

A DIFFERENT VISION OF JUDICIAL REVIEW: IN TRIBUTE TO PROFESSOR GRANO

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Professor Joseph Grano is one of the leading conservative academic voices in constitutional law and criminal procedure in our generation. In a series of powerful articles, Professor Grano challenged Supreme Court decisions protecting the rights of criminal defendants and safeguarding liberties not mentioned in the text of the Constitution or intended by its framers.¹ My politics and my view of Supreme Court decisions are quite different from Professor Grano's. Indeed, there is relatively little in his articles that I would agree with; I have no doubt he feels the same about my writings.

However, one paragraph, in one of his many articles, makes me feel a special kinship with Professor Grano. In a tribute to the man he calls his mentor, Wayne LaFave, Professor Grano wrote: "I grew up in an ethnic, working class neighborhood of South Philadelphia. . . . Neither my family nor my family's circle of friends included lawyers or university teachers. . . . When I look back, I sometimes truly am amazed that this 'kid from South Philly' has made it this far."²

I grew up in an ethnic, working class neighborhood on the far south side of Chicago. I was the first in my family to attend college; neither my family nor its "circle of friends included lawyers or university teachers."³ Like Professor Grano, I am constantly truly amazed at all of the good fortune that has brought me the wonderful opportunities that I have and that a kid from South Chicago "made it this far."⁴ I know what Professor Grano felt as he

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1. See, e.g., Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985); Joseph D. Grano, *Teaching Roe and Lochner*, 42 WAYNE L. REV. 1973 (1996).

2. Joseph D. Grano, *Wayne R. LaFave*, 1993 U. ILL. L. REV. 181, 185.

3. *Id.*

4. *Id.*

wrote that paragraph, and I feel so much the same way.

Despite our similarities in social class and background, our perspectives ended up quite different. Professor Grano describes himself as 'conservative,'⁵ while my politics and my views about judicial review are quite liberal. That makes writing a tribute to him difficult. I respect his scholarship enormously, but I disagree with almost every word.

After careful reflection, I decided that expressing this disagreement is the best possible tribute to him. Professor Grano's scholarship reflects a true passion for engaging in intellectual arguments. Frequently, he discusses and replies to the writings of others.⁶ In this essay, in tribute to Professor Grano, I want to analyze his article, *Judicial Review and a Written Constitution in a Democratic Society*, published in this Law Review almost 20 years ago.⁷ This article is Professor Grano's lengthiest and most detailed expression of his philosophy of judicial review.⁸

Part I of this essay briefly summarizes Professor Grano's argument in favor of great judicial restraint.⁹ Part II identifies the assumptions underlying Professor Grano's argument and argues that his conclusion rests on premises that are unsupported, and perhaps unsupportable.¹⁰ Part III articulates my alternative vision of judicial review and contrasts it to Professor Grano's.¹¹ My goal is not to defend my approach; that would require a book in itself.¹² I readily admit that my approach, like Professor Grano's, rests on unsupported assumptions. Ultimately, what separates us are radically different views about individual rights, democracy, and the role of the judiciary.

Indeed, my conclusion is that this is what separates liberals and conservatives today over the issue of judicial review. Justices

5. *Id.* at 183.

6. See, e.g., Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 30-50 (1981) (responding to the writings of Professors Karst, Perry, Richards, Tushnet, and Parker).

7. *Id.*

8. See generally *id.*

9. See *infra* Part I of this article.

10. See *infra* Part II of this article.

11. See *infra* Part III of this article.

12. A decade ago, I attempted such a book length defense of my theory of judicial review. See ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* (1987). I hope someday to try again to provide such a defense of judicial review that seeks to advance liberty and equality through a living Constitution.

Brennan and Scalia, to pick two obvious examples, disagreed not because one was smarter or one was more in tune with the “true” meaning of the Constitution.¹³ Their disagreement over constitutional issues was political; a liberal as opposed to a conservative perspective.¹⁴ Unfortunately, at least to this point in time, there is no bridge between their, and my and Professor Grano’s, views of judicial review. Each side can make arguments and answer the other’s side’s points; each can muster self-righteous rhetoric. But ultimately neither will ever deliver the “killer” argument to demolish the other’s position or persuade the other. It is about world-view, intuition, faith, and about what is best for society. That doesn’t make discourse irrelevant, but it does say that there must be a realistic appreciation about what arguments can and cannot accomplish.

