c) violated the First Amendment. By contrast, the Section 10(a) provision on leased access channels took nothing away. It merely confirmed pre-existing (though not immediately pre-existing) restrictions on the autonomy of cable programmers. Compared to the state of affairs ten to fifteen years prior to enactment of the statute, there was no

86. 518 U.S. at 734 (plurality opinion).

87. One member of the plurality, Justice O'Connor, found the differences between Sections 10(a) and 10(c) not "constitutionally significant." *Id.* at 2403 (O'Connor, J., concurring in part and dissenting in part).

88. *Id.* at 2386 (plurality opinion).

89. *Id.* at 2394.

retrogression in editorial freedom. Therefore, said the Court, Section 10(a) was not unconstitutional.

Under *Denver Area Telecommunications*, the constitutionality of the provisions does not turn on the scope or content of the editorial control granted to cable operators but on the direction of movement in the law (and on the time frame in which that direction is discerned). Why this should be so is not explained. One might have thought that the First Amendment interest would depend on free speech theory or precedent, not on the history of federal regulation. One might understand, perhaps, some attention to the historical background of 1791 or 1868 (if there were any), but according to the Supreme Court, the meaning of the First Amendment depends on the historical baseline of cable regulation established a decade or so prior to 1984, when federal access requirements were first imposed. Apparently, whatever editorial freedom cable programmers exercised in the previously unrecognized "constitutional moment"[90] of the 1970s, the government cannot now take away. Pre-existing restrictions, however, can be maintained. Had local authorities prior to 1984 felt the need to empower cable operators to censor indecent material, the status quo ante would be different, and both provisions would have been upheld. Finally, it bears emphasis that this bit of recent history was not advanced merely as a relevant fact in an overinclusive opinion but as the decisive difference that explains why two nearly identical statutory provisions meet opposite constitutional fates.

Denver Area Telecommunications reflects a peculiar misuse of non-retrogression. The historical fact that in the 1970s cable operators had control over leased access channels but not public access channels should be irrelevant to whether subsequent federal regulation is constitutionally permissible. The normative force of prior practice is not defended or explained; it is taken for granted. In consequence, a contingent relationship between state and local governments and the cable industry, one prevailing for a relatively brief period in the early history of cable technology, becomes a decisive but unexplained normative standard.

At bottom, the non-retrogression of *Denver Area Telecommunications* is difficult to understand as anything other than a placeholder for a missing analysis. What the pre-existing regulatory regime does not tell us is why a federal grant of editorial discretion to cable operators over various types of programming does or does not offend constitutional values of free speech. That, to be sure, is a difficult question, rendered even more so by the pace of technological change and the necessity to adapt First Amendment concepts to a new setting. The difficulty of the

90. *See* BRUCE ACKERMAN, WE THE PEOPLE (1991).

question, however, does not justify its avoidance. Still less does it make sense for the Court to treat recent history as coercive of future change.

Like *Romer*, *Denver Area Telecommunications* invests ordinary law with constitutional significance. Both decisions treat past political decisions as constraints on future options. In both cases, the Court chooses a particular state of affairs as a baseline and then insists that departure from that baseline is somehow unconstitutional. Both avoid the task of articulating and defending the normative principles that will be elevated to the domain of constitutional law, and both invade the powers of the political branches without coherent explanation.

III
SO WHAT'S WRONG WITH NON-RETROGRESSION?

We have said enough to reveal that we think there is a great deal wrong with non-retrogression. The illogic of suggesting that a constitutionally gratuitous protection or opportunity cannot be taken away; the striking inconsistency of results this stricture creates; the lack of any reason to think that the federal Constitution prefers decision making at one level of state government rather than another; and the artificiality of characterizing a political victory in an unaltered political structure as distorting the political process—all these critiques have been made plain. In this third Part, we extend and deepen them. We see non-retrogression not as an isolated instance of doctrinal confusion, but as an especially gaudy display of endemic weaknesses found elsewhere in contemporary constitutional law. In our view, *Romer*'s revival of non-retrogression and the variation of that idea in *Denver Area Telecommunications* show a Supreme Court adrift in judicial activism, habituated to movement but with no idea where to go.[91]

As we have said, non-retrogression, for all its flaws, may have some practical value when allied to an authoritative determination that movement in one direction is normatively desirable. We focus now on the more problematic use of non-retrogression as a free-standing procedural principle divorced from any substantive agenda. Invoking non-retrogression while disavowing the underlying substantive goal served by

91. We recognize that a more general version of non-retrogression is not at all anomalous in constitutional law. In many areas, the status quo functions as some sort of baseline for constitutional adjudication. In takings cases, for example, the Constitution protects the expectations of a private party in an existing (and not constitutionally compelled) state of affairs. *See generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993) (exploring "status quo neutrality" in diverse areas of constitutional law, including state action, unconstitutional conditions, race and sex discrimination, and procedural due process). The general project of reconstructing constitutional law after the erosion of belief in a natural law of vested rights is beyond the ambition of this Article, which focuses on non-retrogression in the narrower sense.

that strategy signals insincerity, confusion, or some combination of both.

