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CONSTITUTIONAL DEMOCRACY AND THE LEGITIMACY OF JUDICIAL REVIEW*

ABSTRACT. It has long been argued that the institution of judicial review is incompatible with democratic institutions. This criticism usually relies on a procedural conception of democracy, according to which democracy is essentially a form of government defined by equal political rights and majority rule. I argue that if we see democracy not just as a form of government, but more basically as a form of sovereignty, then there is a way to conceive of judicial review as a legitimate democratic institution. The conception of democracy that stems from the social contract tradition of Locke, Rousseau, Kant and Rawls, is based in an ideal of the equality, independence, and original political jurisdiction of all citizens. Certain equal basic rights, in addition to equal political rights, are a part of democratic sovereignty. In exercising their constituent power at the level of constitutional choice, free and equal persons could choose judicial review as one of the constitutional mechanisms for protecting their equal basic rights. As such, judicial review can be seen as a kind of shared precommitment by sovereign citizens to maintaining their equal status in the exercise of their political rights in ordinary legislative procedures. I discuss the conditions under which judicial review is appropriate in a constitutional democracy. This argument is contrasted with Hamilton's traditional argument for judicial review, based in separation of powers and the nature of judicial authority. I conclude with some remarks on the consequences for constitutional interpretation.

The authority of American courts to review and declare unconstitutional popularly enacted legislation is an aspect of our constitution that strikes many as inconsistent with the idea of democracy. As H.L.A. Hart says, English political and legal thinkers find this "extraordinary judicial phenomenon" to be "particularly hard to justify in a democracy".[1] Sidney Hook makes a similar claim: "Those who defend the

* I am indebted to John Rawls and Burton Dreben for their helpful advice and their comments on an earlier draft of this paper.

[1] H.L.A. Hart, 'American Jurisprudence Through English Eyes', in *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), p. 125.

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theory of judicial supremacy cannot easily square their position with any reasonable interpretation of the theory of democracy".[2] These misgivings are not new; they have been expressed since our beginnings. Thomas Jefferson held judicial review to be "a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy".[3] "The people themselves are the only safe depositories of government", he said, and that implies "absolute acquiescence in the decisions of the majority – the vital principle of republics, from which there is no appeal but force".[4]

Throughout much of our history, judicial review has been exercised in ways that are incompatible with any reasonable interpretation of democracy. Still, I believe there is a way to conceive of democracy and the role of judicial review within it which allows it to be consistent with democratic institutions. My basic claim is that the set of moral principles and ideals that best justify democratic decision-making processes provide a justification for the institution of judicial review under appropriate circumstances. In arguing for this, I do not mean to engage in a fruitless dispute regarding the meaning of the term "democracy". Different forms of government can be said to be democratic in one respect or another. Rather, what I aim to do is inquire into the reasons we hold equality of political rights and majority rule to be central to democratic government and society. This will provide a basis for ascertaining the institutional requirements of the democratic ideal of freedom and equality. It is with respect to these requirements that I will assess the philosophical claim that judicial review is, not simply in its practice but also by its nature, inherently undemocratic. I argue that this *a priori* claim is without foundation, and that under certain conditions judicial review can serve to maintain and promote the same ends that justify equal political rights and majority rule.

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[2] Sidney Hook, *The Paradoxes of Freedom* (Berkeley: University of California Press, 1962), p. 95.

[3] Letter to William Jarvis, in P. L. Ford, ed., *The Writings of Thomas Jefferson*, vol. 10, pp. 160–61.

[4] Koch and Pender, eds., *The Life and Selected Writings of Thomas Jefferson* (New York: Random House, 1944), p. 324.

It might be asked what practical importance there can be in raising the question of the legitimacy of judicial review anew. Judicial review is taken for granted within our constitutional system. Questions of its legitimacy no longer arise among lawyers, politicians, or the public. Constitutional debate now centers on specific constitutional issues, and on such questions as the scope of the Court's authority of review, standards of review, and the nature of constitutional interpretation. But all of these issues are connected. Many of the arguments cited in public debate for judicial restraint or against the Warren Court's liberal readings of the Due Process or Equal Protection Clauses are reformulations of earlier objections to the Court's claim to final authority to interpret the constitution. Whatever reasons there are for or against judicial review, they retain their force when applied to issues of constitutional interpretation. My feeling is that we can finally resolve controversial constitutional issues only if we can come to a public understanding of the requirements of a constitutional democracy and the proper role of the judiciary therein.

My discussion proceeds as follows: In Section I, I discuss the philosophical background that gives rise to the dispute over the legitimacy of judicial review. Then in II, I reformulate the traditional objection and examine the conception of democracy upon which it is based. Section III sets forth the bases for an alternative conception of democracy that stems for the social contract tradition. Section IV contains the core of the argument for judicial review. I contend that if we conceive of democracy as a form of sovereignty and not merely a form of government, then judicial review can be construed as a shared precommitment by free and equal citizens to maintain the conditions of their sovereignty. Whether it is appropriate in a particular democratic constitution depends on strategic considerations. In V, I contrast this argument with Hamilton's argument for judicial review from the nature of judicial power, and in VI, I discuss the circumstances under which judicial review is appropriate. Section VII contends that judicial review, if appropriately exercised, does not undermine the bases of democracy. I close in section VIII with some remarks on the consequences for constitutional interpretation.

I. PHILOSOPHICAL BACKGROUND

Inevitably one's view regarding the democratic legitimacy or role of judicial review must turn upon how he conceives of democracy. According to one common view, what democracy essentially involves is equal consideration of and responsiveness to everyone's interests in deliberations on laws and social policies. This way of conceiving of democracy is amenable to a range of philosophical views, but it is most closely associated with utilitarianism. There is nothing intrinsic to utilitarianism that would require majoritarian legislative procedures; whether democracy, conceived as equal representation and majority rule, is an appropriate scheme of institutions depends upon social and historical circumstances. And, as is well known, majority voting procedures as traditionally defined are ill-suited to reflect the intensity of individuals' preferences, which is essential to utilitarian calculations. Still, it can be argued that under modern conditions, and because of their simplicity, majoritarian legislative procedures incorporating equal representation and responsiveness to individuals' preferences approximate more closely than any practicable alternative the decisions that would be realized under a more precise utilitarian calculus. One might then conclude that what underlies and justifies our concern for democracy and majority rule is that they are the most workable procedures for determining the balance of preferences in favor of particular laws.

Considerations like these underlie many objections to judicial review, or to the exercise of that power in cases that do not involve maintaining the integrity of majoritarian legislative procedures.[5] Judi-

[5] This kind of argument underlies John Ely's conception of democracy and judicial review. On Ely's affinities with utilitarianism, see his *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), pp. 187, n. 14 and 237–38, n. 54; see also his, 'Constitutional Interpretivism, Its Allure and Impossibility', *Indiana Law Journal* **53** (1978): 339, 405–08, where he argues that the appeal of democracy can best be understood in terms of its connection with utilitarianism. Also see Jonathan Riley, 'Utilitarian Ethics and Democratic Government', *Ethics* **100** (Jan 1990): 335–48, who argues that in the absence of interpersonal comparability, utilitarians are necessarily democratic.

cial reversals of majority decisions violate the basic democratic principle of equal consideration of everyone's interests, which majority procedures are designed to accommodate. This is a forceful, though I believe misguided, conception of democracy, its bases, and the role of judicial review. I suggest that we approach these issues from a different perspective.

Appeal to the common interest is a convention of democracy; laws are commonly argued for and social institutions are claimed to be justified on grounds that they promote the good of everyone. This convention proceeds from the premise that the interests of all are not simply to be considered but also are to be advanced by government decisions. To ground these commonplace ideas, suppose democracy is represented in the following way: Rather than seeing democracy essentially in procedural terms, we might conceive its essential features in terms of the equal freedom and independence of its citizens. This fundamental democratic value is specified by equal rights of self-determination, and equal participation in the political procedures that settle laws and basic social institutions affecting citizens' life-prospects. The focus here is not upon individuals' unconstrained preferences and their equal consideration in (maximizing) the aggregate satisfaction of interests, but upon the capacity and interest of each person to rationally decide and freely pursue his interests, and participate on equal terms in political institutions that promote each person's good.

While not confined to a specific tradition in democratic thought, this family of ideas – equal freedom, equal rights, and equal political participation – is central to the natural rights theory of the social contract tradition of Locke, Kant, and Rousseau, and to the modern version of that tradition, Rawls's justice as fairness. It is from this perspective that I shall frame my inquiry into the bases of equal political rights and majority rule, and assess the force of the argument that judicial review is anti-democratic. Ultimately, the case for or against judicial review comes down to the question of what is the most appropriate conception of a constitutional democracy. I proceed from the assumption that the basic ideas underlying the social contract tradition capture our commitment to democratic forms better than any theoretical alternative.

If we see the question of the legitimacy of judicial review in that context, then it is no longer a foregone conclusion that judicial review is undemocratic. Instead, the debate becomes an instance of a larger conflict within democratic thought. This conflict is best described in terms of the tension that exists when we attempt to combine the ideals expressed in Rousseau with those of Locke.[6] It is the conflict between citizen's exercise of their equal rights of political participation and the various civil and social rights which we feel should not be subject to political abridgement or calculation. The legitimacy of judicial review ultimately depends upon how we strike the balance between these two sets of potentially conflicting rights.

