

WHY WE CANNOT ASK WHY: ETHICAL INDEPENDENCE AND VOTER INTENT

Should a vote still count if cast for the wrong reason? More specifically, when citizens decide a legislative question themselves, whether through initiative, referendum, or plebiscite, should judges require their votes to be backed by a certain level of responsibility, of “equal concern and respect”?¹ This is not to ask whether laws passed by popular vote require some level of rationality or decency. That is too easy; obviously, they must.² Rather, the question is whether the law should require each individual voter, in the cloister of the voting booth, to cast her vote rationally and responsibly. This Note argues no.

Courts and commentators have struggled to determine when laws, whether enacted directly by citizens or through regular legislation, are invalid because of their intentions.³ This analysis, however, has ignored a key distinction between *voter motivation* and *legislative design*. Voter motivation is the particular reason a citizen (or legislator) chooses to vote for or against a particular measure. Legislative design, on the other hand, is what the measure, as divined by tools of statutory construction, is calculated to do. Inquiry into legislative design is necessary for proper adjudication. Inquiry into voter motivation, however, should be forbidden because it intrudes upon voters’ “ethical independence,”⁴ as Professor Ronald Dworkin terms it.

This Note proceeds in three parts. Part I discusses the cases and commentary confronting the question of inquiry into voter intent. The traditional approach has been to bar such inquiry. However, recent court decisions have eroded that rule. Part II posits a defense of the traditional position. Although the legal doctrine locates such defenses under the First Amendment’s freedoms of speech and association and the right to privacy,

1. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 392 (2011).

2. See *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (citing *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 736–37 (1964)).

3. See, e.g., John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

4. See DWORKIN, *supra* note 1, at 211–13.

such an approach is an unwieldy shield for voter freedom. Instead, such freedom is best founded in the principle of ethical independence, which animates—but extends far beyond—the First Amendment and the right to privacy. This principle of ethical independence requires the distinction noted above between motivation and design. Part III addresses two objections to Part II. First, it discusses the problem of the law’s willingness in other areas to look into the mind. Second, it distinguishes Professor Cass Sunstein’s notion of “naked preferences.”

I. CHALLENGES TO THE PROHIBITION ON INQUIRING INTO VOTER MOTIVATION

Citizen-enacted legislation has a long and controversial history in the United States.⁵ Critics have disparaged the practice both as a means for raw majorities to bulldoze minority opposition⁶ and as a lawmaking process devoid of deliberation, information, and expertise.⁷ Some argue further that the two defects go hand-in-hand.⁸ Given the procedural shortcomings of direct democracy, courts have often stepped in to police its bounds.

The settled law—The Supreme Court’s first encounter with direct democracy occurred in 1912,⁹ when it heard argument to determine whether Oregon’s referendum procedure violated the Republican Guarantee Clause.¹⁰ The Court held the matter nonjusticiable.¹¹ Since then, no case before the Supreme Court has challenged whether a mode of direct democracy, as a procedure itself, is constitutional.

5. For an overview of the history and debate surrounding American direct democracy, see JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAW-MAKING* (1999).

6. See, e.g., Derrick Bell, *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); cf. THE FEDERALIST NO. 10 (James Madison).

7. See Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); see also, e.g., Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 429–32 (1998).

8. See, e.g., William E. Adams, Jr., *Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 469 (1998) (arguing that misinformation and stereotypes are endemic to referenda and correlate with violence against and oppression of minority groups).

9. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

10. U.S. CONST. art. IV, § 4, cl. 1 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

11. *Pac. States Tel.*, 223 U.S. at 149–51.

The Court has encountered numerous cases, however, questioning the constitutionality of laws enacted by popular vote. Resolving these cases has invariably required interpretation of the intent behind the laws in question.¹² Stated simply, the Court's view has been that "[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."¹³ The "implementation of [a law] through popular referendum [cannot] immunize it."¹⁴ In theory, then, the review of popularly enacted and legislatively enacted statutes is the same.

