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Essays

THE AMERICAN DEMOCRACY AND JUDICIAL REVIEW

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I. INTRODUCTION

A good deal of the debate over the meaning and application of various constitutional doctrines is in fact a dialogue about the scope and meaning of American democracy. The debate is seldom put in those terms. Instead the focus is upon the meaning of the text excised from the larger political process or upon various devices of interpretation and noninterpretation. The participants may run the idea of democracy up the flag pole, but they then turn to the perceived real task at hand and begin parsing words, intents and policies. There seems to be an assumption that we all agree on the basic principles of American democracy; it is this delphic constitutional text that gives us so much trouble.

The assumption about a shared meaning of democracy, American or otherwise, is probably wrong and perhaps even pernicious. As one political scientist noted, "Americans mean many different things by the word *democracy*, and unless we take the time and make the effort to clarify what *we* mean by it, we conceal rather than explicate our major premises."[1] To state the proposition more positively, if we take the time to explain what we mean by

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1. M. EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION 7 (1984) (emphasis in original).

democracy or by American democracy, we will have come a long way toward understanding what we are talking about when we engage in constitutional dialogue. But it is easier to state this hopeful proposition than accomplish it. *The Encyclopedia of Philosophy* puts the definitional problem quite well: "'Democracy' is difficult to define, not only because it is vague, like so many political terms, but more importantly, because what one person would regard as a paradigm case another would deny was a democracy at all."[2]

The common understanding of the word "democracy" is government by the people.[3] A literal translation of the ancient Greek renders, "the commons, the people . . . rule, sway, authority."[4] "Democracy" did not always carry the positive connotations commonly associated with it today.[5] But regardless of connotations, even the phrase, government by the people, is fraught with ambiguity. What type of government? Which people? In this century almost every imaginable type of government has claimed to be a democracy or a government of and by the people. Webster's points toward further complexities. One definition speaks of democracy as "political, social and economic equality," while another refers to "a state of society characterized by tolerance toward minorities, freedom of expression, and respect for the essential dignity and worth of the human individual with equal opportunity for each to develop freely his fullest capacity in a cooperative community." A final definition obliquely recognizes something called, "industrial democracy." An examination of democratic theory demonstrates that these tolerable distinctions present only the tip of a much more complex iceberg.[6]

Add to all this a deeply felt patriotic perspective on American democracy and one begins to appreciate both the power of the word "democracy" and the evanescence of its definition. It is abundant with meaning and emotive power, and at the same time verging on meaninglessness. To refer to a particular government practice as undemocratic both vilifies and obfuscates the nature of the practice. Democratic theory is no less charged. How curious that our fundamental law rests upon a premise of such elasticity and over which there is so little agreement.

Various approaches courts and scholars have taken to judicial review throughout our history provide good examples of the interplay between unclarified democratic theory and constitutional doctrine. The debate over the legitimacy of judicial review ostensibly centers upon the relationship between the practice of judicial review and some construct of democracy. The basic notion is that judicial review is in some fashion undemocratic or, as Alexander Bickel put it, counter-majoritarian. Not surprisingly, a firm intellectual grasp on the theory and practice of judicial review proves to be as elusive as the supposed democratic premise on which it rests. What one person regards as an

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2. 2 THE ENCYCLOPEDIA OF PHILOSOPHY 338 (1967); THE SOCIAL SCIENCE ENCYCLOPEDIA 186 (1985).
3. WEBSTER'S THIRD NEW WORLD DICTIONARY 600 (1981).
4. VI THE OXFORD ENGLISH DICTIONARY 442 (2d ed. 1989).
5. *See id. See also* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 282-83 (1967).
6. *See generally* R. MCKEON, DEMOCRACY IN A WORLD OF TENSIONS (1951) (presenting various perspectives on a UNESCO survey on the ambiguity of the word "democracy").

exemplary exercise of judicial review another perceives as an illegitimate judicial function.

One's attitude toward judicial review is inevitably a function of one's views, both prescriptive and descriptive, of the underlying principles of American democracy. The literature has not fully appreciated this apparently obvious connection. Certainly commentators have overlooked some of its more interesting implications. They do not ignore the concept of democracy; indeed, the allusions to our democracy and to the undemocratic deviancy of judicial review are almost obligatory. Most writing, however, relegates the exploration of democracy to a few introductory remarks. The discussion is more evocative than it is explanatory. There is a sense too that the solution of the democratic puzzle is comparatively simple and without substantial controversy. The essence of the debate centers on how to fit a conceptually sophisticated doctrine of judicial review into the relatively unremarkable democratic framework.

An equally plausible approach, however, is to delve more deeply into democratic theory before exploring the niceties of judicial review, with an eye toward fleshing out the relationship between the two. Such an approach is not radically different from the traditional method. It does, however, require a modest turn of the crystal ball, a turn that may provide interesting perspectives on both democratic theory and judicial review. This turn is premised on the notion that judicial review is derivative of democratic theory, not an independent construct to be squared with the latter. If the premise is legitimate, one's theory of judicial review may well be an ineluctable result of a particular theory of democracy. It follows from this possibility that much of the disagreement over the legitimacy and proper scope of judicial review may be really a disagreement over the meaning of American democracy. Indeed, much of the debate over substantive constitutional law may be likewise a debate over the meaning of democracy.

What follows is an effort to construct a critical perspective derived from an impressionistic examination of democratic and political theory from which to assess a number of theoretical approaches to judicial review. The idea is not to show how any particular construct of judicial review is democratic or undemocratic, but to better understand descriptions of judicial review in those terms. A larger goal is to examine the relationship between democracy and judicial review and to explore whether one's attitude toward judicial review is anything more than a function of one's vision of democratic theory. This is only a modest turn of the crystal ball, but it may provide an interesting perspective on an old problem. Perhaps too, this exposition of democracy and judicial review can serve as the basis for exploring the relationship between democratic theory and other constitutional doctrines. After all, if the debate is really over democracy it would be well to consider that subject from to time to time.

II. DEMOCRACY AND DEMOCRATIC THEORY

The proliferation of theories of democracy in the political science and political sociology disciplines is truly overwhelming. However, once one becomes acclimated to the literature, it is apparent that these elegant elaborations of democratic theory and practice are simply variations on (or hybrids of)

two recurring and sometimes counterposed models. The first is commonly referred to as pure or participatory democracy. It possesses an aura of simple, egalitarian charm. Its basic thrust is to maximize citizen participation in governing the state. The second model is generally known as liberal democracy. Within this model, which manifests itself in a variety of forms, citizen participation is channeled and controlled through a structured framework of government that is designed in part to minimize the effects of citizen participation.

Both of these primary models evince specific philosophic conclusions about human nature. Participatory democracy is premised upon a vision of human fulfillment through community, while liberal democracy sees individualism as the primary social force. These premises are in apparent conflict, presenting an intellectual and political dialectic between the needs of society and the rights of individuals. This dialectic establishes the essence of the debate over American democracy. To this extent it not only informs, but perhaps controls, the debate over the legitimacy and scope of judicial review.

A. Participatory Democracy and Civic Virtue

The normative model of pure democracy is based upon the theory that the best (in some versions, the only legitimate) form of government is one in which citizens directly participate in and control the decision-making process of government. The classic example of participatory democracy ostensibly occurred with the rise of the ancient city-states of Greece, particularly Athens. Yet the Athenian democracy was built upon a narrow base of citizenship that excluded most residents of the city, namely, women, children, slaves (who outnumbered the citizens three to two), and the descendants of immigrants.[7] It derived sustenance and stability from an extensive slave system and from conquest. In addition, although all citizens, i.e., adult males of Athenian descent over the age of twenty, could participate fully in the activities of the *polis*, power was often centered on "an elite from wealthy and well-established families."[8] Athenian democracy, therefore, was not a pure democracy. On the other hand, the Athenian experience does represent an historical example of a society placing some value on participation in self-governance. As such, Athenian democracy remains the prototype of participatory democracy, albeit somewhat tainted by reality.

Commentators generally consider Rousseau the leading participatory theorist.[9] Rousseau based his model of democracy upon full participation by individuals in the process of government. But according to Rousseau, democracy is more than a method for enacting laws. It contributes to personal and communal realization. Participation in the process of government uplifts the participants in their knowledge and sensitivity to the needs of others, enhances their sense of mature responsibility, and fully integrates each individual into the community. The requirements of democratic cooperation force the individual to take into account "wider matters than his own immediate private interests."[10]

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7. D. HELD, MODELS OF DEMOCRACY 23 (1987).
8. *Id.* at 27.
9. *See* J. ROUSSEAU, ON THE SOCIAL CONTRACT.
10. C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 25 (1970).

Thus independent citizens learn to recognize their mutual interdependence. Through the process of democracy, reason and will are united for the common good.[11]

This conjunction of the citizen and the state is consistent with the Greek concept of civic virtue through which the private citizen and the public citizen are merged in an effort to discover the common good.[12] For both Rousseau and the ancient Greeks true human fulfillment could be attained only through virtuous participation in the community. The numerous convulsions of the Greek democracy, however, indicate that the ideal of civic virtue was more easily stated than attained.

Despite the shortcomings of the Athenian experience, an idealized version of the self-contained city-state remains the apotheosis of a participatory democracy. Aristotle observed that the ideal state would be populous enough to "suffice for the purposes of life," but small enough to permit the citizens "to know each other's characters."[13] For Rousseau the ideal was the Swiss canton or a similarly situated, small non-industrial community. For others, such as the antifederalists, the ideal may have been the New England town meeting or some similar, manageable unit of local government. In such circumstances full participation is, at least theoretically, a possibility.

In addition to concerns with scale, the classic participatory model is based upon certain economic assumptions about the community. No one in the city-state should be too rich or too poor. For Rousseau, "no citizen shall be rich enough to buy another and none so poor as to be forced to sell himself."[14] Similarly, Jefferson posited his egalitarian creed upon the agrarian model in which each citizen was a self-sufficient farmer in a society characterized by rough economic parity.[15] In short, for the classic theorists, political equality was equated with economic equality or at least with a lack of great economic disparity.

Whether the pure model of participatory democracy can be translated into larger governmental units is problematical at best. John Stuart Mill argued that although participation was the ideal, it was not practical in anything but the smallest town; his alternative was an endorsement of representative democracy.[16] Representative democracy is a species of participatory democracy to the extent that the representatives are expected to reflect directly the will of their constituents. Presumably the constituents gather in some forum, formal or informal, to deliberate over policy matters. Most often, however, representative democracy is a form of liberal democracy in which the

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11. Note that even those who share this belief in the value of participation, i.e., as creating civic virtue, do not necessarily subscribe to a model of pure democracy. Thus, Machiavelli believed a strong leader was needed to bring out the best in people. *See* J. POCOCK, THE MACHIAVELLIAN MOMENT, FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 506-07, 509 (1968); G. SABINE, A HISTORY OF POLITICAL THEORY 346 (1950).

12. G. SABINE, *supra* note 11, at 17.

13. VII ARISTOTLE, POLITICS 163 (S. Everson ed. 1988).

14. II J. ROUSSEAU, *supra* note 9, at ch. XI.

15. A. KOCH, THE PHILOSOPHY OF THOMAS JEFFERSON 178-85 (1943).

16. J. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 80 (1873).

representatives, exercising independent judgment, are the only true participants in the actual decisionmaking process.

Pure participatory democracy at the level of a nation-state presents enormous practical and moral difficulties. These have led many modern political scientists to conclude that classic participatory democracy — even a representative version — is at best a theoretical ideal, unattainable in the modern, highly populated, transnational world.[17] In the words of Robert Dahl and Edward Tufte,

> [a] highly interdependent world of several billion people — whether three, six, ten, or more billions — raises new problems of the most profound sort, and it seems to us doubtful that solutions will be found in theories formulated in and for profoundly different times, or in data analysis that charges ahead in the absence of new theoretical perspectives.[18]

A theoretical alternative, assuming one does not wish to abandon completely the participatory thesis, requires the application of the participatory scheme in social institutions other than in the government of the nation-state. Thus some of the benefits of participatory democracy can be achieved by democratization of the corporate or industrial sector, and by increasing opportunities for full participation in decentralized units of government.[19] At a minimum this democratization and decentralization would vest participants with greater personal autonomy. It would also provide a strong potential for dismantling severe economic disparities which may be inconsistent with the political equality necessary for a legitimate participatory democracy.[20]

Some theorists go further and see this decentralized form of participatory democracy as creating an environment for the flourishing of civic virtue.[21] Multiple layers of participation will foster the emergence of the democratic personality and polity. The nation-state and transnational entities may adopt or conform to the democratic personality of civic virtue even though there is no direct congruence with the classic participatory model.[22] Others see the benefit as no more than equalizing economic and political opportunities across a broad spectrum.

