

The Plural Implications of Value Pluralism: A Comment on Maimon Schwarzschild's *On This Side of the Law and On That Side of the Law*

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I. INTRODUCTION

In his paper, *On This Side of the Law and On That Side of the Law*, Professor Schwarzschild neatly and convincingly presents the thesis that Isaiah Berlin's central idea—value pluralism—can support opposing views on a variety of legal and public policy issues. Value pluralism is the idea that there is a plurality of values in human experience, and that they cannot be reduced to one overarching value or principle. Professor Schwarzschild reviews four strongly debated legal and public policy

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issues—the state action doctrine, judicial activism, gay marriage, and federalism—and shows that value pluralism can be used to argue either for or against each of these issues.

Beginning with state action, Professor Schwarzschild shows that one can use the idea of value pluralism to argue for state action because without it we would subject individuals—and not only the state—to the monolithic power of judicially enforced rights, thus limiting the plurality of possibilities in private life. But, on the other hand, one can use the same idea of value pluralism to argue against state action because it allows private actors to discriminate against others, thus limiting value pluralism in society. As for judicial activism, it is antipluralistic by subjecting states, courts, and legislatures to the monolithic interpretation of the Constitution by the Supreme Court; but, like state action, it is propluralistic by eradicating discriminatory practices that hinder pluralism in society. Gay marriage is pluralistic in allowing more people to choose freely their type of family association, but it is antipluralistic because it endangers the traditional conception of marriage, thus reducing the plurality of values in society. And federalism enhances pluralism by allowing states to choose their own values; at the same time, it hinders pluralism by immunizing states from central government review of their antipluralistic practices and laws.

Although Professor Schwarzschild is careful not to take sides with any one of the opposing possible interpretations of pluralism in each of these examples, he does not go so far as taking the radical view that pluralism can support any position on any issue—a view that would make pluralism an empty concept. On the other hand, his project is also not one of a Berlin exegesis, that is, one of finding out what Berlin had in mind when he used the idea of value pluralism. Rather, the reader is pressed to read between the lines and within the careful discussion finds hints to the author's own views and normative preference regarding the implication of value pluralism.

I suggest that there are two main views that can be found in Professor Schwarzschild's paper. The first is a strong suspicion of any type of centralized power, especially judicial power, as potentially stifling the plurality of values in society and imposing a monolithic view from above. This theme makes federalism and judicial activism especially central issues in the paper, and I will concentrate on both of them in my comment.

The second view regarding the application of value pluralism is more subtle. It is a Burkean defense of traditional institutions, arguing that they represent a way of life in danger of extinction in the face of generic

and prevalent rationalism.¹ Value pluralism should induce us to protect such traditions from extinction. This theme is manifested in the discussion of gay marriage and represents a conservative and traditionalist strand of value pluralism. The two themes can be related according to a view promoting state autonomy as a safe haven against an attempt to subject the variety of tradition-based experiences to the homogeneous effect of rationalism.

In what follows, I will concentrate on these two themes and point out several challenges to Professor Schwarzschild's application of them, starting with a discussion of federalism, moving on to gay marriage, and ending with a discussion of judicial activism, which I will also expand into my own argument on three different ways in which value pluralism can be applied to judicial review adjudication.

II. VALUE PLURALISM AND FEDERALISM

As noted, Professor Schwarzschild's main thesis in the paper is that value pluralism can both support and oppose central doctrines and policies. This is well exemplified in his discussion of federalism. Professor Schwarzschild argues that value pluralism supports federalism because in a federal system "the various state or provincial governments have considerable freedom to adopt their own values and policies, which will differ from time to time and from place to place."² However, value pluralism rejects federalism to the extent that federalism can be invoked in the defense of discriminatory practices by states because such practices would limit pluralism within those states. In particular, he alludes to the way the concept of federalism was used to defend segregation and discrimination in the South during the time of the civil rights movement by arguing that they reflected the South's "way of life."³

Although Professor Schwarzschild has an evenhanded approach to these two opposing implications of the concept of value pluralism on the idea of federalism, it is quite evident that the thrust of his argument is to defend federalism as pluralist, despite its questionable past during the civil rights movement. His argument is that we should not throw the

1. See *infra* notes 15–18 and accompanying text.

2. Maimon Schwarzschild, *On This Side of the Law and On That Side of the Law*, 46 SAN DIEGO L. REV. 755, 766 (2009).

3. *Id.* at 758.

baby out with the bath water, or in his words, “the sorry history of racial segregation ought not to discredit federalism in principle.”⁴ The sophisticated treatment of federalism that runs as a major theme in the paper is one of its strongest and more convincing aspects.

