The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification

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By Nimer Sultany*

"Am I in contradiction with myself?"[1]

Abstract

Every time the Supreme Court strikes down a law enacted by Congress or a state legislature the age-old debate over the "counter-majoritarian difficulty" resurfaces. Theories of judicial review, new and old, are offered to answer this tension between constitutionalism and democracy. But what explains the persistence and contestability of this difficulty? Why has the existing wealth of scholarship failed to resolve this difficulty? In this Article, I address such questions while contextualizing "counter-majoritarianism" within larger liberal theoretical frameworks. I offer a typology and map the prominent progressive liberal answers deployed to justify judicial review in constitutional democracies. This typology and map fill a gap in the existing literature, which has been largely preoccupied with advancing positions within the debate rather than assessing it holistically. This reconstructive exercise both organizes the field of constitutional theory and identifies the discursive moves and patterns of reasoning used within the field. The Article evaluates the similarities and differences between the different positions. By mapping these differences and relations, I show that the supposed distinction between democracy and constitutionalism has been undermined without resolving the underlying tension between these competing values. The collapse of the distinction exposes the circular movement of the debate around the tension. Ultimately, I conclude, the existing body of literature offers no satisfying method for assessing whether the ruling in any controversial case is "counter-majoritarian." I suggest that rather than attempting to solve the difficulty, scholars should recognize its irreconcilability, because only then would a better understanding of the role of law in society emerge.

[1] Alexis de Tocqueville, Democracy in America 250 (J. P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1848) ("I regard it as an impious and detestable maxim that in matters of government the majority of a people has the right to do everything, and nevertheless I place the origin of all powers in the will of the majority. Am I in contradiction with myself?").

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I. Introduction

A. "Counter-Majoritarianism"?

In *Citizens United v. Federal Election Commission*, the United States Supreme Court invalidated parts of the Bipartisan Campaign Reform Act of 2002.[2] Put crudely, a small group of unelected, life-tenured judges acted in a seemingly "counter-majoritarian" fashion by preventing an elected legislature from imposing limits on campaign spending. As it had in previous cases, the Court deployed constitutional rights to restrain the will of contemporary popular majorities.[3] Justice Stevens, concurring in part and dissenting in part, accused the Court of engaging in judicial activism by "bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power."[4] He further argued that "[i]n a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. . . . At bottom, the Court's opinion is thus a rejection of the common sense of the American people . . . ."[5] Chief Justice Roberts spurned this charge: He distinguished "judicial restraint" from "judicial abdication,"[6] arguing that the Court had to redress a governmental violation of fundamental political speech rights.[7]

Not only progressive judges, however, deploy the charge of "counter-majoritarianism."[8] In *Lawrence v. Texas*, the Court invalidated a Texas anti-sodomy law.[9] But, unlike in *Citizens United*, in *Lawrence*, the conservative

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[2] 130 S. Ct. 876 (2010).

[3] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976). Specifically, in these cases, the Court has deployed First Amendment speech rights to justify striking down campaign finance restrictions.

[4] *Citizens United*, 130 S. Ct. at 979 (Stevens, J., concurring in part and dissenting in part).

[5] *Id.*

[6] *See id.* at 919 (Roberts, C.J., concurring) (explaining why broad constitutional holdings are sometimes appropriate).

[7] *Id.* at 924–25.

[8] In contemporary popular and academic discourse in the United States, "liberal" overlaps or is synonymous with "progressive," and is used in opposition to "conservative." I use "progressive" to denote positions that are characteristically associated with left-of-center positions, such as those supporting social democracy, the welfare-state, or affirmative action for minority groups. On the other hand, "conservative" here denotes positions that are associated with right-of-center positions such as, but not limited to, neo-liberalism. The content of these categories is neither stable nor monolithic, because they change over time and include a plurality of positions on a spectrum of issues. Rather, the distinction between these two camps is relative and thus has persisted over time. For the distinction between right and left, see generally, for example, Norberto Bobbio, Left and Right: The Significance of a Political Distinction (Allan Cameron trans., 1996). For a discussion of "progressive" and "conservative" as constitutional categories see, for example, Ronald Dworkin, A Matter of Principle 181–204 (1985) (opposing liberalism to conservatism); Duncan Kennedy, A Critique of Adjudication [Fin de Siècle] 46–48 (1997) (using liberal/conservative); Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich. L. Rev. 641 (1990). For examples of progressive scholarship see *infra* note 20; for examples of conservative scholarship see *infra* note 21.

[9] 539 U.S. 558 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

Justices accused the progressive Justices of activism and counter-majoritarianism. Justice Scalia wrote:

> [P]ersuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. . . . What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change.[10]

Are both *Citizens United* and *Lawrence* "counter-majoritarian" rulings? By evaluating constitutional scholarship, this Article asks whether the long-running debate about the so-called "counter-majoritarian difficulty" provides the intellectual framework to answer this question.[11] I suggest that it does not, because the categories of constitutionalism and democracy are themselves too unstable to support the scholarship that builds upon them.

In the United States, the "counter-majoritarian difficulty" is only one example of a quintessential question standing at the center of political and constitutional theory and dominating its debates: the tension between constitutionalism and democracy.[12] To date, most legal scholarship in this realm has been preoccupied largely with defending or criticizing controversial landmark Court rulings such as *Citizens United* and *Lawrence*.[13] This preoccupation underestimates the tension's centrality, which derives not only from the magnitude of the cases in which it comes to light, but also from its implications for larger discussions concerning the justification of political regimes. *Citizens United* and *Lawrence* embody the broader "counter-majoritarian difficulty" not because their holdings are controversial, but because they crystallize the basic problem with the deployment of rights by a constitutional court to domesticate popular will.

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[10] *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting).

[11] The phrase "counter-majoritarian difficulty" was famously dubbed and popularized by the canonical work of Alexander Bickel. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (2d ed. 1986) (1962).

[12] *See, e.g.*, STEPHEN HOLMES, PASSIONS & CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 136 (1995) ("The existence of an irreconcilable 'tension' between constitutionalism and democracy, in fact, is one of the core premises of modern political thought.").

[13] The literature on judicial review is vast. For some of the early and important contributions to this debate, see generally, for example, BICKEL, *supra* note 11; HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943); LEARNED HAND, THE BILL OF RIGHTS (1958); LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913–1938 (Archibald MacLeish & E. F. Prichard, Jr. eds., 1939); Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); Albert M. Sacks, *The Supreme Court, 1953 Term—Foreword*, 68 HARV. L. REV. 96 (1954); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For the more recent scholarship that was largely invigorated by Bickel's contributions, see discussion *infra* Part II.

This problem looms well beyond *Citizens United* and *Lawrence*; it arises in any case in which the Court reviews the validity of laws enacted by popularly elected assemblies.[14] It lies at the base of theories of judicial review, which seek to justify the role of the Court in reaction to the "counter-majoritarian difficulty." Nor is this problem new: *Lochner v. New York*,[15] *Brown v. Board of Education*,[16] *Citizens United*, and *Lawrence* all bring forth this dilemma.

B.   Overview of the Argument

This Article goes beyond critiquing the Court's rulings in specific cases or articulating a theory of adjudication that reconciles judicial review and democratic theory.[17] Rather, this Article is a discursive analysis of the critiques and theories themselves.[18] The Article investigates the tradition of legal scholarship hitherto produced to justify positions in this long-running de-

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[14] This problem surfaces in cases involving abortion, contraception, pornography, hate speech, religion, apportionment, and Congressional authority. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997) (partially invalidating the Communications Decency Act); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun Free School Zones Act because it violates the Commerce Clause); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating a law barring cross burning); Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating a state law authorizing school prayers); Stone v. Graham, 449 U.S. 39 (1980) (invalidating a statute requiring schools to post the Ten Commandments on classroom walls); Roe v. Wade, 410 U.S. 113 (1973) (invalidating criminal abortion laws); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a law prohibiting teaching evolution theory); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating statute prohibiting the sale of contraceptives to married couples); Reynolds v. Sims, 377 U.S. 533 (1964) (invalidating apportionments of seats in the Alabama legislature and affirming the "one person, one vote" principle).

[15] 198 U.S. 45 (1905) (invalidating limitations on work hours under the notion of freedom of contract). I mention *Lochner* specifically, instead of the "*Lochner*-era," because scholars have recently begun to critically examine whether the whole period was actually a defense of *laissez-faire* capitalism. For a summary and a discussion of this literature see, for example, Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. Rev. 677 (2005).

[16] 347 U.S. 483 (1954) (invalidating racial segregation in schools under the separate but equal policy).

[17] Among the typical criticisms of the Court rulings, critics charge the Court with making an anti-democratic choice by inappropriately exercising judicial power against a reasonable choice by the People and its representatives. *See, e.g.*, *supra* notes 4–10 and accompanying text (discussing quotations from *Citizens United* and *Lawrence*). These critics charge the Court with exercising flawed reasoning, see, for example, Ronald Dworkin, *The "Devastating" Decision*, N.Y. Rev. Books, Feb. 25, 2010 (claiming that the Court wrongly applied the First Amendment to corporations in *Citizens United*), or they charge the Court with infidelity to the Framers' original understanding, see, for example, *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) (disagreeing with the majority's interpretation of "public use" in the Fifth Amendment's Takings Clause).

[18] By "discursive analysis" I mean an analysis of the discursive formations, such as concepts and argumentative techniques, deployed by scholars to address the tensions at the base of the constitutional democratic regime. These discursive elements form a practice of producing cultural meaning by a community of professional scholars. I do not seek a coherent idealization of these scholarly positions. *See* discussion of "situated discursive practice" *infra* note 54. I limit this analysis to the level of discourse, that is, the phenomenological level. *See* discussion of phenomenological *infra* note 23.

bate.[19] Primarily, it examines the persistence of the "counter-majoritarian difficulty," especially in light of the remarkable intellectual resources invested in addressing it by highly sophisticated and well-respected scholars.

This Article maps the field of contemporary progressive liberal constitutional theory ("the field") and offers a typology of its fragmentation.[20] Although the dilemma discussed here arises within both the conservative and progressive camps, I focus solely on the latter and leave assessment of conservative scholarship for another occasion.[21] The general focus on the progressive/conservative divide obscures the internal disputes within these opposing camps. As the discussion of progressive scholarship below seeks to show, while the scholars at issue belong to the same side of the divide, they occupy different positions within the field. This Article's relatively limited focus facilitates an accurate understanding of the workings of the field and prevents myopic analysis.

This mapping reveals a virtual structure of both the debates and the field that is lost when the field is examined episodically.[22] Rather than sup-

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[19] I focus in the remainder of the Article on legal scholarship published in law reviews and books rather than on the rhetoric of judges. Most judicial opinions interact with the facts and opinions of particular cases or lines of cases, typically avoiding articulation of an overarching conceptual vision of adjudication beyond "activism" or "restraint." The scholarly literature I critique here attempts to go behind the "activism"/"restraint" debate and instead provide theoretical defenses for either side of the debate. In so doing, this literature brings to a higher consciousness, and systematically accounts for, views expressed or implied in judicial rulings. Occasionally, such theories themselves influence judicial decision-making. At times the justices themselves write such theoretical accounts outside the Court. *See generally* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[20] For an illuminating discussion of the notion of "progressive constitutionalism," see, for example, J. M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995); Frank I. Michelman, *What (If Anything) Is Progressive-Liberal Democratic Constitutionalism?*, 4 WIDENER L. SYMP. J. 181 (1999); Louis Michael Seidman, *Can Constitutionalism Be Leftist?*, 26 QUINNIPIAC L. REV. 557 (2008) (discussing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000)); Mark Tushnet, *What Is Constitutional About Progressive Constitutionalism?*, 4 WIDENER L. SYMP. J. 19 (1999); Robin West, *Is Progressive Constitutionalism Possible?*, 4 WIDENER L. SYMP. J. 1 (1999); West, *supra* note 8, at 678–713.

[21] For an early conservative example of awareness to the tension between rights and democracy, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 19 (1972) (claiming that the tension can be resolved through an original understanding of the constitutional text). The debate between "originalists" concerning whether "originalism" mandates or rejects judicial activism offers a recent instantiation of the debate. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) (supporting judicial activism on behalf of libertarian causes); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (rejecting judicial activism); SCALIA, *supra* note 19 (rejecting judicial activism); Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081 (2005) (reviewing BARNETT, *supra*). Note, however, that "originalism" is not necessarily a conservative method: Progressive scholars have also appropriated it. For a recent example, see generally JACK M. BALKIN, LIVING ORIGINALISM (2011) (arguing that progressive causes are compatible with the original meaning of the Constitution).

[22] The term "structure" in "structuralist" and "post-structuralist" scholarship signifies recursive patterns of relationships between parts and a larger whole that are reproduced over time through the interaction between these parts. *See, e.g.*, PETER DEWS, LOGICS OF DISINTE-

porting a specific position or synthesizing different positions, this Article searches for such a structure on the phenomenological, discursive level.[23] It identifies and evaluates the primary discursive formations that dominate, define, and limit the field, including the particular ways in which a specific group of scholars uses them. This exercise of identification and evaluation shows that the apparent richness and complexity of the debate conceals the debate's deeper deficiencies and futility.

The body of this Article divides into three parts. Part II maps the landscape of scholarship, presenting a typology of four dominant responses offered by contemporary progressive liberal constitutional theorists to the tension between constitutionalism and democracy. Scholars are either (i) "deniers"—because they deny the tension (e.g., Ronald Dworkin, Bruce Ackerman, and Frederick Schauer); (ii) "reconcilers"—because they reconcile the tension (e.g., John Hart Ely, Cass Sunstein, and Larry Kramer); (iii) "endorsers"—because they recognize the irreconcilability of the tension yet endorse it (e.g., Frank Michelman, Louis Seidman, and Laurence Tribe); or (iv) "dissolvers"—because they dissolve the tension by forgoing judicial review of the validity of legislation (e.g., Jeremy Waldron, Richard Parker, and Mark Tushnet). I refer to the first two groups—both of whom advance conceptual justifications of constitutional democracies—as the "discourse of unity." In contrast, I refer to the last two groups as the "discourse of disunity" because they reject attempts to unite the conflicting concepts and thus do not advance similar conceptual justifications.

Parts III and IV offer ways of understanding the polarized debate illustrated in Part II by arguing that the tension is either irreconcilable (Part III) or that its resolution is based on collapsing the distinction between the concepts, leading to what I call a "circular movement" of the debate (Part IV). Part III explains the polarization of the debate by using the notions of "essential contestability" and "paradox." Contemporary progressives—whose work this Article discusses—recognize that even the most basic concepts deployed in political thought are essentially *contestable*, rather than merely *contested*, and thus are not easily resolvable. Yet deniers, reconcilers, and dissolvers stop short of recognizing that "constitutional democracy" is no

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GRATION: POST-STRUCTURALIST THOUGHT AND THE CLAIMS OF CRITICAL THEORY (1987); ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE AND CONTRADICTION IN SOCIAL ANALYSIS (1979).

[23] By "phenomenological" I mean a consciousness-bound phenomenon, as opposed to an ontological pursuit of a physical or material being. The focus is on appearances and experiences (i.e., the way things appear to, and are experienced by, human consciousness) rather than on their ontological or metaphysical standing (i.e., whether they really exist or not). Edmund Husserl, a major contributor in the discipline of phenomenology, advocated a methodological constraint that brackets ontological questions and instead focuses on the experience of the subject. *See generally* EDMUND HUSSERL, 1 LOGICAL INVESTIGATIONS (Dermot Moran ed., J. N. Findlay trans., 2001). Concretely, this Article focuses on the discourse produced and practiced by a group of scholars in the field of progressive liberal constitutional theory. The Article unearths a structure (a map) of this discourse. Put differently, it is a study of a discursive consciousness.

less an example of contestability than "constitutionalism" and "democracy." Recognizing this contestability gives rise to a paradox between rationally compelling yet contradictory conceptions of the concepts. Part III situates the attempts to resolve the tension between constitutionalism and democracy within familiar patterns that Western thinkers deploy when faced by such perceived paradoxes.

I conclude that the utility of Part III's analysis for understanding the field is limited. Such analysis accepts the dichotomous polarization of the field as a division between constitutionalists who support judicial review and majoritarian democrats who oppose it. This linear view of the field appears inadequate when confronted with the essential contestability of these concepts. To that end, Part IV shows that the typology of Part II is less stable than it appears.[24] Indeed, deniers, reconcilers, and dissolvers collapse the distinction between the two competing concepts of constitutionalism and democracy in their attempt to overcome contestability by resolving the paradox. Specifically, scholars make the argument for one concept by redefining the competing concept and hence deriving their preferred concept from the competing concept. Such collapsing of the distinction throws the debate into a circular movement comprised of redefinitions that offer combinations of constitutionalism and democracy that vary only in degree. Ultimately, rather than solving the paradox, the debate revolves around it.

This Article does not seek to resolve this paradox. Quite the contrary, I suggest that no rational definitive resolution has hitherto been proposed for the conceptual controversy. It does not necessarily follow that no such definitive resolution is logically available. Indeed, it might be satisfying to search for a solution, but that is not the objective of this exercise.

C. *Liberal Dilemmas: From "Constitutionalism and Democracy" to the "Counter-Majoritarian Difficulty"*

Before discussing the question of constitutionalism and democracy, it is important to appreciate its centrality to liberal thinking by ascertaining how it arises in the general theoretical framework of liberalism. Indeed, this question derives from the larger issue of justifying political regimes. Political justification is a foundational concern for liberal theorists in particular because it examines the acceptability of political authority to reasonable persons.[25] Specifically, it is a *public* justification that offers reasons to persons

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[24] In this sense, Part II is a structuralist analysis whereas Part IV is a post-structuralist analysis. Part II reveals a structure within which several differentiated categories are ordered; Part IV shows that this is not the only possible representation of the field nor are the categories representing scholarly positions as differentiated as may be initially assumed. Part II represents the debate in a linear way; Part IV displaces this view for a circular representation of the debate.

[25] Some liberals prefer "rational" instead of "reasonable." *See, e.g.*, DAVID GAUTHIER, MORALS BY AGREEMENT 2–3 (1986) (claiming that a moral theory outlining moral duties can be grounded within "rational choice theory"). One can broadly distinguish between two tradi-

deliberating in the public sphere.[26] And for liberals, such a public justification is not acceptable if others could reasonably reject it.[27] The importance of such political justification reflects modern liberalism's emphasis on reason over might or God.[28] Political authority should be justifiable to reasonable society members who are treated equally, while their wide-ranging disagreements and differences are recognized and respected.[29]

The questions of justifying authority and justifying its imposition of certain obligations on citizens intermingle in these debates.[30] On the one hand, liberals are not anarchists as they do not reject authority as such. Instead, they are quasi-Hobbesian in their acceptance and defense of the inevitability and desirability of legal ordering.[31] On the other hand, they do not

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tions with respect to "reason": One that contrasts reason with the passions or self-interest, and another that contrasts reason with irrationality. The former associates reason with the common good, while the latter considers rationality to be the property of persons who offer "sufficient reasons" for their actions. The latter view stands at the base of rational choice theory. *See* JON ELSTER, REASON AND RATIONALITY 1–3 (Steven Rendall trans., 2009). In his earlier work, John Rawls, too, relied on rational choice theory: "[A] rational person is thought to have a coherent set of preferences between the options open to him. He ranks these options according to how they further his purposes; he follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed." JOHN RAWLS, A THEORY OF JUSTICE 124 (rev. ed. 1999) [hereinafter RAWLS, JUSTICE]. Only in his later work does Rawls clearly distinguish between the rational and the reasonable. *See* JOHN RAWLS, POLITICAL LIBERALISM 48–54 (expanded ed. Columbia Univ. Press 2005) (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. In *Political Liberalism*, Rawls distinguishes between two moral powers of the person: the capacity for a sense of justice and the capacity for a conception of the good. He associates the reasonable with the former and the rational with the latter. *Id.* at 52. Rawls writes, "the reasonable is public in a way the rational is not. This means that it is by the reasonable that we enter as equals the public world of others and stand ready to propose, or to accept . . . fair terms of cooperation with [others]." *Id.* at 53.

[26] RAWLS, POLITICAL LIBERALISM, *supra* note 25, at 465.

[27] For Rawls's discussion of "reciprocity," see *id.* at xliv. For the idea of "reasonable rejectability" as the test for the acceptability of moral principles, see T. M. SCANLON, WHAT WE OWE TO EACH OTHER 202–03 (1998).

[28] *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 469 (William Rehg trans., 1998) ("[T]he exercise of political domination could be legitimated neither religiously (by appeal to divine authority) nor metaphysically (by appeal to an ontologically grounded natural law). From now on, a politics radically situated in this world should be justifiable on the basis of reason, using the tools of postmetaphysical theorizing.").

[29] *See generally* Charles Larmore, *The Moral Basis of Political Liberalism*, 96 J. PHIL. 599 (1999) [hereinafter Larmore, *Moral Basis*]; Charles Larmore, *Political Liberalism*, 18 POL. THEORY 339 (1990) [hereinafter Larmore, *Political Liberalism*]; Stephen Macedo, *The Politics of Justification*, 18 POL. THEORY 280 (1990).

[30] *See* RONALD DWORKIN, LAW'S EMPIRE 191 (1986); A. John Simmons, *Justification and Legitimacy*, 109 ETHICS 739 (1999).

[31] THOMAS HOBBES, LEVIATHAN 117–20 (Richard Tuck, ed., 1996) (1651); *see also* Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345, 358 (2004) (referring to "Hobbes's thesis" by which he means the need for an enforcer that would ensure "that everyone plays by the rules" so that citizens could enjoy the advantages of political association). For a reading of Kant as a defender of the inevitability of the coercive power of positive law under conditions of disagreement, see Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1547 (1996) ("For Kant, the potential for violent conflict and thus the case for positive law is supposed to survive any realistic assumption that we might make about human nature. . . . Even if men are angels, they are opinion-

accept authority that imposes wide-ranging normative commitments on society members, especially concerning the question of the good life—how members decide to lead their private lives.[32] Accordingly, the dominant liberal line runs roughly as follows: Given disagreement between individuals and collective action problems, there is an inevitable and desirable need for a coercive legal and political order (this is the question of justifying the state, or the Hobbesian premise).[33] Then, a question arises: To which conditions should this coercive order conform so that it can be considered legitimate and democratic (this is the question of liberal legitimacy)? To these liberals, authority is neither the good nor the just, but the legitimate.[34]

First, according to these liberal scholars, authority should not specify a conception of the good life: It should not endorse a set of ends or a hierarchy of values. Indeed, these scholars consider defining the good to be more controversial than defining justice amongst individuals.[35] Moreover, these scholars argue that authority ought not be paternalistic, treating "citizens like children."[36] Thus, authority should be impartial towards individuals' private ends, show respect to the individuality of persons, and accept the importance of self-determination.[37]

Second, authority is not equivalent to justice because the unanimity necessary for the exercise of authority is not expected regarding what justice requires, and/or justice is too high a standard to meet given the imperfect conditions of human reality.[38] Although reason gives rise to principles of

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ated angels, and they hold . . . conflicting views about justice for which they are prepared to fight.").

[32] Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 Phil. Q. 127, 131–33 (1987).

[33] *See generally* Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy (1996); Michelman, *supra* note 20.

[34] Dworkin, for instance, grounds legitimacy in "integrity." Dworkin, *supra* note 30, at 190–216. For the Rawlsian "liberal principle of legitimacy," see Rawls, Political Liberalism, *supra* note 25, at 217.

[35] Rawls, Justice, *supra* note 25, at 392–96.

[36] Immanuel Kant, *The Metaphysics of Morals*, *in* Political Writings 141 (H.S. Reiss ed., 2d enlarged ed. 1991); *see also* Immanuel Kant, *On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice*,*' in* Political Writings, *supra*, at 74 [hereinafter Kant, *On the Common Saying*].

[37] For a discussion of "neutrality" or impartiality with respect to the good, see Bruce A. Ackerman, Social Justice in the Liberal State 10–11 (1981); Dworkin, *supra* note 8, at 191–92; Will Kymlicka, Contemporary Political Philosophy: An Introduction 217 (1990); Rawls, Political Liberalism, *supra* note 25, at 193–94; Jeremy Waldron, *Legislation and Moral Neutrality*, *in* Liberal Rights: Collected Papers 1981–1991, at 143 (1991); Larmore, *Political Liberalism*, *supra* note 29, at 341.

[38] *See, e.g.*, Rawls, Justice, *supra* note 25, at 74–77, 173 (referring to imperfection); Rawls, Political Liberalism, *supra* note 25, at xlvi–xlvii (recognizing disagreement regarding liberal conceptions of justice). This disagreement is primarily recognized with respect to the second principle of justice regarding social equality and fair equality of opportunity. For Rawls's reasons for declining to make the second principle a precondition for political legitimacy (that is, social and economic rights are not included in the "constitutional essentials"), see Rawls, Political Liberalism, *supra* note 25, at 156, 229–30, 296, 367. *See also* Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality 214, 234 (2000); Jeremy Waldron, Law and Disagreement 189 (1999).

justice, contemporary liberals do not think that reason necessarily leads to consensus as to these principles—disagreement, even among reasonable society members, is inevitable.[39] Still, many think that consensus can be achieved with respect to some principles of justice.[40] Accordingly, for many liberals, the political order is legitimate so long as the general structure of authority is merely "reasonably just."[41]

Having thus excluded justice and the good, these scholars are left with legitimacy as the basis for the political order.[42] These liberals do not follow Weber in defining legitimacy in terms of the facticity of *acceptance* and obedience.[43] Instead, they conceive of legitimacy as a normative idea concerned with the *acceptability* and justifiability of legal and political ordering through good reasons.[44] Such conceptions of legitimacy identify the set conditions to which political authority should conform in order to be morally justified in coercing citizens to comply with the laws under conditions of disagreement about justice.

Constitutionalism enters the picture as the mechanism for constructing the framework for such legitimate authority. To be sure, constitutionalism includes an institutional specification, such as separation of powers, to prevent the usurpation of power. But more importantly, constitutionalism lays down the fundamental laws and rules that incorporate the basic principles of justice that govern the political community and secure individual rights.

Once the legitimate conditions for legal coercion are stipulated and a functioning legitimate order is in place, citizens can pursue their private ends in conformity with the fundamental rules of the community. The question then shifts: How should disagreements be resolved within this order? The difficulty is how to guarantee the order's sustainability despite disagreement on what constitutes the good life and the acknowledged gap between justice and legitimacy. Operatively, this question becomes: Who decides when people disagree? The majority could carry the day every time disagreement surfaces (after all, the regime should be democratic in order to be legitimate). Alternatively, constraints external to the political decision-making

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[39] *See, e.g.*, RAWLS, POLITICAL LIBERALISM, *supra* note 25, at 54–58 (discussing the "burdens of judgment").