II. THE PROCEDURAL CONCEPTION OF DEMOCRACY AND ITS LIMITS

Let's return and consider the bases given for the categorical objection to judicial review: it is contrary to the will of the majority. This is Jefferson's objection. As Alexander Bickel states it:

> The root difficulty is that judicial review is a counter-majoritarian force . . . [This] is the reason the charge can be made that judicial review is undemocratic . . . Although democracy does not mean constant reconsideration of decisions once made, it does mean that a representative majority has the power to accomplish a reversal.[7]

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[6] I am grateful to Professor Burton Dreben for the suggestion that the dispute over judicial review is best seen in these terms. The contrast is stylistic, and reflects a common perception of these two figures. It is interesting to note that while Locke provided for no institutional mechanism for resolving constitutional disputes, Rousseau did; he envisions an institution with powers of constitutional review. See *On the Social Contract*, Bk. IV, ch. 5, 'On the Tribunate', where he discusses the need for a body, with no share in legislative or executive power, "to protect the sovereign [people] against the government'. He says, "A well-tempered tribunate is the firmest support of a good constitution. But if it has the slightest bit too much force, it undermines everything".

[7] Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), pp. 16–17. Jesse Choper puts the objection in this way: "[W]hen [courts]

A related reason offered to support the claim of the undemocratic nature of judicial review is that judges are not electorally accountable to the majority. As John Ely says:

> The central problem of judicial review is: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.[8]

To formulate the basic problem of judicial review in terms of its being contrary to majoritarianism and electorally accountable policy-making focuses upon symptoms of what must be a deeper problem. Constitutionally, federal judges in the United States are appointed by the executive, with life tenure subject to good behavior. There are good reasons for this practice, some having to do with judicial review. But the fact that federal judges are not accountable to the majority is an institutional fact about the constitution of our national government. Judges could be elected to office for a set term, as they are in many states' systems, and reservations about judicial review would remain. The basic problem with judicial review is not that judges are not electorally accountable to majority will. Instead it must be that the exercise of this power works as a constraint upon the equal right of citizens in a democracy to take part in and influence the government decision-making processes that significantly affect their lives.

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exercise the power of judicial review to declare unconstitutional legislative, executive, or administrative action – federal, state, or local – they reject the product of the popular will by denying policies formulated by the majority's elected representatives or their appointees . . . . Not merely antimajoritarian, judicial review appears to cut directly against the grain of traditional democratic theory". Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980), p. 6. Both Bickel and Choper argue review is still needed to promote moral values (Bickel) and protect minorities' rights (Choper).

[8] Ely, *Democracy and Distrust*, pp. 4–5. Michael Perry concurs: "In our political culture, the principle of electorally accountable policymaking is axiomatic; it is judicial review, not that principle, that requires justification". M. Perry, *The Courts, the Constitution, and Human Rights* (New Haven: Yale University Press, 1982), p. 9.

The basis for the objection that judicial review is undemocratic is expressed by the following principle: In a democracy citizens are to have an equal right to participate in and to determine the outcome of the constitutional and legislative processes which establish the laws with which they are to comply. I call this, following Rawls, the principle of equal political participation.[9] I assume that this principle is a constitutional requirement of democracy. The constitution of any government, whether written or unwritten, is that system of highest-order rules for making and applying those social rules recognized as laws. As such it defines the basic laws and processes necessary for the enactment and application of valid laws. The constitution of a democracy is designed in accordance with the principle of equal participation. Each citizen is to have an equal right to take part in constitutional processes that establish laws and basic social institutions.

The basic objection to judicial review might now be reformulated in the following way: judicial review, since it involves the authority to overrule legislation enacted through procedures that accord with this principle, is a limitation upon citizens' equal rights of participation. It does not matter whether the judges making these decisions are electorally accountable or not. By exercising their equal political rights through legislative procedures designed to accommodate them, citizens have already made as democratic a determination as can be made. So even if presiding judges are elected and can be recalled, the damage has already been done. The Court's revocation of popularly enacted measures can be overridden only by constitutional amendment, requiring far more than a (bare) majority for enactment.

All of these arguments assume that equal political rights requires rule by a bare majority. Later (in IV) I contend that the connection between equal participation and bare majority rule is not as straightforward as it is often taken to be in arguments against judicial review.

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[9] John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971), p. 221ff. Cf. San Antonio Independent School District vs. **Rodriguez**, 411 U.S. Reports 1, at 34, n. 74 (1973), where the Supreme Court says (quoting from Dunn v. Blumstein, 405 U.S. 330 (1972)): "[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens".

But for now consider a more general question: How are we to conceive of democracy if any of these objections are to succeed? There are but two alternatives. First, we might understand democracy in purely procedural terms. By a procedural conception of democracy I mean the identification of democracy with a form of government decision-making where each is guaranteed equal rights of participation and influence in procedures that determine laws and social policies, and where decisions are reached in accordance with the principle of bare majority rule. A procedural conception of democracy involves no substantive restriction upon the outcomes reached by legislative determinations, other than those rights necessary to sustain legislative procedures themselves.[10]

The second view holds that though democracy involves substantive requirements on the kinds of law that may be enacted and enforced, still decisions on the nature and interpretation of these restrictions must be decided as required by the principle of equal participation and majority rule. This conception of democracy often underlies the objection that the legislative branch should have exclusive authority to interpret the constitution.[11] This implies that decisions about the

[10] Brian Barry defines a procedural conception: "I follow . . . those who insist that 'democracy' is to be understood in procedural terms. That is to say, I reject the notion that one should build into "democracy" any constraints on the content of outcomes produced, such as substantive equality, respect for human rights, concern for the general welfare, personal liberty or the rule of law . . . . The only exceptions . . . are those required by democracy itself as a procedure". B. Barry, 'Is Democracy Special?' *Philosophy, Politics, and Society*, (fifth series), ed. P. Laslett and J. Fishkin (Oxford: Blackwell's, 1979), pp. 155–56. William Nelson, *On Justifying Democracy* (London: Routledge & Kegan Paul, 1980), p. 3, also defines democracy in this way. Terrance Sandalow argues, apparently on utilitarian grounds, that a purely procedural conception is morally sufficient, and that judicial interference with legislative process is nothing more than the substitution of preferences of a minority (viz., judges and those whose interests they represent) for those of a majority. See 'The Distrust of Politics', *N.Y.U. Law Review* **56** (1981): p. 446.

[11] This seems to be the conception of democracy underlying Michael Walzer's objections to judicial review in 'Philosophy and Democracy', *Political Theory* **9** (1981): p. 379.

nature and extent of constitutional limitations on laws can only be decided through the very procedures that these restrictions are intended to limit. Whatever force this objection to judicial review has must be established, I believe, on empirical grounds which show that the substantive requirements of democracy are always on balance better realized if their final interpretation is left up to legislative authority. Though I doubt this can be confirmed, I will not argue the point. My concern is the purely philosophical objection that stems from a procedural conception.

Now, of course if democracy is simply defined in procedural terms as a matter of stipulation, then it is trivial that judicial review is undemocratic. But this is not an argument, for stipulative definitions carry no argumentative weight. A purely procedural definition of democracy is fine, perhaps, for certain purposes, so long as it is recognized for what it is. What I find problematic about this account of democracy, however, is that it unduly focuses our attention upon but one aspect of societies that we think democratic to the exclusion of other features that are equally important. It then leads us to ignore the background conditions for stable democratic regimes, as well as the normative requirements of the values and ideals that underlie our commitment to democratic forms.

To see this we only need consider the nature of political procedures and the principle of majority rule. No one would argue that the mere fact that a person makes a decision makes that decision right. The same holds true of group decisions, whether by simple or special majority rules. We have criteria for assessing the rightness of outcomes resulting from any actual political decision-making procedure, no matter how fair or appropriate that procedure may be. Furthermore, there is no practicable way to design a political procedure which would guarantee that the results reached by satisfying its requirements would always correspond to moral criteria of assessment. These points are but examples of the more general rule that principles specifying what is right or fair to do (in this case, following certain procedures) can sometimes conflict with and be outweighed by other principles of right and justice. There are moral limits to the extent of the exercise of equal political rights through majority legislative procedures, and

there is no assurance that these limits always will be respected by the workings of these procedures.[12]

Given these limits on majority rule, the question is whether they can be defined in a way that is consistent with democratic ideals. Can it be argued that majority rule procedures may under certain circumstances work out in such a way that their results can be judged to be not simply unjust, but also undemocratic? One way this might occur is when majority decisions result in limitations on citizens' equal political rights by outright denial of their right to vote, or dilution of their voting rights by malapportionment. Violations of this sort are familiar in American constitutional law. But these are not the only way legislative outcomes can be judged undemocratic. There are structural requirements central to democracy other than equal participation and majority rule.

The absence of a hereditary governing aristocracy holding real positions of political power from which other classes are by law excluded is arguably an important feature of democracy insured by equal political rights. For equal participation requires not only an equal voice and vote, but also equal access to political offices. But to argue against the setting aside of non-political positions for hereditary classes, we need appeal to considerations other than equal political rights. The lack of an aristocracy is but an instance of a larger rule characterizing, if not actual practice, then at least the public ideals of modern democracies. Namely, the absence of social and confessional class systems limiting access to social and political offices to members of favored groups. The most familiar instance of such classes are racial and ethnic groups. But social class systems are also definable in terms of religious, moral, and political affiliations, and in terms of property and wealth. In modern democracies, not being a member of favored religious persuasions or political parties does not generally provide legal grounds for excluding people from social and political offices, any more than does not being a member of favored hereditary or

[12] To use Rawls's phrase, no political procedure is an instance of perfect procedural justice. Rawls, *Theory of Justice*, pp. 85, 359.

racial groups. But, again, there is nothing inherent in equal political participation and majority rule that would prevent the exclusion of such unfavored classes from social offices and positions.