In the equal protection context, courts purport to apply the same rational basis standard to all legislation, whether enacted by citizens or their representatives. For example, in upholding a popularly enacted zoning law, the Tenth Circuit stated, "The 'true' purpose of the [policy], (i.e., the actual purpose that may have motivated its proponents, assuming this can be known) is irrelevant for rational basis analysis.' . . . Rather, under rational basis analysis, we look only to whether a 'reasonably conceivable' basis exists."¹⁵ This standard is a faithful application of the Supreme Court's statement that "it is entirely irrelevant for constitutional purposes whether the conceived reason for [a] challenged distinction actually motivated the legislature."¹⁶ Even under rational basis review, however, the Supreme Court and lower courts have occasionally been less than deferential to

12. *See, e.g.,* *Reitman v. Mulkey*, 387 U.S. 369, 374–76 (1967) (discussing a popularly enacted law's implicit repeal of certain other statutes).

13. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

14. *Id.*

15. *Crider v. Bd. of Cnty. Comm'rs of Boulder*, 246 F.3d 1285, 1289–90 (10th Cir. 2001) (quoting *FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) (first alteration in original)); *cf. Crawford v. Bd. of Educ.*, 458 U.S. 527, 545 (1982) (where a ballot proposition's text espouses nondiscriminatory objectives, the Court, typically, will not "impugn the motives of the State's electorate").

16. *FCC v. Beach Commc'ns., Inc.*, 508 U.S. 307, 315 (1993); *cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." (citation omitted)); *City of Mobile v. Bolden*, 446 U.S. 55, 92 (1980) (Stevens, J., concurring in the judgment) ("[A] political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decisionmaking process were motivated by a purpose to disadvantage a minority group.").

popularly enacted legislation¹⁷ and less than clear when applying more demanding levels of scrutiny.¹⁸

The traditional view: no inquiry into voter motivation—Under mere rational basis scrutiny, there is no question of whether to inquire into voter motivation because such an inquiry would be perfunctory. Because any explanation for a popular enactment, “true” or not, will suffice, there is nothing to be discovered that cannot be hypothesized away. Nevertheless, when courts must scour more diligently, they must also decide whether to attempt to ascertain the motivations of voters. This decision is not whether to go beyond a statute’s text; Inferences beyond the text’s language, including the statute’s probable effects, compliance with the rest of a statutory scheme, and agreement with rationales of policy and morality,¹⁹ are not precluded by this question. In *Reitman v. Mulkey*,²⁰ for example, the Supreme Court went far beyond the seemingly innocuous language of a California housing initiative to find that the initiative effectively repealed portions of the Fair Housing Act.²¹ But the Court did not reach this conclusion by any finding that Californians wanted the initiative to repeal the Fair Housing Act (though many probably did).²² Or, as summarized by the Sixth Circuit, “neither the Supreme Court nor this Court has ever inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results.”²³

Until recently, courts uniformly followed this approach, refusing to peer into the voting booth. In *Kirksey v. City of Jackson*, the Fifth Circuit explained why:

From the earliest times in the unfolding of what has come to be our Constitution and Bill of Rights, free expression has

17. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (discussed *infra*).

18. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (discussed *infra*).

19. See Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22–23 (1967).

20. 387 U.S. 369 (1967).

21. *Id.* at 373–76.

22. See Kenneth R. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 44–45; see also *S. Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291, 295 (9th Cir. 1970) (observing that in *Reitman*, 387 U.S. at 381, “[p]urpose was judged . . . in terms of ultimate effect and historical context”).

23. *Arthur v. City of Toledo*, 782 F.2d 565, 573 (6th Cir. 1986).

been viewed as one of the most precious rights, essential to the flowering and growth of a democratic society. . . . Even the muting of universally offensive comments is not permitted [under the First Amendment].

At the core of first amendment values is the right to espouse political views and associate for political purposes. Inherent in this guarantee is the sanctity of the ballot. The district court was of the opinion that an inquiry “into the motives of voters may very well constitute an unwarranted and unconstitutional undermining of one of the most fundamental rights of the citizens under our constitutional form of government” We agree.