There are, however, two points that I would like to make with regard to Professor Schwarzschild’s argument on federalism. First, one major justification for federalism is not based on value pluralism and may even be antithetical to it. The “laboratory” justification for federalism, according to which states “may . . . serve as a laboratory; and try novel social and economic experiments,”⁵ is based on the analogy of an experiment. This analogy, in turn, presupposes the existence of one “true” answer that the experiment would expose, rather than a plurality of “truths” that coexist together. Therefore, according to the laboratory justification for federalism, pluralism is not a state of affairs that is good in and of itself. Rather we may opt for pluralism as a means for finding out the right solution to the question that we are testing, but once this solution is found, states would hopefully coalesce with it and pluralism will cease to exist.⁶

A similar argument is used for justifying the principle of free speech, according to the “marketplace of ideas” justification for free speech. “[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection,”⁷ maintained Judge Learned Hand, and Justice Holmes famously wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁸ Because we can never know which ideas are correct, so the argument goes, we should test them in the marketplace of ideas, and the ideas that turn out victorious in a free competition will be the most likely to be the true ones. As with the laboratory argument for federalism, according to the marketplace of ideas argument for free speech, the pluralism of ideas is not an end in itself but only a means to get to the one true answer.

The second point regarding federalism and value pluralism relates to Professor Schwarzschild’s argument that it supports discrimination, which is averse to value pluralism. The reasons why discrimination is

4. *Id.* at 768.

5. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

6. See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 85–88 (1995) (supporting the justification of federalism under the “laboratory” model); see also Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1498–500 (1987).

7. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

8. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 73–77 (1960).

averse to pluralism are stated earlier in the paper in the context of state action:

There was not much pluralism altogether about racial mores at the time: segregation and discrimination were depressingly uniform in America, almost monolithically so in the South. The pluralist argument for *Shelley* and the ensuing civil rights decisions is that they helped to crack the monolith and to expand freedom. Civil rights emancipated black Americans and in a sense everyone; and more freedom means more freedom of choice and hence more pluralism in practice.⁹

This passage gives two reasons why discrimination is antipluralistic: first, that discrimination represented a monolithic view in the South, and second, that it limited the freedom of black Americans. I would like to question both of these reasons.

Regarding the first reason, it seems to me that the problem with discrimination was not only, or even primarily, that it reflected a monolithic view in society. Suppose that we found out that discrimination against blacks was strongly debated in the South and represented only one out of many worldviews—would this fact make it more justifiable? And conversely, suppose racial equality becomes the dominant and even the monolithic doctrine in the South, as it hopefully is today—would that in any way subject it to suspicion or criticism?

This discussion reflects a more general tension within Professor Schwarzschild's argumentation and within the discussion on value pluralism in general—a tension between a substantive or positive conception of value pluralism and a procedural or negative one.¹⁰ The positive conception consists of the idea that a plurality of ideas is a good state of affairs in and of itself and should be positively promoted, while a uniformity of ideas is bad in and of itself and should be discouraged. On the other hand, the negative or procedural conception of pluralism focuses on removing formal restrictions against value pluralism, or formal impositions of a monolithic and orthodox view. According to the procedural conception, if, lacking formal restriction on pluralism, society freely chooses to be homogenous, this in itself is not bad, or at least not inconsistent with value pluralism. To my mind, Professor Schwarzschild's discussion of discrimination reveals some of the

9. Schwarzschild, *supra* note 2, at 758.

10. This distinction is not to be confused with another important distinction—that between negative and positive liberty and the ensuing discussion over which of them is implied by value pluralism. For this distinction, see generally GEORGE CROWDER, LIBERALISM AND VALUE PLURALISM 86–90 (2002).