That persons not be excluded from social and political positions on grounds of race, sex, or wealth is associated with equality of opportunity, and that they not be excluded for reasons of religious, moral, or political affiliation has also to do with liberty of conscience and freedom of thought. Equal opportunities and toleration of diverse religious, moral, and philosophical views are important aspects of modern democratic societies; if they are not fully allowed for in practice, they are at least publicly assented to as ideals to be obtained under more favorable conditions.

There are other background conditions of modern democracies not guaranteed by equal political participation. All citizens of modern democracies are entitled to own and transfer property (however this institution is defined), to enter into contracts, and to engage in other civil activities subject to whatever disabilities are recognized by law. These are important civil, as opposed to political, rights. Also, each has such equal rights of legal process as the right to a jury trial with representation by counsel, the right to bring suits to redress civil grievances, and the right against self-incrimination, all of which are subsumed under legal equality. Beyond this, the very idea of the rule of law, though not peculiar to democracy, is nonetheless taken to be one of its conditions. But again, there is nothing inherent in equal participation and majority rule that would prevent violations of the many rights that come under this ideal: impartial, fair and open trials; rules of evidence guaranteeing rational procedures of inquiry; publicly promulgated and clearly defined laws; prohibitions against ex post facto laws and bills of attainder; an absence of executive fiat, etc.

Finally, an important feature of democratic societies is the public recognition that there are areas of individuals' lives that are not subject to infringement by political processes, but which are matters for citizens' own control. We do not believe that a regime is democratic which collectively dictates who individuals marry, what they wear and eat, where they live, and how they must spend their time during a great part of the day. There are limits to the extent of the exercise of

political power in democracies, and a pluralistic social order of some degree is taken for granted. Again, these conditions cannot be adequately justified by appeal to the nature of equal political rights and majority rule.

Equality in the distribution of political power within government is not then sufficient to characterize democratic ideals or the social conditions necessary for stable democratic procedures. However central certain political rights and procedures may be to democratic society, they are not exhaustive of what is involved in a society's being democratic. So, to characterize democracy solely in procedural terms – as if it were just a procedure for summing unconstrained preferences – involves a misconception of democracy, and of the role of equal political rights and majority rule. Of course, we might call a society democratic even though it did not provide for all of the substantive rights and institutions mentioned. But we also would think that conditions are not right in this society and that something crucial was missing. Behind the description of a constitution and a society as democratic are certain ideals regarding persons and their relations as citizens, and these ideals provide the reasons for holding equality of political rights to be of such importance.

III. THE CONTRACTARIAN JUSTIFICATION OF DEMOCRACY

I have suggested that the appropriate way to address questions of the legitimacy and scope of judicial review in a democracy is not by focusing simply upon the political rights and procedures that have traditionally been held to be central to a democracy. Instead, we need look to the values and ideals in virtue of which we hold such procedural aspects of democracies as equal political rights, majority rule, and political accountability important. Then it can be asked what role, if any, judicial review has in promoting or undermining these values. If it turns out that there is no conception of judicial review that would maintain and promote the ideals that stand behind our commitment to democratic procedures better than unconstrained majority rule, then the categorical claim that judicial review is undemocratic can be

sustained. If, however, on some conception of its role judicial review can better implement the ideals upon which political democracy is based, then this is a reason for concluding, not simply that judicial review can be compatible with democracy, but that it is an important democratic institution.

There are two related principles often cited in support of equal political rights and majority rule which might be thought to supply sufficient justification for these institutions, and which would lend support to a procedural conception of democracy. It is sometimes suggested that given the need for some kind of legislative authority, fairness alone requires that it be equally distributed and that disputes be resolved by majority rule. Other things being equal, democratic decision procedures may be fair. But as the preceding section suggests, this is not sufficient for their justification, since there is nothing about majority procedures by themselves that would insure against substantively unfair outcomes. Thus, to focus our concerns for fairness on political processes alone is unduly shortsighted; if fairness is to play a role in the justification of political democracy it must figure in at a more fundamental level.

A second argument for procedural democracy is one we have already encountered. It is that democracy is based in the principle of equal consideration of everyone's preferences whatever they may be, and decision according to the greater weight of expressed preferences. Equal political participation and majority rule are then justified on grounds that they are the best practicable means to insure that everyones preferences get taken into account and considered. The problem here is the same truncated vision of the requirements of political justice, in this case focused on the democratic value of equality. For by itself, the principle of equal consideration is nothing more than a requirement of formal justice – treat like cases alike – applied to political procedures. It is an extremely weak equality requirement, compatible with substantive inequalities of most any kind. Equal consideration of individuals' unconstrained preferences puts no restrictions upon the considerations that will be taken into account in designing laws, hence none upon the reasons that may be offered to justify the substantive inequalities that result from these procedures. And democracy, though it does not imply equality in every respect, does rule out

certain kinds of inequalities, and certain kinds of reasons for inequalities, as substantively unjust. Moreover, there is nothing about equal consideration of interests, per se, that would account for such democratic ideals as equal freedom, self-determination, and individuals' participation in public affairs and decisions on laws and social forms. In the end, equal rights to vote and voice one's views are, on this justification, not a part of a more basic right of participation at all, but are simply a convenient means for registering and satisfying the greater aggregate of preferences.

Consider now a different kind of argument for equal political participation. Among democratic theorists, the thinker with whom the idea of political democracy is most closely associated is Rousseau, for it is initially with him that the principle of equal participation is taken to be of such great importance. Rousseau says that, "The rule of accepting the decision of the majority is itself established by agreement and presupposes unanimity on at least one occasion."[13] His thought can be formulated in the following way: The basic rules according to which laws are made are part of the constitution of any regime. Since the constitution states the conditions according to which all laws are made, by definition it cannot itself be law (hence, established by majority decision), but must have some other foundation. The foundation of the constitution, and therewith the laws, of a democratic society is the equal freedom of individuals, based in the capacity of each to determine and rationally pursue his good in accordance with social requirements. For Rousseau, freedom is not doing what one pleases in the absence of law and all other conditions, but the rational determination of one's good in accordance with laws a person can prescribe for himself. A condition of freedom in this sense is that a person be able to accept the constraints imposed upon his conduct by positive laws and other social conventions. The only condition in

[13] J. J. Rousseau, *On the Social Contract*, Bk. I, ch. 5, last sentence. Kant makes the same claim: "The actual principle of being content with majority decisions must be accepted unanimously and embodied in a contract, and this itself must be the ultimate basis on which a civil constitution is established". 'Theory and Practice', in *Kant's Political Writings*, ed. Hans Reiss (Cambridge: Cambridge University Press, 1970), pp. 73–74.

which we can infer and expect the acceptance by free individuals of the requirements of laws is that in which laws issue from procedures which all could freely accept and unanimously agree to from a position of equal right. And the only constitutional procedure for making laws that free and equal individuals could reasonably accept and agree to is that of equal political right and some form of majority rule.

Part of the function of the social contract in Rousseau's work is to express the idea that democracy is not simply one kind of government procedure for making ordinary laws, but that it is, more fundamentally, a form of sovereignty, one in which free and equal persons combine and exercise their original political jurisdiction to make the constitution.[14] Under conditions where free and independent individuals are equally situated, they would all accept, as the basis for ordering their common affairs, the principle of equal participation. So, it is not the fairness or equal consideration of interests implicit in political democracy that provides its foundation. Instead, equal rights of participation in government are an extension of the equal freedom and original political jurisdiction of sovereign democratic citizens.

Freedom and equality are the basic values that democratic theory has drawn upon since the time of Locke. Democratic political philosophy in large part, and the contractarian tradition in particular, has been a series of attempts to interpret and reconcile these basic democratic values with the purpose of arriving at the social and political conditions appropriate for realizing them. The social contract ideal is designed to accommodate this important aspect of democratic thought. Behind the ideal of a unanimous social agreement is the thought that the appropriate way to determine the principles of government and society is by asking what free and equal persons

[14] On the claim that democracy is a form of sovereignty, and the distinction between sovereign and government, see Rousseau, *On the Social Contract*, Bk. III, ch. 1, paragraphs 3–6; Bk. III, ch. 5, par. 1; Bk. II, ch. 6, note to par. 8. James Miller, in *Rousseau: Dreamer of Democracy* (New Haven: Yale University Press, 1984) discusses this aspect of Rousseau's work. The distinction is also implicit in Locke's *2d Treatise*, and is stated in Kant's essay 'To Perpetual Peace'.

themselves, from a position of equal right, could mutually accept and agree to as the conditions for their social and political relations. Equal political participation and the institutions of a political democracy are a natural extension of this basic idea.

Several arguments can be made for political democracy from a contractarian perspective. Here I will briefly review those most relevant to judicial review. I assume the framework specified by Rawls. The arguments I set forth, if not explicitly made in his works, are at least consistent with his view.