The first amendment assures every citizen the right to “cast his vote for whatever reason he pleases” Baser motives are protected along with the grand and noble. Stigmatized racial attitudes, neither socially admirable nor civically attuned, are not constitutionally proscribed The motivation(s) of the individual voters may not be subjected to the searching judicial inquiry the plaintiffs wish performed.²⁴

The *Kirksey* district court, quoted above, relied upon *SASSO v. City of Union City*,²⁵ which upheld a zoning change by referendum against an equal protection challenge. There, the Ninth Circuit noted that the plaintiffs “reach[ed] beyond purpose.”²⁶

If the voters’ purpose is to be found here, then, it would seem to require far more than a simple application of objective standards. If the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise.²⁷

The Sixth Circuit has also cited *Kirksey* with approval, putting forth not only the secret ballot rationale for denying inquiry into voter motivation,²⁸ but also a presumption in favor of ref-

24. *Kirksey v. Jackson*, 663 F.2d 659, 661–62 (5th Cir. 1981) (internal citations omitted) (quoting *Anderson v. Martin*, 375 U.S. 399, 402 (1964) (stating that a citizen may “cast his vote for whatever reason he pleases”) (dictum)).

25. 424 F.2d 291 (9th Cir. 1970).

26. *Id.* at 295.

27. *Id.*

28. See *Arthur*, 782 F.2d at 573 (“Since a court cannot ask voters how they voted or why they voted that way, a court has no way of ascertaining what motivated the electorate.”); see also *D’Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352 (D.N.J. 1995) (recognizing an absolute evidentiary privilege to one’s political votes).

erendums as truly democratic²⁹ and concerns that evidence of any one voter's discriminatory intent would unfairly impute bias to the whole electorate.³⁰

Challenges to the voter inquiry prohibition—The decisions of the last twenty years have shown a shift toward scrutiny of voter motivation. Led by California, a hotbed of popular legislation, courts have moved toward considering extrinsic evidence of voter motivation when investigating referenda's constitutionality.³¹ The most marked change occurred in 1996, in *Romer v. Evans*.³² *Romer* struck down Colorado's Amendment 2, which prohibited any Colorado state or municipal organ from extending antidiscrimination protections to homosexuals. The opinion's most remarkable feature was its cavalier characterization of Colorado's voters as motivated only by animus: "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity . . ." ³³ It is not the unflattering portrait of Coloradans, in itself, that is noteworthy,³⁴ but the opinion's recourse to voter motivation. Although previous cases had invoked animus as an impermissible legis-

29. *Arthur*, 782 F.2d at 573 (citing *James v. Valtierra*, 402 U.S. 137, 141 (1971)); see also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506 (1990):

During the oral argument in *Reitman v. Mulkey*, then Solicitor General Thurgood Marshall called attention to the fact that California's authorization of discrimination in the private housing market had been enacted by voter initiative. "Wouldn't you have exactly the same argument," he was asked, if the provision "had been enacted by the California legislature?" "It's the same argument," Marshall replied, "I just have more force with this." "No," interjected Justice Black, "It seems to me you would have less. Because here, it's moving in the direction of letting the people of the State—the voters of the State—establish their policy, which is as near to a democracy as you can get."

30. *Arthur*, 782 F.2d at 573–74 (citing *Metro. Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1292 (7th Cir. 1977)).

31. See, e.g., *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360, 1363 (Cal. 1991) ("Because section 3 [of Proposition 13] is ambiguous in context, it is appropriate to consider indicia of the voters' intent other than the language of the provision itself."); see also Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 164–66 (1989) (listing categories of evidence courts could, and should, use to ascertain voter motivation).

32. 517 U.S. 620 (1996).

33. *Id.* at 634.

34. The dissent thought otherwise. See *id.* at 645 (Scalia, J., dissenting) ("The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled 'gay-bashing' is so false as to be comical.")

lative motive,³⁵ none had done so in the direct democracy context. Likewise, although previous cases had struck down popularly enacted initiatives,³⁶ none had done so based on voter motivation. Even so, the Court in *Romer* preserved at least a thin shield around voter motivation. The Court merely deduced voter intent rather than ascertaining it directly. As described by the Eleventh Circuit:

[T]he fatal defect in Amendment 2 was not that the Court determined that *actual* animus motivated passage of the Amendment. . . . [The] *Romer* Court never examined the actual history of the plebiscite vote . . . nor the accompanying campaign rhetoric or the “intent” of the electorate.