[40] *See, e.g.*, *id.* at 133–72 (discussing Rawls's notion of overlapping consensus).

[41] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 106 (1977); John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 148 (1995); *see also* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 250, 260–61 (1979); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792 (2005).

[42] *See generally* NIMER SULTANY, THE POVERTY OF CONSTITUTIONAL THEORY: JUSTICE, LEGITIMACY, AND LEGITIMATION (2012) (unpublished dissertation) (on file with the Harvard Law School Library) (providing an elaborate treatment of this argument and its implications).

[43] *See* 1 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 31–33, 37, 212–16 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1978) (1968).

[44] JÜRGEN HABERMAS, *Legitimation Problems in the Modern State*, *in* COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (Thomas McCarthy trans., 1979); Rawls, *supra* note 41, at 177 n.77 (referring to Habermas). For an example of a sociological conception of legitimacy, see *infra* Part II.B.i.d. *See also* KANT, *On the Common Saying*, *supra* note 36, at 85.

process could be imposed upon the majority by an independent judicial authority. This is the question of constitutionalism and democracy.

Put this way, the question is a matter of practical institutional design within the legitimate liberal state. Scholars of political theory, constitutional theory, and jurisprudence pose and address the question of constitutionalism and democracy at different levels of abstraction. Other formulations of the question include: The so-called "paradox of constitutionalism" (the tension between the constituent power—the People unconstrained in the founding—and the constituted power—the government created by the People, but which controls its affairs);[45] reconciling reason with will (can will-autonomy and will-formation coexist with constraints imposed by reason?);[46] and reconciling liberalism (understood as based on individual autonomy) and democracy (understood to be based on public autonomy).[47] In these debates, constitutionalism, reason, and liberalism seem to be used interchangeably at times.[48]

These grand abstractions notwithstanding, the most prominent example of the theme of constitutionalism and democracy in United States constitutional theory is the "counter-majoritarian difficulty."[49] While democracy, understood as the rule of the many, seems to suggest unconstrained freedom for the will of the majority,[50] constitutionalism seems to work in the opposite direction by imposing constraints on this freedom.[51] Metaphorically, constitutionalism is the gatekeeper that guards against closing the gap between legitimacy and justice. It also maintains the tension between the common good—as understood by popular majorities—and the protected space delineated by individual rights to allow the pursuit of differing conceptions of the good life. Constitutionalism, then, is a corollary to the Kantian liberal distinction between the "right" and the "good": On the one hand, it is the framework that guarantees basic rights and, on the other, it protects different

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[45] *See, e.g.*, THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2007).

[46] *See, e.g.*, Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981) (discussing the question as a tension between will and reason).

[47] *See, e.g.*, Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109 (1995); Rawls, *supra* note 41. *See generally* CHANTAL MOUFFE, THE DEMOCRATIC PARADOX (2000); Sheldon S. Wolin, *The Liberal/Democratic Divide: On Rawls's Political Liberalism*, 24 POL. THEORY 97 (1996) (reviewing RAWLS, POLITICAL LIBERALISM, *supra* note 25).

[48] Indeed, it seems that the tendency towards abstraction leads scholars to elide the distinctions between these concepts. These theoretical weaknesses become concealed when they are translated into concrete questions.

[49] BICKEL, *supra* note 11, at 16.

[50] *See, e.g.*, FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 5–6 (1999) (referring to a common-sense view of democracy as "[p]opular political self-government—the people of a country deciding for themselves the contents (especially, one would think, the most fateful and fundamental contents) of the laws that organize and regulate their political association"); *see also infra* Part III.C (discussing democracy as an essentially contested concept).

[51] *See infra* Part III.D (discussing constitutionalism as an essentially contested concept).

conceptions of the good pursued by citizens within this rights framework.[52] Accordingly, constitutionalism is the deontological antidote to paternalistic teleological rule: It prevents the imposition of the private ends of part of the citizenry on other members of society. Courts and judges gain prominence and significance in this context as the enforcers of constitutionalism. They are the institutional embodiment of, and provide the concrete application for, the abstract idea of constitutionalism.

The historically-situated, concrete form of the debate in the United States over the "counter-majoritarian difficulty" reminds us that, despite the theoretical trappings, the debate is not an expression of a timeless philosophical question.[53] Rather, theoretical interventions in this debate are "situated discursive practices," that is, justificatory exercises that rationalize or critique existing institutional arrangements.[54] Indeed, the crux of the debate over the "counter-majoritarian difficulty" in the United States is about the political stakes of the power of judicial review granted to life-tenured federal judges.[55] Or, as Alexander Bickel put it, the debate is about "the most extraordinarily powerful court of law the world has ever known."[56] Characteristically this debate attracted scholars, whether progressive or conservative, who thought that the stakes were high and thus invested intellectual resources in explicating their positions. Yet, other voices have emerged claiming that the debate is misguided because the stakes are not as high as assumed (because, for instance, the Court is not factually "counter-majoritarian").[57]

The history of ideas exposes the political nature of the change in progressive positions with respect to judicial review.[58] These positions gener-

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[52] RAWLS, POLITICAL LIBERALISM, *supra* note 25, at 174 ("[J]ustice draws the limit, and the good shows the point . . . ."); SANDEL, *supra* note 33, at 10.

[53] Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 156 (2002).

[54] The phrase "situated discursive practice" points out that the activity of forming cultural meaning is both context-bound and historical. For Foucault, for example, discourse is not an "ideal" or a "timeless" activity; rather it is conditioned by historical context and developments. A discursive practice does not refer to the mere expressive function of uttering ideas but to a "body of anonymous, historical rules, always determined in the time and space that have defined a given period . . . ." MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE 131 (1972). That is, "discourse itself [i]s a practice" that "must establish [a group of relations]." *Id.* at 51.

[55] *See, e.g.*, Harry H. Willington, *Foreword*, *in* BICKEL, *supra* note 11. Willington writes in reference to abortion: "To justify or discredit judicial intervention must be seen, therefore, as an academic exercise with potentially important consequences for the nature of American society. It is indeed a high-stakes game." *Id.* at x.

[56] BICKEL, *supra* note 11, at 1, 235.

[57] *See infra* Part II.B.i.d. (discussing the "de-centering" position).

[58] For attempts to construct such a history regarding scholarly attitudes vis-à-vis judicial review, see PAUL KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); Friedman, *supra* note 53; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian*

ally moved from supporting judicial restraint to supporting judicial activism and then back to skepticism regarding the role of judicial review.[59] For the first half of the twentieth century, a majority of progressive liberals invested their intellectual resources in defending judicial restraint against a largely conservative Court. They challenged the *Lochner* Court's impediments to democratic attempts to regulate the market. As Morton Horwitz writes, "the exigencies of political struggle . . . led Progressives to a theory of judicial restraint based on the notion that judicial review was undemocratic."[60]

   Brown v. Board of Education, and the Warren Court more generally, forced later generations of progressives to rethink this political commitment and to defend judicial activism to varying degrees. Yet the consolidation of conservative power, particularly under the Rehnquist Court, brought back progressive unease with activism and with the role of the Court in advancing social change.[61] This unease seemed to prompt some progressives in the 1980s to turn unsuccessfully to history to offer an alternative to, and a more progressive account of, the republican intellectual tradition.[62] Other scholars defended *Roe v. Wade* on substantive grounds while simultaneously rejecting *Lochner*.[63] Concurrently, many progressives were also alarmed by the unintended consequences of progressive rulings, especially the conservative "backlash" that *Roe* produced.[64] Ultimately, the progressive attitude became increasingly skeptical of the Court.[65] Many scholars retracted to "minimalism" or revived "popular constitutionalism," which watered down the Court's role.[66] Thus, the progressive liberal concern with the "counter-

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Difficulty, Part Three: The Lesson of Lochner, 76 N.Y.U. L. Rev. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. Pa. L. Rev. 971 (2000).

[59] Changes in conservative positions present a mirror image to this movement of progressive positions. Conservative scholars generally supported judicial activism during the first half of the twentieth century, then rejected the Warren Court's activism, and defended the Rehnquist Court's activism. *See* Friedman, *supra* note 53, at 156, 159–60.

[60] Morton J. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 Harv. C.R.-C.L. L. Rev. 599, 602 (1979).

[61] For an exemplary discussion of the activism of the Rehnquist Court, see Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism (2004).

[62] For a discussion of "republican proceduralism" under "reconciliation," see, for example, *infra* Part II.B.ii.b. *See also* Kalman, *supra* note 58, at 132 (regarding the "turn to history").

[63] *Compare* Laurence H. Tribe, Abortion: The Clash of Absolutes 78–83 (1990) (defending *Roe* against different objections), *with* Kalman, *supra* note 58, at 84–86 (criticizing the *Lochner* Court). *See also* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 74, 208 (rev. ed. 2005) (criticizing *Lochner* as an "agreed Supreme Court mistake[ ]") [hereinafter Dworkin, Freedom's Law]; Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom (1993) (defending *Roe*'s reasoning).

[64] Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 374 (2007).

[65] *Id.*

[66] For a discussion of "minimalism," see *infra* Part II.B.ii.c; for "popular constitutionalism," see *infra* Part II.B.ii.d.

majoritarian difficulty" emerged as how to justify "good" judicial "activism" (that advances social and racial justice, as in *Brown*) without endorsing "bad" judicial "activism" (that sanctions injustice or evil, as in *Lochner*).[67] In other words, the difficulty is to justify judicial action and faith in law as a tool for progressive change on the one hand, while simultaneously defending against the risk that a judge might actively pursue an anti-progressive agenda on the other.[68]

This search for a consistent, principled justification of judicial review is particularly necessary against the backdrop of the Legal Realist attack. Legal Realists—and their successors in Critical Legal Studies—claimed that judicial decision-making involves policy-making. They challenged the distinctions between law and politics, and between adjudication and legislation.[69] Accordingly, if judicial decision-making is intertwined with policy-making, then judicial review is presumably anti-democratic because it is "counter-majoritarian." The mission of post-Realist scholarship, then, has been to offer principled justifications for judicial review that would reconstruct the assailed distinctions and provide a solution for the tension between judicial review and democracy.[70] Yet, I argue, post-Realist scholarship has largely failed in this mission.

II.   A Typology of the Field

A.   *Introduction*

This Part presents a discursive analysis of the deployment of constitutionalism to control democracy in the field of progressive constitutional theory. To date, several typologies have organized the literature of judicial review from different perspectives, but none of them has comprehensively

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[67] Kennedy, *supra* note 8, at 113–14; Horwitz, *supra* note 60, at 602 ("In some sense, all of American constitutional theory for the past twenty-five years has revolved around trying to justify the judicial role in *Brown* while trying simultaneously to show that such a course will not lead to another *Lochner* era.").

[68] *See, e.g.*, Cass R. Sunstein, *The Minimalist Constitution*, *in* The Constitution in 2020, at 37 (Jack M. Balkin & Reva B. Siegel eds., 2009). Sunstein writes that "minimalists" like himself "reject the liberal activism of the Warren Court, and they are fearful that extreme conservative activism may be the wave of the future. They do not want judges to seize on ambiguous constitutional provisions to issue broad rulings that limit democratic prerogatives." *Id.* at 38.

[69] Since the Legal Realists are a diverse, loosely-defined group, different scholars emphasize different aspects of the literature produced by the Realists. For example, Fisher, Horwitz, and Reed argue that Realism has challenged three central notions in American thought: That the rules of governance are chosen by the People rather than unelected judges; that judicial review protects the representative character of the political system; and that they are governed by "a government of laws" and not by an arbitrary "government of men." American Legal Realism xiv–xv (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993); *see also* Habermas, *supra* note 28, at 213–14.

[70] Kalman, *supra* note 58, at 5 ("Once the legal realists had questioned the existence of principled decision-making, academic lawyers spent the rest of the twentieth century searching for criteria that would enable them to identify objectivity in judicial decisions.").

addressed the conceptual debate in order to reveal its structure.[71] Through interpretive reconstruction of scholarly writings, this Part introduces a typology that identifies the primary discursive formations in the field and lays out the virtual structure that undergirds the field.

This typology fills three major gaps in existing scholarship. First, this typology establishes a connection between the scholarly choice of a specific form of argumentation and the effect of that intervention in the field of constitutional theory. It differentiates between theoretical positions on the basis of their different approaches to the same existing institutional reality. Specifically, I organize the multiplicity of constitutional theories that grapple with the practice of judicial review. I then capture both the proposed forms that judicial review should take and the consequences of such attempts to justify judicial review. Second, rather than separate typologies for democracy debates and for constitutionalism debates, this typology captures both concepts in their (perceived) conflict with each other. Finally, this typology distinguishes between scholarly attempts to achieve some degree of closure in conceptual controversies and the rejection of such attempts.[72]

The debate over constitutionalism and democracy divides into two meta-categories of discourse: a "discourse of unity" and a "discourse of disunity."[73] Put simply, the overarching difference between these meta-cate-

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[71] *See, e.g.*, STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 106–12 (1996) (distinguishing between legal, prudential, and moral arguments concerning judicial review); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1372–73 (2006) (distinguishing between "outcome-related" and "process-related" arguments).

[72] Attempts to seek closure purport to bring normative justificatory interventions (conceptions of legitimacy) to a less contestable territory and, hence, would presumably offer a stable grounding for the political and legal order. By "some degree of closure," I do not suggest that scholars in the field necessarily present their positions as definitive, indisputable solutions. That is, I do not claim that these scholars are treating their theories ("this is legitimacy") as one would treat acceptance of empirical judgments ("this is a table"). In fact, some of the scholars discussed here resist such interpretation of their writings. Dworkin is the most striking example of such resistance. For Dworkin, all cases are normatively laden and controversial. He rejects the use of "objectivity" in legal and moral statements: "I think that the whole issue of objectivity . . . is a kind of fake. . . . We should account to ourselves for our own convictions as best we can, standing ready to abandon those that do not survive reflective inspection." DWORKIN, *supra* note 8, at 167, 172. Although he frequently uses the words "true" and "right answers," he does not imply definitive or non-controversial resolution. Rather, he means the "most reasonable" answer. Ronald Dworkin, *A Reply by Ronald Dworkin*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 278 (Marshall Cohen ed., 1983). While Dworkin recognizes the fallibility of judges, he claims that such fallibility should not prevent them from attempting to find right answers. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1109 (1975). Thus, for Dworkin, recognizing contestability does not preclude the project of attempting to show the best justification of legal and political practices and institutions.

[73] The "discourse of unity" is a unifying discourse that rationalizes away appearances of contradiction. In contrast, the "discourse of disunity" emphasizes the appearance of contradiction. The former seeks convergence whereas the latter seeks separation. The former aspect of my typology resembles what Mark Tushnet calls "unitary theories of constitutional law":

Any theory identifies a set of principles from which its results follow, but unitary theories are special in two related ways. First, there are no conflicts among their

gories is that proponents of the discourse of unity think that "constitutional democracy" can be defended on rational grounds as a harmonious conceptual marriage. Indeed, they unite the concepts and justify judicial review. Conversely, the proponents of the disunity discourse think that this attempt is doomed to failure: The concepts cannot be united in a noncontroversial way that would grant legitimacy to the political regime and justify the practice of judicial review. While the proponents of unity think that political conflict can and should be contained, the advocates of disunity believe that political conflict cannot and should not be contained (at least not definitively or non-controversially). This formulation does not attribute to the proponents of unity any denial of the existence or persistence of political conflict. Indeed, many of them acknowledge disagreements about justice, but they offer legitimacy as an answer to this disagreement. For the disunity position, however, disagreement undermines the prospects of presenting a non-controversial conception of legitimacy.

Within the debate over constitutionalism and democracy, unity and disunity arise in four primary instantiations:

The "discourse of unity" includes two main groups:

(1) Denial: there is no tension between constitutionalism and democracy in the first place, and thus judicial review *is* justified; and

(2) Reconciliation: there is a tension, but it can be reconciled, and thus judicial review *can be* justified.

The "discourse of disunity" includes two main groups:

(1) Endorsement: there is an irreconcilable tension but recognizing this fact does not need to lead to negative practical conclusions because judicial review can be prudentially justified; and

(2) Dissolution: there is an irreconcilable tension and it should be dissolved both conceptually and practically; thus, judicial review is illegitimate.

These groups differ not only in terms of their positions but also in terms of their different discursive techniques. Figure 1 provides an overview of the scholars, positions, and discursive techniques.

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principles. Some may appear to conflict with others, but the appearance is misleading because somewhere in the theory there is a metaprinciple that explains why the conflict does not really arise . . . . The second . . . is that their results follow from their principles in a reasonably rigorous way. Because the set of principles in a unitary theory is self-consistent, standard operations in elementary logic or at least standard uses of the rhetorical devices of legal reasoning can be employed to identify the precise scope of the theory.

MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 181 (1988).

Meta-Groups	**Discourse of Unity**		**Discourse of Disunity**	
Groups	*Denial*	*Reconciliation*	*Endorsement*	*Dissolution*
Representative Scholars	Ronald Dworkin, John Rawls, Jürgen Habermas, Stephen Holmes, John Ferejohn, Lawrence Sager, Bruce Ackerman, Akhil Amar, Frederick Schauer	John Hart Ely, Richard Pildes, Frank Michelman, Alexander Bickel, Cass Sunstein, Larry Kramer, Mark Tushnet	Frank Michelman, Louis Seidman, Laurence Tribe	Jeremy Waldron, Richard Parker, Mark Tushnet
Discursive Techniques	Incorporation, Clarification, Avoidance, De-Centering	Democratic Proceduralism, Republican Proceduralism, Minimalism, Popular Constitutionalism	(Reject attempts to close the question)	Unqualified Proceduralism, Populism

FIGURE 1: A TYPOLOGY OF THE PROGRESSIVE LIBERAL
CONSTITUTIONAL FIELD

Before I explicate the typology further, some methodological points are in order. First, the labels used in the typology are given by the author. No scholar self-identifies thus.[74] Second, this typology does not assume a historical progression from one position to another, but posits that these positions coexist simultaneously and indeed compete against each other for discursive acceptance. Third, this Article considers scholars solely as representatives of patterns of arguments. Thus, the summary of their positions in these specific debates might not do them justice *qua* scholars.[75] Fourth, since some scholars have presented different positions in different writings they will be discussed in more than one category.[76] Finally, while this typology may be generalizable to other conceptual controversies, this Article does not pursue such generalization.

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[74] Nevertheless, I do at times provide textual evidence that corresponds to the label. For instance, I offer quotations in which "deniers" actually "deny" the tension and advocates of "clarification" say that they merely "clarify."

[75] It can be said that in pursuing such an approach I have de-centered the learning subject by focusing on argumentative patterns and their relationship to the field rather than zeroing in on specific scholars. On this aspect of structuralist analysis, see GIDDENS, *supra* note 22, at 38–40, 66.

[76] Thus, for instance, Frank Michelman falls within the "reconciliation" position with respect to some writings and within the "endorsement" position with respect to others; Mark Tushnet falls within "reconciliation" with respect to some writings and within "dissolution" with respect to other writings; and Frederick Schauer falls within the "denial" positions once in the mode of "clarification" and then within "de-centering."

B.   A Discourse of Unity

This Section discusses the positions of denial and reconciliation: The "denial" position denies the tension between constitutionalism and democracy, while the "reconciliation" position acknowledges that a proper interpretation of the two concepts results in conflicting demands. Both the denial and reconciliation positions unite the concepts, and thus overcome the alleged tension and justify judicial review.

i.   Denial

Deniers deploy four primary argumentative techniques to overcome the tension between democracy and constitutionalism: *incorporation* (by incorporating constitutional constraints into the definition of democracy); *clarification* (by claiming that both concepts are interdependent and complementary); *avoidance* (by distinguishing between politics and popular sovereignty, and denying that the latter is constrained by judicial review); and *de-centering* (by questioning the tension's factual basis in order to show that judicial review does not constrain politics).

a.   Incorporation

The first position of denial is the incorporation argument advanced by John Rawls and Ronald Dworkin.[77] This position rejects the majoritarian conception of democracy and redefines democracy as constitutional democracy with constraints on majority rule. By incorporating constitutionalism into the preferred concept of democracy, this position shifts the debate into one internal to the concept of democracy—*intra*-conceptual—rather than an external—*inter*-conceptual—debate between the competing concepts. This approach then advances normative reasons as to why a constitutional conception of democracy is more attractive than a majoritarian regime. It supports these reasons through either an interpretive historical construction that presents a normatively attractive reading of the history of the country or a normative ideal theorization that offers normative reasons that could be accepted by reasonable citizens.

John Rawls advances such a position of denial through a constitution-centered theory of democratic legitimacy.[78] Rawlsian theory, in its early version, prioritizes the "liberty of the moderns" over the "liberty of the

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[77] This Article discusses Rawls and Dworkin more elaborately than other positions of denial because of their prominent and even canonical positions in contemporary political and constitutional theory.

[78] Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 FORDHAM L. REV. 1407, 1420 (2004) (assessing "Rawls's constitution-centered theory of normative legitimacy").

ancients."[79] He argues that individual and civil liberties should not be compromised for the sake of equal political participation.[80] In other words, rights take precedence over democracy. Thus the Rawlsian theory of justice settles this question prior to the concrete stage of institutional design.[81] Indeed, according to the "priority of liberty," restrictions of liberty are justified only for the sake of liberty itself.[82]

Concomitantly, there is a "lexical priority" within Rawls's two principles of justice.[83] Rawls's first principle of justice is primarily concerned with basic political and civil liberties. The second principle focuses on equality. Rawls prioritizes the liberty principle over the equality principle. This "lexical ranking . . . specifies which elements of the ideal [part of the theory of justice in which the principles of justice are strictly complied with] are relatively more urgent."[84] That is, basic political and civil rights are more "urgent" than social rights in designing a democracy.

When Rawls discusses constitutional arrangements and judicial review, he expresses a similar approach. His political conception of justice applies to the "basic structure" of society, which "[he] take[s] to be a modern constitutional democracy."[85] Limitations on majority rule—restrictions of equal political liberty and participation—are compatible with principles of justice so long as every citizen is equally limited and the burden is evenly distributed between citizens over time.[86] Constitutional devices secure civil liberties at the expense of some limitation on political liberty. Such limitation is justified insofar as the benefits of security outweigh the constitutional limitations.

But this act of balancing is not the focus of Rawlsian justice. Rawls explains that constitutional design and entrenchment of rights are not settled philosophically or conceptually. Rather, they are resolved in the constituent assembly according to "a case by case examination of instances, and also taking into account the particular political history and the democratic culture of the society in question."[87] Despite such pronouncements, the Rawlsian theory of justice determines the priority of liberty and the priority of the first

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[79] For the distinction between "liberty of the moderns" (individual liberties) and "liberty of the ancients" (participatory rights), see BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with that of the Moderns*, *in* POLITICAL WRITINGS 307–28 (Biancamaria Fontana ed., 1988).

[80] RAWLS, JUSTICE, *supra* note 25, at 176–77.

[81] *Id.*

[82] *Id.* at 214.

[83] The first principle of justice holds that "[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." *Id.* at 266. The second principle holds that "[s]ocial and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." *Id.*

[84] *Id.* at 216.

[85] *Id.* at 171; RAWLS, POLITICAL LIBERALISM, *supra* note 25, at 11.

[86] RAWLS, JUSTICE, *supra* note 25, at 197, 201.

[87] RAWLS, POLITICAL LIBERALISM, *supra* note 25, at 416.

principle. Rawls implies that the choices of constituent assemblies should comply with this theory.[88] He prefers constitutional arrangements, as they "lead to a more just body of legislation" and "compel a majority to delay putting its will into effect and force it to make a more considered and deliberate decision."[89] The priority of liberty, then, is reflected in the imposition of constitutional constraints on majoritarian decision-making to ensure that rights will not be sacrificed at the altar of political preferences.

In later writings, Rawls modifies this position. He emphasizes that the "fair value of political liberties" provides citizens "an equal chance of influencing the government's policy and of attaining positions of authority irrespective of [citizens'] economic and social class."[90] He thus introduces equality as a consideration that factors into the basic liberties themselves,[91] modifying the first principle of justice to reflect this change.[92] This evolution relaxes the priority of rights over democracy and modifies the preconditions for democratic legitimacy to include equality. Nevertheless, Rawls continues to endorse a constitutional conception of democracy and to reject parliamentary supremacy.[93] In this conception of democracy, principles of justice regulate the basic structure of a well-ordered society. The general structure of political authority reflects this idea through "constitutional essentials," including a list of basic rights of citizenship, derived from the first principle, along with a social minimum that limit legislative majorities.[94] These normative and substantive constraints are necessary for the development of the two moral powers of the person (the rational and the reasonable)[95] and for the legitimacy of the regime. Rawls suggests that a reasonable individual accepts the coercion of a political system as legitimate if: (i) It is universally acceptable to the reasonable and rational; (ii) it is generally complied with by fellow citizens; and (iii) it is not too unjust.[96] This hypothetical

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[88] RAWLS, JUSTICE, *supra* note 25, at 176; *see id.* at 171–76 (discussing the "four-stage sequence": the original position in which representatives choose the principles of justice; the constituent assembly in which delegates establish the constitution; the legislative stage; and the judicial stage). For a critique of the Framers' limited range of choice within Rawls's original position, see Ronald Moore, *Rawls on Constitution-Making*, in NOMOS XX: CONSTITUTIONALISM 238, 247 (J. R. Pennock & J. W. Chapman eds., 1979).

[89] RAWLS, JUSTICE, *supra* note 25, at 201.

[90] RAWLS, POLITICAL LIBERALISM, *supra* note 25, at 358.

[91] *See id.* at 356–63.

[92] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 149 (Erin Kelly ed., 2001).

[93] For Rawls, an unconstrained majority rule in which the majority can vote its preferences violates both public reason and the moral duty of civility. RAWLS, POLITICAL LIBERALISM, *supra* note 25, at 219. Yet, Rawls says that in the debate between supporters of dualist constitutional democracy, supporters of parliamentary supremacy, or a German-style regime, in which some entrenched principles are beyond amendment, his theory need not rule. These alternative regimes should be judged according to the values of public reason included in the political conception of justice. *Id.* at 234–35. For the rejection of parliamentary supremacy, see Rawls, *supra* note 41, at 158.

[94] RAWLS, POLITICAL LIBERALISM, *supra* note 25, at 227.

[95] *See id.* at 48–54.

[96] *Id.* at 217 ("[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reason-

consensual standard for normative legitimacy is supported by an "overlapping consensus" of reasonable people (who disagree about the good life and the requirements of justice) affirming the constitutional essentials. Constitutionalism, then, is integral to democratic legitimacy.

