

The Bicentennial of *Calder v. Bull*: In Defense of a Democratic Middle Ground

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Two centuries ago, in an otherwise inconsequential case, two Supreme Court justices framed the terms of a major jurisprudential debate that has persisted ever since. Justice Chase took the idealist view that the Constitution must be construed to contain implicitly all those individual rights that would be essential terms of a fair social contract. Justice Iredell, by contrast, argued the skeptical position that, when there is disagreement among citizens concerning the content of a fair social contract, there is no way to know for sure who has the correct view.

This essay shows that the debate among constitutional theorists is essentially the same today as it was two hundred years ago. Accordingly, the only way to resolve this debate is to adopt a middle ground that gives judges the power to impose the essential prerequisites of a fair democratic process—but grants judges no power to overturn the substantive results of a fair democratic process. This essay defends this democratic middle ground against the inevitable attacks from both the idealist and skeptical flanks of the debate.

A decade ago, much attention was devoted to the Constitution's bicentennial. Indeed, Chief Justice Burger left the bench to devote full time to preparing for the event. No doubt, moreover, in 2003 there will be much celebration of the two hundredth anniversary of *Marbury v. Madison*.¹ But, in this era of commemorating the formative period of our nation's constitutional order, it is a shame that the bicentennial of *Calder v. Bull*² has passed unnoticed.

A shame, yet not surprising because, apart from some dicta in a couple of opinions, *Calder* is a rather insignificant case. But, oh, what dicta! As students of constitutional law are taught, the debate between Justices Chase and Iredell in *Calder* is essentially the same debate that divides the justices in contemporary "substantive due process" cases, including the abortion cases, *Roe*³ and *Casey*.⁴

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¹ 5 U.S. (1 Cranch) 137 (1803).

² 3 U.S. (3 Dall.) 386 (1798).

³ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

This debate concerns the issue of when, if ever, it is appropriate for judges to declare the existence of constitutional rights that are not identified in the text of the Constitution itself—in other words, of *unenumerated* constitutional rights. The constitutional *idealists*, on one side of this debate, essentially argue that judges should construe the Constitution as protecting whatever rights would be included in an ideal social contract for our nation. The constitutional *skeptics*, on the other side of the debate, maintain that because reasonable minds may differ on the content of an ideal social contract, judges have no basis for invalidating legislation when the Constitution does not identify an asserted right as one to be protected from legislative infringement.

This debate, it should be clear, is distinct from issues involving the interpretation of enumerated constitutional rights, such as the freedom of speech or the right of the people to keep and bear arms.⁵ Whatever the interpretative difficulties involving these textual provisions, they necessarily pale in comparison to the problems of identifying constitutional rights not even mentioned in the text of the document. This distinction between unenumerated and enumerated rights is sound even though the Constitution contains provisions, like the Ninth Amendment, that suggest that at least some unenumerated rights are equally deserving of constitutional status as enumerated rights.⁶ After all, the Ninth Amendment (by definition) does not tell us what unenumerated rights deserve this special status.⁷

Calder v. Bull is an excellent introduction to the issue of unenumerated rights, not only because the case shows that the debate between idealists and skeptics has existed since the very beginning of the Constitution's history, but also because the two sides are so succinctly and lucidly presented in the opinions of Chase and Iredell. In recent years, scholars of constitutional law have attempted to develop more sophisticated versions of both the idealist and the skeptical positions. But these academic exercises, while erudite and illuminating, are essentially just elaborations of the arguments originally presented by Chase and Iredell in 1798. Indeed, as we shall see by closely examining the work of two contemporary scholars, one an idealist and the other a skeptic, it is remarkable how similar their arguments are to their original counterparts.

Given that nothing written in two hundred years has conclusively settled the debate, no one can expect to offer any new arguments that automatically will convince one side or the other to abandon its position. Instead, I propose that the persistence of the debate is reason enough to adopt a middle-ground position that I call *democracy-defining constitutionalism*. This middle-ground position holds that

⁵ See U.S. CONST. amend. I & II.

⁶ See Charles Black, *On Reading and Using the Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE* (Randy Barnett ed., 1989).

⁷ See U.S. CONST. amend. IX (stating “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”).

judges should declare the existence of unenumerated constitutional rights only to the extent that they are necessary to make sure that laws are adopted in a legislative process that qualifies as democratic.

This middle-ground position itself is not new. Its most well-known advocate is John Ely,⁸ and his account of it drew upon the famous footnote four of *Carolene Products*,⁹ which itself just celebrated its sixtieth birthday. But my defense of democracy-defining constitutionalism differs from Ely's insofar as it openly embraces the idealist premises of Justice Chase and his contemporary analogues. As we shall see, Ely's argument for the democratic middle ground was fatally flawed insofar as it attempted to articulate a theory of unenumerated constitutional rights without relying upon the kind of philosophical premises that underlie the idealist position.

Although the premises of the idealist position are sound, its conclusions are not. As our review of idealist reasoning will reveal, a faithful adherence to the idealist premise of civic equality (all citizens should have equal rights of participation in the resolution of politically controversial issues) should lead us to adopt something close to the skeptic's position on the issue of judicially enforceable unenumerated constitutional rights. But we should not accept the skeptic's position automatically. The pure, unadulterated skepticism expressed by Iredell and his contemporary analogues goes too far. The skeptics do not—indeed, could not—reject the premise of civic equality. Given this premise, as I shall explain, it is appropriate for judges to insist that legislatures respect those rights essential for the operation of democratic political processes. In this way, democracy-defining constitutionalism offers a middle-ground position that both idealists and skeptics should be able to accept. But even if dyed-in-the-wool partisans of one side or the other refuse to abandon their previous positions, I hope that a review of the ancient debate between Chase and Iredell, as well as its contemporary equivalent, will convince the open-minded reader that the only possibility of ever resolving the debate lies in the middle-ground position.

I. THE CASE ITSELF

Calder concerned a dispute over the validity of a will. As I tell my students, imagine a dispute between disgruntled children who did not want their father's mistress to inherit under his will and so claimed that he was of unsound mind when he wrote the will. The actual facts of the case are not as colorful, but they present exactly the same constitutional question.

A Connecticut probate court invalidated the will, but the state's legislature

⁸ JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, n.4 (1938); see also ELY, *supra* note 8, at 75–77.

nullified the court's decree and ordered a new hearing on the will's validity. At the new hearing, the probate court declared the will valid. The decedent's heirs, who would have inherited under the state's intestacy laws, appealed the new decision on the ground that the legislature's act was an "ex post facto law" in violation of Article I, section 10 of the United States Constitution. Connecticut's Supreme Court rejected this argument, and the United States Supreme Court affirmed. Each justice wrote his own opinion, yet they all agreed that the "ex post facto" clause of the new Constitution did not apply in this context.¹⁰

Justice Chase also considered whether the legislature's act might still be unconstitutional according to general principles of constitutional law. He ultimately concluded that the state law was not unconstitutional pursuant to such principles because the law did not violate any "vested rights" of the decedent's heirs.¹¹ Nonetheless, he went out of his way to express his belief that any legislation violating vested rights would be unconstitutional. In doing so, he explained why he believed that legislation contrary to general principles of constitutional law would be null and void even if these general principles were not expressly mentioned in the text of the Constitution itself. It is this account of general constitutional principles that deserves our careful consideration.

First of all, at the very outset of Justice Chase's passage, he makes it clear that he subscribes to a social contract theory of government.¹² As he explains, the purpose of the social contract is to establish a just system of government for the members of society. Moreover, he makes clear his belief that the purpose of a society's constitution is to embody the terms of this just social contract.¹³ In effect,

¹⁰ Only four justices heard the case, and three—Chase, Paterson, and Iredell—concurred in the belief that the "ex post facto" clause applied only to criminal laws. Justice Iredell also considered the act of the state's legislature as being judicial in nature and thus beyond the scope of the "ex post facto" clause. Justice Cushing's two-sentence opinion merely says that the act "is not touched by the Federal Constitution" whether it is judicial or legislative in nature. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 400 (1798).

Interestingly, in a case decided just this year, Justice Thomas has urged his colleagues to reconsider the view that the ex post facto clause applies only to criminal laws. *See Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2145 (1998) (Thomas, J., concurring).

¹¹ *See Calder*, 3 U.S. (3 Dall.) at 394.

¹² "The purposes for which men enter into society will determine the nature and terms of the social compact." *Id.* at 388 (italics omitted). The full passage of Justice Chase is quoted in full in the Appendix.

¹³ "The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence." *Id.* This sentence immediately precedes the one stating that "[t]he purposes for which men enter into society will determine the nature and terms of the social compact," thus equating the phrase "social contract" with the antecedent reference to "Constitutions."

for Chase, a society's constitution *is* its social contract, and thus it should be understood that the ultimate purpose of the Constitution is the same as the ultimate purpose of the social contract.

Next, Chase articulates his belief that a just social contract would not grant a legislature unlimited powers but instead would protect the liberty and property of individual citizens.¹⁴ In a truly wonderful sentence, Chase asserts his view that any legislation contrary to the essential terms of a just social contract is necessarily null and void. "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."¹⁵ Given that Chase equates the Constitution with the social compact, it obviously follows for him that any legislation violating an essential term of the social contract must be unconstitutional.