There is a striking similarity between classic theories of participatory democracy and what one may call a Marxist or transitional-Marxist form of democracy. The elements of this form can be found in Marx's observations regarding the Paris Commune of 1871.[23] The model is based upon a pyramid

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17. *See, e.g.*, R. DAHL & E. TUFTE, SIZE AND DEMOCRACY 137-42 (1973).
18. *Id.* at 137.
19. *See, e.g.*, R. DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985) [hereinafter A PREFACE TO ECONOMIC DEMOCRACY]; J. ZIMMERMAN, PARTICIPATORY DEMOCRACY (1986); Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984).
20. A PREFACE TO ECONOMIC DEMOCRACY, *supra* note 19, at 84-110.
21. R. DAHL & E. TUFTE, *supra* note 17, at 139-40.
22. Another possibility is to increase participation through wider use of such devices as the initiative, the referendum and the recall. *See* T. CRONIN, DIRECT DEMOCRACY (1989). The result would be a hybrid of participatory democracy and representative democracy; voting, however, is only a small component of decisionmaking and surely the mere act of voting would not necessarily lead to the human ideals of the classic participatory model.
23. K. MARX, THE CIVIL WAR IN FRANCE 40-42 (1933).

of decentralized governmental units, all of which are run by direct participation of citizens. The smaller units govern local matters and elect delegates to larger units. At the top of the pyramid is a national assembly. All delegates are bound by the instructions from their electing unit and all delegates are subject to recall. The net effect is creation of the general will or, one might say, the dictatorship of the proletariat. In Marx's view, this pyramid of democracy was the antithesis of bourgeois parliamentarianism. It is, in a sense, the representative version of participatory democracy. Needless to say, there is complete political and economic equality within this model.[24]

The new republicanism emerging in current legal literature also draws heavily, if not exclusively, on participatory theory.[25] The essence of this theoretical perspective is succinctly expressed in a discussion of antifederalism found in Stone, Seidman, Sunstein & Tushnet's *Constitutional Law*:

> The animating principle of the republican and antifederalist case was that of civic virtue — the willingness of citizens to subordinate their private interests to the general good. Politics thus consisted of self-rule; but it was self-rule of a particular sort. Self-rule was not a matter of pursuing self-interest but instead of selecting the values that ought to control public and private life. Dialogue and discussion among the citizenry were critical features in the governmental process. Political participation should be active and frequent and not limited to voting or other similar statements of preference. The model for government was the town meeting. . . .[26]

In this republican model, the citizen and the state merge. The process of self-government brings communitarian fulfillment. Further, "[c]ivil society was to operate as a sort of teacher, inculcating virtue, and not merely as a regulator of private conduct. Closely connected to this view was the antifederalists' desire to avoid extreme disparities in wealth, education, and power."[27] Decentralization of governmental authority is a prime tenet of the new republicanism.[28]

This resurrection of the rhetoric of classical republicanism brings the participatory model full circle back to Athens and Plato. Plato's vision of the philosophic ideal is a dialogue among philosophers in pursuit of truth. That vision was constructed across the backdrop of the flawed Athenian democracy. The republican vision covers a wider spectrum of participants — it is democratic — but it also derives sustenance from the Platonic and Aristotelian ideal of the common good; it is a democratic aristocracy. In other words, it places the process of democracy within the ideals or personality of a Platonic aristocracy. If Huey Long had been a new republican he might have said:

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24. *See generally* D. HELD, *supra* note 7, at 105-39.

25. *See, e.g.*, Fallon, *What is Republicanism, and is it Worth Reviving?*, 102 HARV. L. REV. 1695 (1989).

26. STONE, SEIDMAN, SUNSTEIN & TUSHNET, CONSTITUTIONAL LAW 5 (1986).

27. *Id.* at 6. The model is provided further elaboration in Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-33 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-38 (1985).

28. *See* H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 19-23 (1981); Sunstein, *supra* note 27, at 31-38.

"Everyman a philosopher king." This new republican vision is not, however, constructed across the backdrop of a flawed city-state; rather, it exists as an idealized version of the city-state.

B. Liberal Democracy and Self Interest

The modern liberal model of democracy deemphasizes the importance of broad-based citizen participation in government. Instead, it channels such participation through a hierarchical matrix of governmental institutions designed to limit the perceived dangers of pure democracy. Those dangers derive from a distrust of the people. That distrust derives in part from a perception of the people as insufficiently wise, but somewhat inconsistently and in larger part it rests upon the notion that the people are rational individualists who will use the institutions of government to maximize their individual well-being at the expense of others. Both of these themes are evident in Plato's *Republic*, particularly in Socrates' discussion of democracy and oligarchy. A democracy, according to Socrates, was an excuse for ignorant licentiousness, while an oligarchy was premised upon the greed of the ruling class. Modern liberal democracy is meant to ameliorate these all too human proclivities, at least as they operate in the public sphere.

If Rousseau is the philosophic father of participatory democracy, the paternity of modern liberal democracy can be traced to Thomas Hobbes. His bleak vision saw humanity as composed of atomistic creatures bent on personal gratification.[29] Although Hobbes was not a democrat in any form of the term, his conception of humanity as basically self interested recurs throughout the literature of liberal democracy. Mankind is simply not to be trusted; not individually and not collectively. Hobbes' authoritarian solution to this anarchy of unabated self interest, however, has been tempered by the writings of John Locke and others who envision some sort of limited democratic government as presenting the appropriate accommodation between acquisitiveness and responsibility. It should be added too, that Locke did not share Hobbes' dark conception of man in the state of nature; he did recognize however that a sufficient number of our fellow creatures are basely motivated so as to require some type of governmental system.

While participatory democracy's primary theme is communitarian, liberal democracy's focus is on the individual, though not necessarily rank individualism. It is individualism within the context of a commonwealth. There is clearly a wide chasm between the ideal participatory community and all forms of the liberal state. The width of the gap, however, depends on the scope of political authority given the liberal commonwealth. Under some formulas, the commonwealth merely serves as a shield against physical aggression to person or property. Under others the goal is more broadly defined as promotion of some type of public or common good within a community of individuals.

In his essay, "Of Civil Government," Locke lays the foundation for what he believes to be the only legitimate form of government, a commonwealth created by the consent of the members and ruled by the will of a majority of

29. T. HOBBES, LEVIATHAN (1651). The significance of Hobbes to liberal theory will not be discussed as a separate point, but will arise intermittently throughout the overall discussion of liberalism.

those members.[30] In developing this idea, Locke draws a distinction between the individual in a state of nature and the individual as a member of the commonwealth.

In the state of nature, all individuals are of equal dignity and equally free to act in accord with the laws of nature.[31] The law of nature is defined as follows: "The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions. . . ."[32] Most importantly, in the state of nature each individual possesses the full powers of government. As such an individual is fully free to execute justice — in accord with the laws of nature — upon any other individual "without asking leave or depending upon the will of any other man."[33] This is the only power an individual may legitimately exercise over another.[34] "The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule."[35]

Consistent with natural law, i.e., the rule of reason, individuals, through the fruits of their own labor, are entitled to acquire ownership of things.[36] Whatever a person may reduce to personal possession through labor belongs to that person: the acorns he gathers, the deer he slays and the land he cultivates. But no one is entitled to more than he can use.

> As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy.[37]

Consistent with these principles, each person is entitled to gather adequate "meat and drink" for the preservation of his or her own life. The "invention" of money alters this scheme somewhat by allowing the individual to acquire and save more than he or she can use; although nothing Locke says would indicate that such monetary acquisitions can be permitted to leave others without the means of personal preservation.

But all is not perfect in the state of nature. Although the rule of reason is available to all, most inhabitants of the earth are not "strict observers of equity and justice."[38] Therefore, the property one acquires in the state of nature is "unsafe, very unsecure." It is "constantly exposed to the invasion of others."[39] (Locke defines property broadly to include, "Lives, Liberties and Estates.") This tenuous nature of property ownership in the state of nature leads mankind to enter into political communities which Locke calls civil society. Locke observes: "The great and chief end therefore, of men's uniting into

30. V J. LOCKE, THE WORKS OF JOHN LOCKE IN TEN VOLUMES 394-411 (1812).
31. *Id.* at 339-47.
32. *Id.* at 341.
33. *Id.* at 339-40.
34. *Id.* at 342.
35. *Id.* at 351.
36. *Id.* at 352-54.
37. *Id.* at 356.
38. *Id.* at 412.
39. *Id.*

commonwealths, and putting themselves under government, is the preservation of their property."[40]

Locke defines a civil society as one in which any number of individuals jointly relinquish their "executive power of the law of nature" and assign that power to "one body politic, under one supreme government."[41] Such a body politic is a commonwealth and the authority to determine all controversies and to redress all injuries within the commonwealth is placed in an appropriate governmental agency. The members of the body politic are thereafter removed from the state of nature, although not necessarily exempt from the law of nature, and become subject to the laws of the commonwealth. Locke specifically rejects monarchy as an alternative because the difficulties that arise in the state of nature demonstrate that no individual is capable of overcoming "self love." for the same reason no individual is capable of fairly applying the law of nature to his or her own situation.

The laws through which the commonwealth exercises its will are determined on the basis of majority rule:

> For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority. . . . And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it. . . . [F]or where the majority cannot conclude the rest, there they cannot act as one body, and consequently will be immediately dissolved again.[42]

This legislative or lawmaking power can extend no further than to enact laws designed to promote the common good. Since much of what Locke is saying is a refutation of Sir Robert Filmer's defense of monarchism, one can assume that the common good is in contrast to laws designed for the benefit of a ruling monarch or caste. Quite clearly, at the heart of the common good is the preservation of life, liberty and estate.

From the above outline of a consensual commonwealth, developed around property rights of self-interested human beings, one can see the basic elements of liberal democracy. On the whole, mankind cannot be trusted. Some type of governmental system is needed to curb the excessive aggressions of those who are not lovers of equity and justice. The governmental system must be one that does not permit excessive power in any individual or ruling elite since this same proclivity toward self-love is likely to manifest itself through exercises of magisterial power. At the same time liberalism assigns a positive value to individualism. One has a right to acquire ownership in things and ownership coupled with labor will actually benefit both the individual and the community. An accommodation between individual rights and community needs is a commonwealth ruled by those who are also subject to its laws.

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40. *Id.*
41. *Id.* at 389.
42. *Id.* at 395-96.

Numerous thinkers, including some of the framers of our Constitution, have contributed further to this prototype of what will be called liberal democracy, but the essential elements are found in Locke: individualism is to curbed and at the same time permitted to flourish. In any event, what has been said here about the basic philosophy should suffice for the discussion of democracy and judicial review that will follow.

In the twentieth century, the "democratic" part of liberal democracy has received considerable attention. The leading work is Joseph Schumpeter's *Capitalism, Socialism and Democracy*.[43] According to Schumpeter: "Democracy is a political *method*, that is to say, a certain type of institutional arrangement for arriving at political — legislative and administrative — decisions and hence incapable of being an end in itself, irrespective of what decisions it will produce under given historical conditions."[44] Democracy is not an intrinsically valuable form of human interaction and fulfillment; it is a method of government and nothing more. Thus, "there is no absolutely general case for or against the democratic method."[45] As such, democracy is only valuable if it produces appropriate substantive policies.