The Court is not an anti-democratic institution from within this constitutional conception. Institutionally, it protects "higher law when its decisions reasonably accord with the constitution itself."[97] It is anti-majoritarian only with respect to ordinary law. Indeed, judicial review is an "institutional exemplar" of the Rawlsian idea of "public reason"[98]: It exemplifies the ways in which citizens should discuss constitutional essentials through formal democratic channels.[99] Hence, the Court does not merely defend higher law; it makes public reason effective, serves an educative role, and brings vitality to the public forum.[100] Unfortunately, however, Rawlsian theory is not very helpful in resolving the concrete debates on judicial review. It fails to confront the institutional question, the centrality of judicial review, and the manipulability of abstract "higher law."[101]

By contrast, Ronald Dworkin offers a more elaborate effort to answer Bickel's "counter-majoritarian difficulty" by arguing normatively and historically that judicial review is democratically legitimate.[102] Dworkin's historical argument suggests that democracy is a social practice and an interpretive concept. In order to understand the "truth" of contemporary democracy, one needs to examine pre-interpretive paradigmatic understandings collected from observing the history of the concept and its prevalent features in a particular society. By making judgments in the post-interpretive stage, one arrives at the best understanding of democracy. Having then arrived at the best conception of democracy, one would conclude that the majoritarian view is a mistake. Unlike Rawls, Dworkin sees this as an actual question about an actual practice, rather than a question of ideal theory. So far as the United States is concerned, constraints on majorities (as in judicial review) are part of the culture and the political tradition of the nation. Thus, only a conception of democracy that includes judicial review would "fit" the United States' tradition.[103]

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ably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."); *see also* Rawls, *supra* note 41, at 148, 175.

[97] RAWLS, POLITICAL LIBERALISM, *supra* note 25, at 234; *see id.* at 232–34.

[98] *Id.* at 235.

[99] *See id.*

[100] *Id.* at 235–37; RAWLS, *supra* note 92, at 145–48 (explaining the educational role and moral force of the constitution and the institutions of the political conception of justice).

[101] *See supra* Part I.C (discussing these and other theoretical quandaries raised by liberal defenses of judicial review).

[102] Dworkin writes: "I will defend . . . the constitutional conception of democracy. . . . It *denies* that it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favor if fully informed and rational." DWORKIN, FREEDOM'S LAW, *supra* note 63, at 17 (emphasis added).

[103] *See, e.g.*, DWORKIN, *supra* note 30, at 378–79 (discussing American judicial review as "embedded in American legal practice").

Dworkin's constructive historical strategy arguably understates the majoritarian strand in United States history.[104] Even more surprisingly, Dworkin extends his argument to Britain, where the majoritarian tradition is stronger than it is in the United States.[105] Dworkin does not deny this majoritarian tradition; rather, he hedges by arguing that it has been eroded and "compromised" in recent British political history and that it has thus become "less appealing."[106] This observation suggests that Dworkin's position would likely remain similar even if it seemed tenuous to construct the history of the United States in support of the counter-majoritarian thesis. For Dworkin, a "genuine democracy" would constrain the legislature in order to guarantee informed and free participation of citizens.[107] Dworkin, then, subordinates history to a normative impulse.

Dworkin's normative strategy is to change the terms of the debate from an *inter*-conceptual level *between* constitutionalism and democracy to an *intra*-conceptual level between alternative conceptions *within* the concept of democracy: "I shall try to convince you to see the constitutional argument in entirely different terms: as a debate not about how far democracy should yield to other values, but about what democracy, accurately understood, really is."[108] Accordingly, Dworkin contrasts a majoritarian conception against a constitutional conception.[109] He characterizes the former as a "bad" conception that treats people as statistics. In contrast, he advocates a constitutional conception that treats persons as moral agents who belong to a self-governing political community.[110] Democratic self-government is possible insofar as every citizen can see the political community as acting on her behalf.[111] Disagreements about justice, fairness, and political morality require a principled application of the coercive power of the law.[112] It is through the concept of integrity that Dworkin explains how communities commit themselves to treating all members with equal concern and re-

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[104] *See, e.g.*, Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 Calif. L. Rev. 959, 963–64 (2004) (arguing that popular constitutionalism was the norm through most of the United States' history and that the notion of judicial supremacy did not rise into prominence until the 1980s) [hereinafter Kramer, *Popular Constitutionalism*]; *see* Larry D. Kramer, *The Supreme Court, Term 2000—Foreword: We the Court*, 115 Harv. L. Rev. 5, 13–15 (2001) [hereinafter Kramer, *We the Court*].

[105] Dworkin, Freedom's Law, *supra* note 63, at 352, 355 ("But though a written constitution is certainly not a sufficient condition for liberty to thrive again in Britain, it may well be a necessary one.").

[106] *Id.* at 362.

[107] *Id.* at 363.

[108] *Id.* at 15.

[109] Elsewhere, Dworkin makes a similar dichotomy between a "detached" conception of democracy (which judges the democratic credentials of the regime through the process) and a "dependent" conception of democracy (which judges the regime according to the outcomes it is likely to advance). Judicial review is undemocratic only under a detached conception but not under the dependent conception. Dworkin, *supra* note 38, at 186–90, 208–09.

[110] Dworkin, Freedom's Law, *supra* note 63, at 23.

[111] *Id.* at 22; *see* Dworkin, *supra* note 30, at 189.

[112] *See* Dworkin, *supra* note 30, at 214, 411.

spect.[113] For him, legitimacy requires integrity in legislation, adjudication, and the moral community at large.[114]

Having rejected majoritarianism, judicial review no longer appears to compromise democracy: Labeling judicial review as anti-democratic assumes that the invalidated political decisions were democratic.[115] Democracy, however, is "government subject to conditions—we might call these the 'democratic' conditions—of equal status for all citizens."[116] Thus, certain normative conditions (associated with constitutionalism) are incorporated into the chosen conception of democracy, eliminating the tension with constitutionalism. It is part and parcel of the meaning of democracy to constrain considerations of the general welfare or the dominant morality of majorities from encroaching upon individual rights.

The role of judges, according to Dworkin, is precisely to protect rights against policy considerations.[117] He distinguishes between the domain of policy, in which majorities decide collective goals, and the domain of principle, in which judges consult political morality to make decisions regarding individual rights.[118] Following the integrity principle, courts are a "forum of principle" in which judges should employ reasoning based on principles rather than on policy considerations in deciding constitutional disputes.[119] In order to enforce the law and protect rights, judges have to decide what the law is, which requires interpretive normative judgments about the fundamental commitments of the political community and the best legal interpretation to vindicate those commitments.[120]

To conclude, both Rawls and Dworkin argue that democracy, properly understood, is constitutional democracy. The existence of constitutional constraints in the form of rights against majorities is inherent to this conception. Judicial review derives significance from its institutional role in enforcing these rights. This enforcement is an essentially democratic task.

b. Clarification

The second discursive technique found in denial positions is the clarification argument advanced by scholars like Jürgen Habermas, Stephen Holmes, John Ferejohn, Lawrence Sager, and Frederick Schauer. This argument denies the existence of the problem altogether, and claims that the alleged tension originates from a conceptual confusion. Instead of shifting

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[113] *Id.* at 312.

[114] *Id.* at 166–67.

[115] DWORKIN, FREEDOM'S LAW, *supra* note 63, at 17–18.

[116] *Id.* at 17.

[117] Dworkin describes rights as "trumps" against policy justifications and collective preferences. DWORKIN, *supra* note 41, at xi; DWORKIN, *supra* note 30, at 381.

[118] DWORKIN, *supra* note 41, at 22, 90.

[119] DWORKIN, *supra* note 8, at 33, 69.

[120] DWORKIN, *supra* note 30, at 228–31, 378. For an example of a critique of Dworkin's views on integrity, see Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273 (1992).

the ground to the *intra*-conceptual level as a contest between two concep-
tions of democracy (like Dworkin), proponents of this argument address the
tension on its own *inter*-conceptual playing field as a contest between consti-
tutionalism and democracy. In contrast to the incorporation positions that
privilege constitutionalism over democracy, clarifiers argue that constitu-
tionalism and democracy are mutually constitutive, interdependent, and
stand on equal footing before each other without one subordinating the
other; indeed, they are akin to inseparable twins. Unlike the incorporation
position's view of constitutionalism as an external constraint that precedes
democratic politics, for clarifiers, the procedural conditions necessary for
this democratic politics are not really constraints.[121] The argument draws on
Hegel, who understands legal ordering as necessary to enhance human free-
dom. Legal ordering liberates citizens from fears and natural impulses.
While law might be a restriction on abstract freedom, it is the embodiment
of actual freedom.[122] True freedom, Hegel suggests, is only achieved in the
context of interaction with others within an ethical community that is politi-
cally organized in the state.[123]

In this vein, Habermas and the "self-binding" theorists argue that with
clarification the alleged tension between constitutionalism and democracy
disappears.[124] This claim relies on the conceptual distinction between "ena-
bling" and "constraining" conditions. Enabling conditions are the condi-
tions necessary to constitute a practice, whereas constraining conditions are
those that externally restrict a practice. According to Habermas, what con-
stitutes democracy does not constrain it.[125] In particular, human rights—
which are an integral part of the conception of constitutionalism—are "nec-

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[121] Habermas argues that rights for Rawls are "prepolitical" constraints because they have
been decided by the theory of justice outside and "prior to all political will formation" and are
not subject to "democratic self-legislation." Habermas, *supra* note 47, at 129. Rawls denies
this charge by asserting that, under his theory, individual and civil rights do not restrict politi-
cal participation. *See* Rawls, *supra* note 41, at 159. However, Habermas's assertion that his
theory is more proceduralist and democratic than Rawls's is not convincing. Larmore and
Michelman point out that Habermas's theory is constrained by "prepolitical" rights no less
than Rawls's. He too presupposes antecedent individual rights, specifically an individual right
to equal participation in the formation of the collective will. Larmore, *Moral Basis*, *supra* note
29, at 617; Frank Michelman, *Democracy and Positive Liberty*, Bos. Rev. (Oct.–Nov. 1996).
[122] G.W.F. Hegel, Elements of the Philosophy of Right 192–93, 282–83 (Allen W.
Wood ed., 1991) (1821).
[123] *Id.* at 48–49.
[124] Habermas writes: "The relationship between democracy as the source of legitimation
and a constitutionalism that does not need democratic legitimation poses no paradox . . . . By
simply clarifying the concepts, the alleged paradox disappears: enabling conditions should not
be confused with constraining conditions." Jürgen Habermas, *Constitutional Democracy: A
Paradoxical Union of Contradictory Principles?*, 29 Pol. Theory 766, 770 (2001) (emphasis
added). Holmes writes: "[T]he relation between constitutionalism and democracy can be sig-
nificantly *clarified* by an analysis of the way constraints in general can produce or enhance
freedom." Holmes, *supra* note 12, at 137 (emphasis added). *See also* Cass R. Sunstein,
Constitutionalism and Secession, 58 U. Chi. L. Rev. 633, 639 (1991) (claiming that constraints
simultaneously empower and constrain by taking certain issues off the table).
[125] Habermas, *supra* note 124, at 770.

essary enabling conditions" and "as such, they cannot *restrict* the legislator's sovereignty . . . ."[126] On the other hand, the enjoyment of individual rights is not possible without an appropriate exercise of democratic will. For Habermas, constitutionalism and democracy are "co-original[ ]" because neither is "possible without the other" and "neither sets limits on the other."[127]

According to Habermas, understanding the process of constitution-making as an inter-generational, self-correcting process, where different generations experience their involvement in this process as involvement in the same project, resolves the alleged tension between constitutionalism and democracy.[128] While the democratic procedure is a *sine qua non* for legitimacy, it needs to comply with normative demands derived from the presuppositions of communication. These presuppositions derive from a hypothetical ideal discourse that guarantees undistorted communication. Accordingly, one examines political decisions from the perspective of potentially affected citizens who are considered as free and equal participants in an undistorted dialogue. Communicative presuppositions, however, are not reducible to parliamentary debates and legislative pronouncements. Rather, they include the "political public sphere as well as its cultural context and social basis."[129] Under this procedural view, the constitutional court's task is to supervise the "system of rights that makes citizens' private and public autonomy equally possible."[130] The constitutional court's role is better described as a "tutor" rather than as a paternalistic "regent" or a "custodian" of democracy.[131] The Court's exercise of judicial review ensures that majoritarian procedures do not violate communicative presuppositions, and thus secures the "conditions for the democratic genesis of laws."[132]

These arguments mark a transition in Habermas's thought. The earlier Habermas argues that constitutional arrangements like separation of powers

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[126] HABERMAS, *supra* note 28, at 128 (emphasis in original).

[127] Habermas, *supra* note 124, at 767. In this view public and private autonomy are "interdependent" and "related to each other by material implication." *Id.* Political rights guarantee public autonomy. But the effective exercise of the latter requires the protection of private autonomy through individual rights. In turn, enjoyment of private autonomy is guaranteed only if public autonomy is used appropriately. *Id.* Rawls claims that he is co-original too. Rawls, *supra* note 41, at 163–64. For a similar Habermasian perspective, see Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 80 (Seyla Benhabib ed., 1996) (arguing that "[t]he deliberative theory of democracy transcends the traditional opposition of majoritarian politics vs. liberal guarantees of basic rights . . . .").

[128] Habermas, *supra* note 124, at 768. For the difficulties that Habermas's theory generates, especially given Michelman's critiques, see Ciaran Cronin, *On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue*, 19 RATIO JURIS 343 (2006); Alessandro Ferrara, *Of Boats and Principles: Reflections on Habermas's "Constitutional Democracy,"* 29 POL. THEORY 782 (2001).

[129] HABERMAS, *supra* note 28, at 274–75, 280.

[130] *Id.* at 263.

[131] *Id.* at 275, 280.

[132] *See id.* at 265.

and democracy are not "of equal rank as political-ordering principles."[133] He distinguishes two kinds of norms: "[J]ustifiable norms"—norms grounded in rational consensus achieved through ideal conditions of discourse—and norms grounded in force, which he calls "normative power."[134] The principles of separation of powers and individual liberal rights belong to the latter category, which is inferior to the rationally-grounded norms. These principles are only indirectly justifiable norms because they presuppose and stabilize a balance of power. While such ordering principles have an enabling function by securing individual autonomous domains, the regulated interests under these principles may be rejected through the scrutiny of rational discourse.[135] For the earlier Habermas, then, constitutionalism is enabling and restricting rather than constituting; constitutionalism is not co-original with democracy, as they occupy different statuses in the hierarchy of norms.[136]

Like the later Habermas, several constitutional scholars defend the idea of "self-binding," which refers to those "constraints that an agent imposes on himself for the sake of some expected benefit to himself."[137] By generalizing this idea from the individual agent to the People as a collective agent, Holmes argues that the claim of an "irreconcilable tension" between democracy and constitutionalism is nothing but a "myth."[138] Holmes argues that constitutional self-binding is both regulative and constitutive, limiting and

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[133] JÜRGEN HABERMAS, LEGITIMATION CRISIS 111 (Thomas McCarthy trans., 1975).

[134] *Id.*

[135] The earlier Habermas argues that the principle of separation of powers is "intended to guarantee such a balance of power . . . in order to make compromises possible." He further maintains that "bourgeois civil law . . . delimits autonomous domains of action for the strategic pursuit of individual interests. It presupposes a balance of power between private persons and makes compromises on non-generalizable interests unnecessary." *Id.*

[136] These abstract and ideal accounts by the earlier and later Habermas remain unsatisfying from an institutional-operational perspective. William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969, 995–96 (1998) (reviewing HABERMAS, *supra* note 28). Forbath argues that Habermas does not explain the remedies by which constitutional courts can prevent the subversion of the public sphere by the corporate media, the reach of judicial review, the balance of power between the courts and other branches, or the electoral systems needed for equal representation. *Id.* at 996.

[137] *See, e.g.*, JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 4 (2000).

[138] HOLMES, *supra* note 12, at 136–37. For a critique of self-binding theory, see Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1752 (2003). Elster, in his reflection on his own previous writings that defended self-binding, rejects the extension of the idea of self-binding from the level of the individual agent to the level of the collective self (the People). This extension, he writes:

> [I]s often close to meaningless. If instead of the bland and agentless 'precommitment' we use the term 'self-binding,' two acute questions arise. First, what is the self that is tying itself to the mast? Second, how does it accomplish that feat? If we reflect on these questions, the idea of collective precommitment emerges as quite fragile.

Id. at 1758. Elster proceeds to emphasize that "*there is nothing external to society.*" *Id.* at 1760 (emphasis in original).

creative, disabling and enabling.[139] By establishing a basic framework, the Constitution empowers the People to pursue its ends more effectively.[140] Concretely, constitutional devices such as the separation of powers, an independent judiciary, fixed periodical elections, and apportionment plans are justified because they enhance and sustain democracy.[141]

Moreover, self-binding is both beneficial and obligatory because it builds a foundation for learning when used strategically to protect rights.[142] Through an "intergenerational division of labor"—in which previous generations free later generations from the need to struggle with fundamental questions that faced the Framers—self-binding opens new possibilities for learning.[143] This view of self-binding assumes linear learning and presupposes an idea of progress in which the People, having accumulated the wisdom of many generations, moves forward.[144]

Similarly, Ferejohn and Sager distinguish between first-order internal commitments and second-order external commitments.[145] External procedural commitments—such as judicial review, entrenchment, periodical elections, and separation of powers—are "functional" and "instrumental" for achieving internal substantive commitments. Such external commitments increase the likelihood that citizens will honor internal commitments, because the latter are not self-executing.[146] Accordingly, constitutionalism makes democracy possible.

Self-binding will require diverse majorities. The participation of these majorities in constitutional change is likely to lead to a national deliberation that includes a multiplicity of perspectives. For example, self-binding forces broad social consensus to achieve change through the amendment process.[147] Self-binding also encourages a more generalized, more principled, and less particularistic text in which the general interest is taken into account. Judicial review—the judicial application and concretization of such abstract, general constitutional texts—invigorates these national debates and ensures

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[139] HOLMES, *supra* note 12, at 163.

[140] *Id.*

[141] *Id*. at 163, 165–66, 168.

[142] *Id.* at 176.

[143] *Id.* at 159.

[144] Surprisingly, Holmes seems to adopt a version of the very idea of progress that he criticizes in Thomas Jefferson and Thomas Paine's arguments against constitutional constraints. *Id.* There seems to be two views: one claiming that later generations should be freed from chains by previous generations because the former are better situated; another claiming that chains by previous generations allow this progress. Both are progress theories.

[145] John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1936–38 (2003).

[146] *Id.* at 1938, 1944, 1949, 1956 (using the words "functional" and "instrumental" to describe the relationship between internal commitments and external commitments).

[147] U.S. CONST. art. V.

that internal commitments "are, on the whole, honored."[148] Thus, constitutional commitments are more democratic than normal legislation.[149]

In a similar vein, Schauer argues for second-order constraints on first-order policy preferences in order to protect the long-term interests from the "short-term weakness of the will."[150] The need for these "externally-enforced rules" arises out of the recognition that even when good people do good things they might generate "bad collective long-term consequences" or neglect deontological values.[151] The Constitution is such a series of second-order rules, and judicial review should be viewed as an authoritative enforcement of these rules, even with respect to well-meaning policies, rather than as merely a limit against abuses of power.[152]

Unlike those who adopt incorporation positions, the arguments advanced by adherents of clarification positions do not incorporate the conception of constitutionalism into a conception of democracy; nor do these arguments present constitutional self-binding as constraining democracy. Rather, they present constitutionalism as enabling democracy to take concrete shape, to function, and to improve.

c.   Avoidance

The third discursive technique within denial positions is the avoidance argument advanced by scholars such as Bruce Ackerman and Akhil Amar. This argument is predominantly historical in form and celebrates popular sovereignty—that is, the manifestation of the will of the People—as a self-validating notion.[153] In order to rationalize constitutional constraints on

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[148] *Id.* at 1961.

[149] *Id.* at 1958.

[150] Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 Calif. L. Rev. 1045, 1057 (2004).

[151] *Id.* at 1056–57.

[152] As described below, Schauer combines this argument with another mode of argumentation. Thus, he is positioned within the "clarification" position with respect to one argument and within "de-centering" with respect to the other. For the latter, see *infra* Part II.B.i.d. These are both denial arguments and thus complementary.

[153] Ackerman criticizes the "ahistorical" approach to constitutional theory, which focuses on the writings of European political philosophers and misses the distinctive features of the United States' constitutional practice. 1 Bruce Ackerman, We the People: Foundations 3 (1991) [hereinafter Ackerman, We the People]. Nevertheless, the American colonists and revolutionaries were influenced by European thought. *See, e.g.*, Bernard Bailyn, The Ideological Origins of the American Revolution 23, 27–29 (enlarged ed. 1992) (mentioning European scholars like Locke, Montesquieu, and Rousseau). In addition, the parallels between Ackerman's work and Rousseau, in particular, are quite evident as I explain in the text. Further, although the avoidance position is historical and descriptive, it is also obviously normative. History is authoritative because it carries normative weight; otherwise Ackerman's use of history in the debate would be meaningless. By turning to history, Ackerman claims that those periods he identifies as "constitutional" moments created binding constitutional norms. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013, 1022, 1055–56 (1984) [hereinafter Ackerman, *Storrs Lectures*]. *Compare* Ackerman, We the People, *supra*, at 34, *with* Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 Const. Comment. 455, 465–66 (2000) (arguing that "history is not authoritative"

democratic politics, this argument employs a twofold strategy. First, it de-centers representative democracy by pointing out the defects of ordinary democratic practice and the fetishism of representation.[154] Second, it denies that true popular sovereignty—in a sociological (not idealized) sense—can be constrained even by super-majoritarian entrenchment clauses like Article V.

This line of argument draws on Rousseau's arguments for the supremacy of popular sovereignty. Rousseau distinguishes between the "general will," which is directed towards the common good, and the "will of all," which merely reflects the aggregation of factional interests.[155] Sovereignty is "the exercise of the general will."[156] Accordingly, the political community should be oriented towards the common good rather than towards factional interests. Popular sovereignty should subordinate private and factional interests and force them to comply with its commands.[157] Rousseau is hostile to representative democracy because sovereignty lies in the general will and cannot be represented or delegated.[158] Delegation is particularly damaging to the general will because it obviates active political participation, which transforms a person into a higher and more intelligent being.[159]

Accordingly, proponents of the avoidance argument distinguish be-tween the People, corresponding to Rousseau's general will, and majorities, corresponding to Rousseau's will of all. Government under representative democracy represents majorities rather than the People. Thus, the Court does not counter the People's determinations, and, *ipso facto*, the "counter-majoritarian difficulty" does not exist at the level of democratic self-government.

Ackerman draws on Rousseau's distinction between the People and ma-jorities, arguing for a dualistic conception of politics: "Constitutional polit-ics" arise when a "mobilized mass" of citizens acts collectively to redefine the public good in "rare periods of heightened political consciousness" called "constitutional moments."[160] In "normal politics," people pursue narrow interests between constitutional moments.[161] Under this dualist con-ception, which Ackerman applies to United States history, the "counter-majoritarian difficulty" mischaracterizes the issue at hand. Instead, it is only

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and that its relevance "is not determined historically, but by a present political and social decision").

[154] I use fetishism here to denote the act of giving something power that it does not inher-ently possess. In this context, the representative system is arguably fetishized, because some scholars venerate it as if it had the power to stand for the People when in fact it does not.

[155] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER WRITINGS 60 (Victor Gourevitch ed. & trans., 1997) (1762).

[156] *Id.* at 57.

[157] *Id.* at 60 (factional interests); *id.* at 87 (individual interests).

[158] *Id.* at 57–59, 114–16.

[159] *Id.* at 53–54.

[160] Ackerman, *Storrs Lectures*, *supra* note 153, at 1022, 1029.

[161] *Id.* at 1022.

an intertemporal difficulty. Only constitutional moments represent the People sufficiently to achieve popular sovereignty.[162] Accordingly, the task of the Court is to "prevent the abuse of the People's name in normal politics," "to uphold the integrity of earlier constitutional solutions against the pulling and hauling of normal politics," and to force government to initiate constitutional politics.[163] These constitutional cycles overcome, on the one hand, the selfishness, ignorance, and apathy of ordinary politics and, on the other hand, the reification of the People in the representative system when representatives purport to be the People.[164]

According to this theory, the Court's democratic function is to force a conversation between generations.[165] The Court signals to citizens that they should mobilize and forces the resulting movement to clarify its purposes.[166] Ackerman's "structural amendment" concept becomes a reality when the Court confirms a "sustained series of electoral victories and legislative successes."[167] In contrast to normal times in which there is a Court but not a People, in constitutional times there is a People, with a will no Court can obstruct.[168]

Unlike Ackerman, Amar does not distinguish between constitutional and political moments. Nonetheless, he shares Ackerman's critique of representative institutions. Like Ackerman, he disassociates the People from electoral systems and existing formal political arrangements. Like Rousseau, Amar argues that although the Constitution empowers and limits the government, popular sovereignty can neither be waived nor limited by the Constitution.[169] The "counter-majoritarian difficulty" wrongly equates the People with government and the Court with the dead hand.[170] Consequently, it ignores the agency costs of the representative system, such as its bias towards long-serving incumbents and well-funded politicians whose agendas might diverge from that of their constituencies; the deficiencies inherent in

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[162] *Id.* at 1046.

[163] *Id.* at 1030–31.

[164] *Id.* at 1026–27. Reification denotes the reduction of aspects of reality into a thing-like category that does not correspond to their reality. The part displaces the whole. *Id.* In this context, scholars arguably reduce the People to a few institutions and practices, but these cannot possibly "captur[e] the living reality of popular sovereignty." *Id.* at 1028.

[165] Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1805 (2007).

[166] *See* Ackerman, *Storrs Lectures*, *supra* note 153, at 1054.

[167] *Id.* at 1055–56.

[168] Ackerman's theory has been contested on many levels. His distinction between political and constitutional moments seems especially wanting. *See, e.g.*, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992) (reviewing ACKERMAN, WE THE PEOPLE, *supra* note 153); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988). This distinction is foundational for Ackerman because it makes democratic self-government possible, despite the deficiencies of political systems and lack of political participation by the citizenry given the existence of these constitutional moments. Accordingly, if these moments do not really exist, then democratic self-government is unachievable.

[169] ROUSSEAU, *supra* note 155, at 67; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1055 (1988).