To begin with, rational individuals concerned with the freedom to determine and the social conditions for the advancement of their ends have an interest in influencing the political processes that determine the laws significantly affecting their prospects. Equal rights of political participation when combined with the other rights generally held to be necessary for effective participation (freedom of speech and of the press, freedom of assembly, the right to form political parties, etc.), are a way of insuring that everyone's interests are represented, heard and taken into account in processes of legislation. Open and public democratic procedures provide for the exposition of social policy and the reasons behind government measures. Compared with other alternatives, this sort of process is more likely to lead to the adoption of legislation that is reasonable and does not consistently disadvantage particular segments of society.[15] In this way political democracy is instrumental to free and equal individuals' pursuit of their good and their maintaining their freedom. So if we assume the equal situation of individuals in a strong sense (as Rawls's veil of ignorance is designed to imply) in the agreement on principles for structuring constitutional forms, then none will have sufficient reason to concede a greater right of political participation and influence to others, given that others might have a different conception of what is necessary for their own and others' good.

[15] William Nelson, *On Justifying Democracy*, pp. 111–18, discusses the advantages of open and public democratic procedures, and finds this to be the primary justification for representative democracy advanced by Mill.

Second, free and equal sovereign persons would agree upon equal rights of political participation to insure for themselves the conditions of their self-respect. Self-respect involves a sense that your basic ends are worth pursuing and a confidence in your capacities to successfully realize them. It is an essential aspect of anyone's successful pursuit of his good. Self-respect in this sense depends upon the respect of others and their affirmative judgments regarding one's capacities and the importance of one's ends. We usually think of ourselves as others do, and our beliefs about ourselves and the value of our pursuits are inevitably affected by the judgments of others. Now, however inconsequential to ultimate legislative outcomes the exercise of one's political rights may be in large modern democracies, the public recognition that a person has these rights is essential to his sense of self-respect. For the acknowledgment that one is capable of taking part in public affairs on an equal basis with others is at the same time a recognition of those same capacities of rational deliberation and judgment necessary for the successful formulation and pursuit of his good in accordance with fair terms of cooperation. Without this recognition, a person's confidence in his capacities and the worth of his pursuits is undermined. And the thought that one is a second class citizen, not recognized as capable of taking part in public matters on an equal basis with others, would be especially debilitating in modern society, where belief in a natural or divinely ordained order of things justifying fixed subordinate positions is no longer publicly acknowledged as the basis of the political order. The recognition that a person is capable of participating in public life on equal terms is then a condition of his self-respect; if so then equal political rights are an important condition of the successful pursuit of one's good.[16]

Third, as Mill argued, our involvement in deliberations and decisions on the public good develops our reasoning capacities, and also broadens our interests beyond our own concerns, leading us to take an interest in others. In having to explain and justify our claims and positions to others, we must take their interests into account and

[16] On the primary social good of self-respect and its relation to certain equal basic liberties, see Rawls, *A Theory of Justice*, pp. 440–45, 543–47.

appeal to commonly held principles. Political participation can then lead us to a larger conception of society and to the development of our reasoning capacities and moral sentiments. Though political participation is by no means the only form of association through which our capacities and sentiments can be developed, it is an important one since it leads us to take a more comprehensive view of society and of the social interdependence of individuals and groups.

That citizens develop their social capacities and sentiments is important for a number of reasons: first, it is conducive to the stability of government and social forms. Social stability is a condition of anyone's pursuit of his ends, and in a society where individuals conceive of themselves as free and equal, stability is dependent upon citizens' desires to support and maintain social and constitutional forms. So, as means for encouraging citizens' desires to support just social forms, equal rights of political participation are an important way to insure the stability of social and constitutional arrangements. Second, in encouraging the development of various social virtues, including a concern for justice, equal political participation lays the bases for civic virtue and friendship. Civic friendship is not only desirable for the sake of its stabilizing constitutional arrangements, but is important in establishing the moral quality of civic life. As such civic friendship is itself a social good, and is a condition of our realizing other values of community. Finally, third, if we assume (as Rawls, Kant and Rousseau all do) that the exercise and development of our social and moral capacities are intrinsic to our good, then participation in democratic political procedures is a primary means for everyone's realizing this aspect of their good.

A final argument for political democracy is that the rights and principles that define it satisfy what must be a requirement on laws and social forms if they are to be consonant with freedom and mutual respect. I have mentioned how the openness and public nature of democratic procedures is a means to just and effective legislation. But publicity is important not just for reasons of limiting government abuse. As Mill says, the proper function of a representative parliament is "to watch and control government: to throw the light of publicity on its act; [and] to compel a *full exposition and justification* of all of them

which anyone considers questionable".[17] The openness and publicity of democratic legislative procedures normally requires that all seek to publicly justify conduct affecting others by appealing to principles they can accept. Laws are social rules backed by coercive sanctions, and as such there are considerations of mutual respect for persons that require that they be publicly enacted and justified.[18] Moreover, citizens' knowledge of the reasons and purposes underlying laws and social forms is a condition of their freedom. For laws are primary among the social rules that determine what kind of persons we are and can come to be. They shape the primary social institutions which provide the framework within which we determine our course of life, and as such are among the primary social influences on our character and the course of life we take. That citizens know why legal requirements on their conduct are as they are deepens their understanding of their character and their interests and promotes their fundamental interest in the rational self-determination of their conduct and the free pursuit of their ends. The public enactment and justification of laws implicit in democratic political forms is in this way conducive to realizing the democratic ideal of freedom.

To sum up, equal rights of political participation are an extension of the equal political jurisdiction of sovereign democratic citizens. Free and equal persons would accept and agree to equal political rights of participation out of their concern for their good and to secure their fundamental interest in their freedom to decide and pursue their good on fair terms with others. It is by virtue of their equal freedom that democratic citizens share in sovereignty; they retain that sovereignty in providing for equal rights of participation in constitutional forms.

Now Montesquieu says:[19]

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[17] John Stuart Mill, *On Representative Government* (Indianapolis: Bobbs-Merrill, 1958), p. 81.

[18] Cf. here Rawls's claim that respect for persons is shown by treating them in ways they can see to be justified. *TJ*, p. 586.

[19] Montesquieu, *The Spirit of the Laws*, Bk. XV, ch. 2, par. 4. This passage is discussed in John Rawls, 'The Basic Liberties and Their Priority', *The Tanner Lectures on Human Value* (Salt Lake City: University of Utah Press, 1982), vol. 3, pp. 1–87, at p. 82.

> The freedom of every citizen constitutes a part of public liberty, and in a democratic state is even a part of the sovereignty. To sell one's freedom is so repugnant to all reason as can scarcely be supposed in any man.

The suggestion here is that there are basic rights and liberties in addition to equal political rights that are a part of a person's freedom, and his retaining them is also a condition of maintaining sovereignty and independence. To freely give up any of these rights and liberties would be to sell part or all of one's independence and equal status as a sovereign citizen, an act so excessive and contrary to reason as cannot be imputed to anyone. Certain basic rights and liberties are then inalienable: any acts or agreements by which a person seeks to give them up for the sake of other advantages are void and cannot be enforced by the laws. It follows that any purported laws which seek to infringe upon these basic rights, even if affirmed by a majority, are invalid.

Among the basic rights and liberties that are a part of the freedom of sovereign democratic citizens are liberty of conscience and freedom of thought, freedom of association and of occupation, such rights and liberties as are necessary to maintain the independence and integrity of the person, and the rights and liberties implicit in the rule of law.[20] As claimed in the previous section, many of these basic rights and requirements of justice involve conditions and concepts that we naturally associate with the idea of democracy. And they are not adequately justified by the principle of equal participation. More importantly, given the imperfections of political procedures, these basic rights are not in practice guaranteed by the operation of decision procedures designed to satisfy the principle of equal participation. So,

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[20] I rely here on the basic liberties implicit in Rawls's first principle of justice. See, Rawls, 'The Basic Liberties and Their Priority'. On Rawls's account there are also certain institutional rights that should be a part of this list, those needed to insure fair equality of opportunity and to guarantee a social minimum. These conditions are needed for individual independence and the effective exercise of the basic liberties. A precise list of basic rights is a question we can pass over for purposes of discussing the legitimacy of judicial review. What is important is just that there be equal basic rights in addition to rights of participation.

the only circumstance under which free and equal persons would accept and agree to political procedures of any kind, including equal participation and majority rule, is on condition that these procedures be designed to maintain and protect their basic interests in the free pursuit of their good, and therewith the equal basic rights that secure their freedom. This has important institutional implications for the design of a democratic regime, and in particular for judicial review.

I argue (in Section IV) that the equal basic rights that belong to democratic sovereignty provide a different understanding of the purpose of legislative procedures than that provided by a procedural conception of democracy. The procedural conception represents legislative processes as a means for registering citizens' preferences without placing any constraints on their wants or specifying in advance the purpose of legislative procedures. Majority rule becomes, in effect, a device for maximizing the sum (or the average) of satisfactions, without regard to the disadvantages this imposes on some persons. Though this may accurately represent the interest-group politics that often pervade American political life, it does not accord with the public ideals we profess to justify laws. For it is generally accepted that the purpose of legislative procedures in a democracy is to promote the common good, thereby advancing the interests of everyone. This is the intuitive idea underlying the contractarian conception of democracy.