Schumpeter's criticism of the participatory model, which he referred to as "The Classical Doctrine of Democracy," was harsh and blunt. He rejected outright the notion that the will of the people equated with the common good. "There is . . . no such thing as a uniquely determined common good that all people could agree on or be made to agree on by the force of rational argument."[46] More fundamentally, Schumpeter also rejected the idea that there is such a thing as an ascertainable will of the people. Even if people act rationally and promptly, the composite will would not necessarily — in fact, probably cannot ever — be discovered due to the complexities of the volitions of the individual electors. Given the reality of pluralism and the ability of minorities to trump governmental action, a dictatorship is more likely to produce a government for the people than is a government by the people.[47]

On an even darker note, Schumpeter cast doubt upon the rationality of the individual, at least the rationality of most individuals operating within larger human systems.[48] For this he relied upon studies of crowd psychology indicating the ease with which a non-rational herd mentality can dominate a group and upon the manipulations of advertising that work successfully at an extra-rational level. He did not reject the notion of rationality; he merely observed that rationality is not the primary rule of behavior for the masses and that it cannot function effectively under circumstances of broad participatory politics.

In sum, Schumpeter rejected the notion of rule by the people because in his view people do not act rationally individually or as a group, because even assuming some quantum of rationality there is no way to ascertain the common

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43. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1950).
44. *Id.* at 242.
45. *Id.* at 290.
46. *Id.* at 251.
47. *Id.* at 254-56.
48. *Id.* at 256-64.

will through democratic process and because in any event the common will does not necessarily equate with the common good.

For Schumpeter these points were obvious to all intelligent people. He believed that the classic definition of democracy was retained as part of a mythological belief system. Schumpeter's alternative definition of democracy — the competitive paradigm — retains the myth in name only. It is a democracy, but one devoid of any romantic notion about the will of the people, the importance of participation or the common good. Specifically, Schumpeter defined democracy as follows: "The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."[49] The essential condition for democracy is "free competition for a free vote."[50]

Having defined democracy as nothing more than a procedure for selecting leaders, Schumpeter posited five social conditions as integral to the effective operation of a democracy. First, the selected rulers must be of "adequate ability and moral character."[51] The only "effective guarantee" for this is the existence of a social stratum of potential rulers that is neither "too exclusive nor too easily accessible."[52] Such a stratum would develop a tradition of leadership and a "common fund of views."[53] In other words, the democracy must select its leaders from a moderately elitist class that is bred to rule. He offers the English class structure as an instructive positive example.

Next, in a democracy, "the effective range of political decision should not be extended too far."[54] By this Schumpeter meant that the rulers should not extend their rule beyond their own competence. For example, the rulers could agree upon the need for a criminal code and whether certain activities should be criminalized, but the actual content of that code should be left to specialists. In addition, the substantive range of alternatives considered by the rulers must be narrow because a relatively broad range of alternatives threatens a collapse of the democracy. Accordingly, substantive law may have constitutional limits and those limits need not be subject to the "competitive struggle."[55] Thus, "[d]emocracy does not require that every function of the state be subject to its political method. For instance, in most democratic countries a large measure of independence from political agencies is granted to the judges."[56]

Third, a democracy requires a "well trained bureaucracy . . . with a strong sense of duty and a no less strong *esprit de corps*."[57] The bureaucracy must be "strong enough to guide and, if need be, to instruct the politicians who head the ministries."[58] Again, Schumpter called for a social stratum of

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49. *Id.* at 269.
50. *Id.* at 271.
51. *Id.* at 290.
52. *Id.* at 291.
53. *Id.*
54. *Id.*
55. *Id.* at 293.
56. *Id.* at 292.
57. *Id.* at 293.
58. *Id.*

"adequate quality and corresponding prestige that can be drawn upon for recruits — not too rich, not too poor, not too exclusive, not too accessible."[59]

Fourth, a democracy must have self-control. The minority party must accept the ascendancy of the majority party. The electors must allow the rulers to rule. Political action is the province of the rulers, not the people. The electors should even refrain from "the practice of bombarding [the rulers] with letters and telegrams. . . ."[60]

Finally, a democracy must be marked by a tolerance for the views of others. As a consequence, a democracy will function well only in times of relative calm and, as pointed out above, when the range of alternatives is relatively narrow. Tolerance tends to dissolve as the range of alternatives or the intensity of an emergency increases.

Several observations are in order. The competitive model appears, at first blush, to depend upon a self-contradictory view of human rationality. On the one hand, the people are not sufficiently rational to make policy choices, while on the other they are sufficiently rational to select the leaders who will make those choices. Some commentators suggest that this is a tenable distinction because a decision on who should lead requires less sophistication than does a decision regarding the precise contours of any particular policy.[61] This misses an essential part of Schumpeter's thesis. The ruling class is defined as a cohesive group within which the range of policy choices is rather limited. The choice as to who within this group should lead is relatively meaningless especially when one adds to this the importance of specialists and the bureaucracy. Schumpeter's basic cynicism about the ability of the people to govern is allayed not because of a recognized ability to select leaders, but because the selection makes little difference. Although Schumpeter conceded that over long periods people may eventually arrive at correct or rational conclusions, in the short term, which Schumpeter considered vital, one cannot depend on the rationality of the people. Certainly his comments regarding the herd instinct and manipulation by the media are fully relevant to the selection of leaders.

Next, it should be clear that in this formula the competitive model places no particular value on the democratic process. The free competition for the free vote stems more from a perceived need to characterize the system as a democracy than it does from any inherent value in that selection process. Why the ultimate leaders should not be selected by the social stratum from which they are chosen is not readily apparent. Seemingly the need to allay concerns about totalitarian socialism justifies reliance on the residual myth of democracy.[62] The remnant of the myth will be tolerated only so long as it provides appropriate results, i.e., so long as the optimal conditions for democracy prevail.

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59. *Id.* at 294.
60. *Id.* at 295.
61. Miller, *The Competitive Model of Democracy*, in G. DUNCAN, DEMOCRATIC THEORY AND PRACTICE 139-40 (1983).
62. Schumpeter's central thesis was that capitalism had run its course and that socialism would soon emerge as the dominant economic model.

Schumpeter's influence on contemporary democratic theory has been extensive. During the 1950's and 1960's political scientists and political sociologists used the general framework of Schumpeter's model to explore the contours of western democracy and, in particular, American democracy. Such persons as Robert Dahl and David Truman refined the competitive model and gave it an empirical elaboration. This elaboration served as the basis for the development of interest group and pluralist theories of democracy.[63] It now provides a foundation for the social choice and public choice theories of democracy. As such, the competitive paradigm shifted from a realistic explication of democratic governments to what purports to be a prescriptive theory of democracy.

The elaborating work of Robert Dahl is in many ways as important as the basic competitive framework described by Schumpeter.[64] For one thing, Dahl's work had a substantial influence on an entire generation (or more) of political scientists and constitutional law scholars.[65] Next, Dahl's work, especially as it developed over the next three decades, added a humane sophistication to the competitive model that was clearly lacking in Schumpeter's account.

The model of democracy developed in Dahl's *A Preface to Democratic Theory* assumes that the competitive paradigm provides a roughly accurate statement of how modern democracies function.[66] From this assumption Dahl attempts to construct a "real world" model in which participation in the democracy can be maximized. He calls this model a polyarchy. The essential democratic element of a polyarchy is the election. Importantly, elections are not deemed essential because they establish policy preferences in any substantial way. Rather, elections are essential because they provide a method through which leaders are selected and, more importantly, rejected. His ultimate conclusion about the process is significant:

> [Elections and interelection activity] are crucial processes for insuring that political leaders will be *somewhat* responsive to the preferences of *some* ordinary citizens. But neither elections nor interelection activity provide much insurance that decisions will accord with the preferences of a majority of adults or voters. Hence we cannot correctly describe the actual operations of democratic societies in terms of the contrasts between majorities and minorities. We can only distinguish groups of various types

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63. R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967) [hereinafter CONFLICT AND CONSENT].

64. A PREFACE TO ECONOMIC DEMOCRACY, *supra* note 19; R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY (1982); R. DAHL, AFTER THE REVOLUTION (1970); CONFLICT AND CONSENT, *supra* note 63; R. DAHL, WHO GOVERNS? (1961) [hereinafter WHO GOVERNS?] ; R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) [hereinafter A PREFACE TO DEMOCRATIC THEORY].

65. *E.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 30, 38, 45, 192, 311 (1980); J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 59-60 (1980); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 84, 88 (1978); A. BICKEL, THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS 18-19 (1962) [hereinafter THE LEAST DANGEROUS BRANCH].

66. A PREFACE TO DEMOCRATIC THEORY, *supra* note 64, at 131 (taking minor exception with Schumpeter's "otherwise excellent analysis of democracy").

> and sizes, all seeking in various ways to advance their goals, usually at the expense, at least in part, of others.[67]

He further explains, "[e]lections and political competition do not make for government by majorities in any very significant way, but they vastly increase the size, number, and variety of minorities whose preferences must be taken into account by leaders in making policy choices."[68] The majority rules only in the sense that all decisions must fall within the boundaries of majority consensus.[69] Within those boundaries various substantive alternatives are available. The essence of democracy is that substantial numbers of minorities are able to protect their interests within this broad spectrum. Elections are crucial to this grand design because they keep leaders responsive to the multivariate interests of minorities. They operate as a potential negative upon the future exercise of power.

Dahl's model can spin in two divergent ways. If one accepts the model as a realistic appraisal of how modern democracies work, but nonetheless sees an inherent value in democratic participation beyond the vote, the model can be used to examine methods for increasing or improving such participation. In other words, the descriptive model can be used to explore normative possibilities in a realistic fashion. For example, in his later work Dahl outlined an approach to economic democracy that would theoretically reduce the economic disparities he saw as destructive of the democratic process.[70] Consistent with this outline and with his theory of polyarchy, interest groups would still be the primary engines of democracy; the economic (ergo political) clout of these groups would, however, be somewhat leveled. On the other hand, if one sees modern democracy as premised upon the rank opportunism of interest groups, i.e., upon traditional liberal dogma derived from Hobbes, the insights derived from the model can serve as the basis for a more restrictive view of participation in the process. As such, the descriptive competitive paradigm becomes a prescriptive model for controlling the potential excesses of what is, after all, nothing more than a self-interested competition for power.

A recent elaboration of this latter approach is found in the work of William Riker, a social choice theorist. His description of the democratic process bears a likeness to Dahl's model of polyarchy, but the spin is distinctly Hobbesian:

> In modern political science . . . electoral majorities are seen as evanescent, and the legislator himself as a placeholder opportunistically building up an ad hoc majority for the next election. The effect of this opportunism on legislation is that legislators do not mechanistically transmit majority opinion. Rather, they calculate the intensity of opinion, choosing their positions in such a way as to maximize the probability of subsequently garnering citizens' votes. By and large, legislators build coalitions of minorities, each one of which is especially concerned with a particular subset of

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67. *Id.* at 131 (emphasis added).
68. *Id.* at 132.
69. *See* WHO GOVERNS?, *supra* note 64, at 324-25.
70. *See* A PREFACE TO ECONOMIC DEMOCRACY, *supra* note 19.

> issues. This almost certainly does not result in legislation that is a coherent will of the people.[71]

Riker goes further and argues that the legislative process is subject to potential incoherencies caused by a combination of the complexities of voting patterns, the potential for agenda manipulation and the practice of strategic voting.[72] As a consequence of these factors the minorities that rule may not compose even a mathematical majority of the legislature. For these reasons — the individual legislator's self-interest, subservience to minority coalitions and the inherent manipulability of the lawmaking process — Riker is convinced that "legislators, on the whole, automatically fail to protect rights of citizens."[73] Structural constitutional limitations on democracy, therefore, are essential.

The emerging public choice strand of legal scholarship bears a close resemblance to Riker's limited vision of democracy. Both approaches see the public sector as infected by self-interest and both rely upon the incoherency of voting patterns to establish their case against a broader application of democratic process. For Riker democracy is legitimate only because it "may" provide an opportunity to eliminate leaders who become unsatisfactory to the voting public. In all other regards, democratic process is suspect. Similarly, within public choice theory democracy is at best a necessary evil that must be carefully circumscribed.