A. *Candor*

Arguments for non-retrogression necessarily pursue a substantive agenda, but they do so by stealth and indirection, without explicit statement of the value to be served. By feinting toward procedure, non-retrogression disguises substance. Indeed, that may be its principal attraction.

The argument of the United States and the other opponents of Proposition 209 illustrates the point. Faced with a political defeat on affirmative action and with the certain rejection of any argument that racial preferences are constitutionally required, they resorted to non-retrogression. Relying on *Hunter* and *Seattle*, the United States argued that Proposition 209 is unconstitutional because it "singles out measures designed to overcome prejudice for unique and burdensome treatment."[92] The problem, says the Administration, is not just that California took a step "backward" on affirmative action, but that the higher-level repeal departed from the "normal political" process and imposed a "special" burden on proponents of affirmative action.[93]

One can respect the Administration's support for affirmative action without endorsing its reliance on non-retrogression. To see the disingenuousness of the Administration's argument, one need only imagine what would happen if the political situation were reversed. Suppose that a statewide majority of Californians shared the Administration's view and supported affirmative action. Suppose further that certain resistant state entities, including the rigorously color-blind state university system, thwarted their will. Suppose finally that the voters of California amended their constitution to require affirmative action to the extent permitted by the federal Constitution in public universities as well as in government employment and contracting. Now the opponents of affirmative action invoke *Hunter* and *Seattle*. They claim that the state constitutional amendment alters the "normal" political process and imposes "special" burdens on those seeking to end all preferences. Can anyone suppose for a moment that this Administration would support their claim? To us, it seems obvious that the Administration's position has nothing to do with political process and everything to do with political substance. The reliance on non-retrogression is a lawyer's ploy designed to advance the President's no

92. Brief for the United States as Amicus Curiae in Opposition to the Motion for Stay Pending Appeal at 3, Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1996) (Nos. 97-15030, 97-15031).

93. *See id.* at 3-4, 16.

doubt sincere belief that affirmative action should "remain available as a tool to address persistent discrimination in our society."[94]

Of course, it will not do to criticize advocates too sharply for their choice of arguments. "Any port in a storm" may be a sufficient justification for government lawyers, as well as for distressed mariners. But when courts use non-retrogression to cover the advance of substantive goals they are unwilling to announce or defend, the fault is more grievous. One can accept that political judgments are an inevitable part of constitutional adjudication while holding judges to a higher standard than mere politicians. Some commitment to candor—to the willingness to state, however artfully, a basis for decision that the judge believes in and is presumptively willing to follow in future cases—is a prerequisite to constitutional adjudication that one can respect.[95]

For those who wish to respect constitutional adjudication, *Romer* poses a challenge. Even those who entirely approve the outcome may find it difficult to avoid sensing that there is something deeply irresponsible about the Court's opinion.[96] To us, it looks like an intellectual shell game: the Court emphasizes the supposed distortion of the political process and the "special" burden imposed by a state constitutional amendment to avoid saying why the moral judgment underlying Amendment 2 is impermissible and whether *Bowers v. Hardwick* is still good law. Then the Court invokes the "animus" behind Amendment 2 to avoid explaining what is wrong with state constitutionalism and why the federal Constitution prefers local governments. Unwilling to stand

94. *See* David G. Savage, *White House Joins Attack on Prop. 209*, L.A. TIMES, Dec. 21, 1996, at A1 (quoting White House Press Secretary Mike McCurry on the Clinton Administration's decision to oppose Proposition 209).

95. *See* JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 115 (1992) ("The call for candor—for the 'real' and significant reasons underlying the decision—is a response to the entitlement of the People, not to mention the parties to the case, to full disclosure of the Court's reasons for what it decides."); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 667 (1983) ("Candor and sincerity are part of the distinctive process that legitimates judicial power...."); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979) ("If justifications cannot be stated in the opinion, they should not be relied upon in entering the judgment. A Justice who initially reached a decision on the basis of factors he is unwilling to assert publicly as justification is, to my mind, under a duty to reconsider his decision with the impermissible factors excluded so far as is humanly possible."); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("A requirement that judges give reasons for their decisions—grounds of decisions that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power."). *But see infra* note 96.

96. Not everyone had this difficulty. Some eminent observers find virtue in the very aspects of the opinion that we find troublesome. *See* Seidman, *supra* note 33, at 73 ("Part of the genius of *Romer* is that the opinion is written in a deliberately generative fashion. Instead of trying to control future doctrinal developments and shut down lines of argument, it clears away obstacles and opens up possibilities."); Cass R. Sunstein, *supra* note 64, at 53-71 (defending, to some extent, the *Romer* opinion as an example of judicial "minimalism").

on either rationale, the Court offers each to distract from the emptiness of the other. Wherever one looks, the answer lies elsewhere.