I. PROFESSOR GRANO’S THEORY OF JUDICIAL REVIEW

Professor Grano’s thesis is that “[a]rticle III should not be read as authorizing a methodology of judicial review that permits the federal judiciary to constitutionalize moral values or principles of justice not fairly inferable from the written Constitution’s text or structure.”¹⁵ Professor Grano says that judges should “seek to bind the present and the future only by value judgments that the various framers of our Constitution actually have enshrined in the Constitution.”¹⁶

Professor Grano begins his article by illustrating what he regards as illegitimate judicial review; that is, judges “writing into the Constitution values derived from external sources.”¹⁷ He says that the Supreme Court’s decision in *Moore v. East Cleveland*¹⁸ is an example of inappropriate judicial review.¹⁹ In *Moore*, the Supreme Court declared unconstitutional a city’s ordinance that restricted the number of unrelated individuals who could share a residence when the city applied it to keep a grandmother from living with

13. See, e.g., *infra* note 34 of this article.

14. See *id.*

15. Grano, *supra* note 6, at 7.

16. *Id.* at 75.

17. *Id.*

18. 431 U.S. 494 (1977).

19. See Grano, *supra* note 6, at 11.

her two grandsons who were first cousins.²⁰ The Court, in an opinion by Justice Powell, said that the ordinance violated a fundamental right, safeguarded under the Due Process Clause, to keep the family together and that this included the extended family.²¹ Professor Grano disagrees and states: "Unfortunately for interpretivists who empathize with Mrs. Moore, her trial apparently complied with constitutional prescriptions. Moreover, the Constitution does not address a person's right to live with grandchildren, or anyone else for that matter."²²

Professor Grano's argument for what he terms "interpretivist" judicial review can be summarized in four major points.²³ First, he argues that the written Constitution is binding.²⁴ He states: ". . . I start from the premise that the binding nature of our written Constitution must be taken as given."²⁵ He says "[T]o be constitutionally legitimate, therefore, a methodology of judicial review must lie at least within the implicit scope of authority that article III grants to the federal judiciary."²⁶

Second, he contends that *Marbury v. Madison*²⁷ does not justify finding such authority within Article III.²⁸ After reviewing *Marbury*, he writes: "Nothing in Marshall's *Marbury* argument . . . supports the view that the judiciary can invalidate positive law, reflecting the legislature's view of morality, by invoking its own (or anyone else's) nonpositivistic moral principles."²⁹

Third, Grano argues "that the impossibility of developing standards" for noninterpretivist judicial review, in part, explains its illegitimacy.³⁰ He writes that "the impossibility of developing standards for a fundamental values or principles of justice mode of judicial review suggests that we should be reluctant to read such judicial authority into article III."³¹ Professor Grano attempts to show this impossibility by considering the writings of leading

20. See *Moore*, 431 U.S. at 494.

21. See *id.* at 500-06.

22. Grano, *supra* note 6, at 10.

23. See *infra* notes 24-36 of this article and accompanying text.

24. See Grano, *supra* note 6, at 7.

25. *Id.* at 4.

26. *Id.*

27. 5 U.S. (1 Cranch) 137 (1803).

28. See Grano, *supra* note 6, at 16.

29. *Id.*

30. *Id.* at 7.

31. *Id.*

scholars, such as Professors Karst, Perry, Richards, Tushnet, and Parker.³²

Finally, Professor Grano argues that non-interpretivist judicial review is “inconsistent with democratic self-government.”³³ He defines democracy as majority rule and sees noninterpretive judicial review as being inconsistent with this.³⁴ Not surprisingly, from this perspective, he concludes that *Roe v. Wade*,³⁵ and the Court’s protection of a woman’s right to an abortion, was wrongly decided.³⁶

Altogether, it is a powerful argument with a very limited role for the judiciary. Professor Grano would reject any judicial protection of rights, except when they are clearly provided for in the text of the Constitution.³⁷ His conclusion is the one that conservatives, such as Justice Antonin Scalia, have long championed.³⁸

II. THE ASSUMPTIONS UNDERLYING PROFESSOR GRANO’S ARGUMENT

A. The Assumptions of Professor Grano’s Conclusion

Each step of Professor Grano’s argument rests on major assumptions that he does not support or defend.³⁹ Begin with his conclusion: “[A]rticle III should not be read as authorizing a methodology of judicial review that permits the federal judiciary to constitutionalize moral values or principles of justice not fairly inferable from the written Constitution’s text or structure.”⁴⁰ This statement assumes that stare decisis, respect for precedent, is not an inherent part of Article III and the judicial methodology.⁴¹

Article III, section two, of course, assigns to federal courts the

32. *See id.* at 30-50.