According to the theory of public choice, the democratic polity is composed of self-interested "rent-seekers" attempting to use the power of government to steal from those who do not share in the power structure. This rent-seeking characterization applies to both the electorate and its representatives. We are all "utility-maximizing individuals."[74] Everyone is in on the game of seeking personal economic advantage through promotion of government intervention in the free market. Because public choice theory is based on a belief in the merits of an unencumbered free market economy, this legalized interference with the market is, according to one critic of public choice, "an unmitigated disaster."[75] This democratically inspired self- interest must be curtailed.[76]

Jonathan R. Macey attempted to provide a constitutional foundation for the theory of public choice.[77] According to Macey the Constitution was founded upon economic principles consistent with public choice theory. "Thus, consistent with basic economic principles, the framers of the Constitution assumed they were establishing a system of government that would guide the affairs of rational, highly self-interested economic actors who would be

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71. Riker & Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 382-93 (1988).
72. W. RIKER, LIBERALISM AGAINST POPULISM (1982).
73. Riker & Weingast, *supra* note 71, at 397.
74. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 485 (1988).
75. Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 202 (1988).
76. Much the same point is made by Epstein. R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-31 (1985).
77. Macey, *supra* note 74, at 471.

governed by other equally self-interested individuals."[78] The various structural devices found in the Constitution, such as the separation of powers, bicameralism, executive veto, specific limitations on power, etc., were designed to raise transaction costs that discourage rent-seeking or the public promotion of self-interest.[79] In short, democracy is not to be trusted because it is composed of individuals who will promote their own self-interest. The role of the federal government structure is to minimize the impact of this problem.

With the public choice theorists' frank elaboration of liberal democracy, our circle is complete. Liberal democracy, in its most extreme version, is a system of government that assumes the relevant actors are motivated by self-interest or greed. The democratic process, seen primarily if not exclusively as the competition for the free vote, is set in a context of Plato's concept of the oligarchic personality, a personality motivated by greed. Pursuit of the common good plays little or no role within our oligarchic democracy. Rather, the driving force behind government is interest groups pushing their respective agendas upon self-interested politicians seeking to maximize their electability. As a consequence, the role and power of the democracy must be carefully circumscribed to ensure that the promotion of self-interest will not destroy the social enterprise, the sole legitimate purpose of which is protection from other self-interested actors.

C. A Transitional Comment

In examining these polar theories of democracy, i.e., the participatory and the liberal, one is struck by the very different concept of human nature presupposed by each. The participatory theorists, from Rousseau to Marx to current observers such as Carole Pateman and the new republicans, view humankind as essentially (or potentially) communal seekers after the common good. They see human fulfillment as a product of shared commonalities. Liberalism and unrestrained capitalism are seen as major stumbling blocks to the fulfillment of the dream. The liberal theorists — at least those of a public choice bent — have a less sanguine view of their fellow creatures. They see the whole of humanity — at least the true players — as Hobbesian self-seekers bent on personal gratification. The purpose of government is not to fulfill human potential but to protect individual liberty from the unlawful encroachments of other self-seekers. In all other respects, the private sphere and the public sphere are separate.

This fundamental philosophic divergence, admittedly somewhat simplified but generally accurate, explains much of the difference and tension between the two models. The participatory model places few restraints on the democratic process because, properly configured and evolved, that process is the method through which human potential is realized. External restraints deny the theoretical underpinnings of the model and operate to restrict its ability to promote human fulfillment. Republicanism can survive only if the community is allowed to seek, through individual interdependence, the common good. The more severe versions of the liberal model see restraint upon democracy as being the essence of good government. Human potential is realized through the

78. *Id.* at 486.
79. *Id.* at 493-505.

maximization of individual autonomy. The group, i.e., the democracy, is always a potential threat to that maximization. Democratic rule, defined as a product of interconnecting self-interests, must be restrained in order to assure that the individual remains as free as possible to pursue self-interest in the private sphere.

For most of us, our sense of humanity lies somewhere in the middle of this philosophic tug-of-war. Human beings are both self-regarding and other-regarding. This rather obvious realization may create a philosophic discomfort because we cannot fully realize either without sacrificing values inherent in the other. Such discomfort assumes, however, that one of these divergent theories is an ideal to be emulated in the real world. It may well be that these different perceptions of humanity derive from essential contradictions of human nature. The tension between autonomy, on the one hand, and regard for the community, on the other, creates a stable, albeit tense, path between the alienation of pure atomism and the soundless anonymity of absolute self-abnegation. These counter tendencies may also account for our survival. Self-interest motivates us to push to the edge of our abilities; communitarian values lead us to restrain ourselves in the pursuit of personal satisfaction. Regard for others enlightens our view of the needs of the community; regard for ourselves allows us to believe we can actually contribute to the betterment of that community.

With this in mind, it seems that one valuable way of approaching our two polar models of democracy is to see them as standards from which to criticize and analyze current practices. Neither are real world ideals, just as Plato's five forms of government were not meant to be used as a mechanical guide to good government. At the same time, both models (and Plato's five forms) provide philosophic constructs against which to comprehend a political system.[80] Deviation from the particular norm is neither intrinsically good nor intrinsically bad; it is simply a fact to be reckoned with, the ultimate wisdom or morality of it depending on complexities a model cannot effectively address. Each model merely provides a different key to understanding a political system and the people who live within it.

IV. JUDICIAL REVIEW AND AMERICAN DEMOCRACY

A. Hyperliberal Models

Two models of activist judicial review derive from what might be described as a hyperliberal model of democracy. I refer to these models as hyperliberal because the distrust of representative democracy is acute in both. Of the two models, one can be characterized as the progressive model and the other as the libertarian model. The first arises out of an explicit faith in the progressive activism of the Warren Court and endorses a search for an evolving taxonomy of judicially enforceable fundamental rights. The second

80. Plato's five forms of government are, of course, aristocracy, timocracy, oligarchy, democracy and tyranny. PLATO, THE REPUBLIC. Similar to the approach suggested above, these five forms of government are not designed to serve as a taxonomy of governments, but rather as a method to expose various themes having relevance to the governance of a city-state and to the development of the human personality within various social structures.

yearns for a return to the era of economic due process and sees salvation in strict limits upon the scope of government power. Proponents of this model, however, are less than sanguine about the judiciary's role in the discovery or creation of fundamental rights not immediately discernable from the text of the Constitution or from the philosophy of a free market economy.

Although these models of judicial review come from vastly different segments of contemporary political thought, the two are quite similar in their conceptions of the practice of judicial review and of its relationship to democratic theory. Both are premised upon a fundamental mistrust of popular and representative democracy and both see the judiciary as the primary check upon the potential excesses of the elective branches. Their dissimilarity derives from their strikingly different conceptions of the fundamental law embodied in the Constitution.

1. The Progressive Model of Judicial Review

A recent explication and defense of the progressive model of judicial review can be found in Erwin Chemerinsky's *Interpreting the Constitution.*[81] Chemerinsky sees the Supreme Court as playing an integral role in the promotion of the common good through the process of judicially driven constitutional evolution.[82] His approach displays an explicit faith in the long-term ability of the Supreme Court to develop a humane jurisprudence of constitutional law that would parallel the ideals of modern progressivism.[83]

Chemerinsky's discussion of judicial review arises out of what he sees as a misdirected debate over the scope of judicial review. According to Chemerinsky this debate — generally perceived as between originalists and nonoriginalists — is premised upon a "superficial" definition of democracy that posits majority rule and electoral accountability as the sine qua non of our democratic system. In accord with that premise, so the syllogism goes, any branch of the government that operates contrary to majoritarian principles is both antidemocratic and illegitimate. The judicial act of declaring legislative enactments unconstitutional clearly falls into this category. With both sides adopting a procedural definition of democracy as majority rule, the only question is how to limit judicial review so as to comport with that narrow definition.

Chemerinsky rejects the major premise of the debate: "The debate is misdirected because it starts with a premise — all decisions in a democracy should be subject to control by politically accountable institutions — that is neither justified nor justifiable. U.S. democracy does not, and should not, correspond to a purely procedural definition of democracy as majority rule."[84] Any legitimate definition of American democracy, according to Chemerinsky, must incorporate those substantive values and procedures that society is unwilling to sacrifice to majoritarian preferences.[85] This is not meant to dispar-

81. E. CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987).
82. *See, e.g., id.* at 122 (listing positive achievements of judicial review).
83. *Id.* at 117-28.
84. *Id.* at 1-2.
85. There is a brief congruence between Chemerinsky's argument that democracy should not be defined as purely procedural and the participatory model which sees democracy as

age the value of majority rule, but to place it in a proper perspective. From this perspective, democracy is seen as a system of government in which majoritarian procedures operate within a structural framework that promotes tolerance for minorities, freedom of expression and respect for the worth and dignity of the individual.[86] In short, in a true democracy majority rule is simply one component of a political system dedicated to the preservation of substantive fundamental rights.

Having thus broadly defined democracy, the antidemocratic problem of judicial review disappears. Judicial review is no longer antidemocratic; rather, it is a structural device designed to undermine those aspects of majority rule seen as inimical to transcendent "democratic" values. In Chemerinsky's words, "[t]he Constitution purposely is an antimajoritarian document reflecting a distrust of government conducted entirely by majority rule. The Constitution protects substantive values from majoritarian pressures, and judicial review enhances democracy by safeguarding these values."[87]

Although Chemerinsky correctly points out that most theorists of judicial review have approached democratic theory in a superficial fashion, it would seem that he falls into the same trap. His definition of democracy as including substantive values is, of course, nothing more than a restatement of the traditional liberal model of democracy in which pure democracy is viewed as an invitation to tyranny. Accordingly, democracy must be contained within a structure of government designed to limit the perceived dangers of broad-based citizen participation. Chemerinsky does not provide a richer definition of democracy. He merely parrots that version of democracy that relegates the democratic component of a larger political system to a controlled process within that system. By calling the overall system a democracy, much in the style of Schumpeter, Chemerinsky merely sidesteps the more fundamental debate over democratic theory. He ignores completely the participatory theory of democracy and any potential values inherent in a system of government more closely aligned with that theory.

Chemerinsky ostensibly carries his defense of judicial review beyond this somewhat question begging definition of democracy. It remains clear throughout his book, however, that the Hobbesian premise of liberal democratic theory, which is after all at the heart of his definition of democracy, remains the driving force behind each component of the larger defense. The essence of that defense is that our society should be governed by a constitution, that the constitution should evolve over time through means other than amendment and that the judiciary is the ideal governmental body to implement that evolution. The reason given at every step of the analysis derives in some manner from a fear of democratic tyranny and a faith in centralized judicial authority.

Thus, Chemerinsky argues that we should be governed under a written constitution because of the safeguards such a system provides against the

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an opportunity for human fulfillment. However, the congruence is accidental. Chemerinsky is not talking about values inherent in the participatory model. He is referring to those values that transcend any definition of democracy. It may well be that these same values would be protected within the participatory model through the interactive decision-making process; in the liberal model, however, the values are protected through trumps upon the process.

86. E. CHEMERINSKY, *supra* note 81, at 7.

dangerous proclivities of pure democracy, i.e., against the dangers of self-interest expressed through majority tyranny.[88] If we assume that certain rights ought to be valued, then according to Chemerinsky, a constitution is a good way to protect those values. In essence, it shields those values from the potential excesses of the democratic process. He also argues that a constitution, if sufficiently abstract, can provide an important unifying symbol for a people. Both of these reasons — the protection of fundamental values and social unification — are given as support for the next link in the argument, namely that the constitution must be free to adapt to current circumstances. The gist of the argument is that fundamental values cannot adequately be safeguarded by a static constitution and, similarly, that our society will not cling to an archaic constitution as a symbol of national unity.[89]

It seems, however, that these arguments in favor of a constitutional system run a collision course with one another. If a constitution is to protect valued rights, how is it that the rights can be protected if they exist only as abstractions? Similarly, if these constitutional values are to evolve, how can one be assured that the values seemingly protected by the constitution will not, by some process of interpretation or Darwinian natural selection, cease to exist? The collision is avoidable only because of the explicit faith Chemerinsky places in the judiciary as implementer of the constitutional abstractions and as the hidden hand behind the constitutional evolution.

