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Democracy, Not Deference: 
An Egalitarian Theory of Judicial Review

BY RONALD C. DEN OTTER*

But the Constitution is aimed at everyone, not simply the judges.¹

Judicial review is a present instrument of government. It represents a choice that men have made, and ultimately we must justify it as a choice in our own time.²

INTRODUCTION

Alexander Bickel once referred to judicial review as a “deviant institution” in American democracy.³ This Article is about how we can make judicial review less hostile to democratic decisionmaking, thereby avoiding charges that it is inherently antidemocratic.⁴ At present, we treat many of our most divisive issues of public morality as questions of constitutional law and resolve them through judicial review.⁵ As many

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³ Id. at 18.


⁵ A large number of questions of constitutional law are moral questions, or at least have significant moral dimensions. Many of them, such as abortion, surrogate motherhood, the right to die, the appropriate separation between church and state,
critics have pointed out, our increasing reliance on such review over time cannot be easily squared with our commitment to democracy. When we take such questions out of the hands of the electorate, we put considerable faith in judges to make wise moral decisions for us. At the very least, such decisionmaking by courts places some doubt into the claim that citizens are actually ruling themselves.

Nevertheless, constitutional law scholars have rarely contested the concept of judicial review. Those who endorse most of its results have offered a variety of sophisticated theories that attempt to show that judicial review is not so deviant after all. For instance, John Hart Ely introduces a theory of "representation reinforcement," in which judicial review corrects the failures of the political market. Samuel Freeman defends judicial review on the grounds that it furthers democratic sovereignty. Michael Perry offers a "functional justification" of noninterpretive judicial review on human rights issues that he alleges to be consistent with affirmative action, capital punishment, and gay and lesbian marriage, are topics that moral philosophers routinely address. By "public morality," I mean political morality that governs the mutual relations of people who live together in the same political community. Collective decisions about this kind of morality must be justified because public laws are backed by the coercive power of the state. In this Article, I focus exclusively on fundamental political questions that involve moral disputes. My critique of judicial review is not meant to extend beyond these sorts of questions into more technical areas of constitutional law.


8 See generally 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3-33 (1991) (arguing that a theory of "dualist democracy" can reconcile the tension between higher constitutional values and ordinary lawmaking).

9 See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

Others, notably Ronald Dworkin, insist that judges must make value judgments beyond those specified by the framers to ensure political equality. These theorists, who champion activist forms of judicial review, share the belief that, in comparison with the two other branches of government, courts are better suited to serve as forums of principle. As such, they assume that judges can make difficult choices about public morality that are too important to be left to normal democratic processes.

This Article contends that we should not rely so heavily on the judiciary to settle our moral conflicts, although not for the typical reasons mustered by democratic critics of judicial review. We have not openly confronted this problem of taking the Constitution away from the people because the debate over the proper scope of judicial review has been

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11 See Perry, supra note 7, at 91-145.
12 See generally Ronald Dworkin, Law's Empire (1986).
13 See Bickel, supra note 2, at 25; Perry, supra note 7, at 15-16; cf. Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 755 (1982) (suggesting that judges must operate under stricter procedural constraints than those of the other branches); Abner J. Mivka, How Well Does Congress Support and Defend the Constitution?, 61 N.C. L. Rev. 587 (1983) (arguing that Congress lacks political incentives and the institutional capacity to evaluate the constitutionality of pending legislation).
15 The standard challenge, particularly aimed at non-originalist theories of constitutional interpretation, is that unelected judges are not directly accountable to the electorate, and as such, should not have the power to decide questions of national importance that are not explicitly covered by the Constitution. Ackerman refers to this general school of thought as "monistic" democracy and likens it to British parliamentary practice. See Ackerman, supra note 8, at 7-8. However, very few of those who favor non-originalist or noninterpretivist theories of judicial review openly claim that judges ought to apply values not found in the constitutional text nor implied by it. But see Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703-17 (1975). The real issue is not whether judges should be interpreting the Constitution, but rather what constitutes a reasonable interpretation of the text or, strictly speaking, what constitutes a reasonable application of a constitutional provision to a concrete set of facts. As such, the term "non-interpretivism," which is used to describe theories of constitutional interpretation that purportedly go beyond plain meaning and original understanding, is misleading in that it suggests that a judge is not interpreting the text but is doing something else.
framed too narrowly, leaving us with two undesirable extremes. On the one hand, those who defend the exercise of judicial review call attention to the need for those with special competence to assess legislation that is constitutionally suspect. Undemocratic means, they insist, may be entirely appropriate to protect the substantive values that make the operation of constitutional democracy possible. After all, ordinary citizens may not be sufficiently aware of the constitutional and moral implications of their collective decisions. In such instances, judges must have veto power over popular choices to control the vagaries of democratic politics, thereby saving the people from themselves. On the other hand, those who seek to restrict the reach of judicial review in the name of democracy, such as Robert Bork, Antonin Scalia, and William Rehnquist, contend that the people or their elected representatives should decide the vast majority of questions concerning public morality. They point out that an activist approach to constitutional interpretation ultimately rests on an elitist rationale: that ordinary citizens cannot be expected to exercise political power responsibly.

These two standpoints—that we should defer to either the whims of transient majorities or to the expertise of judges—are equally problematic.

16 Cf. Robert A. Burt, The Constitution in Conflict 6 (1992) (claiming that the "debate [over judicial review] has been conducted within the framework of the Hamiltonian conception of judicial supremacy"). The alternative to judicial supremacy is widely believed to be some kind of popular sovereignty, that is, deference to the wishes of the majority. See generally Mark Tushnet, Taking the Constitution Away From the Courts (1999).


19 Cf. Bork, supra note 18, at 10 ("Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute."); see generally Robert A. Dahl, On Democracy 45 (1998) (claiming that "heads of nondemocratic regimes have usually tried to justify their rule by invoking the ancient and persistent claim that most people are just not competent" to govern themselves).

20 Scholarship provides a number of different rationales for judicial review. For a rational choice perspective, see Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 93 (2d ed. 1984). For a Madisonian
Both ultimately fail because they produce either democratically illegitimate or morally objectionable outcomes. For the most part, those who favor a more active role for the judiciary have not been sufficiently concerned with democratically illegitimate outcomes. Many of them are convinced that only judges can be trusted to make principled decisions in the long-term interests of a constitutional democracy. The romantic tale about judges who can be counted on to rise above partisanship, however, does not diminish the fact that we have delegated extraordinary political authority to the judiciary. Two of the obvious problems with this sort of deference to judges are that we cannot take for granted their wisdom or their integrity. The "forum of principle" thesis would seem to require a leap of faith on our part, because nothing guarantees that the exercise of judicial review by real judges will protect constitutional essentials. As one commentator notes, an independent judiciary may replace "one set of tyrants with another." Judicial tyranny is far more serious than that of the other branches of government because federal judges lack direct electoral accountability. Furthermore, changes in the composition of the judiciary make it difficult to predict whether its future members will have the right attitude toward constitutional adjudication.

The central premise of this Article is that this debate over the legitimacy of judicial review and its proper scope rests on a false choice between

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22 While the claim that law is politics by another name is far too crude, critical legal theorists were right to point out that many important judicial decisions are easier to explain on partisan grounds than on legal grounds. This skeptical challenge to the integrity of the law lies at the heart of the American legal realist movement of the 1920s and 1930s as well. See Steven J. Burton, An Introduction to Law and Legal Reasoning, at xiv (1985).


what Mark Tushnet has called “two dictatorships.” In other words, the means of resolving our most fundamental political questions need not be too democratic nor too elitist. This Article puts forth a third alternative: that over time, citizens could learn to perform the role that judges currently play in constraining democratic decisionmaking. The current practice of judicial review undermines democratic self-rule to the extent that judges assume the role of experts on fundamental political questions and thereby deprive citizens of the opportunity to cultivate their civic capacities. If citizens could learn to respect constitutional essentials and vote accordingly, then one of the strongest rationales for judicial review would disappear. This Article argues that judicial review can become more democratic without sacrificing important constitutional values, provided that citizens can incorporate such considerations into their voting decisions. In making this case, I shall use John Rawls’ conception of public reason as a model for such voting and demonstrate how its resultant constraints parallel those of principled constitutional adjudication. As such, the “constitutional” and “democracy” parts of constitutional democracy can theoretically be brought together.

This Article will be divided into three main sections: Part I will describe the shortcomings of the two main approaches to judicial review and show why scholarly literature on the topic forces us into an either/or that prevents us from looking into other more democratic possibilities. Part II shall spell out in detail how the practice of Rawlsian public reason by ordinary citizens could constrain voting on constitutional essentials to produce democratically legitimate and morally acceptable outcomes. Part

29 See infra notes 32-146 and accompanying text.
30 See infra notes 147-88 and accompanying text.
III will develop an analogy between citizens and judges to explain how the kind of voting that Rawlsian citizenship requires could serve as a more egalitarian stand-in for judicial review.\footnote{See infra notes 189-213 and accompanying text.}

I. JUDICIAL REVIEW

A. A Brief History

This section will outline the main difficulties of originalist (interpretive) and non-originalist (noninterpretive) attitudes toward judicial review to show how current scholarship on the topic has pushed us into the awkward position of having to choose between two undesirable alternatives.\footnote{The distinction between “interpretive” and “noninterpretive” theories of constitutional interpretation provided the central theoretical framework for scholarly discourse in the 1980s. See, e.g., Richard B. Saphire, Judicial Review in the Name of the Constitution, 8 U. DAYTON L. REV. 745, 746 (1983). Interpretive theories require close readings of the text and careful attention to original intent or original understanding, whereas noninterpretive theories extend beyond the text, original intent, and original understanding to values that lie outside of the Constitution itself. See Grey, supra note 15, at 706. For a basic account of the differences between interpretive and noninterpretive review, see Perry, supra note 7, at 6-11. For a critique of this distinction, see Lawrence B. Solum, Michael L. Perry’s Morality, Politics, and Law: Originalism as Transformative Politics, 63 Tul. L. Rev. 1599 (1989).}

Legal scholars may move beyond this false dichotomy between democracy without constitutional values and constitutional values without democracy, provided that we are willing to entertain the possibility that citizens could take a more active part in resolving constitutional controversies. Indeed, the main point of this Article is that scholars who are so eager to embrace judicial supremacy because they endorse, on moral grounds, most of the major decisions of the United States Supreme Court after 1954, ought to be less enthusiastic about using the federal judiciary in this manner.\footnote{For an argument that principled legal reasoning amounts to “transcend[ing] ... immediate result[s],” see Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 19 (1959). The obvious problem with Wechsler’s definition is that it is too deontological. Any theory of constitutional adjudication must be sensitive to various consequences. Still, Wechsler is correct to single out the importance of not reducing legal reasoning to a pure form of consequentialist reasoning.} A society in which voters incorporate constitutional considerations into their voting decisions is a society that is, so to speak, beyond
judicial review. As an alternative to reliance on judges, then, my aim is to formulate a conception of democratic citizenship that models how voters could cast their ballots to respect the freedom and equality of their fellow citizens.

I believe two fundamental questions underlie the controversy surrounding the exercise of judicial review. First, who should have the political authority to decide the most important political questions? Second, how should these decisions be regulated, if at all, to preclude morally objectionable results? For many commentators, the obvious answer to the first question is judges. The vast majority of constitutional law scholars believe the Constitution places some political issues outside the reach of simple majorities and that the courts are more institutionally capable of protecting higher law than are the other branches of government. At the same time, this answer has generated considerable controversy because it is far from obvious how judges can be prevented from doing what they like. Unlike elected officials, we cannot vote federal judges out of office, and members of Congress cannot easily remove them for impeachable offenses.

This problem of judges’ lack of direct electoral accountability is complicated by the fact that many of us disagree about what kinds of constitutional interpretations are plausible in the first place. It is not clear, for example, what it means to “misinterpret” constitutional clauses that provide little interpretive guidance. After all, there is no consensus on how the Constitution ought to be read, and the history of the founding period is not terribly helpful on this question. Nor is it clear when a judge has

34 By “constitutional considerations,” I mean more than mere constitutional values specified in the constitutional text or in the case law that has interpreted it over time. I also include public reasons that go beyond what Sunstein refers to as “naked preferences.” Sunstein maintains that the Constitution prohibits such preferences from being used to justify the allocation of a disproportionate share of resources to politically powerful groups without reference to some public value. See Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1689 (1984).