33. *Id.* at 8.

34. *See id.* at 56-57.

35. 410 U.S. 113 (1973).

36. *See Grano, supra* note 6, at 59.

37. *See id.* at 7.

38. *See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

39. *See infra* Part II of this article.

40. Grano, *supra* note 6, at 7.

41. *See infra* notes 57-61 of this article and accompanying text.

responsibility to decide “cases” and “controversies.”⁴² Stare decisis, courts relying on precedents in deciding cases, is the core of the common law method that America took from the English legal system. There is thus every reason to find stare decisis within the terms of Article III, to say nothing of the framers’ intent.

Following Professor Grano’s methodology would require the overruling of a vast array of Supreme Court decisions involving virtually every area of the Constitution concerning individual rights.⁴³ In *Planned Parenthood v. Casey*,⁴⁴ the joint opinion of Justices O’Connor, Kennedy, and Souter, expressly considered and rejected the argument that the Constitution is limited to moral values and principles fairly attributable to the text.⁴⁵ They wrote:

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. . . . But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause. . . . Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. . . . The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.⁴⁶

42. U.S. CONST. art. III.

43. See, e.g., *infra* notes 44-56 of this article and accompanying text.

44. 505 U.S. 833 (1992).

45. See *id.* at 847-49.

46. *Id.*

Professor Grano acknowledges that he would overrule *Moore*.⁴⁷ But all of the Court's decisions protecting family autonomy—including the right to marry,⁴⁸ the right to custody,⁴⁹ and the right to control the upbringing of one's children⁵⁰—would need to be overturned. Likewise, all of the Court's decisions safeguarding reproductive autonomy—including the right to procreate,⁵¹ the right to purchase and use contraceptives,⁵² and the right to abortion⁵³—would be overruled. The list of decisions goes on and on, and includes provisions in the text of the Constitution, such as the contracts clause,⁵⁴ and its amendments. Truly following Professor Grano's approach would mean everything from eliminating the requirement for "minimum contacts" as a due process based requirement for personal jurisdiction,⁵⁵ to ending heightened scrutiny for gender discrimination under equal protection.⁵⁶

47. See Grano, *supra* note 6, at 10-11.

48. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 17-18 (1967) (holding Virginia's anti-miscegenation statute unconstitutional on due process and equal protection grounds and declaring that there is a fundamental right to marry).

49. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 646 and 649 (1972) (holding that unmarried fathers have a fundamental right to custody and declaring unconstitutional a state law that automatically put non-marital children up for adoption when the mother died or relinquished custody).

50. See, e.g., *Troxel v. Granville*, 120 S. Ct. 2054 (2000) (declaring unconstitutional a grandparents' rights statute based on the fundamental right of parents to control the upbringing of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (declaring unconstitutional a state law prohibiting the teaching of the German language based on the right of parents to control the upbringing of their children).

51. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (declaring unconstitutional an Oklahoma law that provided for compulsory sterilization of those convicted two or more times of crimes involving moral turpitude and holding that there is a fundamental right to procreate).

52. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (declaring unconstitutional a state law prohibiting the sale, distribution, or use of contraceptives).

53. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that women have a fundamental right to choose whether to terminate their pregnancies before the fetus reaches viability).

54. See, e.g., *Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (expressly rejecting the framers' intent in interpreting the contracts clause).

55. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (articulating requirement for minimum contacts as based on due process).

56. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that Virginia Military Institute's single-sex enrollment policy violates the equal protection clause).