From Chemerinsky's liberal democratic perspective, once one concludes that an evolving constitution is a good thing, the legitimacy of judicial review is easily established. "[I]n deciding who should be the authoritative interpreter of the Constitution, a primary criterion should be determining which branch of government can best enforce the Constitution against the desires of political majorities."[90] Since the judiciary is relatively insulated from direct political pressure through life tenure and salary protection, that branch is "most able to protect the Constitution's structure and values from majoritarian pressures."[91] Again, liberal democratic theory provides the driving force behind the conclusion. The antimajoritarian values of the Constitution are best protected by a nonmajoritarian institution.

The bottom line of Chemerinsky's vision is that the courts should have broad discretion to interpret and apply all provisions of the Constitution. He does not suggest that judges are completely above the fray; nor does he suggest that judicial decisions are error free; rather he sees the judiciary as relatively virtuous when compared to its legislative and executive counterparts. In the end, he rests his defense of judicial activism on a faith in the long term ability of the court to oversee a positive and progressive constitutional evolution.[92]

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87. *Id.* at 2.
88. *Id.* at 27-36.
89. *Id.* at 66-73.
90. *Id.* at 86.
91. *Id.*
92. *Id.* at 117-28.

Bruce Ackerman's vision of liberal democracy and the role of judicial review within a democracy is quite similar to that presented by Chemerinsky.[93] Although the path through Ackerman's dialogic utopia takes a number of esoteric twists, it ends quite clearly at a very traditional exposition of progressive liberal democracy. The journey begins, not too surprisingly, with a distinctly Hobbesian portrait of humanity:

> So long as we live, there can be no escape from the struggle for power. Each of us must control his body and the world around it. However modest these personal claims, they are forever at risk in a world of scarce resources. Someone, somewhere, will — if given the chance — take the food that sustains or the heart that beats within. Nor need such acts be attempted for frivolous reasons — perhaps my heart is the only thing that will save a great woman's life, my food sufficient to feed five starving men. No one can afford to remain passive while competitors stake their claims. Nothing will be left to reward such self-restraint. Only death can purchase immunity from hostile claims to the power I seek to exercise.[94]

Ackerman's proposed solution is to create a political state in which self-interest is restrained by a rational, neutral dialogue that serves as the basis for all exercises of political power through a process of majority rule. Ackerman recognizes, however, that given his Hobbesian premise, this ideal is not likely to be achieved in the real world of "second-best" options unless some limitations are placed upon potential outcomes. Therefore, while his real world model embraces the ideals of the liberal dialogue, as well as majority rule, it recognizes the power of the majority "to destroy a liberal state." As a consequence, majority rule "is only appropriate for collective choices between options of *equivalent* liberal legitimacy."[95]

Consistent with the above concerns, Ackerman argues in favor of a bill of rights that would place certain values beyond the ambit of simple majority rule. He also proposes the creation of a "special body of dialogic policemen established by the polity to serve as a supreme court." He would give this court power beyond that of ascertaining the original intent of "master statesmen" long dead; rather this supreme court would ascertain the present day liberal legitimacy of particular political outcomes. In short, it would be an activist court designed to insure that particular political outcomes remain consistent with the principles of the rational, neutral dialogue and an evolving concept of fundamental rights. Although such an institution may require a check on its power, Ackerman expresses higher hopes for this court: "[A]n input strategist might dream of providing the bench and bar with a proper sense of their calling in a liberal state, one that emphasizes the special mission of the supreme court without making it a cause for yet another elitist celebration."[96] In other

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93. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) [hereinafter SOCIAL JUSTICE IN THE LIBERAL STATE]; B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

94. SOCIAL JUSTICE IN THE LIBERAL STATE, *supra* note 93, at 3.

95. *Id.* at 297 (emphasis in original).

96. *Id.* at 312.

words, the highest hope is for this court to transcend the Hobbesian vision and to work for the common good.

As Ackerman recognizes, his proposed solution "turns out to be nothing more than old-fashioned liberal democracy."[97] It is, however, liberal democracy with a decidedly progressive tilt and parallels closely the model described by Chemerinsky above. The goal is to seek the common good in a non-tyrannical, highly rational fashion. Due to the competitive struggle for goods and power, that goal is attainable only with the assistance of "dialogic policemen" who will insure that exercises of power comport with the fundamental values of Ackerman's liberal state. This reliance on a highly educated class of legal experts to control and guide the democracy is quite similar to Schumpeter's government composed of members of a cultivated, ruling elite.

Michael Perry's work on constitutional interpretation also comports with the progressive liberal model of democracy and judicial review. His conception of democracy roughly parallels Schumpeter's and Dahl's view of democracy as a system in which leaders are chosen through a free competition for the free vote. In Perry's words, the United States is "philosophically committed to the political principle that governmental policy making . . . ought to be subject to control by persons accountable to the electorate."[98] Democracy is the process through which the people pick these leaders.[99]

In so defining democracy, Perry rejects the type of substantive definition used by Chemerinsky as unnecessarily freighted with subjective value judgments. In the end, however, very little distinguishes the underlying concept of democracy in their respective approaches. Perry's definition specifically focuses on democracy as a process. Within Chemerinsky's definition the actual democratic element is in fact nothing more than a process for registering majority preferences; the substantive values imported into his definition are not so much democratic as they are trumps upon that process. Similarly, the substantive values gleaned from Perry's endorsement of noninterpretive review are but trumps upon what he calls a democracy. The consequence of this definitional battle is that Perry avoids subjectivity as to the definition of "democratic" values, but must worry about subjectivity with respect to judicially enforced human rights later in his analysis. The subjective dilemma arises for Chemerinsky in reverse order.

Perry's justification for judicial review is as decidedly liberal as is his definition of democracy. Interpretive judicial review is justified because the Constitution is the supreme law of the land and because the Supreme Court possesses "the greatest institutional capacity to enforce the legal norms of the Constitution in a disinterested way."[100] This is so because the political branches cannot be expected to proceed in "an impartial, good faith manner, unaffected by considerations of constitutional or political self-interest."[101] Noninterpretive review, which is seen as a semi-religious process through which the nation

97. *Id.* at 313.
98. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 9 (1982).
99. *Id.* at 3-4.
100. *Id.* at 15-16.

searches for fundamental moral guidance, is justified on similar grounds. Members of the political branches, for whom "few if any values rank as high as incumbency," certainly cannot be expected to engage in the quest for these deeper moral values.[102] According to Perry, the institutional insularity of the Supreme Court makes it ideally suited to this task. Again, self-interest must be curbed in order to preserve and even discover higher values. "Noninterpretive review in human rights cases has enabled us to maintain a tolerable accommodation between, first, our democratic commitment and, second, the possibility that there may indeed be right answers — *discoverable* right answers — to fundamental political-moral problems."[103] The relationship between Perry's overall conception of judicial review and Ackerman's dual track democracy is apparent. Both see the Court's role as protector of values that transcend the normal democratic process.

At one point Perry summarily rejects a suggestion that democracy might play a integral role in this prophetic process. He quotes James Bradley Thayer as follows:

> [T]he exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.[104]

Perry dismisses this perception as being too willing to trust the self-interested political branches. The easy dismissal is telling. (It also brings to mind Schumpeter's brash and offhanded dismissal of "The Classical Theory of Democracy.") Thayer's principle derives in part from a basic tenet of participatory theory: immersion in the democratic process will, over time, mold the personality of the participants in a positive way. Hence, according to Thayer, an excessive reliance on judicial review may force a moral and political immaturity on the democracy. The observation is easily dismissed within this hyperliberal model since at the outset it defines the democratic process as of little or no value.

The progressive model of judicial review combines a lack of faith in the representative democratic process (and presumably in any form of participatory democracy) with an almost unyielding faith in the judicial branch as a purveyor of religious, moral, political and constitutional wisdom.[105] The

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101. *Id.* at 19. *See also id.* at 16.
102. *Id.* at 100-01.
103. *Id.* at 102.
104. *Id.* at 18 (quoting J. THAYER, JOHN MARSHALL 106-07 (1901)).
105. Of course, one could add numerous other voices to this category. Among Supreme Court Justices, William O. Douglas and William Brennan come immediately to mind. *See generally* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975); Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural-Law-Due-Process Formula*, 16 UCLA L. REV. 716 (1969).

democracy can be expected to trample the rights of minorities and to ignore fundamental principles of human decency and good government. The judiciary will ameliorate those perceived shortcomings of democracy by rising above upbringing, culture, social class and personal self interest to develop a humane, moral jurisprudence that will lead us from this wilderness of self interest. Republican civic virtue is achieved, but only through the virtuous sentiments of those few lawyers who through relatively uncontrolled circumstances and political good fortune wind up on the highest court in the land.

An observer from another world might well wonder at this fervent, semi-religious reliance on chance and politics, especially when that faith flies in the face of common sense and judicial history. Curious too is the incongruity of placing such unequivocal trust in political appointees while at the same time affording little or no trust in those who oversee these very same appointments. Life tenure and the other emoluments of judicial office may set judges somewhat above the everyday political fray, but does anyone actually believe that these modest devices bring moral or philosophic enlightenment? It is as if these theorists opt for a judicial version of Hobbes' authoritarian solution over Locke's civil society that at least recognizes some value in self rule.

A second, and major, flaw in the progressive viewpoint, is the absence of any universal method for determining the substantive legitimacy of noninterpretive decisions by the judiciary. If judges are free to develop a noninterpretive taxonomy of fundamental rights, how is one to determine whether the adopted taxonomy is correct or even worthy of a modicum of respect? Surely not just because politically liberal legal scholars happen to agree with it; and just as certainly not because politically conservative legal scholars do. Moreover, although individual progressives could probably give a personalized laundry list of fundamental rights and perhaps even a personalized methodology for discovering those rights, there is simply no way to determine which list or method is likely to be adopted or followed.

With carte blanche judicial activism of the type endorsed by Chemerinsky, what are we buying? The philosophy of Justice Brennan or the philosophy of Justice Scalia? Or an incoherent combination of the two? And even if we must choose among the various possible philosophies, nothing explains why the choice should be made by a vote of five to four in a narrow, legalistic proceeding in which self interested parties seek to elicit a favorable ruling through the manipulative art of legal advocacy. This type of unencumbered judicial activism may imbue the academic pursuit of constitutional law with an aura of intellectual regality; but it doesn't strike me as a particularly wise or effective way to run a country.

Despite the enormous amount of scholarship that supports the progressive perspective, the ultimate difficulty is that there is simply less here than meets the eye. There is no adequate reason to believe that a politically appointed judiciary will lead to our moral salvation. It is a myth. And perhaps even a

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Judicial progressives seem bent on coming up with new and clever ways to describe their very standard philosophy. A recent article by Ronald Dworkin, although using different jargon, takes a strikingly similar approach to the progressive models endorsed by Chemerinsky, Ackerman and Perry. Dworkin, *Equality, Democracy, and Constitution: We the People in Court*, 28 ALBERTA L. REV. 324 (1990).

dangerous myth to the extent that it dampens our democratic spirit by offering us the solace of an elitist institution to check our errors and mend our ways. Continuing obeisance to such active judicial review permits us to ignore our personal responsibility in governing this republic. As Thayer put it, "[t]he tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." Yet a substantial portion of the legal academy continues to cling to this perspective; perhaps out of some need for a legal super hero; perhaps out of a hope that they will be anointed to ascend the lofty peaks of the judicial olympus; perhaps out of an utter distrust in democracy — a distrust which, after all, is at the heart of this hyperliberal model.