35 See, e.g., CHEMERINSKY, supra note 17, at 95-105. But see LEARNED HAND, The Bill of Rights: The Oliver Wendell Holmes Lectures, 1958, at 73 (1958) (“For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”).


37 See PERRY, supra note 7, at 9-10.

38 There is a continuing scholarly dispute as to whether constitutional interpretation should resemble statutory or common law interpretation. See, e.g., PAUL
improperly read his or her own value choices into the constitutional text in rendering an illegitimate decision. In fact, reliance on such values may be unavoidable. The abstract nature of many constitutional provisions, furthermore, means that hard questions of constitutional law do not yield self-evident answers. For this reason, it may be difficult to determine from a written opinion alone whether a judge has abused his or her authority.

Controversy over the role courts should play in our political system is not new. Unfortunately, American history does not illuminate how much decisionmaking authority, if any, ought to be delegated to the courts. We do not know whether the framers had a theory of judicial review or, if they had such a theory, whether they intended that the courts alone would review laws’ constitutionality. As Stephen M. Griffin points out, the modern system of judicial review did not exist in the late eighteenth century, and thus, the framers had no chance to evaluate the institution as it currently exists. Nor did they distinguish among the different types of judicial power. In fact, some scholars have questioned whether the Constitution itself authorizes such review.

The modern controversy over the role of the federal courts accompanied the growth of the national state in the late nineteenth and early twentieth centuries. The decisions of the Lochner era engendered the


40 Dworkin, Freedom's Law, supra note 14, at 7.


42 See Chemerinsky, supra note 17, at 1.


44 See Griffin, supra note 21, at 91.

45 Id. at 107.


47 See Griffin, supra note 21, at 90, 99.

48 Lockner v. New York, 198 U.S. 45 (1905) (invalidating a maximum hour work week statute on substantive Due Process grounds).
modern debate over judicial review. After 1954, many constitutional law scholars labored to establish the legitimacy of Brown v. Board of Education. They sought to demonstrate, in other words, that Brown was law, not just politics. At the same time, those scholars also recognized that the kind of judicial activism that had characterized the Lochner era should not be resurrected. In the early 1970s, liberals felt compelled to defend the activist record of the Warren Court by developing theories of judicial review that would justify its most controversial decisions. After 1973, Roe v. Wade produced the scholarship that characterized contemporary constitutional theory and drove scholars into opposing camps.

There is no shortage of critics who allege that the Warren Court and the early Burger Court abused their authority by basing their most controversial decisions in the justices' own substantive value choices. This critique is premised on the thesis that constitutional interpretations not conforming to the plain meaning of the constitutional text or to authoritative external sources, such as original understanding, amount to a usurpation of political power. The practice of judicial review can be legitimate, they insist, only when neutral principles rooted in these two sources strictly constrain the

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50 Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that the segregation of schools based on race, even when facilities are equal, violates the Equal Protection Clause).
51 See Griffin, supra note 21, at 141.
52 The Warren Court was criticized for its allegedly activist decisions, particularly in the area of constitutional criminal procedure.
53 See Tushnet, supra note 26, at vii.
54 Roe v. Wade, 410 U.S. 113 (1973) (establishing the right to an abortion as constitutionally protected in some instances).
55 See Griffin, supra note 21, at 142.
56 The early Burger Court was criticized for allegedly activist decisions such as Roe. See Albert W. Alschuler, Failed Pragmatism on the Burger Court, 100 Harv. L. Rev. 1436, 1449 (1987).
interpretive discretion of a judge. In particular, originalists maintain that their theory of constitutional interpretation is the most legitimate interpretive technique because it provides at least some protection against abuse of judicial authority.

The division between originalists and non-originalists over how strictly such authority should be constrained, however, distracts us from noticing the deeper consensus that exists regarding the institution of judicial review itself. Those who loudly denounce the liberal activism of the Warren Court as a usurpation of the political authority of Congress and state legislatures seek only to restrict the scope of judicial review. Its exercise will be consistent with democratic self-rule, they concede, as long as judges interpret constitutional provisions appropriately—that is, acting as judges and not as legislators. For them, the main difficulty is that judges are tempted to reach results that can only be justified on extraconstitutional grounds. If judicial decisionmaking were more mechanical, then the exercise of judicial review would not be problematic.

The theoretical disagreement between originalists and non-originalists is about its proper scope in a democracy. Even the most fanatical originalists do not believe that Marbury v. Madison should be overturned.

Herein lies the rub. There is too much consensus on the institution of judicial review. Scholarly disagreement is almost entirely focused on how judges should read the Constitution, and not on whether they ought to be reading it in the first place. This preoccupation with interpretive issues prevents us from looking at the institution of judicial review more closely and from examining other democratic possibilities that require more active participation on the part of ordinary citizens. The expansive role of the

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61 For example, for originalists, "obedience to original intent imposes an essential constraint on judicial choice that constitutional language alone does not provide." Robert W. Bennett, Objectivity in Constitutional Law, 132 U. PA. L. REV. 445, 446 (1984). Clear principles found in the Constitution provide the major premise in a practical syllogism. When the judge formulates the minor premise based on her understanding of the particular facts of the case, then the legal conclusion is supposed to follow logically. As such, constitutional judgment can be more deductive, thereby producing neutral, principled judgments.

62 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding the judicial review is the provence of the judiciary).
federal judiciary over the course of our history also contributes to our inability to imagine constitutional scrutiny without judges. As some commentators have noted, our fear of transferring additional political power to the electorate reflects deep skepticism about whether unregulated majority rule can protect the most important constitutional values.

Indeed, the very structure of the federal government is predicated on the weak assumption that even elite political actors can never be trusted to police themselves. If the wisdom of *The Federalist Papers* can be reduced to one main insight about politics, it is that political power must be dispersed throughout a number of government institutions, resulting in a sort of balance of powers arrangement that ensures that one faction will not grow too powerful and achieve hegemony over the other factions. That one could rely on nobler motives is off the table. In Madison's famous words, "Enlightened statesmen will not always be at the helm." At the same time, constitutional law scholars are less likely to extend this sort of skepticism about human nature to judges themselves. Their refusal to do so, however, is undermined by the thoroughly political character of the appointment and confirmation processes today. Robes do not magically transform a person into a more principled human being with better judgment. In the past,

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63 See Griffin, supra note 21, at 59-87 (discussing the expansion of the judiciary, the executive, and administrative agencies in the twentieth century).


67 *The Federalist No. 10*, supra note 65, at 57.

68 But see Griffin, supra note 21, at 119-21 (comparing the American judiciary with those of European countries and finding the American appointment and tenure systems less politically influenced). There is an old joke that a judge is just a lawyer who is friends with a governor. I owe this reference to David Karol.

69 For a particularly egregious example concerning Justice James McReynolds, see John Knox, The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington (Dennis J. Hutchinson & David
ambiguous constitutional provisions, such as due process, have invited bad faith from judges who sought to protect private property rights at the expense of the expansion of the social welfare state.\textsuperscript{70}

At minimum, one should not put forth a theory of judicial review without explaining how judges could be discouraged from using such review to advance a particular partisan agenda.\textsuperscript{71} Yet scholars who are sympathetic to more activist approaches to constitutional interpretation have not adequately defended their belief that most judges can be trusted to resist the temptation of letting their partisan preferences determine legal outcomes. As we know from the past, judges can render poor decisions. Notorious cases like \textit{Dred Scott v. Sandford},\textsuperscript{72} \textit{Hammer v. Dagenhart},\textsuperscript{73} and \textit{Lochner v. New York},\textsuperscript{74} for example, cannot be expunged from the historical record. Those who have been pleased with the results of judicial review on balance must come to terms with the contingency of these positive outcomes. That the current Court could promote states’ rights to advance a conservative partisan agenda remains a real possibility.\textsuperscript{75}

At least part of the explanation for courts’ current prominence in our political system is that the framers did not anticipate the rapid pace of democratization over a relatively short period of time. It is well known that the framers were hostile to mass political participation and never believed that ordinary citizens would be (or would ever need to be) informed about politics.\textsuperscript{76} However, the franchise was extended dramatically from 1787 to 1840.\textsuperscript{77} Although the Electoral College was designed to be a deliberative


\textsuperscript{71} I do not mean to suggest that all judges would be fully aware that they are abusing their authority. I do not doubt that most, if not all, of the most ideological judges sincerely think that they are living up to their professional duties. Therein lies the trouble.

\textsuperscript{72} \textit{Dred Scott v. Sandford}, 60 U.S. (19 How.) 393 (1856) (finding the Missouri Compromise of 1820 to be unconstitutional).

\textsuperscript{73} \textit{Hammer v. Dagenhart}, 247 U.S. 251 (1918) (invalidating a child labor law).

\textsuperscript{74} \textit{Lochner}, 198 U.S. at 45 (invalidating a maximum hour work week statute).

\textsuperscript{75} I am assuming that the Court’s decisions will have a real impact on American politics and society. \textit{But see} \textit{Lawrence Baum, The Supreme Court} 229-46 (6th ed. 1998); \textit{David M. O’Brien, Storm Center: The Supreme Court in American Politics} 319-77 (5th ed. 2000); \textit{Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change?} (1993).


\textsuperscript{77} \textit{See Burt, supra} note 16, at 35.
body, eighteen of twenty-four states held popular votes for the presidency by 1824. In 1865, the Fifteenth Amendment enfranchised African-American males. In 1913, the Seventeenth Amendment provided for the direct election of United States Senators. In 1920, the Nineteenth Amendment gave women the right to vote.

Because of this unexpected democratization, one of the most difficult challenges facing modern deliberative democratic theorists involves how to encourage ordinary citizens to think seriously about political issues. The inherent difficulty of reconciling popular participation with public deliberation has generated widespread skepticism in American political thought about the prospects of mass democracy. As a result, many political thinkers with sincere democratic sympathies have also been reluctant democrats in the sense that they expect certain constitutional arrangements to limit the power of democratic majorities. They see judicial review as a necessary safeguard against a democracy that makes too little room for serious deliberation on important political questions. They are equally unsure that a sufficient number of elected representatives would do any better in terms of putting principled considerations above the desires of their constituents. None of the empirical political science literature on legislative behavior suggests that legislators are more likely than judges to incorporate constitutional considerations into their decisionmaking.

B. Madisonian Democracy

We might say that, over time, we have arrived at judicial review by a process of elimination. Oddly enough, reliance on courts to correct

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79 U.S. CONST. amend. XV, § 1.
80 Id. amend. XVII.
81 Id. amend. XIX.
82 While there are important differences among elite democratic theorists, all of them believe that certain persons, in light of their political expertise, are more qualified than others are to make important political decisions. See DENNIS F. THOMPSON, THE DEMOCRATIC CITIZEN: SOCIAL SCIENCE AND DEMOCRATIC THEORY IN THE TWENTIETH CENTURY 150-51 (1970).
83 Today, the “politicians just want to get elected” explanation of legislative behavior is found in the majority of political science literature on the topic and shows that public opinion constrains what elected officials may do during their tenure in office. But see Louis Fisher, CONSTITUTIONAL INTERPRETATION BY MEMBERS OF CONGRESS, 63 N.C. L. REV. 707 (1985).
democratic excess is not obviously inconsistent with the general intent of the framers to empower "deliberative majorities" at the expense of "uninformed, immoderate, or passionate majorities." In light of their elite biases and distaste for direct democracy, if they had been clairvoyant, the framers might have accepted the idea of having the federal judiciary play a more active part in democratic decisionmaking at the national level. The problem of democratic government, as Madison put it, is "[t]o secure the public good, and private rights, against the danger of such a [majority] faction, and at the same time preserve the spirit and the form of popular government . . ." The Madisonian solution was to refine public opinion through informed and dispassionate reasoning about common concerns. The voice of the people must be "pronounced" by their representatives, he tells us, so that it will be "more consonant to the public good" than that of "the people themselves, convened for the purpose." The purpose of representation, strictly speaking, is not to represent but to mediate or, if necessary, to maintain a balance of power among competing factions by altering popular views.