A key part of Chase's argument is that a constitution should be construed according to its fundamental purposes. He forthrightly acknowledges that he is contemplating a situation in which the text of a written constitution is silent on whether a particular piece of legislation is permitted or prohibited. In this situation, rather than assuming that the legislature is permitted to do anything that the text of the Constitution does not expressly prohibit, Chase argues that it should be assumed, instead, that the legislature is *prohibited* from doing anything that would be inconsistent with the Constitution's fundamental purposes.¹⁶ And because the Constitution's most basic purpose is to secure a just system of government for society, any legislation that is flagrantly unjust must be deemed unconstitutional. Chase closes his argument with this pronouncement: "To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."¹⁷

Chase's theory of unspecified constitutional rights drew a direct response from Justice Iredell.

First, Iredell makes absolutely clear that he accepts the idea that judges would nullify legislation with specific provisions of a written constitution.¹⁸ In other words, Iredell anticipates the doctrine of judicial review as articulated by the

¹⁴ "There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power, [for example, a law purporting] to take away that security for personal liberty, or private property, for the protection whereof the government was established." *Id.*

¹⁵ *Id.*

¹⁶ "It is against all reason and justice, for a people to intrust a Legislature with, [certain] powers; and, therefore, it cannot be presumed that they have done it." *Id.*

¹⁷ *Id.* at 388–89.

¹⁸ "If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void . . ." *Id.* at 399.

Supreme Court five years later in *Marbury v. Madison*.¹⁹ To be sure, Iredell says that this power of judicial review should be used hesitantly, only when the text of the Constitution is so clear that there can be no doubt that the legislation is blatantly unconstitutional.²⁰ Thus, using modern terms, we would call Iredell a champion of judicial restraint. But judicial restraint is not the same as judicial impotence, and Iredell announces that, when necessary, he is prepared to exercise the judicial power—indeed duty (as *Marbury* also conceived it)—to invalidate legislation contrary to a written constitution.

Iredell, however, sees judicial enforcement of unspecified constitutional principles as presenting an entirely separate matter. If there is nothing written in a constitution to constrain the scope of legislative power, then judges have no basis for invalidating legislation on the ground of unconstitutionality. Iredell acknowledges that “some speculative jurists”²¹ believe that legislation contrary to “natural justice” is inherently void.²² But, Iredell responds, judges lack the power to declare legislation void for this reason.²³

Iredell’s point is an institutional one. As long as a written constitution establishes a legislature without limitations on its legislative power, then any law enacted by the legislature is necessarily “lawfully enacted,” within the scope of its authority as delegated by the people in the Constitution.²⁴ And, as long as the legislature is acting within the scope of its constitutionally delegated authority, then the judiciary would be exceeding *its* own authority under the constitution if it declared the legislation invalid.

To bolster his institutional argument, Iredell articulates a classic statement of the skeptical position. He states, “[t]he ideas of natural justice are regulated by no fixed standard.”²⁵ He adds, “[t]he ablest and the purest men have differed upon the subject.”²⁶ These two skeptical assertions, while closely related, are subtly distinct. The first we might call *intrinsic* skepticism: the very subject of “natural justice” has no definite content to be grasped. Even if human minds were perfect, it would not matter because questions of justice are inherently indeterminate. The second, by contrast, we might call *extrinsic* skepticism: even if there are objective right answers

¹⁹ 5 U.S. (1 Cranch) 137 (1803).

²⁰ “[T]he Court will never resort to that authority, but in a clear and urgent case.” *Calder*, 3 U.S. (3 Dall.) at 399.

²¹ *Id.* at 398.

²² *See id.* at 399.

²³ “[T]he Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.” *Id.*

²⁴ *See id.* at 398.

²⁵ *Id.* at 399.

²⁶ *Id.*

to questions of justice, there is no agreement on what they are. As Iredell states, even among the most intelligent and virtuous of citizens there is deep disagreement about what justice requires.²⁷

Whether the disagreement is caused by the inherent nature of the topic of justice or, instead, the inherent imperfections of even the “ablest and purest” of minds, the fact of the disagreement remains. And the existence of this disagreement feeds into Iredell’s institutional argument. When intelligent and virtuous citizens divide into two opposing camps on some issue of justice, and there is no way for humans to step onto some “objective” plateau from which to correctly resolve this debate, then who is to say that the legislature’s views on this debate are inferior to the judiciary’s? In Iredell’s own words, “all that the Court could properly say, in such an event, would be, that the Legislature possessed of an equal right of opinion, had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.”²⁸ This inability of the Court to say that its opinion is superior to the legislature’s is the very essence of the skeptical position.

Thus, in *Calder v. Bull*, Justices Chase and Iredell express exactly opposite views on the issue of unenumerated constitutional rights. Their dispute, although inconsequential to the result of the particular case before them, frames the issue that has bedeviled both the Court and commentators for the past two hundred years. This issue is precisely the point of contention that divides the idealist and skeptical positions. The idealist believes that it is possible to identify essential provisions of a fair social contract through the powers of human reason. As Chase stated, certain legislative enactments would be “against all reason and justice.”²⁹ If an enactment contradicts one of these identifiable essential elements of justice, it is unconstitutional because a silent constitution is presumed to incorporate these essential terms, given its overriding purpose. But a necessary premise of this idealist argument is that “the great first principles of the social contract”³⁰ can be indisputably identified—that any fair-minded person exercising the power of human reason would subscribe to them.

Yet this premise of the idealist argument is precisely what the skeptic rejects. As we have seen, the heart of Iredell’s retort to Chase is that not even the best and brightest of citizens can agree on the essential terms of a fair social contract. And so, it is concerning this crucial question—whether any essential elements of a fair social contract are identifiable by reason—that we should see what additional insight or guidance, if any, the benefit of two hundred years of history has given us.

²⁷ This distinction between intrinsic and extrinsic skepticism differs from Dworkin’s distinction between internal and external skepticism. See RONALD DWORKIN, *LAW’S EMPIRE* 78–83 (1986).

²⁸ *Calder*, 3 U.S. (3 Dall.) at 399.

²⁹ *Id.* at 388.

³⁰ *Id.*

II. THE CONTEMPORARY DEBATE

This essay will not review all two hundred years of developments in constitutional jurisprudence concerning the great debate between idealists and skeptics. Instead, we shall fast forward to the present and examine the arguments advanced by two of today's leading scholars: one an idealist and the other a skeptic. While these two scholars are hardly alone in advocating their points of view, they make especially thoughtful arguments for their respective positions. Thus, by examining these arguments, we can evaluate how far (if at all) the debate between idealists and skeptics has developed since *Calder v. Bull*.

A. *The Contemporary Idealist*

The exemplary contemporary idealist is James E. Fleming.³¹ Indeed, Fleming is unabashedly idealistic. He calls his approach a "Constitution-perfecting" theory of judicial review,³² openly embracing the label of perfectionist that skeptics have pejoratively used against idealists.³³ Fleming believes the judge's task is to make the Constitution the best it can be,³⁴ which includes the judicial identification of constitutional rights unmentioned in the text of the Constitution itself.³⁵

Moreover, Fleming's method for the identification of these unenumerated rights is political philosophy. He relies in particular on the recent work of the famous philosopher John Rawls, whose project is to identify the essential terms of a fair social contract for our society.³⁶ For Fleming, what justifies this judicial reliance on political philosophy is the Constitution's own goal of being a social charter establishing a fair political system for our nation. Fleming states that he

³¹ Fleming's theory is developed in two important articles. James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993) [hereinafter *Substantive Constitution*]; James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995) [hereinafter *Deliberative Autonomy*].

³² See *Substantive Constitution*, *supra* note 31, at 218–19; *Deliberative Autonomy*, *supra* note 31, at 15.

³³ For a well-known earlier criticism of constitutional perfectionism, see Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

³⁴ Fleming follows Ronald Dworkin in arguing that constitutional interpretation "requir[es] the construction of a substantive political theory (or scheme of principles) that *best fits and justifies* our constitutional document and underlying constitutional order as a whole." *Deliberative Autonomy*, *supra* note 31, at 14 (emphasis added) (citing DWORKIN, *supra* note 27).

³⁵ See *Deliberative Autonomy*, *supra* note 31, at 56.

³⁶ See JOHN RAWLS, *POLITICAL LIBERALISM* (1993). This book is a refinement of Rawls's earlier *A Theory of Justice* (1971) insofar as he now limits what he calls the "constitutional essentials" to certain basic civil liberties, thereby excluding from the domain of constitutional law the principles he earlier developed concerning economic and social inequalities. See *id.* at 227–30.

“conceives our Constitution as embodying (or aspiring to embody) a coherent scheme of equal basic liberties, or fair terms of social cooperation on the basis of mutual respect and trust, for our constitutional democracy.”³⁷

Thus, there can be no doubt that Fleming is a contemporary analogue of Justice Chase. In fact, Fleming cites Chase’s opinion in *Calder* as one of his intellectual forebears.³⁸ The only question is whether Fleming adds anything to Chase’s argument by relying on Rawls’s political philosophy as the way to identify the essential content of a fair social contract.³⁹

Rawls builds his political philosophy on the premise that all normal humans are mentally equipped with two “moral” powers.⁴⁰ One is the ability of individuals to formulate personal goals and objectives—that is, to decide for themselves what they want to accomplish in life (to determine their life ambitions). The other moral power is the ability to respect the interests of other persons—in other words, the capacity to ascertain and abide by fair terms of social cooperation with other members of society. For both Rawls and Fleming, these two powers require the existence of certain constitutional rights, namely those rights that individuals need as prerequisites for exercising these two powers.⁴¹ Fleming groups these rights under two headings, one corresponding to each moral power. “Deliberative autonomy” is the term Fleming gives to those rights necessary for individuals to formulate personal objectives and goals in life.⁴² “Deliberative democracy” is the term he uses for those rights necessary for individuals to seek fair terms of social cooperation with their fellow citizens.⁴³

A major theme of Fleming’s work is that deliberative democracy without deliberative autonomy is only half a constitution, and an unstable one at that.⁴⁴ Fleming’s approach views deliberative autonomy and deliberative democracy as twin pillars underlying all the individual rights necessary for a constitution to

³⁷ *Substantive Constitution*, *supra* note 31, at 290; *Deliberative Autonomy*, *supra* note 31, at 20.

