

# Constitutional Self-Government and Judicial Review: A Reply to Five Critics

By CHRISTOPHER L. EISGRUBER\*

NOTHING MORE REWARDS the author of a scholarly book than serious engagement with the arguments advanced in it. I am accordingly grateful to Professors Rebecca Brown, John Denvir, Rick Hills, Mark Tushnet, and Jeremy Waldron for their thoughtful essays on my book, and to Professor Joshua P. Davis and the University of San Francisco Law Review for organizing this symposium. The Law Review has assembled a talented field of scholars, some of whom regard judicial review very differently than I do. I freely confess that I, like many other authors, harbored some dim, unrealistic hope that my arguments might actually persuade reviewers to abandon their positions and adopt my own. I would, however, have been the poorer for it had that wish been granted. My critics have produced vigorous and illuminating responses to my work, and I have learned much from them. If *Constitutional Self-Government*<sup>1</sup> continues to provoke arguments of the kind and quality reprinted in this special issue of the *University of San Francisco Law Review*, I will count the book a great success.

## I. Introduction

I am especially heartened because even some of the most unrelenting critiques of my book implicitly accept some of its key claims. In particular, most of the authors accept important features of the framework I propose for evaluating judicial review, even while they reject many of the specific recommendations I offer within that framework. That common ground is by no means obvious from straightforward perusal of their contributions, some of which focus (in honorable aca-

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1. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001).

democratic fashion) almost exclusively on points of disagreement. For that reason, and to provide context for what follows, I will begin by outlining the core claims of *Constitutional Self-Government* and identifying areas of common ground. I will then address the specific criticisms that have been directed at my book.

Several of my critics argue as though the central purpose of *Constitutional Self-Government* were to defend an aggressive form of judicial review, in which all, or nearly all, moral issues are decided by judges. But that is not my goal. Instead, *Constitutional Self-Government* targets the common view that *even if* judges can protect rights or advance principles of justice better than can legislatures, judicial review is nevertheless at least problematic, and perhaps undesirable, because it is undemocratic. Conventional wisdom assumes an equivalence between “the people” on the one hand and “the legislature” or “the voters” on the other. It accordingly equates “self-government” with “government by legislatures” and “government by voters,” and it regards judicial review and the Constitution as impediments to self-government, since they manifestly limit the freedom of legislatures and voters. These views are accepted more or less unreflectively not only by critics of judicial review, but by many of its most able defenders.

Against these views, I maintain that democracy is not reducible either to “government by legislatures” or “government by voters.” I contend that legislators have incentives (namely, to protect their office and advance their careers) that make them imperfect representatives for the people. More radically, I contend that “voter,” like “legislator,” is a political office, and that, like all offices, “voter” carries with it specific powers and incentives that distinguish “voters” from “citizens” or “the people.” I do not mean to disparage voting or legislatures, both of which are crucial to democratic government. I want only to insist that in large nation-states “the people” can never act in any direct way. Perhaps the people as a whole could govern themselves directly in a tiny city-state, where all citizens might assemble in a “town hall meeting” to discuss and choose among contested policies. Nothing of the sort is possible in a polity the size of Rhode Island (or, for that matter, the city of Providence), much less in the United States as a whole. In large nation-states, “the people” must act through a variety of institutions—national legislatures, state legislatures, local city councils, electorates of various kinds, presidents, governors, mayors, central banks, administrative agencies, school boards, and (I argue) courts—none of which represent “the people” perfectly but all of which contribute something important to democracy.

Because “the people” is not reducible to “the voters,” insulating policies and officials from direct electoral control may serve pro-democratic purposes. *Constitutional Self-Government* elaborates and builds upon that possibility. It argues that judicial review should be regarded not as a constraint on democracy, but as an ingredient in a complex, non-majoritarian form of self-government.<sup>2</sup> That basic claim has three corollaries. First, we cannot assess the democratic credentials of judicial review on the basis of the jejune observation that judges are not elected. The case for or against judicial review must depend upon a more pragmatic assessment of how well courts, by comparison to other available institutions, can serve democratic goals. This inquiry will inevitably have a philosophical and an institutional component. We must first specify criteria by which to assess the democratic or undemocratic character of politics in large nation-states (in *Constitutional Self-Government*, I propose four such criteria: “impartiality,” “effective choice,” “participation,” and “public deliberation”).<sup>3</sup> We must then consider the relative capacity of courts and other institutions to satisfy those criteria. Insofar as judges can (when acting in combination with other institutions) represent people well, we should not worry that they are undemocratic because unelected, but “where [their] competence fails, so too does [the] argument” for judicial review.<sup>4</sup>

Second, we must recognize the complexity of democratic institutions and avoid blunt contrasts between “courts” and “legislatures.”<sup>5</sup> So, for example, I suggest in *Constitutional Self-Government* that American government facilitates participation largely through local rather than national institutions of government.<sup>6</sup> I contend that this feature of the American political system bears upon the case for judicial review. In particular, I argue that judicial review simultaneously tames the tendency of local government to violate democratic norms of impartiality and permits them enough space to serve the democratic goal of facilitating participation.<sup>7</sup> The combination of judicial review and local autonomy may therefore be more strongly pro-democratic in the

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2. Judicial review is not the only topic addressed in *Constitutional Self-Government*. For example, Chapter One offers a pro-democratic justification for the Constitution’s inflexible amendment procedures. *See id.* at 10–45. Most of the book, however, deals with judicial review. My critics (with the exception of Professor Brown) have focused almost exclusively on that topic, and I will do likewise in the remainder of this essay.

3. *See id.* at 82–87 (2001).

4. *Id.* at 78.

5. *See id.* at 206.

6. *See id.* at 86–91.

7. *See id.* at 91–96.

United States than in a system dominated by a well-constituted national legislature.

Third, because the case for judicial review depends upon its value as a representative institution rather than on judges' professional expertise, judges should openly acknowledge the value judgments they inevitably make when deciding controversial constitutional cases.<sup>8</sup> Judges have long struggled to do just the opposite: worried that political decision-making by unelected officials is an embarrassment to democracy, they have tried to justify their controversial rulings as more or less apolitical exercises of legal technique, textual hermeneutics, or historical research. I argue in *Constitutional Self-Government* that this practice has been misleading at best and that it has probably damaged the quality of the Court's performance. Whether judges exercise their power of judicial review rarely or frequently, they ought to do so in a way that recognizes its political character.

These three claims define the conceptual core of *Constitutional Self-Government's* argument about judicial review. They explain what it means to treat judicial review as an ingredient of democracy, rather than a constraint upon it. Taken by themselves, they do not entail any particular conclusion about how much judicial review we should have. They instead demand a pragmatic kind of inquiry, in which the incentives and competencies of judges are compared to the incentives and competencies of other office-holders, including legislators and voters. As I say in *Constitutional Self-Government*, these comparisons involve considerations "that are fairly contestable and partly empirical," and about which reasonable people will differ.<sup>9</sup>

Many of the arguments directed against *Constitutional Self-Government* in this symposium accept the book's conceptual framework even as they dispute my more particular conclusions about the desirability of judicial review. So, for example, Professors Hills, Tushnet, and Waldron all offer interesting (but ultimately, in my view, mistaken) objections to my account of the incentives facing voters.<sup>10</sup> Their arguments appear to concede, however, that these incentives (whatever they are) matter to our assessment of the democratic credentials of electoral democracy and hence to comparisons between elected and appointed

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8. See *id.* at 109–11, 209–11, *passim*.

9. *Id.* at 73.

10. See Roderick M. Hills, Jr., *Are Judges Really More Principled than Voters?*, 37 U.S.F. L. REV. 37, 42–51, 53–55 (2002); Mark Tushnet, *A Goldilocks Account of Judicial Review?*, 37 U.S.F. L. REV. 63, 68–69, 72–74 (2002); Jeremy Waldron, *Eisgruber's House of Lords*, 37 U.S.F. L. REV. 89, 111–14 (2002).

officials. They do not argue that such issues can be dismissed on the ground that the electorate just is, in some crude definitional or axiomatic sense, “the people,” so that a government which is more responsive to voters is necessarily more democratic, regardless of what incentives voters confront and how they behave. This development strikes me as salutary, and, were it to become widespread, I would regard it as a significant advance in constitutional theory. Constitutional theorists have long worried about whether legislatures can be trusted to protect rights, but they have not paid much attention to the possibility of a conceptual distinction between “the electorate” and “the people,” or to the incentives that affect voting behavior. In general, theorists have assumed that legislative sensitivity to electoral preferences is pro-democratic, and then they have debated whether judicial review might nevertheless be desirable.

Of course, *Constitutional Self-Government* does more than set out a framework for analyzing claims about judicial review. The book argues that American-style judicial review is a beneficial and pro-democratic practice. In my view, “[t]he justices make a distinctive contribution to representative democracy” because with respect to some issues “they . . . are better positioned to represent the people’s convictions about what is right”—better positioned by comparison not only to local government, but also to Congress and the President.<sup>11</sup>

I continue to believe that these arguments are sound. Indeed, I have two different reasons to be glad that my critics recognize the institutional complexity of constitutional self-government and, in particular, that they respect the conceptual distinction between “government by the people” and “government by voters” or “government by legislatures.” The first is simply that the argument about comparative institutional competence is the right argument to have, whether or not it ultimately produces a conclusion favorable to judicial review. The second is that I believe the institution will fare well if judged on those terms. In my view, once we focus on how judges perform compared to other officials, rather than on whether judicial review is undesirable simply because judges are unelected, the argument for some form of judicial review (exactly what form is debatable) becomes quite powerful. Most people seem to believe that judicial review helps to protect rights; if they worry about it, they do so on the ground that they regard it as presumptively undemocratic.

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11. EISGRUBER, *supra* note 1, at 5.

In the remainder of this essay, I will try to defend these conclusions against the objections raised by other participants in this symposium. My critics here have deepened the debate about the characteristic behaviors of voters, legislators, and judges, and I believe that their observations make important contributions to our thinking about what forms of judicial review are most useful to democratic government. As I have already said, I am grateful for their insights, and I have tried, in what follows, to show how their ideas can be incorporated into the argument of *Constitutional Self-Government*. On the other hand, I will also try to show that insofar as my critics have argued against the practice of judicial review in general, their claims are weak.

To avoid repetition, I have organized my replies around substantive points of controversy, rather than author-by-author. I have sequenced the topics in a way that parallels the organization of the book. Section II deals with the conceptual foundations of my theory. Section III defends the claim that “government by the electorate” and “government by the legislature” are both unsatisfactory interpretations of “government by the people.” Section IV addresses objections to my claim that the Supreme Court and judicial review are pro-democratic institutions. Section V responds to concerns about judicial review’s impact on political participation and public deliberation. Finally, Section VI treats two issues about how judges should interpret the Constitution. It first discusses interpretive approaches that judges might use to resolve controversial moral and political questions. It then turns to the role of strategic judgment in constitutional law and defends my distinction between discrete and comprehensive moral principles. I use that distinction to make recommendations about when courts should defer to Congress and other officials with regard to strategic questions. In each Section, I have tried to lay out enough of the argument from *Constitutional Self-Government* to enable readers unfamiliar with the book to follow the discussion.

## **II. Conceptual Issues: Majoritarianism, Democracy, and Moral Principle**

### **A. What Is Democracy?**

A common view of democracy equates it with majority rule.<sup>12</sup> This view has been endorsed by political philosophers, political scientists,

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12. Here and throughout this essay, I will refer loosely to “majority rule” and “majorities” without addressing the insights of public choice theory, which raise serious questions about what these concepts mean in the context of a modern democracy. The classic cita-

and constitutional theorists. Perhaps the most venerable example comes from John Locke, who wrote that if the “Majority may employ all [of its] power in making Laws for the community from time to time, and Executing those Laws by officers of their own appointing, . . . then the *Form* of the Government is a perfect *Democracy*.”<sup>13</sup> A much more recent example comes from the political scientist Jon Elster: “Democracy I shall understand as simple majority rule, based on the principle ‘One person, one vote.’”<sup>14</sup> When constructing his influential constitutional theory, John Hart Ely assumed that “the choosing of values is a prerogative appropriately left to the majority.”<sup>15</sup> As Professor Brown points out, the view also appeals to ordinary citizens: “Every school child senses the facial fairness of a ‘majority rule’ system.”<sup>16</sup>

In *Constitutional Self-Government*, I deny that democracy is reducible to majority rule. I identify two distinct objections to the conventional equation between democracy and majoritarianism. First, democracy is government by the whole people, and a majority is by definition only a fraction of the people. Thorough and relentless majoritarianism will therefore be undemocratic. Suppose, for example, that fifty-one percent of the population likes sporting facilities and forty-nine percent likes museums. Would it be desirable, from the standpoint of democracy, to spend all of the public’s money on stadia and none on museums? Would it be undesirable, from the standpoint of democracy, to have a constitutional rule requiring that tax dollars be shared proportionately among majority and minority interests—so that, in this case, forty-nine percent of the expenditures would support the minority’s interest in museums? This simple example illustrates a more general point. If we value democracy, we should demand that our government honor the value of *impartiality*: The government should “respond to the interests and opinions of all the people, rather than merely serving the majority, or some other fraction of

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tion is, of course, KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUE* (2d ed. 1963). An interesting discussion of the point appears in the excellent new book by Professor Rubinfeld, JED RUBINFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 102–15 (2001).

13. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 399–400 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (emphasis added).

14. Jon Elster, *Introduction*, in *CONSTITUTIONALISM AND DEMOCRACY* 1 (Jon Elster & Rune Slagstaad eds., 1993).

15. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 179 (1980).

16. Rebecca L. Brown, *A Government For the People*, 37 U.S.F. L. REV. 5, 8 (2002). She quickly adds that every “school child with the innate sense of fairness also perceives that it is a small step from ‘majority rule’ to ‘ganging up.’”

the people.”<sup>17</sup> Of course, majoritarian procedures will often be useful mechanisms by which to implement the goal of impartiality. But we should be clear that majority decision is democratic only insofar as it is a means to secure impartiality (or some other democratic value). Majority rule is not itself a criterion of democracy, and it may under some circumstances be undemocratic. Majority rule, in other words, is often pragmatically useful to democracy, but it is not constitutive of democracy.

Second, I distinguish between matters of preference and morality. Matters of preference include issues, like the one discussed above, about whether to spend public money on sports facilities or museums. With regard to matters of preference, impartiality requires proportionality. In practice, it requires sharing or taking turns—by, for example, spending some money on stadia and some on museums, rather than making an all-or-nothing choice. Matters of morality are different. Consider, for example, the question of whether it is permissible for the government to criminalize abortion. It is possible, I suppose, to imagine ways of “sharing” or “taking turns” with regard to this issue: We might say that it is constitutionally permissible for the government to criminalize it in some states but not others, or that criminalizing abortion will be permissible in even-numbered years but not in odd ones. Yet, such solutions do not (to say the least) have immediate democratic appeal. On the contrary, many Americans would believe that such compromises fail to respect the distinctive character of moral issues. A democratic government must respect beliefs of that kind: to represent the people well, it must, among other things, represent their belief that matters of preference and matters of morality should be treated differently.<sup>18</sup> I accordingly propose in *Constitutional Self-Government* that impartiality means something different when applied to moral matters: “To rule impartially on moral issues, the government must decide those issues on the basis of moral reasons that have some popular appeal.”<sup>19</sup>

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17. EISGRUBER, *supra* note 1, at 19.

18. My argument thus depends upon the claim that Americans do in fact distinguish between moral values and mere preferences. Professor Brown questions whether this claim is empirical or whether it rests on normative foundations. See Brown, *supra* note 16, at 12 n.20. The claim is empirical. If, however, the American people (or any other people) failed to draw such a distinction, they would be unjust. Circumstances of that kind present complex questions not resolved in *Constitutional Self-Government*; my inclination, however, is to believe that when people are fundamentally unjust, they are no longer entitled to govern themselves. See EISGRUBER, *supra* note 1, at 134.

19. EISGRUBER, *supra* note 1, at 57.

Thus far, of course, my discussion of moral issues has said nothing about majority rule. We can now bring those topics together. They intersect in two ways. First, we are now in position to rebut a common, but mistaken, view about how democracies should handle moral issues. Somebody sympathetic to the impartiality criterion might reason as follows: "With regard to matters of preference, impartiality requires sharing. But sharing makes little sense on moral issues. Either the minority or the majority must win. Minority rule makes no sense, so we are left with majority rule. On issues of morality, then, democracy means majority rule." It should now be evident why this view is mistaken. With regard to moral issues, "sharing" and "minority rule" are indeed unsatisfactory interpretations of impartiality. But so too is "majority rule," which cedes government to a mere fraction of the people. Fortunately, there is another possible interpretation of impartiality: that is, it requires that moral issues be decided on the basis of moral reasons that have popular appeal. The democratic character of moral decision-making, in other words, turns on the character of the government's reasons, not on the sheer size of the constituency for those reasons.<sup>20</sup> If I am correct about this point, it has implications of obvious relevance to the debate about judicial review. In particular: If the judiciary is acting on the basis of the right kind of reasons (namely, moral reasons) but the legislature or the electorate is not, then decision by the judiciary may be *more* democratic than decision by either of the two institutions, even though they have greater numbers on their side.

The second point of intersection is more institutional in character. Insofar as impartiality has different entailments for matters of preference and morality, decision procedures well-suited to implement that goal in one domain may work poorly in the other. To take the relevant example, it may turn out that the best way to produce impartial decisions about matters of preference is to make officials (including legislators) highly sensitive to the preferences expressed by voters in majoritarian elections.<sup>21</sup> It does not follow that making offi-

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20. I say "*sheer size*" because the *popularity* of the reasons does matter. *See id.* at 56; *see also infra* text accompanying note 33.

21. I am offering this simple view as an hypothesis, so that we can examine the consequences it would have if it were true. I am not asserting that, as a matter of fact, majoritarian elections are the best way to produce impartiality even on matters of preference. I do think that elections are indispensable to democracy, especially (though not solely) with regard to matters of preference. But a full treatment of the issue would have to consider devices such as proportional representation, lotteries, federalism, super-majoritarian constitutional amendment procedures, central banks, and administrative

cially sensitive to electoral pressure will produce equally impartial decisions with regard to moral matters. For reasons that we will consider in detail in Section III of this essay, I believe that direct electoral pressure is likely to have some adverse effects upon the ability of public officials to decide moral questions impartially—and, hence, upon their ability to decide them democratically.

These arguments about majoritarianism, morality, and democracy provide essential conceptual infrastructure for the pragmatic, institutional arguments that occupy much of *Constitutional Self-Government* and that will concern us in later sections of this essay. Professors Waldron and Brown make thoughtful criticisms of these basic points. Professor Waldron suggests that I am insufficiently respectful of majority rule. Professor Brown recommends a refinement of my distinction between preferences and moral values. I will consider each of these arguments in turn.

## B. Waldron on Majority Rule and Majority Decision

None of my critics repeat the blunt equations between democracy and majoritarianism that I quoted at the beginning of this Section. Professor Waldron does, however, object to some of what I say about majority decision-making. Professor Waldron is perhaps the most sophisticated and rigorous theorist of majority rule at work today,<sup>22</sup> and his probing arguments here are consistent with his stature. In light of the prominence that constitutional theory has assigned to the allegedly “counter-majoritarian” character of judicial review, his case on behalf of majority rule deserves detailed attention.

Professor Waldron insists that it is a “misconception to contrast judicial review with majority rule.”<sup>23</sup> He correctly points out that the Supreme Court itself uses majority rule: When the Justices disagree about a case, they vote, and the majority wins. According to Professor Waldron,

The difference between decisions by the court and decision by the federal legislature or by the electorate is not a difference in decision-procedure, it is a difference in constituency: a constituency of nine, as opposed to voting constituencies numbered in the hun-

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agencies, all of which would involve departures from thorough-going electoral majoritarianism.