2. The Libertarian Model of Judicial Review

The libertarian model of judicial review rests on a philosophic premise quite similar to that relied on in the progressive model: the human race suffers from an overabundance of self-interest which if left unattended will render life "solitary, poore, nasty, brutish and short."[106] Due to the precarious quality of life in the "state of nature," absolute authority over one's person is surrendered to a sovereign as a means of self preservation. Under both models the creation of the sovereign derives from a covenant between the people and those who are granted the authority to govern. In both models, some version of Locke's representative sovereign is substituted for Hobbes' absolute sovereign. In addition, both models limit the power of the sovereign in order to prevent the sovereign from being seduced by its own self-interest or by the interests of some particular power group. Both models also see the judiciary (or some similar institution) as playing a vital role in preserving the limitations implicit in this governmental covenant or constitution. Locke, on the other hand, saw the people's power to withdraw consent as the key limit on sovereign power.

The essential distinction between these models lies in the manner in which each defines the activist role of the judicial branch. These definitions flow in large part from the respective definitions given to the Constitution itself. The progressives see the judiciary as the hidden hand behind the discovery and evolution of fundamental rights and as the creator of devices for the protection of minorities within the very broad contours of a dynamic Constitution. Included within this range of rights might be such things as a right to nourishment, medical care, decent habitation, education, etc. The discretion of the democracy, largely in the control of narrow interest groups, is properly limited by these judicial creations. Or as Chemerinsky would say, democracy is broadly defined to include these basic rights. The libertarians see the judiciary not as creators of rights, but as guardians of previously discovered rights, namely those rights directly discernable from the text of the Constitution as informed by the philosophy of a free market economy.[107] Rights such as those

106. T. HOBBES, *supra* note 29, at ch. 13. *See also* Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 58.

107. R. EPSTEIN, *supra* note 76, at 28, 31.

in the progressive taxonomy listed above have no place in a constitutional free market economy.[108]

The debate is not a simple one between noninterpretivists and interpretivists (or nonoriginalists and originalists), though it is sometimes phrased in that manner. Nor do the concerns revolve around any dilemma created by the "antimajoritarian" nature of judicial review; for both progressives and libertarians being antimajoritarian is a virtue. The philosophic chasm is much wider. The distinction is between a progressive belief in a discernable but evolving list of fundamental rights and a libertarian belief that the only essential rights are those directly related to the free market economy. For the former, social engineering, particularly by the judiciary, is an artform to be promoted and perfected; for the latter it is anathema. As a consequence, progressives see the covenant as adaptable and evolutionary; libertarians see the covenant, perceived as founded upon a powerful insight into the human condition, as necessarily and righteously static. For both, the role of the judiciary is to enforce the respective underlying philosophic belief against the sovereign, representative democracy.

Richard A. Epstein's *Takings: Private Property and the Power of Eminent Domain* provides a philosophic roadmap to the libertarian model of judicial review. Although *Takings* does not purport to be about judicial review as such, the book does in fact present a succinct description of the activist judicial role in a libertarian state. The discussion begins with a brief exposition on the importance of Hobbes and Locke to our constitutional system.[109] There is nothing startling here other than the fact that libertarians seem to truly relish Hobbes' morbid depiction of human nature. (Progressives, on the other hand, accept the Hobbesian premise, but seem ashamed of this darker side of human nature.) Libertarians credit Hobbes with exposing the dangerous proclivities of self interest in the chaotic "state of nature"; Locke is credited with tempering Hobbes' "crude solution" to the self interest dilemma by advocating the creation of a limited, representative sovereign within the context of a capitalist state.[110] The Constitution is the covenant through which this Lockean civil society is created. The courts are the ark through which the true covenant is preserved.

The role of the judiciary within this civil society is quite straightforward. Judges should preserve the free market economy through a rigorous application of the takings clause and presumably those other constitutional provisions that recognize the sanctity of property and the precisely limited powers of the sovereign.[111] The premise underlying this normative function flows from what Epstein perceives as the primary purpose of civil society, namely, "to secure the internal and external peace. . . ."[112] That being the case, personal autonomy is surrendered to the sovereign only insofar as is necessary to permit the sovereign to exercise this peacekeeping function. As Epstein puts it, "[w]hat individuals must give up is their right to use force; what they are given in

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108. *See* Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695.

109. R. EPSTEIN, *supra* note 76, at 7-18.

110. *Id.* at 8.

111. Property is defined broadly in the Lockean sense to include "lives, liberties, and estates." *Id.* at 17.

112. *Id.* at 13.

exchange is a superior form of public protection."[113] Within this context, self interest still reigns supreme. All pretenses at governmental power beyond the peacekeeping function are illegitimate because no other authority to act has been ceded to the sovereign.

Most importantly, the sovereign is not created to do good in some general sense; rather, the sovereign is created to insure the broadest possible latitude for the pursuit of self-interest within a free market society. Particular opprobrium is heaped upon government forced wealth transfers such as welfare, medicare, social security and so forth.[114] These are all takings and in the absence of just compensation they represent illegitimate exercises of government power. If civic virtue is to flourish it must be a function of the material wealth generated by civil society; not by uncompensated, coerced wealth transfers, however well-intentioned.[115] This would include even those wealth transfers ostensibly designed to keep the peace, i.e., to placate the masses. The peacekeeping function is simply not construed that broadly. In short, the fundamental right of property is at the heart of the Constitution and our capitalist society and the courts should vigorously protect that right against attempted incursions by the sovereign, regardless of whether the government action is well-intentioned, rational or wise.

It follows from these strict limitations on sovereign power that the courts are no more empowered to do good than are the other branches. In particular it is not the function of the courts to perfect a system of natural rights or to discover principles of higher law that transcend laws made by the legislative and executive branches. Judges should ensure that the other branches strictly adhere to the letter of the covenant and no more. The libertarians recognize, as the progressives seem to ignore, that judges are equally as fallible as those who inhabit the other branches of government, at least with respect to the quest for higher law. The judiciary's relative insulation from the political fray and, to an extent, from the economies of the market place may grant judges sufficient distance to permit a neutral application of the principles of a free market constitution. However, these insulations do not imbue judges with the enlightenment necessary to discover more intricate, transcendental principles not readily ascertainable by mere mortals.

These points are emphasized in an essay by Walter Berns entitled *Judicial Review and the Rights and Laws of Nature.*[116] Berns begins his exposition by distinguishing between two schools of judicial review: the proponents of judicial interpretation and the advocates of judicial power. According to Berns, the former seek to apply the language of the Constitution, searching for some relatively set meaning, while the latter use extra-constitutional sources to create an evolving body of fundamental law tantamount to an unwritten constitution. Berns seeks to demonstrate that the advocates of judicial power, especially those who favor the judicial search for higher law principles, misunderstand the philosophic premises of our Constitution. He argues that the Constitution is built around a precise notion of natural right as developed by Hobbes and

113. *Id.* at 15.
114. *Id.* at 306-29.
115. *Id.* at 344-46.
116. Berns, *supra* note 106.

Locke and is not an invitation to discover natural or moral law in the sense suggested by the works of Thomas Aquinas or Thomas Grey.

The natural right that, according to Berns, was the animating force behind the development of our Constitution is the right to govern oneself absolutely, i.e., the right to pursue self interest relentlessly regardless of the costs to other human beings.[117] Given this absolute right, humans can agree on only one thing: the need for peace. All other concepts of right and wrong, good and evil and so forth are merely opinions that may or may not be shared by others and which more than likely will generate conflict rather than promote peace. The solution is to create a sovereign who will enforce the peace and in all other respects permit self interest to remain unabated.

Berns states, without any elaboration, that this precise concept of natural right was the one understood by "the Founders" of our nation.[118] From this he concludes that our Constitution was designed to create a sovereign modeled upon the above philosophy. The role of the constitutional sovereign would be to provide the peace all people desire and to otherwise allow self interest to run its natural course. That natural course would lead to material wealth and general prosperity.

The notion that judges, or anyone for that matter, should impose upon this civil society transcendental values discernable from higher law principles is quite contrary to this specific vision of the Constitution. The only natural law the judges should enforce is that embodied in the Lockean constitution and necessary to the functioning of the civil, capitalistic society. The primary method of doing this is enforcing the limits of sovereign power as described in the constitutional covenant.

Overall, the libertarian scheme is elegantly simple and, unlike the progressive counterpart, it embodies a fairly specific substantive agenda. The judiciary should police the free market and keep it free from the interferences of the representative branches. The latter will inevitably be infected by self-interest; the former will, by virtue of its insulation from the political process, exercise the appropriate regard for the good of society.

Yet the vision is as simplistic as it is simple. It ignores those constitutional provisions that confer powers upon the national government that do not comport with the libertarians' narrow and specific view of the constitutional compact. For example, although libertarians readily accept Congress' power to "provide for the common Defence,"[119] — this, according to Epstein and Berns, is the only legitimate purpose of government — they seem to ignore the next phrase in this grant of authority: "and general Welfare of the United States." Whatever that latter phrase means it must mean something other than "the common Defence." If that is the case, it would seem that there is no single, identifiable purpose to this government of the United States; and reasonable minds can and should differ with respect to what the general welfare entails

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117. *Id.* at 58-59.

118. Berns never defines who he means by "the Founders." Since he relies almost exclusively on the Federalist Papers, one must assume that he limits the Founders to those very few men who directly participated in drafting the document, and, indeed, only a very small segment of those men.

119. U.S. CONST. art. I, § 8, cl. 1.

from time to time. Similarly, regardless of how narrowly one construes the phrase "Commerce . . . among the several states," the power literally granted the government is "To regulate," not, as the libertarians would have it, "To deregulate." And that remains true even if those who wrote the Constitution hoped that the power would be used largely to deregulate.

Even the libertarian vision of the takings clause, which was not part of the original constitutional text, suffers from a simplistically circumscribed view. If, as Epstein suggests, Locke is the father of this clause, then it would seem that we ought to include within our definition of property Locke's concept of a natural right of preservation as well as Locke's views with respect to collective responsibility and potential limits on property ownership.[120] Yet the libertarian view includes both unlimited wealth and unlimited poverty, regardless of the consequences of either. Libertarians simply ignore the uncomfortable parts of Locke. This does not suggest that the free market philosophy is without support in the constitutional text. It simply recognizes that this philosophy presents only one aspect of a much more complicated constitutional landscape.[121]

Finally, Berns' definition of the law of nature — the freedom to do anything one pleases including destroying one's neighbor — endorses a type of licentiousness that is quite inconsistent with Locke's more limited vision the law of nature:

> The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions... . Every one, as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not unless it be to do justice to an offender, take away or impair the life, or what tends to the preservation of the life, liberty, health, limb or goods of another.[122]

The inconsistency of these two definitions is important since the looser, libertarian version plays such a key part in the libertarian philosophy, a philosophy which apparently justifies almost complete irresponsibility toward one's fellow citizens. The point is not that the foregoing quote has a set meaning that I can precisely convey or that it is, standing alone, the key to understanding Locke. Nor is the point that Locke had the correct answer to our woes. The point is that philosophic texts, just as constitutional texts, are subject to

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120. V J. LOCKE, *supra* note 30, ch. II, at 6; ch. V. Both Epstein's and Bern's approaches to Locke suffer from the general problem of attempting to narrowly confine Locke's philosophy to the particulars of some form of capitalism. The same could be said with respect to those who see Locke as a socialist. *See generally* Peter Laslett's introduction to his edition of Locke's Two Treatises of Government for a discussion of this phenomenon. J. LOCKE, TWO TREATISES OF GOVERNMENT 15 (P. Laslett ed. 1960).

121. *See*, Tushnet, *The Constitution as an Economic Document: Beard Revisited*, 56 GEO.WASH. L. REV. 106, 111 (1987) (citing sources indicating a broad philosophical range of support for the ratification of the Constitution).

122. 5 J. LOCKE, *supra* note 30, at 341.

interpretation and that the words quoted above clearly have a potential interpretation that differs markedly from Berns' specific and narrow interpretation of Locke. In short, there is simply no reason to believe that the libertarian interpretation of Locke ought to be considered the philosophic guide to constitutional interpretation, especially when it appears to be more than somewhat inconsistent with the language actually used by Locke.