difficulties of the first conception of value pluralism. While we may assign an instrumental value to value pluralism or find it indicative of a free society, it seems harder to defend a view that would promote diversity and pluralism in and of themselves. Such a view would seem to suggest a very problematic conclusion that, all other things being equal, a society that includes both racial equality and racial discrimination viewpoints is better than a society that has only racial equality viewpoints.¹¹

As to the second reason why discrimination is antipluralistic, namely, that it limited the freedom of black Americans, the question in terms of value pluralism should not only be whether it restricted their freedom and hence the total amount of freedom and choice in American society, which it did, but whether it also restricted the plurality of views and values in American society. There is a strong contention that it did that too, but I would like to mention here the fact that discrimination is not necessarily connected to the restriction of values and worldviews, just as freedom is not necessarily connected to the enhancement of the plurality of worldviews in society.¹² The problem with making such an association is that it requires the persons or groups that are being discriminated against to associate themselves with a certain identity or way of life in order for them to claim discrimination. But consider, for example, discrimination based on disability, age, or gender—is the way of life, ideology, or values of the disabled, the old, or women implied by the very idea of discrimination against them? Must we assume that they have such a particular identity and way of life that we want to protect in order for us to understand the concept of discrimination against them and in order to know that it is wrong? Must we engage in a discussion of what exactly is the disabled identity, the elderly identity, the female identity, or the black identity, for that matter, in order to understand and evaluate discrimination against the disabled, the old, women, and blacks? For discrimination to operate, all that is needed is the concept of unequal treatment based on irrational reasons, such as bias or prejudice

11. Even those associating value pluralism with the “ethic of diversity,” such as George Crowder, would usually wish to put some constraints on the ideal of diversity:

The maximizing dimension of the ethic of diversity must be supplemented by a second kind of consideration, that of balance or coherence among the values to be promoted. Sheer multiplication of different goods must be tempered by attention to the content of those goods and to the relations among them, since some may impede others. The diversity implied by pluralism is therefore best understood as involving both a quantitative and a qualitative element, both a requirement of a generous range of values and a requirement that the values within that range should be tolerably coherent with one another. The ethic of diversity embraces both “multiplicity” and “coherence.”

Id. at 139.

12. See *supra* text accompanying notes 7–8 (arguing that free speech can result in a monolithic view).

or animus. Discrimination against blacks is wrong regardless of the fact that it has also diminished the access of black values into American society and deprived it of black worldviews.¹³

III. VALUE PLURALISM AND GAY MARRIAGE

One of the more thought provoking arguments in Professor Schwarzschild's paper is that the acceptance of gay marriage can be viewed as inconsistent with value pluralism. At first sight, this is surprising because, as Professor Schwarzschild himself notes, allowing more people more choices for marriage seems to enhance value pluralism rather than reduce it. However, his argument is that there is also an antipluralistic tendency in gay marriage:

Gay marriage might not expand human choice so much as it would tend to substitute a new ethos for the old one—an ethos in which marriage no longer means what it used to mean. . . . To preserve marriage in something like its traditional form, from a value pluralist point of view, is to preserve an institution whose values are at odds with the main currents of modern life: currents dominated by free choice and free contract, by mobility, by innovation, by reason, or by what Max Weber called “rationalization.”¹⁴

Gay marriage is antipluralistic, therefore, because it causes an old way of life to become extinct, thus reducing the plurality of values in society. This idea rings familiar and reminds us of the words of the eighteenth-century English philosopher, Edmund Burke, that “[w]hen ancient opinions and rules of life are taken away, the loss cannot possibly be estimated.”¹⁵ But this argument is still perplexing. After all, by losing one way of life, we gain another—a modern one. Why is it that substituting old values for new values makes for less value pluralism, rather than just for the shifting of values in society? Obviously, as in the case of discrimination, this cannot be explained solely by the fact that the old ideas are now unpopular and no longer hegemonic. Presumably, Professor Schwarzschild would not have objected to traditional marriage even at the time it was hegemonic and reflected a monolithic view in society.

13. Cf. Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 834–45 (2001).

14. Schwarzschild, *supra* note 2, at 763.

15. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), reprinted in 24 THE HARVARD CLASSICS 143, 215 (Charles W. Eliot ed., 1937), available at <http://www.bartleby.com/24/3/>.