B. Confusion

An alternative explanation for *Romer* brings it more closely into alignment with the evident disarray of *Denver Area Telecommunications*. It is possible that the *Romer* opinion reflects not guile but confusion, that some of the Justices actually believe that the *form* of Amendment 2 is unconstitutional, entirely apart from its substance. Whether the Justices themselves believe that, some lower courts surely will. The trial court's decision invalidating Proposition 209 is the predictable result of following the procedural rule of no higher-level repeals without regard to the substantive agenda. Such reasoning would implicate a huge variety of state constitutional provisions that withdraw certain issues from the "normal" political process and thereby subject the proponents of change to a special burden.[97] One suspects, of course, that the courts would come to their senses before dismantling state constitutions, but a sincere belief in the unconstitutionality of higher-level political arrangements would have that result.

Romer would not be the first case in which the Court has fooled itself into thinking that substantive concerns could be addressed through procedural restrictions. The late and unlamented doctrine of the irrebuttable presumption is a famous example. In the 1970s the Court decided a series of cases striking down laws, supposedly not because they were substantively impermissible but because they created an "irrebuttable" or "conclusive" presumption, which violated a procedural norm of individualized decision making. In *Cleveland Board of Education v. LaFleur*,[98] for example, the Court invalidated mandatory maternity leave for school teachers on the ground that the regulation created "a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing."[99] This rule was not struck down as a form of sex discrimination or as an undue burden on the fundamental right to bear children, but rather as a violation of procedural due process. Supposedly each teacher had a procedural right to show that the rationale behind the legislative rule (whatever it was) did not apply to her. Of course, that reasoning impeaches legislation generally. Aside from purely precatory provisions, all statutes on all subjects create an irrebuttable presumption of

97. *See, e.g., supra* notes 34-36 and accompanying text.
98. 414 U.S. 632 (1974).
99. *Id.* at 644.

something. Eventually, the Court recognized the problem and threw in the towel on irrebuttable presumptions.[100]

The doctrine of the irrebuttable presumption is not a random example of a constitutional cul-de-sac. It illustrates the same substance-procedure confusion that underlies *Romer* non-retrogression. In *LaFleur*, as in most other irrebuttable presumption cases, the real problem was substantive—an impermissible basis of classification or an unjustified burden on some fundamental right or entitlement.[101] Of course, invalidating a statute on substantive grounds requires a substantive justification, which the *LaFleur* Court was apparently not ready to give. Just as in non-retrogression, the supposed procedural defect of an irrebuttable presumption obviated the need for substantive explanations. And just as in non-retrogression, the problem was not merely aesthetic. Quite predictably, the empty procedural rationalization took on a life of its own, and laws were struck down that would have survived review had the Court been thinking clearly.[102] In *Weinberger v. Salfi*,[103] for example, the district court invoked irrebuttable presumption analysis to strike down a duration-of-relationship requirement for spousal benefits under the Social Security Act, despite the absence of any substantive basis for heightened scrutiny. It was the spectacle of irrebuttable presumption analysis as a loose cannon in the lower courts that moved the Supreme Court to disavow its own doctrine. We expect the same for non-retrogression.

A more complex example of this kind of substance-procedure confusion is the line of cases beginning with *Mullaney v. Wilbur*.[104] In that case, a unanimous Court struck down Maine's law making the defendant bear the burden of proving sudden heat of passion based on adequate provocation, which would reduce intentional homicide to manslaughter. Almost certainly, *Mullaney* reflected an unarticulated and unexamined

100. *See* Weinberger v. Salfi, 422 U.S. 749, 772 (1975) (recognizing that the irrebuttable presumption doctrine threatened to become "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution").

101. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1618-25 (2d ed. 1988) (arguing that the Court applied the irrebuttable presumption doctrine in situations where a fundamental right or a suspect classification independently warranted heightened scrutiny).

102. Given the fluidity of equal protection doctrine in the early 1970s, it is hard to be sure, but *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973), is a likely example. In that case, the Court struck down a law denying food stamps to any household with a member over the age of eighteen who had been claimed as a dependent child by a taxpayer who was not a member of a food stamp eligible household. It is not obvious that any alternative explanation would have supported this decision. *See also* TRIBE, *supra* note 101, at 1624 n.37 (suggesting that the law struck down in *Stanley v. Illinois*, 405 U.S. 645 (1972), might have been upheld had the irrebuttable presumption doctrine not been available).

103. 422 U.S. 749 (1975).

104. 421 U.S. 684 (1975).

assumption that this traditional mitigation was an essential feature of the law of homicide, but the Court framed its decision in purely procedural terms. Whatever facts the state chose to regard as relevant to criminal liability, it had to prove them beyond a reasonable doubt; whatever facts the state chose not to regard as relevant to criminal liability, it did not have to prove them at all.

The Court soon learned, however, that this purely procedural approach to burden of proof would have substantively perverse implications.[105] Overwhelmingly, burden-shifting defenses had been used to make ameliorative changes in the law of crimes, softening traditionally harsh rules on such matters as strict liability for felony murder and statutory rape, reliance on official misstatement of law, and renunciation as a defense to attempt.[106] In every such instance, the supposed constitutional defect of shifting the burden of proof could have been cured, and likely would have been cured, by eliminating the defense altogether and restoring the law's ancient rigor. Faced with this prospect in *Patterson v. New York*,[107] the Court unanimously (though not single-mindedly) abandoned its purely procedural insistence on proof beyond a reasonable doubt.