There are further incongruities. If the structural devices that confer civic virtue upon the judiciary actually work in some significant fashion, there is no reason to assume that the representative branches cannot also be structured toward more virtuous sentiments. That was, after all, the idea of the Constitution. In this way the progressives and the libertarians suffer from a common failure to appreciate the essence of constitutional structure. Nor do they fully appreciate the possibility that segments of society other than the judiciary can, at least under some circumstances, act with measurable and significant civic virtue. Before leaping to a faith in government by judiciary, even a judiciary whose powers are circumscribed by the rules of a free market economy, I would want to understand those structural and social forces that lead other participants in our political and social culture to act with virtuous sentiments despite the problem of free riders and rent seekers. Even if the present constitutional structure is demonstrably defective in this regard, it does not follow that our only recourse is political immaturity with an elite few having the continuing authority to define the good society according to some particular philosophy, free market or otherwise.

B. The Participatory Model of Judicial Review

In a pure participatory democracy all adult members of the community participate fully and equally in the political decisionmaking process. No single voice is entitled to more weight than any other voice. There is no ruling elite, elected or otherwise, and there are no factions or interest groups. Such an ideal participatory democracy can be described as an egalitarian republic or as a true commonwealth.[123] The republican prediction is that, given the proper scale of the community and given reasonable economic parity among the citizens, civic virtue will flourish. Through total community immersion in the democratic process, both individual fulfillment and the common good will be achieved.

There are no external or internal limits upon the political operation of this ideal democracy. There is no written constitution and no bill of rights. The only limitations are of a philosophic nature. The goal and method of the democracy must remain constant, namely achievement of the common good through full citizen participation in the political process. The common good, however, is defined only through political action taken by the democracy; similarly, what constitutes political action is also defined by the community. These somewhat generalized limits have only one consequence. If the commonwealth ceases to operate for the common good or ceases to rely upon a process of full participation, then it ceases to be a democracy in the pure sense. Yet no system of limitations, static or evolving, can force the democracy to maintain its course. The republican or democratic nature of the enterprise is created by the

123. *See* M. TUSHNET, RED, WHITE, AND BLUE, A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 313-18 (1988).

composite personality of its citizens, not by legalistic limitations upon their prerogatives. Thus a pure democracy is a system founded upon choice, choice which must be constantly reaffirmed by the community.

Of course, judicial review, which by definition serves as a check upon a political decisionmaking process, would have no part in such an ideal community.[124] In a participatory democracy, judicial review is antidemocratic in the most obvious and direct sense of the term. It forces the democracy to do (or not to do) precisely what the democracy has defined as the appropriate thing to do. It tells the democracy that the common good is or may be something other than that which the democracy perceives the common good to be. This flies in the face of the fundamental democratic principle that the common good is achieved through political interaction undertaken by the entire citizenry. It tells the democracy that wisdom is not achieved through the process of full participation but, at least under some circumstances, by reference to fundamental principles external to the democratic process. It suggests as well that limits derived from those principles will be enforced by an individual or group of individuals who are above the very process that ostensibly defines the commonwealth. Such a system is one of liberal democracy and for the true participatory democrat is no democracy at all.

It will not do to import a more sophisticated definition of democracy into this system in order to salvage some remnant of judicial review. For example, if one were to provide a baseline definition of democracy that includes certain judicially enforceable fundamental rights (along the lines suggested by Chemerinsky), a liberal democracy would result, i.e., a democracy with enforceable limitations upon those substantive results deemed to be undemocratic. This does not mean that a participatory democracy will not recognize fundamental rights; it means that those rights will be recognized only to the extent to which they remain consistent with what the democracy defines as the common good. What is deemed fundamental may vary from time to time depending on the perceived needs of the community. This takes a leap of faith to be sure. But the premise of a participatory democracy is faith in community and a firm belief that civic virtue will flourish only through the communal, democratic process. The need for this leap of faith may condemn the ideal democratic state to an existence that will never venture beyond the realm of pure contemplation — it may also make the ideal a dangerous weapon of demagoguery; yet, it is worthwhile to reflect that many liberal democrats are quite willing to exercise this same leap of faith, with its inherent potential for intellectual demagoguery, with respect to the supposed virtuous sentiments of the judicial branch.

Suppose, however, that a participatory democracy as so defined, does stray from the path of virtue. Suppose, for example, that the ideal of full citi-

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124. The new republicans, who realize the limitations of pure participatory democracy in the national polity, advocate a central role for the judiciary in preserving fundamental republican virtues such as dialogue (free speech) and participation (voting rights). Michelman goes so far as to suggest that the judiciary should act as virtual representative of the people when they have not had an opportunity for direct participation in the political process. Michelman, *The Supreme Court, 1985 Term — Forward: Traces of Self Government*, 100 HARV. L. REV. 4, 73 (1986). *See also* Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

zen participation is somehow subverted and some identifiable group is left out of the process. Surely a very limited system of judicial review could be designed to keep the ship on course. The judiciary could force the democracy to maintain its ideal of full participation.[125] But this misses the essential point. A true democracy exists only as a communal state of mind. Once the community ceases to act like a democracy, it ceases to be one. No external threat, judicial or otherwise, can force the democratic spirit upon the community. A forced democracy is no democracy at all. If the community takes action inconsistent with democratic principle, if the community acts for something other than the common good, then the community is simply no longer a democracy. No act of the judiciary can make it otherwise.

It is very easy to be seduced by the allure of the participatory model: a government by neutral dialogue among a citizenry of adults imbued with civic virtue, the goal of which is to achieve nothing but the common good; and no elite, judicial or otherwise, to control the choices made by the community. The current literature of republicanism rings with a high tone and there is much to be said for some of the more generalized republican ideals. But the model is quite frightening as a real world proposition and one is hard pressed to discover any real world examples worthy of emulation. In fact, the image of a community with no limitations upon it other than its own sense of the common good, conjures up shadows of massive repressions led by religious zealots, secular totalitarians and the like, all of whom seem to lead communities possessed of a definite and even passionate sense of the common good. Besides, one need not be a moral relativist to recognize that what consists of the common good in the political arena is often more of a guess than it is a discernable fact. As a consequence our passion for imposing the perceived good upon our fellow creatures needs some type of filtering lest we begin to think and act as if we actually know what comprises the common good.

Another difficulty with the model of unrestrained democracy is that there appears to be no reliable method for ascertaining the common will, much less the common good. As Kenneth Arrow showed through his General Possibility Theorem, the basic incoherency of voting patterns undermines any assurance that a principle of majority rule will result in adoption of the majority's first preference.[126] So far no one has come up with a voting system that will.[127] Hence, even a pure democracy is doomed to an existence of second-best options. Of course, it is theoretically possible for a democracy to exist without voting. Choices can be made by developing a sense of consensus through dialogue. But again there is no reason to believe that any particular consensus will actually reflect the first preference of a majority of the participants. If this is correct, then we have no way to discover the common will and, it follows, no way to ascertain the collectively discovered common good, unless one assumes that the common good is the equivalent of the second best option. Thus even if there is a tangible common good, we have no certain way of selecting it when it comes along. If that is the case, it would seem that an unrestrained faith in pure democracy is at best at bit of a fantasy. Even if liberal democracy fares no

125. *See supra* note 124.
126. K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963).
127. W. RIKER, *supra* note 72, at 115-36.

better under Arrow's General Possibility Theorem, at least liberal democracy does not claim to provide a metaphysical solution to the problems of mankind.

A final problem with this model as a real world possibility is that it fails to take into account what everyone of us knows. Human beings are not all paragons of virtue. As best we can tell from history and current experience, they are not now and never have been. That does not mean that there are not people of virtue and it does not mean that most people lack virtue in some significant way. It means as Locke observed, that there are a sufficient number among us who are no respecters of equity and justice. A good many of these seem enticed by the public life. For this reason, it seems that it will always be necessary, at least within our brief lifetimes, to place some type of restraint upon those to whom we grant sovereign authority. Whether or the extent to which judicial review must play a role in this system is another question. The bottom line here, however, is that although judicial review is undemocratic in a most precise manner with respect to participatory democracy, the practice remains at least a minor virtue to the extent that it prevents the democracy from an unrestrained pursuit of the communitarian common good.

This is not to say that judicial review is irrelevant to the ideals of a republican community. The ideals of community, participation and civic virtue can certainly exist in forms of government other than a pure participatory democracy. There is at least one sense in which judicial review could be quite relevant to those ideals. If one assumes that participatory democracy is more of a critical framework from which to assess current practices than it is a plausible real world model, judicial review within a liberal democracy could perform a republican function by becoming a tool in dismantling those social institutions that most clearly prevent the realization of the ideals mentioned above (without allowing those ideals to run amok).[128] For example, a republican enlightened judiciary could give impetus to a modern version of federalism that would assist in the decentralization of government power to manageable units in which citizen participation was actually meaningful. Of course, so long as judicial review remains a component of a democracy, the democracy is a liberal democracy. And even this version of "republican" liberal democracy would have neither more nor less of a claim to legitimacy than do the progressive and libertarian models. Similarly, any judiciary sufficiently powerful to force decentralization could just as well force centralization. The interpretive powers always swing both ways. However, as long as judicial review remains a reality it would seem perfectly appropriate to add republicanism to the list of interpretive devices that now range from hard-boiled law and economics to the meditations of Michael Perry.

Brief mention must be made of Bruce Ackerman's dualist view of liberal democracy through which he claims to "dissolve" the counter-majoritarian difficulty.[129] Although Ackerman's overall theoretical model fits neatly into the progressive liberal category, his dualist view also addresses some concerns more closely associated with participatory theory. Under the dualist view, our definition of liberal democracy derived from Schumpeter and Dahl operates on

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128. *See supra* note 124.

129. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

a lower track much as one would expect, with interest groups jockeying for control of the day-to-day political agenda. The people are generally apathetic although they ritually participate in the process by voting from time to time. Every once in a while, however, the politicos begin engaging in a major revision of our political system, creating what Ackerman refers to as "constitutional moments."[130] These constitutional moments engage a mobilized segment of the populace in a constitutional dialogue. That dialogue is ignited by the Supreme Court which, in essence, warns the people that something big is happening by declaring the acts of the politicos unconstitutional. If the politicos push the battle to the higher track, the people then decide whether to ratify the radical action of the politicos or to toss them out. Presumably the Supreme Court eventually follows whatever decision the public endorses. As Ackerman states it, "[t]o put the point more directly: The *democratic* task of the Supreme Court is to interpret the Constitution of the United States."[131]

Whether Ackerman's constitutional moments thesis actually comports with historical reality is a matter better left to historians (though why they should be trusted, I am not certain). As a potential model for judicial review, however, it definitely has its interesting points. On the higher track, the Supreme Court is not the arbiter of fundamental rights, but the lightning rod of a debate over those rights as well as other fundamental principles of constitutional law. The Court may ignite the debate by taking a particular position, but over time the resulting political dialogue results in some form of consensus which the Court, its personnel perhaps reconfigured, endorses. In this sense judicial review is only a check upon the democracy in a limited sense; it temporarily prevents implementation of the democratic will in order to allow public awareness and consensus to develop. If the contrary democratic will persists, the Court will eventually fall in line. Civic virtue is not found in the Court, but in the dialogue generated by the Court. That certainly points toward the participatory model and away from the more heavy-handed, democracy-checking focus of liberal democracy.

C. A (Somewhat) Madisonian Alternative

But Mark Tushnet tells us that liberal democracy, of which our representative democracy is certainly a species, is theoretically incoherent.[132] Under accepted dogma, sovereign power in a liberal state must be limited. For us, the Constitution describes them and the judiciary is expected to enforce these limits through the process of judicial review. The problem, according to Tushnet, is that given the elastic nature of judicial review, coupled with the indeterminate techniques of legal interpretation, there are no real limits on the judicial power to make law. So liberalism fails of its own logic: the limited government exists only because it creates an institution with unlimited powers to define the limits on the government. In short, there are no limits and there is no true liberalism. Presumably other devices of limitation would fall victim to this same self-destruct principle.

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130. Ackerman suggests three such moments: the Founding, the Civil War and the New Deal. *Id.* at 1051-57.

131. *Id.* at 1051.