My point here is not simply to illustrate the radical nature of Professor Grano's position. Rather, Professor Grano must assume that following precedent is not an inherent part of Article III of the Constitution.⁵⁷ This seems a very difficult, if not impossible, argument to make.⁵⁸

Professor Grano might respond that following precedent never was absolute and that even if stare decisis is an implicit part of the judicial power to decide cases, courts always had the authority to overrule wrong decisions. The problem with this argument is that it is difficult to reconcile the kind of overruling that Professor Grano implicitly calls for with any conception of stare decisis.⁵⁹ Moreover, the debate over judicial review then becomes a disagreement over the appropriate weight to be given to precedent and all other claims become irrelevant.

Professor Grano's conclusion—that courts should not make value judgments except those inherent to the text of the Constitution⁶⁰—rests on other assumptions as well. He must assume that the Article III authority to decide cases and controversies does not include authority to decide matters in a non-originalist fashion. Phrased slightly differently, he must assume that the framers of the Constitution shared his philosophy of judicial review. Because the issue was not discussed at the Constitutional Convention or at the state ratifying conventions, there is simply no way to know.⁶¹

B. A Binding Constitution and the Method of Judicial Review

The first step in Professor Grano's argument is that the written Constitution is binding.⁶² I agree. Yet, I question whether this says anything other than that the Court's task is to interpret the words of the Constitution. All of the Court's decisions that Professor Grano criticizes are consistent with the idea of a binding written Constitution.⁶³ For example, *Moore v. City*, which Professor Grano

57. See *supra* notes 40-56 of this article and accompanying text.

58. See *supra* notes 43-56 of this article and accompanying text.

59. See, e.g., *supra* notes 43-56 of this article and accompanying text.

60. See Grano, *supra* note 6, at 8.

61. For a powerful argument that the framers' intended non-originalist review, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

62. See Grano, *supra* note 6, at 4.

63. See generally *id.*

uses as his paradigm of an inappropriate judicial decision, interprets the word "liberty" in the due process clause.⁶⁴

I know of no Supreme Court decision that rejects, expressly or implicitly, the binding nature of the written Constitution. The disagreement between originalists and non-originalists is over the method of interpreting that document.⁶⁵ Originalists, such as Professor Grano, believe that its meaning is limited to that which is clear in the text or its framers' intent.⁶⁶ Non-originalists, such as myself, believe that the courts, in interpreting the text are not limited to the framers' views from generations radically different from our own.⁶⁷ The binding nature of the text of the Constitution tells us nothing about the method of interpreting that document.⁶⁸

Professor Grano rightly could respond that he is not arguing that the binding nature of the text justifies his theory of judicial review by itself. He could say that this is just the starting point for his argument. I would agree and simply point out that this first step does nothing to resolve the debate over the proper method of constitutional interpretation.⁶⁹

C. Marbury v. Madison and Non-Originalist Judicial Review

The second step in Professor Grano's argument is that *Marbury* does not justify finding authority within Article III for protecting non-textual constitutional rights.⁷⁰ The assumption of this argument is that non-originalist judicial review is illegitimate unless it is justified by *Marbury*.⁷¹ But there is no imaginable reason why this would be so. *Marbury* establishes the authority for judicial

64. See *Moore*, 431 U.S. at 498-99.

65. See Grano, *supra* note 6, at 20 (discussing interpretivism vs. non-interpretivism).

66. Justice Scalia rejects framers' intent and instead says that his approach involves following the "original meaning" of the Constitution. See Scalia, *supra* note 38. I critique this approach in Erwin Chemerinsky, *Justice Scalia: A Critical Appraisal*, U. HAW. L. REV. (forthcoming 2000).

67. See, e.g., Grano *supra* note 6, at 10 (exemplifying the non-originalist approach).

68. See generally U.S. CONST.

69. See Grano, *supra* note 6, at 4 (discussing this starting point of his analysis).

70. See *id.* at 7.

71. See *id.*

review;⁷² it does not purport to define the appropriate methodology for this activity.⁷³ *Marbury*, of course, involves the Supreme Court's interpretation of Article III;⁷⁴ it has nothing to do with how the Court should interpret provisions of the Constitution concerning individual rights.⁷⁵ Thus, *Marbury*'s failure to justify non-originalist judicial review is irrelevant to the legitimacy of that practice.

Professor Grano could rightly respond that he is not arguing that *Marbury* supports his view of judicial review, just that *Marbury* cannot be used to establish the opposing position. I would agree with him that *Marbury* says little about the interpretation debate⁷⁶ and thus is irrelevant to choosing between originalism and non-originalism.