22. He has set forth his arguments in an excellent book, JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

23. Waldron, *supra* note 10, at 107-08.

dreds (in our legislatures) or in the millions (among the voters of the various states).<sup>24</sup>

Nor, he says, is it accidental that all of these institutions rely on majority-decision. When we need to make policy and people disagree, we must have a procedure to get a decision. So, in a case like the one I described earlier, in which people disagree about how to divide public funds among projects (such as stadia and museums), there will almost certainly exist multiple different ways to share the money. Even if democracy requires that we share the money, we still need to choose among the various plans for sharing. We therefore must have some decision rule, and Professor Waldron believes we will often have good reason to select majority-decision as the right procedure. He accordingly criticizes me for failing to analyze “where the use of [majority rule] becomes *necessary*”<sup>25</sup> and he suggests that the processes of moral decision I favor “would have to involve majority-rule at some point.”<sup>26</sup>

Professor Waldron is obviously correct that judicial review in the United States incorporates elements of majority decision. Indeed, those elements go deeper than he suggests. Not only does the Court use majority-rule to decide cases, but the justices are nominated by a president who is chosen by majority vote of the Electoral College, and they are then confirmed by a majority vote of senators, who are themselves chosen by majority vote of the electorate in their respective states. I do not regard these majoritarian elements of the appointments process as embarrassments; on the contrary, I invoke them to defend judicial review.

I also agree with Professor Waldron that no democracy will be able to get by without some form of majority decision-making, and that in many circumstances majority-vote will be the best decision procedure. On the other hand, Professor Waldron exaggerates if he really means to claim what he says, which is that majority-rule will ultimately be a *necessary* procedure in a democracy. Departures from it are common. Some non-majoritarian rules apply only to very specific domains—for example, the rule stipulating that the Senate can ratify a treaty only if two-thirds of its members concur. More significantly, our most fundamental rules, those governing ratification and amendment of the Constitution, also demand super-majority consent. In *Constitutional Self-Government*, I defend super-majoritarian constitutional pro-

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24. *Id.* at 108.

25. *Id.* at 109 (emphasis added).

26. *Id.* at 110.

cedures as reasonable mechanisms for implementing democratic values.<sup>27</sup>

We need not, however, investigate the details of this argument, for Professor Waldron's essay addresses my argument about judicial review, not constitutional amendment. And with regard to judicial review, I am willing to grant him the claims that he is most anxious to establish. Professor Waldron begins his analysis of majority rule by announcing that he aspires to demolish "a crude, misleading and perennial antithesis, which one finds in almost every argument for judicial review, between *morality* and *majoritarianism*."<sup>28</sup> I have no stake in perpetuating this antithesis. My point is not that there is an *inherent conflict* between majoritarianism and *morality*. It is instead that there is *no inherent connection* between majoritarianism and *democracy*. The question whether majoritarianism advances democracy, including the democratic resolution of moral controversy, is entirely a matter of pragmatic institutional strategy.

Since I do not rely on the antithesis that Professor Waldron debunks, I can also accept the consequences he derives from its rejection. In particular, when Professor Waldron finishes his analysis, he claims that my case for judicial review cannot be based on an objection to majority decision, which is, after all, the decision procedure used by the Court itself. According to Professor Waldron, my case must instead rest upon "the constituency of those whose votes are counted on a given issue." More specifically, he says, my argument for judicial review must rest upon the claim that "when we count judges' votes, we are more likely to be counting votes cast for reasons of moral principle, than we are when we count legislators' or electors' votes."<sup>29</sup> Again, I have no quarrel with Professor Waldron about this point. On the contrary, when I summarize my case for judicial review in *Constitutional Self-Government*, I rely (just as Professor Waldron wants) entirely upon the reasons for judges' votes. I make no mention of anything like "majority tyranny," and I suggest that my case for judicial review

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27. See EISGRUBER, *supra* note 1, at 18–20. To similar effect is the argument of PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 181 (1997) ("[W]here the most basic and important laws are concerned . . . it should not be easy to change these laws. In particular it should require more than the fact of majority support in the parliament or even in the population."). As a practical matter, super-majoritarian amendment procedures may help to ensure that a constitution has enough support to command allegiance over time. Cf. Maria McFarland Sanchez-Moreno, *When is a "Constitution" a Constitution? Focus on Peru*, 33 N.Y.U. J. INT'L L. & POL. 561 (2001) (discussing conditions under which constitutions become sufficiently "embedded" in politics to function effectively).

28. Waldron, *supra* note 10, at 106 (later emphasis added).

29. *Id.* at 111.

might be acceptable even to somebody who embraces a “largely majoritarian” democratic theory.<sup>30</sup>

So I will offer Professor Waldron a deal. We can become allies. I will join him in opposing crude oppositions between majoritarianism and morality if he will join me in opposing crude connections between majoritarianism and democracy. I would welcome this alliance, but I fear that Professor Waldron may be reluctant to sign. Were he to do so, he would have to stop saying that the crucial difference between court, Congress, and electorate is a difference in numbers: “a constituency of nine [for the Supreme Court], as opposed to voting constituencies numbered in the hundreds (in our legislatures) or in the millions (among the voters of the various states).”<sup>31</sup> This emphasis on numbers depends on the crude connection between majoritarianism and democracy I have criticized, a connection that emphasizes the sheer size of the voting group rather than the grounds for its votes. The real question is not about blunt numbers (indeed, if numbers mattered so much, then Professor Waldron ought to prefer plebiscites to legislation—but in fact his preferences run the other way).<sup>32</sup> The real question is instead, as Professor Waldron later says, about the reasons why the votes are cast—and, I would add, the relation of those reasons to the democratic criterion of impartiality—not the total number of votes cast.

In the hopes of securing agreement, I will offer Professor Waldron one last olive branch. Although blunt numbers cannot tell us whether government has resolved an issue democratically, neither is it sufficient that the government act on the basis of moral reasons. The moral reasons must have genuine popular appeal. More specifically,

[T]he government must respect the people’s conviction that sustained public deliberation helps moral opinion to converge upon new and better positions. The government must therefore ensure that the vision it articulates is one that has some popular appeal. It ought to reflect the benefits of public discussion, rather than the idiosyncratic whims or intuitions of a few privileged decision-makers.<sup>33</sup>

Perhaps, with that clarification in place, Professor Waldron and I can agree that the real question is about grounds, rather than num-

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30. See EISGRUBER, *supra* note 1, at 71–72.

31. Waldron, *supra* note 10, at 108. He would also have to stop alluding to the Supreme Court as a “nine man junta clad in black and surrounded by law clerks.” WALDRON, *supra* note 22, at 309.

32. He praises the democratic virtues of legislatures in JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999) and in WALDRON, *supra* note 22, at 21–68.

33. EISGRUBER, *supra* note 1, at 55–56.

bers. If so, we can put the obsession with majoritarianism (pro *and* con) behind us. Constitutional theory will undoubtedly be the better for it.

### C. Brown on First-Order and Second-Order Moral Questions

While Professor Waldron is among the most able advocates of legislative supremacy, Professor Brown is a leading defender of liberty-regarding judicial review. She and I disagree about how best to defend that practice: She has advanced a powerful and attractive argument that we should regard liberty, rather than self-government, as the animating purpose behind constitutionalism and judicial review.<sup>34</sup> In these pages, however, she has generously put aside that disagreement and analyzed my theory on its own terms. In the course of her commentary, Professor Brown offers a friendly amendment to my argument. She contends that my category of “moral issues” or “moral judgments” is imprecise and confusing. She suggests that my argument would be stronger were I to recommend that judges decide a specific set of moral issues, namely, those that pertain to “the relationship of government to the individual in a free society.”<sup>35</sup> Professor Brown concretizes this proposal by distinguishing between First-Order and Second-Order moral principles.<sup>36</sup> First-Order moral questions deal with individual behavior: for example, is it immoral for people to utter racist statements? Second-Order moral questions deal with the government’s relationship to individual conduct: for example, is it immoral for the government to criminalize the utterance of racist statements? The two questions bear a complex relationship to one another. It might be immoral for the government to criminalize racist speech even if it is also immoral for people to make racist statements.

Professor Brown is on to something here. I hope that nothing in *Constitutional Self-Government* could be construed to argue that judges should decide every sort of moral issue. As her examples illustrate, some moral issues ought not to be decided by any branch of government, judicial or otherwise. Indeed, many of our most fundamental rights—including the rights of speech, religious liberty, and privacy—leave us free to make our own moral choices, for better or for worse. Even if we limit our attention to moral issues legitimately decided by *some* branch of government, I do not believe that all of them are meet

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34. See Rebecca L. Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531 (1998).

35. Brown, *supra* note 16, at 17.

36. See *id.* at 17–18.

for decision by an unelected constitutional judiciary. Professor Brown's general description of the moral issues that should concern judges—namely, those that deal with the “relationship of the government to the individual in a free society”<sup>37</sup> —is congenial to me.

I am therefore inclined to welcome Professor Brown's suggestion as a clarifying refinement to my theory, and I will invoke it later in this essay to help answer my other critics. I am unsure, however, whether I can accept her recommendation exactly as she has formulated it. The distinction between First-Order and Second-Order moral questions strikes me as slippery. In particular, government officials may sometimes (perhaps often) have to make judgments about First-Order issues in order to resolve Second-Order questions. For example, I do not see how it is possible to decide Second-Order Questions about whether government can criminalize abortion without taking some stand on First-Order questions about whether abortion is the moral equivalent of murder.<sup>38</sup> Moreover, I am not sure whether all of the constitutional issues on the Court's docket fit comfortably into the category of Second-Order moral questions about the “relationship of the government to the individual in a free society.” Questions about federalism and the separation of powers, for example, may be exceptions. On the other hand, Professor Brown herself has described how these structural features of the Constitution are liberty-regarding,<sup>39</sup> and my own view, described in *Constitutional Self-Government*, is that the Court should concern itself with structural issues only when the Court has special competence or there is a direct connection to questions of liberty or equality.<sup>40</sup> In any event, while I am unsure how far to press Professor Brown's suggestion, I am confident that it sheds light on some important questions that we will examine in the pages to follow.

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37. *Id.* at 17.

38. In general, I am not inclined to believe that the state can or should be neutral about questions of moral goodness. I have criticized neutrality in Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 89–91 (1996); Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 603–08 (1996); Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 115–21 (1997) [hereinafter Eisgruber & Sager, *Congressional Power*]; and Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY 200, 213–14 (Stephen M. Feldman ed., 2000).

39. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1990–1991); see also Rebecca L. Brown, *When Political Questions Affect Individual Liberty: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125 (1993).

40. See EISGRUBER, *supra* note 1, at 174–75.

### III. How Principled Is the Behavior of Voters and Legislators?

#### A. Virtues and Vices of the Legislative Process

In *Constitutional Self-Government*, I argue that both legislators and voters have incentives to make political decisions on the basis of self-interest. In the case of legislators, the incentive is simple: legislators must worry about keeping their jobs. This incentive may lead them to disregard their own moral judgments in order to please voters. Of course, that might not be a problem if voters' preferences were good proxies for the people's values: the self-interest of legislators would then lead them to be faithful to the people's moral judgments. Unfortunately, the office of 'voter' also provides incentives for self-interested behavior. I have elsewhere summarized the key features of voting in a large nation:

Voters act in secret; they are not obliged to give reasons for their vote; they choose among a limited set of options (such as two or three candidates for political office, or "yes" or "no" to a ballot proposition); and each voter's individual ballot has almost zero weight in determining the outcome of an election.<sup>41</sup>

In *Constitutional Self-Government*, I emphasize two consequences that flow from these incentives. First, it is thought legitimate, and perhaps desirable, for voters to cast their ballots on the basis of their self-interest (voters may, for example, permissibly choose whatever candidate will minimize their tax burden). Second, voters have no institutional incentive to take moral responsibility for their decisions: unlike judges, they act in large groups, and they need give no account of the reasons for their decision.<sup>42</sup>

These imperfections by no means render elections and legislatures useless, immoral, or ignoble. On the contrary, those institutions are indispensable to democracy. They are capable of doing great good. But the imperfections in the incentives facing voters and legislators make it an error to suppose that "government by the people" is identical to "government by voters" or "government by legislatures." Electorates and legislatures will distort the judgments of the people in

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41. Christopher L. Eisgruber, *Civic Virtue and the Limits of Constitutionalism*, 69 *FORDHAM L. REV.* 2131, 2138 (2001).

42. My thinking on these points has been influenced and informed by the research of James Fishkin. Professor Fishkin argues that large-scale elections provide no incentive for deliberative decision-making by voters, and he proposes imaginative reforms to address this problem. See, e.g., JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* 21-25, 81-104 (1991) (discussing the need for "deliberative opinion polls" and other innovations).

predictable ways. In *Constitutional Self-Government*, I defend judicial review on the ground that it is a reasonable, pro-democratic (though also imperfect) corrective to the imperfections of electorates and legislatures.<sup>43</sup>

Several of my critics contend that I underestimate the extent to which voters and legislators are capable of principled behavior. We might interpret these arguments in either of two ways. First, the arguments might seek to restore the identification between government by the people and government by legislatures, so that we would once again have to regard judicial review as undemocratic by virtue of the fact that it puts limits on what legislatures and voters can do. Alternatively (and, I think, more plausibly), the arguments might lead us to modify our views about the optimal scope of judicial review. This second view would preserve the distinction between government by the legislature and government by the people. It would accordingly allow that judicial review might serve pro-democratic purposes. It would, however, maintain that legislatures did a better job than I have suggested, so that judicial review would be desirable less often than I have suggested.

My critics' arguments contain some important insights, and they repay detailed attention. As will soon become apparent, they have forced me to refine and elaborate upon what I have thus far said about electoral behavior. I will get down to details in a moment, but, first, lest we lose the forest for the trees, I want to offer a general reminder and an important concession. The reminder is this: Principled behavior by voters and legislators is in no way inconsistent with the theory advanced in *Constitutional Self-Government*. On the contrary, I insist that such behavior is both possible and beneficial.<sup>44</sup> Indeed, I

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43. Professor Tushnet claims that I engage in a "Single-Institution Comparison" that considers the legislature's imperfections but not the judiciary's. Tushnet, *supra* note 10, at 64 & n.5. In fact, *Constitutional Self-Government* identifies many defects in the democratic credentials of the judicial branch, including these: Judges may feel deep attachment to a political party or ideological platform, *see* EISGRUBER, *supra* note 1, at 63; life tenure increases the risk that judges will lose touch with the nation's ongoing moral and political debate, *see id.* at 66; all judges are drawn from a single profession, *see id.* at 67; legislatures can often act more effectively than courts, *see id.* at 76; judges too often succumb to the temptations of technical jurisprudence, *see id.* at 109–35; and judges will often be poorly suited to resolve strategic problems related to the implementation of moral principle, *see id.* at 140. Insofar as I can tell, Professor Tushnet adds no items to this list, and, indeed, he claims that I exaggerate how much difficulty judges will have with strategic questions. *See* Tushnet, *supra* note 10, at 78–86. Professor Tushnet undoubtedly believes that some of the judiciary's failings are more serious than I take them to be, but that is a substantive disagreement—not a methodological one—about how to do comparisons.

44. *See, e.g.*, EISGRUBER, *supra* note 1, at 57, 76–78.

count upon it to implement some important principles of justice that are, in my view, ill-suited to judicial enforcement.<sup>45</sup> I am therefore happy to agree with my critics when they describe institutional mechanisms that can produce principled legislative behavior. Of course such mechanisms exist. The relevant question is whether the mechanisms are sufficiently good that we can either identify government by legislators with government by the people (in which case judicial review would be undemocratic) or at least count upon legislatures consistently to produce outcomes that are as principled and as good as what courts would produce (in which case judicial review would be superfluous, and perhaps sub-optimal, even if not undemocratic).

Now for the concession. Professor Tushnet quotes a passage from *Constitutional Self-Government* where I say that “elected officials and voters can, and sometimes do, treat moral principles seriously.”<sup>46</sup> He complains, however, that “Professor Eisgruber . . . does not take that point into account in any serious way in his analysis.”<sup>47</sup> His complaint is valid in two respects. First, I have elsewhere emphasized my objections to judicial supremacy and analyzed possibilities for fruitful partnership between Congress and the Court.<sup>48</sup> I continue to adhere to those views, but I did not discuss them at any length in *Constitutional Self-Government*. The book would have been better had I done so. Second, as Lewis Liman has pointed out in his review of my book, some of my sentences claim too much for the judiciary—in particular, I can be read to claim that “courts are *uniquely* well-situated to make decisions on the basis of principles.”<sup>49</sup> As Mr. Liman correctly observes, my argument does not require so strong a claim. Courts are useful pro-democratic institutions so long as there is a range of cases in which they make a positive, distinctive contribution to the project of self-government (and so long as they do not impose costs which overwhelm those benefits). Courts need not be uniquely principled in order for judicial review to be pro-democratic. I did not mean to claim that courts were uniquely principled, and, in many passages, I was careful to insert that

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45. See *infra* Section VI.B. (discussing comprehensive moral principles).

46. EISGRUBER, *supra* note 1, at 76.

47. Tushnet, *supra* note 10, at 65.

48. For my objections to judicial supremacy, see Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L. J. 347, 352–64, 371 (1994). On the idea of partnership between Court and Congress, see Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 462–64 (1994).

49. Lewis J. Liman, *Constitutional Self-Government*, N.Y.L.J., Aug. 9, 2002, at 2 (emphasis added).

qualification. But elsewhere I was less careful than I should have been, especially when my attention was focused on exploding the mistaken conceptual equation between government by legislators and government by the people.

I do not, however, want to make Professor Tushnet or my other critics too happy. They seem to think that were I to take full account of the possibility of principled behavior by voters and legislators, it would undermine the case I make for judicial review. For reasons I shall now explain, I believe that is not so.

## B. What Does It Mean To Be Self-Interested?

My theory depends upon a distinction between self-interest and moral judgment. Professors Hills, Tushnet and Waldron all suppose that by “self-interest,” I mean only *material* or *economic* self-interest.<sup>50</sup> They accordingly doubt whether my argument has any application to most of the cases that come before the Supreme Court. They suggest, in particular, that financial self-interest is rarely a plausible explanation for why voters might oppose civil rights.

I think the class of civil rights cases affected by financial or material self-interest is larger than that envisioned by my critics. It encompasses, for example, cases involving unjust restrictions on the distribution of public benefits (such as *Plyler v. Doe*<sup>51</sup>), cases about substandard prison conditions (which are sometimes expensive to remedy), and cases about the rights of criminal defendants (since most people see themselves as potential victims, rather than potential defendants, and fear that restraints on law enforcement will leave them more vulnerable—hence the notorious Willie Horton advertisement from the 1988 presidential election). It may include virtually any Equal Protection Clause case, since most such cases could be settled if only some right or benefit were offered more broadly (if money were no object, would Virginia have had an all-female military academy to complement the VMI?).<sup>52</sup> It could include a vast range of other cases in which the question (when put in doctrinal terms) is whether the government has invoked “appropriately tailored means” to effectuate

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50. See Hills, *supra* note 10, at 38, 43; Tushnet, *supra* note 10, at 66–67, n.18; Waldron, *supra* note 10, at 112–13.

51. 457 U.S. 202 (1982) (holding that Texas violated the Equal Protection Clause by excluding illegal immigrant children from its schools).

52. See *United States v. Virginia*, 518 U.S. 515 (1996) (holding that Virginia violated the Equal Protection Clause by maintaining a publicly funded, all-male military academy).

a legitimate goal: cost is presumably one reason for choosing something other than the "least restrictive means."

Still, if "self-interest" referred only to "financial self-interest" or "material self-interest," that would create serious problems for my position. As Professor Tushnet points out, it would be virtually impossible for me to explain what was going on in the flag-burning cases. Many voters appear willing to cast their ballots in favor of politicians who enact prohibitions on flag-burning. Professor Tushnet correctly observes that it is hard to attribute this behavior to economic self-interest. Prohibiting flag-burning will not pad the bank accounts of voters. Professor Tushnet accordingly argues that I should concede that electoral opposition to flag-burning is predicated upon moral judgments.<sup>53</sup>

But self-interest is not reducible to material or economic self-interest. I undoubtedly bear some responsibility for confusion about this point, since many of my examples in *Constitutional Self-Government* emphasize the importance of economic interests. I was careful, however, to frame the basic proposition more abstractly: "The circumstances of the voting booth exacerbate [the] tendency" to "conflate what is in our interest and what is right."<sup>54</sup> It is a mistake to limit self-interest to its material or economic forms. If we avoid that error, we can easily identify self-interested reasons to oppose flag-burning. Here is the simplest one: People might find flag-burning offensive, and they might feel themselves better off if not exposed to such offensive speech. That is a judgment about self-interest, though not material self-interest. It is different from a judgment about whether it is morally permissible for the government to censor flag-burning. In fact, I think it entirely plausible that many Americans share the perspective that Justice Anthony Kennedy expressed in his highly personal concurrence in *Texas v. Johnson*.<sup>55</sup> Justice Kennedy said that he found Johnson's speech "repellent" but that it was nevertheless unconstitutional for the state to punish it. He accordingly felt "distaste" for the outcome of the case even though he thought it was "right." My claim is that if a person shares the combination of judgments expressed by Justice Kennedy, that person is more likely to act on the feelings of "distaste" when occupying the role of "voter" than when occupying the role of "judge."

