




Fall 2001

Persuasion: A Model of Majoritarianism as Adjudication

Christopher J. Peters

University of Baltimore School of Law, cpeters@ubalt.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac

 Part of the [Jurisprudence Commons](#), and the [Law and Philosophy Commons](#)

Recommended Citation

Persuasion: A Model of Majoritarianism as Adjudication, 96 Nw. U. L. Rev. 1 (2001)

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

Articles

PERSUASION: A MODEL OF MAJORITARIANISM AS ADJUDICATION

*Christopher J. Peters**

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?

James Madison, *Federalist No. 10*¹

I. INTRODUCTION: THE MAJORITARIAN DIFFICULTY²

The countermajoritarian difficulty is the most pondered problem in contemporary constitutional theory; the majoritarian difficulty is among the most ignored. The countermajoritarian difficulty, of course, is Alexander Bickel's famous label for the tension between (supposedly nondemocratic) judicial review and (supposedly democratic) majoritarian government.³

* Assistant Professor of Law, Wayne State University Law School. I am grateful to Michael Abramowicz, Robert Bennett, James Gardner, Mark Tushnet, and the participants in a faculty workshop at the Florida State University College of Law for their insightful comments on earlier drafts of this Article; to Dean Joan Mahoney for research funding; and, as always and above all, to my wife Trish Webster for her constant patience and support.

¹ THE FEDERALIST NO. 10, at 124 (James Madison) (Isaac Kramnick ed., 1987).

² With apologies to Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995). Croley uses the phrase "the majoritarian difficulty" in a different sense than my use of it here: He refers to problems that arise when judges are elected and thus accountable to the majority.

³ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986) (first published 1962). The validity and coherence of Bickel's construct have long been the subjects of spirited debate, most recently (and quite productively) in a Symposium published in this *Review*. See Symposium, *The Counter-Majoritarian Difficulty*, 95 NW. U. L. REV. 843 (2001). Many of the contributors to that Symposium make the point that democratic politics in America is far from purely "majoritarian," a truth that is important generally but not pertinent to my arguments in this Article.

"[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive," Bickel wrote, "it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it."⁴ That is the difficulty: How, in what purports to be a democracy, can nine—and often fewer—nonelected, life-tenured judges legitimately trump the will of the majority?⁵

Perplexing as that question has proven to be, it is hardly more perplexing than a question constitutional theorists rarely ask: How, in what purports to be a democracy, can the *majority*, apparently by strength of numbers alone, legitimately trump the will of the *minority*? Majority rule is coercion; it is, no less than dictatorship or oligarchy, rule by the will of some over the will of others. It is only that the rulers in a majoritarian system outnumber the ruled. But the ruled are *ruled* nonetheless. In what sense can this be called democracy? This is the *majoritarian* difficulty.

Suppose, for example, that democratic legitimacy relies upon some degree of "self-determination"—the ability of each individual citizen to play a meaningful role in deciding what rules will constrain his or her behavior.⁶ On this view, a regime is more democratic to the extent that it permits individual self-determination and less democratic to the extent that it inhibits it. Measured on such a scale, any system of majority rule always seems to suffer from a crisis of democratic legitimacy, because some percentage of the citizenry—often a very large percentage—always will be denied the ability to play a meaningful role in deciding on policy, merely by the happenstance of being outvoted. Members of a minority, it appears, are not governing themselves; they are being governed by members of the majority.

Or suppose that democratic legitimacy relies at least in part upon a

⁴ BICKEL, *supra* note 3, at 16-17.