Today, very few of us would champion the kind of elitism that Madison defends so openly in The Federalist. Nor is it evident that an extended republic is any less prone to factions than smaller political units are. Most democratic theorists have welcomed the movement toward mass democracy in the United States as a step toward the actualization of political equality. But they also fear that this movement has rendered election campaigns and ordinary politics less deliberative, as citizens disagreeing on political issues are less likely to justify their respective stances with sincere reasons. This fear cuts against the democratic belief that citizens are supposed to be treated as if they were equally qualified to participate in the process of collective decisionmaking. In sum, one is hard-pressed to maintain that American politics today is deliberative or participatory in any meaningful

85 THE FEDERALIST NO. 10, supra note 65, at 55.
86 Madison writes that the purpose of republican (representative) government is "to refine and enlarge public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations." Id at 59.
87 Id.
88 On the decline of discourse with the rise of a popular audience via the mass media, see TULIS, supra note 65.
89 See, e.g., DAHL, supra note 19, at 37.
sense. Voters seem to have little incentive to work through the facts, arguments, and opposing arguments that underlie important political questions or, even more basically, to gather information concerning them. It seems almost inevitable, then, that the advent of mass democracy leads to a trade-off between participation by ordinary people and the quality of deliberation in the public sphere. If the citizenry and legislative bodies cannot deliberate, then courts must fill the void. This Article posits that more situations than we realize may be amenable to democratic correction if we are willing to entertain the possibility that ordinary citizens can learn to respect constitutional essentials. For too long, most commentators have assumed that we cannot constrain democratic choices to protect such essentials without relying on judges whose moral knowledge is alleged to be superior to that of ordinary citizens. One of the main aims of this Article is to challenge the assumption that teaching citizens to become better judges of constitutional values is not an option. At the very least, I hope to shift the burden of persuasion back to those who are incurably cynical about the civic capacities of ordinary Americans. After all, majority rule threatens constitutional values only when citizens are incapable of incorporating such considerations into their voting decisions. Those who cannot conceive of a better system tend to believe that the pure, principled legal reasoning we expect from judges can be preserved only when we maintain a high wall of separation between politics and law. The failure to do so, it is widely believed, is bound to lead to unprincipled results. By contrast, this Article suggests that we should try to put principle back into democratic decisionmaking.

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90 Political science literature on voting behavior suggests that voters do not have incentives to digest large amounts of political information, to reach thoughtful decisions, or to consider voting as a public matter. Citizens who do not perceive voting to be a matter of principle or of civic duty have no rational motivation to pay attention to such questions. The result is that the relatively minor inconveniences of gathering information and going to the polls discourage large numbers of citizens from fully participating in political life. Gathering information is costly and often not worth acquiring given the infinitesimal probability that a single vote can make a difference anyway. See Anthony Downs, An Economic Theory of Democracy 36-50, 207-76 (1957).


92 Cf. Edward Lazarus, Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court (1998) (showing the absence of real deliberation on the part of the justices during the 1987 term).
C. Democracy

1. Democratic Critics of Judicial Review

The democratic critique of judicial review appeals to the popular notion that democracy entails some deference to the wishes of the majority when unanimous agreement on collective decisions is impossible. Democratic critics of judicial review are less likely than those who defend more activist approaches to believe that judges render more principled constitutional judgments than other citizens. As a result, they insist that the scope of judicial review must be restricted to ensure that the preferences of the majority are respected unless the text of the Constitution unambiguously addresses the issue at hand. They contend that, by entrusting the survival of constitutional values to courts, we have in effect embraced an aristocratic form of government that puts political power into the hands of modern-day philosopher-kings. For many of these critics, the fact that there are no right (or better) answers to fundamental political questions means that these questions should be left to the will of the people as expressed through their elected representatives. The practice of judicial review, the critics conclude, is often incompatible with democratic self-rule when unelected judges can invalidate popular legislation for reasons without democratic pedigree.

2. Alexander Bickel's "Counter-majoritarian" Difficulty

Our skepticism toward the possibility of democratizing judicial review can be partly traced to the influence of Alexander Bickel's legal scholarship. Bickel believed that judicial review is a "counter-majoritarian force in our system" when it is not exercised appropriately. In particular, he was concerned that the finality of judicial review prevented an ordinary, electorally accountable legislative majority from overturning the Court's decisions. He began The Least Dangerous Branch by frankly admitting

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93 Historically, judicial restraint has been associated with moral skepticism and moral relativism. See Ely, supra note 9, at 57-59; see also Rehnquist, supra note 18, at 703-05.

94 For examples and commentary on Bickel's influence, see Choper, supra note 6, at 4-10; Bruce Ackerman, The Storrs Lectures: Discovering the Constitution, in The Storrs Lectures (Nov. 1983), 93 Yale L.J. 1013, 1014 (1984).

95 Bickel, supra note 2, at 16.

96 See Griffin, supra note 21, at 107.
that the power of judicial review is not explicitly in the Constitution.\footnote{BICKEL, supra note 2, at 1.} Article III, he claimed, only refers to "'the judicial Power'" and "does not purport to tell the Court how to decide cases.\footnote{Id. at 5.} The text and the historical evidence concerning the framers' intent, furthermore, were inconclusive.\footnote{Id. at 15.} Bickel then pointed out that both Marshall and Hamilton had been disingenuous in denying that judicial review in the name of the "people" implied judicial supremacy.\footnote{Id.} Without question, when the Court declares a legislative act unconstitutional, "it thwarts the will of the representatives of the actual people here and now; it exercises control, not in behalf of the prevailing majority, but against it."\footnote{Id. at 16-17.} For this reason, Bickel concluded, "the charge can be made that judicial review is undemocratic."\footnote{Id.}

3. Robert Bork's Original Understanding

Like Bickel, Robert Bork views the practice of judicial review as highly problematic.\footnote{Bork, supra note 18, at 35.} Unlike his mentor, however, Bork seeks to restrict its scope significantly.\footnote{Bickel's concern was to specify the appropriate role for the Supreme Court. See BICKEL supra note 2, at 23-24.} Bork relies on a sharp contrast between (legitimate) originalist and (illegitimate) non-originalist approaches to constitutional interpretation, arguing that his version of original understanding is the only means through which judicial review and democracy can be reconciled. He claims that most exercises of judicial review are illegitimate as judges either rely upon extraconstitutional principles or do not apply constitutional principles neutrally.\footnote{Bork, supra note 18, at 8-10.} When constitutional provisions are vague or ambiguous, Bork believes the inferences drawn in reaching legal conclusions must come from premises clearly specified in the text or rooted in the specific intentions of the framers.\footnote{Id. at 13, 17. On the difficulties with specific intent theories of constitutional interpretation, see Walter F. Murphy, Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?, 87 YALE L.J. 1752, 1764-65 (1978) (book review). For parallel problems concerning statutory interpretation, see generally Gerald MacCallum, Jr., Legislative Intent, 75 YALE L.J. 754, 754-82 (1966); Max}
explaining why judges must read the Constitution in a manner that strictly limits their interpretive latitude. By contrast, when judges operate under non-originalist theories of constitutional interpretation, he fears that judicial decisionmaking cannot be principled in the sense of being faithful to neutral constitutional values.\textsuperscript{107}

Bork’s preoccupation with how to read the Constitution, however, distracts his opponents from the fundamental weakness of his approach to constitutional adjudication: he adheres to a theory of constitutional democracy that is not normatively defensible. Models based on interest group pluralism may more or less accurately describe democratic politics today, but such models fall far short of constituting a persuasive normative argument for the raw majoritarian democracy that he advocates. Reducing democracy to majority rule, moreover, is question-begging. The issue that generates so much controversy in the first place is determining the kind of democracy that would be most appropriate today.\textsuperscript{108} Bork turns Bickel’s “counter-majoritarian tendency” into a much more serious antidemocratic tendency by substituting “counter-majoritarian” for “antidemocratic” even though these terms are not synonymous.

The development of a conception of democracy ought to precede any attempt to offer a theory of constitutional interpretation. In other words, we must be clear on the role the judiciary ought to play in a constitutional democracy, before we decide how the constitutional text ought to be read. This means that we need to engage in normative argumentation about the character of democracy before addressing interpretive issues.\textsuperscript{109} Yet Bork makes virtually no attempt to defend his paper-thin conception of democ-

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\textsuperscript{107} Without a doubt, there are many difficulties associated with Bork’s theory of original understanding and with originalist jurisprudence more generally. At the very least, judges and their clerks are not professional historians, and even if they had such training, scholarly controversies still would be unavoidable. For this reason, judges will end up taking sides in such controversies without being sufficiently familiar with the relevant primary and secondary sources. It goes without saying, moreover, that there are nearly insurmountable difficulties with reconstructing original understanding (assuming that such an understanding existed in the first place), applying abstract constitutional provisions to unforeseen circumstances, and so on.

\textsuperscript{108} \textit{But see} ROBERT A. DAHL, \textit{DEMOCRACY AND ITS CRITICS} 169-71 (1989) (arguing that controversy over judicial review is also about resolving conflicts between basic rights).

\textsuperscript{109} On the need for such normative argumentation, see GRIFFIN, \textit{supra} note 21, at 110.
racy on moral grounds. In fact, he seems to be entirely unaware of the need for such a defense at all. What little theory he puts forth rests on two highly controversial premises. First, he takes for granted that democracy is synonymous with raw majority rule. Indeed, in *The Tempting of America*, he offers no reasons for selecting this theory of democracy over its rivals despite the fact that there are multiple models of democracy, many of which are not predicated on extreme deference to majorities. As one commentator notes, the very idea of "democracy" is fundamentally contested.

It is not as if Bork can wish away alternative models of democracy so that he might conclude that democracy boils down to aggregating the preferences of the electorate. Such a conception cuts against a wide range of more deliberative theories of democracy which require that citizens justify their collective choices to their fellow citizens. The idea that decisionmaking in a democracy can and should be more than the mere product of the aggregated tastes, preferences, or prejudices of the majority has deep roots in the scholarly literature on democratic theory and civic republicanism. Indeed, by definition, a "constitutional" democracy places some kind of limit on majority rule. Bork also ignores the existence of other counter-majoritarian constraints in our political system such as the


111 See BORK, *supra* note 111.

112 For example, Bentham favored voting based on preferences. By contrast, Rousseau maintained that such votes must be based on the common good. See Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26, 29 n.14 (1986). Obviously, Bork takes Bentham's side in this debate, yet he apparently does not recognize that in doing so, he is taking a controversial position.


congressional committee system, bicameralism, and the presidential veto. At a minimum, he must address obvious objections to his more or less utilitarian theory of democracy.

Bork is also a moral subjectivist, or moral relativist. Ironically, he indicted one of his most prominent critics, Ronald Dworkin, on exactly this

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116 See Griffin, supra note 21, at 109.

117 Consider the following sentences that Bork has written:

Every clash between a minority claiming freedom from regulation and a majority asserting its freedom to regulate requires a choice between the gratifications (or moral positions) of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the competing claims.

Bork, supra note 111, at 257. Not only has Bork begged the question by reducing moral points of view to gratifications, but he also fails to see that respecting “neutral” constitutional values itself requires a value choice that cannot simply be a raw matter of taste or preference. Deference to original understanding, in other words, must be argued for. From the proposition that value choices are really subjective preferences, it follows that if anti-miscegenation laws are not covered by the Equal Protection clause, which is likely to be the case from an originalist standpoint, then there is no rational way of settling the dispute between those who love someone of a different race and want to marry that person and racists who hate the very idea of interracial relationships. It is far from obvious, of course, why “gratifications” based racial prejudice should receive the same moral weight in such a case, or for that matter, any weight at all. Bork also criticizes Griswold v. Connecticut, 379 U.S. 926 (1964), on the same grounds: “the majority of Connecticut’s citizens believes that the use of contraceptives is profoundly immoral. Knowledge that it is taking place and that the state makes no attempt to inhibit it causes those in the majority moral anguish and so impairs their gratifications.” See Bork, supra note 111, at 257-58. He also criticizes Tribe’s view that Bowers v. Hardwick, 478 U.S. 186 (1986), was wrongly decided:

How can any individual, professor, judge, or moral philosopher tell us convincingly that, regardless of law or our own moral sense, certain forms of unconventional behavior must be allowed? There is no apparent reason why the Court should manipulate the level of generality to protect unconventional sexual behavior any more than liberty should be taken at a high enough level of abstraction to protect kleptomania. Tribe has more sympathy for one than the other, but that hardly rises to the level of a constitutional principle.