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53. See Tushnet, *supra* note 10, at 66-67, n.18.

54. EISGRUBER, *supra* note 1, at 61-62.

55. 491 U.S. 397, 420-21 (1989).

Other non-economic interests might also affect electoral decision-making. For example, some people, even if they are not offended by the act of flag-burning, may dislike the kinds of people who burn flags. They may enjoy inflicting harm upon, or damaging the prestige of, the people whom they dislike. Such pleasures are not material or economic, but they reflect interests (rather than values) nevertheless. In *Constitutional Self-Government*, I suggest that interests of this kind have influenced the politics of the right-to-die issue and of controversies about sexual freedom.<sup>56</sup>

Professor Brown's distinction between First-Order and Second-Order moral questions enables us to identify another way in which the balloting process can produce a partial or distorted representation of the people's values. People might believe not only that flag-burning is offensive but that it is immoral, while also believing that it is unjust for the government to criminalize flag-burning. Their First-Order moral beliefs, in other words, might condemn flag-burning, while their Second-Order moral beliefs condemn censorship. If so, people might choose to use their ballot to express their First-Order moral beliefs. They might, in other words, vote for a candidate who loudly condemned flag-burning, even if that candidate violated the voters' Second-Order principle prohibiting government censorship. This sort of expressive voting is not, strictly speaking, the pursuit of self-interest, and so it requires me to expand upon the formulation I offered in *Constitutional Self-Government*. The incentives of the polling booth may lead voters to mistake self-interest for moral value, or to act on First-Order moral values at the expense of Second-Order ones. The upshot, though, is the same: The incentives of the voting booth make mass elections a predictably flawed reflection of the people's judgments about (to borrow again from Professor Brown) the relationship between the government and the individual.

## C. Voting Behavior

### 1. The Rational Voter

There is, then, no shortage of interests and other considerations (such as the complex interplay of First-Order and Second-Order moral judgments) that might explain how the incentives of the electo-

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56. See EISGRUBER, *supra* note 1, at 60–61, 160–61. For a recent example from national politics, see Paul Krugman, *ANWR and Peas*, N.Y. TIMES, March 15, 2002, at A23 (suggesting that Republican support for drilling in the Alaskan wilderness is motivated by a desire to appeal to hard-core conservative constituents who enjoy goring the interests of liberal environmentalists).

ral process produce seriously flawed representations of the people's values. Professors Hills, Tushnet, and Waldron, however, all make a second objection to my view. They all suggest, in one way or another, that it is at best ungenerous, and perhaps terribly elitist, for me to suppose that voters will act on the basis of these interests or other distracting considerations. After all, if judges can figure it out, why not voters? Does my argument assume that they are less intelligent, or less virtuous, than judges?

Of course not. My argument depends on the incentives of the office of 'voter,' not on who voters are. We can see these incentives at work, for example, in the influential account of voter behavior provided by political scientist Samuel Popkin. Professor Popkin analogizes voters to investors and regards "the vote as a reasoned investment in collective goods, made with costly and imperfect information under conditions of uncertainty."<sup>57</sup> He believes that a voter "behaves as if asking 'what have you done for me lately?'"<sup>58</sup> He emphasizes that, unlike personal investors or consumers, voters have very little incentive to do much research when answering this question. "[T]ime and money spent gathering information leads to a better vote, not necessarily a better outcome. . . . Voters are thus not particularly well informed about the details of public policy and government activities."<sup>59</sup>

Professor Popkin's book is famous for its ingenious account of how voters cope with the problem that information about candidates is costly. He argues that voters assess candidates through "shortcuts" that include "assessing a candidate's policy stands from his demographic characteristics; using overall estimates of a candidate's competence and of his integrity or sincerity; and judging political integrity from personal morality."<sup>60</sup> Professor Popkin illustrates his point with an anecdote from Gerald Ford's losing presidential campaign against Jimmy Carter. While campaigning in Texas, President Ford was served

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57. SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* 10 (1991). Professor Hills asserts that Professor Popkin's analysis is inconsistent with my own. See Hills, *supra* note 10, at 55. That claim rests upon a misinterpretation of my views. In particular, Professor Hills suggests I believe that "[v]oters . . . might cast their ballot in a frivolous or thoughtless way," *id.* at 46, and that "popular control of government through elections [is] a sham." *Id.* at 54-55. I do not believe either of these things. What I believe, and what I say in *Constitutional Self-Government*, is that voting involves incentives that tend to skew representation in the direction of interests and away from values. See, e.g., EISGRUBER, *supra* note 1, at 61-62.

58. POPKIN, *supra* note 57, at 11.

59. *Id.* at 10.

60. *Id.* at 17-18.

tamales, and he started to eat them without removing the husks. This gaffe was widely publicized and cost the President votes. Some people might think it irrational for voters to reject a president because of his unfamiliarity with Mexican food, but Professor Popkin disagrees. He suggests that Ford's gaffe is the kind of cue that voters reasonably use to avoid having to do more extensive research about candidates: "Would a Mexican-American voter who saw President Ford bite into an unshucked tamale be wrong to conclude that the president had little experience with Mexican-American culture, little feel for it?"<sup>61</sup>

Consider now the implications of Professor Popkin's account for the flag-burning issue. Let's assume that many voters have views of the following sort. They find flag-burning offensive. They think that the flag-burners are vulgar and immoral because they are expressing opinions that are hurtful and untrue. The voters believe that America is a great country, and they think that the flag-burners stand for all sorts of "un-American" positions about both domestic and foreign policy. The voters also believe, however, in the freedom of speech, and they accept that this freedom will sometimes call upon them to tolerate speech they find offensive. They recognize that there is a serious question about whether the freedom of speech protects flag-burning, but they think that the issue is far from clear. Some of them, for example, suspect that burning an object is "action," not "speech." In any event, they feel little sympathy for the flag-burners, and they would be delighted if it were possible to reconcile their desire to punish the flag-burners with their support for the freedom of speech.

Now, if that is the state of voter opinion, what "cue" does a candidate send if she takes the side of the flag-burners against the United States government? The question virtually answers itself. On the assumptions laid out above, voters see themselves as very different from flag-burners. Voters reject all the opinions they associate with flag-burners and regard them with contempt. Insofar as voters use shortcuts to assess candidates, they will want convincing proof that candidates resemble the voters themselves, rather than the flag-burners. Of course, a candidate could try to prove that she resembles the voters in that she hates flag-burners *and* respects the freedom of speech. That is obviously, however, a more complicated position, and it puts heavier burdens on the voter. The voter must figure out whether the candidate really hates flag-burners or whether she is willing to protect flag-burners because she is "soft" on patriotism. Unless the candidate in

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61. *Id.* at 2.

question has other proof of her patriotism (she might be a war hero, like Senator John McCain), the voter may have to delve into details of the candidate's position about free speech. We are now a long way from a simple "tamale bite." Since most voters will care more about the bundle of policies they associate with "patriotism" than about vindicating the rights of flag-burners, most voters will, under Professor Popkin's theory, have no incentive to do the extra research. They will follow the cues and vote for the candidate who gives a compelling, unambiguous condemnation of flag-burning. Indeed, even a voter especially sensitive to free speech issues will have no incentive to do the extra work unless she thinks other voters will do likewise; it would be pointless for her to do research if she believes that all other voters will act on the basis of the "patriotism" signal.<sup>62</sup>

Of course, this account is based on a hypothetical (but not, I think, implausible) specification of voter preferences. I do not mean to insist upon its validity, nor do I wish to tie myself to the particularities of Professor Popkin's theory. I invoke his theory only in order to illustrate more general claims about the voting process. First, the incentives of the electoral process provide voters no reason to engage in extensive reflection and research. Second, in candidate elections, questions about matters such as free speech (what Professor Brown calls Second-Order moral questions) come bundled with questions about crime control, economic policy, national defense, the environment, and so on. The latter set of questions will have a much greater impact on the everyday lives of most voters. It is accordingly rational for voters to pay more attention to these issues when they try to figure out whether candidates are like them or when they ask candidates (in Professor Popkin's words) "what have you done for me lately?"

## 2. Dynamics of Public Choice

There is another way that the electoral system skews representation of the people. Let's assume, counterfactually and implausibly, that voters have nearly perfect information about candidates. The voting process will still produce a misleading picture of public values. As I have already said, one feature of voting is this: voters have very limited choices. In national elections in the United States, voters choose only among candidates. If the voter is lucky, she may find a candidate who agrees with her about every issue. That is unlikely, however. A voter

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62. *See id.* at 11 ("[E]lections are won only when enough people vote together. . . . Therefore, in deciding which issues to focus on and which candidates to vote for, voters will be affected by information about what other voters are doing.").

may therefore have to decide whether she wants to cast her ballot for the candidate who agrees with her about flag-burning, or the one who agrees with her about some other issue—such as tax policy or gun control or abortion or whether to invade Iraq.

As a result, candidates will sometimes have an incentive to frame their positions in response to single-issue voters. Single-issue voters may have extreme or idiosyncratic moral views not shared by the population as a whole.<sup>63</sup> It is also possible that single-issue voters will have a conflict of interest. Single-issue voters are, almost by definition, those who care most intensely about the topic in question. Many (though certainly not all) of those who care most intensely will be people who have a personal stake in the issue.

Flag-burning is not the best example of this phenomenon, partly because so many voters care about the issue (on the account constructed above, they care partly because a candidate's willingness to condemn flag-burners is an especially good "cue" to a range of policy positions associated with "patriotism"). Consider, however, questions like those raised by the Religious Freedom Restoration Act ("RFRA"),<sup>64</sup> which dealt with whether religiously motivated conduct should be exempt from some local, state, and federal laws. RFRA operated "beneath the radar" of most voters; it was not a highly visible issue. It mattered a lot, however, to some churches, which could use the act to claim (among other things) exemption from costly zoning regulations. These churches could mobilize voters against legislators who opposed the bill. Or, to take another example, most voters pay little attention to debates about whether copyright law infringes upon free speech rights. These debates matter intensely, however, to some sectors of the entertainment industry, which will offer both dollars and votes to sympathetic candidates.

Of course, the fact that church-goers have a personal interest in the outcome of debates over RFRA does not mean they are wrong or unrepresentative of American values. Minorities and disadvantaged groups often advance the cause of justice by demanding protection for their personal interests. But there is no reason to suppose that

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63. This problem is exacerbated by the effect of primary elections which tend to empower partisan activists. As a result, the most extreme voters in the party may have disproportionate power to choose the winning candidate. See LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* 34–36 (2000). For Professor Tushnet's own discussion of the point, see Mark V. Tushnet, *Foreword: The New Constitutional Agenda and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 43–44 (1999).

64. 42 U.S.C. § 2000bb (1994).

interests and values will always line up in this happy way. We should worry about an institution that predictably assigns moral issues to the portion of the population that has the strongest personal interest in them.

The effects I am now describing depend partly upon the way elections aggregate opinions, rather than solely on the psychology of individual voters. In that sense, this argument expands upon those I offer in *Constitutional Self-Government*. It has, however, the same structure. In particular, it does not depend upon any claim that the people who vote are ill-educated, or unintelligent, or less thoughtful than (for example) judges. Instead, it depends entirely on the characteristics and incentives that define voting as an institution. First, voters make blunt choices among extremely limited options, so that somebody who chooses to vote on the basis of her views about flag-burning pays a price: If she votes solely on that basis, she cannot also vote on the basis of her views about taxation or the environment or foreign policy or anything else. Second, voters, unlike judges, are not asked to recuse themselves when their self-interest is at stake.

### 3. Two Challenges for My Critics

Much though I hope these arguments will persuade my critics, I expect they will remain skeptical about my account of voter behavior. If so, I would put two challenges to them. First, my critics should consider whether their own critiques of judicial review already incorporate and endorse the model that I use to analyze voter behavior. Professors Hills, Tushnet, and Waldron all argue that, in one way or another, judicial review makes citizens and legislators behave less responsibly by taking power out of their hands.<sup>65</sup> Professor Hills makes the point with an analogy: “[T]he jury system would not produce serious deliberation unless jurors really believed that they decided issues of money, imprisonment, life, or death.”<sup>66</sup> By the same token, says Professor Hills, “one cannot expect the public to discuss the details of *Casey* or *Roe* with any care or intelligence unless they believe they will have some share in deciding whether to sustain these decisions.”<sup>67</sup> In other words, the constraints imposed by judicial review leave ordinary citizens with a feeling of powerlessness, which discourages them from engaging in serious deliberation. Yet, Professor

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65. See Hills, *supra* note 10, at 57; Waldron, *supra* note 22, at 291; MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 66 (1999).

66. Hills, *supra* note 10, at 57.

67. *Id.*

Hills and my other critics are reluctant to accept that the vast numbers involved in electoral politics might by themselves leave individual citizens feeling powerless and hence discouraged from engaging in serious deliberation, or investing any other effort that might be needed to ensure that they cast their vote responsibly.

I find this combination of views puzzling. If the “electorate” had a “mind” or “feelings,” then “it” might “feel” that judicial review had left “it” less powerful. But the electorate does not have a “mind”; only individual voters have minds and feelings. And for individual voters, by far and away the most important fact about their power is that each of them has only a single vote to cast out of tens of thousands, or hundreds of thousands, or millions—which is to say, virtually no power at all, with or without judicial review. From the standpoint of the individual voter, the presence or absence of judicial review has only a trivial impact upon the power each possesses over the policy of a large, modern state. If Professors Hills, Tushnet, and Waldron believe that judicial review actually has a significant impact on the likelihood that individual citizens will engage in serious political deliberation, then they ought, *a fortiori*, to accept my argument about the incentives facing voters as a result of their numerical insignificance.

Second, I wonder whether my critics are willing to embrace direct democracy. They seem to criticize judicial review because they want government by legislatures, not plebiscites (Professor Waldron has been a particularly eloquent spokesman for this view).<sup>68</sup> If that is so, then it seems fair to ask what goes wrong in direct democracy. Proponents of legislative government may reject my particular account of the incentives facing voters, but, if they are to justify their preference for legislatures over plebiscites, they must have some concerns about how voters would make policy. It would be nice to know the specifics.<sup>69</sup> For present purposes, however, it does not matter. Somebody

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68. See, e.g., WALDRON, *supra* note 22; WALDRON, *supra* note 32.

69. One popular critique of direct democracy holds that wealthy interest groups can manipulate initiatives and referenda, so that their apparent populism is an illusion. The work of Elisabeth Gerber, however, suggests that this argument may rest more on myth than fact. ELISABETH GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT DEMOCRACY* 137–40 and *passim* (1999). If Professor Gerber is correct, then critics of direct democracy cannot claim that it is a mask for elite power; they must resist it despite its genuinely populist and majoritarian characteristics. Professor Gerber herself suggests several possible grounds for concern about direct democracy, including the possibility that it be too majoritarian—that, in other words, it may leave minorities at a special disadvantage. See *id.* at 142–46. Other political scientists, however, have suggested that this criticism, too, rests on exaggeration. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 212–14 (1999); Todd Donovan &

who prefers legislatures to plebiscites is bound to agree with me that government by the people is not the same thing as government by voters and that extreme sensitivity to the electoral expression of popular preferences is, far from being a democratic ideal, a possible impediment to democracy rightly understood. If so, the crucial question is not whether it is desirable that government officials have some independence from electoral judgment, but whether it is desirable to supplement the independent judgment of legislators with independent judgment by judges.

#### D. Politicians' Behavior

Professors Hills, Tushnet, and Waldron direct most of their fire against my account of *voter* behavior. That stance has obvious rhetorical appeal; it is easy to paint somebody who criticizes elections as elitist. From a theoretical standpoint, however, it is probably a mistake for my critics to focus so much on voting. Unless they are enthusiastic about plebiscites, they will eventually have to agree with me that it is in fact a problem if legislators are too sensitive to electoral pressure. The more serious challenge to my position, I think, would focus on the deliberative virtues of the legislative process.

Yet, oddly enough, only Professor Tushnet mentions this possibility, and even he does so almost in passing. He suggests two reasons why legislators might be free to act on their own, independent moral judgments, rather than those expressed by voters. First, the legislator "might have been so good at delivering . . . pork that her constituents cut her some slack on some issues implicating moral principle."<sup>70</sup> Second, voters might actually prefer independent-minded legislators, either because they defer to the official's "experience" or because they

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Shaun Bowler, *Responsive or Responsible Government?*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 264–70 (Shaun Bowler, et al., eds., 1998). Professors Donovan and Bowler are more sympathetic to another criticism. They emphasize that initiatives and referenda confront voters with a single choice and provide "no . . . readily used mechanism for aggregating preferences and trade-offs." *Id.* at 257–58. In their view, this structural feature of direct democracy may cause it to under-represent the people's willingness to pay for social services. *See id.* at 254–58. In general, the political scientists have been cautious and ambivalent in their assessments of direct democracy. Two distinguished journalists have published books that are considerably more critical, but their evidence is anecdotal. *See* PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* (1998); DAVID BRODER, *DEMOCRACY DERAILED* (2000).

70. Tushnet, *supra* note 10, at 67.

“place a positive value on having a representative who thinks independently.”<sup>71</sup>

These two possibilities have different implications. Members of Congress clearly have some freedom of the first kind that Professor Tushnet describes. Indeed, many occupy safe seats (partly through gerrymandering, rather than by consequence of their proficiency at bringing home the bacon) and rarely face a serious electoral challenge. The key questions, then, are (1) how often do representatives seize these opportunities for independent moral judgment, and (2) how well do they represent the people when they do so? Institutional incentives provide some ground for skepticism on both scores. First, even if voters cut their representatives “some slack” on moral issues, they do not (on this first possibility) affirmatively desire independent judgment from their representatives, and they may punish any representative who goes “too far.” It is accordingly possible that legislators will see the exercise of independent moral judgment as involving risks but no benefits.<sup>72</sup> Second, it is an open question whether persons selected on the basis of their ability to deliver pork will be any good at making independent moral judgments (the question, of course, is not whether they are perfect, but how they compare to judges, who have their own faults).

The second possibility has a higher upside. If voters really want independent judgment from their representatives, then representatives will have affirmative incentives to deliberate over moral issues. Moreover, voters will presumably have an incentive to choose people who have good judgment (and the backbone to use it). The key question here, then, is whether voters in fact have the preferences that Professor Tushnet ascribes to them. Some poll data suggests exactly the opposite.<sup>73</sup> Nevertheless, these sorts of facts are hard to measure, and we might hold out hope that Professor Tushnet’s optimistic account is correct.

I have no doubt that legislators sometimes act on their own moral judgments, and that they do so for both of the reasons given by Professor Tushnet. It is, as we have seen, an empirical question whether they

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71. *Id.* Tushnet actually states this as two different reasons. I combine them to emphasize their common element—that is, under both rationales, the voters put real value on their representative’s willingness to act independently from their own judgments.

72. A leading expert on Congress argues that although members of Congress “are not single-minded seekers of reelection, reelection is their dominant goal.” To a first approximation, “legislators will do nothing to advance their goals if such activities threaten their [reelection].” R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 5 (1990).

73. Some of the data is summarized in BRODER, *supra* note 69, at 228.

do so sufficiently often, or sufficiently well, to undermine the case for judicial review. We cannot resolve those empirical questions here. My own impression, though, is that given how much independence many legislators enjoy in practice, it is surprisingly rare for them to say anything unpopular.<sup>74</sup> The reflexive submission of American politicians to electoral opinion and interest groups seems so clear that it is more interesting to debate its causes and character than its existence (perhaps that is why my critics, despite their apparent preference for legislatures over plebiscites, spend most of their time defending the virtue of voters rather than the independence of legislators).<sup>75</sup>

#### IV. How Well Do Courts Represent the People?

##### A. The Pro-Democratic Account of Judicial Review

In *Constitutional Self-Government*, I defend judicial review as a pro-democratic institution that, despite its own flaws, usefully corrects the imperfections of the electoral process (described in the preceding Section of this essay). More specifically, I contend that “[u]nelected judges, and especially the Supreme Court, form a representative institution . . . [t]hat combines a democratic pedigree with disinterestedness and moral responsibility.”<sup>76</sup> Judges have a democratic pedigree “[i]n a very simple procedural sense” because “although most are not themselves elected, they are political appointees, nominated and confirmed by elected officials.”<sup>77</sup> Of course, after appointment federal judges enjoy life tenure, and life tenure “renders judges more remote from the people than other public officials.”<sup>78</sup> Yet, life tenure also “enhances the possibility that judges will approach moral issues in a disinterested fashion, and so bring to bear upon those issues the right kind of reasons—reasons that flow from a genuine effort to distinguish right and wrong, rather than from self-interest.”<sup>79</sup> From the standpoint of democracy, life tenure is complex: it simultaneously attenuates the democratic pedigree of judges and facilitates their capacity to perform a specific kind of representative function.