IV. THE DEMOCRATIC JUSTIFICATION OF JUDICIAL REVIEW

We are now in a position to address the democratic legitimacy of judicial review. I begin with some remarks on a democratic constitution. A primary aspect of modern constitutionalism is that the authority to make laws is an ordinary power of government, one that is both delegated and limited. In a constitutional democracy all political authority is understood to derive from the sovereign people who, conceived as equals, exercise their constituent power to create and define the nature and limits of ordinary political authority. Legislative authority is among the ordinary powers of government that have their source in the peoples' constituent powers. As such it is subject to

whatever constraints are placed upon it by the sovereign people in exercising that authority.[21] Like any power of government the authority to make laws is then fiduciary and is only to be exercised for the public good.

By contrast, we might look upon legislative authority as having its source in the will of God or the natural order of things. Some person or group is then represented as having the power to make laws in virtue of certain natural perfections and virtues (as in Aristotle's *Politics*), or by delegation from God or his worldly representatives (as in certain medieval theories and theories of royal absolutism).[22] In these cases the criterion of the legitimacy of legislative authority is not conceived in terms of the will of the governed. Though they might be viewed as agreeing to be ruled according to these principles, their consent and agreement plays no role in justifying legislative authority.

This is what distinguishes a constitutional democracy from other constitutional forms: all legitimate political authority is derived from the constituent power of the sovereign people, conceived as equals and as having equal rights to determine the political constitution, and this authority is created by them with the understanding that it is to be exercised for the good of each.[23] So conceived, a democratic constitu-

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[21] Constituent power is the power of the people, joined together as a body politic, to create political authority and determine the form of the political constitution. By the exercise of constituent power, the people create institutional forms endowed with the ordinary powers of government. These governing agents of the people make, apply, and administer laws for the public good. The distinction between the constituent power of the people and the ordinary power of government is common to the natural rights theory of the social contract tradition. See Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), Second Treatise, chs. 11–13.

[22] See, for example, Sir Robert Filmer's *Patriarcha, or the Natural Power of Kings* (1680), to which Locke's social contract doctrine was largely a response.

[23] Kant defines democracy in this way: "The democratic form of the state is most complex. [for it contains the following relationships]: first, the Will of all to unite to constitute themselves a people; then, the Will of the citizens to form a commonwealth; and, finally, [their Will] to place at the head of this commonwealth a sovereign, who is none other than this united Will itself". *The Metaphysical Elements of Justice* (Indianapolis: Bobbs-Merrill, 1965), Ak. 339/110.

tion is a natural extension of social contract views. It is the result of an agreement, whose purpose is to define and set up political institutions to determine laws and institutions that are necessary for the effective exercise of the equal basic rights that secure persons in the free pursuit of their good. The procedures best designed to realize this end meet the democratic requirements of justice. On this conception of democracy, what makes a constitution democratic is not equal consideration in majority procedures, but that it specifies rights and procedures devised to promote the good of each citizen and maintain the equal rights that constitute their democratic sovereignty. I will define the role of majoritarian legislative procedures in this context, and address the legitimacy of judicial review.

Constitutional procedures that incorporate equal rights of participation are, we have seen, most likely to insure that equal freedom and the good of each are realized. A just democratic constitution then must specify constitutional rights and procedures that define the principle of equal participation. It includes a universal franchise, legislative procedures allowing for equal representation, election to offices open to all, and whatever rights are necessary for free and informed political deliberation and public discussion (freedom of speech and of the press, freedom of assembly, the right to form and join political parties, etc.). Now, what is the place of bare majority rule in these procedures? There is nothing about rights of equal participation that would require that a bare majority make legislative decisions under all conditions. If it did, political equality could not be satisfied at the level of decision on a constitution, or be the condition of a unanimous social contract. In fact, any number of special majority rules (three-fifths, two-thirds, or even unanimity) are consistent with equal rights of participation, so long as persons are symmetrically situated in decision procedures.[24] The argument for bare majority rule

[24] Rousseau saw decision by a bare majority as appropriate only for certain kinds of decisions: "[T]he more important and serious the decisions, the closer the prevailing opinion should be to unanimity; . . . the more hastily the matter under consideration must be decided, the smaller the prescribed majority should be; in decisions that must be reached immediately, a majority of a single vote should

must then be that at the level of constitutional agreement, free and equal rational persons concerned with advancing their good would unanimously choose that ordinary legislative decisions be settled by a bare majority. There may be different ways to show this. To begin with, bare majority rule provides the most efficient way consistent with equal political rights to respond to problems requiring prompt solution. Special majority rules are more cumbersome. Second, this rule is more effective than any special majority rule in advancing the particular interests of each person. On the assumption that they know very little about the indefinite future, by choosing bare majority rule rational individuals minimize the chances that their interests will depart from legislative decisions. This decision rule is more likely than any alternative to result in legislation that does not unduly disadvantage anyone in the pursuit of his interests. Bare majority rule should then yield results that concur more often with each person's particular good than any special majority rule.[25]

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suffice". *Social Contract* Bk. IV, ch. 2, 'On Voting', last par. This follows from his conception of voting procedures as a means for accurately determining the requirements of the General Will. For a similar conception, see Rawls, *TJ*, sec. 54; and Joshua Cohen, 'An Epistemic Conception of Democracy', *Ethics* **97** (1986): 26–38. These accounts are part of ideal theory, presupposing what Rawls calls a "well-ordered society". Since the argument for judicial review is part of non-ideal theory, presupposing that legislators will not always impartially vote the requirements of justice, I have adapted an argument for majority rule more in accord with this assumption of partial compliance.

[25] An intuitive way to see this is that bare majority rule is the only size for which losers can never outnumber winners. So the chance that one will be among those losing out is minimized with this rule. See Brian Barry and Russell Hardin, eds., *Rational Man and Irrational Society* (Beverly Hills: Sage Pub. Co., 1982), pp. 305–06, 313–15, for a discussion. This argument was initially made by Douglas Rae, 'Decision Rules and Individual Values in Constitutional Choice', *American Political Science Review* **63** (1969): 40–53. Rae contends that in a constitutional choice procedure, the collective choice rule that would be chosen by rational voters wishing to maximize the agreement between the collective choice and their own individual preferences is bare majority rule. Bare majority rule is best in the long run, assuming that voters do not know the likelihood of their being in the majority on issues that will arise. A formal proof of the argument

But in order for these considerations to be convincing to free and equal rational persons, certain background conditions must be sustained. At the level of constitutional choice, their representatives will want to insure that the ordinary procedures for making laws do not compromise anyone's sovereignty by endangering the rights and liberties necessary for free persons' pursuit of their good. This provides a reason for imposing constitutional constraints on bare majority procedures, which insure that the basic rights and requirements of justice are taken into account and respected. Primary among these constraints is a constitutional bill of rights, which further specifies their equal basic rights in light of general knowledge of their circumstances, and serves as a substantive condition of the exercise of legislative authority. This provides a way for sovereign citizens to guarantee not only their equal political rights, but also the other equal basic rights necessary for citizens' free pursuit of their good. By a bill of rights they, in effect, agree to take certain items off the legislative agenda. In so doing they publicly recognize and acknowledge that maintaining the sovereignty and independence of each is a condition of their cooperation, and partially define the ends of legislative change.

Now the problem becomes how to best insure that these substantive constraints on legislative change are respected. Given the imperfect nature of even just legislative procedures, a democratic constitution might justifiably incorporate certain procedural constraints upon legislative processes, to insure that the basic rights and interests of each citizen are actually taken into account in legislative deliberation. Among these procedural limitations upon bare majoritarian rule are such familiar constitutional devices as separation of powers; bicameral legislatures and other checks and balances, including perhaps some

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has been given by Michael Taylor, 'Proof of a Theorem on Majority Rule', *Behavioral Science* **14** (1969): 228–31, and Philip D. Straffin, Jr., 'Majority Rule and General Decision Rules', *Theory and Decision* **8** (1977): 351–60. The argument, however, does not work if peoples' preferences are patterned or asymmetric (e.g., divided along ethnic or class lines). In that case, the rational choice may be a special majority rule, or, what comes to the same thing, specific constitutional guarantees, as I argue for in the text.

federalist scheme; and the executive's authority to require that certain legislative decisions be made by the decision of a special majority (the executive veto). The criterion for determining whether any of these constitutional procedures are called for is as follows: what, given current conditions, is required of political procedures by the principles of right and justice to secure the conditions necessary for citizens' fair and effective exercise of their equal basic rights?

It is in this context that we should understand the role of judicial review. It is among the procedural devices that free and equal sovereign persons might rationally agree to and impose, in light of their general knowledge of social conditions, as a constraint upon majority legislative processes, to protect the equal basic rights that constitute democratic sovereignty. Judicial review limits the extent of the exercise of equal rights of political participation through ordinary legislative procedures. Its purpose is to enforce the substantive constraints on legislation that have been taken off the legislative itinerary. Since it invokes a non-legislative means to do this, it may well be a constitutional measure of last resort. But this does not imply that it is undemocratic. For it is not a limitation upon equal sovereignty, but upon ordinary legislative power in the interest of protecting the equal rights of democratic sovereignty.