[170] Amar, *supra* note 169, at 1077–79, 1085.

gerrymandering; and the problems of an ill-informed public. These deficiencies show that the government is not representative of the People and that, therefore, judicial review is not counter-majoritarian when it limits government.[171] On the other hand, Amar grounds the process of amending the Constitution in an inalienable right of the People to abolish and amend government at any time. Unlike Ackerman's structural amendment in violation of Article V, this right to amendment preempts the need for a lawless revolution. This right to amendment further demonstrates that the Constitution is representative of the People, because the People can change it at will. It then follows that the Court acts on behalf of the People when it enforces the Constitution.[172] Because the People is "democratic by definition," judicial review is not incompatible with democracy.[173]

The objections to the avoidance position in which popular sovereignty is presented as a self-validating notion may take two primary forms: An empirically-oriented critique would point out that the People has never manifested itself, and that avoidance scholars have not articulated a convincing mechanism by which the general will can be discerned and distinguished from the mundane aggregation of preferences in ordinary majorities. A more normative critique would argue that it is circular to claim that popular sovereignty is attractive by reference to the People.

d.   De-Centering

The fourth discursive technique is the de-centering position advanced by Frederick Schauer, Barry Friedman, and Michael Klarman. Unlike the avoidance position, which de-centers *representative democracy*, the fourth form of denial de-centers the *Court* and thus de-emphasizes constitutionalism. It presents a descriptive—rather than a conceptual—denial. One version of the de-centering position, advocated by Schauer, rests on a positivist distinction between constitutionalism and the social presuppositions of constitutionalism. Legitimacy is therefore rooted in social facts of ongoing acceptance.[174] Schauer claims that one should distinguish between the Constitution as a text and the sociological conceptions that underlie it and validate its authoritative power.[175] Thus, a societal change in sociological conceptions regarding what counts as law, the meaning of rights, and the authority of the constitutional text is an extra-textual venue for constitutional

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[171] *Id.* at 1080–86.

[172] *Id.* at 1078.

[173] *Id.* at 1079.

[174] For a contrasting view of the normative conception of legitimacy mentioned above, see *supra* notes 42–44 and accompanying discussion.

[175] Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 145, 147–48 (Sanford Levinson ed., 1995).

amendment.[176] Unlike Amar's theory of amendment according to prescribed rules and existing rights, or Ackerman's revolutionary change in violation of Article V, this argument presents a third way for constitutional change which is both extra-legal and not lawless.[177]

Another instantiation of de-centering is the adoption of a procedural reading of the Constitution.[178] Schauer argues that the "counter-majoritarian difficulty" is based on a view of the Constitution as the main locus for decisions about national identity and fundamental values.[179] Judicial intervention becomes worrisome given these enormous stakes. In contrast to this substantive constitutional theory, Schauer espouses a procedural reading of the Constitution as merely a text that sets the "basic structure of government."[180] Under this "modest" reading, judicial intervention involves no enormous stakes and no assault on self-rule because representative institutions and the general public still decide the main issues. Hence, judicial supremacy is not as threatening as it might initially seem.[181] Accordingly, the "modest" Constitution and judicial supremacy go hand-in-hand.[182]

In contrast to the historical framing of the avoidance positions, the de-centering argument is largely an empirical rejection of the alleged judicial intrusion of the domain of policy-making. Proponents of the de-centering position, like Friedman, maintain that most important national and political decisions are not decided by the Court, and, even if they are so decided, they are usually consistent with popular will.[183] Klarman adds that only a romantic view would perceive the Court as the "countermajoritarian hero."[184] Schauer goes further by arguing that most of the issues on the Court's docket are not even political in any interesting sense.[185] His argument is part of a

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[176] *Id.* at 148; *see also* Alexander & Schauer, *supra* note 153, at 463. For a critique of this positivist position, see LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 30 (2001) (noting the ambiguity and contestability of social facts and the need to make normative choices amongst different readings of social facts); Frank I. Michelman, *Constitutional Authorship*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 64, 84 (Larry Alexander ed., 1998) (arguing that coercion exists not only in the case of the legal ordering but also in the sociological presuppositions that validate it, and concluding that participation in this coercion should also be justified).

[177] Schauer, *supra* note 175, at 154 n.20 (situating his position between Amar's and Ackerman's).

[178] Schauer, *supra* note 150, at 1045.

[179] *Id.* at 1064–67.

[180] *Id.* at 1065.

[181] *Id.* at 1064–67.

[182] *Id.* at 1067.

[183] *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[184] Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 192 (1998) [hereinafter Klarman, *Constitutionalism*]; *see also* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 2 (1996) [hereinafter Klarman, *Revolutions*].

[185] Schauer writes:

For in a year in which the war in Iraq, terrorism, escalating fuel prices, healthcare, immigration reform, Social Security, the nuclear capability of Iran and North Korea,

general descriptive sociological view of the law as a "limited domain."[186] This kind of empirical argument, however, is open to the charge that it uses an overly narrow definition of what counts as politics.[187]

e.   Summary of Denial Positions

The preceding discussion explicated four prominent positions of denial: incorporation, clarification, avoidance, and de-centering. Advocates of the incorporation position focus their analysis on the *intra*-conceptual level of the concept of democracy by defending a conception of democracy that incorporates constitutionalism. Advocates of the clarification position focus on the *inter*-conceptual level by presenting the relationship between the concepts of democracy and constitutionalism as critically symbiotic. In the incorporation and clarification positions, democratic politics is by definition constrained either by reading constitutionalism into democracy as a normatively attractive interpretation of democracy itself (incorporation), or by making constitutionalism a necessary condition for the practice of democracy (clarification). Accordingly, democratic politics is, and should be, controlled through the substantive commitments that define the political community as such, either because these commitments are part of what democracy, properly understood, means (incorporation) or because democracy is not self-executing (clarification). The more the community upholds these constraints, the more it is faithful to its own constitutive commitments, and the better it will be able to function as a democracy.

The avoidance and de-centering positions underplay the importance of the limits on politics by claiming that the Court is not really dealing with

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Hurricane Katrina, the estate tax, corporate scandals, CEO salaries, bird flu, and the minimum wage appeared to dominate the nation's public agenda and the workload of the nation's policymakers, only with respect to terrorism and related issues of homeland security—and then only as to one aspect of those—was there much overlap between the agenda of the nation's governance and the agenda of the Supreme Court.

Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 8–9 (2006). He adds:

Perhaps most importantly, the distance between the Court's activities and the public's major concerns—the relatively small number of decisions the Court actually removes from what the public would desire to control directly—calls into question much of the contemporary and not-so-contemporary angst about the countermajoritarian or antidemocratic behavior of the Court.

Id. at 50.

[186] Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1942 (2004) (noting that "failing to recognize the overwhelming narrowness of legal argument produces a distorted picture of the practices and institutions we know as the law").

[187] *See* Duncan Kennedy, *The Political Stakes in "Merely Technical" Issues of Contract Law*, 1 EUR. REV. PRIVATE L. 7, 8 (2001) (arguing that private law issues often considered "merely technical" actually have political stakes because choices between different rules and standards correspond to choices made in the political domain between individualism and altruism). Additionally, Kennedy argues that the politics of technicality vindicates the center against the left and right extremes and upholds the distinction between the private and the public. *Id.*

political issues (de-centering) or that the Court is dealing with second-rate political issues (avoidance). While the incorporation and clarification positions are heavily conceptual, the de-centering position is largely empirical or descriptive, and the avoidance position is largely historical. The de-centering and avoidance positions reject the tendency of the other strands of the unity position to escalate the debate to a highly theoretical realm and thus implicitly accuse it of inflating the political stakes or at least of failing to realistically assess them. Yet, like the other strands of denial, they arrive at unity of the concepts.

ii. Reconciliation

Unlike the deniers, the reconcilers acknowledge that proper use of the concepts of constitutionalism and democracy will inevitably result in tension. Nonetheless, they believe that this tension can eventually be reconciled through changes in the role or form of judicial review. Reconcilers reconcile the tension through four primary discursive moves: *democratic proceduralism* (by assigning the Court the task of policing the political process); *republican proceduralism* (by assigning the Court the task of policing the deliberative process); *minimalism* (by advocating judicial deference to the political process); and *popular constitutionalism* (by incorporating democracy into constitutionalism).

a. Democratic Proceduralism

The democratic proceduralism position, also called pluralist or process theory, argues that the Court merely facilitates the procedural fairness of the democratic process by enabling participation. The Court intervenes when the political market malfunctions and the process is untrustworthy. This can happen when insiders attempt to preserve their advantageous position by blocking political change and excluding outsiders, or when there is a "systematic disadvantaging" of a minority group facing prejudice and hostility.[188] Unlike the clarification strand within denial positions, here the argument is for "judicial restraint" and avoiding value judgments given the perceived problems of "counter-majoritarianism."

Justice Stone's famous footnote in *United States v. Carolene Products Co.* inspired much of the literature following this line of argument.[189] John Hart Ely, the main expositor of this position in legal scholarship, argues that the Court makes popular sovereignty possible—rather than thwarting it—by

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[188] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 103 (1980).

[189] 304 U.S. 144, 152 n.4 (1938). For a discussion of the importance of footnote four, see Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L.J. 1287, 1289 (1982). For a critique of the formula expressed in footnote four, see Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985).

enabling participation and reinforcing representation.[190] This approach rests on three arguments.[191] First, he argues that the Constitution is "overwhelmingly" concerned with structure and process rather than with identifying and preserving substantive fundamental values;[192] the latter "is not an appropriate constitutional task."[193] Second, he argues that this approach is consistent with the principles undergirding American representative democracy,[194] namely, that political decision-making processes should be equally accessible to citizens, and that the interests of those affected by political decisions should be considered.[195] Third, he argues that this approach "involves tasks that courts, as experts on process," are better qualified to carry out than politicians[196]: "The point isn't so much one of expertise as it is one of perspective."[197] As "comparative outsiders in our governmental system," judges are objective and more trustworthy than politicians in policing the political process.[198] Ely, then, reconciles the tension between constitutionalism and democracy by reading the Constitution—and reframing the role of judicial review—as procedural.[199] Unlike Dworkin, he rejects the use of political and moral philosophy in judicial intervention.[200] This procedural theory leads Ely to criticize *Roe v. Wade* as an illegitimate judicial intervention akin to *Lochner*.[201]

Ely's critics, however, assert that his flight from substance to procedure has been unsuccessful,[202] and that his theory presupposes a substantive polit-

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[190] Ely writes:

My main point in using the examples has been to suggest a way in which what are sometimes characterized as two conflicting American ideals—the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other—in fact can be understood as arising from a common duty of representation. . . . [It is] a participation-oriented, representation-reinforcing approach to judicial review.

ELY, *supra* note 188, at 86–87; *see generally* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

[191] ELY, *supra* note 188, at 87–88.

[192] *Id.* at 87–88, 92.

[193] *Id.* at 88.

[194] *Id.* at 88, 102.

[195] *Id.* at 100.

[196] *Id.* at 88.

[197] *Id.* at 102.

[198] *Id.* at 103.

[199] Ely does not deny that the Constitution is motivated by a substantive goal, namely "preserving liberty." He claims, however, that the Constitution's emphasis is on "how" that goal can be achieved. *Id.* at 100.

[200] *Id.* at 58.

[201] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 939–40 (1973).

[202] *See, e.g.*, DWORKIN, *supra* note 8, at 57–70; Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

ical theory of representative democracy.[203] Despite the general perception
that Ely's project has failed,[204] some continue to advocate a modified version
of his theory of democratic proceduralism through the law of democracy
literature.[205] Richard Pildes, for example, argues that judicial review polices
institutional design and prevents political self-entrenchment.[206] This over-
sight is the "ineliminable task" of the Court, even if other domains are left
to the People.[207] Unlike deliberative democrats who lament interest-group
politics, post-Elyian democratic proceduralists continue to work within the
pluralist paradigm. Pildes rejects the "romantic" view of politics pro-
pounded by participatory democrats and recognizes "collective organiza-
tional forms" as the natural way politics is practiced.[208] In politics—as in
markets—antitrust measures should allow citizens to compete.[209] Thus, an
external supervisor is required to ensure the fairness of the rules of the politi-
cal game. Still, although the Court should be more active in "structural"
issues, it should play a "minimal" and "circumspect role" in deploying
rights and equality arguments within the political domain in order to avoid
"curtailing" the democratic "process of self-revision."[210] By playing a lim-
ited role, the Court would avoid "Lochneriz[ing] the very design of demo-
cratic institutions."[211] Thus, post-Elyian proceduralists like Pildes reconcile
constitutionalism with democracy by reducing the role of the Court to the
necessary minimum to guarantee a competitive political process and thereby

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[203] *See, e.g.*, Habermas, *supra* note 29, at 265–66; James E. Fleming, *Constructing the
Substantive Constitution*, 72 Tex. L. Rev. 211, 219 (1993). Fleming distinguishes between
two kinds of flight from substance, and claims that:

> [Ely's] theory does not take the first flight: it is not a process-*based* theory at all, but
> rather a process-*perfecting* theory that perfects processes in virtue of its substantive
> basis in a political theory of representative democracy (a qualified utilitarianism
> rooted in equal concern and respect). Ely's theory, however, does take the second
> flight: his two process-perfecting themes do not account for, and thus leave out,
> certain substantive liberties that are manifested in our constitutional document and
> implicit in our underlying constitutional order.

Fleming, *supra*, at 219 (emphasis added).
    [204] *See, e.g.*, Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Pro-
cess Theory*, 77 Va. L. Rev. 721, 722 (1991).
    [205] For a defense of Ely's political process theory in a qualified manner, see Michael J.
Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747 (1991).
    [206] Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118
Harv. L. Rev. 28, 43–44 (2004); *see also* Michael J. Klarman, *Majoritarian Judicial Review:
The Entrenchment Problem*, 85 Geo. L.J. 491 (1997).
    [207] Pildes, *supra* note 206, at 42.
    [208] *Id.* at 53–54.
    [209] *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lock-
ups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998).
    [210] Pildes, *supra* note 206, at 42, 48.
    [211] *Id.* at 48. Pildes writes: "By . . . invalidating self-entrenching, anticompetitive laws,
courts might do more to secure the relevant interests of individuals and groups than by issuing
first-order judicial decisions about rights or equality. . . . [C]ourts have a distinct calling . . . to
address the structural problem of self-entrenching laws that govern the political domain." *Id.*
at 54.

minimizing the infringement upon the political space in the name of constitutionalism.

b. *Republican Proceduralism*

The second major discursive move in reconciliation is the civic republican revival. Unlike the democratic proceduralism position, which advocates for a limited role for the judiciary, the republican proceduralism position entails a more active judiciary.[212] This difference in judicial roles follows from a robust conception of politics. Unlike democratic proceduralists, republican proceduralists believe that in politics virtuous citizens should pursue the common good, even though in private life they follow self-interest. This conception of politics has been referred to as "jurisgenerative" politics, in which the multitude is transformed into a singular identity.[213] The Court's task becomes to police the inclusive deliberative democratic process, which expresses the People's identity and the pursuit of the common good.

Some of Frank Michelman's writings exemplify the republican proceduralism position.[214] Michelman proposes what he calls a dialogic, "process-based, republican-not-pluralist constitutional jurisprudence."[215] Republican constitutionalism, on this view, "involves the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members."[216] Pluralism, on the other hand, is "the deep mistrust of people's capacities to communicate *persuasively* to one another their diverse normative experiences . . . ."[217] Pluralists perceive politics as a market in which different parties aim at maximizing their preferences.[218] Thus, Michelman shares with Ely the "representation reinforcing" justification for judicial review, but he does so in order to maintain jurisgenerative politics.[219] The task of the Court on this view is "protect[ing] the republican state—that is, the citizens politically engaged—from lapsing into a politics of self-denial."[220] Michelman aims to bypass "[a]ctual democracy," i.e. majoritarian politics, by "appealing to law's republic."[221] The Court then protects the presuppositions of United States constitutionalism by ensuring that dialogue between participants of

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[212] HABERMAS, *supra* note 28, at 265, 276–77.

[213] Robert M. Cover has influenced this "jurisgenerative" line of thinking. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

[214] *See, e.g.*, Michelman, *supra* note 168; Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

[215] Michelman, *supra* note 168, at 1526–27.

[216] *Id.* at 1495.

[217] *Id.* at 1507 (emphasis in original).

[218] *Id.* at 1508.

[219] *Id.* at 1525; *see also id.* at 1502–24.

[220] *Id.* at 1532.

[221] *Id.* at 1537.

the political process is free of coercion and exclusion.[222] By redefining democracy as a republican process of self-government and giving the Court a primary position in administering this process, Michelman hopes to reconcile the tension at the base of the "counter-majoritarian difficulty."[223]

c. Minimalism

The third discursive move within reconciliation is the minimalism of scholars such as Alexander Bickel and Cass Sunstein. These scholars advocate a "weaker" form of judicial review to render judicial review compatible with democratic theory. This confinement is less structural and more a question of judicial policy or attitude. Accordingly, the minimalism position calls for judicial modesty or deference.

Bickel considers judicial review a "deviant institution" and argues for applying "method[s] of avoidance," procedural devices such as ripeness, standing, or the political question doctrine.[224] These "passive virtues" allow the Court to avoid deciding certain issues on grounds of principle when strict application of principles would not allow the needed flexibility for expediency in politics, or when such principles would not be widely accepted in society.[225] This means, in Gerald Gunther's memorable formulation, a "100% insistence on principle, 20% of the time."[226]

Similarly, Sunstein advocates for a judicial minimalism in which judges act modestly and leave issues "incompletely theorized."[227] Accordingly, judges should generally decide cases "as narrowly as possible," thus leaving more to the political process.[228] Like Bickel, Sunstein asks the Court to resolve disputes without going into too many unnecessary and controversial territories. From this perspective, Sunstein, like Ely—considers the ruling in

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[222] *Id.* at 1526–27.

[223] For a critique of this account, see HABERMAS, *supra* note 28, at 285–86 (claiming that republicans fail to distinguish between ethics and politics given their idealization of politics, and that they ground preconditions in a particular antecedent agreement of the community rather than an ideal inclusive one). *See also* Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243, 2262–63 (1993) (arguing that the precondition of non-distortion is neither an actual nor an external precondition for United States constitutionalism; rather it is a contested condition within the practice itself, because the inclusion of different actors and the degree of this inclusion are a matter of dispute and struggle).

[224] BICKEL, *supra* note 11, at 18, 128 (referring to the Court as a "deviant institution"); *id.* at 170 (referring to "method of avoidance" and "ripeness"); *id.* at 116 (referring to "standing"); *id.* at 183–93 (referring to "political question doctrine").

[225] *See id.* at 111–98.

[226] Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

[227] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 39–41 (1999).

[228] *Id.* at 61.

Roe v. Wade a "large mistake."[229] Sunstein's minimalism, however, is more substantive than Bickel's and thus more deferential to politics. Unlike Bickel, Sunstein does not consider the Court to be the only principled institution.[230] Nonetheless, this attempt by the minimalist position to avoid the political involvement of the Court has been criticized as unsuccessful given the Court's need to exercise political judgment over when and how to deploy minimalism and minimalist devices.[231]

d. *Popular Constitutionalism*

The fourth discursive move in reconciliation is the popular constitutionalism of scholars such as Larry Kramer and Mark Tushnet. This line of argument challenges the exclusivity and finality of judicial interpretations of the Constitution, arguing for popular involvement in enforcing and determining constitutional meaning. Unlike the de-centering position's argument that most of the important decisions are already outside the constitutional realm, popular constitutionalists seek to distribute the authority to create constitutional meaning.[232] The popular constitutionalist discursive move reverses the incorporation move within denial: While denial incorporates constitutionalism into democracy, popular constitutionalism incorporates democracy into constitutionalism.

Kramer, for example, acknowledges the tension between constitutionalism and democracy, but he frames it as a tension internal to constitutionalism itself, between two competing conceptions of constitutionalism: judicial supremacy, in which judges interpret the Constitution, and popular constitutionalism, in which the People interpret it.[233] He argues that the growing role

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[229] Sunstein, *supra* note 68, at 38; *cf.* Cass R. Sunstein, *The Fate of* Roe v. Wade *and Choice*, Boston Globe, Sept. 14, 2008, at D9.

[230] Cass R. Sunstein, The Partial Constitution 145–46 (1993); *see also* Christopher J. Peters & Neal Devins, *Alexander Bickel and the New Judicial Minimalism*, *in* The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory 45, 46 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005) (arguing that "Bickel's minimalist project was *juricentric*" while "the New Minimalism . . . is primarily *policentric*" (emphasis in original)). Peters and Devins cite other "substantive" minimalists. Peters & Devins, *supra*, at 46; see, for example, Robert A. Burt, The Constitution in Conflict (1992); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4 (1998); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54 (1997); Neal Kumar Katyal, *Judges as Advicegivers*, 50 Stan. L. Rev. 1709 (1998); *see also* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 Harv. L. Rev. 1693 (2008).

[231] Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 Stan. L. Rev. 169, 207–08 (1968) (arguing that Bickel fails to extract the Court from politics); Mark Tushnet, *The Jurisprudence of Constitutional Regimes: Alexander Bickel and Cass Sunstein*, *in* The Judiciary and American Democracy, *supra* note 230, at 23–43 (claiming that Bickel and Sunstein fail to draw a convincing distinction between law and politics).

[232] *See* Schauer, *supra* note 150, at 1065 (noting this difference between his position and popular constitutionalists).

[233] Kramer, *We the Court*, *supra* note 104, at 14 (describing judicial supremacy and popular constitutionalism as "conflicting principles").

of the Court comes at the expense of popular involvement in constitutionalism. This lack of popular involvement means that the Constitution is no longer "an act of popular will."[234] Rather than a model of judicial supremacy in which the Court, while retaining the final word, is but one of several branches authorized to interpret the Constitution, the Court applies a model of judicial sovereignty in which it is the only branch authorized to interpret the Constitution.[235] Rejecting judicial sovereignty, Kramer criticizes the exclusivity and finality of the Court's interpretive judgments.[236] The Constitution should not be merely an ordinary law to be defined by the Court alone. Accordingly, the People should be entrusted with the final interpretive authority and the Court should be subordinate to the People, as represented by the elected branches. Yet, Kramer emphasizes that he is not arguing for the abolition of judicial review "or even judicial supremacy";[237] rather, he suggests "thinking about a minimal model of judicial review that calls upon judges to intercede only where necessary."[238]

Kramer's views resemble other scholars' concerns with the separation of powers.[239] These scholars have propagated what has come to be known as "departmentalism," according to which "each of the three branches of the federal government possesses independent and co-ordinate authority to interpret the Constitution," and hence the Court does not have a privileged or an exclusive position in its interpretive judgments.[240] Nevertheless, for many departmentalists, the Court's interpretation practically binds the President and Congress because the Constitution is understood to grant the Court this power.[241] Departmentalism, then, rejects judicial supremacy but not necessarily judicial review.[242]

Another version of popular constitutionalism rejects finality, but is less concerned with interpretive authority and more with enforceability. Tushnet, in some of his recent interventions, has adopted such a reconciliatory ap-

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[234] *Id.* at 12–13 (comparing the Constitution as "an act of popular will" in the time of the founders with judicial supremacy that "had entered America[ ]'s political lexicon by the 1830s").

[235] *Id.* at 13–16.

[236] *Id.*

[237] *Id.* at 166.

[238] *Id.*

[239] *See, e.g.*, SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES (1992); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 236 (1994).

[240] Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1031 (2004); *see also* Kramer, *We the Court*, *supra* note 104, at 84–86 (tracing this view back to Madison and Jefferson).

[241] Kramer, *We the Court*, *supra* note 104, at 7–8 (explaining that even scholars who criticize judicial finality do not generally object to judicial supremacy); Post & Siegel, *supra* note 240, at 1033 n.30 (explaining that "[m]ost scholars" accept the binding and final nature of judicial rulings (citations omitted)); *see also id.* at 1033 (noting *inter alia* that departmentalists believe finality stems from the constitutional allocation of judicial power in the courts).

[242] John E. Finn, *The Civic Constitution*, *in* CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 41, 59 (Sotirios A. Barber & Robert P. George eds., 2001).

proach. In *Weak Courts, Strong Rights*, Tushnet argues for reconciling the tension by adopting a "weak-form" judicial review according to which the Court can examine the constitutionality of legislative acts but does not have the power to enforce declarations of unconstitutionality and does not have the final word.[243] The last word remains with the legislature. Accordingly, this form of judicial review allows courts to identify and enforce socio-economic rights but only in a provisional manner that can be overturned by the legislature.[244] The argument, then, justifies adopting socio-economic rights by minimizing what is conceived of as an anti-democratic feature of judicial intervention.

e.   Summary of Reconciliation Positions

Reconcilers accept judicial review and focus their concerns on the form it takes and the authority of judicial interpretations of the Constitution. Reconcilers aim to change the balance of power by reducing judicial power vis-à-vis legislative power and curbing the judiciary's influence. As such, one of the main differences between some scholars of reconciliation and the de-centering position within denial is that the former is prescriptive and the latter is descriptive.

For reconcilers, constraints on politics are allowed, but only to the extent necessary to protect the democratic process (democratic proceduralism), protect membership in the political community (republican proceduralism), and so long as the Court shows deference to political institutions (minimalism), or leaves room for popular participation (popular constitutionalists). Some of these scholars define the relevant political community more narrowly than others (pluralistic and aggregative for the democratic proceduralists, rather than deliberative and participatory for republican proceduralists). Thus, while for many reconcilers constitutionalism is a procedural notion, the meaning of proceduralism differs from one group to another depending on their (substantive) conception of the political community.

While differences in reconcilers' proceduralism(s) are significant for the kind of politics they espouse, deniers are largely more constraining of politics than reconcilers. Unlike reconcilers, deniers are unapologetic about these constraints since they see them as part and parcel of their conceptions of politics and democratic self-government. These constraints are internal, integral, and constitutive of—rather than external to—politics.