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74. The impeachment of President Clinton, which was unpopular with the electorate, is a frequently cited counter-example. *See id.*, at 226–27; JACOBS & SHAPIRO, *supra* note 63, at xii–xiii. It is not clear which way this example cuts: Even if it is a good example of legislators acting independently from voters, it also seems to involve extreme partisanship.

75. *See* EISGRUBER, *supra* note 1, at 77–78.

76. *Id.*

77. *Id.* at 78.

78. *Id.*

79. *Id.*

## B. Are Judges Disinterested?

My defense of judicial review is pragmatic in character. It depends on several claims about the performance and composition of democratic institutions. Prominent among these are the following: (1) that the incentives facing voters and legislators incline them to decide some moral issues on the basis of self-interested reasons; (2) that judges are disinterested, and so are likely to decide moral issues on the basis of moral reasons rather than self-interest; (3) that unelected judges have a democratic pedigree that enables them to speak for the people; (4) that judicial review does not suppress political participation and public deliberation; and (5) that judges are capable of implementing at least some moral principles effectively. Critics of judicial review have traditionally trained their fire on proposition (3) and, to a lesser but still very substantial extent, on propositions (1), (4), and (5). The contributors to this symposium have renewed all those arguments.

My impression is that proposition (2) has been less controversial. Commentators generally accept that “principled decision-making” is the judiciary’s strong suit. It is something we demand from judges even outside the context of judicial review: we want them to render impartial, principled judgments when interpreting statutes, applying the common law, or presiding over trials (including the trials of defendants accused of infamous and horrible crimes). Perhaps for that reason, even critics of judicial review seem to think that it is desirable to insulate judges from electoral control. Few constitutional theorists (if any) argue that we should remedy the allegedly “aristocratic” character of the judiciary by subjecting all judicial offices to periodic elections. The question for constitutional theory has not been whether judges are relatively more likely than other public officials to engage in principled decision-making, but whether that benefit is sufficient to overcome other alleged disadvantages—such as the allegedly undemocratic character of those decisions.

Nevertheless, Professors Hills, Tushnet, and Waldron all raise doubts about whether judges are as disinterested as I claim them to be. Professor Hills identifies two kinds of interests that might influence judges improperly. First, he suggests that judges might crave the “charisma, social standing, and fame of a judge who makes front page news” and so might decide cases to increase their time in the limelight.<sup>80</sup> I agree that judges are sometimes subject to temptations of

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80. Hills, *supra* note 10, at 44.

this kind. In particular, some judges, “including federal circuit court judges, . . . may be interested in pleasing political officials in order to obtain appointment to higher courts.”<sup>81</sup> But I believe that Professor Hills exaggerates the importance of these incentives. If they dominated judicial behavior to the extent that he suggests, that would be bad news not only for judicial review, but for adjudication generally—since judges can easily make the news by, for example, handing out unusual sentences (be they lenient, harsh, or just outlandish) to criminal defendants. In any event, as I point out in *Constitutional Self-Government*, these arguments seem particularly inapt to Supreme Court Justices, who are usually doomed to the glare of the spotlight whether they decide (for example) in favor of or against the constitutionality of tuition vouchers.

Somewhat more plausibly, Professor Hills claims that judges have an incentive to increase their power by expanding the scope of judicial review.<sup>82</sup> This incentive would not matter in every case that crossed the Supreme Court’s docket, but it might be decisive in some (such as, to choose from a broad range of historical periods, *Marbury v. Madison*,<sup>83</sup> *Cooper v. Aaron*,<sup>84</sup> and *City of Boerne v. Flores*<sup>85</sup>). I concede this point in *Constitutional Self-Government*.<sup>86</sup> Again, though, the question is how much it matters. Most cases are not about the scope of judicial review, nor do judges always expand the scope of judicial review when it is in controversy—that is why, for example, the Court sometimes issues decisions (about standing, for example) that narrow its jurisdiction.

Professor Hills makes a third argument that depends not so much on how judges behave, but on what it means to be disinterested. He suggests, in effect, that judges may fail to be disinterested if they pursue principles in ways that are zealous, dogmatic, or partisan.<sup>87</sup> Professor Tushnet and Professor Waldron make similar points.<sup>88</sup> As Professors Tushnet and Waldron note, I concede this point in *Constitutional Self-Government*, where I observe that “judges may feel deep at-

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81. EISGRUBER, *supra* note 1, at 223–24 n.30.

82. See Hills, *supra* note 10, at 43–44.

83. 5 U.S. (1 Cranch) 137 (1803).

84. 358 U.S. 1 (1958).

85. 521 U.S. 507 (1997).

86. “There is no reason to think that judges are uniquely trustworthy arbiters of their own competence. After all, many people have an exaggerated faith in themselves, and judges are no exception.” EISGRUBER, *supra* note 1, at 174.

87. See Hills, *supra* note 10, at 42 (worrying that judges may pursue principle with “the wrong intensity”).

88. See Tushnet, *supra* note 10, at 74; Waldron, *supra* note 10, at 113–114.

tachments to a political party, or to their social class, or to the legal profession, or to some ideological platform.”<sup>89</sup> These attachments are possible impediments to principled decision-making.

Ideally, we should hope that justices have a kind of ‘grand disinterestedness’: they should be contemplative and flexible rather than fanatical or dogmatic, and they should have enough integrity to pursue moral intuitions even when those intuitions lead them to question positions they have held and political affiliations they have cherished.<sup>90</sup>

We cannot count on life tenure to produce this idealized version of disinterestedness. Some judges will approach the ideal of grand disinterestedness, but some will be zealots, and most will be somewhere in between. Still, the incentives that flow from life tenure are useful even if they are not perfect. It is valuable to have an institution that is insulated from some forms of self-interest, even if it is not insulated from all forms of self-interest.<sup>91</sup>

Ultimately, of course, it is an empirical question whether most judges are partisan zealots, just as it is an empirical question whether they are headline-loving media hounds, or whether they are power-grabbing imperialists bent on expanding the reach of judicial power. None of these descriptions strike me as plausible, but I do not pretend that I have proven them false—nor am I sure what it would mean to do that. We might, I suppose, try to identify possible examples of interested behavior by judges, and then consider whether it makes sense to regard those examples as typical. The most obvious such case is *Bush v. Gore*,<sup>92</sup> in which many people thought that the justices behaved like political partisans; I have tried, in *Constitutional Self-Government*, to explain why that case was atypical.<sup>93</sup>

Rather than concoct additional examples for the purpose of shooting them down, I will content myself with two observations. First, as I have already noted, if judges were not in fact disinterested, that weakness would have consequences for all their functions, not just for judicial review. It would, for example, undermine their ability to partner with Congress in the interpretation and enforcement of abstract, politically visible statutes such as Title VII, the Voting Rights Act, and the Religious Freedom Restoration Act.<sup>94</sup> Second, as I have also said,

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89. EISGRUBER, *supra* note 1, at 63–64.

90. *Id.* at 64.

91. *See id.* at 64.

92. 531 U.S. 93 (2000).

93. *See* EISGRUBER, *supra* note 1, at 62–63.

94. The Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000(bb) (1994), is an especially interesting example. Both Professor Tushnet and Professor Waldron like to

the general opinion, insofar as it counts for anything, seems to be that judges are in fact more principled than legislators. Common concern about judicial review stems not from a belief that judges are unprincipled, but that judicial review is undemocratic, or that the judiciary is too weak to enforce its judgments (however principled they may be). But neither of these observations resolves the issue. There is an empirical judgment at the bottom of the argument, and my critics are entitled to take a dim view of the judiciary, provided they do so consistently (that is, provided that they are willing to extend this view to statutory as well as constitutional cases, or to explain why they expect the judiciary to behave differently in the two settings).<sup>95</sup>

### C. Lawyerly Technique and Moral Judgment

Several of my critics suggest that even if judges are disinterested, they are nevertheless too concerned with legal technicalities to speak for the people about moral principle. Professor Waldron puts the point most trenchantly. He says that when judges decide controversial cases, they do not state moral grounds for their judgments. In his view, "the opinions of the Court are paragons . . . of dense and complex doctrinal argument, and often they involve pyrotechnic displays of ill-temper on questions of interpretive strategy . . . . But they are

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cite the Act as an instance of principled legislative action. See TUSHNET, *supra* note 65, at 66, 126; Waldron, *supra* note 10, at 103. Yet, RFRA was predicated upon the assumption that judges would deal more fairly than legislators with burdens on the religious practice of unpopular faiths. For an account from a leading proponent of RFRA, who was actively involved in drafting it, see Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 775-77 (1998). This assumption may have been too pessimistic: small religions have often fared well in Congress. See Eisgruber & Sager, *Congressional Power*, *supra* note 38, at 135. The experience of the Santeria, however, provides some justification for the distrust of legislatures that is at RFRA's core. Congress was afraid to act on behalf of people who engaged in animal sacrifice, even though they were the target of egregious discrimination. By contrast, a unanimous Court protected their rights in *City of Hialeah v. Church of the Lukumi Babalu Aye*, 508 U.S. 520 (1993). On the unwillingness of Congress to act, see Laycock, *supra*, at 776 ("Stephen Solarz, the lead sponsor of RFRA in the House, wanted to file a congressional amicus brief in *Lukumi*, but he could not get a single Representative or Senator to even consider signing such a brief. The Santeria religion was too unpopular to touch.").

95. My critics may find this difficult to do. For example, although Professor Tushnet wants to take the Constitution out of the courts, he does not want to take the courts out of politics. On the contrary, a close reading of his book reveals that he offers his proposals partly in order to get courts *more* involved with some kinds of issues. He suggests with approval, for example, that "[t]he courts might be *more* willing to regulate police activities if they could do so without invoking the Constitution." TUSHNET, *supra* note 65, at 165. It is hard to see why we should prefer that the police be supervised by unelected judges, rather than elected executive branch officials, unless judges have some of the virtues I attribute to them.

risible as examples of moral deliberation.”<sup>96</sup> Professor Waldron recognizes that I criticize the Court for hiding moral judgments beneath technical trappings.<sup>97</sup> He says, however, that this feature of my argument cannot deflect his critique. He correctly observes that my case for judicial review depends upon the claim that judges are “publicly accountable for their decisions.”<sup>98</sup> He then notes that “the significance of this public reason-giving—which is supposed to . . . give judicial institutions the edge when it comes to moral deliberation—is surely entirely nugatory if the reasons given are not reliable indicators of the grounds on which the decision was actually made.”<sup>99</sup> Finally, Professor Waldron suggests that it would be futile to hope that judges would reform their practice sufficiently to solve these problems. They are just doing what lawyers do, and their training and habits will not let them do much different.<sup>100</sup>

I agree with much in this admirably vigorous argument. Yet, Professor Waldron’s critique seems to presuppose that my theory relies upon the idea that judges have “special moral sensitivity”<sup>101</sup> or that the Supreme Court is “a forum for focused and sustained moral argument.”<sup>102</sup> In fact, I make no such claim. I praise courts for their tendency to act upon moral *judgments*, not for their capacity to engage in what Professor Waldron calls moral *deliberation*. Put differently, I suggest that judges have incentives to make decisions on the right sort of grounds (that is, they will decide moral issues on the basis of moral reasons, rather than on the basis of self-interest). I do not claim that judges are likely to provide us with especially good or creative or inspiring theories to explain or justify those grounds. I am in fact skeptical about any theory that recommends judges on the basis of their intellectual sophistication.<sup>103</sup>

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96. Waldron, *supra* note 10, at 103.

97. *See id.* at 103–04.

98. *Id.* at 104 (quoting EISGRUBER, *supra* note 1, at 60).

99. Waldron, *supra* note 10, at 105.

100. *See id.* at 105–06. Professor Hills makes a similar claim. He says that “neither Eisgruber nor Dworkin consider the possibility that [legalistic] rhetoric is the occupational habit of being a judge, part of the elitist professional culture that judges . . . adopt to satisfy [their] . . . claims to authority.” Hills, *supra* note 10, at 51. In fact, I do consider this possibility. *See, e.g.*, EISGRUBER, *supra* note 1, at 208, *infra* text accompanying note 113.

101. Waldron, *supra* note 10, at 102.

102. *Id.* at 103. Nor does my position turn upon whether judges can produce “uplifting moral rhetoric.” Hills, *supra* note 10, at 51.

103. *See* EISGRUBER, *supra* note 1, at 68–71. I am accordingly skeptical about whether it would be a good idea for judges to heed the call that Ronald Dworkin issued long ago, for “a fusion of constitutional law and moral philosophy.” RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1981). I do not believe that judges will be good philosophers (of

Once we focus on moral *judgment*, rather than moral *deliberation*, judicial opinions fare better. For example, Hugo Black's famous interpretation of the Free Speech Clause, declaring that "no law means no law,"<sup>104</sup> is not much of a theory. Nor, for that matter, is it a technical legal doctrine. It does, however, express a comprehensible moral judgment: namely, that it is rarely, if ever, permissible for the government to censor speech on the ground that its content is objectionable. Justice Black stood firm for that judgment in case after case. His opinions would earn him a poor grade in a philosophy class or a jurisprudence seminar. But it was clear enough where he stood. He was not "hiding the ball" in some way that defeated public accountability.

It is also easy to find moral judgments in Professor Waldron's preferred counter-example, Justice Scalia's opinion for the Court in *Employment Division v. Smith*.<sup>105</sup> Justice Scalia says that if religious conduct were presumptively exempt from criminal laws, the result would not serve an appropriate "constitutional norm" such as "equality of treatment" or "the unrestricted flow of contending speech."<sup>106</sup> Instead, it would produce a "constitutional anomaly" because any religious believer would be allowed, "by virtue of his beliefs, [to] 'become a law unto himself.'"<sup>107</sup> This result is unacceptable because it would produce absurd consequences; in particular, people could claim exemption from a vast range of important laws.<sup>108</sup> These are moral judgments. Whether they are sound judgments is a different question, but Justice Scalia has, in any event, made his judgments available for public criticism, and, indeed, he has been criticized relentlessly (although I think there is in fact more to be said for his position than many people suppose).<sup>109</sup>

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course, Professor Dworkin may have been addressing his recommendation to academics rather than judges, in which case I have no quarrel with it). Likewise, I think that Alexander Bickel misdescribed the Court when he suggested that judges had "the leisure, the training, and the insulation to follow the ways of the scholar." ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25 (1962). The justices are policy-makers, not scholars.

104. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).

105. 494 U.S. 872 (1990).

106. *Id.* at 886.

107. *Id.* at 885-86.

108. *See id.* at 888-89.

109. Lawrence Sager and I offer a partial defense of *Smith* in Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994). Having written so much about *Smith* and *Boerne*, I feel obliged to correct one small inaccuracy in Professor Waldron's paper. Professor Waldron writes that "Eisgruber himself acknowledges that the decisions in *Smith* and . . . *City of Boerne v. Flores* are mainly about the 'catastrophe of misgovernance' that

By the same token, when we compare Court and Congress, we must focus on the grounds upon which the two institutions acted, not on the aesthetic quality of the documents they produced. It is therefore of no import that Professor Waldron admires the Congressional Record debates on the Religious Freedom Restoration Act much more than the Supreme Court opinions in *Smith*.<sup>110</sup> What matters is whether Congress passed RFRA because of the kind of judgments expressed in the Record, or whether Congress instead acted because (for example) the bill was supported by powerful lobbies that could tar any dissenting legislator as unsympathetic to religion.<sup>111</sup> The latter reason is self-interested rather than moral. To the extent it drove congressional action, one will not find the fact recorded in committee reports or the Congressional Record.

In general, my critics exaggerate the extent to which lawyerly technique interferes with the ability of judges to make moral judgments. It is true that when judges invoke moral judgment "X," they have a tendency to say such things, as "the Framers believed X," or "the text of the Constitution would be meaningless if X were not true," or "our precedents dictate X," rather than "X is a sound moral judgment." Whatever harm these formulations may cause, however, they do not preclude us from identifying X as the linchpin of the Court's reasoning. Nor do those formulations supply any reason to suppose that X is just a mask for some entirely different, perhaps self-interested reason.<sup>112</sup>

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would result were the respondent's conception . . . of religious freedom adopted." Waldron, *supra* note 10, at 102. In fact, I do not discuss *Smith* at all in *Constitutional Self-Government*, and I believe that the case turns on the moral principle that Sager and I call "equal regard." Eisgruber & Sager, *supra*, at 1282-84. *Boerne* did involve a "catastrophe of misgovernance," Eisgruber & Sager, *supra* note 48, at 467, but that is not a full description of the constitutional defects in the statute.

110. See Waldron, *supra* note 10, at 102-03. Actually, Waldron refers only to the majority opinion in *Smith*; for whatever reason, he does not seem to consider the dissenting opinions relevant to the quality of the Court's debate. The omission is significant. On both flag-burning and RFRA, the debate (by which I mean all the opinions, not just the majority's) in the Supreme Court seems more balanced and inclusive than the debate in Congress, which was remarkably one-sided.

111. The issue is complex. Professor Waldron refers, in particular, to debates about whether to extend RFRA to prisons. See *id.* at 103 n.62. Congress rejected efforts to exclude prisoners from RFRA. That action was almost certainly driven by principle. It is not so clear that the same can be said for the bill as a whole.

112. In that regard, Professor Waldron is right to think that it would be odd if I shared Jerome Frank's skeptical view of legal reasoning, but mistaken to believe that I actually do share it. See *id.* at 104. Legal reasoning is obfuscatory insofar as it tries to present moral judgments as the upshot of technical methodology. Yet, unlike Judge Frank, I do not be-

On the other hand, I agree with Professor Waldron and my other critics that judicial review would perform its task better if judges openly acknowledged the moral judgments they were making. Indeed, as I said in the Introduction to this essay, that is one of the book's central claims. Perhaps more surprisingly, I also agree that lawyerly habits are an obstacle to improvement. As I say in *Constitutional Self-Government*, "Supreme Court Justices have a natural, and destructive, tendency to iron out the complexities in their role by conceiving of constitutional interpretation as a technical legal exercise" because technical legal analysis is "what lawyers do best, and people like to exaggerate the importance of things they do well."<sup>113</sup> That is undoubtedly a problem, and it makes judicial review less effective than it would otherwise be. We should not, however, exaggerate the scope of the problem. Judicial review is a valuable practice even as it now stands. Moreover, though lawyerly habits may limit how much improvement we can expect from judgments, it is odd to suppose that no improvement is possible. As Professor Brown observes, judges cloak their decisions in legalisms not simply from habit or training but in response to the chorus of commentators who (like Professors Hills, Tushnet, and Waldron) cry that it is undemocratic for judges to make political decisions.<sup>114</sup> One purpose of *Constitutional Self-Government* is to discourage these mistaken complaints and so remove one incentive that leads judges to drape their moral judgments in technical dressings.

#### D. An Aristocracy of Lawyers?

The more common complaint against judges is not that they are biased or unprincipled, but that they lack a democratic pedigree. My critics renew this argument in various ways. Professor Hills rehearses a conventional, if extreme, version of the charge. He maintains that judicial review is an aristocratic institution. According to Hills, the logic of my argument is "the same as the old Tory case for the House of Lords."<sup>115</sup> Hills says that under this "older theory, only a landed aris-

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lieve that legal reasoning points "the audience *away* from the facts that were most important to the judges in deciding as they did." *Id.*

113. EISGRUBER, *supra* note 1, at 208. I have elsewhere devoted an entire essay to arguing that "by felt instinct or by conscious design, the justices have reconceived the Constitution to buttress their claim to interpretive supremacy." Christopher L. Eisgruber, *Judicial Supremacy and Constitutional Distortion*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 701 (Sotirios A. Barber & Robert P. George, eds., 2001).