³⁸ See *Deliberative Autonomy*, *supra* note 31, at 26.

³⁹ Although Fleming protests that his “constitutional constructivism is not a theory of natural law or natural rights,” he admits that its “principles are aspirational—the principles to which we as a people aspire, and for which we as a people stand—and may not be fully realized in our historical practices, statute books, and common law.” *Id.* at 16. Thus, Fleming is undeniably an idealist, given his belief that the Constitution should be construed to conform to these aspirational principles.

⁴⁰ See RAWLS, *supra* note 36, at 302.

⁴¹ See *Deliberative Autonomy*, *supra* note 31, at 18.

⁴² See *id.*

⁴³ See *Substantive Constitution*, *supra* note 31, at 292; *Deliberative Autonomy*, *supra* note 31, at 19.

⁴⁴ See *Deliberative Autonomy*, *supra* note 31, at 19.

protect; without both pillars the constitution collapses.⁴⁵ Deliberative democracy is not enough because citizens are not merely social beings. Instead, they are individuals who need a zone of personal sovereignty within which they can make decisions for themselves independently—decisions over which society as a whole cannot exercise a veto (no matter how democratically a society might choose to exercise a veto power).⁴⁶

Although Fleming's idea of deliberative autonomy sounds attractive, the problem is pinning down exactly what rights should be judicially protected according to this idea. Fleming's (admittedly incomplete) list includes some familiar subjects of recent constitutional litigation: the right of consenting adults to engage in sexual relations, the right of extended family members to live together, and the right of medical patients to refuse unwanted treatments.⁴⁷ The question inevitably arises why these rights and not others. For example, why not a right to engage in prostitution? Or a right of friends to live together? Or a right to consume whatever drugs one wishes?

Fleming disclaims that deliberative autonomy should be understood to encompass these asserted rights. Deliberative autonomy is not, he says, a libertarian notion that individuals are free to do whatever they please as long as they do not interfere with the pleasure of others.⁴⁸ Instead, according to Fleming, deliberative autonomy protects only those rights that are "significant" to the ability of individuals to define and accomplish their "important" personal objectives in life.⁴⁹

But it is not at all clear why, even limited in this way, deliberative autonomy would not encompass the additional rights asserted. The right to consume mind-altering drugs may be necessary, either to relieve physical or psychic pain, or to pursue an aesthetic vision. (Consider all the important literature, art, and music produced as a result of hallucinogenic drugs.)⁵⁰ The right of fraternity brothers to share a dwelling may be just as important to some persons' conceptions of a good life as the right of biological cousins to live together. (Monastic orders, after all, are based on the premise that monks should live with their spiritual kin rather than their biological relatives.) Even the right to engage in prostitution may be necessary to achieve important ambitions in life. (Imagine a so-called "high-class hooker" who

⁴⁵ See *id.* at 3–4.

⁴⁶ See *id.* at 32.

⁴⁷ See *id.* at 7 & n.27 (collecting the relevant cases).

⁴⁸ See *id.* at 45.

⁴⁹ See *id.* at 40–41.

⁵⁰ Also, if Fleming would support the right of religious sects to use peyote to pursue their spiritual ends, as would the dissenters in *Employment Division v. Smith*, 494 U.S. 872 (1990), then it would be contrary to his Rawlsian impartiality among competing conceptions of the good life to deny atheists an equal right to use similar drugs to pursue their most cherished personal objectives.

escorts her affluent clients to the opera, theater, and symphony, as well as expensive restaurants and “high-society” parties, and who otherwise might not be able to enter this exclusive world of privilege.) In short, Fleming’s idea of deliberative autonomy faces severe line-drawing problems.

Moreover, these line-drawing problems cut both ways. Just as arguments can be made to extend the scope of deliberative autonomy to encompass rights that Fleming would leave unprotected, so too can arguments be made to exclude from the scope of deliberative autonomy rights that Fleming would wish to include. If the Constitution does not protect the right to engage in sexual relations in exchange for financial remuneration, then why should the Constitution be construed as permitting casual extramarital sex even when there is no obvious economic transaction involved? (Some sociologists might argue that the sexual component of a casual dating relationship is one part of a complex bargain between two self-interested partners, making their relationship different from conventional prostitution only in degree.) It cannot be that the right to have a one-night fling with a previous stranger is significant to formulating or achieving a life plan, whereas the right to sell (or purchase) sex is not.

Similarly, if it is not sufficiently important that close friends or spiritual kin have the right to live in a neighborhood zoned for nuclear-family housing, then it cannot be sufficiently important for cousins to defeat this kind of zoning law. After all, any argument that could justify separating friends (they can still visit frequently, even if they cannot move in together) applies just as well to cousins. Likewise, if there are strong enough reasons to prevent people from experimenting with marijuana, then presumably there are good enough reasons to require people to continue life-sustaining medical treatment. After all, the cessation of life-sustaining treatment will, by definition, certainly cause death, whereas the experimental use of marijuana has virtually no risk of fatality.

Moreover, these line-drawing problems cannot be avoided even if Fleming were to retreat to the robust libertarian position that adults should be free to do whatever they wish as long as they do not harm anyone else. It is always debatable whether one person’s conduct causes harm to others.⁵¹ Suicide can harm family members and friends. Multi-family dwellings in a single-family neighborhood can lower property values and interfere with the neighbors’ peaceful enjoyment of their property.⁵² Finally, sexual promiscuity among consenting adults, in addition to

⁵¹ For a philosophically sophisticated discussion of the limits of extreme libertarianism, see AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 230–73 (1996).

⁵² Some families may have moved into a particular neighborhood specifically relying on existing zoning laws restricting housing to single-family homes. If some neighborhoods are zoned this way to accommodate this preference, while other neighborhoods are zoned for multi-family housing to accommodate different lifestyle choices, why should those who want multi-family dwellings be able to eliminate all single-family neighborhoods?

spreading the risk of disease, can change the culture of society. For example, children growing up in a culture where sexual promiscuity is widely accepted may be tempted to experiment with sex at earlier ages than they otherwise would, and thus parents who (for whatever reason) wish to raise their children to remain abstinent until marriage may have a harder time at this parenting task than if nonmarital sex were illegal.

Also, even the most ardent libertarians must agree that some citizens are not competent to make certain decisions regarding their own self-interest, and, therefore, in some circumstances paternalism is justified. Mentally ill individuals who are suicidal need to be restrained so that (hopefully) psychiatric treatment may cure them of their extreme depression. But once this obvious point is acknowledged, new line-drawing problems arise. Are cancer patients in extreme pain competent to make a decision to commit suicide? What if they are being pressured by relatives, or even insurance companies, to pull the plug before they are ready? Reasonable libertarians can disagree about exactly where to draw the line dividing justified from unjustified paternalism.

In an essay written before the Supreme Court decided the recent physician-assisted suicide cases,⁵³ Fleming argued that it would be a “constitutional tragedy” if the Constitution did not grant terminally ill patients the right to secure the services of doctors in deciding when and how to end their lives.⁵⁴ According to Fleming, “the state’s proscription of physician-assisted suicide is tantamount to conscription of terminally ill persons into involuntary servitude.”⁵⁵ This rhetoric seems overstated: after all, laws against physician-assisted suicide simply prohibit the medical profession from aiding the attempts of individuals to end their lives; this prohibition does not stop those who really want to kill themselves from doing so.

In any event, as the Supreme Court itself recognized, Fleming’s moral argument is better addressed to a legislative rather than judicial forum.⁵⁶ There are indeed plausible moral arguments that may persuade the people of a state, or their elected representatives, to permit certain forms of physician-assisted suicide in narrowly limited and carefully controlled circumstances. But there are also plausible moral arguments on the other side that might persuade the people or the legislature to reject categorically any form of physician-assisted suicide. One such argument is the potential harm to the medical profession—the idea that doctors should have an undivided loyalty to healing is hardly untenable. Another argument is that pain should always be treated with efforts to end the pain, rather than the patient’s life, even if the result is to sedate the patient.

⁵³ See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

⁵⁴ See James Fleming, *Constitutional Tragedy in Dying*, 24 *FORDHAM URB. L.J.* 881 (1997).

⁵⁵ *Id.* at 882.

⁵⁶ See *Washington*, 117 S. Ct. at 2275.