Actually, though, I am conceding more than I need to here. A strong argument can be made that *Marbury* is a non-originalist decision.⁷⁷ The text of the Constitution says nothing about a judicial power to declare federal laws unconstitutional.⁷⁸ The Framers did not discuss this at the Philadelphia Convention.⁷⁹ Moreover, *Marbury* expressly provides for a special judicial role in protecting individual rights.⁸⁰ The Court said that "it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."⁸¹

The central point, though, is that *Marbury* says nothing about the appropriate method of constitutional interpretation.⁸²

D. Are Determinate Standards Needed for Legitimate Judicial Review?

The third step in Professor Grano's argument is that

72. See *Marbury*, 5 U.S. (1 Cranch) at 157 (stating "it is the United States province and duty of the judicial department to say what the law is.")

73. See generally *id.*

74. See *id.*

75. See generally *id.*

76. See *id.*

77. See, e.g., WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES*. 1008-46 (1953) (arguing that the framers did not intend judicial review).

78. See generally U.S. CONST.

79. See Henry Monaghan, *The Constitution Goes to Harvard*, 13 Harv. Civ. Rights—Civ. Lib. L. Rev. 117, 125 (1978).

80. See *Marbury*, 5 U.S. (1 Cranch) at 166.

81. *Id.*

82. See generally *id.*

noninterpretive judicial review is illegitimate because of the inability to develop standards for judicial decision-making. He writes that “[T]he impossibility of developing standards for a fundamental values or principles of justice mode of judicial review suggests that we should be reluctant to read such judicial authority into article III.”⁸³ Professor Grano makes clear that he is saying that the values for constitutional decision-making must be clear and apparent from sources external to the Justices’ own views.⁸⁴ In other words, what he means by “standards” are constitutional principles that make it unnecessary for Justices to make value choices.⁸⁵

The key problem with this argument is its circularity. Professor Grano defines the difference between originalist and non-originalist review as being that the former involves the Court applying only value judgments that are clear from the text of the Constitution, while the latter involves Justices making value choices beyond the text and the framers’ clear intent.⁸⁶ His central thesis is that judges should “seek to bind the present and the future only by value judgments that the various framers of our Constitution actually have enshrined in the Constitution.”⁸⁷ In this third step of his argument, Professor Grano is simply saying that non-originalist judicial review is illegitimate because it is not originalist judicial review.⁸⁸ He is correct that non-originalist judicial review involves judicial value choices, but that simply distinguishes it from originalist judicial review; it doesn’t explain why that makes it illegitimate or less desirable as a method of constitutional interpretation.

Phrased differently, Professor Grano’s argument rests on several assumptions. First, Professor Grano assumes that judicial review is legitimate only if the values can be found in standards external to the values of the Justices.⁸⁹ But Professor Grano never justifies this

83. Grano, *supra* note 6, at 7.

84. *See id.*

85. *See id.*

86. *See id.* at 7 and 20 (Grano discusses this in terms of interpretivism and non-interpretivism).

87. *Id.*

88. *See id.*

89. *See id.* at 64 (stating “Interpretivism only permits the court to constitutionalize . . . value[s] . . . if it can be derived from a value judgement already enshrined in the constitutional text structure”) *Id.*

premise.⁹⁰ My guess is that for him it is axiomatic. But it isn't. Quite the contrary, it is the central difference between originalists and non-originalists, and certainly the key difference between Professor Grano's view of judicial review and mine. Therefore, one theory cannot be argued as preferable to the other simply by describing its characteristics.

Second, Professor Grano assumes that originalism offers standards that meet his requirements for judicial review.⁹¹ But originalism, like non-originalism, requires courts to make value choices.⁹² At the conclusion of his article, Professor Grano argues that *Brown v. Board of Education*⁹³ can be justified under an originalist approach.⁹⁴ Assuming that he is correct, and I am very skeptical of this, that says only that *Brown* is permissible under an originalist approach;⁹⁵ Professor Grano does not purport to argue that *Brown* is required under an originalist approach.⁹⁶ In other words, a Justice following Professor Grano's approach could have come to either conclusion in *Brown*.⁹⁷

Thus, under his approach, like mine, Justices must make value-choices.⁹⁸ Of course they do. Because constitutional rights are not absolute, courts must decide when there is a sufficient justification for infringement. This is a determination that is inherently subjective and cannot be based on external standards. Whether there is a compelling, or an important, or even a legitimate purpose cannot be decided by any external standard; it is a value-choice by the Justices.