114. See Brown, *supra* note 16, at 25.

115. Hills, *supra* note 10, at 37. Actually, Professor Hills levels this accusation not only against me, but also against my friend and former colleague (as well as teacher) Ronald M.

ocracy could truly represent the permanent interests of the nation, because only this social class was sufficiently independent of economic need to be impartial about moral principles.”<sup>116</sup>

This argument exemplifies a remarkable feature of modern constitutional theory. Professor Hills draws casual analogies between judges and unelected aristocrats, such as hereditary nobles or Platonic philosopher-kings. Yet, like many other sophisticated constitutional theorists, Professor Hills virtually ignores how American judges get their jobs: unlike noblemen or philosopher-kings, they are appointed by elected politicians on the basis of their political views.

My theory emphasizes precisely that fact. As a result, it differs sharply from the “old Tory theory” in at least two respects. First, I contend that judicial impartiality is the result of structural incentives that apply to judicial office-holders, not of the social class or position that judges have prior to their appointment. Second, I emphasize that American judges, unlike an hereditary aristocracy, are chosen by elected officials on the basis of (among other things) their political views.<sup>117</sup>

These differences are crucial. What makes the old Tory theory aristocratic is that it privileges one social class, not the fact that it recognizes the political benefits of disinterestedness and impartiality. In order to convict my argument of being anti-democratic, Professor Hills must show that it shares the Tory favoritism for a particular social class, not just that it shares the Tory desire to insulate some decision-makers from economic pressure in order to make it more likely that they will act impartially. My claim, after all, is that it is possible and desirable for a democratic system to incorporate institutions that secure this kind of impartiality while nevertheless respecting the basic

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Dworkin, whom Professor Hills sometimes treats as though he were a sort of co-author for my book. I am flattered by the pairing with Professor Dworkin, whose work I admire. Yet, while Professor Dworkin has influenced me greatly, he should not be held responsible for any mistakes I have made in *Constitutional Self-Government*. I would caution readers against assuming that Professor Dworkin agrees with me. See, e.g., *supra* note 103 & *infra* note 219.

116. Hills, *supra* note 10, at 37.

117. My theory differs from the Old Tory theory in a third respect. According to Professor Hills, the Tory theory held that “*only* a landed aristocracy could truly represent the permanent interests of the nation, because *only* this social class was sufficiently independent of economic need to be impartial about moral principles.” *Id.* (emphasis added). I do not believe that unelected judges are the “*only*” institution capable of acting impartially with regard to moral principles. I repudiate that view in several places and even call it “silly.” EISGRUBER, *supra* note 1, at 57.

democratic principle that “all mentally competent adults are equally capable of telling right from wrong.”<sup>118</sup>

Professor Hills elaborates his complaint of class-based favoritism by pointing out that all judges are lawyers. He says that “[it] is a familiar point since Tocqueville published *Democracy in America* that lawyers as a class tend to have values and beliefs that differ significantly from those of the public generally.”<sup>119</sup> Fortunately, Professor Hills does not allege that I favor judicial review *because* lawyers constitute a class with special characteristics. Such an allegation would, of course, help to buttress his charge that my view is tainted by aristocratic bias. But the allegation would be untrue. My theory explicitly recognizes the professional bias of lawyers as a *defect* in the democratic pedigree of judges. As Professor Hills acknowledges, I admit this problem and devote several paragraphs to it.<sup>120</sup> Indeed, the Conclusion to *Constitutional Self-Government* focuses on tensions that arise because the Constitution “hard-wires a connection between constitutional interpretation and the legal profession.”<sup>121</sup> Nevertheless, I also point out that the problem is easily overstated. Why? Because even if the legal profession as a whole shares certain biases or values, presidents need not choose nominees who conform to the profession’s norm. So, for example, if seventy percent of lawyers believe that affirmative action is constitutionally permissible, a conservative president will have little trouble finding a suitable nominee from among the thirty percent minority.

What does Hills have to say about this argument? He says that it is “true as far as it goes, but it simply ignores the [possibility that] lawyers, as a class, subtly support elitist over popular values.”<sup>122</sup> I confess that I am unsure what possibility Professor Hills believes me to have ignored. He does not supply any examples to clarify what sort of “elitist values” he has in mind. He merely suggests, in a footnote, that a “culturally elite bias” will correlate with a “politically liberal one.”<sup>123</sup> Yet, if that is Professor Hill’s concern, then his argument is no different from the one that I just answered: even if lawyers as a class have some sort of “politically liberal” bias (a sociological proposition about which I express no view), conservative presidents will have no difficulty finding conservative lawyers to appoint as judges.

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118. EISGRUBER, *supra* note 1, at 57.

119. Hills, *supra* note 10, at 45.

120. *See id.* at 46; EISGRUBER, *supra* note 1, at 67–69, 71, 207–08.

121. EISGRUBER, *supra* note 1, at 207.

122. Hills, *supra* note 10, at 46.

123. Hills, *supra* note 10, at 46 n.33.

Professor Hills's argument presupposes that there are some values common to virtually all lawyers, so that a president would have a difficult time finding judicial nominees who lacked them. Are there any such values? It is hard to say. The most obvious possibilities involve traits useful to the practice of law—such as, perhaps, a preference for technical legal argument over common-sense moral judgment, or a heightened concern for procedural issues, or a respect for precedent.<sup>124</sup> Yet, even these values (if “values” is the right word) might not be sufficiently pervasive to constrain the options available to appointing presidents. For example, lawyers in general might be reluctant to abandon precedents, but would one say that about William O. Douglas, Earl Warren, or Clarence Thomas? Nor is it clear that lawyerly habits—such as concern for precedent and process—would undermine the democratic credentials of judicial review. Such characteristics might make judicial review less desirable or effective than it would otherwise be. But making judicial review less effective is not the same thing as making it undemocratic. It seems unlikely that any trait exhibited pervasively throughout the entire legal profession would be so ideologically loaded, or so damaging to constitutional interpretation, as to destroy the democratic pedigree of judges.

Nevertheless, that judgment (like many others relevant to my case for judicial review) “ultimately rests upon considerations that are fairly contestable and partly empirical.”<sup>125</sup> Reasonable people differ over such matters. Some observers may believe, despite what I have said, that lawyers constitute a distinct social class with elitist values, and that presidents will not be able to avoid choosing judges who exhibit those values. People who hold this view will have reason to doubt whether judges have the democratic pedigree requisite to represent the people.<sup>126</sup> Yet, before converting their doubts into conclusions, those inclined to find evidence of class bias in judicial demographics should subject other institutions to the same scrutiny. It is far from clear that the judiciary will turn out to be the most aristocratic branch. For example, George W. Bush, the current president, is the son of another recent president, the grandson of a Connecticut senator, and brother to the current Florida governor (who had himself been mentioned as a possible presidential candidate). His rival in the most recent presi-

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124. Characterizing the values and traits of the legal profession is a tricky business. For one controversial effort to do so, with attention to implications for judicial review, see generally ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE CONSEQUENCES AND MENTALITY OF JUDICIAL REVIEW* (1989).

125. Eisgruber, *supra* note 1, at 73.

126. *Id.*

dential election was Al Gore, a former Tennessee senator, who was the son of another Tennessee senator. Presidential politics today thus shares at least one objectionable characteristic of aristocratic rule by landed gentry: namely, it involves the exercise of power by dynastic families.<sup>127</sup> The example may be an extreme one, but the pattern is not mere coincidence. As Aristotle pointed out, elections favor elites: In general, it helps to be wealthy or famous or in some other way extraordinary, and ordinary folk have little chance of winning.<sup>128</sup>

### E. Changing the Composition of the Court

Like Professor Hills, Professor Denvir expresses concern about defects in the democratic pedigree of American judges. Professor Denvir, however, approaches the issue in a spirit more sympathetic to my argument. Rather than suggesting that such defects undermine the case for viewing the Supreme Court as a representative institution, Professor Denvir proposes two changes that might make the Court better-suited to its representative functions. First, he asks whether it would be desirable to appoint some non-lawyers to the Supreme Court. He correctly notes that non-lawyers have served on the constitutional courts of some European countries, such as France, and he observes that the inclusion of non-lawyers on the Supreme Court would answer the concerns of those (including me as well as Professor Hills) who worry about the effects of drawing the Court's members entirely from a single profession.<sup>129</sup> Second, Professor Denvir proposes that the Constitution be amended to replace life tenure for Supreme Court Justices with a "long nonrenewable term" of fifteen years.<sup>130</sup> The United States is virtually unique in allowing its constitutional court judges to serve indefinitely; as I admit in *Constitutional Self-Government*, the American practice runs the risk that "judges who once had a democratic pedigree [will,] after long service on the court, [lose] touch with the nation's ongoing political and moral debate."<sup>131</sup> Professor Denvir's proposal would cure that problem.

Both of these reforms are plausible, but both also involve risks, and I am not sure, in the end, whether they would help or hurt. In an

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127. Akhil Amar is one of the few theorists to examine the constitutional implications of this point. See, e.g., Akhil Reed Amar, *U.S. Successions Began With George (III and W)*, L. A. TIMES, January 23, 2000, at 1.

128. See ARISTOTLE, POLITICS, Book IV.vii.3(1294b) (H. Rackham trans., Loeb Classical Library 1932); *id.* at Book VI.i.8(1317b).

129. John Denvir, *Proudly Political*, 37 U.S.F. L. REV. 27, 33-34 (2002).

130. *Id.* at 33.

131. EISCRUBER, *supra* note 1, at 66.

early draft of *Constitutional Self-Government*, I actually began the book by inviting readers to consider how we should react if a president were to nominate a non-lawyer—I offered former New Jersey Senator Bill Bradley as an example—to the Court. The issue turns out to be complex. The Supreme Court is not simply a forum for constitutional debate. It is also the nation's court of last resort for all questions of federal law, and, as Richard Fallon has recently reminded us, it is responsible for translating the Constitution's meaning into legal doctrines that can be implemented by lower courts.<sup>132</sup> Of course, Justice Bradley (like his colleagues) would have law clerks who could help him with the technical issues, and he could always defer to the other Justices on cases about, for example, the meaning of the Federal Rules of Civil Procedure. Still, in the end, I am inclined to believe that we might get equal benefits from less radical changes to the composition of the Court, such as by selecting lawyers with political experience to fill vacancies. A president inclined to nominate Bill Bradley could instead call upon Bruce Babbitt or George Mitchell.

With regard to limited terms, I once agreed with Professor Denvir wholeheartedly. Citing arguments made by L. H. Larue and L. A. Powe, Jr., I suggested that "it would be better . . . if [Supreme Court Justices] were . . . required to retire after serving a limited term."<sup>133</sup> But while writing *Constitutional Self-Government*, I had second thoughts. As I observe there, "judges who serve a single, non-renewable term . . . have to worry about what they will do next." There is some chance that they will covet "high-paying jobs in the private sector" or "another political appointment—as, say, attorney general or ambassador to Italy."<sup>134</sup> I do not know how great these risks are, but the possibility leaves me agnostic about the reform that Professor Denvir recommends.

## F. The Judiciary's Track Record

In *Constitutional Self-Government*, I make the following claim: "It is becoming increasingly difficult to find evidence that the Supreme Court represents the people so badly as to raise questions about its [democratic] legitimacy."<sup>135</sup> In support of that claim, I point out that "the most egregious cases of judicial overreaching"—cases like *Lochner*

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132. See Richard H. Fallon, Jr., Implementing the Constitution 5 and *passim* (2001).

133. Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORDHAM L. REV.* 1611, 1612–13 & n.5 (1997).

134. EISGRUBER, *supra* note 1, at 67.

135. *Id.* at 73.

*v. New York*<sup>136</sup> and *Scott v. Sandford*<sup>137</sup>—“are now more than fifty years old.”<sup>138</sup> In the past half-century, “the Court’s greatest moments have come when it intervened most boldly”<sup>139</sup>—in cases such as *Brown v. Board of Education*<sup>140</sup> and *The Pentagon Papers Case*<sup>141</sup>—and its greatest embarrassments have come “when it refused to act”<sup>142</sup>—in cases such as *Korematsu v. United States*.<sup>143</sup> I concede that “there are those—including Robert Bork and Antonin Scalia—who say that they regard *Roe v. Wade*<sup>144</sup> . . . as a disaster comparable to *Lochner*.”<sup>145</sup> But I note that “*Roe* is a controversial decision; it is not, like *Scott* or *Lochner* or *Korematsu* . . . , universally reviled.”<sup>146</sup> With very few exceptions, Americans today disagree about “*which* morally and politically contested issues judges should address, not about *whether* they should address such issues at all.”<sup>147</sup>

Professor Tushnet takes exception to this argument and contends that it is “simple academic gerrymandering.”<sup>148</sup> He complains that it “omits the abortion cases, the affirmative action cases, the racial redistricting cases, and the Court’s grudging interpretation of Congress’s power under Section Five of the Fourteenth Amendment—all, I note, more recent than the cases . . . that Professor Eisgruber praises.”<sup>149</sup> In Professor Tushnet’s own view, “the emerging judgment among liberals is more that, from 1954 (*Brown*) to sometime in the 1970s or early 1980s, the United States was better off for having judicial review, and that for more recent years the ‘on balance’ judgment is enormously complex and might well come out against judicial review.”<sup>150</sup>

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136. 198 U.S. 45 (1905) (holding state maximum hours laws to be unconstitutional infringements on the freedom of contract).

137. 60 U.S. (19 How.) 393 (1857) (holding the Missouri Compromise unconstitutional).

138. EISGRUBER, *supra* note 1, at 73.

139. *Id.*

140. 347 U.S. 483 (1954) (holding that racially segregated public schools violate the Equal Protection Clause).

141. 403 U.S. 713 (1971) (holding that the president could not restrain publication of the Pentagon Papers).

142. EISGRUBER, *supra* note 1, at 73.

143. 323 U.S. 214 (1944) (upholding constitutionality of internment camps).

144. 410 U.S. 113 (1973) (recognizing a constitutional right to an abortion).

145. EISGRUBER, *supra* note 1, at 74.

146. *Id.*

147. *Id.*

148. Tushnet, *supra* note 10, at 75.

149. *Id.*

150. *Id.* at 76 n.49.

I am mildly surprised by Professor Tushnet's criticism, since I thought I was repeating a claim that he had made himself. In *Taking the Constitution Away from the Courts*, Professor Tushnet wrote: "Different people disagree about when the courts abuse their power, but we seem to think that an institution pretty much like the one we have is good for us."<sup>151</sup> That assertion does not seem so different from my own suggestion that "[t]hough virtually everybody is upset about one case or another, few observers look at the Court's track record and claim, with the benefit of hindsight, that the United States would have been better off during the last fifty years without judicial review."<sup>152</sup>

In any event, Professor Tushnet is certainly correct about two things. First, he is right that my examples of the Court's "great moments" are decades old. He is wrong, however, to suppose that this is "academic gerrymandering." It would be foolish to ask whether the Court has made the United States "better off" by asking whether "we" agree with its holdings in recent controversial cases. People (including scholars, judges, and ordinary citizens) disagree about how those cases should have been decided—that is what it means for them to be "controversial." Our evaluation of the Court's performance will mirror our substantive disagreements. Since the Court was considerably more liberal "from 1954 (*Brown*) to sometime in the 1970s or early 1980s" than in "more recent years,"<sup>153</sup> it is unremarkable that, as Professor Tushnet rightly observes, "liberals" are happier with the Court's performance in the first period than in the second. Conservatives, presumably, have the opposite reaction. So what?

To pass judgment upon the Court as a democratic institution, we need to establish evaluative criteria that abstract from our specific disagreements. We need, in other words, a theory about what it means for a government to decide moral issues democratically when citizens disagree about the right answer to those issues. As I have already explained,<sup>154</sup> *Constitutional Self-Government* argues that in order to represent Americans well, their government must decide moral issues in the manner that Americans themselves think such issues ought to be resolved—namely, "on the basis of moral reasons that have popular appeal."<sup>155</sup> This criterion enables us to assess the Supreme Court's

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151. TUSHNET, *supra* note 65, at 173.

152. EISGRUBER, *supra* note 1, at 73. My footnote to this claim both identifies Professor Tushnet as an exception to the general rule and then quotes his concession that most people seem happy with the Court. *See id.* at 226 n.70.

153. Tushnet, *supra* note 10, at 76 n.49.

154. *See supra* Section II.A.

155. EISGRUBER, *supra* note 1, at 71.

performance in controversial cases. We may ask whether we believe that the Supreme Court has acted “on the basis of moral reasons that have popular appeal” even when we believe that it has decided a case incorrectly. I have no difficulty taking that view of, for example, the Court’s recent affirmative action cases. I believe that the majority was wrong in *Adarand Constructors v. Pena*,<sup>156</sup> but I do not believe that the majority was unprincipled, or that it acted on the basis of elite, aristocratic values that lacked popular appeal.

My judgments about *Adarand* are informed by its context. I might suspect that the conservative justices were unprincipled if their decisions invariably tracked the platform of the Republican Party, for example. But they do not. Though the current Court is relatively conservative, it has produced significant decisions that liberals can endorse. My own list would include, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>157</sup> *Romer v. Evans*,<sup>158</sup> *Santa Fe Independent School District v. Doe*,<sup>159</sup> and *Dickerson v. United States*,<sup>160</sup> among others. Perhaps more impressively, the Court has sometimes produced unanimous or nearly unanimous statements of principle that transcend the liberal/conservative divisions of ordinary politics. One finds such agreement in, for example, *Church of the Lukumi Babalu Aye v. City of Hialeah*,<sup>161</sup> *Reno v. ACLU*,<sup>162</sup> *United States v. Virginia*,<sup>163</sup> *Dickerson*,<sup>164</sup> *Watchtower Bible and Tract Society of New York v. Village of Stratton*,<sup>165</sup> and *Whitman v. American Trucking Associations*.<sup>166</sup>

According to the theory that I advance in *Constitutional Self-Government*, we are *better off* for having an institution that decides moral

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156. 515 U.S. 200 (1995) (holding a federal affirmative action program unconstitutional).

157. 505 U.S. 833 (1992) (recognizing a constitutional right to an abortion).

158. 517 U.S. 620 (1996) (invalidating a Colorado law that limited the right of gays to obtain legal protection against discrimination).

159. 530 U.S. 290 (2000) (holding that a public school violated the Constitution by holding prayer ceremonies at football games).

160. 530 U.S. 428 (2000) (affirming that police must warn suspects of their constitutional rights).

161. 508 U.S. 520 (1993) (unanimous judgment) (invalidating a statute that prohibited unpopular religious group from engaging in “ritual slaughter” of animals).

162. 521 U.S. 844 (1997) (unanimous in part and 7-2 as to the remainder) (invalidating Communications Decency Act of 1996).

163. 518 U.S. 515 (1996) (7-1 as to the judgment) (holding that Virginia violated the Equal Protection Clause by denying women admission to publicly funded university).

164. 530 U.S. 428 (7-2 opinion authored by Chief Justice Rehnquist).

165. 122 S. Ct. 2080 (2002) (8-1 as to the judgment) (holding unconstitutional a broad ban on door-to-door solicitation).

166. 531 U.S. 457 (2001) (unanimous judgment) (refusing to hold that the Clean Air Act was an unconstitutional delegation of legislative authority).

issues in *the right way* (that is, on the basis of moral reasons having popular appeal), even if we often disagree with the *outcomes* produced by that institution. I do not mean to suggest that there are no right answers to contested moral questions, or that it should be a matter of indifference if the Court consistently produces worse outcomes than would other institutions. People care deeply that moral issues be resolved correctly. To represent Americans well, their government should not only decide moral issues on the basis of moral reasons, but also produce the right answers to those questions (and do so as fast as possible). Democracy demands *efficacy* as well as *impartiality* from government: “a democratic government ought to be able to deliver what its citizens want”<sup>167</sup>—and that includes, especially, justice. But we now confront, once again, the fact that Americans disagree about how to answer moral questions. Is there any way to make progress? One way is to look back upon past disputes with regard to which time and discussion have produced something that approaches moral consensus. Does it now seem, with the benefit of hindsight, that judicial review helped move us forward or that it held us back? This assessment obviously involves older cases rather than more recent ones, not because of “academic gerrymandering,” but because moral consensus emerges (if at all) only with the passage of time. That is why, in *Constitutional Self-Government*, I emphasize the widespread view that in the past half-century, “the Court’s greatest moments have come when it intervened most boldly” and its greatest embarrassments have come “when it refused to act.”<sup>168</sup>

Professor Tushnet is also correct that judgments about the net impact of judicial review are likely to be “enormously complex.”<sup>169</sup> That is especially so if we are trying to determine whether judicial review has been good for “protecting rights” or “promoting justice.” To pursue that inquiry, we would first have to develop an account of what rights are worth protecting. Parts of this account, at least, would be very controversial. We would then have to use this account to evaluate the effects not only of the Supreme Court’s controversial cases, but also of less controversial ones decided by it and all the other courts around the country. That’s not all. We would also have to ask how legislators would have behaved in the absence of judicial review.