Instead, the Court found the proffered rationales so implausible that the Court *inferred* that animus was the only conceivable (as opposed to actual) rationale.³⁷

The closely watched *Perry v. Schwarzenegger*³⁸ has pushed over further than *Romer*. In *Perry*, the Ninth Circuit on mandamus affirmed the district court’s unprecedented expansion of discovery: “Whether campaign messages were designed to appeal to voters’ animosity toward gays and lesbians is a question that appears to be susceptible to expert testimony, without intruding into private aspects of the campaign.”³⁹ Those private aspects were narrowly defined, however, as only “private, internal campaign communications concerning the formulation of campaign strategy and messages.”⁴⁰ The district court’s findings of fact indeed demonstrate an intrusive inquiry into voters’ motivations.⁴¹ Time will tell whether

35. See Daniel A. Crane, *Faith, Reason, and Bare Animosity*, 21 CAMPBELL L. REV. 125, 139–46 (1999) (summarizing the Supreme Court’s animus jurisprudence).

36. See *supra* notes 17–18 and accompanying text.

37. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1279 (11th Cir. 2004) (citing *Romer*, 517 U.S. at 632).

38. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

39. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1165 (9th Cir. 2010).

40. *Id.* at 1165 n.12 (emphasis omitted).

41. See *Perry*, 704 F. Supp. 2d at 985 (“84 percent of people who attended church weekly voted in favor of Proposition 8.”); *id.* at 986 (“[T]he religious characteristics of California’s Democratic voters’ explain why so many Democrats voted for Barack Obama and also for Proposition 8.”); *id.* at 987 (noting testimony stating “that the wave of campaigns that we have seen against gay marriage rights in the last decade are, in effect, the latest stage and cycle of anti-gay rights campaigns of

such expansive investigation of voters is a mere aberration or a permanent change in the law.

II. ETHICAL INDEPENDENCE

Courts have used two different arguments to justify the prohibition on inquiring into voter motivation. Both arguments emphasize the negative consequences of such an investigation. The first argument relies on the First Amendment's right to freedom of association, emphasizing the chilling and disruptive effect of an intrusive examination of private political activity. Inferring voter motivation, according to this argument, would require in-depth discovery into the operations of specific groups active during the referendum campaign. This would hinder such groups' ongoing work and, worse, make individuals less likely to participate in such groups in the future for fear of being deposed or cross-examined for no other reason than their political beliefs. The second argument relies on the right to privacy. According to this argument, persons have the right to a secret ballot, which remains forever secret if they wish, because of its revealing nature and because of its key role in assuring free elections.⁴²

Both arguments, however, orbit a more salient, but unnamed, concern. For the freedom of association argument, surely it is not enough to say that the inconvenience or even embarrassment of litigation proceedings is enough to shield an entire area from inquiry—after all, does litigation ever *not* bring with it expense and discomfiture? What seems to be truly at play is a well-founded unease with putting political associations on trial, literally, in referenda to determine whether their aims and beliefs are, in the equal protection sense, rational or not.⁴³ A judicial proceeding to ferret out animus or another illegitimate mo-

a sort that I have been describing; that they continue with a similar intent and use some of the same imagery").

42. See *D'Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352, 1358 (D.N.J. 1995) ("The community's interest is that the citizen's vote, the culminating act by which his opinion is made most effective, should be absolutely sincere—i.e., should represent accurately his opinion upon the persons or the propositions presented for choice." (quoting 8 WIGMORE, EVIDENCE § 2214(b), at 162–63 (McNaughton rev. ed. 1961))).

43. Cf. *United States v. Ballard*, 322 U.S. 78, 86–88 (1944) (barring jury inquiry into the veracity of a religion's tenets).

tive appears incompatible with the classic conception of the First Amendment as fostering a marketplace of ideas.