While *Patterson* ended the proceduralism of *Mullaney*, the Justices disagreed on what should take its place. The majority resorted to empty formalism: every element of an offense must be proved beyond a reasonable doubt, but elements of a defense need not be. Under this rule, the government can do anything it likes, so long as it uses the right label. The *Patterson* dissenters attempted to rehabilitate *Mullaney* by resorting to history: proof beyond a reasonable doubt should be required, but only for those elements that historically "in the Anglo-American legal tradition" have been important to the fact or grade of criminal liability.[108] This approach would have at least redirected the constitutional standard toward a meaningful substantive inquiry into *what* the government should have to prove beyond a reasonable doubt before imposing criminal liability, though we doubt that the traditional law of crimes is the right baseline for making that determination.[109]

105. *See* Patterson v. New York, 432 U.S. 197, 209 n.11, 211 n.13 (1977); *see also id.* at 207-08 n.10 (quoting Peter W. Low & John C. Jeffries, Jr., *DICTA: Constitutionalizing the Criminal Law?*, 29 VA. L. WKLY, No. 18, 1 (1977)).

106. *See* John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1353-56 (1979).

107. 432 U.S. 197 (1977).

108. *Id.* at 226 (Powell, J., dissenting).

109. For an alternative view based essentially on a concept of proportionality and focusing on proof beyond a reasonable doubt of a constitutionally adequate basis for imposing the punishment authorized, see Jeffries & Stephan, *supra* note 106, at 1365-79.

The aftermath of *Mullaney* and *Patterson* continues to sow confusion. In *Montana v. Egelhoff*,[110] the Court upheld Montana's exclusion of voluntary intoxication as evidence that the defendant lacked the necessary mens rea of deliberate homicide. The statute accomplishing this result was very oddly drafted. Deliberate homicide was defined as "purposely" or "knowingly" causing the death of another, and a separate section of the criminal code excluded proof of voluntary intoxication.[111] At least eight Justices agreed that Montana could constitutionally rewrite the deliberate homicide offense to make voluntary intoxication irrelevant,[112] but the dissenting Justices thought it unconstitutional to accomplish precisely the same result in a separate provision.[113] There is no way to be certain, but we doubt that the dissenters in *Egelhoff* were advancing a covert substantive agenda; more likely, the Court's own precedents seduced them into thinking that constitutionality hinged on a meaningless distinction.

Mullaney and its progeny have the same essential weakness as the irrebuttable presumption and non-retrogression cases. In each context, the Court attempted to solve a substantive problem with a procedural rule. In each context, this strategy allowed the Court to avoid, for a time, explaining or justifying its substantive concerns. In each context, however, the procedural rule took on a life of its own and threatened the wholesale invalidation of laws that were substantively unobjectionable. In *Mullaney* and in the irrebuttable presumption cases, the Court has been forced to backtrack (with varying degrees of candor), which seems the likely fate of the current doctrine of non-retrogression.

IV

NON-RETROGRESSION AND TRADITIONALISM

We think the best way to understand the attraction of non-retrogression is to consider another approach to constitutional adjudication, one that has much in common with non-retrogression and which the Rehnquist Court has also embraced: traditionalism. Non-retrogression and traditionalism are analytically related. In our view, they are also symptomatic of an activist Supreme Court with no clear sense of direction.

Tradition as a normative standard is familiar in constitutional law. Most prominently, modern substantive due process cases purport to

110. 518 U.S. 37 (1996).

111. *Id.* at 37 (quoting MONT. CODE ANN. §§ 45-5-102, 45-2-203 (1995)).

112. Justice Breyer would not say. *See id.* at 79 (Breyer, J., dissenting).

113. *See id.* at 61 (O'Connor, J., dissenting, joined by Stevens, Souter, and Breyer, J.J.); *see also* Griswold v. Connecticut, 381 U.S. 479, 499 (1964) (Harlan, J., concurring) (concluding that substantive due process protects "basic values 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 [(1937)]").

protect only those unenumerated "fundamental rights" that are "'deeply rooted in this Nation's history and tradition.'"[114] In recent years, largely through the influence of Justice Scalia, the role of tradition in Supreme Court opinions (particularly in dissenting opinions) has expanded to cases involving the First Amendment,[115] the Equal Protection Clause,[116] and the Takings Clause.[117] Unlike other uses of history by the Court, the appeal to tradition in these cases is meant to be persuasive independent of the original intent of the framers or ratifiers of the Constitution. Traditionalism thus differs from originalism, which draws its normative authority not from historical practice but from a social contract theory of precommitment by the American people. Certain forms of tradition may be evidentiary of original intent, but true traditionalism (at least as we use the term) imbues past practice with intrinsic authority, disconnected from any supplemental source of constitutional legitimacy.[118]

Non-retrogression and traditionalism are structurally similar; indeed, non-retrogression is traditionalism in a radically shorter time frame. For example, *Bowers* says that since homosexual sodomy has been subject to moral and legal censure since Blackstone's time, it cannot qualify for substantive due process privacy protection.[119] Similarly, *Romer* looks to more recent past practice in determining whether local anti-discrimination laws can be overridden. In *Romer*, even the brief duration of local anti-discrimination laws is sufficient to create an entitlement against higher-level repeal. In both cases, the bare fact of a

114. Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (quoting Moore v. East Cleveland, 432 U.S. 494, 503 (1977)). For discussions of the role of tradition in constitutional jurisprudence, see generally Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993); Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901 (1993).