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167. EISGRUBER, *supra* note 1, at 84.

168. *Id.* at 73.

169. Professor Tushnet rightly identifies Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEG. STUD. 275 (2002), as an important treatment of the topic. See Tushnet, *supra* note 10, at 76 n.49.

There are at least two hypotheses about how American legislators might behave if judicial review were absent: They might behave better (because legislators will behave more responsibly if they cannot count on judges to remedy their delicts) or worse (because legislators will behave less responsibly if they can get away with it, and because the public will care less about constitutional principles if there is no institution specifically dedicated to protecting those principles). Any conclusion about whether judicial review has been good or bad for rights will therefore be not only complex but speculative.

But what does that prove? I have the impression that Professor Tushnet is assuming that unless judicial review has been good for rights, then it must be an undesirable institution, since it obviously makes the United States less sensitive to the preferences expressed by voters in the polling booth, and hence, in his view, less democratic. Under this view, proponents of judicial review labor under a heavy "burden of proof"—they must justify sure-fire losses to democracy on the basis of speculation about benefits for rights and justice. My argument in *Constitutional Self-Government* tries to show that this reasoning is fallacious. As I have already said, judicial review can make American government *more* democratic *even if* judicial review's impact on rights is (more or less) neutral. Why? Because judicial review is relatively more likely than other political institutions to respect the distinctive character of moral issues; hence, a mixed system of government that includes judicial review will better represent the American people (who themselves distinguish between moral and other issues) than will a thoroughly legislative system. That, I think, is part of the reason why Americans often give the Supreme Court higher approval ratings than they give Congress: They believe that the Court treats moral issues in the way that people want them treated—which is to say, as matters of principle.<sup>170</sup>

It thus seems to me that Professor Tushnet has the burden of proof exactly backward. If most Americans like the institution of judicial review; if judicial review is a representative institution, not an undemocratic practice; and if the case against judicial review is at best "enormously complex" and profoundly speculative, then why should

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170. In a Gallup Poll released on July 10, 2000, forty-seven percent of Americans said they had either "a great deal of confidence" or "quite a lot of confidence" in the Supreme Court. Only twenty-four percent felt that way about Congress. See Chris Chambers, *Military Number One in Public Confidence, HMO's Last*, GALLUP NEWS SERVICE, July 10, 2000. The Supreme Court has done well by comparison to Congress in polls since 1970. See TERRI JENNINGS PERRETTI, IN DEFENSE OF A POLITICAL COURT 169 (1999). The data about support for the Court is, however, complex, and one should not push it too hard. *Id.* at 163–70.

we consider “taking the Constitution away from the courts?” Why not instead think about how best to improve an institution that we have and like?

### G. An American House of Lords?

Professor Waldron criticizes my argument in an especially imaginative way. He suggests that the benefits I attribute to judicial review would be better secured by an appointed legislative chamber, like the modern British House of Lords.<sup>171</sup> Some readers may suppose that Professor Waldron’s argument is a replay of the one from Professor Hills that we dismissed earlier, but that is not so. Professor Waldron is not alleging that judges compose an elite or aristocratic class akin to the landed gentry. He carefully stresses that in today’s House of Lords, the vast majority of the members owe their seats to appointment by elected officials, not to noble birth. He is willing to assume away the “hereditary and ecclesiastical rump” of unappointed peers<sup>172</sup> and the titles of nobility—in his words, the “Britishness” of his example is “not supposed to be an embarrassment”<sup>173</sup> (and certainly it is not so to me, since I admire many features of British government). Professor Waldron’s point is thus not about elitism (or at least not about class-based elitism). Instead, his point is that insofar as I favor a representative institution that combines democratic pedigree with disinterestedness, I should recommend an appointed legislature, not a constitutional court. Professor Waldron correctly observes that the judgments required by judicial review are not, on my theory, legalistic in character, so that the legal training of judges is unnecessary to, and may actually interfere with, their task. He also observes, again correctly, that I regard some important moral issues as ill-suited to adjudicative institutions, so that the Supreme Court must leave some principles (to use the now-familiar terminology of Lawrence G. Sager) “judicially under-enforced.” An appointed legislature might have all the virtues of judicial review while avoiding these problems. It might, in other words, combine democratic pedigree with disinterestedness, while not falling prey to legalism or finding itself incompetent to enforce some moral principles. So why judicial review—why not an American House of Lords instead?

In a moment, I will attempt to answer this question head-on. I want first to note, however, that I could simply demur to the charge.

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171. See Waldron, *supra* note 10, at 93–98.

172. *Id.* at 94.

173. *Id.* at 95.

That is, even if Professor Waldron's claims were entirely correct, they would not refute the argument of *Constitutional Self-Government*. All modern democracies delegate some important political functions to officials who are insulated from electoral pressure. Judicial review and the House of Lords are hardly unique in this respect. Most countries delegate significant economic authority to central banks, such as the Federal Reserve Board, which plays a large policy-making role in the United States. I count it as a virtue of *Constitutional Self-Government* that it explains why every democracy (including, of course, Britain) includes non-majoritarian institutions of this kind. Conversely, it seems to me a great embarrassment for doggedly parliamentary theories, which insist that every important decision ought to be under the control of voters or elected officials, that no modern nation (including Britain) qualifies as democratic under the definition they recommend. So I am perfectly happy to admit that *Constitutional Self-Government* provides a pro-democratic account of the House of Lords (or at least all but the "hereditary and ecclesiastical rump").

Professor Waldron, of course, does not merely assert that my theory helps to justify British institutions. He claims to show that, under my theory, the United States would be better off if it could exchange judicial review for an unelected legislative body like the House of Lords. Should that claim disturb me? I do not see why it should. *Constitutional Self-Government* does not assert that the United States has the best system of government that it could possibly have, nor does it argue that every country should rush to embrace American-style judicial review. On the contrary, the book's core insight is that there is an enormous variety of institutions, electoral and otherwise, that modern nations may legitimately use to implement democratic ideals.<sup>174</sup> Different countries will proceed differently.<sup>175</sup> My goal in *Constitutional Self-Government* is to ask how best to understand and participate in American constitutional practices, including judicial review, in light of democratic ideals. My answer is that we should understand them (again, including judicial review) as imperfect but useful pro-demo-

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174. See EISGRUBER, *supra* note 1, at 9 ("[W]e must first appreciate the wide variety of institutions—including judicial review and super-majoritarian amendment rules—that nations might harness to democratic purposes."); see also *id.* at 77:

My ambition here . . . is to destabilize the idea that there is any single institution—such as the legislature or electorate—that is uniquely entitled to speak for the people. My goal is to highlight the wide variety of institutions that are not merely democratically legitimate but also are reasonable means by which to pursue democratic flourishing.

175. See *id.* at 74–77.

cratic institutions. So, in particular, judges should recognize that judicial review assigns to them a representative function, and they should not shrink from or conceal the political judgments that go with it.

These conclusions are unaffected by the possibility that other countries have better institutions, or that the United States would be better off if its institutions were different.<sup>176</sup> The British Parliament might be a better representative institution than the American Congress; it would not follow that Congress was not a representative institution at all, or that its members should not understand themselves as serving a representative function. Likewise, the House of Lords might be a better representative institution than the American Supreme Court; it would not follow that the Supreme Court was not a representative institution at all, or that justices should not understand themselves as serving a representative function. If judges recoiled from their political role (as some now do), that would not endow us with a House of Lords—it would just leave us with a less effective Supreme Court.

For these reasons, I would not feel threatened by Professor Waldron's argument even if I thought it were true—even if I were convinced, in other words, that an appointed legislature were superior to a constitutional court. I am not, however, convinced by the argument. Professor Waldron suggests that his House of Lords would assert authority over a broader range of moral issues than would my constitutional court, and he asserts that I should count this an advantage. His institution, however, has the vices of its virtues: Its expansive jurisdiction might encourage it to reach a greater number of issues for which disinterestedness is genuinely useful, but it might also lead the chamber to seize many issues for which it is not. Almost anything can look like a moral issue; it is always possible to ask whether this or that policy is "the right thing to do." Professor Tushnet, for example, argues that moral principle is at stake every time Congress dickers over how to adjust tax rates, whether to impose a tariff, or where to build a highway.<sup>177</sup> An unelected legislative chamber might be tempted to the same view, and, if so, its domain would include the whole of the legislative docket.

Professor Waldron and others might wonder, though, what reason I have to resist this conclusion. After all, if moral questions are

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176. *See id.* at 68 ("Judgments about the comparative merits of the German and American constitutional system tell us nothing about whether democratic principles require American courts to defer to American elected officials.").

177. *See* Tushnet, *supra* note 10, at 65–66.

present, and if the House of Lords is competent to address them, then why not let it do so? The answer turns is simple. Government must respect moral principle, but that is not all it does. Good government should make people better off. It should care for their interests as well as their values. In my view, this task will constitute the bulk of government policy-making: Although moral principle puts important limits on government action, most policy-making will be a highly discretionary effort to accommodate a wide range of interests. For this purpose, the information provided by electoral incentives is useful rather than distracting.<sup>178</sup> It ensures that legislators will be sensitive to the actual interests of the people (and, as I argued earlier, I believe that the incentives of the electoral process are reasonably—though not perfectly—well-shaped to communicate information about the people's interests).

This information about interests will also be useful in some controversies where moral issues loom more prominently. As I emphasize in *Constitutional Self-Government*, to address moral concerns adequately, officials must not only make moral judgments but also make sound strategic choices about how to implement those judgments.<sup>179</sup> Designing effective strategy requires, among other things, enlisting other actors: individuals, businesses, interest groups and so on. To get the cooperation of these actors, it helps to know what interests motivate them. Electoral pressure may help to communicate precisely that kind of information.

The risk, then, is that an unelected senate or House of Lords of the sort that Professor Waldron imagines might seize too many "mixed" issues of morality and preference. With regard to many of these issues, elected officials' sensitivity to voter preference is more useful than the disinterestedness of their unelected counterparts. The dangers of an aggressive unelected legislative chamber would be especially great in a decentralized political system like the American one, in which state and local governments exercise a tremendous amount of power. As I point out in *Constitutional Self-Government*, this arrangement is double-edged.<sup>180</sup> Local government bodies are relatively hospitable to participatory democracy. Their autonomy advances the democratic goal of *participation*. Local governments are, however, also

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178. See EISGRUBER, *supra* note 1, at 83 ("elections help to measure preferences and interests, thereby providing information that everybody will think relevant to at least some questions").

179. See *infra* Section VI.B.

180. See EISGRUBER, *supra* note 1, at 91.

relatively vulnerable to factional capture. Their autonomy accordingly makes them a threat to the democratic goal of *impartiality*. One task of democratic government is to find a way to supervise local units so as to eliminate their worst abuses yet preserve enough autonomy so that they remain meaningful sites of participatory democracy. I argue that the limited jurisdiction of a constitutional court makes it well-suited to this task.<sup>181</sup> Conversely, the unlimited jurisdiction of Professor Waldron's unelected legislature might enable it to overwhelm local government.

Perhaps there is some way to work out these difficulties. Professor Waldron is a bit vague about exactly what powers his proposed institution would have or how its jurisdiction would be triggered in a decentralized polity (I do not blame him for this—he is not, after all, recommending the House of Lords in his own name, but as a test of my theory). If we fill in the gaps correctly, there might be some way to set up a fruitful partnership between the House of Lords and the nation's various elected bodies. And, to make precise my own concerns about the unelected legislature, I would have to say more about which issues are best-suited to an unelected body, and why the structure of a constitutional court might do a reasonable (though obviously imperfect) job of selecting out such issues.<sup>182</sup> For the moment, I hope only that the considerations advanced here suffice to give a flavor of the sort of analysis that would be necessary. In the end, an unelected legislative chamber might improve upon a constitutional judiciary, but it is hard to be confident either way. "Identifying optimal structures of [constitutional] review . . . is a tricky business, and we ought to beware the temptation to believe that the grass is greener on the other side of the fence."<sup>183</sup> What will matter most, as I have already said, is not figuring out which institutional structure is best, but deciding how to make the best of the institutional structures we actually have.

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181. *See id.* at 95.

182. Professor Brown's useful distinction between First-Order and Second-Order moral questions might provide some help with these issues, too, although I doubt it would do all the work I need.

183. EISGRUBER, *supra* note 1, at 67. *see also id.* at 76 (stating that in "the practical design of government institutions, there are no certainties, only competing risks").

## V. Does Judicial Review Impair Popular Participation or Public Deliberation?

### A. Judicial Review and Democratic Flourishing

*Constitutional Self-Government* recognizes that if “judicial review inhibits or impairs democratic participation, that would be a reason for judges to defer to elected officials.”<sup>184</sup> The book accordingly contains a chapter devoted to “democratic flourishing.” In that chapter, I consider whether judicial review inhibits or impairs democratic activity. In order to pursue that topic rigorously, I, like other democratic theorists, must keep in mind a special challenge attached to the implementation of participatory democracy in modern nation-states. In polities that comprise millions of citizens, not everybody will be able to exercise real power. Regardless of whether policy-making is performed by legislatures, elected executives, administrative agencies, or courts, professional politicians and elite opinion-makers in the media and elsewhere will exercise disproportionate influence. Ordinary people may write letters or circulate petitions, but, for the most part, they will find that their “energy is just a drop in an ocean, carried along by demographic tides beyond their control.”<sup>185</sup> It is therefore unsatisfactory simply to point out that some political institution (be it legislative, judicial, or neither) gives power to elites, for all large-scale systems will do that. We must instead define with some care the participatory goals that we want democracy to serve, and then make realistic comparisons between feasible systems.

*Constitutional Self-Government* proposes that we judge democratic institutions by reference to two goals relevant to the political engagement of citizens. The first goal is “participation.” It insists that “any citizen willing to commit time and effort should be able to make a meaningful difference in politics and feel that politics is a rewarding part of her own life.”<sup>186</sup> The second goal is “public deliberation.” It entails that democracies “should encourage citizens to think and converse about basic questions of justice.”<sup>187</sup> I then ask whether judicial review adversely impacts either of these goals. I distinguish several distinct arguments often conflated by critics of judicial review, such as the claim that judicial review diminishes the power of ordinary citizens; the claim that judicial review diminishes legislative vigor; and the

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184. *Id.* at 79.

185. *Id.* at 81.

186. *Id.* at 85.

187. *Id.* at 86.

claim that judicial review cuts off public deliberation. In order to confront these arguments in their strongest form, I consider at length the events surrounding *Dred Scott v. Sandford*,<sup>188</sup> which is perhaps the Supreme Court's worst decision and is frequently cited as evidence of judicial review's harmful implications for democratic politics. At the chapter's end, I conclude that while it is "impossible to say for sure, there is very little evidence" that judicial review somehow drains democracy of its vigor.<sup>189</sup>

## B. Judicial Review and Participation

Among my critics here, only Professor Hills discusses at any length issues related to participation and deliberation. He is, to say the least, unhappy with my treatment of these points. He begins his argument quite abstractly. He says that "self-government requires . . . that the People be active agents in causing their officials to respect their beliefs and values,"<sup>190</sup> and he contends that "[j]udicial representation of the people cannot be democratic self-government because the people are not the effective cause of judicial decisions' alleged consistency with popular values."<sup>191</sup>

We must be careful here. These references to "the people" as "agents" or "cause" are a source of potential confusion. In a large democracy, "the people" cannot act directly. Without more, the claim that "the people" should be "the effective cause" of government action is not much more specific than the general claim that the people should govern themselves. We must insist upon knowing in more detail what it means for the people to do that.

Unfortunately, it is not entirely clear what argument Professor Hills wants to make. At times, he seems to suppose that "the people" are "the effective cause of" government action so long as it results from the choices of electorally accountable officials.<sup>192</sup> If that were so, Professor Hills' argument might not cut against judicial review at all, since, as I have emphasized, judges are chosen by electorally accountable officials on the basis of their political values and views. It is not mere coincidence if "judges' beliefs and values, in a general way, track

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188. 60 U.S. (19 How.) 393 (1857).

189. EISGRUBER, *supra* note 1, at 108.

190. Hills, *supra* note 10, at 38.

191. *Id.* at 52.

192. *Id.* at 54–55 (contrasting view that elections are a "sham" with view that they are "flawed but effective").

popular beliefs and values."<sup>193</sup> Those parallels result from voters' choices. In any event, the claim that government should be sensitive to voters' preferences simply takes us back to the argument about whether the voters are the same as the people; it does not add anything new to the considerations we addressed in Section III.

Much of what Professor Hills has to say, however, focuses on the topic of political participation. He believes that *Constitutional Self-Government* disparages the value of participation to democracy. He claims, for example, that "Eisgruber . . . launches a frontal assault on the idea that popular participation must be linked to governmental outputs,"<sup>194</sup> and that under my theory "[p]articipation . . . need not be the cause of government's effectively choosing one policy over another; in Eisgruber's scheme, participation is more like therapy than a decision-making procedure."<sup>195</sup>

I find these assertions puzzling. Although one would not know it from reading Professor Hills, I agree with him that participation is important and that it must be connected to political power. I criticize "abstract notions of democracy" that "deflect attention from the institutional machinery of government—elections, offices, procedures, jurisdictions, and powers."<sup>196</sup> I insist that we must focus upon "mechanisms [that] distribute power across the population."<sup>197</sup> I praise elections on the ground that, despite their defects, "they explain how all Americans get a share of political power."<sup>198</sup> I emphasize that the goal of participation requires that even those citizens

who find themselves consistently on the losing side in political battles should feel that they can bring their views to the attention of public officials and their fellow citizens; that they can get an honest and thoughtful reply; and that they can sometimes engineer accommodations which, even if they do not count as a victory, will soften the impact of a loss.<sup>199</sup>

I accordingly believe that much of Professor Hills' argument is irrelevant to the theory I actually advance in *Constitutional Self-Government*.<sup>200</sup> It is, however, possible to isolate two important pieces of his

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193. *Id.* at 52.

194. *Id.* at 53.

195. *Id.* at 55.

196. EISGRUBER, *supra* note 1, at 82.

197. *Id.* at 83.

198. *Id.*

199. *Id.* at 85–86.

200. For example, Professor Hills contends that "Eisgruber . . . forgets that . . . large communities are divided into much smaller electoral districts which are the relevant unit for most sorts of political activity." Hills, *supra* note 10, at 54. In fact, I say that "American

argument that do not depend upon his interpretation of my views. First, Professor Hills announces his own criteria for evaluating participatory democracy. He correctly believes that these criteria are different from my own, and, according to Professor Hills, that is sufficient reason to reject my theory. Second, Professor Hills contends that public deliberation has little or no capacity to affect constitutional questions once the Supreme Court has passed on them. If he were correct about that proposition, it would create serious problems for my argument. Each of these arguments deserves careful attention, and I consider them in turn.

According to Professor Hills, participatory democracy entails that every citizen must have “influence proportionate to ability to persuade her fellow citizens.”<sup>201</sup> He adds that under this view, “civic activists’ interests and values would crowd out the values and desires of civic slobs who did not vote or read a newspaper.”<sup>202</sup> According to Professor Hills, this tendency is a virtue, not a vice, of the democratic system he favors: “For lovers of democratic participation, . . . power should be proportionate to participation: Voters and speakers get influence, and soap-opera watchers don’t, and the latter’s lack of power is the penalty for abdicating their duty to be a good citizen.”<sup>203</sup>

In this brief paragraph, Professor Hills actually articulates two distinct, but equally problematic, criteria for assessing democracy. He first says that in a democracy, a citizen’s influence should be “proportionate to ability to persuade her fellow citizens.”<sup>204</sup> A few sentences later, he says that “power should be proportionate to participation.”<sup>205</sup> These tests are different. The first criterion, which demands only that influence be proportional to persuasive power, is exceedingly inequalitarian and highly unattractive. A citizen’s ability to persuade others may depend upon her education, her looks, her talents, her wealth, her fame, or her family name (if you want influence, it helps to be a Bush or a Kennedy), not her level of participation. Moreover, the first criterion will be tautologically satisfied in any system that gives unchecked power to electoral majorities, since power will then be pro-

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government facilitates *participation* principally through institutions of local government.” EISGRUBER, *supra* note 1, at 86. I then devote ten pages plus footnotes (nearly five percent of the book) to the relationship among judicial review, local government, and democracy. *See id.* at 87–96, 228–30.