Fleming would argue that it is deeply unfair to deny individuals the right to decide whether they prefer immediate death to prolonged sedation. But, in the absence of a constitutional clause specifically giving individuals this right, the moral issue of fairness in this context should be decided by the people or their elected representatives rather than by an unelected, life-tenured court. We can imagine Fleming and his allies making their moral argument in a public hearing before an elected assembly, and we can imagine members of this assembly debating the merits of this moral argument along with the counterarguments against it. Suppose that Fleming loses in the legislature because, after careful consideration of the competing moral arguments, a majority of the elected representatives conclude that the risks of subtle coercion and corruption among doctors are simply too great to let doctors help their patients kill themselves. What justification would an unelected, life-tenured court have for overturning the legislature's moral judgment just because a majority of the court's members disagreed with the legislature's conclusion concerning how to balance the competing moral considerations? As Iredell observed two hundred years ago, in the absence of a specific constitutional provision on point, the institutional authority to make this moral judgment lies with the legislature even if the judiciary considers the legislature's moral judgment erroneous.⁵⁷

Now, the argument is sometimes made that the Supreme Court is sufficiently democratic to justify substituting its moral judgments for those made by elected legislatures. After all, members of the Court are appointed by an elected President, with the approval of an elected Senate, and the Court's decisions are reversible by constitutional amendment. But given the extraordinary obstacles of the amendment process—the necessity of securing approval from thirty-eight different legislative bodies, after obtaining two-thirds supermajorities in both houses of Congress—this degree of popular control over the Supreme Court is insufficient to make it a truly democratic institution. It would be different if the independence of the Supreme Court were structured much like the independence of the Federal Reserve, whose decisions Congress can overturn by ordinary legislation. There is nothing intrinsically undemocratic about a legislature delegating difficult decisions to an appointed body of special experts, so long as majoritarian institutions of government retain ultimate control over the exercise of the delegated authority.⁵⁸ This

⁵⁷ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798).

⁵⁸ The argument for majority rule is that no other decisional procedure distributes political power as equally among all citizens in society. See ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 139–41 (1989) (explaining May's Theorem). If one-third plus one can block the considered judgment of two-thirds minus one on a contentious issue of social policy, a small group of citizens necessarily exercises political control over a much larger group. While the citizenry as a whole might wish a delegated legislature to follow certain supermajoritarian procedures, democratic fairness requires that the people themselves retain the authority to change the laws of their society by majority vote.

proposition remains true even if the field of expertise is moral philosophy. Thus, it is perfectly consistent with democracy for a democratic legislature to submit the contentious issue of physician-assisted suicide, or any similarly divisive issue concerning personal autonomy, to a panel of appointed experts, if the legislature (or electorate itself) retains the authority (by majority vote) to overrule the panel's determination.⁵⁹

Indeed, rather than setting up an ad hoc panel of moral experts for each delicate issue as it arises, it is probably much more preferable to establish a permanent panel of professional experts, appointed for a fairly lengthy term of years, so that over time the institution can establish real independence through the development of credibility. In this way, the legislature is likely to think long and hard before overturning the well-reasoned judgment of the moral experts that individuals should be entitled to engage in a certain form of personal autonomy, even in the face of widespread social disapproval. But if, notwithstanding the judgment of the experts, a majority of citizens truly and deeply believe that it would be morally wrong to permit individuals to exercise a certain personal freedom—like physician-assisted suicide—then it would be undemocratic to deny them (or their elected representatives) the power to put this moral judgment into law. Because the present procedures for a constitutional amendment effectively deny the people this power, if the Supreme Court asserts judicial enforcement of unenumerated rights of personal autonomy, its action is inconsistent with the democratic sovereignty of equal citizens. (The Supreme Court apparently understood this truth in the actual physician-assisted suicide cases recently decided,⁶⁰ although the Court did not disavow entirely its previously asserted authority to identify unenumerated rights of personal autonomy.⁶¹)

It is unclear how Fleming would respond to this line of reasoning because he largely ignores the institutional issue of who should decide controversial questions concerning the proper scope of personal liberties. Instead, Fleming devotes his

⁵⁹ The legislature of New York did just this on the issue of physician-assisted suicide. *See* *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

⁶⁰ “By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.” *Glucksberg*, 117 S. Ct. at 2267–68.

⁶¹

[T]he development of this Court's substantive-due-process jurisprudence has been a process whereby the outlines of the ‘liberty’ specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review.

Id. at 2268.

attention to developing substantive arguments concerning why certain personal liberties should be safe from governmental interference notwithstanding the countervailing moral arguments that permitting these liberties would harm other individuals or society as a whole. Even if I share Fleming's (largely) libertarian views, the pressing institutional problem remains: what if a majority of the people, or their elected representatives, after thoughtfully considering the merits of Fleming's arguments, reject them in favor of the counterarguments? Some political institution must decide whether Fleming is right or wrong. In our current system of government, the institutional choice is between an elected legislature (or a statewide referendum) and an unelected and life-tenured tribunal, with only nine members, whose decisions are effectively immune from popular revision. Given this choice, it is hard to see the latter alternative as more consistent with the democratic idea that all citizens should ultimately share equal control over the affairs of state.

B. *The Contemporary Skeptic*

Although Fleming fails to confront the force of this institutional objection, Jeremy Waldron, our exemplary neo-Iredellian, makes it the centerpiece of his attack against judicial enforcement of constitutional rights.⁶² Waldron presents his position most forcefully in an essay written in response to recent calls for introducing into Britain American-style judicial review.⁶³ He argues that even those who fervently believe that individuals have basic moral rights to certain personal freedoms should prefer legislative rather than judicial protection of these freedoms. (Waldron's objection to judicial review, in fact, extends beyond the judicial enforcement of unenumerated constitutional rights. He objects to judicial enforcement of enumerated rights as well—at least as a matter of drafting a new constitution for a society. But if a society already has a constitution with a written bill of rights, Waldron might concede, along with Iredell, that the judiciary should enforce its explicit provisions "in a clear and urgent case."⁶⁴)

Waldron's key point is that believers in individual rights must not overlook the basic right of each individual citizen to participate in political decisionmaking on equal terms with every other individual citizen.⁶⁵ As Waldron observes, American-style judicial review is inconsistent with this democratic right since it gives an elitist judiciary the essentially unrevisable last word on what the substance of the law will

⁶² See Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 OX. J. LEG. STUD. 18 (1993).

⁶³ See *id.*

⁶⁴ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798).

⁶⁵ See Waldron, *supra* note 62, at 36 (stating that "self-government and participation in politics by ordinary men and women, on equal terms, is itself a matter of fundamental right").

be.⁶⁶ Waldron asks us to imagine ourselves advocating vociferously on behalf of some human right (perhaps the right to have an abortion) and to imagine further that we prevail in our advocacy of this right in a vote of the legislature, or a referendum, only to have the legislation struck down by unaccountable judges because it contradicts *their* belief about human rights (for example, a belief that, even prior to viability, a fetus has a right to life that defeats any abortion right).⁶⁷ Is it possible that in this circumstance we would think the judges justified in negating our democratic victory, especially because we must consider our own understanding of human rights at least as worthy of respect as theirs *and* our view has more support than theirs?

Waldron acknowledges that “[t]hings might be different if principles of right were self-evident or if there were a philosophical elite who could be trusted to work out once and for all what rights we have and how they are to be balanced against other considerations.”⁶⁸ But such is not the case. As Waldron explains, the disagreement among philosophers concerning the content and scope of essential human rights is just as widespread and deep as it is among ordinary citizens.⁶⁹ Moreover, philosophers recognize that their disagreements on these moral issues are in good faith, not motivated by self-interest.⁷⁰ Similarly, there is no reason to think that the same moral disagreements among ordinary citizens are not equally sincere. After all, the moral reflections of ordinary citizens are not different in kind from the moral reflections of philosophers. As Waldron aptly puts it, “[p]olitical philosophy is simply conscientious civic discussion without a deadline.”⁷¹ If we are cynical about self-serving motivations underlying the moral arguments advanced by ordinary citizens in public debate, then just as easily we can be cynical about the motives of judges. Conversely, if we continue to insist that our own moral arguments are advanced in good faith, then we must be prepared to credit the claims of others that their opposing moral arguments are also in good faith.⁷²

⁶⁶ See *id.* at 41–45.

⁶⁷ See *id.* at 50–51.

⁶⁸ *Id.* at 49.

⁶⁹ See *id.* at 29–31.

⁷⁰ See *id.* at 36.

⁷¹ *Id.* at 35. On this important point, the philosopher Rawls is himself in complete agreement. See John Rawls, *Reply to Habermas*, 92 J. PHIL. 140–41 (1995). “There are no experts: a philosopher has no more authority than other citizens. . . . Everyone appeals equally to the authority of human reason present in society.” *Id.*

⁷²

It is no doubt possible that a citizen or an elected politician who disagrees with my view of rights is motivated purely by self-interest. But it is somewhat uncomfortable to recognize that she probably entertains exactly the same thoughts about me. Since the issue of rights before us remains controversial, there seems no better reason to adopt my view of rights as definitive and dismiss her opposition as self-interested, than to regard me as the selfish

Given the existence of good faith disagreement on moral issues, Waldron points out that some decisional rule must be adopted to determine which side shall prevail.⁷³ A democratic vote of all citizens, or their elected representatives, is not the only possible decision rule. The disagreement could be settled by a king (philosophically minded or otherwise). But a democratic procedure in which each citizen has an equal vote is the decision rule most consonant with the idea that the deliberate convictions of each individual citizen are equally worthy of respect.