So conceived, judicial review is a kind of rational and shared precommitment among free and equal sovereign citizens at the level of constitutional choice. By the exercise of their rights of equal participation they agree to a safeguard that prevents them, in the future exercise of their equal political rights, from later changing their minds and deviating from their agreement and commitment to a just constitution. This is one condition they might put on their agreement to the decision rule that the preferences of a bare majority shall be decisive in making ordinary laws. By granting to a non-legislative body that is not electorally accountable the power to review democratically enacted legislation, citizens provide themselves with a means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative processes. Thereby, they freely limit the range of legislative options open to themselves or their representatives in the future. By agreeing to judicial review, they

in effect tie themselves into their unanimous agreement on the equal basic rights that specify their sovereignty. Judicial review is then one way to protect their status as equal citizens.

To conceive of judical review as a kind of shared precommitment implies a division of labor among government institutions. Bare majority legislation promotes more effectively than any other decision rule the particular good of each individual; moreover it provides the most rapid response to legislative issues consistent with equal political rights. But what is effective in the long run is not always just in particular instances. Bare majority decisions are not the best rule for insuring that no one's constitutional rights are violated. Here special rules are better, with unanimity being the best. But such rules become increasingly ineffective the larger the majority required, and are normally unworkable for legislative purposes. So to maintain legislation that most effectively promotes each person's good and the public good, while providing that the basic rights of citizens are not violated in the process, free and equal persons could rationally agree to bare majority decisions on condition that they be subject to review by an independent body set up for these purposes.

To sum up the argument thus far for judicial review: Like any ordinary power of government, majority legislative procedures have a subordinate position and are justified in terms of the ends they promote. As a decision rule for satisfying the requirements of equal political participation in legislative contexts, majority rule is the primary institution for promoting the ends that equal political rights realize. Recall that the first argument (in section III) for equal political participation is that it is instrumental to insuring that the interests of all are represented and advanced in political processes. And yet, majoritarian legislative procedures are themselves an imperfect means for realizing these ends. This supplies the justification for the traditional constitutional devices that limit legislative procedures. These institutions limit these procedures either by slowing the pace of legislative change to insure the rationality of deliberation (bicameralism, federalism, and other checks and balances), or they directly restrict the scope of legislative authority to insure the justice of this procedure (by a bill of rights, with or without judicial review). Judicial

review is then one among several constitutional mechanisms that could be agreed to, to limit the exercise of rights of equal political participation through bare majority legislative rule. As such, its general justification is that under certain circumstances it may be necessary as a means for insuring that fundamental equal rights that are a part of democratic sovereignty are respected and maintained in the ordinary processes of government. In this way, its justification is ultimately the same as that given for majority rule. What ultimately justifies majority legislative procedures, the equal freedom of sovereign democratic citizens, also justifies our acceptance of other constitutional procedures that define and enforce limits to the sorts of decisions that are left up to bare majority decisions.

Among possible legislative forms, majority rule best advances the interest of each democratic citizen in the free pursuit of his good. Where there is widespread public recognition and acknowledgment of the equal rights of democratic sovereignty, and where it is publicly accepted that the purpose of legislation is to advance the good of each, then majority legislation may be adequate for realizing these ends. For under these ideal conditions there is a shared conception of justice and the common good to guide public debate, and legislative deliberation and change. Majority decisions should then normally converge upon just measures that advance the basic interests of all and enable them to pursue their good. But in the absence of widespread public agreement on these fundamental requirements of democracy, there is no assurance that majority rule will not be used, as it so often has, to subvert the public interest in justice and to deprive classes of individuals of the conditions of democratic equality. It is in these circumstances that there is a place for judicial review.

V. THE TRADITIONAL ARGUMENT FOR JUDICIAL REVIEW

I have argued that judicial review can be made consistent with democracy if it is viewed as a shared precommitment to the equal rights of democratic sovereignty. To see judical review as a precommitment to equality fits with the basic idea underlying the social

contract tradition of Locke, Rousseau, Kant, and Rawls. The social contract is often described in terms of a rational, self-interested compromise among essentially conflicting interests. This is the tradition that stems from Hobbes. Agreement is born of competition for scarce resources, and is a bargain that is made to insure against mutually destructive conduct in each person's pursuit of his private ends. The model for agreement here is economic bargains. But not all agreements are like this. For example, in marriage vows, pacts among friends, or compacts among members of the same religious faith, the parties make the agreement, not because of a conflict of interest, but to commit themselves to a shared ideal of association for the indefinite future. Their agreement is not a compromise, but a shared precommitment. This is one way to envision the role of the social contract in the natural rights tradition and in Rawls. The agreement is not born of a fundamental conflict of interest; indeed it presupposes there presently is none. It represents democratic citizens' shared fundamental interest in maintaining the conditions of their equal sovereignty. Though diversity of particular interests resulting from individuals' freedom is presupposed, the agreement captures their shared acceptance of and commitment to maintaining their equal status in the free pursuit of their ends. By the social contract, they agree to the equal rights and conditions of justice that maintain their equal sovereignty; and in agreeing to a constitution they create political institutions that tie themselves into the terms of this agreement. Judicial review, as one among several features of that constitution, is a part of democratic citizens' precommitment to just social forms. It can be an effective way for free and equal persons to bind themselves to the basic terms of their social cooperation.[26]

Let's look now more closely at legislative and judicial authority, and see how the democratic argument for judicial review differs from the traditional argument for that institution. On the conception of a

[26] For discussion of the idea that the social contract involves a shared precommitment to justice, and a contrast with Hobbesian views, see my paper, 'Reason and Agreement in Social Contract Views', *Philosophy and Public Affairs* **19** (1990) 122–57.

democratic constitution outlined, legislative procedures embodying bare majority rule are not identifiable with democracy; instead they are but a part of the institutional framework of a democratic regime. Like any institution created by the sovereign people, legislative authority is a delegated power of government, to be exercised by representatives in accordance with constitutional conditions and for the good of each citizen. As delegated, it is an ordinary power of government, not to be confused with the constituent power that creates it.

In setting up a constitution, the body of citizens place the ordinary powers of government in a political regime. Each of these powers has the duty to interpret the constitution in carrying out its assigned role. In any regime where these powers are separate, there will be a need for a final authoritative interpretation of the constitution in order to coordinate these diverse powers and resolve persistent disputes, avoid conflicting demands from being placed on citizens' conduct, and insure that constitutional forms are being respected and adhered to by the ordinary powers of government. Since the constitution specifies the abstract basic rights of citizens, the clear delineation of constitutional rights and consistency in application provided by a final interpretation is essential to citizens' pursuit of their good, as well as to just and effective laws.

Final authority to interpret the constitution is a necessary power of government that is distinct from the ordinary powers of the legislative, judicial, and executive functions. It is the power to determine, for institutional purposes, whether the people's exercise of their constituent power has been respected in each branch's execution of its ordinary powers. Final authority is also a delegated and institutional power, and is not to be confused with either the ordinary powers of government or with ultimate constitutional authority, which always resides in the sovereign body politic. Somewhat like institutional procedures for amending the constitution and a bill of rights, the final authority of interpretation might be seen as an institutional expression of the constituent power of sovereign citizens.

My central claim has been that there is nothing intrinsic to ordinary legislative power in a democracy that would require that the separate and distinct power of final interpretation be placed or conjoined with

it. I have not argued, however, that the authority of final interpretation must be placed in the judiciary. Compare this with the traditional argument for judicial review, stated by Hamilton in *The Federalist*, #78. The Supreme Court, under Marshall, later relied on it in *Marbury vs. Madison* in claiming the power of the courts to give the final interpretation of the constitution. The argument is based in the doctrine of separation of powers, which Hamilton claims is a requirement of the rule of law. Begin with the assumption, (1) "No legislative act . . . contrary to the Constitution can be valid." The question arises, who then has the institutional authority to make determinations of constitutional validity? (2) Separation of powers is a requirement of the rule of law that is a part of a constitutional democracy; without separate powers, there is no protection for "public liberty." (3) Under separation of powers, it is the institutional role of the judiciary to interpret and apply the law. (4) The constitution is, and must be regarded as, *fundamental law*. (5) Therefore, it must belong to the courts "to ascertain [the Constitution's] meaning as well as the meaning of any particular act proceeding from the legislative body." (6) It follows that when, in the course of applying the law, the courts decide that legislation (or executive decrees) conflict with the Constitution, it must declare these acts unconstitutional. (7) The Courts then have, by virtue of their constitutional role, authority to interpret the constitution, and in the interest of stability and public liberty they should have final authority.

Assumption (2) is questionable. The English parliamentary system is not marked by separation of powers in our sense. And there the courts have no authority of constitutional review, yet "public liberty" and a democratic system is pretty well maintained. But the crucial assumption for our purposes is (4). Separation of powers is a doctrine that defines the division of those ordinary powers of government that exist in any political regime. And under the doctrine of separation of powers, the courts have exclusive authority to interpret and apply ordinary laws, just as the legislative has authority to make all the laws. The problem is that the constitution of a political regime is not just so much more ordinary law for courts to interpret. It is rather the highest order system of rules for making those institutional rules that are

recognized as ordinary laws. As such, it provides the basis for all laws and for the separation of the powers of government; nothing is law, and no institution has any powers, except as it accords with the constitution. And there is nothing about the ordinary powers of courts granted under the constitutional separation of powers that would grant to the judiciary (or any other branch) the authority to interpret those exceptional rules that constitute the three powers of government and assign to them their ordinary powers. To see this, we need only posit a separate institution that has powers of constitutional review over all three ordinary powers. This is just what Rousseau suggests as a solution to the problem of who is to have the power of final interpretation of the constitution.[27]

So it is a mistake to interpret judicial review as implicit in separation of powers and the ordinary authority of the courts. To see judicial review in this way obscures what is really going on when courts exercise this power. It makes it seem as if they are merely carrying out their normal constitutional function. Whereas what is really involved is that the courts step beyond ordinary law and their role under separation of powers to assess ordinary acts of government by any of the three separate powers. This is not a peculiarly judicial power; it is rather the exercise of a conserving power. Whoever exercises this final authority acts as the conservator of the constitution.