C.   A Discourse of Disunity

The discourse of disunity argues that it is impossible to unite constitutionalism and democracy. Proponents of this discourse believe that there is

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[243] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 33 (2008).
[244] *Id.* at xi.

no indisputable theory that can successfully integrate judicial review in de-
mocracy. They highlight the irreducibility of disagreement, and argue that it
is misguided to pretend that disagreement can be superseded in some con-
sensual manner.[245] For some scholars, this belief in the irreducibility of dis-
agreements is not limited to the good and the just, but extends to
legitimacy.[246] If legitimacy itself is disputable, it follows that it cannot be
deployed to contain disputes about the good and the just. This Section dis-
cusses two main groups of positions within the discourse of disunity: *en-
dorsement* (which endorses judicial review despite its incompatibility with
democracy) and *dissolution* (which abolishes judicial review given its in-
compatibility with democracy).

i.   Endorsement

Endorsement positions differ substantially from the denial, reconcilia-
tion, and dissolution positions because they do not deny or attempt to recon-
cile the tension between constitutionalism and democracy; nor do they
follow the dissolution recipe for resolving the tension, which is to advocate
the majoritarian conception of democracy and annul judicial review. Argu-
ments advanced by Frank Michelman, Louis Seidman, and Laurence Tribe
exemplify this position.

a.   Frank Michelman

I earlier discussed the civic republican strand in Michelman's writings,
which militated in favor of classifying them within reconciliation positions.
Here, I examine Michelman's later writings, in which he argues that "there is
no such reconciliation to be had."[247] This position originates in "a grown-up
acceptance" of contradiction and not only "of ambivalence, complexity and
approximation."[248] Indeed, the "appreciation of hitherto denied contradic-
tion can be emancipatory."[249] Rather than a pessimistic acknowledgment of
the contradiction between human impulses of individualism and collectiv-
ism, Michelman believes that "the contradiction is [his] friend."[250] Accord-
ingly, deconstruction should not lead to relinquishing construction;
acknowledging abstraction does not dispense with rights altogether; and rec-

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[245] *See, e.g.*, JEREMY WALDRON, THE DIGNITY OF LEGISLATION 153–54 (1999).
[246] As discussed below, this extension of contestability is more forceful in the endorsers'
case than in the dissolvers' because the dissolvers ultimately offer an answer to the legitimacy
question that seeks to overcome contestability.
[247] MICHELMAN, *supra* note 50, at 32. Michelman writes, "[Dworkin's] argument seems
meant to reassure and persuade us that we really can reconcile a democratic aspiration . . . with
the practice of letting a few judges decide the applied contents of the country's basic laws. But
I think the real, darker-hued message is that there is no such reconciliation to be had." *Id.*
[248] Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*,
in NOMOS XXVIII: JUSTIFICATION 71, 84 (J. Roland Pennock & John W. Chapman eds., 1986).
[249] *Id.* at 86.
[250] *Id.* at 94.

ognizing the ambivalence of distinctions like the one between law and politics does not lead to withering them away.[251]

Michelman considers judicial review to be a liberal edifice of prudence, and not a logical necessity of liberalism.[252] Nevertheless, the centrality of the activist progressive judge, the Court, and judicial review are constant themes in his work. In his reconciliation position, it is the *dialogic* judge who enhances our freedom,[253] and in the endorsement position, it is the *responsive* judge who enhances the credibility and respectability of the legal order in the eyes of the citizens.[254] There are two crucial differences between these characterizations: First, the authority of the judge in the endorsement position is no longer derived, as in the reconciliation position, from a reification of the identity of the People;[255] and, second, in the endorsement position, judicial proclamations are not considered as public authoritative answers to the question of legitimacy.

This endorsement position vis-à-vis legitimacy warrants further discussion. Michelman argues that legitimacy *per se* is not achievable; one has to settle for a weaker idea of "legitimation-worthiness" of the general structure of authority, which can legitimate legal and political decisions and their enforcement.[256] One can approximate a public demonstration of legitimacy without ever realizing it.[257] While legitimacy is not achievable, procedural validity is insufficient because what is needed is normative validity.[258] Legitimation, then, is less than legitimacy, but more than mere procedural validity. This legitimation does not follow from a procedural idea of democracy or from an act of democratic founding by the People. Instead, democratic legitimation is impossible for three reasons: circularity, infinite regress, and "reasonable interpretive pluralism."[259]

One cannot define democracy by reference to democracy itself because that would be circular. Ultimately, one must appeal to substance to judge the procedure. And one cannot judge the respect-worthiness of a democratic process, whether constitutional or majoritarian, by reference to the respect-worthiness of a previous democratic process because that will only lead to "infinite regress."[260] Likewise, deflecting from one concrete level of controversial laws to a higher and more abstract level of basic laws merely leads to

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[251] *Id.* at 94, 89–90, 83–84.

[252] MICHELMAN, *supra* note 50, at 135.

[253] Michelman, *supra* note 214, at 75.

[254] MICHELMAN, *supra* note 50, at 58–60.

[255] *Id.* at 13.

[256] Frank I. Michelman, *Reply to Ming-Sung Kuo*, 7 INT'L J. CONST. L. 715, 726 (2009).

[257] MICHELMAN, *supra* note 50, at 8; Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 RATIO JURIS 63, 76 (2000).

[258] Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101, 115 (2003) (distinguishing between validity, legitimacy, and rightness: Laws need not be just to be legitimate and may be valid yet illegitimate).

[259] Michelman, *supra* note 257, at 70.

[260] Frank I. Michelman, *Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary*, 47 UCLA L. REV. 1221, 1240 (2000).

disagreement over the proper interpretation of these higher laws that are meant to settle the controversy in a more concrete way. And attempting to avoid this new interpretive controversy by searching for a higher level leads, again, to infinite regress.[261]

By "reasonable interpretive pluralism," Michelman means an irreducible residue of disagreement with respect to the moral justifiability of political coercion (as in disagreement over the interpretation and application of human rights).[262] Reasonable interpretive pluralism is an assumption about social life. Denying it would simply demonstrate its existence, because it would reveal the existence of disagreement between those who believe that disagreement over legitimacy is irreducible and those who do not.

Such disagreement exists between Michelman and Rawls. For Rawls, disagreement is contained amongst reasonable persons; irreconcilable conflict only persists between the reasonable and the unreasonable. For Michelman, however, disagreement is pervasive among the reasonable. For Rawls, a convergence of an overlapping consensus of differently situated, yet reasonable, substantive theories on a bill of rights makes the project of constitutional democracy possible. Under this account, controversy in modern constitutional regimes is ultimately containable through consensus on a conception of legitimacy. In contrast, Michelman doubts the possibility of convergence: Abstract constitutional essentials detached from their practical materialization are a *carte blanche*, and thus it is impossible to reach an agreement over them. Abstraction merely hides disagreement. If abstraction fails to contain disagreement, then Rawlsian convergence is not possible, and Rawlsian legitimacy fails.

Michelman does not reject proceduralism in which rightness judgments are transformed into constitutionality.[263] Instead, he believes that methods of substance-avoidance or controversy-avoidance are doomed to fail.[264] Rawlsian and Habermasian proceduralism purport to offer abstract background conditions for legal and political ordering. Yet, such procedures require substantive judgments on whether their standards are fulfilled.[265] Thus, they do not allow citizens to escape from making controversial substantive judgments that would lead to disagreement. Universalizable hypothetical acceptability of these abstract conditions is impossible even for the reasonable, given their removal from meaningful concrete materialization.

For Michelman, then, contestable substantive judgments are simply inevitable. Legitimation can follow only from juristic competence that allows

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[261] MICHELMAN, *supra* note 50, at 49–50; Michelman, *supra* note 257, at 75–76.

[262] Michelman, *supra* note 257, at 70–72; Frank I. Michelman, *Postmodernism, Proceduralism, and Constitutional Justice: A Comment on van der Walt and Botha*, 9 CONSTELLATIONS 246, 246–47 (2002).

[263] *See, e.g.*, Frank I. Michelman, *A Reply to Baker and Balkin*, 39 TULSA L. REV. 649, 658 (2004).

[264] *See, e.g.*, Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1, 13–14 (2003); Michelman, *supra* note 214, at 122–24.

[265] Michelman, *supra* note 257, at 67–68.

such judgments based on a chosen set of principles. Constitutionalism means the existence of *a priori* non-negotiable normative principles that inform a jurist's understanding of the regime as democratic and in compliance with human rights principles.[266] Only such substantive judgments can solve the problem of infinite regress and allow the jurist to judge the regime. Such principles also inform the so-called proceduralist accounts. These principles lead Michelman to endorse a substantive conception of democracy, understood as social democracy.[267]

While Michelman's endorsement position does not necessarily conflict with the other camps on these normative principles, disagreements follow three interrelated themes. First is the question—debated mainly with the deniers and reconcilers—of whether these principles can be inscribed in, or deduced from, noncontroversial notions of democracy or procedure in order to grant legitimacy to the political regime. Second is the debate between endorsers and dissolvers regarding whether the negative answer to the previous question should lead to relinquishing existing arrangements. Third is the debate regarding who "authors" these principles: the *judge* (Dworkin); the *People* (Ackerman); or *individual reason* (Michelman).

That is, for Michelman, there is no public author. Individual reason leads to these principles, but reason cannot preclude disagreement with other reasonable individuals.[268] Unlike with ordinary individuals, disagreement among judges causes a problem for justice. One cannot rely on judicial authority to declare for her the respect-worthiness of the regime under which she lives.[269] Ultimately, this is a judgment for which the individual must take responsibility.[270] Of course, the individual may still consider others' views vis-à-vis the regime in making her own assessment.[271]

Michelman concludes that reason can establish *a priori* normative principles to guide judgments regarding the legitimation-worthiness of a political regime.[272] This position owes a debt to both Kant and Kelsen because it recognizes the necessity of grounding judgments in purely logical principles.[273] Michelman's position, then, differs from the reliance in the discourse

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[266] *Id.* at 66; MICHELMAN, *supra* note 50, at 50.

[267] Michelman, *supra* note 20; *see also* Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 33 (2003) (claiming that a conception of democracy that does not include social rights is a poor conception of democracy).

[268] *See, e.g.*, Michelman, *supra* note 260, at 1243.

[269] Michelman, *supra* note 31, at 351.

[270] Michelman, *supra* note 257, at 66–67.

[271] Michelman, *supra* note 256, at 729–30.

[272] *See* Michelman, *supra* note 257, at 66–67.

[273] KANT, *On the Common Saying*, *supra* note 36, at 86. Kant writes:

But reason provides a concept which we express by the words *political right*. And this concept has binding force for human beings who coexist in a state of antagonism produced by their natural freedom, so that it has an objective, practical reality, irrespective of the good or ill it may produce (for these can only be known by experience). Thus it is based on *a priori* principles, for experience cannot provide

of unity either on history (avoidance positions) or on factual judgments (decentering positions). Unlike Kant, Michelman denies that public reason can converge over these principles. Like Kelsen, he claims that one needs to be a "believer" in constitutionalism because no other "objective" way exists.[274] Once one believes in constitutionalism, individual justifications can multiply and there is no need to converge on an objective (i.e., publicly demonstrable and deductively provable) normative justification. The emphasis moves from consensus on a *shared justification* to consensus on *compliance* based on individualized justifications.[275] Citizens may have diverging reasons for collaborating with freedom-guaranteeing public institutions. Nonetheless, liberal legal and political ordering is possible so long as citizens—who recognize the importance of government under law—comply with and maintain these institutions. Michelman, then, abandons the quest for consensus-based public justification in liberalism without abandoning the idea that liberal reason—though it cannot command consensus—justifies public institutions of freedom.

b. Louis Seidman

Seidman presents another version of the endorsement position. Like Michelman, he sees political conflict as intractable and rejects theoretical attempts to contain this conflict.[276] In fact, he believes conflict should be

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> knowledge of what is right, and there is a *theory* of political right to which practice must conform before it can be valid.

Id. (emphasis in original); Hans Kelsen, *The Function of the Constitution*, *in* ESSAYS ON KEL-SEN (Richard Tur & William Twining eds., 1986) (arguing that grounding the validity of a lower legal norm in a higher norm leads to infinite regress, and that the only way to block this regress is to presuppose a basic norm that would grant validity to the whole legal system). Kelsen writes:

> It is the 'basic' norm, because no further question can be raised about the basis of its validity; for it is not a posited but a presupposed norm. It is not a positive norm, posited by a real act of will, but a norm presupposed in juristic thinking. It represents the ultimate basis of the validity of all the legal norms forming the legal order. Only a norm can be the basis of the validity of another norm.

Id. at 115. Using Kantian terminology, Kelsen describes his move as providing "the transcendental-logical condition of the judgments with which legal science describes law as objectively valid." *Id.* at 116.

  [274] Kelsen analogizes grounding the validity of the legal system in the basic norm to religious thinking: "[A]s a believer, one presupposes that one ought to obey the commands of God. This is the statement of the validity of a norm that must be presupposed in a believer's thinking in order to ground the validity of the norms of a religious morality." Kelsen, *supra* note 273, at 112.

  [275] *See* Michelman, *supra* note 31, at 353 (explaining that "Hobbes's thesis" requires voluntary compliance with the laws in exchange for enjoying the benefits from collective organization in a political community); *id.* at 358 (explaining that believing in "the great goods of government by law, along with Hobbes'[s] thesis, provides the major premise for . . . a legitimation project"); *id.* at 364–65 (comparing his approach with Rawlsian "overlapping consensus").

  [276] SEIDMAN, *supra* note 176, at 7–8.

celebrated, as he considers stasis to be the real risk.[277] Thus, scholars and judges should reorient their perception of the role of constitutional law towards unsettlement. Entrenching political settlements through constitutional law is inadequate because it means excluding losers from the political community.[278] Unsettlement sends a message of inclusiveness because nothing is final or fixed.[279] Judicial review can play a major role in unsettlement.[280] It simply must avoid pretending to rule according to neutral or apolitical constitutional principles.[281] Thus, unsettlement theory is mainly a change of attitude and does not require serious changes in existing arrangements.[282]

Like Michelman, Seidman's position questions the Rawlsian ideas of reasonable pluralism and overlapping consensus.[283] For Seidman, there is nothing more than *modus vivendi* in politics; it is a dangerous posture to claim otherwise.[284] Indeed, if there is any potential overlapping consensus, it will be around *disagreement*, rather than agreement on a fixed and stable settlement of any sort.[285]

c.   Laurence Tribe

Tribe presents a third version of the endorsement position. He calls the search for objective grounds for constitutional law and judicial review the "futile search for legitimacy."[286] For Tribe, every exercise of power is problematic and suspect. Theories legitimating exercises of power are dangerous because they conceal the problematic nature of exercising power and silence

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[277] *Id.* at 56.

[278] *Id.* at 44.

[279] The openness for unsettlement, however, is no comfort for losers in the face of settled injustice. *See* Brannon P. Denning, *Against (Constitutional) Settlement*, 19 Const. Comment. 781, 789 (2002) (reviewing Seidman, *supra* note 176).

[280] Seidman, *supra* note 176, at 62, 83–84.

[281] *Id.* at 38–39.

[282] *Id.* at 75, 180.

[283] *Id.* at 32.

[284] For a somewhat similar example of a neo-Hobbesian value-pluralist position, see John Gray, Two Faces of Liberalism 5–6 (2000).

[285] Seidman's arguments resemble Roberto Unger's. *See* Roberto Mangabeira Unger, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy 530 (1987) (arguing that citizens should be granted "destabilization rights" to disrupt concentrations of power and well-established institutions). Yet, Seidman claims that his position is different because he thinks "that ordinary legal institutions currently in place have the capacity to serve the unsettlement function" without recourse to institutional changes. Seidman, *supra* note 176, at 57.

[286] Laurence H. Tribe, Constitutional Choices 5 (1985). Tribe writes:

[A] sense of the ultimate futility of the quest for an Archimedean point outside ourselves from which the legitimacy of some form of judicial review or constitutional exegesis may be affirmed. Even if we could settle on firm constitutional postulates, we would remain inescapably subjective in the application of those postulates to particular problems and issues. For, at *every* level of constitutional discourse . . . there is no escape from the need to make commitments to significant premises. And these may be premises that others do not share . . . .

Id. (emphasis in original).

doubts.[287] Tribe sees legitimacy neither as the uncontested premise, nor the product of constitutional practice.[288] Rather, the search for legitimacy should be abandoned altogether, because it is better to leave the tension apparent.[289]

Like Michelman, Tribe rejects the "pretense of proceduralism" in which substance and subjectivity are denied.[290] Disagreement is not limited to the meaning of constitutional norms, but extends to the "very identity" of the authoritative legal materials ("the Constitution").[291] On both these levels of disagreement there are no "objectively deduced or passively discerned in a viewpoint-free way. . . . single 'answer[s]' [that are] readily available."[292] There is no escape from the need to make choices and take "responsibility for choice."[293] For Tribe, these choices are egalitarian.[294]

Yet, Tribe is wary of the possible nihilistic implications of his view and emphatically rejects nihilism.[295] He stands somewhere between the "rule of law" and the "rule of men"; between an impartial order and an order based on nothing but unconstrained personal preferences of judges; and between those who believe in determinacy and those who see constitutional practice as hopelessly indeterminate. He neither endorses the first nor wholly denies the second.[296] Tribe, like Michelman and Seidman, does not see such con-

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[287] *Id.* at 6–7.

[288] *Id.* at 273 n.9.

[289] *Id.* at 7; *see also* Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 437 & n.17 (1983).

[290] TRIBE, *supra* note 286, at 28.

[291] *Id.* at 25.

[292] *Id.* at 26.

[293] *Id.* at 26, 44.

[294] For instance, Tribe supports the redistribution of property, *id.* at 165–87, affirmative action, *id.* at 221, and sex equality, *id.* at 238. For some scholars, however, it is not clear how these choices are made. *See* L. A. Powe, Jr., *Making the Hard Choices Easy*, 11 AM. B. FOUND. RES. J. 57 (1986) (reviewing TRIBE, *supra* note 286). According to Powe, "a reader gets surprisingly little feel for how choices are *really* made. Despite Tribe's disclaimer of certainty . . . the choices look and sound very easy for Tribe." *Id.* at 75 (emphasis in original).

[295] TRIBE, *supra* note 286, at 3. "Nihilism" implies the denial of the availability of rationally-compelling statements about the world (epistemologically); the denial of the availability of rationally-compelling answers to the question of the good life (in morality); and the denial of the availability of rationally-compelling renditions of legal practice (in law). *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 4–5 (1984). More concretely, in legal theory nihilism is associated with the claim that the law is incoherent, and thus all generalizations about legal practice are invalid. Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1309 (1979). Tribe himself came close to this nihilist position in his decision not to publish the projected second volume of the third edition of his treatise on constitutional law because he concluded that constitutional practice has become contradictory to the extent that a synthesis is no longer possible at this particular time. Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 294–95 (2005). For Tushnet's reaction to this decision, see Mark Tushnet, *Treatise Writing During Constitutional Moments*, 22 CONST. COMMENT. 251 (2005).

[296] TRIBE, *supra* note 286, at 4. Tribe writes:

  For all the writing and work I do ventures repeated acts of faith that more is at stake than that; that constitutional interpretation is a practice alive with choice but laden with content; and that this practice has both boundaries and moral significance not

clusions as necessarily damaging for the continuation of the practice of judicial review itself. Indeed, elsewhere Tribe defends the legitimacy of judicial review, not only on democratic grounds as the enforcer of the People's own constitutional commitments but also as light unto the nation's.[297] Indeed, "[t]he whole *point* of an independent judiciary is to be 'antidemocratic,' to preserve from transient majorities those human rights and other principles to which our legal and political system is committed."[298]

Tribe, Seidman, and Michelman, then, occupy a distinct position within the field. Whereas deniers, reconcilers, and dissolvers all arrive at a degree of closure with respect to the conceptual controversy, the endorsement position rejects such closure on either side of the debate and declines to make such grand theoretical claims.[299]

ii.   Dissolution

The second position in the discourse of disunity is dissolution. Dissolution resolves the tension by practically forgoing constitutionalism as understood by the discourse of unity and embracing majoritarianism. Dissolution is a mirror image of the discourse of unity. Denial and reconciliation are anti-majoritarian, while dissolution is majoritarian.[300] The denial position posits that conceptual clarity leads to unity of the concepts; the dissolution position contends that it leads to disunity.[301] Both the denial and reconciliation positions argue for the removal of fundamental issues like basic rights or procedural fairness from politics; the dissolution position rejects this removal. Denial and reconciliation positions constrain democratic politics; the

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wholly reducible to, although never independent of, the ends for which it is deployed.

Id. Such an intermediary position led one commentator to observe that the "approach of not taking an approach is not illuminating." Richard A. Posner, *The Constitution as Mirror: Tribe's Constitutional Choices*, 84 Mich. L. Rev. 551, 553 (1986) (reviewing Tribe, *supra* note 286). Posner argues that Tribe does not acknowledge the "political character of his own premises," and that his policy choices are "based on will and emotion." *Id.* at 561, 564.

[297] Laurence H. Tribe, Jeremy Waldron & Mark Tushnet, *On Judicial Review*, Dissent, Summer 2005, *available at* http://www.dissentmagazine.org/article/?article=219. Tribe's statement is a reply to Mark Tushnet, *Democracy Versus Judicial Review*, Dissent, Spring 2005, *available at* http://www.dissentmagazine.org/article/?article=248.

[298] Tribe, *supra* note 63, at 80 (emphasis in original).

[299] This position is influenced by Legal Realism and Critical Legal Studies. Indeed, Tushnet had reached a similar conceptual position in the 1980s claiming that judicial review is both necessary and impossible. Yet, when it emanates from within the liberal field, the position is often more optimistic than in its critical form. *See* Mark Tushnet, *Constitutionalism and Critical Legal Studies*, *in* Constitutionalism: The Philosophical Dimension 150 (Alan S. Rosenbaum ed., 1988). For another possible candidate for the endorsement position, see Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. Rev. 1103, 1111–12 (1983) (advocating "eclectic liberalism"). Shiffrin criticizes the "desire for security [that] triumphs over the willingness to live with and appreciate ambiguity." *Id.* at 1192.

[300] *See supra* Part II.B.i.a (discussing incorporation); *supra* Part II.B.i.c (discussing avoidance).

[301] *See supra* Part II.B.i.b (discussing clarification); *see also* Waldron, *supra* note 38, at 303.

dissolution position argues for unconstrained democratic politics. Denial and reconciliation positions support judicial review; the dissolution position rejects judicial review. Denial and reconciliation positions are arguments for an existing practice; the dissolution position is an argument against this practice.

Indeed, the dissolution position critiques avoidance tactics (like Ackerman's) by rejecting the distinctions between two realms of politics or two forms of expression of popular will. There are two main expressions of this rejection: *unqualified proceduralism* (for which the justification for majoritarianism is rights-based) and *populism* (for which the justification for majoritarianism is participation-based).

a.   Unqualified Proceduralism

Jeremy Waldron—a prominent exponent of the dissolution position—is a majoritarian proceduralist.[302] He opposes constraining majorities by higher law; argues that citizens and their representatives should decide the procedures to resolve conflicts regarding rights (including determinations of which rights citizens should have); and defends legislative sovereignty.[303] He offers two objections to the constitutional conception, a principled rights-based argument and a more pragmatic one. The former takes the liberal view of human agency to its logical end: The tension is not between rights and democracy, but between constitutional rights enforced by judicial review and democracy. Entrenchment of rights means constitutional immunity and corresponds to the disabling of citizens and their representatives, rendering the regime anti-democratic. According to this view, entrenchment is based on a "predatory view" of human nature and sends a message of mistrust that contradicts individual moral autonomy. If the individual is to be trusted as a bearer of rights, then the same individual should be trusted as a bearer of political responsibilities.[304] Waldron, then, makes an opposite move to the incorporation strand in denial. Whereas Dworkin shifts the dis-

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[302] Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 39 (1993); *see also* WALDRON, *supra* note 38, at 160. Waldron rejects qualified majoritarianism and argues for pure majoritarianism. The former reproduces conflicts regarding considerations of justice and thus does not advance settlement of disagreements. *Id.* at 198. For an example of a qualified majoritarianism, see Carlos Santiago Nino, *A Philosophical Reconstruction of Judicial Review*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 285–332 (Michel Rosenfeld ed., 1994). Nino starts as a dissolver but he ends up as a reconciler.

[303] For the roots of this view in the British tradition of constitutionalism, see A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (MacMillan & Co. 10th ed. 1961) (1885); Ulrich K. Preuss, *The Political Meaning of Constitutionalism*, *in* CONSTITUTIONALISM, DEMOCRACY AND SOVEREIGNTY: AMERICAN AND EUROPEAN PERSPECTIVES 11–27 (Richard Bellamy ed., 1996) (explaining that, in the British tradition, the protection of rights is ensured by relations of cooperation between the different parts of the parliament rather than by a court).

[304] Waldron, *supra* note 302, at 27–28; *see also* WALDRON, *supra* note 38, at 282; Waldron, *supra* note 71, at 1366.

cussion into one internal to democracy, Waldron shifts it into one internal to constitutionalism.

In contrast to positions within the unity discourse, Waldron asserts that disagreement is a fact at all levels of political debate, demonstrating the unity discourse's failure to secure a consensual theory of authority. Indeed, rights theorists themselves disagree both about what counts as rights and the content of these rights.[305] Resolving disputes about rights by recourse to theories of authority merely reproduces these disagreements.[306] Eventually, disputes about authority—"disagreements about how to settle disagreements"—must be settled by a majoritarian procedure.[307] By claiming that rights themselves are controversial and thus cannot trump majority decisions, Waldron specifically argues against Dworkin.[308] To the extent that Dworkin thinks that disagreements about justice can be contained by "integrity" that seeks coherence in the political community, Waldron thinks that disagreements about what justice requires extend to whether—and if so how—justice should be balanced against integrity.[309]

Furthermore, Waldron believes justice cannot be the "first virtue of social institutions"—as Rawls claims in *A Theory of Justice*[310]—because even reasonable people can disagree about justice.[311] The Rawlsian notion of overlapping consensus cannot contain disagreements on justice because justice can be derived from citizens' conception of the good, and different conceptions are unlikely to converge on a single list of rights.[312] Furthermore, self-binding theorists who argue for rationally imposed commitments ignore disagreement about these very commitments.[313] Consensus over constitutional rules is impossible because people disagree about what reason requires. Finally, even if everyone agrees that representative political institutions suffer from ailments—as Ackerman and Amar, for instance, point out—such agreement should not lead to excluding citizens from participation and handing decision-making to a small group of judges to decide what the ailments are.[314]

Unlike the pluralist scholars who understand politics as a self-interested pursuit, and deliberative democrats who conceive of politics as a moral con-

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[305] Waldron, *supra* note 302, at 30.

[306] *Id.* at 32.

[307] *Id.* at 40.

[308] *Id.* at 33.

[309] WALDRON, *supra* note 38, at 197–98.

[310] RAWLS, JUSTICE, *supra* note 25, at 3.

[311] WALDRON, *supra* note 38, at 160–61.

[312] *Id.* at 161–63.

[313] Waldron, *supra* note 302, at 47–49; Jeremy Waldron, *Precommitment and Disagreement*, *in* CONSTITUTIONALISM, *supra* note 176, at 285, 292; *see also supra* Part II.B.i.b (discussing "self-binding" theory within clarification).