201. Hills, *supra* note 10, at 55.

202. *Id.* at 55–56.

203. *Id.* at 56.

204. *Id.* at 55.

205. *Id.* at 56.

portionate to the ability to persuade voters, even if, for example, the citizens with the most persuasive power are media celebrities and millionaires who can afford to buy television time.

In light of these difficulties, we might assume that Professor Hills really means to endorse the second test, which insists that power must be proportionate to participation. Yet, if his first test is inegalitarian and easy to satisfy, his second test turns out to be inegalitarian and impossible to satisfy. The second test has different implications for two groups of Americans: those who "vote or read a newspaper" and those who do not. In the United States, the latter, politically inactive group appears to be large. "[N]ewspaper readership has been plunging in recent decades,"<sup>206</sup> and fewer than sixty percent of Americans vote, even in major elections.<sup>207</sup> Under a conception of democracy that makes power proportionate to participation, the "values and interests" of "civic activists" will "crowd out" the "values and desires" of "civic slob."s.

This aristocracy of activists is a strange kind of democratic ideal. Professor Hills seems to believe that those disadvantaged by his criterion are simply lazy: If the "soap-opera watchers" want government to care about their values and interests, they need only get off the couch and into the public square. We should not assume, however, that people disengaged from politics lead indolent, worthless lives. In fact, there is considerable evidence that most Americans not active in politics are nevertheless engaged in other valuable pursuits.<sup>208</sup> Moreover, one must wonder why Professor Hills, who is keenly sensitive to the possibility of class bias among judges, does not worry more about elite bias among "civic activists." Empirical evidence suggests that political activism in the United States correlates with education, wealth, and social status.<sup>209</sup>

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206. ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 218 (2000). Only about twenty-one percent of Americans between the ages of eighteen and twenty-nine read a newspaper daily; for Americans between the ages of thirty and forty-four, the number is thirty-four percent. *See id.* at 252.

207. The turn-out rate in presidential elections has been below sixty percent since 1960 and dipped below fifty percent in 1996. *See id.* at 32. Sidney Verba, Kay Lehman Schlozman and Henry E. Brady report that, as of 1987, only thirty-five percent of Americans said they "always vote" in local elections. *See* SIDNEY VERBA, ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 74-79 (1995).

208. *See, e.g.,* VERBA, ET AL., *supra* note 207, at 74-79 (describing non-political civic activities of Americans). Verba and his co-authors are concerned with civic involvement. We should also keep in mind that people may live valuable, other-regarding lives even if they have few or no civic connections—for example, the scientist who works ceaselessly in search of a cure for cancer, or the mother who cares continuously for a disabled child.

209. *See id.* at 28-30, 354-55, 459-60, 463-65 and *passim*.

As Professor Hills rightly observes, this aristocracy of activists would be unacceptable to me, since I believe that democracies should be impartial toward their citizens: they should not favor the values and interests of "civic activists" over others. This feature is, of course, not peculiar to my own conception of democracy. Nearly all participatory democrats start from the premise that government should show equal concern for all citizens.<sup>210</sup>

As I said earlier, there is a second fundamental problem with the idea that power should be proportionate to participation. The criterion is impossible to apply. In any democracy, there will be committed activists on both sides of any contested question. On at least some of these questions, one side must win, and another must lose. How is it possible, under those circumstances, for power to be proportionate to participation? Should we not expect that some highly participatory, deeply committed groups will find themselves consistent losers in the political process, despite all their hard work? Will they not feel, quite correctly, that they do not have power proportionate to their participation?

We get a second form of incoherence if we try to cure the inegalitarian features of Professor Hills' position. Suppose we insist, as I think many participatory democrats would do, that a nation is not democratic unless nearly everybody is an "activist." What, then, would it mean for everybody's power to be proportionate to their participation? If the nation is large, it would presumably mean that everybody's power would be nearly zero, since, by hypothesis, everybody is an "activist" and so power must be divided equally among millions, or hundreds of millions, of people. It is hard to imagine how this would be possible. Would there be no leaders who exercise more power than others?

Perhaps these two forms of incoherence will lead Professor Hills back to his first criterion, in which influence must be proportionate to persuasive power rather than participation. Each activist citizen, he might say, should have an equal vote in determining which opinions are persuasive. But since we have now eliminated the possibility that persuasive power depends upon participation (which is, by hypothesis, equal), we are back to our original problem. Where does it come from? Intelligence? Charisma? Good looks? Wealth? Family name? Or does Professor Hills mean to assume that provided there is real partic-

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210. See, e.g., *id.* at 10 ("Democracy rests on the notion of the equal worth of each citizen. The needs and preferences of no individual should rank higher than those of any other.").

ipation by everyone, the merits of the argument (and the merits alone) will determine who wins and, hence, who has persuasive power?<sup>2</sup>

These problems all share a common theoretical root. Like many constitutional theorists who wax romantic about populism, democracy, and participation, Professor Hills never comes to terms with the inevitable tendency of elites to dominate any form of politics (be it judicial, legislative, administrative, or executive) in a populous state. Not surprisingly, this failure infects his discussion of public deliberation as well as his analysis of participation.

### C. Judicial Review and Public Deliberation

Professor Hills complains that public deliberation will be impotent or pointless insofar as the Supreme Court decides questions of justice, since "citizens cannot really influence the Court's decisions."<sup>211</sup> He wrongly asserts that, if this were so, I would be comfortable with that state of affairs. Professor Hills interprets me to say that "debate sparked by controversial Supreme Court decisions is sufficient even though the debaters have no power to change the outcome."<sup>212</sup> This reading of my book confuses necessity and sufficiency. I advance a demanding criterion of public deliberation that requires individuals to "become engaged in argument [about public affairs,] even though they will often lack the power to affect how the argument plays out."<sup>213</sup> I do not, however, suggest that it would be acceptable if Supreme Court decision-making (or any other aspect of democratic government) were unresponsive to public deliberation. On the contrary, I insist that democratic institutions, including courts, must be sensitive to public deliberation about justice.<sup>214</sup>

From my standpoint, then, it would be an enormous problem if Supreme Court decision-making were unresponsive to public deliberation. We must therefore ask whether Professor Hills is correct to suppose that "citizens cannot really influence the Court's decisions."<sup>215</sup> He is hardly alone in that view, of course. Indeed, he has company from two other participants in this symposium. Professor Tushnet makes the point with a literary flourish: He says that ordinary citizens who criticize Supreme Court decisions "are rather like Glendower:

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211. Hills, *supra* note 10, at 56.

212. *Id.*

213. EISGRUBER, *supra* note 1, at 87.

214. *See id.* at 55-56.

215. Hills, *supra* note 10, at 56.

They, like him, can call the spirits from the vast deep, but the Supreme Court will not let the spirits answer."<sup>216</sup> In his fine book *Law and Disagreement*, Professor Waldron contends that public debate about Supreme Court rulings amounts to nothing more than an "impotent" "debating exercise" conducted by a "star-struck people speculat[ing] about what the Supreme Court will do next."<sup>217</sup>

There is an irony here. A common critique of judicial review complains that "the Supreme Court follows the election returns."<sup>218</sup> Apparently Professors Hills, Tushnet, and Waldron think this view entirely without foundation: Not only does the Supreme Court not follow the election returns, but the Justices are unmoved by public debate, period. The truth almost certainly lies somewhere between these two extremes. The Supreme Court is not directly responsive to the expression of electoral preferences, but it is deeply embedded within public debate. The Justices care what people are saying about justice and constitutional principles, both because they care about their institution's reputation and, more fundamentally, because they care about the right answers to the questions they confront.<sup>219</sup> The tradition of critical public debate about Supreme Court decisions serves, in Frank Michelman's words, to "expos[e] the basic law-interpretors to the full blast of sundry opinions and interest-articulations in society."<sup>220</sup>

Even if we indulge the implausible assumption that Supreme Court Justices are deaf to public argument, public criticism of Supreme Court decisions would not be "impotent talk." There are many

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216. Tushnet, *supra* note 10, at 73.

217. EISGRUBER, *supra* note 1, at 97 (quoting WALDRON, *supra* note 22, at 291).

218. FINLEY PETER DUNNE, *THE WORLD OF MR. DOOLEY* 89 (Collier ed. 1962) ("No matter whether th' constitution follows th' flag or not, th' supreme court follows th' illiction returns.").

219. *Constitutional Self-Government* calls upon judges to be sensitive to public opinion in an additional way. It argues that, in very rare circumstances, it is appropriate for a judge to defer to public opinion even when she disagrees with the public's judgment.

[A] judge might conclude that, despite the ambiguities in American public opinion, she cannot honestly offer her own judgments about justice in the name of the American people. Under those circumstances, democratic principles require that she act on the basis of what she considers to be the people's best judgment about justice, rather than her own.

EISGRUBER, *supra* note 1, at 130. This suggestion might be controversial with some people who are otherwise sympathetically inclined toward my views. As Professor Brown correctly observes, judicial deference to public opinion carries a serious risk: "This democratization of principle could, perhaps, be faulted for giving too much to the people." Brown, *supra* note 16, at 16. (Ronald Dworkin has, in conversations about my argument, expressed a similar concern.)

220. FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 60 (1999).

ways for citizens and officials to limit the force of a judicial decision. Louis Fisher, a political scientist, goes so far as to claim that “[f]or the most part, Court decisions are tentative and reversible like other political events.”<sup>221</sup> Perhaps Professor Fisher exaggerates, but his basic insight is surely valid. Citizens and politicians may not only try to change the composition of the Court but also “enact laws that work around the Court’s ruling.”<sup>222</sup>

For these two reasons, it seems to me plainly wrong to suggest that public deliberation about Supreme Court decisions is unconnected to decisional power. Suppose, though, that Professors Hills, Tushnet, and Waldron were to moderate their position so as to make it more plausible. They might say, for example, not that public deliberation is pointless in the wake of Supreme Court decision-making, but only that it is *relatively* less important: Citizen deliberation matters more often and more directly when issues are decided by elected officials.

We now confront again the problem that undermined Professor Hills’ treatment of democratic participation: In a large nation, there is a strong tendency for elites to dominate policy-making. In order to show that public deliberation matters more to legislative than to judicial decision-making, Professors Hills, Tushnet, and Waldron would have to offer some realistic model of how ordinary citizen opinions could influence elite decision-makers in legislative processes. They seem to assume that the mere fact of elections guarantee this outcome. Some leading analysts of political participation hold exactly the opposite view. Professor Benjamin Barber, for example, writes, “Electoral activity reduces citizens to alienated spectators—at best, watchdogs with residual and wholly passive functions of securing the accountability of those to whom they have turned over their sovereignty.”<sup>223</sup> According to Professor Robert Putnam, “voting and following politics” are “relatively undemanding forms of participation” in which citizens behave like “fans” who stay “in their seats, following the

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221. Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 *SUFFOLK U. L. REV.* 85, 87 (1999).

222. EISGRUBER, *supra* note 1, at 97. At least one political scientist has speculated that the American debate about abortion has been more vigorous than its Canadian counterpart not because the Supreme Court settled matters, but because the American political structure allowed pro-life groups so many different avenues to work around the decision. See KENNETH D. WALD, *RELIGION AND POLITICS IN THE UNITED STATES* 33–35 (1997).

223. BENJAMIN R. BARBER, *Neither Leaders nor Followers: Citizenship Under Strong Democracy, in A PASSION FOR DEMOCRACY: AMERICAN ESSAYS* 95, 98 (1998).

action and chatting about the antics of the star players.”<sup>224</sup> It is telling that when Professors Barber and Putnam describe the relationship of citizens to large-scale modern elections, they use the same metaphor—that of “spectatorship”—which my critics find singularly apt for the relationship of citizens to courts.

Perhaps Professors Barber and Putnam are mistaken, or perhaps there is some way to reconcile their views with those of Professors Hills, Tushnet, and Waldron. My critics here do not, however, offer models to back up their claims. Instead, they adopt different attitudes toward judicial and electoral decision-making.<sup>225</sup> When they discuss the judiciary, they take a skeptical, realist stance in which they disaggregate “the people” into individual persons and emphasize the disproportionate power of elites. When they discuss elections, they adopt a romantic stance in which they refer to “the people” or “the People” as though it were an unproblematic and self-evident collective actor, and in which they assume that a sympathetic ear awaits every citizen who goes to Washington. This asymmetric treatment of legislative and judicial institutions is, as I have said before, the central target of *Constitutional Self-Government*. It is an error to assume that government by the people is equivalent to government by elections or government by legislatures. In order to compare the impact of courts and legislatures on public deliberation, we must subject both to the same scrutiny. Perhaps, if Professors Hills, Tushnet, and Waldron do that, they will be able to show that judicial review is bad for public deliberation. As yet, however, they have not engaged the relevant questions.

## VI. How Should Courts Interpret the Constitution?

### A. Modes of Constitutional Interpretation

#### 1. The Vices of Technical Jurisprudence

In *Constitutional Self-Government*, I urge judges to recognize that constitutional interpretation will require contested moral and political judgments. I criticize originalism as predicated upon mistakes about how language works and what constitutions do.<sup>226</sup> I identify ways in which judges have tried to hide controversial judgments behind fallacious arguments about precedent, text, history, and tradi-

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224. PUTNAM, *supra* note 206, at 37.

225. As Martin Flaherty has observed, legal academics have a tendency to apply “strict scrutiny” to judicial institutions and “rational relationship” scrutiny to others. See Martin S. Flaherty, *Constitutional Assymetry*, 69 *FORDHAM L. REV.* 2073, 2075 (2001).

226. See Eisgruber, *supra* note 1, at 25–39.

tion.<sup>227</sup> I urge judges not to repeat these errors. I offer, in other words, a great deal of advice about what judges ought *not* to do when they decide cases or write opinions.

Professor Denvir makes a proposal consistent with those I recommend. He says that if I am correct about the Supreme Court's function, then Supreme Court Justices should not confine themselves to a "narrowly legal form of reasoning," but should instead adopt a "looser, but no less rational, form of discourse" in which "[s]tare decisis would play a less prominent role."<sup>228</sup> I take it that Professor Denvir has in mind something like the lucid, common-sense style of interpretation he uses in his own elegant book, *Democracy's Constitution: Claiming the Privileges of American Citizenship*.<sup>229</sup> Professor Denvir contends that if the Court were to adopt an openly political, non-legalistic mode of reasoning, its decisions would continue to be controversial, but they would be more "transparent."<sup>230</sup>

I am sympathetic to this suggestion, provided that it is not intended to deny *stare decisis* an important role in legal reasoning. In my view, respect for *stare decisis* can "improve the quality of judicial reasoning."<sup>231</sup> Moreover, Supreme Court Justices must create a stable body of precedent if they wish to guide the implementation of constitutional law by other federal and state courts. For that reason, I believe that precedent must figure more heavily in constitutional adjudication than in other, non-judicial forms of constitutional interpretation. I do not take Professor Denvir to deny these points. His claim is that courts should rely less on *stare decisis* when contested principles are at stake, not that they should ignore it. And with that general claim I agree:

## 2. How Should Judges Analyze Moral Questions?

In addition to urging that judges "resist the temptations of technical jurisprudence,"<sup>232</sup> I also give some examples of permissible or successful arguments. I try to justify, for example, the way that Justice Brandeis used history in his opinion in *Whitney v. California*.<sup>233</sup> I ex-

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227. See *id.* at 109–35, 149–53.

228. Denvir, *supra* note 129, at 34.

229. See generally John Denvir, *Democracy's Constitution: Claiming the Privileges of American Citizenship* (2001).

230. Denvir, *supra* note 129, at 34.

231. EISGRUBER, *supra* note 1, at 69.

232. *Id.* at 211.

233. *Id.* at 128–30 (discussing *Whitney v. California*, 274 U.S. 357, 375–78 (Brandeis concurring)).

plain why tradition might figure appropriately in some constitutional cases, and I construct an argument that might fill gaps in the Court's reasoning about sexual freedom.<sup>234</sup> I do not, however, give constitutional judges any sort of "cookbook" to get them through hard cases. I do not tell them whether to consult philosophy or history or the common law or microeconomic theory or what-have-you. I do not supply any interpretive methodology, and I do not say what an ideal opinion would look like.

Several of my critics implore me (with varying degrees of exasperation) to say more about how good judges should proceed.<sup>235</sup> I regret that I cannot satisfy them. As Professor Brown correctly anticipates, I believe that such "specificity is impossible or undesirable . . . the best that a sound constitutional theory can do is to free judges from the artificial and destructive constraints imposed by other theories, to go out and use their judgment as best they can."<sup>236</sup> I once thought differently. When I set out to write *Constitutional Self-Government* many years ago, my chief aim was to produce an account of the best method for reading the Constitution. Yet, as I worked to make my intuitions rigorous, I came to regard interpretive methodology as less important. The job of judges is not to produce aesthetically graceful readings of the Constitution. Nor is it to build elaborate or sophisticated theories. Instead, the judicial task in constitutional cases is to speak about justice on behalf of the people. For such a role, "jurisprudential technique is less important . . . than lawyers and scholars commonly suppose, and . . . what matters most is moral conviction and practical judgment."<sup>237</sup>

I readily agree, then, with Professor Brown when she recommends that judges should exercise "political judgment."<sup>238</sup> Professor Brown has done as much as anybody to explain what that would mean, and analyses like hers help to make the concept of judgment more concrete.<sup>239</sup> Still, in the end, I am not sure that my prescription gives much aid to a judge confronted with a hard case—except to tell her that she ought not flee the hard issues about morality and justice by concealing her judgments in the complexities of originalism, intratextualism, or some other legalistic doctrine. Other than that, her job is

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234. See Eisgruber, *supra* note 1, at 143–48, 157–61.

235. See, e.g., Brown, *supra* note 16, at 24; Hills, *supra* note 10, at 59–60.

236. Brown, *supra* note 16, at 24.

237. EISGRUBER, *supra* note 1, at vii.

238. Brown, *supra* note 16, at 25.

239. See Rebecca L. Brown, *Tradition and Insight*, 103 YALE L. J. 177 (1993).

to identify the hard questions, make honest judgments about them, and strive to test and explain her conclusions with whatever kinds of reasons seem most helpful and illuminating. What works best

is probably a matter of personal style and preference. What matters is not whether judges use historical and philosophical argument, or even how much they do, but rather that they understand the point of such argument: it should assist judges in their effort to speak about justice on behalf of the people.<sup>240</sup>

To be sure, I have no trouble identifying desirable versions of judging and opinion-writing. For example, I have elsewhere analyzed the basic elements of John Marshall's judicial style, and I have suggested that, contrary to common opinion, modern circumstances do not preclude today's judges from emulating Marshall.<sup>241</sup> He would be an ideal model. But I certainly do not want to suggest that judges need to achieve Marshall's virtuosity in order to do their jobs well. Nor do I want to suggest that there is anything in Marshall's style that would resolve substantive constitutional controversies. In constitutional judging, there is no methodological "holy grail" that will produce the right answers; as elsewhere in politics, there are only hard questions demanding tough judgments. The virtue of constitutional courts is that they provide officials with incentives to ask the right questions, not that the officials possess special methodological insight.

## **B. Discrete and Comprehensive Principles: What Is the Scope of Judicial Review?**

### **1. What Can Judges Do Well?**

In *Constitutional Self-Government*, I emphasize that judges must consider strategic as well as moral issues when deciding how to craft constitutional rules. I also argue that legislatures will sometimes be in much better position than courts to address the strategic difficulties raised by a moral principle. Legislatures' comparative advantage with regard to strategic matters will sometimes give courts good reason to defer to legislatures, even when courts are more likely to identify or respect the relevant moral principles. If courts lack the competence to resolve the strategic issues well, their insistence on principle will carry

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240. EISGRUBER, *supra* note 1, at 8, 70–71.