Waldron notes the irony of human rights advocates abandoning democratic procedures in favor of elitist judicial review.⁷⁴ Human rights advocates usually premise their defense of individual liberties on the ground that individuals should be trusted to make certain decisions about their own conduct. But if ordinary individuals deserve this trust, then they also should be trusted to participate equally in making the necessary collective decisions about the extent to which constraints on personal liberties are warranted to prevent harms to other members of society. After all, some institution of government is going to draw the line between freedom and constraint, and, if human rights advocates are correct about the capacity of individual citizens to make intelligent choices about their own self-government, then why should human rights advocates prefer that this line-drawing authority be entrusted to an elitist institution rather than a democratic procedure in which all individuals participate on equal terms? Waldron summarizes this point:

If a process is democratic and it comes up with the correct result, it does no injustice to anyone. But if the process is non-democratic, it inherently and necessarily does an injustice, in its operation, to the participatory aspirations of the ordinary citizen. And it does *this* injustice, tyrannizes in *this* way, whether it comes up with the correct result or not.⁷⁵

Waldron recognizes that existing political procedures may not be perfectly democratic. But these imperfections do not justify judicial review.⁷⁶ The

opponent and her as the defender of principle.

Waldron, *supra* note 62, at 50.

⁷³ See *id.* at 31–34. Waldron has stressed this important point in much of his recent work. See, e.g., Jeremy Waldron, *The Circumstances of Integrity*, 3 LEG. THEORY 1 (1997); Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996).

⁷⁴ See Waldron, *supra* note 62, at 27–28.

⁷⁵ *Id.* at 50.

⁷⁶ In recent decades the development of public choice theory has exposed various potential defects in political processes that strive to be egalitarian and democratic. For example, democratic legislatures can become the captives of special interest groups. But these potential problems do not necessarily justify more intrusive judicial review. For an especially thoughtful and sophisticated discussion on the issue, concluding that, for all their flaws, democratic legislatures remain the

institutional issue, as he observes, is “essentially a *comparative* one.”⁷⁷ Whatever the imperfections of the ordinary legislative processes, they still are much more democratic than rule by an unelected and unaccountable judiciary.

Thus, Waldron is the consummate contemporary Iredellian. His argument, like Iredell’s, is institutional—the identification of rights should be left to the legislature, not the judiciary. And, like Iredell, Waldron premises this institutional argument on the skeptical view that disagreement about what rights individuals should have is inevitable. Waldron is more explicit than Iredell in drawing the distinction between intrinsic and extrinsic skepticism.⁷⁸ Nonetheless, Waldron’s point about the persistence of sincere disagreement among philosophers is essentially the same as Iredell’s observation about persistent disagreement among even the “ablest and purest” of men.⁷⁹ Neither side of the moral debate can prove that it necessarily has the right answer and that the other side must concede. Given this situation, both Iredell and Waldron maintain that there is no justification for the judiciary substituting its moral beliefs for those of an elected legislature, whose moral opinions are just as worthy of respect and can claim a more legitimate, democratic pedigree.

III. THE DEMOCRATIC MIDDLE GROUND

If there were no middle ground between idealism and skepticism, I would have to side with Iredell against Chase, and Waldron against Fleming. The idealists are unable to refute the fact that citizens sincerely disagree about exactly what personal liberties they should have and the extent they should be able to exercise these liberties without government interference. Nor can the idealists overcome the institutional argument that the fairest way to resolve this sincere disagreement is a democratic process in which each citizen participates equally.

But there is a middle ground. It holds that judges may identify and enforce unenumerated rights *if but only if* those rights are essential to ensuring that the

lesser of two evils, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

⁷⁷ Waldron, *supra* note 62, at 44.

⁷⁸

That we need a theory of authority to settle disagreements is in no way a concession to moral subjectivism or conventionalism or relativism. One can recognize the existence of disagreement in society, including disagreement on matters of rights and justice, and one can acknowledge that some disagreements are, for practical purposes, irresolvable, without staking the meta-ethical claim that there is no fact of the matter about the issue that the participants are disputing.

Id. at 34.

⁷⁹ *Id.* at 25.

legislative process is indeed democratic. Thus, judges may insist that each citizen have an equal vote in the election of representatives in the legislature, but judges may not insist that citizens have the right, for example, to physician-assisted suicide (because in no way can that right be considered essential to a citizen's equal participation in democratic politics).

Perhaps the best example of a Supreme Court decision justifiable according to this middle-ground theory of democracy-defining constitutionalism is the poll tax case, *Harper v. Virginia Board of Elections*.⁸⁰ In *Harper*, a Virginia law disqualified any citizen from voting in state and local elections who failed to pay an annual poll tax of \$1.50.⁸¹ The Court invalidated the electoral disqualification on the ground that it unfairly imposed a greater voting obstacle on poorer, rather than richer, citizens.⁸² The Court needed a theory of unwritten constitutional law to justify this decision because the text of the Constitution strongly indicated that it imposed no barrier to the Virginia law.⁸³ Moreover, claiming it reasonable for a legislature to restrict the voting rights of less affluent citizens, Justices Black and Harlan wrote dissents that echoed Iredellian skepticism.⁸⁴ Nonetheless, the Court's decision in that case has served the nation well. The Court's decision guaranteeing all citizens, rich or poor, equal access to the ballot box has made the Constitution—and the system of government it establishes—more worthy of the respect and allegiance of all citizens, rich and poor alike.

A. *Waldron and the Middle Ground*

Given that Waldron premises his rejection of American-style judicial review on his commitment to the basic democratic right of citizens to participate equally in the formation of their society's laws, one might have thought that Waldron would have embraced this middle-ground position of democracy defining constitutionalism. But he does not. Instead, he claims that there is just as much sincere disagreement among philosophers and ordinary citizens concerning the essential requirements of a fair democratic process as there is concerning what substantive rights citizens should have.⁸⁵ Accordingly, Waldron contends that

⁸⁰ 383 U.S. 663 (1966).

⁸¹ *See id.* at 665.

⁸² *See id.* at 670.

⁸³ Section Two of the Fourteenth Amendment specifically contemplated state-imposed restrictions on the franchise. However, even more glaring was the Twenty-Second Amendment, ratified only two years earlier, which invalidated poll taxes for *federal* elections but noticeably omitted any such barrier to poll taxes for state or local elections. *See* U.S. CONST. amend. XIV § 2; U.S. CONST. amend. XXII.

⁸⁴ *See Harper*, 383 U.S. at 671–86.

⁸⁵ *See Waldron, supra* note 62, at 39 (stating that “[t]he truth about participation and process

judges should let the existing legislative procedures resolve *these* disagreements about which legislative procedures would be most fair, just as the existing legislative procedures should be used to resolve disputes about citizens' substantive rights.⁸⁶

Waldron acknowledges that it might seem odd to entrust the existing legislative process with the authority to decide whether or not to reform itself to become more democratic.⁸⁷ (There appears to be some sort of conflict of interest here.)⁸⁸ However, Waldron reminds us that some purely procedural authority must exist to resolve disputes about what procedures to use. For example, if there is a dispute whether the voting age should be 18 or 21, the vote to resolve this dispute must either include or exclude the disputed age group. Moreover, whatever the alleged deficiencies of the existing legislative process, it still will be more democratic than a vote of judges who need not stand for any sort of election (and whose decisions are practically unrevisable). Thus, in choosing a procedure for deciding whether the existing legislative process needs to be more democratic, Waldron argues that the existing legislative process is still preferable to judicial review.⁸⁹

The problem with Waldron's argument on this point is that it ignores the issue of legitimacy—whether the society's system of government and law deserves the allegiance and obedience of the individuals living in the society, or instead whether these individuals are morally justified in attempting to subvert the system.⁹⁰ Democracy is an essential element in securing the legitimacy of a political system. Unless the processes for adopting society's laws qualify as democratic, the legal system does not deserve the allegiance or obedience of the people it purports to bind. Jefferson made this much clear in the Declaration of Independence.⁹¹

So far, this point about legitimacy might seem to support, not undercut, Waldron's position. But although democracy is necessary for legitimacy, judges

is as complex and disputable as anything else in politics").

⁸⁶ *See id.*

⁸⁷ *See id.* at 40.

⁸⁸ For a systematic development of this point, see Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

⁸⁹ *See* Waldron, *supra* note 62, at 39.

⁹⁰ Rawls gives the following definition of legitimacy: "[P]olitical power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideas acceptable to them as reasonable and rational." RAWLS, *supra* note 34, at 217; *see also* THOMAS NAGEL, *EQUALITY AND PARTIALITY* 33 (1991). "The task of discovering the conditions of legitimacy is traditionally conceived as that of finding a way to justify a political system to everyone who is required to live under it." *Id.*

⁹¹ "Governments," as Jefferson said, "deriv[e] their just powers from the consent of the governed," and whenever a government becomes tyrannical "it is the Right of the People to alter or to abolish it." THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

have a special institutional responsibility for assuring the legitimacy of the laws they enforce. For this reason, although the judiciary itself may be an undemocratic institution, it must make sure that legislation is adopted through democratic means.