[314] Waldron, *supra* note 302, at 44–45.

vergence over the common good,[315] Waldron understands politics as a good-faith disagreement over principle "all the way down"[316] where "everything is up for grabs."[317] Nonetheless, Waldron does not argue that everything is permissible in politics—or that whatever is decided in a majoritarian process is democratic—and shares the liberal constitutionalist objective of "slowing-down" politics.[318] "Democracy and majority-decision," Waldron writes, "make moral sense only under certain conditions."[319]

The pragmatic argument against judicial review further explains these conditions. The argument is both process- and outcome-related. In terms of process, the practice of settling disputes about rights, justice, and democracy by allowing a few unelected judges—who settle their internal disagreements by a majority vote—to review the enactments of elected legislators violates principles of political equality and representation, and is therefore "illegitimate."[320] The outcome-related argument stipulates that entrenchment of rights leads to textual rigidity, formalism, and concern with the legitimacy of judicial decisions, which are detrimental to substantive outcomes.[321] These two prongs of the pragmatic argument are conditioned upon four assumptions: (i) the existence of well-functioning democratic institutions; (ii) a well-functioning court system; (iii) a commitment to individual and minority rights; and (iv) the existence of disagreements about rights in society.[322] The lack of these conditions renders Waldron's argument against judicial review, and for unqualified proceduralism, inapposite.

b. Populism

The second discursive strand within the dissolution position is populism, of which Richard Parker and Mark Tushnet are two prominent proponents. Like Waldron, populists reject judicial review. Unlike Waldron's unqualified proceduralism, however, populism emphasizes participation of ordinary citizens more than rights. The populist argument aims to improve the democratic process by promoting ordinary political energy among the People, rejecting the removal of issues from political debate, and rejecting attempts at impeding majority rule.[323] For the populist, political freedom

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[315] For an example of pluralist scholars, see *supra* notes 188–201 and accompanying text discussing Ely's views. For an example of deliberative democrats, see *supra* Part II.B.ii.b discussing Michelman's republican proceduralism. *See also* discussion *infra* Part III.C.

[316] WALDRON, *supra* note 38, at 295.

[317] *Id.* at 303–05.

[318] *Id.* at 305–06; *see also* Waldron, *supra* note 302, at 46.

[319] WALDRON, *supra* note 38, at 283.

[320] Waldron, *supra* note 71, at 1353.

[321] *Id.* at 1381.

[322] *Id.* at 1359–69.

[323] Richard D. Parker, *Seegers Lecture: "Here, the People Rule": A Constitutional Populist Manifesto*, 27 VAL. U. L. REV. 531, 574, 578–79 (1993).

means "political equality, popular sovereignty and, therefore, majority rule."[324]

Parker contrasts his populist position with the "liberal" position: The former argues for equality in political agency; the latter justifies inequality in political agency by supporting judicial review.[325] Parker argues that the "central mission . . . of modern constitutional law . . . ought to be to promote majority rule."[326] He attacks what he calls the Anti-Populist sensibility, which associates the majority with connotations like intolerance, irrationality, emotionality, and irresponsibility and aims at taming ordinary politics.[327] The Populist sensibility that Parker espouses attacks both political passivity and derision of ordinary political energy.[328] For him, the Anti-Populist fetishizes constitutional law and the Court, while the Populist seeks disenchantment from constitutionalism. He rejects "oracles of . . . law," arguing that judges should be ordinary people; courts should be politicized; and, at times, judicial decrees should be disobeyed. In the long run, law cannot control politics.[329] Constitutionalism, then, is a fantasy providing losers in political conflict with false guarantees.

Parker's populism, however, might be considered illiberal (and thus outside this project's mapping).[330] Parker invokes "honor" as a "moral sentiment" and a "social code" that dictates respect amongst citizens.[331] In contrast, Waldron is a liberal individualist who sees reason as a constraint on

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[324] Richard D. Parker, *Five Theses on Identity Politics*, 29 Harv. J.L. & Pub. Pol'y 53, 53 (2005).

[325] It should be noted, however, that the constitutional populists discussed here lack the populist sensibility against private power, and focus only on public power. *See* Balkin, *supra* note 20, at 1946 n.29 (noting this focus with respect to Parker's work); Seidman, *supra* note 20, at 567–68 (making a similar point with respect to Tushnet's work).

[326] Parker, *supra* note 323, at 573.

[327] *Id.* at 553–55.

[328] *Id.* at 556–57.

[329] *Id.* at 564–65, 581–83.

[330] Balkin includes Parker within the left-liberal camp composed of progressives and populists. Balkin, *supra* note 20, at 1943 n.23 (mentioning Parker's support for constitutional populism); *id.* at 1944 ("An opposition between progressivism and populism exists wholly within left-liberal discourse . . . ."). However, Parker's arguments seem to evoke four strands that, taken together, lead him outside the left-liberal camp: (i) Rousseau-esque romanticism (explaining the centrality of the term "sensibility"), see, for example, Irving Babbitt, Rousseau and Romanticism (1919); (ii) an anti-Nietzschean posture faulting the morality of the few that excludes the majority from governance; for Nietzsche's views, see Friedrich Nietzsche, On the Genealogy of Morality (Keith Ansell-Pearson ed., Carol Diethe trans., 1994); (iii) a romantic view of the People as a historic organic whole that goes back to Herder, see, for example, Johann Gottfried Herder, Another Philosophy of History and Selected Political Writings (Ioannis D. Evrigenis & Daniel Pellerin trans., 2004); and (iv) a Schmittian view of the sovereignty of the People as extending outside the rule of law, see, for example, Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab trans., 2005).

[331] Richard D. Parker, *Democratic Honor: Liberal and Populist*, 39 Harv. C.R.-C.L. L. Rev. 291, 298–99 (2004). Parker claims that the "populist democratic impulse vastly extends access to the experience of honor." *Id.* at 305. Respect amongst citizens, according to this view, emanates from honor and not from external constraints imposed on them. Such constraints are disrespectful to citizens. *Id.* at 299–300.

the passions. Furthermore, Waldron's work lacks the anti-elitist sensibility of Parker's populism.

Tushnet, discussed above within the reconciliation positions, has expressed a populist position in other writings that is more clearly within the progressive liberal field.[332] Like Parker, Tushnet calls his approach populist because "it distributes responsibility for constitutional law broadly."[333] He argues that "the Constitution belongs to us collectively" and not to lawyers and judges.[334] Judicial constitutional interpretation "has no special normative weight."[335] Unlike popular constitutionalists in the reconciliation positions, Tushnet and Parker aim not merely to weaken the interpretive authority of judicial pronouncements, but to erase the distinction between judicial and non-judicial formations of constitutional meaning.

Tushnet distinguishes between a "thick" Constitution and a "thin" Constitution. Populist constitutional law discusses and defends a "thin" Constitution of fundamental principles exhibited in the Declaration of Independence and the Preamble of the United States Constitution.[336] Proponents of this approach "believe[ ] that the public generally should participate in shaping constitutional law more directly and openly."[337] Thus, Tushnet defines populist constitutional law as "a law committed to the principle of universal human rights justifiable by reason in the service of self-government."[338] For Tushnet, there is no contradiction between universal human rights and populist constitutionalism.[339] While the People might make bad decisions, this is no different than judges and courts.[340]

Waldron, Parker, and Tushnet defend positions that make them dissolvers who reject the rule of judges. As such, dissolution is a distinct position from all the other positions. Whereas deniers and reconcilers overcome the tension between constitutionalism and democracy, dissolvers see irreconcilable tension. Whereas endorsers consider it an insoluble tension, dissolvers insist that it is soluble. Unlike reconcilers that are concerned with interpretive supremacy and finality of judicial review, dissolvers attack the very legitimacy of judicial review. Rather than being an argument for modifying judicial review or changing its relative status in the general power scheme, as in some of the reconciliation strands, the dissolution position is an argument for the abolition of judicial review.

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[332] *See supra* note 243 and accompanying text.

[333] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS x (2000).

[334] *Id.* at 181–82.

[335] *Id.* at x.

[336] *Id.* at 9–14.

[337] *Id.* at 194.

[338] *Id.* at 181.

[339] Even radical measures, such as the nationalization of property, are consistent with American political philosophy. *See id.* at 190.

[340] *Id.* at 186.

c.   Summary of Disunity Positions

Endorsers and dissolvers employ two different notions of impossibility or disunity. For the dissolvers, impossibility encompasses the conceptual and practical; for the endorsers, impossibility is confined to the realm of conceptual demonstration and is not extended to prescriptive recommendations. In other words, for the endorsement position, the conceptual disunity does not dictate any determinate course of action. Thus, the positions articulated by Michelman, Seidman, and Tribe do not lead them to dispense with judicial review like the dissolvers; instead, they embrace judicial review despite the conceptual disunity. Unlike Dworkin's harmonious system in which tensions disappear without any tradeoffs, endorsers are value-pluralists who argue that the persistence of the tension necessitates choices. Their choice is to endorse judicial review.

Endorsement, in turn, takes an intermediary position between unity positions and dissolution. While proponents of endorsement differ from the supporters of the discourse of unity by rejecting their conceptual positions and many of their justifications, endorsers' institutional prescriptions nonetheless end up in the same camp. The proponents of endorsement practically live with, more or less, the same arrangements that deniers and reconcilers accept. The main difference between unity and endorsement is the form of justification offered for constitutionalism and the weight given to this form. Despite different justificatory exercises they are institutionally similar.

Consequently, the division between unity and disunity does not correspond to the division or competition between the two conceptions of democracy (majoritarian and non-majoritarian). The endorsement position does not necessarily espouse a majoritarian conception. Dissolution, however, entails a majoritarian conception.

D.   Summary: A Mapping

The preceding discussion has presented a complex structure of the field of progressive liberal constitutional theory by surveying the central debate concerning the tension between constitutionalism and democracy. I have attempted to show the different parts that constitute the whole of the field and how these parts relate both to each other and to the whole. The following charts give a summary and a general overview of the field, while highlighting prominent trends inside it.
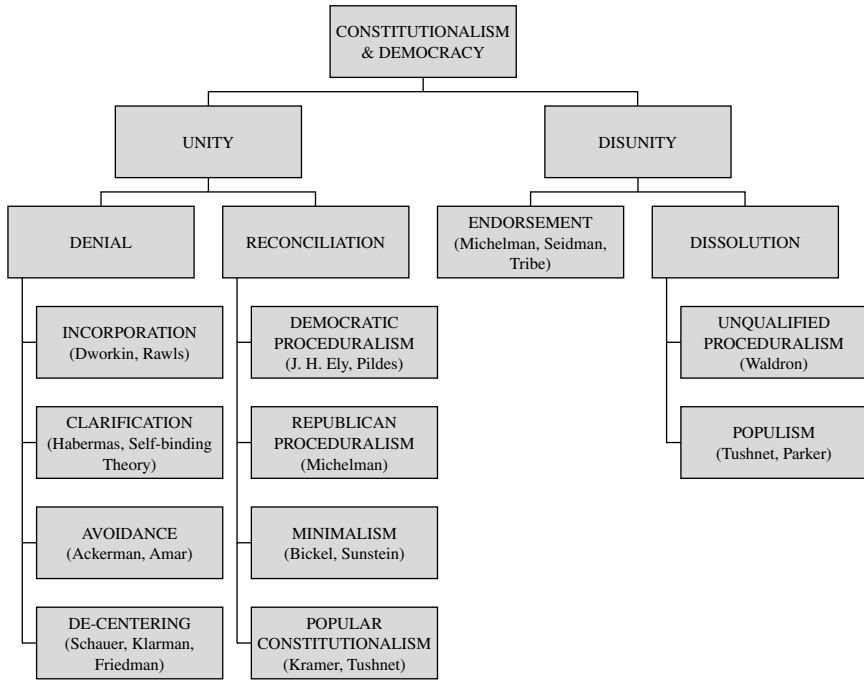
FIGURE 2: MAPPING PROGRESSIVE LIBERAL CONSTITUTIONAL THEORY

Figure 2 presents a concrete illustration of the discursive structure. Starting from the question of the perceived tension between constitutionalism and democracy, the chart shows how scholarly positions diverge into two meta-groups. These meta-groups are fragmented into four groups. These four groups, in turn, are fragmented into several sub-groups. Well-defined cohorts of scholars occupying a specific field of inquiry and addressing a similar question populate each of these meta-groups, groups, and sub-groups.

CONSTITUTIONAL   CONSTITUTIONAL
     DEMOCRACY   DEMOCRACY

FIGURE 3: RELATIONSHIPS: PROGRESSIVE LIBERAL
CONSTITUTIONAL THEORY

   While Figure 2 aims to map the whole of the discursive field, Figure 3
focuses on relations among the main groups that comprise the whole. Figure
3 shows the basic dichotomy between unity and disunity as opposing camps
or meta-groups. Within each camp, it shows the two groups that make up
the camp. The dotted, double, and bold lines in Figure 3 indicate increasing
degrees of separation between the groups. The dotted line in between denial
and reconciliation in the unity camp represents the narrow gap between the
two positions. The double line between endorsement and denial shows the
marked difference between the group in the disunity camp and that in the
unity camp. The former rejects the conceptual unity of constitutionalism and
democracy as advocated by the latter. Yet, these differences do not over-
shadow the similarity. Indeed, the tag "constitutional democracy" above
endorsement positions is the same as the one around the denial and reconcil-
iation positions. The bold line surrounding the dissolution group shows that
this group is different from all other groups in its rejection of constitutional

democracy and in that it embraces majoritarian proceduralism. It also shows the isolation of this group given this difference.

E. Convergence

These aforementioned positions seem to move on a linear spectrum from constitutionalists to democrats, or from believers in the conceptual unity of constitutional democratic regimes to non-believers. More concretely, the spectrum moves from constitutional democrats whose faith seems unshakeable (deniers); to weak skeptics whose skepticism quickly evaporates into solid faith in the unity of the concepts (reconcilers); to strong skeptics whose skepticism of the concepts' compatibility constantly looms, yet never develops into a full-scale practical disbelief (endorsers); to active non-believers (dissolvers). Within this typology, only the endorsers do not attempt to close the debate. From this perspective, believers and non-believers appear as two sides of the same coin.

Within this spectrum, however, some positions converge. On a first reading, denial and reconciliation are two distinct positions, but when closely examined, these positions collapse into each other: The difference between deniers and reconcilers is really only a temporal matter—the presumed reconciliation between constitutionalism and democracy occurs at different points of time. For the deniers, it occurs at the beginning of the intellectual journey; for the reconcilers, it occurs at the end of the intellectual journey. In other words, unity positions are *all* reconciliatory. The difference between them is between the already-reconciled (i.e. the *state* of being reconciled) and the soon-to-be reconciled (i.e. the *act* of reconciling). Deniers present a state of affairs in which reconciliation is unnecessary because they dismiss the tension between constitutionalism and democracy, whereas reconcilers provide reconciliatory theories because they acknowledge the tension.

Furthermore, unity positions are *all* denial positions. Temporally, denial occurs either *ab initio* (for the deniers) or *post factum* (for the reconcilers). In psychological terms, these positions correspond to the difference between two forms of denial: wholesale denial (denying the existence of the tension) and minimization (initially acknowledging the tension, but such admission is not daunting because eventually scholars solve it rather easily).[341] Ultimately, the difference between denial and reconciliation is a matter of degree, not kind.

Another interesting feature of this typology is that the tension between constitutionalism and democracy—which pits the pro-constitutionalists

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[341] For denial as a defense mechanism see, for example, ANNA FREUD, THE EGO AND THE MECHANISMS OF DEFENCE (rev. ed. 1966). For the distinction between wholesale denial (or denial of fact) and minimization (or denial of impact), see, for example, THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES 114 (David Sander & Klaus R. Scherer eds., 2009).

against the pro-democrats—is not only external across the groups of positions but also internal to them. Recall that within the dissolution positions, one line of justification is rights-based, as in Waldron's unqualified proceduralism, while the other emphasizes participation, as in Tushnet's populism. Likewise, the denial positions are, in general, inclined to rights-based justifications, whereas the reconciliation positions are more participation-based. More importantly, some denial positions are relatively more inclined to rights-based justifications, like Dworkin's incorporation, while others are more inclined to participation, like Ackerman's avoidance.

Furthermore, both sides of the debate mirror each other's accusations, namely, reification and fetishism.[342] For instance, constitutional democrats like Ackerman argue that reducing the People to the representative system and denying the transformative agency of popular sovereignty is a process of reification.[343] Others, like Dworkin, argue against the majoritarian model's reduction of moral agents into mere statistics.[344] This alleged reification leads, in turn, to the additional charge of fetishism. From Ackerman's perspective, the representative system becomes fetishized because it is treated as if it stands for the People; from Dworkin's perspective, fetishism occurs when the part (majority-rule) stands for the whole (genuine democracy) as if it were endowed with binding powers. These constitutional democrats hope to de-fetishize majoritarian democracy by advocating for popular sovereignty (Ackerman) or democratic self-government (Dworkin) and defending judicial review and constitutional constraints in general. Similarly, majoritarians like Tushnet and Parker accuse constitutionalists of reifying constitutionalism by divorcing the "rule of law" from the "rule of men," and thus fetishizing constitutionalism by falsely elevating it above the fury of ordinary politics.[345] Majoritarians hope to defetishize constitutionalism by abolishing higher law and annulling judicial review. Thus, by disenchantment with constitutionalism, majoritarians risk fetishizing the People; by disenchantment with the People, constitutionalists risk fetishizing constitutionalism.

Taking this mirrored and linear debate, Part III suggests that the tension between constitutionalism and democracy is irreconcilable because the two concepts are essentially contestable and thus can reasonably lead to contradictory conclusions. Part IV suggests that only by collapsing the distinction between the concepts and ignoring this contestability can scholars "resolve" the contradiction.

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[342] *See supra* notes 154, 164.

[343] *See supra* text accompanying note 168 (discussing Ackerman's position).

[344] *See supra* text accompanying notes 108–11 (discussing Dworkin's position).

[345] *See* Parker, *supra* notes 325–29 and accompanying text; Tushnet, *supra* note 297 ("Liberals were unbelievers for the first half of the twentieth century and then got religion during the short period when liberals dominated the Court. The Supreme Court and judicial review are false gods, and liberals should return to their unbelief.").

III. From Contestability to the Paradox

Justification and reason, two interrelated motifs of liberalism, wend their way through this discussion of the alleged contradiction of constitutional democracy. The complex relationship between post-Enlightenment liberalism and reason, in turn, gives rise to two additional issues: first, the nature and origin of contradictions in general, of which this particular contradiction is only an example (the focus of sections A to D below); second, the prospects and the possible methods for resolving them (the focus of Section E).

A. The Essential Contestability of Concepts and the Good Life

Contemporary disagreements about the relationship between constitutionalism and democracy exemplify the amenability of foundational concepts in liberalism to different positions. Some scholars explain this amenability by distinguishing between Enlightenment and post-Enlightenment liberals in their approaches to reason.[346] For most Enlightenment liberals, the free application of universal reason leads to moral and political consensus because reason can unveil truth, and morality can be deduced from rationality.[347] Post-Enlightenment liberal scholars, however, recognize that reason does not necessarily lead to moral truths and that rational disagreement is an integral part of the human condition.[348] Both post-Enlightenment liberals and their predecessors believe that public political justification is possible by virtue of reason. Where the two groups differ is in how they explain the possibility of convergence on political justification, given the level of disagreement inherent in any political community.[349] As the preceding discussion reveals, contemporary liberals are deeply divided on how to explain the convergence on acceptable notions of legitimate political ordering and thus proffer various ways to political justification.

The notion of conceptual contestability emerges against the backdrop of these fragmented liberal approaches to reason and the post-Enlightenment recognition of the limits of rational inquiry.[350] W. B. Gallie argues in a fa-

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[346] *See, e.g.*, Gerald F. Gaus, Contemporary Theories of Liberalism 1–22 (2003); Rawls, Political Liberalism, *supra* note 25, at xviii (distinguishing his own work from Enlightenment liberalism).

[347] Gaus, *supra* note 346, at 4–5. A major representative of this line of thought is Kant. *See* Kant, *What is Orientation in Thinking?*, *in* Political Writings, *supra* note 36, at 249; *see also* discussion of "reason" and "rationality," *supra* note 25.

[348] *See* Rawls, Political Liberalism, *supra* note 25, at xvi. Rawls argues that his political conception of justice, unlike Enlightenment liberalism, does not claim to be "true" but only "reasonable." *Id.* at xix–xx. Furthermore, while he claims that his political conception of justice is the most reasonable, he does not consider it the only reasonable conception of justice. *Id.* at xlvi–xlvii.

[349] Gaus, *supra* note 346, at 18–19.

[350] *See, e.g.*, John N. Gray, *On the Contestability of Social and Political Concepts*, 5 Pol. Theory 331, 335 (1977).

mous article that the persistence of some conceptual disputes cannot neces-sarily be explained away by reference to psychological or metaphysical causes.[351] While supported by sound arguments, these genuine disputes are irresolvable because they center on "essentially contested concepts" which he defines as "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of the users."[352] Gallie charac-terizes essentially contested concepts as appraisive because they denote "valued achievement," are internally complex, variously describable, open for modification in unpredictable ways, and used either aggressively, to re-fute other descriptions, or defensively, to defend against the same.[353]

For William Connolly, the thesis of essential contestability includes three elements.[354] First, concepts are highly disputed, yet also partly shared in a way of life.[355] Second, rationality's tools can illuminate these controver-sies, but are insufficient to resolve the debate definitively by showing that only one account is defensible.[356] Given the lack of rational consensus, the debate remains open.[357] Third, affirming contestability does not preclude de-fending a specific position within the debate.[358] Connolly emphasizes that the thesis of essential contestability accentuates the "internal connection" between disputes over concepts and rival worldviews regarding the good life ("the contestable standards, judgments and priorities which help to consti-tute that life").[359] The contestability of the good life makes it likely that concepts used by scholars will be similarly contestable. Indeed, conceptual debates about politics, for instance, are not merely debates about the deploy-ment of discourse and concepts in politics. These debates also partly consti-tute politics because these concepts are internal to politics.[360] Thus, the "desire to expunge contestability from the terms of political inquiry ex-presses a wish to escape politics."[361]

The notion that a concept is essentially contestable recognizes that other contestable concepts are implicated in the concept's description or presup-positions. Still, scholars have largely applied the notion of essential contest-ability to intra-conceptual disputes rather than inter-conceptual ones.[362] In

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[351] W. B. Gallie, *Essentially Contested Concepts*, 56 Proc. Aristotelian Soc'y 167, 169 (1956).

[352] *Id.*

[353] *Id.* at 171–72. Gallie adds two additional conditions to distinguish contestability from confusion. *Id.* at 180. Waldron expands the appraisive criterion to include non-achievement. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 Law & Phil. 137, 157–59 (2002).

[354] William E. Connolly, The Terms of Political Discourse 225, 230 (3d ed. 1993).

[355] *Id.* at 225–26.

[356] *Id.* at 227.

[357] *Id.* at 244 n.5.

[358] *See also* Waldron, *supra* note 353, at 153.

[359] Connolly, *supra* note 354, at 230–31; *see also* Gray, *supra* note 350, at 344.

[360] Connolly, *supra* note 354, at 36, 39.

[361] *Id.* at 213.

[362] *See, e.g.*, Waldron, *supra* note 353, at 157–59 (applying the notion of contestability to the "rule of law").

this Article, I extend this thesis to refer not only to the contestability of "democracy" and "constitutionalism" taken separately but also to the contestability of the attempt to bring these concepts into a stable relation in which a perceived tension or conflict is absent *ab initio* or eradicated after the fact. If these concepts are essentially contested, then the ways in which they are positioned in relation to each other, and, for that matter, how they are understood to relate to other concepts, are no less contestable. Moreover, as discussed in Part II, the line between intra-conceptual and inter-conceptual disputes blurs because the dispute across concepts quickly becomes a dispute within the concepts themselves.[363] When one subscribes to a concept, its description or definition largely informs the resolution of the inter-conceptual dispute and vice versa; that is, the preferred resolution of the dispute between concepts is likely to inform the preferred definition of the concept or concepts.[364] This cycle might explain the great attention given to definitions in the dispute over the concepts under discussion. This also calls to attention a possible question-begging reasoning in which the cross-conceptual resolution presupposes the definition or definitions. Yet, both the alleged resolution and the employed definitions are contested and are likely to remain contestable.

B. *The Persistence of the Counter-Majoritarian Difficulty*

Employing this notion of contestability should not necessarily lead to finding a consistent, principled account of scholarly resolution of conceptual disputes. One might think that scholars adopt a general theoretical approach for consistent resolution of cross-conceptual disputes by transforming them into disputes internal to the concepts, or vice versa, regardless of the specific issues at hand and the implications of their resolution. Such an expectation is likely to falter. Dworkin's writings exemplify this point. In his discussion of constitutionalism and democracy, he adopts the first approach by shifting the discussion into competing conceptions of democracy.[365] He does the same with respect to the tension between liberty and equality, by transforming the debate into one internal to equality.[366] Conversely, in his discussion of pornography, Dworkin rejects the attempt to portray the debate as one

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[363] *See, e.g.*, *supra* Part II.B.i.a (the focus of Dworkin's incorporation on the concept of democracy); *supra* Part II.B.ii.d (the focus of Kramer's popular constitutionalist on the concept of constitutionalism); *supra* Part II.C.ii.a (the similar focus of Waldron's unqualified proceduralism on constitutionalism). All these positions purport to resolve the tension between concepts by offering an account of a single concept.

[364] For example, a scholar who subscribes to a majoritarian conception of democracy is likely to resolve the tension between democracy and constitutionalism, by rejecting constitutional constraints on majority rule like judicial review. In contrast, a scholar who supports judicial review and constitutional democracy is likely to reject the majoritarian conception of democracy.

[365] DWORKIN, FREEDOM'S LAW, *supra* note 63, at 15–31.

[366] DWORKIN, *supra* note 8, at 188–91.

internal to negative liberty, and shifts it into one between positive liberty and negative liberty.[367] Taking Dworkin as but one exemplar of the failure of an overarching, trans-substantive approach, I suggest that the approach to conceptual disputes cannot be an isolated theoretical judgment *per se*. Rather, it depends on the specific issues at hand. Yet, many scholars who recognize the contestability of concepts continue to address the debate on a highly theoretical level that abstracts from explicitly political considerations.[368]

Accepting the intertwining of the conceptual and the political offers a more accurate account for the persistence of the "counter-majoritarian difficulty." Consider, for example, the bewilderment of many rationalist or empiricist scholars over the "obsession" with, or persistence of, this difficulty. They express wonder over why scholars who have debated this question for a century cannot grasp simple facts of political science, history, or logic concerning judges, democracy, or political systems.[369] This assessment suggests that the debate over this difficulty will come to an end once scholars come to their senses, that is, once they forgo their preoccupation with the normative over the descriptive, values over facts, and the "ought" over the "is."[370] Rationalist and empiricist scholars reduce the political battle to factual and conceptual debates that are supposedly resolvable by rational inquiry. Such a view, however, ignores contestability.

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[367] DWORKIN, FREEDOM'S LAW, *supra* note 63, at 214–26.

[368] *See* KENNEDY, *supra* note 8, at 50 (claiming that one should be wary not to reduce political debates to mere philosophical questions); West, *supra* note 8, at 648–49 (claiming that divisions in constitutional thought emanate from political orientations and are only complicated by jurisprudential differences).