⁵ It would more accurately describe the core difficulty, I think, to state the question in the following more nuanced way: How can nine (or fewer) nonelected, life-tenured judges legitimately remove certain issues from the purview of majoritarian politics? Often judicial review is most controversial when it comes down, with seeming finality, on one side of a question that is politically divisive at the time, such as public school segregation in 1954, *see* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), or abortion in 1973 and today, *see* *Roe v. Wade*, 410 U.S. 113 (1973). This suggests that the "difficulty" of judicial review lies not so much in its trumping the will of a (bare, perhaps shifting) majority, but in its foreclosing further consideration of the issue within the majoritarian political process. Bickel, I think, recognized this subtlety; otherwise his exhortation to the Court not to "relieve [the political process] of [the] burden of self-government" makes little sense. BICKEL, *supra* note 3, at 156. In any case, the idea of "trumping the will of the majority" serves as useful shorthand here.

⁶ Classic statements of this idea include those of Locke, Kant, and Rousseau. *See* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 316-17, 367-69, 374-94 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690); IMMANUEL KANT, *On the Common Saying: "This May Be True in Theory, but It Does Not Apply in Practice,"* in KANT: *POLITICAL WRITINGS* 61, 74-87 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991) (1793) [hereinafter KANT, *Theory and Practice*]; IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT: *POLITICAL WRITINGS*, *supra*, at 93-99 [hereinafter KANT, *Perpetual Peace*]; IMMANUEL KANT, *The Metaphysics of Morals* §§ 43-49, in KANT: *POLITICAL WRITINGS*, *supra*, at 131, 136-43 [hereinafter KANT, *Metaphysics*]; JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* bk. 1, ch. VI, at 22-27; bk. 4, ch. II, at 168-70 (Willmoore Kendall ed. & trans., 1954).

conception of “political equality,” by which each citizen has an equal chance to influence policy.⁷ Political equality too seems to be defeated by majority rule, because members of minorities by definition have no influence on policy while members of majorities by definition have decisive influence. Again, the majority can impose its will on the minority simply by virtue of numbers. It is true that members of minorities with respect to some issues may be members of majorities with respect to other issues, but this is small comfort to the person who finds herself in the minority on an issue she believes to be extremely important, or to the person who finds herself to be perpetually a member of the minority. (A communist, for example, is likely to be in the permanent minority on a great many very important issues in American politics at the turn of the twenty-first century.)

It is the dynamics of this majoritarian difficulty that undergirded Madison’s celebrated essay *Federalist No. 10*. Madison’s professed concern was the possibility of majority *factions*: majorities “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁸ His solution was to reduce the opportunities for majorities to act as factions, by establishing a system of representation to govern a large polity. But the majoritarian difficulty does not disappear even if we assume a majority that does not act as a *faction* in Madison’s sense—even if we posit a majority that acts deliberatively and in good faith, with the utmost concern for protecting minority rights and with the honest goal of doing what ultimately is best for the community as a whole. For then it becomes a matter of the majority’s good-faith beliefs about how best to serve the common good trumping the minority’s good-faith beliefs about how best to serve the common good. The majority may be benevolent, but, with respect to the minority, it is no less a dictator.

Contemporary theorists of *deliberative democracy* suggest a possible solution to the majoritarian difficulty.⁹ They assert that decision by major-

⁷ John Rawls holds such a view, see JOHN RAWLS, *POLITICAL LIBERALISM* 5, 289-371 (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]; JOHN RAWLS, *A THEORY OF JUSTICE* 60-65, 195-257 (1971), as does Ronald Dworkin, see RONALD DWORIN, *A MATTER OF PRINCIPLE* 205-13, 269-73 (1985); RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 180-83, 266-78 (1978).

⁸ THE FEDERALIST NO. 10, *supra* note 1, at 123.