115. *See* Lee v. International Soc'y for Krishna Consciousness, 505 U.S. 830 (1992) (holding that airports are not public forums because they are a modern invention without the requisite tradition of having been held open for speech activity); Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (arguing that Establishment Clause invalidation of prayer at public school graduation ceremony "lays waste a tradition as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally"); Rutan v. Republican Party of Illinois, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) ("[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.").

116. *See* United States v. Virginia, 116 S. Ct. 2264, 2292 (1996) (Scalia, J., dissenting) ("[W]hatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.").

117. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting) (arguing tradition of no compensation for state regulatory takings made such uncompensated takings constitutional).

118. *See* Brown, *supra* note 114, at 183-91.

119. *See Bowers*, 478 U.S. at 192-94; *id.* at 197 (Burger, J., concurring).

pre-existing social or legal practice becomes the measure of constitutionality.

The argument for tradition as a constitutional value, though seldom made explicit, seems to have both functionalist and deontological strands. The functionalist defense of tradition depends on the idea that anything "we" have been doing or thinking for a long time must have considerable value, even if we now have difficulty understanding or articulating just what that value might be.[120] The argument seems to reflect faith in a kind of natural selection that will preserve only objectively good or useful practices or beliefs. The deontological case for tradition draws on another neo-Burkean strain.[121] The idea suggests that there is intrinsic value in maintaining continuity and community with our forebearers by thinking of ourselves as engaged in a collective project with past generations.[122]

Despite these supposed strengths, traditionalism has obvious weaknesses. For one thing, tradition as a normative standard faces the severe practical problem that proponents of almost any right or position can articulate a plausibly supportive tradition. So long as the evidentiary basis, time frame, community, and level of generality are up for grabs, tradition is almost infinitely plastic.[123]

Even if tradition did constrain judicial discretion in the way that believers hope, its normative appeal as a source of constitutional values is far from obvious. The objections are both majoritarian and countermajoritarian. On the one hand, tradition captures the mainstream value judgments of a past majority and thus is likely to be an unsatisfactory source for protecting marginalized minorities. On the other hand, constitutionalizing tradition privileges the values of past majorities over those of present majorities without providing any justification for this dead hand control from the past.

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120. *See, e.g.*, Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501 (1989). McConnell writes:

> An individual has only his own, necessarily limited, intelligence and experience (personal and vicarious) to draw upon. Tradition, by contrast is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time, each of them making incremental and experimental alterations (often unconsciously), which are then adopted or rejected (again, often unconsciously) on the basis of experience—the experience, that is, of whether they advance the good life. Much as a market is superior to central planning for efficient operation of the economy, a tradition is superior to seemingly more "rational" modes of decisionmaking for attainment of moral knowledge.

Id. at 1504.

121. *See generally* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 183 (C. O'Brien rev. ed., Penguin Books 1969) (1790) (criticizing political rationalism and instead urging reliance on "the general bank and capital of nations and of ages").

122. *See, e.g.*, Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

123. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 60 (1980).

The theoretical problems with non-retrogression mirror and magnify those of traditionalism. Even if one accepts functionalist assumptions about long-standing social practices, no one could claim that the recent history of anti-discrimination laws adopted by a few Colorado localities or affirmative action programs enacted by sub-units of the California state government enacted reveal the long-term adaptive success of gay rights or affirmative action. Nor would a Burkean likely find that maintaining affirmative action shows appropriate reverence for the past or humility about our present role in an intergenerational common project. Indeed, we think it hard to imagine any defense of non-retrogression as a source of constitutional values (though it may conceivably have worth as a strategy for pursuing values identified elsewhere). In short, non-retrogression has all the weaknesses of traditionalism but none of its strengths.

Though similar in structure, non-retrogression and traditionalism, as applied by the current Supreme Court, differ radically in content. For much of the modern history of substantive due process, tradition served, at least nominally, as a justification for expanding constitutional rights. Tradition was said to guide incorporation of the Bill of Rights against the states, as over time the Court incorporated those rights representing "'principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.'"[124] This apparently backward-looking language was quoted in *Griswold v. Connecticut* to describe the newly discovered fundamental right of married couples to use contraceptives.[125] Similarly, in *Moore v. East Cleveland*, the Court found that substantive due process "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[126] While one might question the sense in which the right to use birth control devices (much less the right to an abortion) was grounded in "this Nation's history and tradition," the Court in the early privacy cases at least sometimes seemed to regard tradition as a jurisgenerative force for expanding constitutional rights.[127]

In *Bowers*, however, the valence of tradition switched. That case used the absence of a supporting tradition to reject the claim of a right to engage in homosexual sodomy. As subsequent substantive due process cases confirmed, tradition became an obstacle to the expansion of

124. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

125. 381 U.S. at 487 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

126. 431 U.S. 494, 503 (1977).