It might be argued that this is all that opponents of judicial review need to establish the authority of the legislative branch in a democracy to have final interpretive authority: this authority must rest with a democratic legislature because, after all, it has lawmaking powers and is therefore sovereign, or at least best representative of popular will.

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[27] See note 6, above. Such an institution currently exists in several constitutional regimes. The constitutions of the Federal Republic of Germany (1949), and Austria provide for a constitutional court separate from ordinary courts. Unlike American judicial review, these extraordinary courts have the authority to review acts of legislation as they are promulgated by their parliaments, in the absence of enforcement by the executive and judicial "case or controversy". See Carl J. Friedrich, *Constitutional Government and Democracy*, 4th ed. (Waltham, Mass.: Blaisdell, 1968), pp. 261–62.

But this argument also misunderstands the nature and function of majority legislative rule. The people are sovereign in a democracy, as is evidenced by their retaining authority to amend the constitution. They delegate a fiduciary power to legislative agents to make ordinary laws for the public good. In so doing, they do not alienate constituent power or any part of their sovereignty. Moreover, popular will has its clearest and most original expression in a democratic constitution. And there is nothing about that agreement that would require delegating to those with the authority to make ordinary laws the final authority to decide the nature of constitutional conditions for the validity of those laws. Only if one holds to the doubtful claim that legislative institutions are the sole legitimate representatives, not simply of legislative will, but also of the constitutional will of the people, can he draw that conclusion.

VI. THE CIRCUMSTANCES OF JUDICIAL REVIEW

The democratic argument for judicial review rests on the assumption that the courts can play a significant role in maintaining the conditions of democratic sovereignty. An obvious objection to this argument is that we have no assurance that judicial review will be properly exercised to correct for the failures of legislative processes. Just as likely it will be used to secure the power of elites against legitimate democratic measures.[28] This is an empirical objection my argument has not addressed. My concern has been with the categorical objection, made on purely philosophical grounds, that judicial review is inconsistent with democracy. It is certainly true that judicial review is subject to abuse, just as are the legislative procedures it is designed to correct. But this does not affect the democratic argument for judicial review in terms of its being appropriate under certain conditions to maintain a just democratic constitution. The likelihood that courts

[28] Peter Railton argues that the court is an elite institution that maintains the power of elites in liberal democracies via judicial review, in 'Judicial Review, Elites, and Liberal Democracy', *Nomos, XXV: Liberal Democracy* (New York: NYU Press, 1983), 153–80.

will, in a particular government, fail to maintain a just constitution is one among several empirical considerations that must be taken into account before it can be decided that conditions appropriate for judicial review hold in a particular society.

This means that whether judicial review is appropriate for a particular democratic constitution is a strategic question. Unlike the argument for democratic legislative procedures, the argument for judicial review does not attempt to show that this institution is essential to a democratic constitution. Instead, it takes democratic legislative procedures for granted, and its justification is contingent upon the extent to which these procedures serve the ends in virtue of which they are found appropriate. All that has been argued is that judicial review can be a proper institution in a democracy to insure that the democratic requirements of justice are realized where there is a substantial likelihood that legislative procedures will not insure these requirements themselves. This does not mean that it is called for whenever legislative processes might result in unjust outcomes. Even under the ideal conditions of what Rawls calls a "well-ordered society", majority procedures are not perfect with respect to the requirements of democratic justice. We can assume, however, that under these circumstances the public's sense of justice is sufficiently strong and developed that, once the consequences of unjust legislation come to public awareness, legislative procedures will themselves provide the necessary adjustment to justice. In that instance there is no need for judicial review to act as a corrective to legislative failures. The circumstances where judicial review is appropriate are where legislative procedures are incapable of correcting themselves. This happens when the public sense of justice is not sufficiently developed or directed to influence legislative procedures to make the necessary corrections to democratic justice, or when the legislative branch is so controlled by particular interests (due, most often, to the undue influence of wealth on elections and legislative processes) that it does not accurately reflect considered public views in matters of justice.

Whether judicial review is needed to maintain the requirements of a democratic constitution is then dependent on social and historical circumstances. It is a matter for factual determination whether the

overall balance of democratic justice can be more effectively established in a democratic regime with or without judicial review. This in the end is how we must assess claims that majoritarian legislative procedures are the only form of decision-making consistent with democracy; or that the legislature should make decisions according to its own view of the constitution; or that it should have exclusive authority to interpret the constitution. These contentions can be made only with respect to specific democratic regimes, and their justification must proceed on empirical grounds. A primary point of my argument has been that one cannot dogmatically single out a feature of democratic constitutions (such as majority rule, or political accountability, or even equal political participation) and conclude that judicial review is undemocratic because it does not meet the demands of this standard. More than one principle is needed to characterize democratic ideals, and we cannot categorically say judicial review is not under certain conditions an effective institution for maintaining these principles. If so, then the *a priori* philosophical claim that judicial review is inherently undemocratic is unfounded.

This means that there are various combinations of institutional processes that can satisfy the requirements of democracy. As I said at the outset, democracy is not a notion that is exhaustible in procedural terms. Whatever else we might choose to call it, a society that allowed for equal political rights and majority rule, yet systematically denied religious, ethnic, and racial classes some or most of the basic rights I have mentioned, does not realize the ideals we associate with democracy, and consequently hardly deserves the name. A society is more or less democratic to the degree that it provides for the fundamental rights of free and equal sovereign citizens, and insures the social conditions for their effective exercise and each person's free pursuit of his good. If judicial review is, for social or historical reasons, among the institutions necessary to guarantee these rights and conditions, and is not put to improper use, then a constitution that allows for it is still democratic. If on the other hand judicial review, or any other government institution (including majority rule), is used, as they so often are, to frustrate or deny citizens the effective exercise of the equal basic rights of sovereign citizens, then that society to that extent does not

realize the ideal of democracy suggested. Whether a society is more or less democratic cannot be ascertained by looking to the presence or absence of judicial review in its constitution; we must also look to see if this power is necessary, and how it is exercised.

VII. THE EFFECT OF JUDICIAL ON SELF-RESPECT, STABILITY, AND PUBLIC JUSTIFICATION

I have argued for the democratic legitimacy of judicial review on grounds of its likelihood to promote the same ends as those justifying majority rule: judicial review can be an effective institutional means for insuring the equal freedom of sovereign citizens and the fundamental equal rights that are among the conditions necessary for the free pursuit of their good. But there were other arguments made in Section III for equal political participation, from self-respect, stability, and publicity. Before the case for democratic legitimacy can be completed, it must be asked whether judicial review is consistent with these arguments.

It has been suggested that judicial review involves a form of inequality that can undermine the self-respect of citizens in a democracy, thereby frustrating their pursuit of their good.[29] What can be said in response to this? We can distinguish two forms of political inequality. First there are formal inequalities of political rights, such as rules depriving certain classes of the franchise, or giving others plural voting privileges. These inequalities explicitly single out groups for preferential and adverse treatment, and these discriminations are publicly known and recognized. Second, there are the inequalities of influence implicit in special majority rules. Though affording to minorities greater than equal influence in deciding legislative change, these inequalities differ from formal political inequalities in that they are anonymous. No specified minority has the authority of unequal influence. Special majority rules do not single out individuals or groups for special or adverse treatment in political procedures, and any

[29] Frank Michelman, 'In Pursuit of Constitutional Welfare Rights: One View of Rawls's Theory of Justice', *U. Penn. Law Review* **121** (1973): 962, 1008–09.

citizen can exercise a greater than equal influence on any occasion where these rules hold by voting against any measure requiring more than a bare majority for its passage.

Constitutional limits upon bare majority rule in the form of a Bill of Rights with judicial review, can be viewed, like an executive veto, as functional equivalents of special majority rules. For a judicial determination of unconstitutionality can be overcome by a constitutional amendment by a special majority. This helps in responding to two objections. First, it is relevant to the objection that judicial review is undemocratic because it is counter-majoritarian. To see judicial review as a functional equivalent of a special majority rule deprives that objection of much of its force. For special majorities required to amend the constitution always retain the ultimate authority to determine any political question. So unless it is just arbitrarily stipulated that democracy always entails the right of a bare majority to rule in all questions, the claim that judicial review is undemocratic because counter-majoritarian simply means it is inconsistent with rule by majorities less than those needed to make constitutional decisions through amendment. But surely it is not undemocratic to require a special majority to make certain decisions, especially those that directly affect democratic sovereignty, the equality of basic rights, and the constitutional design of government and society. To hold otherwise would mean that democracy is inconsistent with constitutionalism.