⁹ The term “deliberative democracy” apparently is of relatively recent origin. See James Bohman & William Rehg, *Introduction* to DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS ix, xii (James Bohman & William Rehg eds., 1997) (attributing the term to Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980)); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra*, 67, 87 n.1 (attributing the term to Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985), but acknowledging Sunstein’s attribution of the term to Bessette, *supra*). I use it here to refer, in a fairly loose sense, to a group of modern theorists who share an emphasis on the connection between public deliberation or discourse and political legitimacy. The group is diverse and in disagreement about many substantive and methodological particulars, and I doubt that all

ity rule becomes politically legitimate when it is the product of rational deliberation among political equals on grounds acceptable to all the participants. When these conditions are met, the theorists contend, majority rule is not simply a means of imposing majority beliefs or preferences upon the dissenting members of the minority. Majority rule is rather a method of implementing *communal* decisions made through a process of free and equal deliberation in which every participant has the opportunity to engender majority support for her position. On a deliberative democratic view, the procedural features of free and equal participation in political decision-making, and of justification of decisions by reference to mutually acceptable grounds, transform a majority decision into a decision of which every member of the community is, in a meaningful sense, the author.

So, for example, Joshua Cohen distinguishes between a “deliberative” conception of democracy and an “aggregative” conception. On a deliberative conception, “to justify the exercise of collective political power is to proceed on the basis of free public *reasoning* among equals,” in which the participants base their arguments upon “considerations that others have reason to accept.”¹⁰ In contrast, on an aggregative conception, “democracy institutionalizes a principle requiring equal consideration for the *interests* of each member.”¹¹ Deliberative democracy emphasizes collective *reasoning* to a common decision; it requires action based on good-faith beliefs about the common good and relies upon the possibility that participants’ existing views may change as a result of discussion.¹² Aggregative democracy, on the other hand, emphasizes atomized *voting* to reach decisions; it permits, and even assumes, action based solely on the participants’ self-interest and discounts the possibility that preexisting preferences might change.¹³ On a deliberative view, Cohen contends, the results of political decision-making can properly be seen as *collective*, as deriving from the equal participation and self-governance of *every* member of the polity, not just those in the ma-

its “members” think of themselves as belonging to the group at all. It includes, among others, political philosophers like John Rawls, Jürgen Habermas, Joshua Cohen, and Jon Elster; the legal philosopher Ronald Dworkin; and constitutional theorists like Cass Sunstein and Frank Michelman.

¹⁰ Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 9, at 407, 412-13 (emphasis added).

¹¹ *Id.* at 411 (emphasis added). Edmund Burke recognized long ago the distinction between a merely aggregative democracy and a truly deliberative one:

Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates, but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole.

Edmund Burke, *Speech to the Electors of Bristol* (Oct. 13, 1774), in BURKE’S POLITICS 114, 115 (Ross J.S. Hoffman & Paul Levack eds., 1959). A good brief survey of the development of this distinction in democratic thought can be found in Jon Elster, *Introduction* to DELIBERATIVE DEMOCRACY 1, 1-5 (Jon Elster ed., 1998).

¹² See Cohen, *supra* note 10, at 412-16.

¹³ *Id.* at 411-16.

majority.¹⁴

Similarly, Ronald Dworkin denies that democratic legitimacy hinges on the “majoritarian premise”—close to Cohen’s aggregative conception—that “political procedures should be designed so that . . . the decision that is reached is the decision that a majority . . . of citizens favors.”¹⁵ Instead, Dworkin defends a “constitutional conception of democracy”—akin to Cohen’s “deliberative” conception—by which “collective decisions [are] made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.”¹⁶ On the constitutional conception, political decisions are communal, not coercive; they are “a matter of individuals acting together in a way that merges their separate actions into a further, unified, act that is together *theirs*.”¹⁷

These deliberative conceptions of democracy get around the majoritarian difficulty by denying that majorities really are privileged with respect to minorities—by denying that majorities really *rule*. On the deliberative democratic view, “majority rule” is simply a procedure for bringing closure to discussion when a decision finally must be made.¹⁸ But the resulting decisions belong no less to members of the minority than to members of the majority, because they are meaningfully the products of free and equal discussion among *everyone*. The dissenter who has had the full and fair opportunity to persuade her fellows has engaged in self-determination no less than the member of the ultimate majority on an issue; it is just that her arguments were not as persuasive as her opponents’. The dissenter also has