For the privacy argument, the rationale seems tautological: inquiry into voter motivation jeopardizes the secret ballot; the secret ballot, in turn, is necessary to ensure that voters express their true preferences, so that the vote expresses voters' true preferences. This argument does not answer why it is so integral that voters be able to express their true preferences, beyond some general notion of democratic legitimacy. More troubling is that the argument fails to address the exact counterargument implied by inquiry into voter intent—that is, that votes should not count when cast for the wrong reasons.⁴⁴

A better approach: ethical independence—The First Amendment and privacy arguments both find their timber in the principle of ethical independence. As propounded by Professor Ronald Dworkin,⁴⁵ ethical independence is the natural outgrowth of the essential rule of personal responsibility: If a person is to live well, she—and nobody else—must take seriously her responsibility to live well, which requires earnestly defining and pursuing what is, to her, the life well-lived.⁴⁶ Consequently, one cannot interfere with another's choices solely because the interferer believes those choices to be wrong. Even so, interference predicated on protecting people from physical harm, or reducing traffic congestion, or lowering obesity rates, or any of hundreds of other rationales is permitted, for “[n]one of these laws denies my

44. To be fair, Professor Sager has addressed this point, though he goes no further than identifying that the concern is the “sanctity of individual choice.” Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1421 (1978). His words are nonetheless instructive:

[I]t is highly questionable whether it is appropriate to examine motivation in the electoral process. We have a basic sense of that process as an intentionally opaque, impenetrable mechanism which aggregates personal preferences without regard to their nature or origin. To put the matter in its most extreme form, imagine a challenge to a mayoral election on the ground that the electorate had favored candidate X because he or she was white, as opposed to candidate Y who was black. Clearly, we would reject such a challenge on principle, even if the fact of racial animus was quite firmly established. This solicitude for the sanctity of individual choice in the electoral context logically extends to legislative plebiscites.

Id.

45. See DWORKIN, *supra* note 1, at 211–13.

46. See *id.* at 209–10.

responsibility to define ethical value for myself . . . because none aims to usurp my responsibility to identify a successful life."⁴⁷

Both arguments listed above allude to the principle of ethical independence. Subjecting a political association to a court's definition of rationality is wrong, because such inquisition would serve to tell the association which of its aims are permissible. This is not the same as regulating an association's activities as they affect others, which is acceptable as part of morality, as Professor Dworkin uses the term.⁴⁸ Rather, the inquisition would be used to pass judgment upon what the association defines for itself as the good life.

The same reasoning applies to the privacy rationale. It is important that a voter express his true preferences because, above all else, it is part of his ethical independence. Democracy is not necessarily requisite for ethical independence (though Professor Dworkin argues that it follows naturally enough⁴⁹), but if a citizen may vote, a judge infringes that citizen's ethical independence by examining the reasons for that vote.⁵⁰ The political system allows a citizen to express his vision of the good life through his vote. Thus, an examination of that expression, which implies the ability to reject that expression as invalid, is an invasion of the citizen's prerogative. Yes, morality requires that citizens, like legislatures, enact only laws that pass constitutional muster. But ethics requires that a law's constitutionality not turn on the private reasons for its enactment. Doing so would be akin to telling a voter whether or not his conception of the good life is appropriate.

One may argue that voting on referenda is not an ethical exercise. Laws are passed to regulate the conduct of others, so the standards of morality, not the agnosticism of ethics, apply: When stepping into the voting booth, the person takes off his private citizen hat and puts on his legislator hat, which demands a certain level of regard for others. This argument misunderstands the distinction between voter motivation and

47. *Id.* at 369.

48. *See id.* at 191 ("Moral standards prescribe how we ought to treat others; ethical standards, how we ought to live ourselves.").

49. *See id.* at 392–95.

50. *See id.* at 212 (explaining that authenticity does not require limitless possible options, but it does require full freedom to choose among the options that are available).

legislative design. Again, the trouble arises because a popularly enacted law can be found unconstitutional even if its harm is couched, hidden, or oblique; the fulcrum, however, cannot be voter motivation. Even if bad motivation is readily ascertainable, the harm is insufficient to impeach a popularly enacted law because it is merely expressive.⁵¹ Although citizens might have such a claim on their legislators, it is too much to conscript their fellow citizens into such a prophylactic requirement, even when these fellow citizens are legislating. If a popularly enacted law is otherwise free of cognizable harm, meaning that it is not morally defective and hence unconstitutional under traditional interpretation, then there can be no remedy for the inference, or even the fact, that citizens had irresponsible motives in the voting booth. In this situation, the complaint against such a law—reduced to the hard nub of voter motivation—is only that one person is offended by another’s conception of values, or of living well. The grievance melts away into simply, “It offends me that that person believes that.” And such grievance is not enough.⁵²