Second, to see judicial review as a kind of special majority rule clarifies why that practice need not undermine citizens' self-respect. For though the Court is itself a specified minority, its adverse decisions on laws can always be overcome by a special majority of citizens or their representatives, and no specified minority has the ultimate authority in this constitutional procedure. The ultimate authority that minorities have in constitutional questions remains anonymous. There are no formal inequalities in the system as a whole that gives a specified minority ultimate authority on any political question. Each citizen in the amendment process retains an equal right to participate in the constitutional process, to express his views, and to vote upon any constitutional issue (either directly or through his representative). So, seen as part of a special majority rule procedure for deciding

questions that bear on the constitution, judicial review itself should do little to undermine citizens' sense of self-worth, at least as long as that power is properly exercised.

Furthermore, maintaining the equal basic rights of all citizens is of far greater importance to everyone's self-respect than whatever non-formal inequalities of political power judicial review might involve. The argument for political democracy from self-respect (in Section III) proceeds from the premise that an equal status as citizens is the primary social basis of self-respect. Equal political rights are justified on that ground. But other civil and social rights are equally important, if not more so, to the equal status of citizens and their self-respect. If judicial review is appropriate to society and is properly exercised to insure that these rights and the conditions for their effective exercise are legislatively maintained, then, on balance, the self-respect of all citizens should be better preserved than without judicial review.

Consider next the argument for democracy from the publicity of democratic procedures. Here I will only note that judicial review, rather than undermining the process of public justification, can contribute substantially to that end. The practice of the Court of publicly justifying its decisions by issuing reasoned opinions makes public (in a way legislative procedures do not) the reasons and purposes behind legislation, and examines laws in light of the constitution. In upholding legislation against constitutional challenge, the Court seeks to legitimate laws by showing how they are consistent with the constitution. This requires that the Court publicly demonstrate that laws are not unduly coercive but are consonant with democratic freedom. And in holding legislation unconstitutional, the Court does not just check legislative failures of justice; it also supplies constitutional reasons for these failures. In both of these ways, judicial review can work to establish a public reading of the constitution and its moral foundations, and examine the laws in light of these principles.

Moreover, in serving this justificatory function, judicial review (again if exercised appropriately) can play an important role in cultivating a shared sense of justice and the public good. Recall the third argument for political democracy on grounds of its tendency to broaden citizens' views beyond their own concerns, laying a basis for

the qualities of civic virtue and civic friendship that are needed to sustain stable social life in the absence of autocratic power. If we see judicial review as having a justificatory role in addition to its role in checking government abuse, then it can be understood as a further government institution for cultivating citizens' appreciation of and support for just democratic institutions and ways of life. In publicly interpreting the constitution, the Court demonstrates the moral bases of constitutional forms, and thereby provides a common ground for public understanding and support. As such, judicial review encourages citizens' sense of justice and their desire to maintain constitutional forms. The justificatory function of judicial review is then partly educative as well. Judicial review is, I have said, most appropriate under conditions where the public sense of justice is divided or underdeveloped, or where legislative representatives are unresponsive to the interests of everyone. Under these circumstances, when legislative procedures depart from the requirements of a just democratic constitution, they are unlikely to be capable of self-correction. As an institutional means for cultivating the public's sense of justice, review cannot only be a way of increasing the likelihood that legislative departures from justice will not be repeated, but also that they will not be publicly tolerated.

Finally, the existence of a large body of judicial opinions establishes a doctrinal basis for public discussion and legislative deliberation, and gives direction to public affairs. In interpreting the constitution in light of its application to specific laws, the Court gives content to the otherwise abstract provisions of the constitution, and furnishes a common source for the terms of public debate. This can have the effect of sobering and improving the quality of public and legislative discussion and argument by securing commonly understood meanings for abstract and often vague constitutional principles and concepts. Moreover, the existence of a body of constitutional law can serve as a reminder to legislators of their constitutional responsibilities and their duty to direct laws towards constitutionally legitimate ends. These considerations show that, as a means for both rectifying unconstitutional legislation and cultivating citizens' commitment to just con-

stitutional forms, judicial review, if correctly exercised, can be an important stabilizing force in those democracies where it is called for.

VIII. CONCLUSION

There are other arguments for judicial review which may be pertinent to our constitutional scheme. The most important stem from our federal system and the extraordinary power of the executive branch. Within any federal scheme, where legislative and other powers are divided among several governments, there is a need for a single authoritative voice to provide clear and uniform interpretations of the constitution, for reasons of coordination, national unity, and to protect against states' overly zealous pursuit of their particular interests. Further, given the extraordinary powers (both constitutional and popular) exercised by the Presidency in our country, as well as its independence from the legislative branch, one of the most compelling reasons for the authority of judicial review is to insure against the potential abuse of executive power in situations where Congress is either incapable or unwilling to intervene. Though these are important arguments, I have not relied on them since they concern peculiarities of our constitution, and have little direct bearing on the objection to judicial review based on the nature of democracy.

In fact, I have hardly addressed the specific question of the justification of judicial review on democratic grounds within our constitution at all. My concern has been to establish that the standard basis for objecting to the institution of judicial review – that it is inconsistent with democracy and majority rule – involves a misconception of the nature of legislative power and a shortsighted conception of democracy. There is nothing undemocratic (and it is disingenuous to claim there is) about the judicial review of laws that infringe against the equality of such fundamental moral rights as liberty of conscience and freedom of thought, freedom of association, freedom of occupation and choice of careers, political participation, and, more generally, the freedom to pursue one's own plan of life. Judicial review is undemocratic when it contravenes majority decisions in order to maintain the

power and legal privileges of elite social and economic classes against social change and economic reforms designed to enable each citizen to achieve independence and to effectively exercise these fundamental rights. Our Court has taken both directions. For much of its existence the Supreme Court tended to constitutionally enshrine, against attempted legislative reform, prevailing laws, conventions, and privileges regarding the legal institution of private property that were especially favorable to those who legally control the great mass of wealth. Whether, on balance, the Court's more recent disavowals of these interpretations and its more concentrated efforts at securing the equal basic rights of citizens are sufficient to compensate for its earlier distortions of a democratic constitution is a question I shall not undertake to answer.

Who is to have the final authority to interpret the constitution in a democracy is one question; how that authority is to be exercised is a more complicated question I have only indirectly addressed. The second question requires both a theory of constitutional interpretation, and an account of the scope of the Court's authority of judicial review. But the argument for judicial review offered provides a basis for responding to these issues.[30]

The contractarian conception of democracy used to justify judicial review implies that certain substantive rights and requirements of justice underlie our commitment to the political procedures of a democracy, and that it is these substantive values that democratic procedures are designed to realize. So, in reviewing legislation, there is no way for the Court to avoid substantive considerations of justice; that is its mandate. This contrasts with John Ely's influential "process-perfecting" view, according to which the authority of judicial review is to be limited to procedural considerations in order to insure fair representation and electoral accountability in decision-making processes. It is not denied that the Court's primary role is to maintain the

[30] David A. J. Richards has long argued for a contractarian interpretation of the U.S. Constitution. See *The Moral Criticism of Law* (Encino, CA.: Dickenson, 1977): *Toleration and the Constitution* (Oxford: Oxford University Press, 1985); *Foundations of American Constitutionalism* (Oxford: Oxford University Press, 1989).

integrity of procedural forms. But we cannot understand what these procedural forms are, their conditions and limits, without first coming to a decision on the basic rights and ends of justice these procedures are designed to realize.[31]

Similar considerations apply to the account of judicial review that says judges should look exclusively to the written Constitution and the original intentions of its framers to decide the requirements of its abstract provisions.[32] No one would deny that the historical document which bears the name "The Constitution of the United States" is an important feature of the practices and principles that make up our constitution. But it is important not to confuse the two. For there are many practices that are a part of our constitution – judicial review being primary among them – which are not inferable from this text in the way original intent proponents propose. How we identify the constitution of our regime is the ultimate question of constitutional interpretation. And nothing can identify itself as the constitution in a self-referential way. Officials and the public look to the written Constitution, among other things, to identify the basic principles of our constitution. But this is simply to say that referring to this document is part of the settled conventions and procedures of interpretation within our constitution for identifying constitutional requirements. Our written Constitution is then a part, and only a part, of our constitution. It plays a significant though non-exclusive role in constitutional interpretation. It is not, and it is not generally understood to be, the complete representation or embodiment of all constitutional conditions and institutions.

I do not mean to belittle the importance of a written constitution

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[31] Here I agree with Ronald Dworkin's arguments against Ely in *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985), ch. 2. For a similar criticism see Laurence H. Tribe, *Constitutional Choices* (Cambridge, Mass: Harvard University Press, 1985), ch. 2.

[32] See Raoul Berger, *Government by Judiciary* (Cambridge, Mass: Harvard University Press, 1977); Robert Bork, 'Neutral Principles and Some First Amendment Problems', *Indiana Law Journal* **47** (1971): 1; and *The Tempting of America* (New York: Free Press, 1990). See Dworkin, id., for an effective attack on this view.

in a democracy. My point is rather that deciding the role that any such writing must play cannot be taken for granted (as original intent theorists do). Instead, it is an important issue in constitutional interpretation which cannot be decided by looking to the text itself or the intentions of those who designed or ratified it. Our forebears' intentions can be of little relevance to constitutional interpretation in a democracy. For it is now our constitution; we now exercise constituent power and cannot be bound by our ancestors' commitments. Only our intentions, as free and equal sovereign citizens, are then relevant in assessing the constitution and assigning a role to the document that bears that name. And we cannot do this without ultimately looking to the requirements of a just democratic constitution.

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