See Bork, supra note 111, at 204. Bork does not seem to consider the possibility that Tribe has such sympathy because Tribe has good moral reasons that support his conclusion, that is, premises that constitute a good argument (or at least a better
charge.\textsuperscript{118} Even more ironically, Bork denies that he is a moral relativist or radical moral skeptic.\textsuperscript{119} What is perhaps most disturbing about Bork's reliance on relatively unconstrained democratic decisionmaking is that it leaves little, if any, room for moral deliberation in democratic politics.\textsuperscript{120}

Apart from the issue of whether political representation can work in practice, collective decisions on the most important public matters should never rest on the mere prejudice of the majority.\textsuperscript{121} A preference that is based on racial hatred, for instance, should not be accorded any moral weight at all. Advocates of originalism, or judicial restraint more generally, put tremendous faith in the capacity of the people and their representatives to make morally acceptable decisions without any restraints. The problem is that people cannot simply be left to vote their preferences without some argument than his opponents have been able to put forth). Whether Tribe is right or wrong is neither here nor there. Rather, the point is that such an argument is possible, yet Bork rules out this possibility at the outset. Outside of economics, political science, and English departments, very few people believe that moral propositions cannot be true or false, even if such propositions are not analytically true or false (that is, true or false by definition) or empirically verifiable (as in the case of a scientific proposition).

\textsuperscript{118} BORK, supra note 111, at 213. In fact, nothing could be further from the truth. See Ronald Dworkin, Objectivity and Truth: You'd Better Believe It, 25 PHIL. & PUB. AFF. 87-139 (Spring 1996).

\textsuperscript{119} BORK, supra note 111, at 259.

\textsuperscript{120} The core idea of a deliberative democracy is that “when citizens or their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions.” AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 1 (1996).

\textsuperscript{121} The very concept of representation is highly problematic, independent of whether special interests tend to have disproportionate influence in the policymaking process. As Rousseau once put it, “The English people believes itself to be free. It is greatly mistaken; it is free only during the election of the members of Parliament. Once they are elected, the populace is enslaved; it is nothing.” JEAN JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 74 (Donald A. Cress ed. & trans., Hackett Publ’g Co. 1983) (1762). For an anarchist interpretation of Rousseau, see ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 5-25 (1970). Consider the following conceptual problems with contemporary American representative democracy: (1) It is unclear whether those who do not vote at all or who vote for a losing candidate are really being represented in a winner-take-all system with arbitrary geographic divisions; (2) It is virtually impossible for a citizen to find a representative whose political positions mirror his or her own on every single political issue. As such, when that elected city, state, or federal official casts a vote, that vote may not have been how the citizen who is “represented” would have voted.
sort of minimal constraint that determines which preferences are morally acceptable. Bork’s morally relativistic deference to mere preferences means that he would have to concede that the treatment of women and various racial, ethnic, and religious minorities as second-class citizens in the past was neither right nor wrong, but only a matter of personal taste. Indeed, before the enactment of the Fourteenth Amendment, a court that tried to remedy political inequality was acting illegitimately. For Bork, there is no room for rational discussion about the facts and reasons that might underlie such preferences.

It is more or less obvious why such a normative account of our shared political life leaves much to be desired. One might ask Bork whether he believes that a preference for original understanding, or democracy itself, can be reduced to matters of taste. This Article does not suggest that a question of such enormous political and normative significance—what is the best conception of democracy for us today—can be settled by a mere definition. Rather, the point is that much of what passes as disagreement over judicial review is really about a more fundamental question concerning how people who want to pursue different ends that may at times come into conflict can still live together. We must develop the best arguments possible in formulating a conception of democracy that yields results that are both democratically legitimate and morally acceptable in the sense of being fair to everyone affected. Because Bork makes no real attempt to defend his particular theory of democracy, he leaves the most important normative question unanswered. For this reason, more generally, those who adhere to non-originalist theories of constitutional interpretation should not concede democratic ground to their critics. Bork’s theory of original understanding is only intrinsically democratic on the basis of his particular definition of democracy, a definition that he does not defend against obvious objections.

B. Deference: The Argument in Favor of Judicial Review

Bork’s failure to establish his own democratic credentials, however, does not mean that those who favor more activist forms of judicial review do any better. Although these theories also have weaknesses, judicial

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122 For evidence of Bork’s moral relativism earlier in his academic career, see Bork, supra note 18, at 9-10.
123 See, e.g., GRIFFIN, supra note 21, at 103-04.
124 This Article will not rehearse in any detail the wide range of arguments that aim at establishing the democratic credentials of this kind of judicial review. The sheer size of the literature on the topic makes it extremely difficult to summarize
supremacy—letting judges have the final say on constitutional essentials—is appealing because most of us appreciate the desirability of keeping the wrong kind of politics out of legal decisionmaking to protect the fundamental rights of individuals and of discrete and insular minority groups. This seems to be the lesson of Brown. A democracy that solely consists of bargaining among interest groups is likely to exclude groups that lack political resources, and thus lead to unfair outcomes.

At their best, courts can function as forums of principled, rational argumentation in which legal premises are offered to support legal conclusions. Under this view, the judiciary has the responsibility of protecting higher law, that is, the most important constitutional values, from the intrusions of transient majorities. As such, the most fundamental political questions must be removed from everyday democratic politics by turning them into legal questions, thereby handing them over to judges. Those who have defended the rationality of the way in which judges decide cases, at least under optimal conditions, have tried to establish that it is possible to keep law and politics sufficiently separate. A judge could reach a legal conclusion in a particular case yet at the same time could have reached a different conclusion based on political, religious, or moral grounds. Put differently, the judge recognizes that good legal reasons may differ from those that he or she would appeal to if he or she were making a personal decision that did not have to be justified to others.

the various schools of thought. See supra notes 7-12.

125 In effect, the justices of the United States Supreme Court also have the final word on such questions. It is no secret that federal question jurisdiction covers an extremely wide range of political issues. It also goes without saying that the extraordinary difficulty of amending the Constitution through the two procedures specified in Article V renders the vast majority of U.S. Supreme Court decisions final. Even when the Court denies certiorari, letting the lower appellate court decision stand, in effect it has rendered a judgment on the legal issue.


128 Michael Perry contends that judicial review is justified because it introduces a deliberative element into ordinary politics. See Perry, supra note 7, at 106-10.

129 For the most part, this argument is made from a theoretical standpoint. The institutional realities of Supreme Court decisionmaking suggest that we should not jump to the conclusion that the decisions of lower court judges, especially in politically-charged cases, are not affected by partisan considerations. On this point, see Griffin, supra note 21, at 123.

130 Cf. Wechsler, supra note 33, at 15-16 (arguing that in constitutional cases judges must make a judgment among various values).
C. A More Democratic Form of Judicial Review

At times, there may be very good reasons to let judges make decisions that protect fundamental rights, advance political equality, and so on. For instance, certain decisions such as *Brown*\(^\text{131}\) have furthered equal citizenship and social justice in America.\(^\text{132}\) Even Bork himself believes that *Brown* was rightly decided.\(^\text{133}\) At its best, judicial review has corrected some of the market failures of the actual practice of democracy and has put fundamental political issues on the national agenda that otherwise might have remained buried because they were too politically controversial to be addressed by the other branches.\(^\text{134}\) One might conclude that judicial review is indeed antidemocratic, but that its purpose is perfectly legitimate in a constitutional democracy that seeks to preserve fundamental values that should never be compromised.\(^\text{135}\) However, the point is that these means are undemocratic because under such a scheme, citizens leave difficult choices of public morality to others. In a sense, then, those who claim that judicial review can be squared with democracy are trading on an ambiguity. Such review may advance democratic ends such as political equality, but that does not mean that the means are democratic as well. As stated in the Introduction,\(^\text{136}\) the debate over the legitimacy of judicial review between proponents of judicial constraint and those of judicial activism overlooks a third possibility: that citizens might decide constitutional essentials for themselves without so much judicial oversight.

By accepting constitutional review by judges, citizens delegate to experts the right to make moral decisions for the entire nation.\(^\text{137}\) Whether judges are likely to be more morally sensitive than ordinary citizens, though, is an open question. Indeed, we have some reasons to believe that even the Supreme Court is not really a deliberative institution where the justices exchange reasons with their fellow justices in trying to convince them to change their minds.\(^\text{138}\) At most, the assumption that judges possess

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\(^{131}\) *Brown*, 347 U.S. at 438.


\(^{133}\) BORK, *supra* note 111, at 74-84.

\(^{134}\) See ROSENBERG, *supra* note 75. *See also* ACKERMAN, *supra* note 8, at 131-50.

\(^{135}\) See *supra* notes 8-12.

\(^{136}\) See *supra* notes 3-28 and accompanying text.

\(^{137}\) For an account of the fundamental tension between philosophical and democratic authority, see Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379 (1981).

\(^{138}\) *Cf.* LAZARUS, *supra* note 93 (discussing the partisan forces that contribute to the Court's decisionmaking).
greater moral wisdom than ordinary citizens is highly questionable.\textsuperscript{139} Although they may have extensive technical expertise in specialized areas of the law, judges may also lack the kind of moral sensitivity that would allow them to react appropriately to real cases.\textsuperscript{140} Such judgment would seem to require a wide range of life experiences and an appropriate series of emotional responses that judges may not possess despite their legal training. As many critics have pointed out, the most brilliant legal minds often do not make it to the bench.\textsuperscript{141} Furthermore, after \textit{Bush v. Gore},\textsuperscript{142} we ought to be more skeptical of the willingness of the current United States Supreme Court to keep politics and the law separate.\textsuperscript{143}

On the other hand, it makes little sense to entrust this responsibility of keeping politics and law separate to voters who are uninformed about constitutional considerations or who only see democratic politics as a means of advancing their respective interests. Citizens who are ignorant and depraved will not make good political choices, that is obvious. Yet such charges should not be exaggerated, especially when we have made little effort to prepare citizens for citizenship in the first place. A move toward a more democratic theory of constitutional review would not occur overnight, of course, but instead would require careful planning on the part

\textsuperscript{139} Many constitutional law scholars and political scientists have seen constitutional adjudication as a mix of law and politics. \textit{See, e.g.}, J. \textsc{Woodford Howard}, Jr., \textsc{Courts of Appeals in the Federal Judicial System} 184-88 (1981); H.W. \textsc{Perry}, Jr., \textsc{Deciding to Decide: Agenda Setting in the United States Supreme Court} 271-84 (1991).

\textsuperscript{140} Compared with ordinary statutory and common-law questions, constitutional issues turn less on technical legal analysis and more "on a choice between competing sections that contain conflicting political and social values." \textsc{Fisher, supra} note 43, at 5. For this reason, in reviewing these sorts of cases, having moral wisdom is indispensable and perhaps more important than having specialized training in particular areas of the law.

\textsuperscript{141} On the role of merit in selecting, appointing, and confirming federal judges, see \textsc{Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection}, 61 S. Cal. L. Rev. 1735 (1988).

\textsuperscript{142} \textit{Bush v. Gore}, 531 U.S. 98 (2000).

\textsuperscript{143} At the very least, the poor quality of the majority opinion in \textit{Bush v. Gore} should call into question our confidence that the Court can render principled judgments. For an argument that the Court could have reached a more principled legal rationale supporting the same legal conclusion, see \textsc{Richard A. Posner, Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts} 3-4 (2001); Richard A. \textsc{Epstein}, "\textit{In Such Manner as the Legislature Thereof May Direct}": \textsc{The Outcome of Bush v. Gore Defended, in The Vote: Bush, Gore, and the Supreme Court} 13-37 (Cass R. Sunstein & Richard A. Epstein eds., 2001).
of civic educators. The widespread acceptance of judicial review in one form or another by originalists and non-originalists alike means that it is not imperative for citizens to have an adequate understanding of constitutional values when they cast their ballots; courts can be expected to correct their mistakes or those of their elected representatives.

Our preoccupation with the results that the Court has reached in the past, many of which are morally justified, can blind us to the serious costs of relying so heavily on judicial review as an insurance policy against democratic excess. A conception of democracy that reserves serious moral argumentation for courtrooms is less likely to cultivate citizens who are critical of the uses of political power by the state. Citizens who transfer so much power to courts are probably more prone to accept political authority uncritically as well. One does not have to romanticize the New England town meeting or the Lincoln-Douglas senatorial debates to recognize the importance of a moral deliberation model in which citizens address and resolve political conflicts together in a principled manner. The fact that critical constitutional issues are resolved chiefly through litigation should trouble us, to the extent that the legal process is opaque to the vast majority of citizens. A democracy in which most citizens exercise very little real political power because many of their collective decisions are subject to judicial review, arguably does not meet the requirement of democratic self-rule. In fact, such a political system might be more accurately characterized as an elite democracy or as an oligarchy.