This is not to say that expressive harms are never cognizable. To put it tautologically, they are cognizable when the harm to the subject extends from purely ethical harm⁵³ to moral harm. Our laws correctly ban cross-burning and obscene pornography for just this reason: The psychic harm is palpable enough to be given legal weight.⁵⁴ Meanwhile, for those offended by

51. Using the example of *Palmer v. Thompson*, 403 U.S. 217 (1971), Professor Hasen highlights one such expressive harm in this vein, suggesting that “when a city closes its pools rather than integrating them, there is arguably greater harm to racial equality from the message that the closure sends than from the loss of being able to swim in the pool.” Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 891 (2006). Professor Hasen also notes the quandary may solve itself:

If the courts decide that expressive harms indeed create cognizable harms, policing directly for motivation may make sense and may be the only way to prevent these expressive harms. If this analysis is right, when the legislative body adapts to the learning curve and starts hiding its true intent, the expressive harm itself may disappear, or at least be dissipated.

Id.

52. See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (“Our obligation is to define the liberty of all, not to mandate our own moral code.” (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992))).

53. We may define ethical harm as the knowledge that someone else is discharging their ethical life in a way offensive to one’s own ethics.

54. See, e.g., *Virginia v. Black*, 538 U.S. 343, 359–60 (2003); *Allen v. Wright*, 468 U.S. 737, 755 (1984); *Miller v. California*, 413 U.S. 15, 23–26 (1973).

profanity on clothing⁵⁵ or nudity at drive-in theaters,⁵⁶ their only recourse is to “avert[] their eyes.”⁵⁷ This is a difficult line to draw.⁵⁸ For example, assuming Amendment 2 in *Romer* was not defective for, among other things, its restructuring of the political process, for its potential repeal of other anti-discrimination statutes, and so on, is it possible that the sheer weight of Amendment 2 crossed the line from expression to real harm? Perhaps so, although such an exception to the prohibition on voter motivation inquiry would threaten to swallow the rule: When would a person challenge a popularly enacted law except when she does feel severely hurt?

*Necessary indeterminacy*⁵⁹—Now to address more fully the question of why we must afford voters, but not legislators, space for ethical independence. If voters pass laws just as legislators do, the first argument goes, they should be held to a standard consistent with “due process of lawmaking.”⁶⁰ Yet if legislators are truly representatives of the people, says the response, they should be afforded any motive imaginable for their votes on bills.

To some extent, we do afford legislators motives beyond, or perhaps in contradiction of, the Constitution’s requirements. Legislators routinely and obviously allow their religious beliefs to inform their votes.⁶¹ The Speech or Debate Clause⁶² shields federal legislators’ motives to some degree, and courts have erected thick barriers against probing the minds of government

55. See *Cohen v. California*, 403 U.S. 15 (1971).

56. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

57. *Cohen*, 403 U.S. at 21.

58. For an attempt to draw the line between legitimate speech and illegitimate group libel (or hate speech, as it is usually called), see Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010). For an in-depth discussion of court decisions and academic commentary on the subject of expressive harms, see generally Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings* (Cornell Legal Studies Research Paper No. 11-03, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1750354.

59. This phrase is borrowed from Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1117 (1993).

60. See Linde, *supra* note 7.

61. For a defense of this practice, see, for example, MICHAEL J. PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (2003). For the opposite, see, for example, Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

62. U.S. CONST. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, they shall not be questioned in any other Place.”).

officials.⁶³ Nonetheless, officials' freedom is constrained by their role as intermediary. As Madison argues, a republic, as compared to a direct democracy, "refine[s] and enlarge[s] public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of our country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."⁶⁴

Setting aside Madison's affinity for an elite governing body, his view suggests at least three ways in which representatives, but not private citizens, can or should be constrained. First, by holding a seat of responsibility and taking an oath to uphold the Constitution, we hope that representatives will genuinely use proper motives in their votes. Second, elected legislators are not to be carried by "temporary or partial considerations."⁶⁵ Enlarging the electoral sphere for each representative attenuates the factional impulses of any constituency within that sphere. This forces representatives to gain the allegiance of a broader swath of citizens, which in turn requires such representatives to cast and justify their votes in terms understandable to many. Representatives must thus steer within the bounds of an "overlapping consensus"⁶⁶ to gain reelection. Granted, even this kind of representative can, in his heart of hearts, cast his votes for ulterior reasons. However, if he can justify his votes in a Madisonian way to a diverse majority, then does any hidden, "true" motive matter? Third, representatives should be constrained by being what Madison terms a "medium." The representative's vote is not his own, but that of the people he represents. Hence, the representative's moral, not ethical, responsibilities are implicated by his votes because they have been entrusted to him. By his votes alone, regardless of what the laws enacted by those votes do, the representative represents his constituents—to cast those votes for flippant or prejudiced reasons would be a betrayal of that trust. True, a