However, the main thrust of Professor Schwarzschild's ideas is revealed once we notice the other Burkean strand that is imbedded in them—the emphasis on the homogenizing effect of reason, rationalism, and utilitarianism. Utilitarianism and rationalism are at odds not only with traditional ways of life but also with the idea of value pluralism itself because they provide the overarching idea under which all other ideas must be subsumed and according to which all other values can be commensurate. Like economic review, which has inherited utilitarianism and rationalism in current legal and public discourse, utilitarianism and rationalism seem to do away with all irrational customs and traditions, on their way to subjecting the entire spectrum of human values and experience to the single test of reason and utility.¹⁶

The following words from Burke's famous book *Reflections on the Revolution in France* reflect very similar ideas to those of Professor Schwarzschild. Rejecting rationalism as “this barbarous philosophy, which is the offspring of cold hearts and muddy understandings, and which is as void of solid wisdom as it is destitute of all taste and elegance,”¹⁷ Burke, in beautiful prose, laments the fact that:

[N]ow all is to be changed. All the pleasing illusions, which made power gentle and obedience liberal, which harmonized the different shades of life, and which, by a bland assimilation, incorporated into politics the sentiments which beautify and soften private society, are to be dissolved by this new conquering empire of light and reason. All the decent drapery of life is to be rudely torn off. All the superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked, shivering nature, and to raise it to dignity in our own estimation, are to be exploded as a ridiculous, absurd, and antiquated fashion.¹⁸

The traditional ways of life must bow to the homogenizing specter of reason, and human experience seems to shrink down to the single measure of reason.

Note however that this interpretation of value pluralism is decidedly a traditionalist and conservative one, and not necessarily the one with which Berlin would have sided. Although he would definitely have sided with the rejection of reductive rationalism and utilitarianism, Berlin would have probably shirked away from some of the more

16. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 784 (1994) (“Different kinds of valuation cannot without significant loss be reduced to a single ‘superconcept,’ like happiness, utility, or pleasure. Any such reduction produces significant loss because it yields an inadequate description of our actual valuations when things are going well.” (footnote omitted)). For a similar criticism of the Law and Economics movement, see Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics*, 64 U. CHI. L. REV. 1197 (1997).

17. BURKE, *supra* note 15, at 214.

18. *Id.* at 213–14.

coercive aspects of traditionalism and conservatism. After all, it is not pluralism in and of itself that guides traditionalism; not all ideas are welcomed under traditionalism but only those ideas that have passed the test of time and have been ingrained into long-standing institutions. Only those ideas and institutions that represent the accumulated reason of generations are those that should be revered and protected. This may very well come at the expense of value pluralism if value pluralism means threatening those institutions and traditions.

IV. VALUE PLURALISM AND JUDICIAL ACTIVISM

Moving on to judicial activism, Professor Schwarzschild argues that judicial activism promotes pluralism because it prohibits discriminatory practices, but that it is antithetical to pluralism because “[c]onstitutional adjudication, in particular, tends to impose a single, almost unchangeable standard across the country. . . . [O]nly one judicial interpretation can prevail, at least in principle, at any given time.”¹⁹ Having more constitutional adjudication would mean fewer decisions by lower courts, which are more diversified and plural than those of the Supreme Court, and also fewer decisions by legislatures and executive bodies, which are similarly more varied and plural than the Supreme Court.

However, the extent to which constitutional adjudication would produce more uniformity and less pluralism may vary depending on several factors. It may depend, for example, on whether constitutional adjudication is conducted through rules or through standards. Rules are deemed to be a more effective means of control over lower courts and would therefore promote more uniformity within the judicial system.²⁰ But some constitutional decisions are conducted through standards, which empower lower courts and exert less control over them. The Court periodically shifts between rules and standards, and there may be differences between rule-based and standard-based adjudication within a single Court depending on the Justice writing the opinion and on the area of law.²¹

19. Schwarzschild, *supra* note 2, at 759.

20. See Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 328 (2007).

21. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 41 (1999); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 393–94 (1985); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 69 (1992).