II. RAWLSIAN PUBLIC REASON

A. Overview

The purpose of this section is to show that citizens' practice of Rawlsian public reason could produce collective decisions that are both

\textsuperscript{144} See generally AMY GUTMANN, DEMOCRATIC EDUCATION (1999) (offering a variety of ideas about how citizens can be educated in democratic values and emphasizing the importance of the development of their deliberative capacities).

\textsuperscript{145} H.L.A. Hart claims that authority, by its very nature, excludes deliberation. Summarizing the thought of Hobbes, he remarks that authority is intended "to preclude or cut off any independent deliberation by the hearer of the merits of pro and con of doing the act." H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 253 (1982). David Gauthier writes that "[a]n appeal to authority—to requirements imposed by authority—is an alternative to an appeal to reason—to requirements based on reasons for acting." DAVID P. GAUTHIER, PRACTICAL REASONING: THE STRUCTURE AND FOUNDATIONS OF PRUDENTIAL AND MORAL ARGUMENTS AND THEIR EXEMPLIFICATION IN DISCOURSE 139 (1963).
democratically legitimate and morally acceptable, thus drastically reducing the need for judicial oversight. This constrained process of decision-making shows that the apparent choice between two extremes, one that is too deferential to judges and one that is too deferential to the raw preferences of the people, is false. By following the limits of public reason when they resolve fundamental political questions, political majorities can have their way, but only when they can offer acceptable justifications to political minorities or to individual dissenters. This section will be divided into the following subsections: (1) a detailed description of Rawlsian public reason; (2) an assessment of its implications for democratic citizenship; and (3) an argument that this kind of reason parallels that of judicial review but unlike such review, possesses democratic legitimacy.

B. The Idea of Public Reason

Above all, Rawls' more recent writings are concerned with how people who have different and often conflicting ends can formulate mutually acceptable terms to govern their common life. These terms are not just any terms that are reached as the result of a bargain or that are imposed by the strongest party. Instead, these terms must respect the political equality of all citizens and their freedom to pursue their respective conceptions of a good life. A society whose citizens and elected officials do not comply with public reason is not well-ordered. In addition, the failure to follow public reason undermines the mutual trust and civic friendship that holds a morally and religiously pluralistic political community together over time. Without public reason, for Rawls, people who share the same social space will never be able to live together as political equals.

The idea of public reason has its roots in Rousseau's concept of the general will.


147 This Article does not argue that judicial review should be wholly replaced. Rather, its exercise should not extend to questions of public morality that should be resolved by citizens themselves after sufficient public deliberation.


149 As Rousseau puts it, the general will is "concerned with their common preservation and general well-being." ROUSSEAU, supra note 122, at 79. Rawls'
cast their ballots on the basis of their preferences or personal interests. Rather, their collective decisions should be predicated upon reasons that ensure that each member of the political community is treated equally. Rawls insists that citizens must restrain themselves by observing public reason when they deliberate and vote on fundamental political questions. "Public reason" is designed to map the kinds of reasons and arguments that are appropriate in justifying legislation on the most important political questions to all reasonable persons. Under conditions of moral pluralism, public reason is the only normative political language that makes such justification possible. For Rawls, voting is not a private act because it creates law that affects the entire political community and is backed by the coercive power of the state. To produce legitimate legislative outcomes, citizens must refrain from voting according to reasons that are non-public—that is, those that would be unfair in a society that does not share the same moral or religious convictions.

The existence of moral pluralism renders the problem of public justification more critical than ever before because there is no guarantee that public deliberation will fulfill its purpose of producing authoritative collective decisions that legitimize the use of force against those who refuse to comply. A society whose members could keep their deeper differences private or who were not tempted to extend their sectarian convictions to the public realm without proper justification would not need public reason. The idea of voting according to public reason parallels that of Rousseau, who thought that votes should be based on interpretations of the common good rather than on mere preferences. Rousseau restricted popular decisionmaking to votes on laws instead of their implementation in particular instances. For him, only the social compact to form a civil association in the first place requires unanimity. In all other instances, the vote of the majority binds everyone who has consented to the compact.

On the centrality of public reason to Rawls' political liberalism, see Bruce A. Ackerman, Political Liberalisms, 91 J. Phil. 364, 368 (1994).

150 On the basic difference between Rousseau's and Bentham's voting schemes, see Joshua Cohen, An Epistemic Conception of Democracy, 97 Ethics 26, 29 n.14 (1986).

151 Rousseau also believed that the more important a political decision, the closer the vote should be to unanimity. See Rousseau, supra note 122, at 82.

152 "Conditions of moral pluralism," following Rawls, refers to intractable disagreement over the nature of the good life for human beings. Rawls refers to this condition as the existence of reasonable pluralism; it is moral because it refers to people's deepest convictions.

153 For Rawls' last views on public justification, see Rawls, Justice as Fairness, supra note 28, § 9, at 26-29.
question of what reasons justify a certain vote on fundamental political
questions means that we must know the general classes of reasons that we
could give to others and that they might find acceptable independent of
their deeper religious or philosophical beliefs. Otherwise, public delibera-
tion will not produce legitimate collective decisions.

Rawls seeks to offer an account, then, of the sorts of legitimate, or fair,
reasons that could be introduced in public deliberation. If citizens are to
reach consensus on constitutional essentials and matters of basic justice,
they must recognize more or less the same reasons as good reasons in
justifying public laws. Such consensus may not be secured, though, when
citizens can offer any reasons or arguments that they like. The fact that
deliberation is intended to justify the coercive power of the state means that
citizens should not offer idiosyncratic or parochial reasons to justify their
votes. Nor should they appeal to deeper moral or religious convictions that
are bound to be controversial in a morally pluralistic society such as our
own.

For Rawls, rejecting public reason has serious consequences. As one
commentator explains:

[T]o reject the claims of public reason at this level is to opt out of rational
discussion, it is to take a position outside the language game of rational
discussion about narrative issues. One must be willing to say to others: "I
cannot give you a reason you accept, and I am not willing to attempt to
give you a reason or to offer my reasons for your perusal. I shall simply
do as I wish, given my point of view." That is an extreme position.154

The unwillingness of a citizen to justify his or her vote to the fellow citizen

Second, the balance of non-public reasons can decide any issue that does not fall under "constitutional essentials" or "questions of basic justice." Rawls believes that public reason should address only the most important political matters, that is, those that are too important to be decided by the sum of the preferences of the electorate. By definition, public reason is a regulatory political morality. Public reason cannot answer deeper philosophical questions about what is valuable in human life or evaluate any reasonable moral or religious conviction on its merits; that is not its purpose. Rather, public reason is a moral standard that governs the political relationships and actions of citizens whose ends are bound to conflict at times. If such ends never came into conflict, then public reason would no longer be necessary.

C. Rawlsian Citizenship

To be a citizen of the Rawlsian well-ordered society is to belong to a political society whose members are politically equal. For Rawls, good citizenship entails the willingness to become conversant in the language of public reason and to comply with its norms when necessary. In particular, when one assumes the role of citizen, the balance of public reasons must be allowed to resolve the most important political questions:

[Public reason is] the reason of equal citizens [in a democratic society] who, as a collective body, exercise final political and coercive power over one another in enacting laws and amending their constitution. . . . [T]he limits imposed by public reason do not apply to all political questions but only to those involving what we may call 'constitutional essentials' and questions of basic justice. This means that political values alone are to settle such fundamental questions as who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property. These and similar questions are the special subject of public reason.157

Public reason is predicated on an ideal of democratic citizenship that suits conditions of moral pluralism. Such conditions are problematic to the extent that reasonable citizens may have very different ideas about the

156 See RAWLS, JUSTICE AS FAIRNESS, supra note 28, at 89.
157 RAWLS, POLITICAL LIBERALISM, supra note 28, at 214.
kinds of public laws that should be enacted. Public reason is a political morality because it is limited to this context; it only outlines how citizens ought to treat one another—as free and equal beings—when they must resolve fundamental political questions that affect the entire political community. Therefore, understanding the ideal of public reason is vital to understanding how to conduct oneself as a democratic citizen.\textsuperscript{158} Citizens do not vote their interests, tastes, or preferences; moreover, they do not appeal to what they believe to be right or true according to their own comprehensive doctrines.\textsuperscript{159} Citizens are supposed to vote for candidates who honor the limits of public reason, thereby ensuring that candidates and elected officials will observe them as well.

This self-restraint on the part of citizens allows them to make collective decisions on fundamental political questions without convergence at deeper levels.\textsuperscript{160} Public reason also sets out guidelines for public inquiry and criteria as to the information and knowledge relevant in discussing and resolving such questions.\textsuperscript{161} This reason aims to narrow our deeper differences and render them more manageable when collective decisions have to be made to the satisfaction of every reasonable person who is affected by them. For this reason, we should not draw inferences from premises that are too deeply embedded in particular comprehensive doctrines when we seek to convince the other members of our political community. A person would not want to assume the truth of Roman Catholic theology, for instance, if he or she were trying to convince non-Catholics that abortion or euthanasia should be illegal. Instead, we must try to reason based on premises that responsible citizens accept to reach conclusions that we think that they could also reasonably accept. Certain kinds of arguments must be ruled out as illegitimate at the outset because they could not possibly convince those who do not already accept their basic premises.

The existence of deep moral pluralism, for Rawls, means that we must use authorities acceptable to those with whom we disagree if we are to meet the minimal requirements of political legitimacy and thereby avoid unjustified coercion. Public justification is addressed to others and must

\textsuperscript{158} Id. at 218.

\textsuperscript{159} Id.

\textsuperscript{160} This interpretation of Rawlsian public reason finds additional support in Rawls' idea of "decent nonliberal peoples" in which "decent" is an even weaker constraint than "reasonable." See John Rawls, The Law of Peoples, in The Law of Peoples, supra note 28, at 3, 60-67.

\textsuperscript{161} See Rawls, Justice as Fairness, supra note 28, § 8.3, at 89.
begin with what is, or can be, held in common.\textsuperscript{162} To treat our fellow citizens fairly, we must be willing to cast our arguments in ways that are likely to appeal to them. Hence, it is not enough that a person has an intense desire to do something or believes with all of his or her heart that a particular belief is true. Explanations as to why dissenters are justifiably coerced must be public in the sense that they can be universalized or widely accepted under conditions of moral pluralism. A premise that cannot be known or justified apart from its deeper theoretical sources fails to satisfy public reason's requirement of reciprocity, because it could not support a mutually acceptable conclusion. A citizen who reasons from premises that he or she already knows some of the reasonable members of her audience will never accept fails to respect the freedom and equality of his or her fellow citizens. Reasons and arguments whose grounds are private or are too complex to be understood by others—e.g., those that are based on pure self-interest or on a particular conception of the human good—must be ruled out prior to actual deliberation to prevent citizens from being driven farther apart.

In short, the legitimate exercise of political power must be justified on more restrictive grounds. Rawls hopes that civic reasoning can be "public" in that it aims to persuade a particular audience, namely all of the reasonable members of the well-ordered society. The goal is to find reasons that will secure the assent of everyone. To be convinced by a public reason is to be convinced by a reason that can be universalized irrespective of deeper philosophical or religious divisions. A citizen must imagine whether that reason would be a sufficient reason from the standpoint of another reasonable person who does not, and cannot ever reasonably be expected to, share his or her comprehensive religious or moral beliefs about the human good. Public reason requires us to put ourselves into the shoes of others and to try to see fundamental political questions from their perspective before we make political choices. We fail to meet this requirement when we do not engage in this kind of thought experiment and do not exercise the kind of self-control that it demands.