63. See, e.g., Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 721–24 (1975) (questioning the propriety of examining federal administrators).

64. Frickey, *supra* note 7, at 425 (citing THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961)).

65. *Id.*

66. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

representative must decide for himself what the best conception of a representative is,⁶⁷ including whether a representative should always vote as his constituents would like or whether a representative should exercise independent judgment. That determination happens after elections, meaning that the representative makes that decision on behalf of his constituents, not himself. Thus, it is a moral, not an ethical, decision. Consequently, representatives cannot be afforded the full range of freedom in their reasoning for their votes.

These three points suggest an answer to the question posed earlier of why citizens cannot be held to the same standard as legislators when voting on referenda. Voters are not acting as a medium in their reasoning: in a referendum, Citizen *A* is not Citizen *B*'s representative, so Citizen *B* has no claim to Citizen *A*'s motives. Again, this is not to say that a law enacted by popular vote may trample the minority—if that were the case, the fate of all would be entrusted to the majority.⁶⁸ The reasoning process—good, bad, or absent—of each citizen is entirely private. There is no delegation of authority—no entrustment—of that reasoning here, unlike when citizens elect a representative.

This notion of nondelegation is reflected in the traditional legal position discussed in Part I. The prohibition on inquiring into voter motivation is a prohibition on policing the “rock-bottom, indigestible fact of each person’s lonely individuality, his ultimate responsibility for his own beliefs, judgments, and choices.”⁶⁹ Unlike a legislator’s reasoning, a voter’s reasoning is the antecedent rather than the consequence of a political choice. The voter’s reasoning is prepolitical. Political actors must, therefore, leave the voter’s reasoning alone as the “necessary indeterminacy”⁷⁰ of a society. To do otherwise is an entrenchment of one’s conception of ethics at the expense of another’s.

67. Cf. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

68. Compare corporate law, in which a controlling shareholder owes a fiduciary duty to the minority. See, e.g., *McMullin v. Beran*, 765 A.2d 910 (Del. 2000).

69. CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* 22 (2007).

70. Post, *supra* note 59, at 1117.

The result of this necessary indeterminacy is a Brownian⁷¹ conception of democracy that is defended in other areas of law. The First Amendment's protection for liberty of the mind is the most prominent example.⁷² Likewise, the Supreme Court has hesitated to legally endorse any brand of orthodoxy.⁷³ The state action doctrine⁷⁴ and the prohibition on reexamining jury verdicts⁷⁵ are two more examples of this phenomenon. All these doctrines share, with the bar against inquiring into voter intent, a respect for ethical independence.

III. OBJECTIONS AND ANSWERS

Mens rea—It is true that the law in other areas looks into the minds of private citizens. In criminal trials, whether someone had “proper” or “improper” thoughts often determines his freedom or, potentially, his death.⁷⁶ Some laws, such as hate crime legislation, even extend beyond the typical categories of negligence, knowledge, and intent to include heightened penalties for a defendant who “[i]ntentionally selects the [victim] . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”⁷⁷ What liberty of the mind is afforded here? How can voting on an initiative, which also involves a state-of-mind-plus-action, be distinguished?

The distinction is, again, ethics and morality. State of mind is an appropriate inquiry in criminal and tort law because the in-

71. Named for Scottish botanist Robert Brown, Brownian motion is “the peculiar random movement exhibited by microscopic particles . . . when suspended in liquids or gases that is caused by the impact of the molecules of fluid surrounding the particles.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 284 (1981).

72. See FRIED, *supra* note 69, at 95–123.

73. See, e.g., *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”); *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (“[A] constitution is not intended to embody a particular economic theory It is made for people of fundamentally differing views . . .”).