Why do judges have this institutional responsibility to assure the legitimacy of the legal system? We must remember that judges are the ones who send citizens to jail, or impose other penalties, if citizens have breached a law. When citizens complain about the fairness of the law in question, the very legitimacy of the court itself and its decrees are called into question. "You should not send me to jail just because I chose to live under the same roof as my grandchildren," says Ms. Moore to the judge who is about to sentence her for violating a nuclear-family zoning ordinance.⁹² "Any system of law that denies me the right to live with my grandchildren is tyrannical, illegitimate, and not worthy of allegiance or respect," she continues. "If you, as judge, enforce this law, you too are being tyrannical and lack legitimacy. Your decrees deserve to be thwarted and dishonored, to the extent feasible, rather than respected and obeyed."

This objection is potentially powerful. No court should want its decrees to be illegitimate, unworthy of respect or obedience. Instead, all courts should strive to make sure that their decrees deserve the obedience of those to whom they are directed.

If the process by which the law was adopted was democratic, then the court has a ready answer to the charge of illegitimacy:

I understand, Ms. Moore, why you object to a law that denies you the right to live in this house with your grandchildren. But this law was adopted by a zoning board whose members were elected by a vote in which you along with all your fellow citizens had equal rights of participation. The zoning board considered whether to open your neighborhood to extended-family housing, but decided instead to make this one part of town just for nuclear families, leaving the rest of town to different kinds of housing arrangements. We cannot say that the board's balancing of competing considerations was inherently unreasonable.

In any event, the process by which this zoning law was adopted was a democratic one, and thus the law's legitimacy is unimpeachable. Had your side of the zoning debate prevailed before the zoning board, you would not tolerate this court's invalidation of the law on the ground that it failed to protect the right of nuclear families to choose a neighborhood consisting uniformly of similar families. Thus, you should not ask this court to invalidate the zoning law just because your side of the debate did not prevail. A democratically elected zoning board is the fairest procedure for resolving zoning disputes among citizens. For this reason, the board's decisions deserve the respect and obedience of all citizens, no matter which side prevails.

⁹² This hypothetical dialogue between litigant and judge is derived from *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

While the losing litigant may not like to hear this response, it is enough to satisfy the court that it does not lack legitimacy when it punishes a person for violating a democratically enacted law.⁹³

But if the process by which the law was adopted was undemocratic, then the court has no such response available. Remember, the litigant before the court is still complaining about the substantive loss of liberty as a result of an allegedly tyrannical law. Now, however, in addition to this substantive complaint, the litigant can add a procedural challenge. Therefore, when the litigant argues that the law restricting her liberty is unworthy of obedience, she is correct because a democratic legislature might have chosen not to adopt the law in question. To paraphrase Waldron, a democratic legislature may or may not adopt substantively tyrannical laws, depending upon one's own (contestable) conception of substantive tyranny. But an undemocratic legislature is necessarily tyrannical because, by definition, it deprives citizens of their right to participate equally in the formation of society's substantive laws. Thus, to avoid a valid charge of illegitimacy, a court must make sure that the laws it enforces were adopted by a democratic process.

To be sure, Waldron is correct to say that reasonable minds differ on how best to structure a democratic process. For example, is proportional representation preferable to the system of winner-take-all districting that we have in America? Waldron is right that judges should leave the choice among alternative versions of democracy to the operation of democratic politics itself. In other words, the decision to adopt proportional representation should be made (if at all) using the existing system of winner-take-all districting. It should not be imposed by judicial fiat.

But there are some political processes that no one could claim to qualify as democratic. Even Waldron must acknowledge this as he is confident in condemning judicial review and rule by philosopher-kings as undemocratic. As Waldron describes, no political process could plausibly qualify as democratic that does not, in some way, guarantee all adult citizens equal voting rights in referenda or the election of representatives to the legislature.⁹⁴ Thus, this requirement of equal voting rights is at least one condition that judges may insist upon to assure the legitimacy of the laws they enforce.

⁹³ I assume here that the zoning decision was not infected with racial prejudice. *Cf. Moore*, 431 U.S. at 510 (no evidence of any such prejudice in the record of the actual case). As John Ely has persuasively explained, a "representation-reinforcing theory of judicial review" needs to guarantee not only that the legislative process grants equal rights of participation but also that no minority group is effectively shut out of the process because of systematic bigotry. *See ELY, supra* note 8, at 135–81. This anti-discrimination principle, however, is arguably an *enumerated* right by virtue of the Equal Protection Clause. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 789 (1991).

⁹⁴ *See* Waldron, *supra* note 62, at 50. "[W]e should focus our attention on the individuals—millions of men and women—who claim a right to a say, on equal terms, in the processes by which they are governed." *Id.*

It may still seem a bit paradoxical that a concededly undemocratic institution—like an unaccountable judiciary—should have the power to insist that the legislative process comply with the essential elements of a democracy. But, again, we may invoke the judiciary's need to guarantee its own legitimacy. Whether or not the judiciary is a democratic institution, it must be a legitimate one. Moreover, the only way it can be legitimate is to make sure that the laws it enforces are the product of a democratic process.

In this regard, if careful, we can usefully invoke some themes from Justice Chase's opinion in *Calder*. Chase stated that judges should interpret a constitution in accordance with its most basic purpose: to establish a social contract that is fair for all citizens.⁹⁵ In somewhat more modern terms, we might say that this idea of a fair social contract corresponds to the idea of legitimacy: a government is legitimate only if it deserves the assent of the citizens it purports to govern. In other words, a fair social contract is one that all citizens have an obligation to accept as legitimate and worthy of their assent (whether or not they actually grant this assent).⁹⁶ Thus, invoking Chase's opinion, we can affirm that the job of judges is to construe the Constitution to make sure that it deserves the assent of those it purports to bind.

The problem with Chase is that he took this idea too far. Chase believed that a constitution could not count as legitimate unless it guaranteed certain substantive rights, including rights to private property.⁹⁷ This was Chase's error. Two hundred additional years of history and philosophy has provided us with knowledge that a constitution is legitimate—worthy of the assent and allegiance of citizens who must live under it—so long as it establishes a fair, democratic process for resolving substantive disagreements among citizens concerning divisive social issues, including the extent to which private property should be protected. If a constitution truly grants all citizens equal control over the formation of the laws that will govern their relations with each other, then citizens have no basis for complaint because, given their equal status as citizens, they could not expect a greater than equal share of political power. Thus, while Chase had an overextended conception of legitimacy, there is nothing wrong with his underlying idea that the purpose of a constitution is to establish a legitimate system of government, and, accordingly, the interpretation of a constitution should be guided by this basic purpose.

⁹⁵ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

⁹⁶ As Thomas Nagel has explained, the unanimity necessary for legitimacy is not "actual unanimity among persons with the motives they happen to have," but rather "a unanimity which could be achieved among persons . . . provided they were . . . committed within reason to modifying their claims, requirements, and motives in a direction which makes a common framework of justification possible." NAGEL, *supra* note 90, at 33.

⁹⁷ See *Calder*, 3 U.S. (3 Dall.) at 388 (stating "[t]he people of the United States erected their Constitutions . . . to protect their persons and property from violence").

B. *Idealism and the Middle Ground*

Idealists, like Fleming, attack the idea of limiting the test of legitimacy solely to the creation of a democratic legislative process.⁹⁸ They claim that any attempt to limit legitimacy to procedural rights is self-contradictory because the value of democracy itself derives from an underlying commitment to the substantive principle that each citizen deserves equal input in the formation of society's laws.⁹⁹ Moreover, idealists maintain, the respect for the decisionmaking capacities of ordinary citizens implicit in the view that citizens should have equal shares in democratic government necessitates a similar respect for the capacity of individual citizens to make decisions concerning how best to lead their own lives. Thus, idealists assert, if democracy is necessary for legitimacy, then rights to personal autonomy are also necessary for legitimacy. As Fleming puts it, the idea of deliberative democracy (*i.e.*, responsible *collective* self-government) must be supplemented with deliberative autonomy (responsible *personal* self-government).¹⁰⁰

Taking these two points in order, I first readily concede that a commitment to democracy necessarily rests on what some might wish to call "substantive" values. In any event, democracy and the underlying idea of equal citizenship are certainly not value-neutral. They necessarily entail a rejection of aristocracy and its underlying idea that a certain elite segment of society should be entrusted with the authority to adopt the laws that will govern all.

A problem with previous defenses of democracy-defining constitutionalism has been suggestions that this democratic middle-ground offers a value-neutral form of judicial review. Indeed, the most well-known proponent of democracy-defining constitutionalism, John Ely, has done a particular disservice in this regard. In his own critique of idealism, Ely appeared to say that any judicial reliance on the insights of political philosophers would be inappropriate. Imagining the judges citing political philosophers in their opinions, Ely quipped that, given the profound disagreements among philosophers, judicial decisions ultimately would be based on assertions such as "We like Rawls, you like Nozick. We win, 6-3."¹⁰¹ This quip shows that Ely shared with the skeptics a deep distrust of any judicial reliance on political philosophy, and one way to understand Ely's *Democracy and Distrust* is

⁹⁸ See *Deliberative Autonomy*, *supra* note 31, at 28–29.

⁹⁹ Waldron piggybacks on this idealist objection in his effort to show the incoherence of a proceduralist middle ground. See Waldron, *supra* note 62, at 40.

¹⁰⁰ See *Deliberative Autonomy*, *supra* note 31, at 30.

¹⁰¹ ELY, *supra* note 8, at 53. The reference is to Robert Nozick, whose book *Anarchy, State, and Utopia* (1974) was a leading critique of Rawls's earlier work, *A Theory of Justice* (1971). While Rawls had attempted to justify extensive reliance on taxes to redistribute wealth from the rich to the poor, Nozick argued that such taxes were akin to slavery.

that it attempts to defend democracy-defining constitutionalism from thoroughly skeptical premises.