Civic reasoning within the constraints of public reason, Rawls believes, can fulfill the minimal conditions of political legitimacy without fully liberalizing underlying reasonable comprehensive doctrines; thus, it remains true to the principle of liberal neutrality toward reasonable conceptions of the common good.\textsuperscript{163} The possibility of this kind of justification raises the question of how minimal this justification must be

\textsuperscript{162} See Rawls, Political Liberalism, supra note 28, at 100.
\textsuperscript{163} See id. at 49-51.
in order to be seen as legitimate in the eyes of those who do not share more or less liberal views of human flourishing. Put another way, in the midst of reasonable moral pluralism, are there any reasons that can be sufficiently universalized to legitimate the most important collective decisions? Can Jews, Muslims, Christians, Buddhists, and Atheists, for example, ever find common ground in political life? The answer to this question is important because any theory of justice must have a principled response to those who dissent—a response that explains why dissenters have a moral duty to fulfill their civic responsibilities willingly, and even more basically, to comply with the law. One of the central purposes of Rawlsian public reason is to show that citizens who have very different values still have such a duty when they assume the role of citizen and vote on the most important political questions.

This order, of course, is tall. Rawls insists that a citizen can have a non-liberal conception of the human good and nonetheless be reasonable in his sense of the term. There is hope, because many contemporary comprehensive doctrines support free thought and liberty of conscience in the abstract. Their looseness, furthermore, will enable their adherents to endorse regulatory political principles from a wide variety of moral perspectives. Reasonableness describes the attitude that characterizes a citizen who is willing to comply with norms of public reason. Being reasonable is essential in the midst of moral pluralism because reasonable persons recognize the primacy of political values, that is, the overriding importance of treating all citizens as free and equal beings who have life plans of their own. By implication, unreasonable people withhold their consent from principles that are fair to everyone on account of non-public reasons rooted in their deeper sectarian beliefs.

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164 Reasonable citizens are those who are willing “to propose and honor fair terms of cooperation” and “to recognize the burdens of judgment and to accept their consequences.” Id. at 49 n.1, 49-51.


166 According to Rawls, reasonable persons: (1) possess the two moral powers —i.e., a capacity for a sense of justice and a capacity for a conception of the good; (2) have the intellectual powers of judgment, inference, and the ability to assess evidence rationally; (3) have a determinate conception of the good; (4) are willing to be sincere, fully cooperating members of the well-ordered society; (5) will propose and willingly abide by fair terms of social cooperation so long as others reciprocate; (6) acknowledge the burdens of judgment; and (7) have a reasonable moral psychology. See RAWLS, POLITICAL LIBERALISM, supra note 28, at 48-58, 81-86.
D. Difficulties with Public Reason

Some critics of Rawlsian public reason allege that citizens should be able to introduce any reason or argument into public deliberation.\(^\text{167}\) Others have challenged Rawls' definition of reasonableness on the grounds that it excludes too many citizens from the "legitimation pool"—the group of persons whose endorsement would legitimize collective decisions made on the basis of public reason.\(^\text{168}\) More specifically, many critics worry that it is unfair to ask religious citizens to refrain from introducing their theological views into public debate or from appealing to them when they decide how to vote.\(^\text{169}\) Privatizing religion does not permit them, these critics maintain, to remain faithful to the requirements of their religious dogmas.\(^\text{170}\) To insist that religion should not play a public role, they complain, is to ask religious citizens to give up their conception of "the good." Furthermore, the effects of public reason restrictions are hardly neutral when citizens with non-liberal conceptions of the good (and their children) are likely to feel pressure to assimilate into a secular culture. As one commentator


\(^{169}\) See, e.g., Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us about Speaking and Acting in Public for Religious Reasons*, in RELIGION AND CONTEMPORARY LIBERALISM 162 (Paul J. Weithman ed., 1997). However, Rawls later added a "proviso," taking back the more restrictive view of public reason. According to the later view, citizens may propose whatever considerations they like in public deliberation provided that they are prepared to offer public reasons "in due course." See RAWLS, POLITICAL LIBERALISM, supra note 28, at liii.

\(^{170}\) See Patrick Neal, *Political Liberalism, Public Reason, and the Citizen of Faith*, in NATURAL LAW AND PUBLIC REASON 171, 171-201 (Robert P. George & Christopher Wolfe eds., 2000) (arguing that refusing to subordinate one's religious convictions is not a failure to respect one's fellow citizens as equals).
remarks, "The manifold blessings of liberal social orders come at a price, and we should not be surprised that those who pay the most occasionally grow restive."\textsuperscript{171}

The likelihood that some comprehensive doctrines will not thrive under his regime of public reason might cut against his claim that all reasonable groups could support it for their own reasons. This Article argues that life plans that are unreasonable—i.e., those that do not respect the freedom and equality of the other members of the political community—are not entitled to any weight at all when we must determine what kinds of reasons justify political coercion on the part of the state. In the end, it is not clear why we must give reasons to those in our political community who refuse to respect us, that is, to treat us as political equals. Conceptions of the human good that do not tolerate the reasonable life plans of others may be legitimately opposed. An objection that political liberalism does not carve out sufficient space for all reasonable comprehensive doctrines would have to demonstrate that Rawls' political conception of justice does not identify the right space.\textsuperscript{172} The real issue is whether the exclusion or restriction of certain ways of life can be defended as being as fair as possible to the others who reside within the political community.

It is not enough to insist that one's life plan could be disadvantaged by a particular conception of justice. A person who enjoys the thrill of crime will resent the enforcement of the penal code, but that does not mean such laws are unfair or could not be justified to him or her. Because no political conception of justice can be perfectly neutral when human beings inhabit the same social space, what makes it reasonable to reject a regulatory political morality such as public reason is either that it leaves a citizen too badly off compared with others or that it demands too much of him or her.\textsuperscript{173} At the very least, those who believe Rawlsian public reason leaves inadequate room for diversity must offer an alternative that is fairer to all conceptions of the good, yet at the same time achieves political legitimacy.

One cannot simply wish moral pluralism out of existence and then put forth a utopian conception of justice that assumes people's ends can easily be harmonized. Indeed, it is hard to imagine a human society that did not marginalize some conceptions of the good, especially those that cannot

\textsuperscript{171} William A. Galston, What is Living and What is Dead in Kant's Practical Philosophy?, in Kant & Political Philosophy: The Contemporary Legacy 207, 222 (Ronald Beiner & William James Booth eds., 1993).

\textsuperscript{172} See Rawls, Political Liberalism, supra note 28, at 198 n.33.

\textsuperscript{173} I borrow this definition from Thomas Nagel. Thomas Nagel, Equality and Impartiality 38 (1991).
peacefully coexist with other conceptions. It is not as if political morality can include all conceptions of the good when the very problem in the first place is that such conceptions, even reasonable ones, come into conflict at times. The real question is whether such marginalization is legitimate—in the sense that it is acceptable to use force or civil sanctions against those who refuse to comply. Fundamentalist Christians may have a right to home-school their children and to raise them in a religious environment. This right does not mean, however, that they also may use the coercive power of the state to force others to comply with their religious convictions. Being unreasonable boils down to a failure to appreciate that public laws should not be based on controversial sectarian doctrines unjustifiable to a morally diverse citizenry. Because of the unwillingness of unreasonable citizens to extend civic respect to others, unreasonable persons can be coerced (provided that the reasons offered for such coercion are sufficiently reasonable). Presumably, whether a citizen is reasonable or unreasonable on a particular fundamental political question could be determined on a case-by-case basis sensitive to the relevant details.

In principle, regulatory norms of public reason will encourage the flourishing of different ways of life because they do not attempt to assess life plans on their merits. In fact, Rawls’ political liberalism more generally might even be challenged on the grounds that his refusal to rank particular conceptions of the good reveals a distinct, and arguably controversial, anti-perfectionist tolerance for individual inclinations. A life plan that appears to be silly or eccentric to you or me, provided that it is reasonable in the sense of not unreasonably interfering with those of others, should not fare any worse than other reasonable life plans would fare in a perfectly competitive market. The point is to permit citizens to pursue their diverse ends because such ends are deeply personal matters that can be expected to vary from person to person. Rawls’ theory of public reason is only designed to settle conflicts among the plurality of ends that inevitably arise in political life. Individuals have a basic right to reach their own conclusions about how they ought to live, provided that their way of life does not unreasonably interfere with the life plans of others. As long as citizens decide to form political communities, they must construct regulatory principles that allow them to make difficult collective choices as fairly as possible. One cannot simply object that such principles are unnecessary in

a more ideal, communitarian society, because any political theory worthy
of our consideration must explain how political conflicts will be resolved.

Those who are critical of Rawls' approach must show that their
alternatives would accommodate more conceptions of the good than Rawls' theory would accommodate, while still meeting the minimal requirements of political legitimacy. They must address the deeper problem of figuring out how clashes of ideals can be settled in a mutually acceptable manner to avoid unjustified coercion. Appeals to unregulated public deliberation, as I suggested above, seem to deny the very existence of moral pluralism, or at least to deny that pluralism presents much of a problem from the perspective of public justification or political legitimacy. Whether diversity would grow under Rawls' scheme, of course, remains to be seen. Yet the case for his idea of public reason looks more promising than vague appeals to ideals of diversity, tolerance, or community, because the reciprocity implicit in public reason would not reduce a morally acceptable collective life to a common Millian or Kantian life plan. As Rawls makes clear, moral autonomy fails to satisfy the constraint of reciprocity. The restrictions on the kinds of arguments that are legitimate within the limits of public reason also preclude those based on secular comprehensive ideals such as Lockean self-ownership, Kantian autonomy, and Millian individuality. These doctrines are sectarian and consequently cannot be universalized to serve as the basis of public morality.

E. Voting According to Public Reason

Commentators have focused almost exclusively on the deliberative aspects of public reason—whether it is overly restrictive, too liberal, too unrealistic, and so on—and have not given voting behavior in the Rawlsian society the attention that it deserves. As Rawls himself makes clear, it is imperative that citizens not only deliberate within certain constraints, but also vote in a manner that satisfies these constraints. It makes little sense to require citizens to deliberate within certain parameters and then to allow

175 See RAWLS, POLITICAL LIBERALISM, supra note 28, at 98.
176 See Rawls, Public Reason Revisited, supra note 28, § 2.4, at 146.
177 All comprehensive views—e.g., Roman Catholicism, Judaism, Atheism, or liberal views such as that of Locke, Kant, and Mill—are too controversial to be shared by all reasonable citizens. The idea is that all comprehensive doctrines are sectarian. Hence the need for a public or political morality that is not premised on any articlar comprehensive doctrine.
178 See RAWLS, POLITICAL LIBERALISM, supra note 28, at 219.
them to vote differently. There are two non-public reason ways to vote: (1) a citizen could vote to advance his or her own individual good irrespective of other considerations; or (2) he or she could vote to further his or her own sectarian good as a good for everyone, that is, as the basis of public morality. Rawls tells us that citizens who are not government officials realize the ideal of public reason by thinking of themselves as if they were legislators and by holding government officials to the restrictions of public reason.\textsuperscript{179} Although usually they do not directly vote on matters of public concern, their civic duty requires citizens to ensure that particular statutes do not conflict with norms of public reason. They fulfill this civic duty by monitoring their elected representatives.

Whether ordinary citizens can live up to this duty, furthermore, is not only a matter of their being motivated to vote appropriately,\textsuperscript{180} they must also apply the norms of public reason competently in determining whether their elected officials have acted for the right (sufficiently public) reasons. The “right” part of reasons under conditions of moral pluralism rules out appeals to the divine nature of religious texts, to religious faith, and to revelation. An orthodox Jew, for example, could not use the \textit{Talmud} to justify dietary restrictions for everyone even though he or she is free to make the same case on other grounds and is welcome to make such a case within her particular religious community. Arguing that abortion, homosexuality, or physician-assisted suicide is wrong on the basis of Roman Catholic theology would likewise violate public reason by inappropriately introducing a comprehensive doctrine into the discourse. Yet arguing for the same conclusion from premises based on public reasons, such as the negative effects that these practices might have on the family or on future citizenship, would be permissible.\textsuperscript{181} Whether this argument, based on public reason, could be countered by more convincing public reasons leading to the contrary conclusion would be settled by actual political discourse conducted appropriately.

As Rawls reminds us, public reason does not answer all political questions in advance.\textsuperscript{182} However, it does outline the kinds of general reasons that are sufficiently public in the sense of being morally acceptable

\textsuperscript{179} See Rawls, \textit{Public Reason Revisited}, supra note 28, \$ 1.1, at 135-36.

\textsuperscript{180} After all, this civic duty is not legally enforceable but is self-imposed. See Evan Charney, \textit{Political Liberalism, Deliberative Democracy, and the Public Sphere}, 92 AM. POL. SCI. REV. 97, 101 (1998).

\textsuperscript{181} See Rawls, \textit{Public Reason Revisited}, supra note 28, \$ 2.4, at 146-49.