74. See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

75. U.S. CONST. amend. VII (“[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States . . .”).

76. See, e.g., Patricia Wen & Milton J. Valencia, *Jury Convicts Odogren of Murder: Rejects Insanity Defense; Life Term Mandatory*, BOS. GLOBE, Apr. 30, 2010, at A1.

77. *Wisconsin v. Mitchell*, 508 U.S. 476, 480 (1993) (quoting WIS. STAT. § 939.645(1)(b)) (internal quotation marks omitted).

quiry has moral aims. The reason purposeful murder is punished more harshly than negligent homicide, while the most sordid but unimplemented thoughts of killing are not punished at all, is because of the need to deter wrongful conduct. The discouragement of bad motives here—do not intentionally kill, do not hurt someone because of their race—does suppress those thoughts in the minds of those who would otherwise entertain them. The difference is that the bad thought is anchored to harmful action; it does not itself constitute the harmful action. It requires volition to swim outside one's lane,⁷⁸ and that is the extent of the inquiry here: first being outside your lane, why are you here?

Naked preferences—Professor Cass Sunstein has argued that political choices are constitutionally defective when they distribute “resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”⁷⁹ Instead, all laws must appeal to “some public value that the differential treatment can be said to serve.”⁸⁰ At first blush, this argument may seem antidemocratic, standing against the idea that “in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.”⁸¹ A prohibition on voter inquiry in referenda may seem to give cover to no more than “raw political power,” but it deserves a better defense than a dismissive majoritarianism.

The problem with Professor Sunstein's thesis is that it extends a preference too far. To put it bluntly, why is Professor Sunstein's favoring of public values over pure majoritarianism more than a naked preference? Pure majoritarianism itself may be a public value, yet it is given short shrift. Further, determining what counts as a public value and what counts as merely a “want” is extremely difficult and seems inevitably to boil down to a different, but nonetheless naked, preference. The naked preference thesis collapses into itself. This is not to say that Professor Sunstein's approach is not a *better* way to approach

78. See DWORKIN, *supra* note 1, at 287–88.

79. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

80. *Id.* at 1694.

81. ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139 (1990).

lawmaking than pure majoritarianism; rather, it means only that it does not transcend it.⁸²

Even if we accept Professor Sunstein's approach, how does it apply to direct democracy? Specifically, Professor Sunstein leaves unclear whether public values ever force voters to forego their private preferences in the voting booth. For example, if a voter is committed to alleviating the suffering of the poor, and she is deciding whether to vote in favor of a referendum to impose a new five-percent tax on businesses for food stamps, there is no reason she would need to appeal to a public value beyond the fact that she likes the idea and wants to see it applied.

This argument, however, is little more than the economists' utility fallacy. According to this theory, even the most courageous and sacrificing behavior is actually selfish because, on some level, such behavior affords the person more utility than other options. If not, then the person would not have chosen it. With the example above, one could easily say that, though the woman experiences the tax as an additional cost when she shops, she derives more than compensatory utility from knowing the taxes go to help the needy. Thus, her choice was nothing more than a naked preference after all. Professor Sunstein's argument, in proving everything, proves very little.

Beyond the utility trap, the great difficulty with naked preferences as they apply to direct democracy is the problem of the pre-political discussed in Part II. A popularly enacted law that hurts *A* only if *B* had certain motives—that is, only if *B* acted on a mere naked preference—infringes *B*'s ethical independence. Requiring *B* to act in accord with public values, whatever those are, when no harm other than an expressive one is at stake, is to dictate to her what she can and cannot value. This the state cannot do.

82. Cf. DWORKIN, *supra* note 1, at 128:

If our instincts are right, and one reading of Yeats or the equal protection clause really is better than another, then why can't we explain why it is? Interpretive judgments, like moral judgments, can't be barely true. It can't just be a brute fact with no further explanation that Shylock's Jessica betrays her father because she is ashamed of being a Jew. There must be some further explanation of why that is true, if it is true.

CONCLUSION

The bar against inquiring into voter intent is a bastion worth defending. Sheltered within is each person's right to a sincere vote and ethical independence. While the bastion's walls have been assailed in recent years, they have neither crumbled nor been overrun. Hopefully this Note shores them up a bit.

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