But this attempt was doomed to failure because defending the democratic middle ground with skeptical premises is an impossible task. Embracing thoroughly skeptical premises of the kind Iredell and Waldron espouse leaves no basis for claiming democracy is worthy of protection. Complete skepticism knows no reason for preferring democracy to aristocracy, and thus could offer no justification for judicial insistence that the legislative process be at least minimally democratic in giving each citizen an equal vote.

Ely attempted to avoid this problem by claiming that the Constitution itself values a democratic political process, and thus any judicial enforcement of this value is not coming from the judges' own personal philosophical beliefs but rather from the Constitution itself. The problem with this claim is that, while the Constitution obviously does contain a number of provisions that implicitly endorse the value of democracy, the text of the Constitution is not exclusively concerned with establishing a fair democratic process. Rather, the text of the document identifies a number of substantive values entirely independent of democratic processes as worthy of constitutional protection. These include contract and property rights as well as freedom of religion. Thus, with respect to the identification of *unenumerated* rights, the text of the Constitution offers no basis for preferring procedural rights to a fair democratic process over some set of substantive rights analogous to contract, property, religion, and the like.

Ely tried to downplay the substantive rights identified in the text of the Constitution. He called them an "odd assortment" and insisted that the Constitution as written is mostly concerned about procedure, and therefore judicial identification of unenumerated rights should be limited to procedural rights.¹⁰² But this argument seems especially weak. Most people are offended that the suggestion that the protection of religious liberty is odd, and many people feel the same way about contractual and property rights. Nor does it seem accurate to claim that the document itself cares more about procedural than substantive rights. The Constitution as written does not signal any such preference one way or the other. Instead, it appears to treat all enumerated rights on an equal level.¹⁰³ Thus, if there is to be a successful middle ground that distinguishes between procedural and substantive rights for purposes of judicial identification of *unenumerated* constitutional rights, the defense of this middle ground must come, not from reading

¹⁰² See ELY, *supra* note 8, at 101.

¹⁰³ It may be true that numerically there are more provisions in the Constitution concerned with procedural rather than substantive rights. Even so, the Constitution does not create any hierarchy of value among different constitutional provisions—the Free Exercise Clause has exactly the same constitutional status as does the Nineteenth Amendment, which gives women and men equal voting rights.

the text of the Constitution itself, as Ely wished, but instead from fundamental principles of political philosophy.

We need not be quite as fearful—or skeptical—of political philosophy as Ely. Political philosophy has evolved considerably in the quarter-century since the famous debate between Rawls and Nozick first surfaced in print. To be sure, political philosophers still disagree on important substantive matters, and it would be inappropriate for judges to choose sides in these areas of disagreement. But there is a strong emerging consensus among contemporary political philosophers that these substantive disagreements should be resolved democratically, using fair procedures that give citizens equal participatory rights. As evidence of this consensus, consider just the following major works written in recent years: Dennis Thompson and Amy Gutmann, *Democracy and Disagreement* (1996),¹⁰⁴ Brian Barry, *Justice as Impartiality* (1995);¹⁰⁵ James Fishkin, *The Dialogue of Justice* (1992).¹⁰⁶

Indeed, Rawls's own more recent work is much more modest in its claims than his original book, focusing primarily on the fundamental ideas underlying a democratic political system.¹⁰⁷ Thus, we can distinguish, as Rawls does, between the core and periphery of his philosophy. The core of Rawlsian thought—like the basic idea of civic equality, that all citizens should be considered equals in the body politic—provides the foundation necessary to sustain any democratic system of government and so finds common ground with all the other contemporary philosophers endorsing democracy as the fairest way to settle substantive

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Democracy seems a natural and reasonable way [to cope with moral disagreement on substantive values] since it is a conception of government that accords equal respect to the moral claims of each citizen, and is therefore morally justifiable from the perspective of each citizen. If we have to disagree morally about public policy, it is better that we do so in a democracy that as far as possible respects the moral status of each of us.

AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 26 (1996).

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The upshot of this is that, where substantive justice is unavailable to provide a basis of agreement, we cannot hope to find consensus on the basis of any other substantive criterion. But that, fortunately, is not the end of the matter. . . . [I]t is hard to see why anybody of sound mind should be asked to accept less than equal political rights. Generalizing the point, we may say that, where substantive justice falls short, the search for agreement has to be pushed up to the procedural level.

BRIAN BARRY, *JUSTICE AS IMPARTIALITY* 109–10 (1995).

¹⁰⁶ “A theory of legitimacy does not yield a systematic theory of justice. Instead, it yields a theory of the fully legitimate political system.” JAMES FISHKIN, *THE DIALOGUE OF JUSTICE* 203 (1992).

¹⁰⁷ See RAWLS, *supra* note 36, at 35.

disputes.¹⁰⁸ Thus, unlike Ely, we need not fear that our defense of democracy-defining constitutionalism relies on Rawlsian ideas as long as we confine ourselves to the core of his thought and do not extend ourselves to the periphery of his more controversial claims.

Moreover, democracy-defining constitutionalism must rely on Rawlsian-type political philosophy not only to justify democracy as the necessary procedural means for a legitimate system of government but also to sustain the idea that the Constitution should be interpreted to be legitimate. This latter proposition, in turn, stems from two subsidiary ones. First, the purpose of a constitution is to secure the legitimacy of a society's government. Second, a constitution should be construed in accordance with this purpose. Despite what Ely thought to the contrary, a successful defense of democracy-defining constitutionalism requires the support of both these propositions. But both these propositions are products of political philosophy and cannot be derived solely from the text of the Constitution itself.

In this essay, I cannot explore in detail all the reasoning of political philosophy necessary to sustain these two propositions. Suffice it to say here that they ultimately depend on a basic principle of reciprocity, namely that citizens should resist advocating the adoption of a legal regime that they would find objectionable were they in the position of other members of society.¹⁰⁹ This principle of reciprocity, in fact, lies at the heart of Rawls's own political philosophy,¹¹⁰ especially his most recent writing. Accordingly, I share with Fleming a belief that a theory of unenumerated constitutional rights should derive from Rawlsian premises. But these core Rawlsian principles need not entail a judicially enforceable right to personal autonomy (deliberative or otherwise).

Even though a defense of democracy derives from so-called "substantive" values, such as civic equality and reciprocity, it does not follow that a theory of judicial review is self-contradictory if *operationally* it confines itself to the identification of rights essential to the existence of a fair democratic process rather than extending itself to substantive rights of personal autonomy that a fair

¹⁰⁸ Rawls's own acknowledgment of this common ground is best found in his work, *Reply to Habermas*, *supra* note 71, where he says that he, Habermas, and other contemporary philosophers "agree that whether [certain] liberties are incorporated into the constitution is a matter to be decided by the constituent power of a democratic people." *Id.* at 165. Rawls goes on to emphasize that the appropriate design of a constitution cannot be settled by political philosophy alone, but must also include considerations of a particular society's history and culture. Given these remarks by Rawls, it seems as if Fleming may be claiming too much insofar as he suggests that Rawls's work supports judicial identification of an *unenumerated* right to personal autonomy.

¹⁰⁹ For an extended discussion of the idea of reciprocity, see GUTMANN & THOMPSON, *supra* note 104, at 52–95.

¹¹⁰ See RAWLS, *supra* note 36, at 16–17; see also John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 770 (1997) (stating that reciprocity requires citizens to propose political principles that they "think it at least reasonable for others to accept").

democratic process reasonably might choose to reject. This operational distinction is not incoherent. Even if it may be debatable at the margin whether some asserted right is really essential for a fair democratic process, surely it is plain that many asserted rights cannot be so described. In addition to the previous example of physician-assisted suicide, it should be obvious that the right to reside with one's grandchildren, however important to personal fulfillment, is not essential to one's ability to participate equally in democratic politics. Thus, although the *reason* for this operational distinction may be rooted in "substantive" values, the democratic middle ground cannot be condemned as internally inconsistent just because it confines the actual work of judicial review to rights necessary for a fair democratic process.

Addressing now the idealist's second objection, I can also concede that a citizen's capacity to participate equally in the formation of society's laws supports the idea that a citizen has the capacity for personal self-government. But the problem still remains in determining when an individual's exercise of personal self-government intrudes on the interests of other members of society, or when the ordinary presumption of competence is overcome by special circumstances. Agreeing wholeheartedly with idealists that government should provide citizens with a zone of personal autonomy, I still maintain with Waldron that citizens reasonably may disagree about exactly how to define contours of this zone. Thus, even card-carrying libertarians need a voting procedure to resolve disagreements among themselves, and there is no way around the point that the fairest procedure for libertarians to adopt is to give each of them an equal voice in determining the resolution of their dispute. In other words, libertarians, who object to paternalism in personal decisions, should also object to paternalism in collective decisionmaking, which is exactly what the idealist view of judicial review entails.