In addition, the tendency toward applying rules or standards in the highest court's adjudication may change across countries. As Professor Schwarzschild points out, the American judicial system is unique in having a small Supreme Court with a very small docket exerting control over a vast system of lower courts both state and federal.²² This feature of the American judiciary favors relatively clear and stable rules rather than standards as a means of effective control because control over the lower courts on a case-by-case basis through standards is impracticable. Other judicial systems that are smaller and more manageable may opt for more standards rather than more rules as the need for control is less acute. A similar argument has been made as to why American free speech jurisprudence is rule driven while the Canadian one is more standard driven.²³

In some other legal systems, there may also be cases in which the highest court is big and diverse enough to allow for value pluralism within the court itself or in which it shares its finality with other courts—such as the European Court of Justice and European Court of Human Rights with relation to the supreme courts of European countries—while other decisionmaking processes, such as the legislative and the executive, may turn out to be more monolithic and unchanging.

Finally, on a more principled level, one can question whether the idea of value pluralism is at all acceptable as a guiding ideal for legal interpretation. Do we really want to have varied and different interpretations for each legal or constitutional provision, at each point of time? Value pluralism, as applied to legal interpretation, seems to conflict with another central principle—the rule of law—according to which law should be clear and stable so that people can direct their behavior according to it. The rule of law is contradictory to the rule of men, which would be the case if law would allow for pluralistic and individualized interpretations rather than establish a stable and central one.

22. Schwarzschild, *supra* note 2, at 759–60. The American Supreme Court issues less than a hundred decisions per year and exerts control over a judicial system that serves a population of more than 300 million people. See, e.g., *The Statistics*, 122 HARV. L. REV. 516, 516 (2008). In comparison, the Israeli Supreme Court issues more than 6000 decisions per year, and exerts control over a judicial system that serves more than 7 million people. See Guy E. Carmi, *A Constitutional Court in the Absence of a Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court as the Only Tribunal for Judicial Review*, 21 CONN. J. INT'L L. 67, 86–87 (2005).

23. See Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 67, 77 (Sujit Choudhry ed., 2006) (noting that prosecution decisions are made by a more centralized authority in Canada and Great Britain than in the United States and therefore there is a greater risk of leaving decisions to prosecutors without clear guiding rules).

Professor Schwarzschild seems therefore to make an important and convincing argument with regard to judicial review in the context of his argument on federalism in the United States, that is, as another manifestation of his argument that the states should be able to have their own laws, free from a centrally imposed monolithic view of the federal government. But, viewed as an argument for judicial review and judicial activism in general, it may encounter several difficulties.

V. VALUE PLURALISM AND JUDICIAL ACTIVISM:
THREE POSSIBLE IMPLICATIONS

I will devote the rest of my comment to suggesting an additional account of the possible implications of value pluralism to judicial activism and judicial review. This account will depart from Professor Schwarzschild's discussion but will touch upon it at several junctions.

I would like to suggest three possible implications of value pluralism in terms of judicial activism and judicial review. The first implication is the rejection of absolutism and formalism in favor of a contextual and balancing approach to legal and constitutional interpretation. Faced with the recognition that conflict among values is inevitable and omnipresent, and that the variety of societal values should be acknowledged and respected, judiciaries around the world come to the conclusion that a judge should not give absolute or categorical preference to any one value at the expense of all the other values. A judge should rather strive to reflect the plurality of values in her decisions, by giving voice to all of the possible values and worldviews in society and balancing between them to the best of her abilities, in accordance with the particular circumstances of the case. Value pluralism therefore connotes judicial balancing.²⁴

Two strands of the balancing approach can be regarded as an implication of value pluralism. The first emphasizes the pragmatic necessity of balancing as a conclusion drawn from value pluralism. Because social conflict cannot cease to be, and the attempt to find an absolute or overarching principle that would do away with such conflict

24. For the documentation of the spread of the contextual and balancing approach around the globe in the context of a value pluralist worldview, see DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159, 171–76 (2004). See also David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 693–95 (2005); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 73–74 (2008).