\textsuperscript{182} Id. \$ 6.1, at 164.
to those who do not share the same conception of the good.\textsuperscript{183} Even if the public reason constraints on public deliberation are not as strict as Rawls initially made them out to be, citizens still have a moral and civic obligation to vote according to them.\textsuperscript{184} They must base their votes on reasons that they sincerely believe could be justified to those who do not share their deeper convictions. Because comprehensive conceptions of the common good cannot be universalized under conditions of moral pluralism, the reasons for voting one way rather than another must take into account other people who cannot be expected to accept reasons that have a controversial pedigree. Citizens who do not vote according to public reason on constitutional essentials and matters of basic justice commit the civic sin of failing to respect the freedom and equality of their fellow citizens.

In effect, a vote based on non-public reasons denies that collective decisions affecting the entire political community must treat all citizens equally. Even in a morally diverse society such as our own, the value of political equality is considered self-evident. At least symbolically, the right to vote is the most important element of equal citizenship in America.\textsuperscript{185} Extending the franchise, over time, has contributed to the notions that political equality lies at the core of our democratic ideal, and that any society denying a competent person an equal voice in public affairs is not a democracy at all. Franchise extension illuminates the reason why Rawls claims that public reason derives “from a conception of democratic citizenship in a constitutional democracy.”\textsuperscript{186} For Rawls, the possession of the two moral powers—“the capacity to have and act from a sense of justice, and the capacity to form, revise, and pursue a conception of the good”—confers the status of equal citizenship.\textsuperscript{187} This status, in turn, cannot be taken away simply by a majority vote or on account of morally arbitrary factors such as race, ethnicity, gender, sexual orientation, religious affiliation, or property ownership. As long as a person possesses these powers to a minimal degree, he or she has a right to an equal share of coercive political power and a right to be treated by others in a way that respects these powers.

\textsuperscript{183} Its criterion of reciprocity also precludes premises that are grounded exclusively in the alleged truth of secular comprehensive doctrines such as utilitarianism, feminism, Marxism, libertarianism, and perfectionist varieties of liberalism, see id. § 7.1, at 176.
\textsuperscript{184} See Rawls, Political Liberalism, supra note 28, at 219.
\textsuperscript{185} See Guinier, supra note 115, at xiii; Judith N. Shklar, American Citizenship: The Quest for Inclusion 2 (1999).
\textsuperscript{186} See Rawls, Public Reason Revisited, supra note 28, at 136.
I. CITIZENS AS JUDGES

A. The Analogy

This section will spell out the analogy between good Rawlsian citizenship and good judging in some detail, explaining how public reason might operate. This account is designed to give a more concrete idea of how citizens with the right kind of motivation might approach their most important voting decisions. As legislators, citizens must think like judges legislating on a constrained basis. The duality is between our judge-like role as citizens governing ourselves within the limits of public reason, and our private lives, in which we live according to the full moral or religious truth as we see it.

As we saw in the last section, Rawls fears that the existence of moral pluralism may prevent reasonable citizens from convincing the members of their political community that the arguments that justify their collective decisions on constitutional essentials are sound. This problem is remarkably similar to that of the legitimacy of judicial review, inasmuch as the legal reasons that support legitimate constitutional decisions are widely acknowledged in the constitutional culture—that is, reasons that are found in the Constitution itself or based on a reasonable inference from the text. For Rawls, though, the task of public justification is considerably more complicated under conditions of moral pluralism because what counts as a good argument, or even what counts as a good reason, may be contested. At the very least, public justification is supposed to produce reasons that dissenters could not reasonably reject. This concern about meeting the

188 This argument assumes that most citizens of normal intelligence could attempt to apply norms of public reason to real constitutional essentials in good faith. It does not offer ideas about the kinds of constitutional or institutional reforms that might be appropriate. That is a very important practical question, to be left to another day. This Article solely puts forth a more democratic alternative to judicial review on conceptual and normative grounds.

189 As "legislators," we are supposed to hold our elected representatives to the standards of public reason.

190 I owe this phrasing to Andrew Lister, a friend of mine who read a rough draft of this Article and made this suggestion.

191 The concept of "rejectability" is attributable to T.M. Scanlon. As he explains, "An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement." T.M. Scanlon, Contractualism and Utilitarianism, in UTILITARIANISM AND BEYOND 110, 110 (Amartya Sen & Bernard Williams eds., 1984).
minimal requirements of justification is not skeptical in the sense of assuming that moral propositions cannot be true or false or that such propositions can only be true relative to a particular time and place. Instead, it is premised on the inherent difficulty in particular cases of putting together an argument about public morality that would persuade all reasonable persons who already are divided over the nature of the human good.

As a solution to this problem of political legitimacy, Rawls appeals to our political heritage as the source of our shared public morality. Roughly, the constraints of Rawlsian public reason parallel those of principled constitutional adjudication and are designed to produce popular consensus on constitutional essentials. The widespread practice of public reason would reduce the need for courts to serve as forums of principle in our constitutional democracy. Citizens who vote sincerely according to the balance of public reasons could take the place of judges in deciding constitutional essentials that do not require technical legal knowledge. As a result, democratic decisionmaking could be both participatory and principled, producing democratically legitimate and morally acceptable outcomes. Such outcomes would be preferable to morally acceptable yet democratically illegitimate outcomes on the one hand, and to morally objectionable yet democratically legitimate outcomes on the other hand.

Rawls himself holds up ideal judicial practice as a model of the sort of self-restraint that he anticipates on the part of citizens when they aim for public justification:

> Public reason sees the office of citizen with its duty of civility as analogous to that of judgeship with its duty of deciding cases. Just as judges are to decide them by legal grounds of precedent and recognized

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193 Cf. Frederick Schauer, *Judging in a Corner of the Law*, 61 S. Cal. L. REV. 1717, 1726-31 (1988) (contending that hard cases, which are the kinds of cases that appellate judges are most likely to review, are less likely to require conventional legal expertise for their resolution).

194 Other things equal, collective decisions on the most important political questions ought to be fair in the sense that all reasonable people would accept, or at least understand, their underlying reasons and ought to be democratically legitimate—i.e., actually be endorsed by real citizens. On the importance of democratic legitimacy, see Christopher Bertram, *Political Justification, Theoretical Complexity, and Democratic Community*, 107 ETHICS 563 (1997).
canons of statutory interpretation and other relevant grounds, so citizens are to reason by public reason and to be guided by the criterion of reciprocity, whenever constitutional essentials and matters of basic justice are at stake.\textsuperscript{195}

The idea is something like this: when a judge tries to answer a question of constitutional law in good faith, he or she looks to the text of the Constitution and perhaps to external sources that have added interpretive gloss over time. The judge is committed to interpreting the text—applying its principles or rules to the particular facts of the case in front of him or her—individually of his or her deeper moral, religious, or particular convictions and of the judge's intense desire for a particular outcome on non-legal grounds. Indeed, this psychological supposition is central to the possibility of principled legal reasoning more generally.

Similarly, for the citizen who thinks of him or herself as a judge, the values of our political heritage are to serve as the case law informing the citizen's judgments concerning fundamental political questions. Just as courts preserve their legitimacy in a constitutional democracy by exercising the power of judicial review responsibly, citizens are to take their duty of civility to comply with the norms of public reason equally seriously. This commitment does not mean that citizens who are sincerely committed to public reason will never reach different decisions, particularly in hard cases that may be factually complex. Nothing rules out the possibility that citizens with the best of intentions may make interpretive mistakes. In very hard cases, moreover, there may not be a right or an obviously better answer even after citizens have narrowed down their choices to a number of possibilities.\textsuperscript{196} There will be difficult choices at the margins and reasonable people may reach different, but equally plausible, conclusions.\textsuperscript{197} It is widely recognized that a general principle of law—or any general political or moral principle for that matter—may be underdetermined when it must be applied to a concrete set of facts.\textsuperscript{198} Similarly,

\textsuperscript{195} RAWLS, POLITICAL LIBERALISM, supra note 28, at lv.

\textsuperscript{196} Ronald Dworkin is famous for holding the view that there are right answers (those that fit better) even in hard cases. See DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 39.

\textsuperscript{197} Conflicts arising from the burdens of judgment always limit the extent of possible agreement even among reasonable persons. See RAWLS, JUSTICE AS FAIRNESS, supra note 28, at 35-37; RAWLS, POLITICAL LIBERALISM, supra note 28, at 54-58; Rawls, Public Reason Revisited, supra note 28, at 177.

\textsuperscript{198} See, e.g., Fiss, supra note 13, at 739-41; Ken Kress, Legal Indeterminacy, 77 CAL. L. REV. 283 (1989).
legal conclusions do not simply follow deductively from legal premises. Nevertheless, even though we cannot expect unanimity in hard cases, citizens must try to reach conclusions that aspire to public justification.

At the very least, the analogy between citizens and judges is suggestive. It gives us another way to think about citizenship in a deliberative, constitutional democracy that is more principled and less hostile to actual moral argumentation among citizens themselves. Equally importantly, the Rawlsian conception of citizenship in which citizens assume a judge-like role does not commit the error of reducing democracy to crude majority rule with insufficient attention to the public good. The idea of citizens as judges captures the reasonable attitude (or the moral psychology) that a Rawlsian citizen has when his or her vote on a constitutional essential may create a public law that coerces others. A judge or citizen can accept this dual identity without becoming morally schizophrenic. It is not inconceivable, for instance, for a judge to believe that abortion or affirmative action is morally wrong on personal grounds and nevertheless believe that the Constitution permits the practice, or conversely, that abortion is morally permissible but not protected by a right of privacy specified in the Constitution. In fact, this possibility is what we would expect from someone whose highest duty requires him or her to base his or her legal decisions on principled reasons that can be justified to others who do not share his or her deeper beliefs. At best, the final decision is the product of thoughtful, principled deliberation and as such, is as legitimate as possible in an imperfect world.

B. Egalitarian Implications

As we saw earlier, defenders of the power of judicial review contend that its exercise is a necessary evil in a democracy where most citizens are

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199 The difficulties of formalism are well known. For a more nuanced conception of formalism, see Frederick Schauer, *Formalism*, 97 *Yale L.J.* 509 (1988).


201 As Thomas Nagel puts it:

The pure ideal of political legitimacy is that the use of state power should be capable of being authorized by each citizen—not in direct detail but through acceptance of the principles, institutions, and procedures which determine how that power will be used. This requires the possibility of unanimous agreement at some sufficiently high level, for if there are citizens who can legitimately object to the way state power is used against them or in their name, the state is not legitimate.

poorly informed and take very little interest in public affairs. Such judicial oversight cannot be avoided, they allege, because the people or their elected representatives will make rash and often foolish judgments on important political questions that ought to be a product of careful, principled deliberation. Nevertheless, such a purportedly realistic solution, as this Article has shown, has serious normative difficulties of its own. Resolving our most difficult political differences through litigation in forums that are opaque to most citizens is problematic. Can we claim in good faith that citizens are ruling themselves if they do not grasp more of the details of how controversies of public morality are resolved in their name? It is a bit disturbing that the vast majority of citizens in the United States could not understand the legal reasoning that determined the outcome of their most recent presidential election, leading to allegations that one side had “stolen” the election.

At minimum, understanding how a democracy settles conflicts over rights, duties, and the distribution of scarce resources should be common knowledge. The scope of judicial review could be drastically reduced, as I have argued above, if citizens could act more like judges or indeed, if they were trusted with some degree of minimal civic responsibility in the first place. For this reason, it is worth exploring a model of citizenship based on Rawlsian public reason that resembles the way in which judges ought to make legal decisions. Civic reasoning according to the constraints of public reason eventually might be able to replace judicial review on questions of public morality provided that real citizens were willing and able to apply its norms to real constitutional essentials and matters of basic justice competently. One of our primary aims should be to formulate an inclusive mode of deliberation that makes room for serious moral argumentation but that also requires real citizens, rather than judges, to express the constitutional will of the people. As such, citizens would share coercive political power equally.