132. M. TUSHNET, *supra* note 123.

What are we to make of this? If liberalism is incoherent, what are the alternatives, aside from Tushnet's conclusion that, "[c]ritique is all there is?"[133] The democratic polar alternative to liberalism — the ideal participatory, republican state — seems unlikely to blossom within our lifetimes and I am not sure we would want it to, at least not until the species evolves well beyond its current primitive appetites. And the authoritarian alternative such as that proposed in Hobbes' *Leviathan*, although perhaps always a possibility and appealing to some, would not be particularly appealing to those of us accustomed to at least the illusion of choice. In fact, some form of liberal democracy, imperfect and perhaps theoretically incoherent, seems to be the inevitable result of our suspicions about these other two options, each of which derives from its own caricature of humanity, the first as inherently virtuous and the latter as inherently rapacious.

A possible option might fall between the hyperliberalism of the progressives and the libertarians, who both rely on their respective versions of an actively engaged judicial Leviathan, and the abstract romanticism of the participatory democrats, which, at least from a skeptical perspective, offers solace in something of a communal Leviathan. Such a compromise may have been what Madison tried to accomplish.[134] It also strikes me as quite comfortable with Locke's conception of a commonwealth. In any event, a midpoint accommodation between the individual and community at least provides a third vantage from which to consider the antidemocratic charge against judicial review.

In terms of the potential incoherence of such a compromise, a few observations are in order. First, a less obsessive regard for active judicial review might ameliorate the supposed incoherence of the system. The essence of judicial review is the enforcement of external limits upon the sovereign. A system that relies more upon internal structures, both political and social, as a means of limitation than it does upon external restraint might be less incoherent (assuming there can be degrees of incoherency) than its opposite counterpart. This point will be developed further. Next, one's concept of liberal democracy need not adhere rigidly to the type of definitional, syllogistic reasoning suggested by Tushnet. A liberal democracy could be one that recognizes the importance of restrictions on sovereign power but at the same time recognizes the inherent fallibility of legalistic limitations. It could be based as much on intuition and experience as it is based on logic. Besides, the question is not whether any particular governmental system is theoretically coherent. Rather the question is whether that system will work in some reasonably just fashion and in a manner relatively consistent with one's theory of politics. Reliance upon any system always requires as much an act of faith combined with experience as it does an exercise in logic or metaphysics. (After all there is a popular belief that, under theories of aero-dynamics, bumble bees are not supposed to be able to fly; this has come as a surprise to many atheoretical bumble bees). Finally, in a life fraught with ambiguities, a moderate amount of

133. *Id.* at 318.

134. In relying on Madison, I do not mean to suggest that he is one of the demi-god founding fathers whose philosophy we must adopt as our own. Nor do I mean to suggest that I actually have figured out what Madison thought. I mean only to give you my proximation of what I think a relatively bright man thought about the government he assisted in creating.

incoherence is merely part of the price for playing. The mistake of the hyperliberals and the participatory democrats is that they are seeking a perfect state in an imperfect world. The quest for the perfect government or the perfect society usually leads to nothing more than a perfect mess. With that in mind, let us examine a version of the more modest, structural (partially incoherent) liberal perspective.

In the Federalist No. 10, Madison describes the government created by the proposed written Constitution as a republic. The essence of this republic was "a compromise between the power of majorities and the power of minorities, between the political equality of all adult citizens on the one side, and the desire to limit their sovereignty on the other."[135] In defending this compromise, Madison distinguished between pure democracy and his conception of a constitutional republic:

> From this view of the subject, it may be concluded, that a pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in lives, as they have been violent in their deaths.[136]

A republic, on the other hand, was a superior form of government. Rule was not by the majority but by a "small number of citizens elected by the rest."[137] These representatives would have "enlightened views and virtuous sentiments."[138] They would act as a filter for the passions and prejudices of the people. "Under such a regulation, it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose."[139]

Madison was certainly not a republican in the sense of the word applied by the new republicans. His republic depended upon class based hierarchies and was premised upon a basic mistrust of the democratic spirit. Yet, despite Madison's denunciation of what he terms pure democracy, it is quite clear that his theory of government is at least partly premised upon values commonly associated with participatory and new republican theory. The essence of his republic is a contractual system of "self-government" established by the peo-

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135. A PREFACE TO DEMOCRATIC THEORY, *supra* note 64, at 4.
136. THE FEDERALIST NO. 10, at 61 (J. Madison) (J. Cooke ed. 1961).
137. *Id.* at 62.
138. *Id.* at 64.
139. *Id.* at 62.

ple.[140] And although the common mass of people could not be fully trusted with the reins of government, elected representatives might be worthy of such trust. That trust, albeit somewhat skeptical, was based on a belief that these "enlightened" representatives would, in general, act on behalf of the common good. The best hope for cultivating such an attitude was through creation of a representative democracy that spread power and influence over a vast geographic area. This would undermine the power of petty factions and increase the representatives' awareness of the common enterprise. Civic virtue is as important to the Madisonian creed as is his skepticism of popular sovereignty. The Constitution could not guarantee civic virtue, but it could not survive without it.

Even while extolling the virtues of a republican government, Madison recognized inherent dangers in such a system. "It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it, may forget their obligations to their constituents, and prove unfaithful to their important trust."[141] Similarly, a democracy, even one carefully circumscribed, contained a dangerous potential to elect "[m]en of factious tempers, of local prejudices, or of sinister designs."[142] Madison also recognized "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions."[143] His well known discussion of factions was premised on the notion that self-interest was an important, and sometimes dangerous, motivating factor in human affairs.[144]

As a consequence of these untoward possibilities and human propensities, the legislative branch, i.e., the most democratic branch, was deemed the most dangerous.[145] Madison described that branch as one of "enterprising ambition."[146] The constitutional structure of checks and balances, including such devices as bicameralism, the executive veto, indirect election of Senators, etc., coupled with specific limitations on government power, was designed to allay these concerns. Civic virtue was an ideal to be cultivated, but self-interest was just as clearly a factor to be reckoned with.

> The aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the

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140. THE FEDERALIST NO. 46, at 315 (J. Madison) (J. Cooke ed. 1961); THE FEDERALIST NO. 49, at 339, 340-41 (J. Madison) (J. Cooke ed. 1961).

141. THE FEDERALIST NO. 62, at 418 (J. Madison) (J. Cooke ed. 1961).

142. THE FEDERALIST NO. 10, at 62 (J. Madison) (J. Cooke ed. 1961).

143. THE FEDERALIST NO. 62, at 418 (J. Madison) (J. Cooke ed. 1961).

144. THE FEDERALIST NO. 10 (J. Madison) (J. Cooke ed. 1961); THE FEDERALIST NO. 51, at 351 (J. Madison) (J. Cooke ed. 1961).

145. THE FEDERALIST NO. 48, at 334 (J. Madison) (J. Cooke ed. 1961).

> [A]nd where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.

146. *Id.*

> next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.[147]

Thus the ideal of civic virtue is threatened by the propensity toward excessive self-interest. It is, of course, this aspect of the Madisonian model that the proponents of liberal democracy see as the centerpiece of constitutional structure: a frank recognition of the dangers created by self-interest operating in the sphere of public law.

The foregoing discussion indicates that Madison was a structuralist. He believed that a system of government could be designed that would accommodate both individualism and civic virtue. It was the internal structure of the system, however, that would accomplish these tasks, not necessarily some external agency. Although the judiciary might protect that structure, there was an express assumption that civic virtue would be promoted within the political branches by the configuration of those branches within the federal system. Through this structure, there would be a republican melding of the private and public persona. To be sure, the political branches would always be an admixture of virtuous sentiments and self-interest, but the prediction was that through the federal structure civic virtue would prevail.

There is no indication of this type of faith in structure in the progressive and libertarian theories of judicial activism discussed above. Their only hope for the survival of the republic is a court composed of individuals who see clearly some particular notion of liberal progress. Although Madison may have subscribed to Hamilton's endorsement of judicial review in Federalist No. 78, nothing indicates that he saw the judiciary as the primary repository of civic virtue within the republic or as the primary check upon governmental excess. If one must rely on judicial review to maintain the republic, there is no republic; there is merely a government by an elite judiciary. On the other hand if the judiciary intervened to occasionally adjust a structure that will inevitably go out of tune from time to time, government would be not *by* judiciary but *with* a judiciary.

The idea then is for the judiciary to allow the republican democracy to function and flounder through its inevitable fits and starts and errors and to eventually solve or fail to solve the unending list of problems that confront so complex a society. This brings us back to our earlier reference to interest group and pluralist theories of democracy and to Dahl's notion of polyarchy. Madison's prediction of how the federal structure would operate probably was not entirely accurate. Our elected officials are not generally blessed with virtuous sentiments. Factions have not dissipated. We now refer to factions as special interests. In fact, as Dahl observes such factions are at the very heart of our system. They make it a representative democracy by forcing both elected and non-elected officials to take account of a broad range of alternatives on policy choices. This may not make for majority rule in any significant sense but it does require those who are subject to election and reelection to develop a broad base of support within the community.[148] This somewhat removed form of democracy is then filtered through the structure of our federal system. The

147. THE FEDERALIST NO. 57, at 384 (J. Madison) (J. Cooke ed. 1961).

benefit of that system is not that it forces virtue upon the unwashed, but that it forces even the unwashed to take heed of the multitude of interests represented in our society. This is all very complicated and probably not susceptible to explication by a single, all-encompassing theory. The practice of judicial review within such a system should be a humbling experience because modern formulas of doctrinal analysis often fail to grasp the political dynamics of this system. The question of which groups' interests are over or under represented takes more than a simple count of hands.

This article does not call for an end to judicial review — such a conclusion would fly in the face of both experience and logic. It calls, rather, for careful judicial review, something along the lines described by Alexander Bickel in *The Least Dangerous Branch* and *The Morality of Consent*[149] and followed to some extent by such currently unfashionable justices as Felix Frankfurter and the second John Marshall Harlan. Bickel's central point, that judges ought to be circumspect in enforcing what they perceive to be constitutional commands, goes directly to the heart of the matter. Our system of government is both elegant and complex. The Constitution is less a contract than it is an evolved form of political interaction. To the extent possible one ought to let the system work. Intervention is at times necessary, but the rule of daily judicial behavior ought to be to the contrary. Indeed, if the system is in need of constant intervention, the solution is not a persistent pattern of judicial tinkering, but a new Constitution.

In short, somewhere between the hyperliberalism of judicial activism and participatory democracy's disdain for external checks lies a realm in which an independent judiciary can remain available to check those marked deviations from the constitutional norm that cry out for intervention. There will be no three part test to indicate when this intervention will occur. There will be no certainty that this power will be exercised with care. There will be no assurance that the Constitution will be correctly interpreted or applied. In fact, one can expect wide swings between libertarian and progressive perspectives, between careful intervention and careless disregard for egregious constitutional violation. The hope is that, by and large, a middle course that will permit us the necessary folly of trying to run this country through our imperfect, representative and modified-republican democracy.

In any event, this third perspective provides yet another basis for considering whether judicial review is antidemocratic. As would be expected from this mid-point on the spectrum, the answer is mixed. To the extent that judicial review must sometimes intervene to prevent implementation of laws enacted by the representative democracy, the particular intervention is by definition antidemocratic. However, under a system in which judicial intervention is not the norm, but the exception, occasional intervention does not condemn the practice to a charge of being antidemocratic, at least not in any meaningful sense of the term. As a moderate check upon the representative branches,

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148. *See, e.g., Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988) and sources cited therein.

149. A. BICKEL, THE MORALITY OF CONSENT (1975); THE LEAST DANGEROUS BRANCH, *supra* note 65. I'll not go into a detailed explication of Bickel's theories. The attempted cover could not do justice to the original.

judicial review is no more antidemocratic than a whole host of constitutional provisions: bicameralism, presidential veto, federalism, the composition of the Senate, etc. And to the extent that it is antidemocratic it merely comports with our commonsense conclusion that neither pure democracy nor even an unencumbered representative democracy are worth the risks inherent in such systems.

V. CONCLUSION

The question of whether judicial review is antidemocratic depends entirely upon one's definition of democracy and, with respect to our system of government, it depends as well upon how one envisions the proper functioning of the American democracy. It took a long time to say that. I'll end now.