127. *But see* ELY, *supra* note 123, at 61 (pointing out that Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), used tradition to question the constitutionality of racial preferences).

rights.[128] This is the conservative, judicially-constraining sense of tradition that Justice Scalia has advocated, on the theory that the only way to maintain any defensible conception of substantive due process is for the Justices to stay within the (presumably narrow) bounds set by objectively identifiable, traditional norms and practices.[129] The difference between progressive and conservative traditionalism often lies in the level of abstraction at which the relevant tradition is identified. The tradition of respecting the privacy of intimate relationships might have supported the claimed right in *Bowers*, but the Court could not identify a specific tradition of respecting the freedom to engage in particular forms of homosexual sex. Likewise, in *Michael H. v. Gerald D.*, Justice Scalia rejected the progressive traditionalism of *Griswold* in favor of a conservative approach that would "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[130]

Our interpretation of *Romer* and the United States' position in the Proposition 209 litigation resonates with progressive traditionalism. It is activist and forward-looking, expanding judicial involvement in state political processes by selectively identifying progressive reforms and securing them against higher-level repeals. Whereas *Bowers* voiced the Court's toleration and perhaps endorsement of conservative values, *Romer* has been received as a tradition-breaking signal of liberal-minded acceptance and approval of homosexuality.[131] Scalia-style traditionalism protects narrowly defined traditions that reflect conventional or conservative social values; non-retrogression uses historical fact as a springboard for enlarging constitutional protection of individual rights and disadvantaged groups.

If the new traditionalism secures the past against the future, non-retrogression secures the future against the past. In *Reitman* and *Hunter*, the Court anticipated a future of comprehensive prohibitions against racial discrimination, both public and private. Non-retrogression defended this foreseen result by ratcheting state-imposed change in the "right" direction and raising the costs of backtracking. So viewed, *Reitman* and *Hunter* are microcosms of Alexander Bickel's description

128. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (holding no due process right for genetic father to establish paternity because the "historical traditions specifically relating to the rights of an adulterous natural father" did not support such a right).

129. *See* Brown, *supra* note 114, at 201-02.

130. 491 U.S. at 127 n.6. On the debate over the level of abstraction at which a tradition should be defined, see, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 98 (1991); J. M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990).

131. *See, e.g.*, Seidman, *supra* note 33, at 97 (crediting the Court for "the moral imagination necessary to see that [discrimination against homosexuals] is constitutionally problematic" and for "build[ing] empathic connections" to gays).

of the Warren Court as "seized of a great vision . . . hav[ing] glimpsed the future."[132] Bickel portrayed a Court that took its cues from an imagined national future that would retrospectively vindicate its efforts. In Bickel's view, the Warren Court was attempting to lead a social revolution, and revolutionaries have no authority on their side other than the future. In much the same vein, *Romer* contains an implicit prediction that the future will reveal the rightness of preserving anti-discrimination protection for gays and lesbians. In this the majority may be right: if legally tolerated discrimination against homosexuals soon becomes as anachronistic as racial segregation in the Jim Crow South, *Romer* will ultimately be seen as prophetic. Perhaps the Court, in the third decade of what is now a mainstream gay rights movement, has some measure of confidence that as go Aspen and Boulder, so eventually goes the country. Just as *Brown v. Board of Education*[133] now seems obviously right despite reasoning that offended the analytic sensibilities of contemporaneous commentators,[134] *Romer* may eventually seem like an obviously warranted nudge in the right, and historically inevitable, direction. Thus, non-retrogression may be understood as a relatively low-cost way for the Court to further social change, allowing the Justices to cast themselves not as revolutionaries, but rather as ushers or shepherds, intervening only when a state strays from the path of progress.

In this respect, non-retrogression and traditionalism are in essence the same enterprise. Both substitute a purportedly positive question—how things used to be or how they will be—for the normative question of how they should be. Both non-retrogression and traditionalism facilitate judicial evasion of responsibility for difficult substantive decisions. One might have thought, for example, that *Romer* was a case about the extent to which homosexuals are analogously situated, constitutionally, to women and racial minorities. The Court purports to avoid this terribly difficult question by seeming to intervene only to preserve the status quo. Likewise, how much easier for the Court in *Griswold* to imagine itself as merely protecting the traditional sanctity of the marital bedroom against assault by an insurgent state legislature than weighing an individual right to reproductive autonomy against the interest of a state in guarding against harms to third party moralists. Non-retrogression and traditionalism both allow the Court to disclaim responsibility for controversial substantive judgments by pointing to

132. ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 100 (2d ed. 1978).