[369] *See, e.g.*, Terri Peretti, *An Empirical Analysis of Alexander Bickel's* The Least Dangerous Branch, *in* THE JUDICIARY AND AMERICAN DEMOCRACY, *supra* note 230, at 123. Peretti writes:

> American democracy is not majoritarian. I must admit that advancing such an obvious point feels rather silly. However, the persistence of the countermajoritarian paradigm in constitutional scholarship—a straw-man argument if there ever was one—makes such silliness necessary . . . [D]espite the occasional concession [that American democracy is anti-majoritarian] . . . Bickel stubbornly and irrationally clings to the majoritarian view.

Id. at 137; Friedman, *supra* note 53, at 157 ("[T]he paradigm that has driven constitutional theory for more than half a century may be neither necessary nor accurate . . . .").

[370] "Positive" political science focuses on the actuality of judicial practice rather than normative arguments regarding the desirable form of this practice. It is less concerned with the direction and values to which judicial practice should be oriented than it is with studying its past as an observed experience from which conclusions can be drawn regarding possible future developments of this practice. Specifically, in this context, it asks to what extent have the Court's rulings been counter-majoritarian? This is an empirical question that is not concerned with normative definitions of democracy or how democracy can be reconciled with constitutionalism. It seeks to address the factual assumptions underlying the normative controversy. For an argument for the introduction of "positive" political science into normative theory of judicial review, see Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 259 (2005); see also Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275, 277 (2002) (noting that the debate between supporters and opponents of judicial review, like Dworkin and Waldron, is "relatively insensitive to the facts about the protection of individual rights in existing systems of judicial review").

Yet neither the flight from facts to values nor the opposite move from values to facts is likely to end the debate.[371] The "counter-majoritarian difficulty" persists because both the political battle over the good life and the discussion concerning the role of law in society persist.[372]

C.   Democracy as an Essentially Contested Concept

Contestability might have been contained or superseded if democracy included an adequate and agreed-upon procedure to resolve such issues. It could be argued that democracy is an ideal candidate for replacing the role that reason played in the dominant view of Enlightenment liberalism.[373] According to this view, if reason is no longer assumed to lead to a consensus endorsing freedom under law, then a democratic process could perhaps substitute for reason by providing a reliable mechanism for demonstrating *public* reason.[374]

Democracy itself, however, is a contestable concept.[375] While many contemporary liberals accept the democratic process as the means for sorting out the public reason required for endorsing freedom under law, they often disagree about what this process should look like and what democracy means and requires. The classical debate on the meaning of democracy is between procedural democracy (or majoritarianism) and constitutional democracy. According to the first conception, democracy is the rule of the

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[371] Indeed, the distinction between judgments made irrespective of facts and fact-based judgments (the "analytic" and "synthetic," or the conceptual and the empirical) has been forcefully challenged. *See* W. V. Quine, *Two Dogmas of Empiricism*, 60 Phil. Rev. 20, 34 (1951) ("[F]or all its a priori reasonableness, a boundary between analytic and synthetic statements simply has not been drawn. That there is such a distinction to be drawn at all is an unempirical dogma of empiricists, a metaphysical article of faith."). Quine maintains that the difference between conceptual schemes and "brute facts" is "only one of a degree" rather than kind. *Id.* at 43. *See generally* Hilary Putnam, The Collapse of the Fact/Value Dichotomy and Other Essays (2002). Alasdair MacIntyre notes that the modern outlook, according to which facts are value-free, marks a transition from an Aristotelian, teleological paradigm to a "mechanist view":

> On the former view human action . . . must be, characterized with reference to the hierarchy of goods which provide the ends of human action. On the latter view human action . . . must be, characterized without any reference to such goods. On the former view the facts about human action include the facts about what is valuable to human beings (and *not* just the facts about what they think to be valuable); on the latter view there are no facts about what is valuable.

Alasdair MacIntyre, After Virtue: A Study in Moral Theory 84 (3d ed. 2007). MacIntyre criticizes the law-like generalizations stipulated by the social sciences and questions the alleged predictive power of these sciences given the pervasiveness of unpredictability in human affairs. *Id.* at 88–108.

[372] To be clear, I am not suggesting the strong argument that the "counter-majoritarian difficulty" is insoluble; I am only offering an explanation of why it has persisted.

[373] Gaus, *supra* note 346, at 20–21.

[374] I bracket, for a moment, critiques of the assumption that the institutional structure of the representative democratic system corresponds to majority preferences. *See, e.g.*, Robert A. Dahl, A Preface to Democratic Theory 129–31 (1956).

[375] Connolly, *supra* note 354, at 10–11; Gallie, *supra* note 351, at 183–87.

many. The law is the will of the majority so long as the formal procedures for its enactment have been followed. On the other hand, the constitutional conception restricts what the many can do through limits provided by constitutional constraints (fundamental laws of the community) that are established by the People itself. Accordingly, the majority-will-turned-into-law has to conform to fundamental laws. It is from within the context of the constitutional democratic conception that debates over the tension between constitutionalism and democracy and the "counter-majoritarian difficulty" arise.

However, the constitutional democratic framework itself is amenable to different interpretations. Contemporary debates have largely focused on two rival sets of conceptions: aggregative conceptions and deliberative conceptions. Aggregative or pluralist conceptions understand democracy as a market-like competitive process in which the preferences of strategic players, whether individuals or interest groups, are aggregated. Deliberative or civic republican conceptions, on the other hand, understand democracy as a process of dialogue in which practical reason is exercised for the purposes of reaching agreement over issues of collective concern and articulating the common good. According to such conceptions, the process of resolving disagreements and decision-making should be inclusive of all those who are subject to, and might be influenced by, the decision in order to qualify as legitimate.[376]

Cass Sunstein positions deliberative conceptions on the spectrum of several possible responses to the descriptive pluralism upon which aggregative conceptions are based[377]: normative pluralism (acceptance of the descriptive, as in Robert Dahl's theory of polyarchy);[378] modified normative pluralism (minorities-protecting-aggregative democracy, as in Ely's process theory);[379] invocation of rights as an autonomous sphere (whether egalitarians or libertarians); and finally, the deliberative democracy invoked by civic republicans. While the deliberative conception is generally popular amongst scholars, there are probably as many deliberative conceptions as there are deliberative democrats.[380] Additionally, some scholars continue to reject the

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[376] IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 18–26 (2000) (discussing these two conceptions of democracy).

[377] Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32–35 (1985).

[378] *See generally* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971).

[379] *See generally* ELY, *supra* note 188.

[380] For examples of this literature, see BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004); JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY (1996); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT: WHY MORAL CONFLICT CANNOT BE AVOIDED IN POLITICS AND WHAT CAN BE DONE ABOUT IT (1996); HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY (2002); YOUNG, *supra* note 376; Benhabib, *supra* note 127; Michelman, *supra* note 214. For a discussion and a review of some of this scholarship, see Emily Hauptmann, *Can Less Be More? Leftist Deliberative Democrats' Critique of Participatory Democracy*, 33 POLITY 397 (2001); Emily Hauptmann, *Deliberation = Legitimacy = Democracy*, 27 POL.

deliberative conception.[381] These disagreements are consequential to judicial review. As discussed above, supporters of majoritarian conceptions, like Waldron, reject judicial review.[382] And it is often the case that proponents of aggregative conceptions, like Ely and Pildes, argue for a more limited role for the judiciary than proponents of deliberative conceptions, like Rawls, Habermas, and Michelman.[383]

Moreover, disagreements over the meaning of "democracy" are not limited to the academic literature. They are evident in Court rulings and judicial attitudes. Morton Horwitz claims that since 1940 "democracy" has become a "foundational concept" in the Court's rulings.[384] Yet, as Horwitz shows, the Court deployed the concept differently over time both to constrain and justify judicial intervention. Those who saw "democracy" more narrowly and procedurally as simply majority rule (for instance Justice Frankfurter), found a tension with judicial review.[385] Those who conceptualized "democracy" more broadly and substantively, like the view associated with the Warren Court, found no such tension and argued that judicial review can promote "democracy."[386]

This leads the discussion back to the starting point: Rather than democracy being the remedy for contestability, it is part and parcel of this contestability. Its introduction to the debate gives rise to other forms of disagreement.

D.   Constitutionalism as an Essentially Contested Concept

Because democracy is itself contestable, and therefore cannot contain contestability, it would seem that constitutionalism is the only remaining promising candidate for this role. Indeed, some contemporary liberal thinkers present the idea of constitutionalism as a reaction to contestability and pluralism with respect to the good life. But constitutionalism is an equally contestable notion. This contestability undermines the utility of constitutionalism. Applying contestability to constitutionalism in this section shows the insufficiency of mere conceptual or definitional inquiries to settle disputes over constitutionalism and the futility of denying the connection between

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THEORY 857 (1999); Christian F. Rostbøll, *Emancipation or Accommodation? Habermasian vs. Rawlsian Deliberative Democracy*, 34 PHIL. & SOC. CRITICISM 707 (2008).

[381] For an example of such rejection, see, for example, Pildes, *supra* note 206, at 53–54.

[382] *See* discussion of Waldron's position of dissolution *supra* Part II.C.ii.a.

[383] For an example of a deliberative democrat who does not give the Court a prominent role, see SUNSTEIN, *supra* note 230, at 145–46.

[384] Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 61 (1993); *see also id.* at 61–63.

[385] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 661–63, 667 (1943) (Frankfurter, J., dissenting).

[386] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

conceptual disputes and political ones in the pursuit of such theoretical accounts.

Constitutionalism is often captured by the slogan "government by law, not government by men."[387] Scholars offer variations on this theme, calling constitutionalism "the idea . . . that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations."[388] Others suggest it is "the endeavor to place government under reason expressed as law."[389] In another formulation, it is "the containment of politics, including popular politics, by a supervening law that itself stands beyond reach of the politics it is meant to contain."[390] A final articulation calls constitutionalism "the idea of the subjection of even the highest political authority in a country to limits and requirements having the form and force of law."[391]

Constitutionalism exemplifies essential contestability because it is internally complex and is variously described.[392] The origins of the concept are themselves varied, supposedly emanating from three distinct traditions—in Britain, France, and the United States—that describe and deploy the concept in different ways.[393] The rise of liberal constitutionalism is also connected to the end of the Cold War and the collapse of the Soviet Union, as it suggested for some scholars a historical progression towards liberal democracy.[394] For these scholars, the only available alternative became the combination of market economy and liberal constitutionalism.[395] Thus, in the

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[387] This statement seems to originate from James Harrington's formulation "empire of laws and not of men." JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 21 (J.G.A. Pocock ed., Cambridge Univ. Press 1992) (1656). Such a formulation invites the charge of fetishism by the populists who see this as an enchantment with constitutionalism. *See* discussion *supra* Part II.E.

[388] Wil Waluchow, *Constitutionalism*, STAN. ENCYC. PHIL., http://seop.leeds.ac.uk/entries/constitutionalism/ (last updated Feb. 20, 2007).

[389] MICHELMAN, *supra* note 50, at 50.

[390] Michelman, *supra* note 20, at 183.

[391] Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, *in* THE CAMBRIDGE COMPANION TO RAWLS 394, 394 (Samuel Freeman ed., 2003).

[392] Thomas C. Grey, *Constitutionalism: An Analytic Framework*, *in* NOMOS XX, *supra* note 88, at 189. According to Grey:

Constitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse. The long-standing confusion about the meaning of the term appears in the numerous mutually inconsistent simple definitions that have been confidently asserted in its name.

Id.

[393] *See* Preuss, *supra* note 303, at 18–24.

[394] *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

[395] *See, e.g.*, *id.* at xi (asserting that "the *ideal* of liberal democracy could not be improved on") (emphasis in the original); *id.* at 44 (liberalism "[i]n its economic manifestation" simply is a free market economy); *see also* Francis Fukuyama, *Reflections on the End of History, Five Years Later*, 34 HIST. & THEORY 27, 29 (1995) ("[L]iberal democracy and free markets constitute the best regime, or more precisely the best of the available alternative ways of organizing human societies."). These arguments are highly problematic, of course. The flaws relevant to this Article include an insufficient attention to the contestability of liberalism itself and an

modern world, constitutionalism has also become an appraisive concept.[396] It is a prominent feature of world order and a precondition for admission to the club of democratic nations.[397] Indeed, "one may even say that constitutionalism has risen to the status of the only contemporary political idea that enjoys almost universal acceptance."[398]

While the above-quoted formulations of constitutionalism readily showcase the view of politics espoused by constitutionalists, they are highly abstract and fail to capture the different conceptions offered by scholars in the field. Indeed, they do not expose the controversies surrounding the concept, which roughly divide into two major groups. First, scholars debate the internal components or criteria of the concept—as in debates over whether constitutions must be written or unwritten, flexible or rigid, and whether limitations on government may be based on conventions or only laws[399]— and its validity conditions, as in debates over constitutional authorship.[400]

Second, scholars debate the goals the concept might serve and its ability to achieve these prescribed goals. Given inherent disagreements about the good life, constitutionalism is perceived in the liberal tradition as necessary.[401] Constitutionalism presumptively shows respect to individuals' choices by tolerating their chosen ways of life. For many liberals, then, constitutionalism is synonymous with the "proceduralization" and "legalization" of the question of justice—first-order rightness—in order to circumvent an "overt moral civil war."[402] It attempts to minimize conflict by deferring the question from the statute level to the general structure of authority. Constitutionalism, then, "mediates the controversies that arise among citizens who hold clashing political aspirations."[403] Moreover, constitutionalism itself is likely to be an already mediated controversy. Indeed,

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obliviousness to the contradictory nature of liberal democracy (the tension between rights and democracy). *See* David Held, *Liberalism, Marxism, and Democracy*, 22 THEORY & Soc. 249, 257 (1993) (noting these two flaws with respect to Fukuyama's writings). Unger refers to views like Fukuyama's as the "dictatorship of no alternatives." ROBERTO MANGABEIRA UNGER, WHAT SHOULD THE LEFT PROPOSE? 1 (2005).

[396] *See* Gallie, *supra* notes 351–52 and accompanying text.

[397] *See* Vivien Hart, *Democratic Constitution Making*, 107 U.S. INST. PEACE SPECIAL REPORT, July 2003, at 2, http://www.usip.org/files/resources/sr107.pdf ("We live in an era of constitution making. Of close to 200 national constitutions in existence today, more than half have been written or re-written in the last quarter century.").

[398] Preuss, *supra* note 303, at 11.

[399] Grey, *supra* note 392, at 190.

[400] Michelman, *supra* note 176 (distinguishing between the priority of reason in "liberal constitutionalism" as opposed to populism (Ackerman) or non-volitionist positivism (Schauer)).

[401] *See* discussion *supra* Part I.C.

[402] Michelman, *supra* note 260, at 1252; *see also* Frank I. Michelman, *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, 42 TULSA L. REV. 891, 893 (2007) (discussing different attempts to proceduralize controversial moral and ethical questions).

[403] MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 2 (2006).

"all constitutions remain compromises as long as citizens cannot agree on the qualities of the good society."[404]

For other scholars, constitutionalism is an illusory and self-deceptive project. It is an attempt to escape from the reality of politics by mere verbal utterances. Some Legal Realists, for instance, define constitutionalism as "the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order."[405] Similarly, for Tushnet, constitutionalism is no more than an ideological "effort to create social institutions that stabilize the social world by placing the definition of the social order beyond willful transformation."[406] Likewise, for Unger, liberal constitutionalism aims at "slowing politics down" and thus impedes the "transformative reach" of politics.[407]

Judicial review is less contestable and more concrete than constitutionalism, but this does not mean that judicial review is controversy-free. Judicial review is at the center of the controversies in constitutionalism both regarding its existence as an integral part of the concept and regarding its role within the concept.[408] While not always a significant component of constitutionalism, judicial review is generally part of the liberal constitutionalist ideal, whether for prudential reasons, out of logical necessity, or because of the historically conditioned development of political regimes, as in the United States. One reason for the importance of the judiciary in these debates, notes Habermas, is that it stands at the intersection between democracy and the rule of law.[409] In fact, argues Howard Gillman, the relation between "regime politics" and "jurisprudential regimes" gives rise to the claim that "constitutionalism in the United States is not merely a normative or theoretical practice. It is also a distinctive form of politics."[410]

The fragmentation and proliferation of theories of constitutionalism, then, comes as no surprise. Michael Klarman, for example, identifies ten conceptions of judicially enforceable constitutionalism:

> [E]nforcement of a principal-agent relationship; enforcement of societal precommitments; providing a mechanism for checks and balances; protection of minority rights; maintenance of continuity

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[404] *Id.* at 8.

[405] Richard S. Kay, *American Constitutionalism, in* CONSTITUTIONALISM, *supra* note 176, at 16 (quoting Walton H. Hamilton, *Constitutionalism, in* 4 ENCYCLOPEDIA OF THE SOCIAL SCIENCE 255 (Edwin R.A. Seligman & Alvin Johnson eds., 1931)).

[406] Tushnet, *supra* note 295, at 151.

[407] ROBERTO MANGABEIRA UNGER, THE SELF AWAKENED: PRAGMATISM UNBOUND 187–88 (2007).

[408] Of course, American-style judicial review, which is the focus of American discussions and thus the focus of this Article, is not the only model of judicial review. *See generally* VICKI C. JACKSON & MARK V. TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (2d ed., 2006); Waldron, *supra* note 71, at 1353–60.

[409] Habermas, *supra* note 124, at 766.

[410] Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 107 (2006).

> or tradition; symbolizing national unity; serving an educational
> function; securing finality for disputed issues; providing a rule of
> recognition for the law; [and] satisfying a majoritarian preference
> for constitutionalism.[411]

Klarman argues that all of these accounts are descriptively unsatisfactory
and normatively ambiguous as they require controversial value judgments.[412]
Hence, constitutional theories are no less controversial than the particular
substantive controversies they are supposed to circumscribe.[413] Conse-
quently, neither constitutionalism as a "framework," nor the answers pro-
vided by its mechanisms for internal debates is controversy-free. The choice
of a conception of constitutionalism is likely to affect the resolution of con-
troversies or to presuppose the likelihood of a certain answer. Given this
entanglement between moral and political conflicts, and between conflicts
over ways of life and the method devised to bracket or tentatively resolve
them, the recourse to method becomes futile. Further insisting on this
method despite this entanglement may have bad effects on political and
moral debate.[414]

As with democracy, there are no neutral or non-controversial defini-
tions for constitutionalism. As Thomas Grey writes:

> [T]here is no reason to suppose that an adequate conceptual anal-
> ysis of constitutionalism must produce a definition, a set of neces-
> sary and sufficient conditions which justify either describing a
> norm as constitutional or describing a set of norms as a constitu-
> tion. The focus on definition leads to largely verbal dispute, or to
> stipulative fiat masquerading as discovery or analysis.[415]

Thus, the debate should move away from definitions.

If every conception of constitutionalism is value-laden and thus contro-
versial, it follows that the distinction between the public framework of jus-
tice—that which is universally recognized as good for everyone—and the
private choices of the good within this framework—that which is subjec-
tively good for the individual—is itself contestable and difficult to draw.
Substantive commitments guide every choice between institutional arrange-
ments, which will be more congenial to certain forms of life than to others.[416]
But no matter how thin these substantive commitments are, they fail to con-
tain conflict in a non-controversial manner. Evading disagreement by esca-

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[411] Klarman, *Constitutionalism*, *supra* note 184, at 145. Klarman offers an eleventh ac-
count: "The Supreme Court, in *politically unpredictable* ways, imposes *culturally elite* values
in *marginally countermajoritarian* fashion." *Id.* at 146 (emphasis in original).

[412] *Id.* at 193–94.

[413] *Id.*

[414] SANDEL, *supra* note 33, at 23; *see also* DWORKIN, FREEDOM'S LAW, *supra* note 63, at
37.

[415] Grey, *supra* note 392, at 190–91 (emphasis in original).

[416] UNGER, *supra* note 407, at 192–93.

lating from one level to a higher one—from a specific statute to the Constitution or from the good to the just—does not lead to consensus.[417] Disagreement is not only evident with respect to conceptions of the good but also with regard to the concrete application of the constitutional principles designed to evade disagreement over the good.

To frame this tension more concretely, under a constitutional democracy the judiciary is entrusted with this business of concrete applications. Because these applications are contestable, it comes as no surprise that the judicial power to enforce them is itself contestable. Scholars disagree on whether to hand the power to settle disputes over constitutional meaning to unelected judges or to majoritarian processes. Both sides of the debate have offered reasonable justifications for rejecting positions espoused by the other side.

Here, then, is a puzzling feature of much of the contemporary discussion of political and constitutional theory: On the one hand, a repeated attempt by scholars to find a solid and uncontroversial normative justification ("legitimacy") for legal and political ordering; and on the other hand, the proliferation of contestable ways for doing so. The latter seems to undermine the former. If the "problem" is disagreement about fundamental questions within a political community, these suggested "solutions" bring more disagreement rather than less.

Thus far, this Part has discussed the contestability of "democracy" and "constitutionalism" separately. The paradox, however, arises from the marriage of the two concepts. The remainder of this Part examines whether the combination between the concepts delivers what each could not on its own. The possibility of political justification seems to hang on a positive answer to such question.

E.   Between a Paradox and an Antinomy

Contestability gives rise to paradoxes. Indeed, scholars describe the combination of constitutionalism and democracy as a "paradox," "tension," or "difficulty."[418] These terms essentially describe the puzzling existence of two plausible and defensible, yet seemingly contradictory or inconsistent, conclusions. In this sense, the "paradox of constitutional democracy" is one major example of a more general phenomenon. This Section examines the possible methods for resolving such paradoxes. It discusses the meaning and types of paradoxes and the general patterns of scholarly answers given to paradoxes, and applies these patterns to the concrete typology developed in Part II. I argue that the "paradox of constitutional democracy" is irre-

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[417] Waldron, *supra* note 302, at 39–41.
[418] *See* HOLMES, *supra* note 12, at 134–37 (using "paradox" and "tension"); MICHELMAN, *supra* note 50, at 4–11 (using "paradox"); Bickel, *supra* note 11, at 16–23 (using "difficulty"); Habermas, *supra* note 124, at 769–70 (using "paradox").

solvable not only because "constitutionalism" and "democracy" are contestable concepts, the combination of which results in a paradox but also because there are multiple kinds of paradoxes, a variety of ways to resolve paradoxes, and such resolutions may themselves be inconsistent.

i.   Types of Paradoxes

There is no one definition of "paradox." Paradoxes have been defined as "questions . . . that suspend us between *too many* good answers."[419] One indication of the existence of a paradox "is that different thinkers 'solve' it in incompatible ways."[420] For W. V. Quine, a paradox is a nexus between a seemingly absurd conclusion and a seemingly defensible argument supporting it.[421] Quine distinguishes between three kinds of paradoxes. First, *veridical paradoxes* yield truthful conclusions despite appearances to the contrary. Second, *falsidical paradoxes* are absurd in conclusion and fallacious in argument. Third, *antinomies* contain contradictory conclusions flowing from accepted patterns of reasoning.[422]

Only antinomies require revision or rejection of conceptual traditions and established conceptual frameworks or patterns of reasoning.[423] For Quine, the "discovery of antinomy is a crisis in the evolution of thought."[424] An antinomy brings about contradictory results that require such revision.[425] Thus, antinomies are paradigm-dependent. What seemed to be antinomies to the classical Greek philosophers might be exposed in our generation to be resolvable contradictions given, for instance, the progress of science.[426] Of course, not all scholars facing the same paradoxical situation would agree on defining it as an antinomy. Some might think it is merely a veridical or falsidical paradox that can be resolved by the very patterns of reasoning and conceptual schemes in which this paradox arises. Thus, the way scholars conceive of a situation influences the proposed resolution for this dilemma.

ii.   Responses to Paradoxes

There is no single way to resolve a paradox. Western philosophers have tackled paradoxes in five primary ways: rationalism, empiricism, Kantian-

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[419] Roy Sorensen, A Brief History of the Paradox: Philosophy and the Labyrinths of the Mind xii (2003) (emphasis in original).

[420] *Id.* at 299.

[421] W. V. Quine, *The Ways of Paradox*, *in* The Ways of Paradox and Other Essays 1 (rev. ed. 1976).

[422] *Id.* at 4–6 (regarding "antinomy"); *see also* Immanuel Kant, Critique of Pure Reason 410, 459–60 (Paul Guyer & Allen W. Wood eds., 1998) (1781).

[423] Quine, *supra* note 421, at 9.

[424] *Id.* at 16.

[425] *Id.* at 5.

[426] *See id.* at 9.

ism, Hegelian dialectics, and decisionism.[427] The first two approaches seek to reconcile apparent contradictions by harmonizing reason and perception. The third and fourth are not reconciliatory in this sense, yet they do respond to perceived contradictions and the reality of contradictions, respectively.[428] The fifth approach is an emotivist approach according to which choice between inconsistent ethical demands is unguided by reason.[429]

In the first vein, rationalists emphasize the role of reason, whereas empiricists privilege perception and experience. Rationalists think that paradoxes originate in logical mistakes, and thus resolve them by offering logical solutions, as in Habermas's clarification position.[430] Empiricists think contradictions stem from the lack of sufficient reliable information, and solve them by introducing information, as with de-centering positions and some of Bickel's critics.[431] On the other hand, Kantian and dialectical approaches to paradoxes espouse a fundamentally different response. These approaches do not seek to wish away contradictions. Rather, they acknowledge the existence of paradoxes. They may disagree on which paradoxes are antinomies, and Kant himself limits antinomies into four paradigmatic cases. But overall, the Kantian response is basically that reason runs out, because there is no conclusive rational way to, for example, prove the existence of God or free will.[432]

This Article's mapping and typology show that the responses offered by constitutional theorists to the question of constitutionalism and democracy are variations of some of these approaches to paradoxes.[433] But more than

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[427] SORENSEN, *supra* note 419, at xii–xiii (mentioning rationalism, empiricism, and dialectics); *id.* at 303–05 (discussing the differences between Kant and Hegel).

[428] *See id.* at 304–05.

[429] For a discussion of emotivism, see MACINTYRE, *supra* note 371, at 11–12 ("Emotivism is the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character.") (emphasis in original). *See generally id.* at 6–22.

[430] *See supra* notes 121–52 and accompanying text.

[431] *See* discussion of de-centering positions *supra* Part II.B.i.d; *see also supra* note 369 (citing empiricist critics of Bickel, namely Peretti and Friedman).