E. The Definition of Democracy and the Theory of Judicial Review

The final step in Professor Grano's argument is that non-interpretivist judicial review is "inconsistent with democratic self-

90. See generally *id.*

91. See *id.* at 4 (explaining the standards he views necessary for legitimate judicial review).

92. See *infra* notes 93-98 of this article and accompanying text.

93. 347 U.S. 483 (1954).

94. See Grano, *supra* note 6, at 67-68.

95. See, e.g., *supra* notes 93-94 of this article and accompanying text.

96. See Grano, *supra* note 6, at 67-68 (stating "an interpretivist can support *Brown*.")

97. See *id.* at 71 (commenting "Although the evidence is not conclusive . . . plausible case . . . can be made.").

98. See, e.g., *supra* notes 93-94 of this article and accompanying text.

government."⁹⁹ He defines democracy as majority rule and sees noninterpretive judicial review as being inconsistent with this.¹⁰⁰

Professor Grano assumes, but does not justify, his definition of democracy.¹⁰¹ Yet, as I have argued extensively elsewhere, this definition of democracy is not axiomatic and indeed, I believe, is incorrect.¹⁰² Over a decade ago, I wrote: "[T]he framers openly and explicitly distrusted majority rule; virtually every government institution they created had strong anti-majoritarian features. Even more importantly, the Constitution exists primarily to shield some matters from easy change by political majorities."¹⁰³ I argue that the proper definition of American democracy must include not only the procedure of majority rule, but also the substantive values contained in the Constitution.¹⁰⁴ Non-originalist judicial review advancing these values is thus consistent with this alternative, broader definition of democracy. In other words, from this perspective, "judicial review enhances democracy because it safeguards the substantive values that are part of democratic rule."¹⁰⁵

My goal here is not to defend, or even describe, an alternative definition of democracy in detail. Instead, the point is that there are alternative conceptions of democracy and that Professor Grano simply assumes his definition and then reasons from it.¹⁰⁶

III. A DIFFERENT VISION OF JUDICIAL REVIEW

As should be obvious by this point, I have a very different view from Professor Grano about how courts should interpret the Constitution. I believe that, in interpreting the Constitution, it is appropriate for the Court to protect values that are not clearly stated in the text or intended by the framers.¹⁰⁷ For example, I believe that the Court was correct in *Moore* to safeguard a fundamental right to keep the extended family together. I also

99. Grano, *supra* note 6, at 8.

100. *See id.* at 56-57.

101. *See id.* at 56-59.

102. *See, e.g.,* Erwin Chemerinsky, *supra* note 12; Erwin Chemerinsky, Foreword: *The Vanishing Constitution*, 103 HARV. L. REV. 43, 74-77 (1989).

103. Chemerinsky, Foreword, *supra* note 102 at 74-75.

104. *See id.*

105. *Id.* at 76.

106. *See* Grano, *supra* note 6, at 56-57.

107. *See* Chemerinsky, Foreword, *supra* note 102, at 76.

believe that non-originalist decisions, safeguarding the right to marry, the right to custody of one's children, the right to control their upbringing, the right to procreate, the right to purchase and use contraceptives, and the right to abortion, were correct.¹⁰⁸

My central position is that it is desirable for society to have an institution, such as the judiciary, that is accorded great discretion in imparting specific, modern content to constitutional provisions. The Supreme Court's role in interpreting the general language of the Constitution is to identify those values so important that they should be protected from majority rule. I readily concede that this involves judicial choices about what values to safeguard. Judges certainly can look to the framers' intent and the original meaning and tradition, but none of these sources are authoritative or binding. Ultimately, Justices must decide, to the best of their ability, what are the values worthy of constitutional protection in interpreting words such as "liberty" and "equal protection." It is not a matter of subjective preference in the sense of whim; it is Justices being responsible for articulating and defending, based on all available sources, what they regard as the appropriate content of the Constitution's majestic language. Again, my goal here is not to defend this conception of judicial review. Like Professor Grano's theory, it rests on many assumptions. But it is interesting to contrast what accounts for the difference in his and my views, and more generally that of originalists and non-originalists.