is futile, it is the task of judiciaries to balance the different interests and values in society in an attempt to accommodate and reconcile them. This strand dates back to the pragmatist movement's rejection of absolutism in legal and philosophical thinking early in the twentieth century and is expressed in the work of the legal Progressives such as Roscoe Pound and Benjamin Cardozo.²⁵ Roscoe Pound, for example, explained, "I do not believe the jurist has to do more than recognize the problem . . . presented to him as one of securing all social interest so far as he may, of maintaining a balance or harmony among them that is compatible with the securing of all of them."²⁶

The second strand is symbolic and expressive in nature and seems to be a more recent phenomenon. It contends that the judicial decision should express respect to each of the values involved in it by giving voice to each and by making sure that no value or interest is left out of the judicial balance. This expressive function also accounts for attempts to frame the judicial decision as a compromise between conflicting worldviews—a golden path between them—reflecting societal consensus rather than societal extremes.

Professor Paul Kahn identified such a tendency in the jurisprudence of Justice Lewis Powell and termed it "representative balancing." "The appeal of representative balancing," argued Kahn, "is its requirement that the Justice regulate that competition among interests by reference to the value of pluralism, of openness to all factions."²⁷ Such balancing "aims to give voice to each interest by setting forth a rule that accommodates all of them. Ideally, that rule allows each interest its maximum realization consistent with recognition of and respect for other competing interests."²⁸

Justice Powell's most famous decision, *University of California v. Bakke*, is a good example of this line of pluralism-based balancing approach.²⁹ In *Bakke*, concerning affirmative action in university admittance policies, Justice Powell contraposed the value of "color blindness" with the value of "affirmative action" and reached a compromise that seems to give voice to both: affirmative action would be allowed, but only through an individualized review of applicants

25. See *infra* notes 32–34 and accompanying text (arguing that Justice Holmes represented another view with regards to the implication of value pluralism).

26. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 96 (1922). Pound also asserted that the judicial function should be that of "weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment." Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 4 (1943).

27. Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 4 (1987).

28. *Id.* at 5.

29. 438 U.S. 265 (1978).

rather than through quotas.³⁰ Justice Powell thus showed respect for each of the values implicated in his decision and framed his decision as one that accommodated both and retained the essence of each. It is only fitting that the one value that he did adopt wholeheartedly in his decision was the quintessential pluralistic value of “diversity.”³¹

However, the balancing approach as an implication of value pluralism—whether of the pragmatic or the expressive kind—faces the following objection: why should the Court be in charge of harmonizing and accommodating the clashes of values in society, rather than the elected bodies of government? Do not these elected bodies reflect the actual compromises that society has reached at a given point in time? Do we not elect these bodies exactly for that purpose—to make decisions with regard to the proper balance of interests and values? The recognition of value pluralism may therefore lead a court to a conclusion regarding judicial activism and judicial review that is diametrically opposed to the one arrived at by the balancing approach. Out of recognition of the plurality of values, a court may conclude that it should not intervene at all in the play of values and interests in society reflected by the democratic process. Instead, it may opt for judicial neutrality, and in turn for judicial deference, to the decision of the elected bodies of government.

This second implication of value pluralism to judicial review reflects a more skeptical approach than that of balancing. It considers that values are incommensurable in a strong sense, so any compromise or reconciliation would become impossible. Therefore, any attempt at compromise would be a judicial imposition of one value over another in the guise of a neutral compromise. The only place to decide between such conflicts would be in the battleground of democratic competition rather than in court through any rational attempt at reconciliation.

This view may be most clearly associated with the jurisprudence of Justice Holmes. Professor Grey argues that:

30. *Id.* at 316–18.

31. *Id.* at 313.

Holmes did not believe there was any rational metric for balancing one [policy] against the other. For him, competing policies represented a split in the community, whose different portions “want different things,” and, in the absence of a legislative resolution based on counting heads or registering the dominance of one group over another, these conflicting wants were incommensurable.³²

In terms of constitutional adjudication and judicial review, this strand of skeptical pluralism led Justice Holmes to his famous emphasis on judicial deference, captured most succinctly in his dissent in *Lochner*: “[A Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”³³

Justice Holmes’s follower in the Court, Justice Frankfurter, similarly combined respect for different and contradicting worldviews and societal interests with a strong sense of judicial deference and belief that clashes of interests should be decided through the political rather than the judicial process. Discussing the conflict between free speech and national security, involved in *Dennis v. United States*, Frankfurter noted:

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. . . .