[432] At face value, scholars who accept the irresolvable antinomian character of constitutional democracy make a move that resembles Kant's. For Kant, the existence of contradiction and the lack of ability to rationally and conclusively prove the existence of God or free will do not necessarily mean a disbelief in God or free will. For constitutional scholars, like Michelman, the contradiction between constitutionalism and democracy does not mean the impossibility of constitutional democratic regimes or the impossibility of judicial review. Yet, the antinomy here is different: For Kant, it is reason running out; for Michelman, it is agreement running out. Thus, one might distinguish between two kinds of antinomy: Epistemological antinomy in which the antinomy is considered "internal" to reason, because reason does not provide persons with sufficient resources to reach a definitive conclusion; and political antinomy in which the antinomy is considered resolvable by individual reason, but such resolution does not command agreement. Post-Enlightenment liberals are generally concerned with the latter given their interest in political justification.

[433] An exception is the moral skepticism of the emotivist/decisionist approach, which is largely rejected by field participants. *See, e.g.*, Michelman, *supra* note 214, at 25–26 (arguing that decisionism is incompatible with the idea of "positive freedom" or "self-government" but compatible with "negative liberty").

that, the mapping shows a more complicated picture beyond what the "tri-chotomy" of rationalism, empiricism, and Kantianism supposes. To begin with, there are not necessarily generic approaches to all paradoxes because the same scholar could be a rationalist with respect to one paradox and an empiricist with respect to another. More importantly, the chosen pattern of reasoning does not necessarily predict the conclusion with respect to the specific paradox at hand. Obviously, rationalists and empiricists who think that logical and empirical solutions are available with respect to the paradox do not think that this alleged paradox constitutes an antinomy and thus think it can be resolved. The form and implications of this resolution, however, are a matter of further inquiry.

Denying the existence of antinomy can produce different results. Some scholars deny the existence of antinomy to claim a harmonious marriage between constitutionalism and democracy. Even if these scholars agree that antinomies are paradigm-dependent, they will argue that in the current para-digm, a specific paradox does not qualify as an antinomy. The strongest form of this argument denies not only the antinomian character of the ques-tion, but even that it is a paradox in the first place. Dworkin's denial posi-tion vis-à-vis the paradox of constitutional democracy exemplifies this stronger form of the argument.[434] A milder form accepts the seemingly para-doxical nature but quickly offers solutions to resolve it, as, for example, reconciliation positions like Ely's do.[435] For these theorists, the so-called paradox is no more than falsidical, because the argumentation is flawed and the conclusion is absurd. To use Quine's terminology, for them the paradox is a "false alarm" once the "underlying fallacy" has been exposed.[436]

Scholars on the other accepting end of the paradox spectrum accept the initial contradictory nature but proceed in different directions. They might—as exemplified by Michelman's endorsement position vis-à-vis the paradox of constitutional democracy—accept the antinomian character as a fact of life and hence think that the contradiction is irresolvable whether logically or empirically.[437] Or, as exemplified by Waldron's dissolution posi-tion, they might proceed to solve the contradiction and thus end up denying the antinomian character.[438] For the latter theorists, the paradox is no more than veridical because the apparent contradiction is actually correct: Consti-tutionalism and democracy are contradictory.

iii.   Revisiting the Typology

The preceding discussion suggests that, given the variety of approaches that might be pursued in the face of contradictions, a guide may be helpful to

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[434] *See supra* Part II.B.i.a.
[435] *See supra* Part II.B.ii.a.
[436] QUINE, *supra* note 421, at 9.
[437] *See supra* Part II.C.i. for a discussion of endorsement positions.
[438] *See supra* Part II.C.ii. for a discussion of dissolution positions.

navigate the inquiry into the field. Revisiting the typology of Part II through the tools developed in this section clarifies the internal distinctions amongst the different positions:

(1) *Denial*: For deniers like Dworkin, Habermas, and Ackerman, the tension between constitutionalism and democracy is not an antinomy. It is not even a paradox.

(2) *Reconciliation*: For reconcilers like Bickel, Ely, and Sunstein, the tension is a paradox but not an antinomy. It is a falsidical paradox.

(3) *Endorsement*: For endorsers like Michelman, Seidman, and Tribe, the tension is both a paradox and an antinomy.

(4) *Dissolution*: For dissolvers like Waldron, Tushnet, and Parker, the tension is a paradox but not an antinomy. It is a truth-telling paradox.

Three out of the four positions try to close the debate by rejecting the "antinomian" character of the "paradox" and recasting it as a soluble question. While unity positions—denial and reconciliation—see a false paradox, dissolution sees a real paradox. Deniers and reconcilers see a false paradox because, for them, liberal premises lead to constitutionalism and thus they defend the practice of judicial review. Dissolvers insist that it is a resolvable paradox, and they resolve the paradox *against* judicial review because they think that liberal premises lead to majoritarianism. Thus, only dissolution requires a fundamental institutional change by rejecting judicial review and constitutional democracy. In contrast, only endorsers see an antinomy because liberal premises lead both to constitutionalism—as deniers claim—and democracy—as dissolvers claim—the final result of which is self-contradiction.

Figure 4 restates the positions:

		Paradox	Antinomy	Institutional Implications	Constitutional Democracy
UNITY	Denial	NO	NO	NO	YES
	Reconciliation	YES	NO	NO	YES
DISUNITY	Endorsement	YES	YES	NO	YES
	Dissolution	YES	NO	YES	NO

FIGURE 4: REVISITING THE TYPOLOGY OF THE PROGRESSIVE LIBERAL CONSTITUTIONAL FIELD

IV.   THE CIRCULARITY OF PROGRESSIVE CONSTITUTIONALISM

While Quine's typology sharpens the different positions taken in the field, it presupposes a linear view of the spectrum of those positions. As articulated, the major dispute in constitutional theory involves the relationship between constitutionalism and democracy. The dispute seems to lead to wide and irreconcilable gaps between opposite positions on a linear contin-

uum: Deniers sacrifice democracy for constitutionalism, while dissolvers sacrifice constitutionalism for democracy. Deniers prefer the rule of judges while dissolvers make the majority the sovereign.

Despite these differences, I suggest that the basic opposition in the field between constitutional democrats and majoritarians is not as sharp and wide as it appears. Unlike Part II, which collapses the differences between deniers and reconcilers *within* the discourse of unity,[439] this Part's analysis goes further to collapse the distinctions between positions *across* the discourses of unity and disunity. Complementing the analysis of Part III, this Part shows that the contradiction between the concepts can be resolved only by collapsing the distinction between them, and that this collapse leads the debate into a circular movement.

A. *Loopification*

The notion of "loopification" shows the nature of the discursive movement in the field and challenges the linear view of the debate.[440] According to Duncan Kennedy:

> One's consciousness is loopified when the ends of the continuum seem closer to one another, in some moods (for some purposes, in some cases), than either end seems to the middle. Otherwise stated one's consciousness is loopified when one seems to be able to move by a steady series of steps *around* the whole distinction, ending up where one started without ever reversing direction.[441]

Kennedy develops this concept in the context of the debate about the public and private distinction. Kennedy casts away the image of a linear opposition between an unregulated private sphere and a regulated public sphere. Instead, he argues that loopification occurs in this debate because each side of the distinction includes elements of the other side and thus the distinction itself blurs.[442] The debate offers varying degrees of regulation that move from the most private to the most public, from the family to the state. Yet, the family is a basic unit comprising the state, which, in turn, is part of the family because it regulates familial relations by, for example, protecting the best interest of the child.[443] The public-private continuum is circular because both the family and the state are simultaneously public and private, and between them there are many entities that combine, to varying degrees, public and private aspects.

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[439] *See supra* Part II.D.

[440] I am indebted and grateful to Frank Michelman and Gonçalo de Almeida Ribeiro for extremely helpful discussions of this section.

[441] Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349, 1354 (1982) (emphasis in original).

[442] *Id.* at 1354–57.

[443] *Id.* at 1356.

The progressive liberal constitutional field exemplifies loopification because what is suppressed in one extreme comes into full force in the other. Democracy is suppressed by the deniers, but comes forward more potently in the dissolvers' case. Rights are suppressed by the dissolvers, and come back to the foreground in the deniers' case. But that which leads the deniers to suppress democracy through rights is itself democracy. And that which leads the dissolvers to reject rights for the sake of democracy is itself rights.

Hence, there are two circles: The first is represented by a movement away from rights towards democracy—from the deniers to the dissolvers, which ends with rights; the second reverse-circle is represented by the movement away from democracy towards rights—from the dissolvers to the deniers, which ends with democracy again. Therefore, the extremes are closer than they seemed at the outset. In between these two extremes are gray areas represented mostly by the reconcilers who offer combinations to varying degree of democracy and constitutionalism.

To elaborate, two opposing camps both claim to provide a theory of "genuine democracy." At the outset, deniers (constitutional democrats) seem to prioritize constitutionalism while dissolvers (majoritarians) seem to prioritize democracy. Yet, deniers present themselves as the true democrats even though they privilege constitutionalism over democracy. And dissolvers present themselves as the true constitutionalists even though they privilege democracy over constitutionalism.

Deniers, like Dworkin, claim to be the "real democrats" because they provide a theory for the proper understanding of self-government.[444] Rights provide necessary conditions or restrictions that allow the People to self-govern. Thus, "genuine democracy" implies rights.[445] If the dissolvers care about democracy, according to a denier, it should lead them to constitutionalism. In the other extreme, dissolvers, like Waldron, claim that, given disagreement, it is not possible to agree on such restrictions or conditions.[446] Waldron advocates for a supra-right to equal participation, which should lead to a simple majority rule. Rights, in other words, imply majoritarianism. Deniers claim to be rights-based in their approach, but such an approach, according to the dissolver, should lead to equality in political agency and majoritarianism. Thus, rights—properly understood—do not extend to constitutional entrenchment. That is, both deniers and dissolvers accuse the other camp of misunderstanding the very concept on which each camp builds its case against the other.

Both Dworkin and Waldron agree that there is no tension between democracy and individual rights.[447] Yet this agreement, or starting point, leads to opposing movements: For the deniers, rights dictate movement towards

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[444] *See* discussion of Dworkin, *supra* notes 102–19 and accompanying text.
[445] *See* discussion of Dworkin, *supra* notes 102–19 and accompanying text.
[446] *See* discussion of Waldron, *supra* notes 302–22 and accompanying text.
[447] WALDRON, *supra* note 37, at 282.

one direction (constitutional democracy); for the dissolvers, rights lead towards the other direction (majoritarianism). The end result of the movement in both directions is called democracy by their proponents. Therefore, regardless of whether one is a denier or a dissolver, rights are believed to lead to "genuine democracy."

Figure 5 illustrates the phenomenon of loopification with a circular movement around the tension between constitutionalism and democracy. Starting at the circle from Dworkin, one moves (clockwise) away from constitutionalism towards an increasing degree of "democratization," from a "thick" conception of rights to thinner conceptions. Starting at the circle from Waldron towards the opposite direction, one moves away from democracy towards an increasing degree of "constitutionalization." But regardless of the movement's direction on the circle, the ending point is the starting point. If one begins from constitutionalism, one ends up with constitutionalism again, and if one starts from democracy one ends up with democracy again. Yet both democracy and constitutionalism are essentially contested concepts: In starting from a contestable territory, one ends up with a similar one.
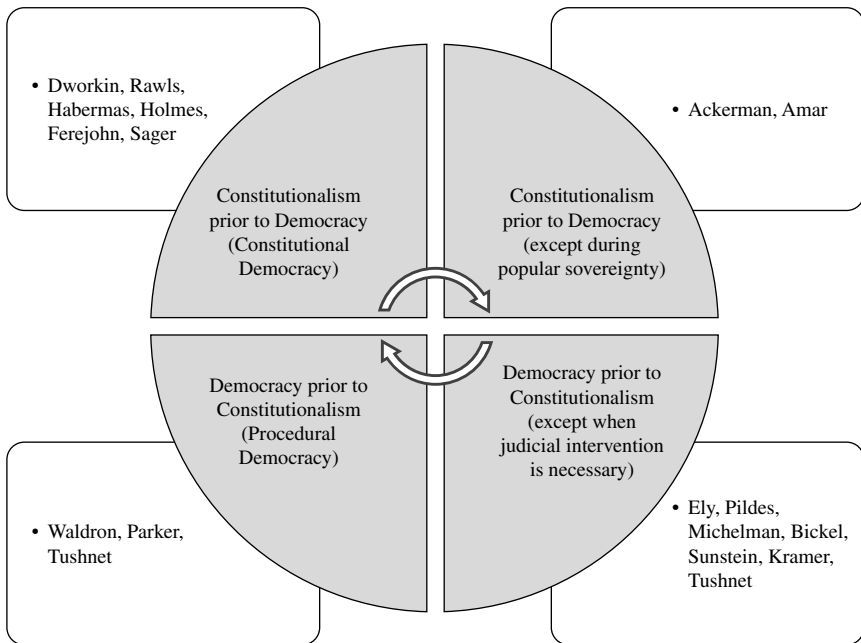

FIGURE 5: THE CIRCULAR MOVEMENT *AROUND* THE CONSTITUTIONALISM/
DEMOCRACY DISTINCTION

Ultimately, Dworkin and Waldron still occupy different positions, but they are closer to each other than to the middle of the circle, which is com-

posed of the democracy and constitutionalism distinction. They both deny or dissolve one side of the distinction and thus retain the same distance from the middle. They both restate the issues at hand. Dworkin is as far from— or as close to—resolving the tension as Waldron is.

B.   *Undermining the Distinction*

The above discussion draws attention to a general phenomenon of undermining the distinction between constitutionalism and democracy, which itself gives rise to the tension between the concepts. The distinction is less clear than it appeared at the beginning of the intellectual inquiry. Both extremes of the debate deconstruct it and collapse it by deducing one concept from the other. Dworkin argues for the priority of constitutionalism: A proper understanding of democracy as constitutional democracy means democracy requires constitutional constraints. He thus argues for the value of constitutionalism *from within* the concept of democracy. Waldron argues for the priority of democracy: A proper understanding of rights requires a majoritarian decision-making process on all matters. He derives his majoritarianism from a supra-right to equal political participation. Waldron thus argues for the value of democracy *from within* the concept of constitutionalism.[448] In other words, both Dworkin and Waldron argue for prioritizing their preferred concept, given a proper understanding of the other competing concept.[449]

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[448] Thus, one might say that Waldron is a participant in a unity discourse no less than Dworkin. By collapsing the distinction, and deducing one concept from the other, he "denies" the disunity of the concepts and unites them. Nonetheless, he is still a dissolver in my typology rather than a denier since the typology was drawn in reference to the current institutional reality that includes judicial review. Still, one can think of an alternative way of drawing the initial distinction made in this Article, as represented by the following chart. I thank Frank Michelman for making this point clear to me.

	Unity	Disunity
Democracy implies rights (rights are prior to majorities)	Dworkin, Habermas	Michelman
Rights imply majoritarianism (majoritarianism over courts)	Waldron	Parker

[449] I use Dworkin and Waldron here as examples, but one can observe a similar movement of the debate with respect to other positions. Consider the denial and dissolution positions advanced by Ackerman and Tushnet. Ackerman sacrifices democracy for constitutionalism, and Tushnet sacrifices constitutionalism for democracy. The pictorial expression of this polarization is a straight-line continuum. However, Ackerman distinguishes between two conceptions of democracy—popular sovereignty and representative democracy—and argues for his pro-constitutionalism position by claiming that a proper understanding of democracy as popular sovereignty requires constitutional constraints. That is, he argues for the merits of constitutionalism *from within* the concept of democracy. Tushnet distinguishes between two conceptions of constitutionalism—judicially-enforced constitutionalism and populist constitutionalism, or the "thick" Constitution and the "thin" Constitution—and argues for his pro-democracy position by claiming that a proper understanding of constitutionalism as populist constitutionalism requires majoritarian decision-making. In other words, Tushnet derives his

Thus, the loop shows that the radical endorsement of one concept over the other occurs when the distinction is collapsed. It is the very act of collapsing the distinction that creates polarization in the field. Scholars occupying opposite sides in the debate make the same move to achieve different results. Once the distinction has been collapsed scholars can go either way: democracy or constitutionalism. Collapsing the distinction is not inherently a pro-democracy or pro-constitutionalism move.

However, it is the very clarity of the distinction that gives rise to the tension in the first place. The normative effects of deductions and definitions become questionable. Far from resolving the tension, this scholarly process of redefinitions and deductions merely restates the issues at hand. Neither defining democracy as a majority rule nor as a constitutional process can settle the debate, given the contestability of both conceptions. Neither deducing democracy from rights nor deducing rights from democracy settles the debate given the contestability of such a deduction.

C. Outside the Circle?

This account leaves out the fourth group: the endorsers. This group, in effect, claims to be outside the circular movement. Endorsers resist being caught in the circle by rejecting the reduction of the tension to one side of it, or by claiming that the concepts can otherwise be reconciled. They have given up the attempt to advance a conceptual position in the field. For endorsers, it is futile to advance a new smart theory to resolve the tension; it is even misleading to pretend that any new smart theory can or should resolve the tension given the unlikelihood of eradicating reasonable disagreement. Conceptual solutions advanced by other scholars simply hide this disagreement or ignore it. Endorsers effectively say that if one takes disagreement seriously, then one would have to abandon the quest for conceptual solutions or, alternatively, one would have to advance a conceptual solution that is beyond contestation. Because the latter has not been shown possible, thus far, the former remains more attractive.

This outsider position requires redrawing Figure 3 so that the most distinct group becomes the endorsers rather than the dissolvers (see Figure 6).

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majoritarianism from a supra-right to equal political participation. He argues for the merits of democracy *from within* the concept of constitutionalism. Therefore, both Ackerman and Tushnet collapse the distinction between democracy and constitutionalism: They privilege one of the competing concepts by arguing that such privileging is warranted by a proper understanding of the other concept. Ackerman presents himself as the true democrat, even though he privileges constitutionalism over democracy, whereas Tushnet presents himself as truest to the constitutional ideal, even though he privileges democracy over constitutionalism. The pictorial expression of this polarization is a loop or a circular continuum.

CONSTITUTIONAL   CONSTITUTIONAL
   DEMOCRACY   DEMOCRACY

DENIAL	**ENDORSEMENT**
RECONCILIATION	**DISSOLUTION**

UNITY   DISUNITY
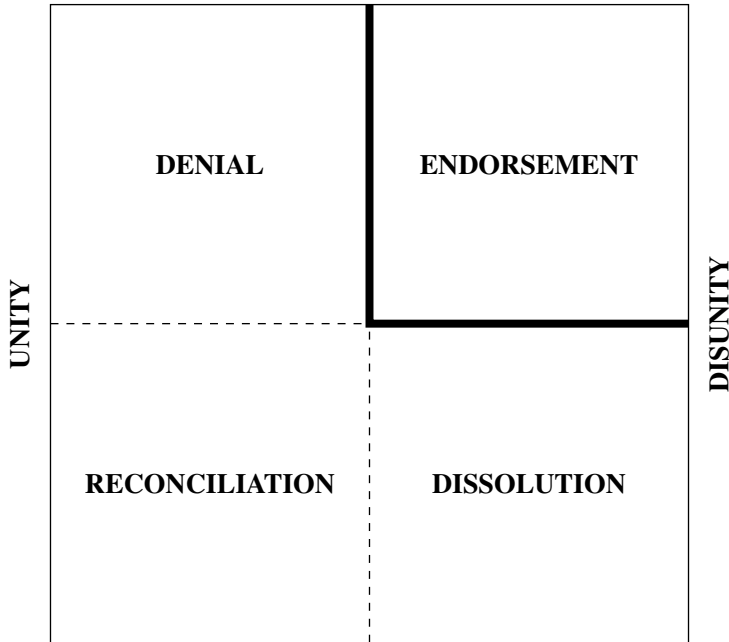
CONSTITUTIONAL   MAJORITARIAN
   DEMOCRACY   PROCEDURALISM

FIGURE 6: RELATIONSHIPS: DISCURSIVE MOVES OF PROGRESSIVE
CONSTITUTIONAL THEORY

This redrawing, however, does not mean that Figure 3 inaccurately rep-
resents the field. Rather, these are two ways of representing the field: a
focus on *discourse* itself (Figure 6), or a focus on the *effects* of discourse
(Figure 3). As for the latter, it remains correct that, insofar as institutional
prescriptions are concerned, the dissolvers are more distinct. The endorsers
are not radically different from the deniers and reconcilers in that respect.
After all, they are constitutional democrats, like the deniers and reconcilers.
However, insofar as the discursive strategy is concerned, the dissolvers lose
some of their singularity given the proximity of their strategies to the unity
groups.

Only the endorsement position refuses to hide the choice and value
judgments behind rational, empirical, and conceptual solutions claiming to
resolve or dissolve the foundational tension of modern constitutional democ-
racies. Endorsers reject both the majoritarian answer of the dissolvers and
the constitutionalist answer of the deniers and reconcilers. These answers
are equally controversial and fail to command a consensus that would re-

solve the tension. Yet acknowledging the irreconcilability of the tension—that is, the inability to solve it within existing theoretical frameworks—does not lead endorsers to reject these very theoretical frameworks given their emphasis on the political aspect of the tension, that is, the lack of agreement. Further, abandoning the project of legitimacy does not lead endorsers to reject existing constitutional democratic regimes as unjustifiable. In other words, they have not abandoned the project of public justification *simpliciter*. Rather, they only gave up the inter-subjective version of it. While for the endorsers as individuals or as reason-givers constitutional democracy is probably justified (indeed, that is why they endorse the existing institutional reality), endorsers do not offer a publicly demonstrable and deductively provable justification that can command consensus.

V. CONCLUSION

Attempts to resolve the "counter-majoritarian difficulty" or the "tension between constitutionalism and democracy" bring the field of progressive liberal constitutional theory into an evident state of contradiction. Multiple discursive moves have attempted to answer this tension in order to justify or critique the practice of judicial review of the validity of legislation. Different scholars have attempted to provide an indisputable normative premise to justify non-negotiable principles that legitimatize existing political regimes. In search of such a premise, these scholars have turned to foundational concepts like "democracy" and "constitutionalism." But these concepts are not useful because they are unspecified. Thus, scholars have offered and defended their own conceptions of these concepts. It then becomes evident that each concept has many competing conceptions, and each concept involves the other in differing ways. These same concepts lead prominent scholars to opposite directions, producing the effect of contradiction.

This state of the field creates a tension between the claims of different theorists that they have found a solution demonstrating the compatibility of judicial review with democracy, on the one hand, and the multiplicity of solutions that fail to bring the debate to a close, on the other hand. The former seems to be an attempt to overcome contestation, while the latter enhances contestation. That is, by attempting to overcome contestation, scholars enhance contestation. Yet, the typology offered in this Article is not merely a symptom of the fact of contestation in the field, it is also a symptom of the contestability of the main legal and political concepts. Indeed, this contestation is an outcome of many competing, rationally appealing theories advanced by highly sophisticated and well-respected leading scholars. Different theoretical positions (denial, reconciliation, and dissolution) under-

mine each other by advancing respectable rational arguments against competing positions.[450]

Many scholars in the field recognize contestability in some form. Nonetheless, they ignore contestability in practice and continue to advance certain positions within the field, claiming their own conception is superior to others' based on self-defined criteria. Each scholar further claims that her theory will provide a consensual basis for legal and political ordering, and particularly for judicial review. As such, these scholars still aspire to a certain degree of closure by attempting to resolve the tension between constitutionalism and democracy.[451] They "resolve" the tension, however, only by papering over disagreement and through definitional fiat.

Despite these theoretical efforts, no single theory has hitherto achieved consensus or gained wide acceptance, and the debate thus far has been inconclusive. The typology offered in this Article is only one way to organize theoretical interventions in the debate. It shows that the proffered theories are more similar than is normally acknowledged, given their convergence into certain modes of discourse. In addition, most of these theories are loopified in a similar way. The mapping and typology—as illustrated by loopification—are symptoms of a circular movement in the debate. The debate revolves around the tension without addressing it in a satisfactory manner. Only by collapsing the distinction that gives rise to the tension in the first place can scholars claim that they are able to resolve the seemingly irreconcilable tension. Against this backdrop, it is not surprising that democracy and constitutionalism are no less contestable and inconsistent at the end of the intellectual journey than at its beginning. Thus, the complexity and richness of the debate is misleading as it conceals this circular movement and the failure to advance the debate.

Not only is the debate not advancing, it is also detrimental to the examination of specific legal questions in which scholars deploy charges like "counter-majoritarianism," "judicial activism," or "usurpation of power." In light of the contestability of competing concepts, these charges, which are made alternately by progressives and conservatives against rulings they disapprove of—for example, *Citizens United* or *Lawrence*—become questionable. It is difficult to give these charges any determinate meaning. Far from clarifying the real issues at stake in specific cases, the introduction of these charges merely obscures them. The deployment of such rhetorical charges further conceals the intractability of political disputes that these cases em-

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[450] Endorsement contributes to this contestability by critiquing the other positions, but it is not similarly affected by these positions because endorsers do not attempt to compete with the other positions.

[451] For a discussion of the meaning of closure, see *supra* note 72.

body.[452] While these charges deploy shared concepts that everyone can refer to in public debates, these concepts are virtually empty.

I am not suggesting the strong version of essential contestability, according to which no theory might be presented in the future to resolve the tensions and hence produce rational closure in the field. I suggest only that this has not yet been the case, and that it is unlikely that this will be the case anytime soon within the progressive liberal constitutional field. This Article does not offer a solution to the tension between constitutionalism and democracy. It provides only a critique of the ongoing attempts to solve the tension.

While all this in no way proves the failure of contemporary constitutional theorists to justify progressive constitutional democratic or majoritarian regimes, it allows for a growing sense of skepticism towards the deployment of competing discursive strategies for this purpose, and hence skepticism towards the project of legitimacy in general. After all, the project is one of public political justification—that is, an attempt to convince rational or reasonable people in the public sphere. It is not about the smartest theory *per se*, but about a theory's ability to provide a public political justification that can be offered to others as a compelling normative reason that cannot be reasonably rejected. This failure might not have been consequential had the discussion revolved around a less important tension than the one between constitutionalism and democracy. It is perhaps unsurprising that progressive liberal theorists attempt repeatedly and in a variety of ways to rationalize modern democracies, given the perception of foundational tension and the political stakes. These repeated and unconvincing attempts suggest an anxiety regarding the contradictory foundations of the political order as well as an effort to wish the contradiction away and quiet this anxiety. Nevertheless, all these attempts notwithstanding, the specter of unresolved tension still looms over the modern liberal polity, and thus the question of liberal legitimacy remains far from being resolved.

Perhaps it is more fruitful to ask new questions.

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[452] *See, e.g.*, Louis Michael Seidman & Mark V. Tushnet, Remnants of Belief: Contemporary Constitutional Issues 5 (1996) (noting that commentators "pretend" that hard constitutional questions are easy).