241. See Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1997 SUP. CT. REV. 439, 473–81 (1997).

few benefits—the road to bad policy, we might say, is paved with good intentions.<sup>242</sup>

In an effort to characterize the set of cases in which judges should defer to legislatures, I distinguish between “discrete” and “comprehensive” moral principles. This distinction draws fire from two of my critics, Professors Denvir and Tushnet. I will discuss the distinction and their criticisms shortly. First, however, I want to elaborate upon the intuition that underlies the distinction, both because the intuition helps explain the distinction and because I feel more strongly about the intuition than about the distinction. In that regard, consider a case I discuss at length in *Constitutional Self-Government: Timmons v. Twin Cities Area New Party*.<sup>243</sup> *Timmons* dealt with an issue about “fusion candidacies.” In a fusion candidacy, the state’s official election ballot lists a single candidate as having the endorsement of two different parties—usually one of the major parties (Republican or Democrat) and a smaller party. Where fusion candidacies are possible, they will likely increase the power of third parties, since small parties may be able to tip close elections by endorsing major party candidates. *Timmons* arose because Minnesota prohibited “fusion ballots”; the state said that no candidate could appear on the ballot as the nominee of more than one party. A candidate challenged the Minnesota law, claiming that it was unconstitutional (he said, in particular, that it was a restriction on his speech rights and on the rights of his political party). Minnesota defended the law by arguing, among other things, that fusion candidacies would undermine the two-party system, which, Minnesota claimed, was good for democracy.

The Supreme Court upheld the Minnesota law. Two leading commentators on election law, Samuel Issacharoff and Richard Pildes, have criticized the *Timmons* decision. They argue that Minnesota’s law is unconstitutional because it impedes the growth of third parties, entrenches the power of the two major parties, and hence diminishes the vigor and responsiveness of American democracy.<sup>244</sup> They argue,

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242. See Eisgruber, *supra* note 1, at 136–40, 168–69, 173–75. The leading works on the relationship between strategy and principle in constitutional adjudication are by Lawrence G. Sager. See, e.g., Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993); Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). On this topic, and on many others, I have been greatly influenced by Professor Sager’s work.

243. 520 U.S. 351 (1997).

244. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 683–87, 716–17 (1998).

in other words, that the law at issue in *Timmons* is unconstitutional because inconsistent with a constitutional principle of the following kind: "The government ought to foster a vibrant political process in which voters have real power to choose among meaningful alternatives." Because Professors Issacharoff and Pildes believe that third parties make democracy stronger, they believe that the Minnesota law is a bad one. It bears emphasis that Professors Issacharoff and Pildes regard this sort of argument as the only valid reason for holding the anti-fusion statute unconstitutional. They reject, for example, the argument that the Minnesota law was an unconstitutional imposition on the freedom of individual candidates.<sup>245</sup> For them, the claim in *Timmons* succeeds as a claim about the quality of the electoral process, or else it fails.

Professors Issacharoff and Pildes are surely correct that democracy benefits from vigorous electoral competition and that democracy suffers if elected elites stifle competition in order to entrench their own power. Their argument about *Timmons* depends, however, upon two speculative judgments of political science: first, that some kinds of third parties will make democracy stronger, not weaker; and, second, that "fusion ballots" will help to nurture third parties of the right kind. For all I know, Professors Issacharoff and Pildes may be correct about both assumptions. The claims are not, however, uncontroversial; some people believe, for example, that the two-party system is good for democracy and that third parties weaken it. I see no way to say with confidence whether Professors Issacharoff and Pildes are right in their speculative judgments. More to the point, I do not see any reason to think that judges will be able to figure out whether Professors Issacharoff and Pildes are correct. If *Timmons* is viewed in light of principles like those recommended by Professors Issacharoff and Pildes, strategic issues dominate moral ones, and, in my view, the case for judicial deference to legislatures is strong.

The distinction between "discrete" and "comprehensive" moral principles is an effort to generalize from examples such as *Timmons* and describe a group of cases in which judicial deference to legislatures is warranted. Comprehensive principles demand that "some system, considered as a whole, should treat people fairly."<sup>246</sup> With regard to *Timmons*, the principle that "electoral systems should promote vigorous competition" is comprehensive. Discrete principles, by contrast,

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245. *Id.* at 644-45, 685.

246. EISGRUBER, *supra* note 1, at 170.

“announce particularized side-constraints upon governance.”<sup>247</sup> With regard to *Timmons*, the principle that “government interferes with the expressive freedom of candidates whenever it prohibits them from listing multiple endorsements on official ballots” is discrete. On my argument, if judges accept this latter, discrete principle, they have no reason to defer to the legislature in *Timmons*. But if, like Professors Issacharoff and Pildes, judges believe that the latter principle is mistaken and that only the former, comprehensive principle justifies a finding of unconstitutionality, then, on my view, they ought to defer to the legislature.

In Chapter Six of *Constitutional Self-Government*, I apply the distinction between “discrete” and “comprehensive” principles to a variety of constitutional cases relating to elections, federalism, and the separation of powers. I suggest that in many of these cases, the only relevant, compelling moral principle deals with the overall fairness of some political process, and I argue that the Supreme Court has been too willing to interject itself into such cases. The Chapter recommends that judges should “enforce constitutional restrictions on institutional reform only in relatively exceptional cases, such as when there exists a morally justifiable side-constraint on the government’s institutional options, or when the reform deals with an area in which the judiciary has special expertise.”<sup>248</sup> The examples that rivet the attention of Professors Denvir and Tushnet, however, come earlier in my discussion, when I suggest that economic rights (of both conservative and liberal varieties) implicitly depend upon comprehensive arguments about the fairness of the economic system.<sup>249</sup> Unhappy with my treatment of economic rights, they advance two objections to my distinction between discrete and comprehensive principles: first, that it is conceptually unsound, and, second, that even if sound, it inappropriately limits the range of principles that receive judicial protection.

## 2. Is the Distinction Coherent?

Professors Denvir and Tushnet both claim that my distinction is useless because any constitutional issue can always be framed in terms of discrete or comprehensive moral principles. So, for example, Professor Denvir suggests that the issue in *Timmons*, where I recommend against judicial intervention, might be posed in terms of a right of “political association” that forbids states to “tell political parties with

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247. *Id.* at 170.

248. *Id.* at 204.

249. *See id.* at 165–66.

whom they can associate.”<sup>250</sup> Professor Denvir correctly characterizes this principle as discrete rather than comprehensive. Professor Denvir also notes that, on my own account, the issue in *Times v. Sullivan*<sup>251</sup> can be framed in terms of either discrete or comprehensive principles. I defend judicial intervention with regard to libel laws on the basis of a principle that “the government must not penalize persons for criticizing its officials or policies.”<sup>252</sup> I regard this principle as discrete. I acknowledge in a footnote, however, that there are several more comprehensive principles relevant to *Sullivan*, such as “the government is obliged to facilitate robust and open debate.”<sup>253</sup> Professor Denvir concludes that the distinction between discrete and comprehensive is almost infinitely malleable and hence unattractive.<sup>254</sup> Professor Tushnet reaches a similar conclusion.<sup>255</sup>

Professors Denvir and Tushnet are right up to a point. By itself, the distinction between discrete and comprehensive principles has virtually no concrete entailments. To matter, it must be combined with the substantive political judgments of a particular constitutional interpreter. At that point, however, it acquires real bite. The prescriptive implications for a judge might be put this way:

Decide whether there is a discrete moral principle *that is persuasive to you* and that justifies the right claimed in the case. If so, uphold the right. If not, defer to the legislature, even if you think the claim of a right might be a legitimate application of a comprehensive moral principle.

It is irrelevant whether there exist discrete moral principles if those principles are *not* persuasive to the judge in question. Likewise, if there does exist a discrete moral principle that is persuasive to the judge and justifies the claimed right, it does not matter if there exist more comprehensive principles that also justify the claimed right.

With these observations in mind, we may return to *Timmons*. Consider Professor Denvir’s proposed principle: State legislatures ought not to tell parties with whom they can associate. That principle is not only discrete but attractive. It is unclear, however, whether it justifies finding Minnesota’s law unconstitutional. I think it does not. Minnesota is only restricting the identifying information that can appear on

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250. Denvir, *supra* note 129, at 31.

251. 376 U.S. 254 (1964) (holding that the First Amendment protects critics of public officials from libel suits, except when they proceed with “actual malice”).

252. EISGRUBER, *supra* note 1, at 172.

253. *Id.* at 243 n.7.

254. See Denvir, *supra* note 129, at 32.

255. See Tushnet, *supra* note 10, at 78–82.

the official ballot. The state is not prohibiting anybody from joining a particular party, nor is it prohibiting parties from announcing or publishing endorsements of other parties' nominees. I accordingly do not believe that the freedom of association is at stake in the case. A judge who shared my judgments in this regard would have to consider whether there was any other discrete principle that was both persuasive and able to justify the claimed right. She might consider, for example, whether there is a principle that protects the expressive freedom of candidates to list political affiliations on the election ballot. Such a principle is discrete, and, were it valid, it could justify the right claimed in *Timmons*. In my view, though, the principle is unappealing. I do not believe that it makes sense to say that a society is better off, from the standpoint of justice, simply because political candidates are free to list multiple party affiliations on a ballot.<sup>256</sup> In other words, the value of fusion candidacies strikes me as entirely dependent upon their instrumental relationship to the quality of the electoral process; they are not independently valuable as a manifestation of individual liberty. So I tend to agree with Professors Issacharoff and Pildes that the constitutionality of the anti-fusion statute stands or falls on whether it impedes electoral competition—it stands or falls, in other words, on the basis of its consistency with a moral principle that is comprehensive rather than discrete.

Of course, you may not agree with all of the (many) controversial judgments expressed in the preceding paragraph. You might believe that the freedom of association or the expressive freedom of candidates is at stake in some important way in *Timmons*. If so, you could reject my conclusions about *Timmons* even if you agreed with my general suggestion that judges should not intervene on the basis of comprehensive moral principles. That does not, however, prove that the distinction between discrete and comprehensive principles is infinitely malleable or indeterminate. It proves only what I have already said—namely, that the distinction acquires traction only when combined with the moral and political judgments of particular persons. Like the other elements of my theory, the distinction between discrete and comprehensive moral principles supplies no “cookbook” that prescribes the outcome for controversies independently of the political judgments of particular officials and interpreters. Instead, it is part of a conceptual and institutional framework that produces determi-

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256. By contrast, it makes perfectly good sense to say that a society is better off, from the standpoint of justice, insofar as people are at liberty to join whatever political party most appeals to them.

nate decisions only when combined with the controversial judgments of the people who inhabit it.

### 3. Is the Distinction Helpful?

Professors Denvir and Tushnet also argue that my distinction, even if it can be made 'determinant, is a poor benchmark against which to test whether judges should intervene. Professor Tushnet's treatment of this point is especially elaborate and interesting. He offers the South African Constitutional Court's decision in *South Africa v. Grootboom*<sup>257</sup> as evidence that there are "forms of judicial review in which the demands on the courts' ability to make strategic judgments are dramatically reduced."<sup>258</sup> *Grootboom* dealt with homeless persons who sought recognition of a constitutional right to housing. The claimants invoked provisions of the South African Constitution that guarantee "'access to adequate housing' and [impose] on the state . . . a duty to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.'"<sup>259</sup> The Court granted relief of a limited form. It issued what Professor Tushnet calls an "order to plan."<sup>260</sup> The Court did not compel the government to provide the plaintiffs in *Grootboom*, or anybody else, "with housing in short order."<sup>261</sup> Instead, it obliged the government to develop a housing plan that included "a component catering for those in desperate need."<sup>262</sup>

Professor Tushnet plausibly suggests that decrees of this kind may reduce the importance of my distinction between discrete and comprehensive principles. He acknowledges that it would have been a mistake for the *Grootboom* Court, or any other court, to frame an injunction that would "spell out the requirements of distributive justice in detail."<sup>263</sup> But the choice, Professor Tushnet emphasizes, is not an all-or-nothing one between specifying such an injunction or else staying out completely. The Court found a middle ground by recognizing a duty to plan. Professor Tushnet concedes that this duty is "no panacea"; it may have perverse consequences.<sup>264</sup> But that is true of judicial remedies in other cases, too, including those that involve what

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257. 2000 (11) BCLR 1169 (CC).

258. Tushnet, *supra* note 10, at 86.

259. *Id.* at 83.

260. *Id.*

261. *Id.*

262. *Id.* (quotations omitted).

263. *Id.* at 84.

264. *Id.* at 83.

I call “discrete principles.” The crucial point is that “a judicial requirement of planning is a strategic adaptation to the limits of judicial competence” to enforce comprehensive principles.<sup>265</sup> In *Timmons*, for example, a Court might perhaps have required Minnesota to develop a plan to ensure the existence of vibrant electoral competition.<sup>266</sup>

Professor Tushnet and I disagree less than he supposes. I am receptive to the idea that courts might make a useful contribution to the pursuit of comprehensive principles, provided that their intervention is structured in the right way. Indeed, I suggest in *Constitutional Self-Government* that “[i]f we want the benefits of judicial involvement in questions of political structure, but worry that judges will make strategic errors, we might encourage judges to impose restrictions subject to congressional revision—just as they do under . . . dormant Commerce Clause jurisprudence.”<sup>267</sup> I cite to Professor Michael Dorf’s arguments about “provisional adjudication” (Professor Tushnet refers, in the same connection, to related work).<sup>268</sup> I also had in mind the arguments of Professor Helen Hershkoff about state court constitutional jurisprudence, where, as she observes, various mechanisms (including the flexible amendment procedures of state constitutions) have sometimes facilitated fruitful partnerships between courts and legislatures.<sup>269</sup>

Professor Tushnet’s suggestion, recommending “orders to plan” and other kinds of injunctions, strikes me as another possible way to deal with the strategic challenges associated with comprehensive principles. I am happy enough to refine what I say in *Constitutional Self-Government* to accommodate this point: Although comprehensive principles require greater judicial deference to legislatures than do dis-

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265. *Id.* at 84.

266. Minnesota might be able to do that with relatively little trouble, since, despite its anti-fusion provision, the state’s election laws are actually relatively favorable to third parties and independent candidates. That is one reason why Jesse Ventura was able to become the state’s governor. See Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1617–18 (1999). On the other hand, it is not wholly clear what it would mean for Minnesota to have a plan for “cultivating real electoral competition.” It is possible that we are in fact dealing with a relatively discrete principle when we talk about housing rights for the most desperate citizens, as compared to when we talk about ensuring vibrant electoral competition.

267. EISGRUBER, *supra* note 1, at 203.

268. Michael Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60–73 (1998). Professor Tushnet cites to Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998), see Tushnet, *supra* note 10, at 20 n. 84.

269. See Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

crete ones, that deference need not be complete. Deference may be implemented through devices such as “orders to plan” or “provisional adjudication” rather than through pure abstention (it is, of course, a separate question, about which I take no position: whether “orders to plan” are likely to do more good than harm).

More generally, if we wish to develop a complete treatment of how judges should respond to strategic questions, we would have to consider a wide variety of factors. Some of these factors will, like the distinction between discrete and comprehensive principles, pertain to the structure of moral judgments. Other factors will pertain to the institutional structures that govern interaction between courts and other political institutions. These structures include constitutional amendment rules, varieties of judicial injunctions, and mechanisms for obtaining judicial reconsideration of past decisions. How one integrates these factors will depend heavily upon one’s own judgments about the strategic acumen of judges, and, as I concede in *Constitutional Self-Government*, some thoughtful commentators take a more optimistic view of judicial abilities than I do (Professors Issacharoff and Pildes, in particular, present evidence from German constitutional practice to suggest that judges can do a good job with some complex questions about electoral processes).<sup>270</sup> I believe that the distinction between discrete and comprehensive principles is a useful part of this story. It highlights one element that renders some constitutional questions resistant to judicial treatment. It also helps to identify conceptual links between domains that are usually treated separately. So, for example, in *Constitutional Self-Government* I try to show how constitutional questions about election law and federalism have a common structure; they depend upon comprehensive principles of a similar kind, so that, as a *prima facie* matter, one ought to favor judicial intervention in both cases or in neither. But even if the distinction between discrete and comprehensive principles is useful, it is still only part of the story about judicial competence, not all of it, nor the end of it.

## Conclusion

As Professors Denvir and Brown rightly observe,<sup>271</sup> the “counter-majoritarian difficulty” has had a long run in constitutional theory. Worried that judicial review is undemocratic, constitutional theorists

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270. See EISGRUBER, *supra* note 1, at 175; Issacharoff & Pildes, *supra* note 244, at 690–99.

271. See Denvir, *supra* note 129, at 28; Brown, *supra* note 34, at 531–33. Barry Friedman’s work details the genealogy of the obsession. See, e.g., Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part IV: Law’s Politics*, 148 U. PA. L. REV. 971 (2000).

have sought either to curtail the practice or to develop sophisticated methodologies that enable judges to escape the hard judgments demanded by the Constitution's open-ended language. Academic distress over political decision-making by judges has ebbed and flowed, but it seems now to be again at high tide.<sup>272</sup> Liberal academics disappointed with the Rehnquist Court have increasingly embraced populist rhetoric once associated with conservative opponents of the Warren Court. Judge-bashing is in vogue, and professors clamor about handing the Constitution back to "the People." Now, if only the People would step forward and accept it.

Therein lies the difficulty, of course. In a large nation-state, the people cannot assemble, deliberate, or decide as a whole. They act only through various institutions, all of which are imperfect representations of the people. Every modern democracy therefore harnesses a complex array of institutions to represent the people. It is hard to imagine how any such polity could get by without assigning substantial political authority to courts, if not through judicial review then through the enforcement of very abstract statutes. Indeed, when the champions of legislative government look for illustrations of legislatures at their best, their preferred examples of principled legislation frequently involve statutes, such as Title VII or the Religious Freedom Restoration Act, that call upon courts to make difficult and highly contestable judgments.<sup>273</sup>

In *Constitutional Self-Government*, I have tried to explain why political decision-making by judges, including the practice of judicial review, is consistent with basic democratic principles. The combination of courts, legislatures, and electorates (and the combination of national, state, and local institutions) may in fact implement democracy better than any one or two of those institutions could do if taken alone. My critics have directed vigorous and thoughtful objections against my position. Their insights have pushed me to refine and expand upon the arguments of *Constitutional Self-Government*. They have demonstrated the need for continued discussion about what form judicial review should take in the United States. They have provided reasons why not every nation need embrace judicial review (although most seem now to have done so, in one form or another). In my view,

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272. For varying degrees of skepticism and populism, see, e.g., NAGEL, *supra* note 124; RICHARD D. PARKER, *HERE THE PEOPLE RULE* (1994); TUSHNET, *supra* note 65; WALDRON, *supra* note 22; Larry Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5 (2001); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

273. See, e.g., Waldron, *supra* note 10, at 103, 112.

however, the critics have not advanced any good reason to suppose that judicial review is undemocratic.

That conclusion matters. In American politics today, the real question is about how to practice judicial review, not whether to get rid of it. The flawed democratic theory that regards judicial review as undemocratic will accordingly have the same consequences that it has always had: It will induce people to berate America's judges for doing what their task requires them to do, which is to make tough, politically controversial judgments. It will not, in other words, cause us to abandon judicial review or give us a more robust legislature. It will only give us a timid, wavering version of judicial review.

We have good reason to resist that outcome. Constitutional theory's populist turn comes at a precarious moment. The nation confronts a security crisis, and people worry, with real justification, about the presence of terrorists among us. In our country's history, weaker threats have induced shameful violations of civil liberties. American courts have usually acquiesced rather than resisted. It is too early to say what will happen this time, but some judges, such as District Judge Shira Scheindlin in New York, have stood up for principle.<sup>274</sup> She and other brave judges will undoubtedly feel the heat of criticism from legislators and other officials who are more sensitive to the majority's security than to the rights of a minority. It would be tragic if the judiciary's enemies were to derive sustenance from theories that, although sympathetic to the cause of liberty, cling to the mistaken assumption that judicial review and democracy are inevitably at odds with one another.<sup>275</sup>

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274. See, e.g., Mark Hamblett, *Material Witnesses' Detention Narrowed*, N.Y.L.J., May 1, 2002, at 1. Judge Scheindlin ruled on statutory, rather than constitutional, grounds. Attorney General John Ashcroft immediately declared that "one trial judge in New York represents an anomaly."

275. It is encouraging that some of the world's leading jurists have begun to insist upon a pro-democratic account of judicial review. That theme is, for example, a prominent topic in Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245 (2002). Three years earlier, Justice Dieter Grimm of the German Constitutional Court wrote that "the decision pro or contra judicial review is not one of principle but one of pragmatics. The choice has to be made between different types of democracy, not between democracy and judicial review." Dieter Grimm, *Constitutional Adjudication and Democracy*, 33 *Isr. L. Rev.* 193, 201 (1999).