Libertarians are likely to respond, however, that the very legitimacy of government depends on the government's respect for a zone of personal autonomy for each individual citizen. Also, if I am correct that judges are supposed to assure the legitimacy of the government, libertarians will seize this point and argue that it is just as proper for judges to enforce unenumerated substantive rights of personal autonomy as it is for judges to enforce unenumerated procedural rights of equal participation in democratic politics. If legitimacy requires both deliberative autonomy and deliberative democracy, as Fleming insists, then the judiciary should enforce each prerequisite of legitimacy with equal vigor.¹¹¹

The problem with this argument is that constitutional rights of personal autonomy—unlike constitutional rights of equal participation in democratic politics—are *not* an essential prerequisite for the legitimacy of government. Respecting rights of personal autonomy may be necessary for a government to be just, but legitimacy is not the same as justice—it is a narrower, more circumscribed

¹¹¹ See *Deliberative Autonomy*, *supra* note 31, at 3.

concept.¹¹² Justice is concerned with all the rights that citizens might have: rights to wealth and income as well as various personal freedom (intellectual, sexual, and otherwise). The separate issue of legitimacy arises precisely because different citizens have different opinions about exactly what justice requires. A legitimate government is one that gives each citizen's own views of justice a fair opportunity of prevailing in the contest among competing views about justice. And precisely because a legitimate government is one that establishes a fair process for resolving disagreements among citizens about the substantive requirements of justice, the rights necessary to secure a legitimate government are limited to those rights essential for a fair political process and do not encompass rights to personal autonomy that are not necessary for political participation. Thus, insofar as idealists like Fleming maintain that rights of personal autonomy are necessary for *legitimacy*, as distinct from justice, they are mistaken.

Moreover, to be absolutely clear on the crucial institutional point, in endeavoring to identify unenumerated constitutional rights, courts should entrust themselves only with the task of ensuring the *legitimacy* of the political system, and most emphatically *not* with its justice. If they take on the role of guaranteeing the justice of the laws of their society, they inevitably usurp the proper role of the legislature, as it is the job of a democratic legislature to resolve disputes among competing conceptions of justice. Obviously, where the Constitution itself has made a commitment to one view of substantive justice over another, it is appropriate for judges to enforce this commitment, but that circumstance involves the interpretation of *enumerated* substantive rights, not the problem of identifying unenumerated rights. However, if in this latter context, courts confine themselves solely to the role of ensuring the *legitimacy* of the political system, then they are not usurping the legislature's proper role because all the courts would be doing in this circumstance is guaranteeing each citizen equal participatory rights in the legislative process.

Now, it still may be hard for a libertarian to accept the idea that the judiciary should confine itself to enforcing the legitimacy of the political process rather than guaranteeing the justice of all the personal rights the libertarian believes citizens should have. But libertarians should recognize that all citizens have their own views about the substantive requirements of justice, and they all feel just as strongly in the correctness of *their own* views as the libertarians do in theirs. Libertarians should acknowledge that they have no more right to impose their contested conception of personal liberty on the rest of citizens than do other citizens to impose *their* contested views on libertarians. Instead, libertarians, like others, should agree upon a democratic process for resolving their disagreements about justice, even while recognizing the risk that this democratic process may make some substantive mistakes from their point of view (although not from the point of view of others, who happen to comprise a majority). In other words, as strongly as libertarians

¹¹² On the distinction between legitimacy and justice, see FISHKIN, *supra* note 106, at 203.

believe in the justice of certain personal liberties, they still should recognize the primacy of equal citizenship and the obligation of respecting the results of a fair political process for resolving substantive disagreements about justice. For this reason, libertarians should accept that, in identifying unenumerated constitutional rights, courts should be limited in securing the essential conditions of *legitimacy*, which is confined solely to those rights necessary for equal citizenship in democratic politics.

IV. CONCLUSION

For the reasons just explained, even libertarians should find democracy-defining constitutionalism preferable to the unadulterated idealism of Chase or Fleming. The only lingering doubt is whether this democratic middle ground is preferable to the pure skepticism of Iredell or Waldron. In the end, I favor the middle ground for a philosophical reason: because democracy is necessary for the legitimacy of law, and because judges are properly concerned that the law they enforce be legitimate, it is appropriate for judges to insist that the legislative process qualify as democratic. This philosophical justification for democracy-defining constitutionalism is in sharp contrast to Ely's attempt to provide a skeptical defense of the democratic middle ground. As we have seen, however, Ely's approach necessarily fails to offer a reason to prefer the democratic middle ground to the pure skepticism of Iredell and Waldron, and thus this philosophical defense is required if democracy-defining constitutionalism is to secure itself a stable footing.

There remains the inevitable problem that people will disagree about exactly what prerequisites are absolutely essential for a legislative process to qualify as democratic. For example, a legislature might take the position that a right to an education is unnecessary as long as uneducated citizens still receive an equal right to vote. The judiciary, however, might be tempted to say that the right to vote is an empty formality without at least some degree of basic education. But then we are right back to the issue of which institution, legislature or judiciary, should decide how much education, if any, is an essential precondition for democracy.¹¹³

Obviously, the more that the judiciary insists upon in the name of democracy, the weaker the defense of this middle ground becomes. But if the judiciary is careful to confine itself to a few instances where the legislature seems egregiously intent on subverting democracy itself, then the more the judicial intervention will be justifiable despite the fact that the judiciary is not itself a democratic institution. A useful project for constitutional theory would be to define, with some precision, exactly what rights the judiciary would be justified in enforcing as guardians of

¹¹³ Elsewhere I consider this specific institutional question at some length. See Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475 (1998).

democratic legitimacy.¹¹⁴ While this essay cannot undertake this project, I hope it has shown why the democratic middle ground is the best hope for resolving the debate concerning the judicial identification of unenumerated constitutional rights—a debate that, as *Calder* shows, has persisted in the Court for the last two hundred years.

Of course, even if the democratic middle ground is a theoretically sound position, there is the danger that in the hands of judges it will be abused and will deteriorate into an excuse for judges to engage in an activist second-guessing about legislative judgments about the substantive requirements of justice. The fact that, after the famous footnote of *Carolene Products* in 1938, the Supreme Court's commitment to democracy-defining constitutionalism proved short-lived (ending with the unenumerated right of privacy recognized in *Griswold v. Connecticut*¹¹⁵) is certainly cause for concern.

I would argue, however, that the historical perspective we gain by commemorating the bicentennial of *Calder v. Bull* gives us a reason for a different, more cautiously optimistic conclusion. The idea of a democratic middle ground is relatively young and embryonic when compared to the ancient and well-developed positions of idealism and skepticism, as so well expressed by Chase and Iredell two centuries ago. It is perhaps not surprising, therefore, that the idea of the democratic middle ground—only tentatively expressed in a footnote—did not firmly take root at first. But the history of judicial review in the United States, both the distant and recent past, has shown neither the pure idealism of Chase nor the pure skepticism of Iredell to be a satisfactory position for the Court to take. The idealism of Chase gave us *Dred Scott* as well as *Lochner*, while the skepticism of Iredell would have sustained the constitutionality of poll taxes as well as other restrictions on the equal voting rights of citizens. Thus, both theory and history tell us that the democratic middle ground deserves another chance.

¹¹⁴ Michael Klarman has begun this project. See Klarman, *supra* note 88. In addition, there is my own work on education. See *supra* note 113. I hope to make further contributions to this effort.

¹¹⁵ 381 U.S. 479 (1965).

APPENDIX

Calder v. Bull

3 U.S. (3 Dall.) 386 (1798) [excerpts]

Justice Chase [at 387–89]:

I cannot subscribe to the *omnipotence* of a *State Legislature*, or that it is *absolute and without control*; although its authority should not be *expressly* restrained by the *Constitution*, or *fundamental law*, of the State. The people of the *United States* erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their *persons* and *property* from violence. The purposes for which men enter into society will determine the *nature* and *terms* of the *social compact*; and as *they* are the foundation of the *legislative power*, *they* will decide what are the *proper* objects of it: The *nature*, and *ends* of *legislative power* will limit the *exercise* of it. This *fundamental* principle flows from the very nature of our free *Republican* governments, that no man should be compelled to do what the laws do *not* require; *nor to refrain from acts which the laws permit*. There are acts which the *Federal*, or *State*, legislature cannot do, *without exceeding their authority*. There are certain *vital* principles in our *free Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of *legislative power*; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty*, or *private property*, for the protection whereof of the government was established. An ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of *legislative authority*. The obligation of a law in governments established on *express compact*, and on *republican principles*, must be determined by the *nature* of the *power*, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law; a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes a man a *Judge in his own cause*; or a law that takes *property* from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The *genius*, the *nature*, and the *spirit* of our State Governments, amount to a prohibition of *such acts of legislation*; and the *general principles of law and reason* forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare *new crimes*; and establish rules of conduct for *all* its citizens in *future* cases; they may *command* what is right, and

prohibit what is wrong; but they cannot change *innocence* into *guilt*; or punish *innocence* as a *crime*; or violate the right of an *antecedent lawful private contract*; or the *right of private property*. To maintain that our Federal, or State, Legislature possesses *such powers*, if they had not been *expressly* restrained; would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments*.

Justice Iredell [at 398–99]:

If, then, a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. Sir *William Blackstone*, having put the strong case of an act of Parliament, which should authorize a man to try his own cause, explicitly adds, that even in that case, “there is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature, or no.” *I Bl. Com.* 91.

In order, therefore, to guard against so great an evil, it has been the policy of all *American* states, which have, individually, framed their state constitutions since the revolution, and of the people of the *United States*, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of authority, their acts are

invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges, to determine the validity of a legislative act.