C. The Accessibility of Public Reasons

One could object that such a legalistic paradigm of civic reasoning would make unreasonable demands of ordinary citizens. Indeed, this charge is so common that it prematurely cuts off serious discussion of alternative models of democracy that are less fixated on courts and more open to

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202 See, e.g., supra notes 8-14 and accompanying text.
203 On public ignorance of the operation of the court system, see POSNER, supra note 24, at 136 n.23.
citizen participation. Rawlsian public reason would not be seen as so unrealistically utopian if our society were more willing to educate all of its citizens in the basic aspects of democratic citizenship and to devote social resources to this end. Civic education could focus on developing the deliberative skills that would close the gap between the ideal of public reason and its practice over time. We do not expect ordinary citizens, of course, to become philosopher-kings. But we already allow them to serve on juries and to vote. Thus, it is not as if we have never trusted citizens with any kind of real power. One of the advantages of civic reasoning and voting according to the constraints of public reason is that it is likely to be less exclusionary than richer deliberation based on deeper legal or moral argumentation would be. The ultimate goal would be for the vast majority of citizens to practice public reason competently and thus, render democratically legitimate decisions.204

At the very least, public reason is more likely to be accessible to a wide audience of different educational levels. It might also encourage ordinary citizens to take public affairs more seriously.205 As John Stuart Mill once argued, our involvement in deliberation and decisions concerning the public good develops our reasoning capacities and broadens our interests beyond our own concerns, leading us to take an interest in others.206 As Cass Sunstein points out, our preoccupation with the role of the courts in the American constitutional system is at odds with the equally important civic republican tradition that emphasizes active political participation and concern for the public good.207 For these reasons, it is imperative to create a public of more thoughtful citizens who can apply public reason to real fundamental political questions.

204 Rawls states, "Political values alone . . . are to settle who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property." Rawls, Political Liberalism, supra note 28, at 214.

205 Cf. Fishkin, supra note 78, at 20.


Our acceptance of judicial review as an insurance policy against
cajoritarian excess discourages us from thinking about how we might
realistically bring politics and principled deliberation together. This is the
main point of this Article. Public deliberation and voting according to
Rawlsian public reason constitute the minimal moral conversation that
deliberative democracy requires. The practice of public reason by ordinary
citizens would enable them to take responsibility for the choices that
otherwise would be made only in their name. For far too long, we have
given judges the power to make decisions that citizens should be able to
make on their own. Without an opportunity to learn how to vote appropri-
ately, citizens will never learn to rule themselves. Under such circum-
cstances, we should not be surprised that many citizens take little interest in
politics.

The “shallow reasons” that count as good public reasons form one of
the greatest virtues of public reason, because this quality can reduce the
historical tension between popular participation and the quality of
deliberation. If deliberative agreement among real citizens is necessary
to produce legitimate decisions, the practice of public reason cannot be
limited to those who have specialized academic or professional training. At
the same time, the “shallow” aspects of public reason, like constitutional
values, are sufficiently moral in that they treat all members of the political
community with equal concern and respect. In this way, good reasons will
guide voting behavior and generate legitimate public laws. The Madisonian
model of democracy, which has exerted so much influence over our
collective imagination, assumes the realm of politics to be an arena of
interest group pluralism, coalition-building, bargaining, and compromises.
Those who believe that democratic politics should be more principled are
often attacked for their purported ignorance of political history, political
institutions, and real world considerations more generally. This apparent
split between politics and principle, however, prevents us from seeing the

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208 On the difficulties of inculcating liberal civic virtues such as tolerance in
children whose parents are deeply religious, see Stephen Macedo, Liberal Civic
Education and Religious Fundamentalism: The Case of God v. John Rawls?, 105

209 I borrow the term “shallow reasons” from S.A. Lloyd. Lloyd, supra note 188, at 718. Cass Sunstein makes the same point when he suggests that “low-level
explanations,” or a relatively modest rationale, may be sufficient in commanding
agreement from a diverse people. See SUNSTEIN, ONE CASE AT A TIME, supra note 7, at 14. Similarly, Gutmann and Thompson argue that “citizens should seek the
rationale that minimizes rejection of the position they oppose.” See GUTMANN &
THOMPSON, supra note 121, at 84-85.
possibility of a more deliberative political existence where courts are not the only forums for principled argumentation.\textsuperscript{210}

Tying justification to the everyday practice of exchanging reasons among ordinary citizens is central to a move away from placing our faith in judges toward true democratic self-rule in which citizens make choices about public morality based on reasons that are widely accessible.\textsuperscript{211} As such, the gap between theoretical and publicly accessible reasons can be closed, allowing ordinary citizens to understand the reasons that underlie the laws that they themselves are supposed to legislate. As Jeremy Waldron puts it:

Society should be a \textit{transparent} order, in the sense that its workings and principles should be well-known and available for public apprehension and scrutiny. People should know and understand the reasons for the basic distribution of wealth, power, authority, and freedom. Society should not be shrouded in mystery, and its workings should not have to depend on mythology, mystification, or a "noble lie."\textsuperscript{212}

Indeed, in a democracy, that a reason or argument is too complex to be understood by the vast majority of the population counts as a strong reason against using it as a means of public justification. All other things equal, and assuming reasonable levels of education and attention, we ought to prefer reasons that are widely accessible to reasons that only can be understood by a minority of highly educated citizens. After all, people

\textsuperscript{210} This thought is not as counterintuitive as it may initially sound because in most other non-political spheres, we expect good reasons to guide practical reasoning, and we reject the claim that any reason whatsoever counts as a sufficient reason for an action. For example, most of us would not allow a fellow juror to explain his or her vote to convict a defendant in a criminal trial on the grounds that an African-American is more likely to be a criminal. This reason, based on racial prejudice, would be unacceptable. We would ask such a juror for better reasons to support his or her belief in the defendant's guilt and if he or she could not produce them, we would demand that he or she change his or her vote.

\textsuperscript{211} Earlier, in \textit{A Theory of Justice}, Rawls acknowledged this potential problem: "[A] conception of justice is to be the public basis of the terms of social cooperation. Since common understanding necessitates certain bounds on the complexity of principles, there may likewise be limits on the use of theoretical knowledge in the original position." \textit{JOHN RAWLS, A THEORY OF JUSTICE} 142 (1971).

cannot accept a reason if they cannot understand it. Reasons that can be comprehended only by philosophers, lawyers, and economists occupy an awkward spot in a democracy because ordinary citizens, on their own, must accept them freely. If these reasons are only dimly understood or not comprehended at all, we cannot really say that we have respected the autonomy of each citizen, that is, his or her capacity to understand and accept reasons that are supposed to guide his or her actions. When we do not treat citizens in this way, we do not treat them with equal concern and respect.

This publicity requirement—that for public reasons to have real justifying force they must be sufficiently accessible—raises a difficult question about what kinds of reasons ought to be excluded on the ground that they are too complex to be comprehended by an adult citizen of average intelligence. This Article cannot address this matter. To be sure, there is room for debate concerning whether a particular reason or argument falls on one side of the line or on the other side. The point is that in the end, to legitimate public law, the reasons offered must not only be fair to all of those who are affected, but must also be as transparent as possible to ensure that citizens do not simply defer to other citizens who purport to be experts.

Allowing citizens to vote merely on the basis of their personal preferences, as many democratic critics of judicial review would have us do, does not expose the important political issues to adequate moral scrutiny. At the very least, citizens in a democracy should be able to explain their vote with some appreciation for its potential effects on other members of the political community. After all, aggregations of votes determine who will have the power to make decisions that have far-reaching domestic, and sometimes global, ramifications. The reasons that citizens provide need not be sophisticated, but they ought to be minimally moral and based on facts. In other words, the moral reasons offered to justify public law ought to legitimize what otherwise would be unjustified coercion. They must be fair to everyone in the sense of being sufficiently respectful of the right of each citizen to formulate and pursue his or her own morally permissible ends. Even when sincere deliberators cannot reach consensus in hard cases, a vote that takes place after such deliberation is much more likely to be legitimate in the eyes of deliberators who have been exposed to all of the relevant arguments and who have had a real opportunity to be heard.

The process of exchanging good-faith reasons to make principled collective decisions can generate public opinion based on a thoughtful appraisal of political options, rather than based on cues from the mass
media and from special interests. Creating participatory conditions that are more conducive to civic learning calls for a more cooperative, less antagonistic style of collective decisionmaking that eschews the kind of politics that merely advance individual interests or parochial ideals without proper consideration of the freedom and equality of others. In a democracy, it matters not only whether the outcomes are fair or just, but also how political conflicts are resolved. These collective decisions affect the lives of too many people to be made in a way inaccessible to the majority of ordinary citizens. The case for Rawlsian public reason as an alternative to judicial review turns on the degree to which public deliberation can constrain how citizens vote on fundamental political questions. The reasons that guide a citizen’s decision must be consistent with treating other citizens as political equals and tolerating, if not respecting, their reasonable life plans. In sum, the practice of public reason by citizens is preferable to the exercise of judicial review by unelected judges because citizens should be trusted with the civic responsibility of making their own collective decisions.

**CONCLUSION**

In the preceding pages, this Article argued that voting on the basis of Rawlsian public reason should take the place of judicial review on questions of public morality, thereby avoiding the troubling antidemocratic implications of judicial supremacy. The point was not to attack the concept of judicial review—or at least not the “review” part—but rather to explain how something like judicial review could be practiced more democratically by citizens when they make decisions for the entire political community. The apparent dilemma between the exercise of judicial review by unelected judges on the one hand and unconstrained majoritarian rule by the public on the other hand, then, disappears. Indeed, the parallel between judicial review and public reason deserves to be examined in much greater detail, because their functions in a constitutional democracy have remarkably similar normative justifications. Both operate to constrain democratic decisionmaking to protect higher law. The most obvious advantage of the practice of public reason is that it minimizes the need for judicial incursions into the democratic space, allowing ordinary people to have more direct control over their own lives.213

213 As J.B. Thayer wrote:

"It should be remembered that the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil,"
At the same time, without question, the requirements of public reason put a great deal of civic responsibility on the shoulders of ordinary citizens. They cannot ignore reasonable dissenters but must justify their votes on constitutional essentials to them. In doing so, I claimed that it would be useful for them to think of themselves as judges before they cast their ballots. Just as judicial integrity requires judges to apply the law in good faith, the civic duty of Rawlsian citizens demands that they employ the same sort of self-restraint, allowing the balance of public reasons, as opposed to their deeper religious or moral convictions, to guide their voting decisions. Such reasons parallel good constitutional reasons to the extent that both classes of reasons are premised upon respect for political equality and the freedom of individuals to pursue their respective conceptions of the good. Those who seek to use the state to restrict this freedom must produce sufficiently compelling reasons to overcome the strong presumption against such uses of coercive political power. Reasons that fall short of this standard—i.e., those than can be reasonably rejected by dissenters—cannot legitimize legislation when fundamental political questions are at stake.214 In fact, the absence of such reasons puts into considerable doubt the moral obligation of such persons to obey the law. From a practical standpoint, furthermore, considerable empirical evidence suggests that people who believe that the law is legitimate are more likely to comply with it.215 At the very least, the right to coerce reasonable dissenters must be based on a moral justification that has wide appeal under conditions of moral pluralism.

The most honest rationale for the practice of judicial review today is deep pessimism about the likelihood that ordinary citizens could ever come

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214 However, justification need not be addressed to unreasonable persons. On this point, see Erin Kelly & Lionel McPherson, On Tolerating the Unreasonable, 9 J. POL. PHIL. 38 (2001).

215 Cf. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 7 (1990) (noting that some studies show a link between compliance and confidence in the law’s legitimacy, but that the link is only “moderately strong,” and little research has been done in this area).
to appreciate constitutional values or to apply them to particular cases. In this sense, many of us are still "reluctant" democrats who accept a sharp distinction between democracy and constitutionalism. From this cynical standpoint, judicial supremacy turns out to be the lesser of two evils: it is appropriate in an imperfect world where the vast majority of citizens are incapable of making informed, reflective decisions on basic questions of public morality. This pessimism masks highly questionable optimism about the likelihood that judges will do any better in terms of rising above partisan politics in the defense of higher law. Simply put, this belief is based too much on wishful thinking and too little on historical and empirical evidence. More importantly, such pessimism prevents us from exploring the possibility that the practice of constitutional review could be made more democratic. Indeed, Americans are not hopelessly divided over political morality, at least not at an abstract level. Excessive skepticism about the capabilities of ordinary citizens discourages us from thinking seriously about how we might bring the people and the Constitution closer together. In the end, we ought not to settle so easily for a democracy in which citizens are not trusted to rule themselves.

See Brest, supra note 64, at 1106.