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.³⁴

A third approach to judicial review as an implication of value pluralism comes out of an attempt to reconcile the two former approaches. Process Theory, which developed as a response to the theory of complete judicial deference—even in cases such as *Dennis*—allows for some judicial activism on the one hand but, on the other hand, restricts it to the protection of the democratic process. Associated primarily with the work of Professor John Hart Ely,³⁵ but originating much earlier in the famous *Carolene Products* footnote,³⁶ Process Theory seems to be

32. Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 36 (1995).

33. *Lochner v. New York*, 198 U.S. 45, 75–76 (Holmes, J., dissenting).

34. *Dennis v. United States*, 341 U.S. 494, 525 (1950) (Frankfurter, J., concurring).

35. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); see also JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

36. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). For another precursor of the Process Theory, see generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

motivated by the same skeptical strand of value pluralism that motivated judicial deference and by the same recognition that, in principle, clashes of values and interests should be resolved by the legislature rather than by the judiciary. However, unlike the judicial deference approach, Process Theory allocates a special function to the judiciary in regulating the democratic process and in maintaining that it does indeed reflect the plurality of values in society. Therefore, judicial review would be more justifiable when the rights in view are those that pertain to the democratic process itself or enhance the participation of marginalized groups in that process, such as the rights of free speech and equal protection.

Among these three approaches, it would seem that Professor Schwarzschild's views align most closely with the third one—judicial process. This approach fits his criticism of judicial activism in general as limiting the free play of values in society, as well as his acknowledgment of its role in addressing discrimination and governmental censorship, which themselves limit the free play of values in society. Indeed Professor Schwarzschild cites favorably to the *Carolene Products* footnote as manifesting the application of value pluralism to judicial activism.³⁷

To conclude this part, I would like to attempt to apply the Process Theory approach to judicial review to the question of gay marriage, which Professor Schwarzschild discussed in his paper.³⁸ Professor Schwarzschild did not address this issue directly, as he only discussed the implications of gay marriage on value pluralism and did not address the question whether gay marriage legislation should be reviewed by the Court. I would like to suggest that, according to the Process Theory, gay marriage should not be among the issues that would justify the subjection of the democratic process to the second-guessing of the Court. This is so because, unlike legislation that limits the rights of minorities and marginalized groups in society and hence is suspect of reflecting a bias in the democratic process, legislation that would allow gay marriage promotes the rights of a minority and a marginalized group in society—the gay community—and therefore is not suspect of originating from such a bias. It would seem that Process Theory would suggest that, in such cases, the decision should be left to the democratic process and to the majorities reflected in legislative decisions.

37. Schwarzschild, *supra* note 2, at 762 & nn.23–24.

38. *Id.* at 762–64.

A similar argument was made in a recent Israeli case concerning the exemption given to ultraorthodox men and women from military service.³⁹ In a concurring opinion, Justice Grunis specifically cited to Ely's Process Theory in order to maintain that because the case represented the promotion of minority rights and interests by the majority, rather than their limitation, it is not a suspect case that should give rise to a high level of judicial scrutiny, and the judiciary should leave the matter to the democratic process.⁴⁰

VI. CONCLUSION

Professor Schwarzschild's thoughtful paper provides a rich platform for the discussion of the plural implications of value pluralism, which has also been the center of this comment. Whatever those implications are, one phenomenon seems to rise clearly out of the discussion—the pervasiveness and wide acceptance of Berlin's idea of value pluralism in legal discourse and legal theory. Ironically maybe, but also fortunately, Berlin's value pluralism has almost attained the status of a monolithic view in legal discourse.

39. HCJ 6427/02 Movement for Quality Gov't v. Knesset [2006] (not yet reported) (upholding a law providing exemption from military service for Yeshiva students).

40. See generally Moshe Cohen-Eliya, *Towards a Procedural Limitation Clause*, 10 MISHPAT UMIMSHAL [LAW AND GOVERNMENT IN ISRAEL] 521 (2007) (in Hebrew, arguing for the application of Process Theory in Israeli constitutional interpretation, and supporting Justice Grunis's invocation of Ely's jurisprudence).