133. 347 U.S. 483 (1954).

134. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

someone else who is responsible: local governments that are on the right historical track or the collective practices or conscience of the American people. The Court thus situates itself as the heroic defender of past or future generations against attempted deviations from what Bickel called "fidelity to a true line of progress."[135]

But it is worth remembering that Bickel's portrait of the Warren Court as the midwife of a utopian future was ultimately a cautionary tale. From Bickel's vantage at the end of the 1960s, many of the Warren Court's most ambitious projects seemed already to be unraveling.[136] The explanation, according to Bickel, was the institutional unsuitability of the Court to the role of prophetic architect of social policy. Bickel was deeply skeptical that the Court could successfully do much more than make law interstitially by resolving concrete issues of individual justice and, from time to time, "highlight[ing] issues of principle" that might otherwise be lost in the pragmatic bustle of the political branches.[137] If the Court really could foresee the future, then perhaps it could and should resolve such issues of grand principle and force society to live up to that resolution. Unfortunately, as Bickel put it, borrowing from Wechsler, "the verdicts of history are unfathomable in advance."[138]

Relying on the future to justify present action is especially problematic when the national fortune teller is the Supreme Court, whose predictions will causally influence the course of historical events.[139] Frankly, we see little reason to believe that the Justices are gifted prophets. Some of the Court's landmark decisions were attempts to settle divisive national controversies by choosing the outcome ultimately destined to prevail and thereby sparing the country the trial and

135. BICKEL, *supra* note 132, at 13.

136. *See id.* at 173. Bickel warned:

> If my probe into a near-term future is not wildly off the mark, therefore, the upshot is that the Warren Court's noblest enterprise—school desegregation—and its most popular enterprise—reapportionment—not to speak of school prayer-cases and those concerning aid to parochial schools, are heading toward obsolescence, and in large measure abandonment. And, if this assessment has any validity, it must be read as a lesson.

Id.

137. *Id.* at 176-78.

138. *Id.* at 100 (citing Wechsler, *supra* note 134, at 11).

139. *See* ELY, *supra* note 123, at 70 ("The 'prophecies' of people in power have an inevitably self-fulfilling character."). Of course, the causal relationship between Supreme Court decisions and social change is complicated, frequently overestimated, and treacherous to predict. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (examining the conditions under which courts can produce social change and concluding that they can virtually never lead significant social reform); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (detailing the complex eausal relationship between *Brown* and post-WWII changes in race relations).

tribulation of getting there on its own.[140] *Roe v. Wade*[141] and *Furman v. Georgia*[142] are examples. In both of these cases, the Court seemed to sense that the country was moving inexorably in one direction—toward acceptance and liberalization of abortion rights and toward disapproval and abolition of the death penalty—and it intervened to accelerate that progress.[143] Hindsight has not been kind to either prediction.[144] In short, betting on the future is risky judicial business, especially given that the Court changes the odds by placing its bet. Both *Hunter* and *Romer* reflect such a gamble. As of this date, *Hunter* looks like a good bet, as broad prohibitions against private racial discrimination have come to pass. On *Romer*, the jury is still out.

CONCLUSION

In this Article, we have tried to expose non-retrogression as the basis of decision in recent Supreme Court cases and to reveal the doctrinal, conceptual, and jurisprudential weaknesses in that approach. As our argument on those issues seems clear enough, we close with a more speculative comment. In our view, the revival of non-retrogression as a constitutional principle is symptomatic of a Supreme Court adrift in an age of judicial activism. In the days of John Harlan, judicial restraint—in the sense of self-conscious modesty in the exercise of judicial review—was associated with political conservatism. On the Rehnquist Court, conservatism is ascendant, but judicial restraint seems to have fallen by the wayside.

Nowhere is the decay of restraint more evident than in the Court's treatment of federal statutes. Justice Holmes once said, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[145]

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140. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 17 (1996).

141. 410 U.S. 113 (1973).

142. 408 U.S. 238 (1972).

143. For analysis along these lines of one Justice's participation in *Roe*, see JEFFRIES, *supra* note 48, at 349-52 ("By constitutionalizing abortion, Powell meant to anticipate popular sentiment, not to supplant it. By leaping over the current legislative muddle, the Court would achieve—quickly, cleanly, and without wrenching divisions—the solution toward which the country as a whole was clearly aimed.").

A very similar expectation motivated Justice Stewart's participation in *Furman*. At the time Stewart thought the abolition of capital punishment inevitable, but he lived to see a resurgence of popular support for that penalty. *See id.* at 413-16.

144. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985) (suggesting that *Roe* went too far too fast). In the wake of *Furman*, popular support for capital punishment skyrocketed and thirty-five states reenacted capital punishment for homicide. *See* JEFFRIES, *supra* note 48, at 414.

145. OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295 (1920).

This statement not only reflects Holmes' priority; it also implicitly describes the actual practice of judicial review. Overwhelmingly throughout its history, the Supreme Court has acted against state and local legislation—most often laws that are parochial, anachronistic, or otherwise insulting to contemporary national norms.[146] In most of these cases, the Court has the country on its side.[147] Almost by definition, this is rarely true of federal statutes. Acts of Congress typically represent, if they do not define, a national consensus. For that reason and because of the greater respect owed a coordinate branch of government, Supreme Court invalidation of federal statutes is relatively rare.

We therefore think it notable that in the three years of 1995-1997, the Supreme Court issued twelve opinions invalidating acts of Congress.[148] To find a comparable period of judicial activity, one must go back to 1934-1936.[149] Whatever else may be said of the Rehnquist

146. *See* Klarman, *supra* note 140, at 16.

147. *See id.* at 17.

148. Printz v. United States, 117 S. Ct. 2365 (1997) (invalidating interim provision of the Brady Act requiring local officers to perform background checks on handgun purchasers); Reno v. ACLU, 117 S. Ct. 2329 (1997) (invalidating two provisions of the Communications Decency Act of 1996); Raines v. Byrd, 117 S. Ct. 2312 (1997) (invalidating standing provision of the Line Item Veto Act); Boerne v. Flores, 117 S. Ct. 2157 (1997) (invalidating the Religious Freedom Restoration Act, insofar as it purported to restrict state and local government); Denver Area Educ. Telecomm. Consortium v. FCC, 517 U.S. 2374 (1996) (invalidating provisions of federal statute regulating cable television); Colorado Republican Campaign Comm. v. FEC, 517 U.S. 2309 (1996) (holding FECA provision limiting a political party's expenditures on behalf of a candidate violative of First Amendment); United States v. IBM Corp., 517 U.S. 1793 (1996) (federal tax on insurance premiums paid to certain foreign insurers held violative of the Export Clause); Seminole Tribe v. Florida, 517 U.S. 1114 (1996) (invalidating provision of Indian Gaming Regulatory Act authorizing a tribe to sue a state in federal court to compel good-faith negotiation); United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act as beyond federal power); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down federal ban against display of alcohol content on beer labels); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (invalidating legislation reviving suits found time-barred under a newly-shortened limitations period); United States v. National Treasury Employees Union, 513 U.S. 454 (1995) (provision barring Members of Congress and federal employees from accepting honoraria held violative of First Amendment).

149. Ashton v. Cameron Dist., 298 U.S. 513 (1936) (holding unconstitutional provision for adjustment of municipal indebtedness); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding Bituminous Coal Conservation Act beyond commerce power); United States v. Butler, 297 U.S. 1 (1936) (holding unconstitutional additional provisions of Agricultural Adjustment Act); Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936) (holding amendments to Agricultural Adjustment Act not within taxing power); Hopkins Sav. Ass'n v. Cleary, 296 U.S. 315 (1935) (holding unconstitutional provision for conversion of state associations to federal associations); United States v. Constantine, 296 U.S. 287 (1935) (holding unconstitutional special excise tax on liquor dealers operating in dry states); Louisville Bank v. Radford, 295 U.S. 555 (1935) (striking down act giving mortgagors of farm property option to buy at appraised value with no monetary obligation other than reasonable rent); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding unconstitutional provisions of National Industrial Recovery Act); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (holding unconstitutional compulsory retirement system for employees of interstate carriers); Perry v. United States, 294 U.S. 330 (1935) (holding invalid abrogation of gold clause in government obligations); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (striking down additional provisions of National Industrial Recovery Act); Lynch v. United States, 292 U.S. 571 (1934) (holding

Court, it is not unwilling to act. Indeed, we think the Justices have internalized the habit of judicial activism, so that striking down an act of Congress for no very clear reason (as in *Denver Area Telecommunications*) no longer seems like a big deal.

The astonishing thing is that this willingness to pull the trigger is no longer motivated, as it was for the Warren Court, by a clear idea of the "right targets." The current Supreme Court is habituated to the exercise of power but has no clear agenda. In consequence, it invalidates laws for internal inconsistency and legislative sloppiness,[150] for reasons that border on the trivial, as in *Denver Area Telecommunications*, and, as in *Romer*, for reasons that the Court is unwilling or unable to give.

Non-retrogression suits this mood. Its procedural garb allows the Court to strike down occasional unattractive laws, while avoiding substantive explanations. Though unrelated in substance and incommensurate in importance, *Romer* and *Denver Area Telecommunications* share this flaw. In neither case does the Court address the question crucial to any sensible use of non-retrogression: which way is forward, and which way is backward? A Court that is not prepared to answer that question directly has no business relying on non-retrogression; a Court that is prepared to answer that question directly has no need to do so.

unconstitutional as to an outstanding contract repeal of all laws pertaining to war risk insurance); Booth v. United States, 291 U.S. 339 (1934) (holding violative of Article III temporary reduction in pay of retired judges).

150. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (striking down Gun-Free School Zones Act, plausibly because of Congress's failure either to require a connection to interstate commerce or make an explicit finding that guns-near-school substantially affected interstate commerce); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down for internal inconsistency federal ban on alcohol content advertising).