Ultimately, the major disagreement is over the importance of limiting the powers of the political majority in society. I see the key function of the Constitution as taking some matters away from majority rule. A generation ago, Justice Jackson wrote: The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.¹⁰⁹

Professor Grano, of course, would agree to this as well. Our disagreement is over the scope of what should be protected from

108. See *supra* notes 48-53 of this article.

109. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

the majority.¹¹⁰ He would limit this to that which is specified in the text or clearly intended by its Framers.¹¹¹ I would go beyond this.¹¹² Some of our disagreement undoubtedly is substantive: I believe that women have a fundamental right to abortion and he does not.

Our disagreement, too, rests on two other differences. One is the extent to which there should be trust or distrust in majoritarian institutions. Although Professor Grano and I both believe in democracy, I believe that majoritarian institutions cannot be trusted to safeguard fundamental rights and especially not to protect minorities.¹¹³ The other disagreement is over the degree of trust or distrust to have in an unelected federal judiciary. I certainly am familiar with all of the dangers of judicial review, but, on balance, believe in the desirability of courts having the power to advance liberty and equality through non-originalist judicial review. Professor Grano comes to an opposite conclusion.¹¹⁴

To make this less abstract, consider Professor Grano's criticism of *Moore*.¹¹⁵ He and I would disagree about some or all of the following three points. First, our difference may be about the importance of protecting a grandmother's right to live with her two grandsons. I believe that this is extremely important and properly labeled a "fundamental right." Professor Grano might not. Our difference then would be substantive. My guess is that we do not really disagree over this; we both likely think that the East Cleveland zoning ordinance as applied here is undesirable.¹¹⁶

Second, our disagreement could be over the extent of appropriate deference to the East Cleveland City Council. Once I have concluded that the right to keep the extended family together is a basic aspect of liberty, I see no need for deference to the choice of the majoritarian institution. Professor Grano believes very much in deference to democratic decision-making except when there is a value clearly stated in the Constitution.¹¹⁷

110. Compare Chemerinsky, Foreword, *supra* note 102, at 74-76 and Grano, *supra* note 6, at 7.

111. See Grano, *supra* note 6, at 7.

112. See Chemerinsky, Foreword, *supra* note 102, at 74-76.

113. See *id.*

114. See Grano, *supra* note 6, at 7.

115. See *id.* at 8-11.

116. See *id.* at 11 (stating "the prosecution in *Moore* outraged my moral sensibilities").

117. See *id.* at 7.

Third, we likely disagree over the benefits and dangers of non-originalist judicial review. I believe that, on balance, it is desirable for courts to have the authority to protect Ms. Moore and her grandchildren through the use of substantive due process. Professor Grano is much more fearful of non-originalist judicial review.¹¹⁸

Is not this, then, what the disagreement between originalists and non-originalists, liberals and conservatives, is all about when it comes to judicial review? They disagree over substantive values, they disagree over the appropriate degree of deference to majoritarian institutions, and they disagree over the proper extent of trust or distrust to have in the judiciary.

I doubt that these differences ever can be bridged. But if nothing else, it is important to be as clear as possible in understanding and identifying our disagreements. Perhaps it will lead to better analysis and arguments. At the very least, it will make clear that neither side ever can conclusively establish its position or refute the other one. Those, like Justice Scalia, who self-righteously proclaim theirs as the only true vision are profoundly mistaken. There is no true vision; not mine and not his and not Professor Grano's. There are only competing visions and arguments in support of each.

IV. CONCLUSION

Joseph Grano's articles on judicial review, and all of his writings, are outstanding expositions of a conservative viewpoint about the role of the courts and the desirable content of constitutional rights. In this essay, I have tried to pay tribute to him by analyzing one of his articles and using this as an opportunity to contrast opposing views about judicial review. The debate over the Supreme Court's role and methodology is as old as the country and will continue as long as there is a United States of America. But this debate has been tremendously enriched because of Joseph Grano and his important contributions to the scholarly literature.

118. See *id.* at 11 (illustrating his fear of non-originalist review with the use of *Moore* as an example).