¹⁴ *Id.* at 415; see also Cohen, *supra* note 9, at 75 (explaining that deliberative democracy “aims to arrive at a rationally motivated *consensus*—to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals”); Joshua Cohen, *Democracy and Liberty*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 9, at 185, 185 [hereinafter Cohen, *Democracy and Liberty*] (“The fundamental idea of democratic, political legitimacy is that the authorization to exercise state power must arise from the *collective decisions* of the equal members of a society who are governed by that power.”). This idea of a “collective” or “communal” decision owes an obvious debt to Rousseau’s concept of the “general will.” See ROUSSEAU, *supra* note 6, at bk. 2, chs. I-IV, 33-47, bk. 4, chs. I-II, 162-71.

¹⁵ RONALD M. DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1, 15-16 (1996).

¹⁶ *Id.* at 17.

¹⁷ *Id.* at 20.

¹⁸ See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 77 (1996) (“Deliberative democracy recognizes that the government must take a stand on questions involving . . . disagreement, even if reciprocity and its other constitutive principles do not determine the answer.”); ELAINE SPITZ, *MAJORITY RULE* 26 (1984) (“Voting . . . takes place in order to settle disputes. At some point in conflict situations, resolution becomes necessary . . .”); Elster, *supra* note 11, at 9 (“[P]olitical deliberation is constrained by the need to make a *decision*. . . [T]he importance of time in political life implies that, in addition to deliberation, voting as well as bargaining inevitably has some part to play.”). The British Prime Minister Clement Attlee perhaps put it best: “Democracy means government by discussion, but it is only effective if you can stop people talking.” Clement Attlee, Speech at Oxford (June 14, 1957), quoted in *Lord Attlee on Art of Being Prime Minister*, *TIMES* (London), June 15, 1957, at 4.

experienced political equality with her opponents, because neither side has enjoyed an artificial advantage in the deliberative process. The entire affair has been cooperative, not coercive.

As the examples given above suggest, theorists of deliberative democracy draw an important distinction between two conceptions of political decision-making: *deliberative* decision-making (or *public reason*¹⁹), by which legitimate political decisions proceed from public discussion among citizens on the basis of mutually acceptable grounds; and *aggregative* decision-making (or *pluralism*²⁰), by which legitimate political decisions proceed from the aggregation of existing interests and preferences through the mechanism of voting.²¹ For deliberative democratic theorists, only on the deliberative conception can a political decision that arises from disagreement, and binds members of a dissenting minority, be considered truly collective and thus legitimately coercive.

This deliberative democratic answer to the majoritarian difficulty is attractive. It is also mysterious. The mystery lies in the mechanism by which free and equal public discussion on mutually acceptable terms transforms coercive majority decisions into legitimate ones. Why must political decisions be based upon grounds that are acceptable to all rather than on the individual preferences or interests of the discussants? (Why, that is, should we prefer a deliberative conception of politics to an aggregative one?) And how can a majoritarian decision be seen as truly *collective*—as authored by the members of both the majority *and* the dissenting minority—merely by virtue of free and equal participation in the preceding deliberation? Theorists of deliberative democracy have been vague about the answers to these questions, lending their theories a troubling air of alchemy.

I attempt some answers in this Article. To find them, I look to an institution that has answered similar questions implicitly, in time-honored and generally accepted practice, for hundreds of years. That institution is adjudication—specifically, adjudication according to the Anglo-American common-law tradition. Like majority rule, adjudication involves the coercion of “losing” parties—that is, parties who disagree with the resulting decision. Yet adjudication can be seen as democratically legitimate because, and to the extent that, it incorporates the meaningful participation of those who will be bound by it. The mechanism of adjudicative legitimacy is one

¹⁹ This is John Rawls's term for it. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM*, *supra* note 7, at 212-54; John Rawls, *The Idea of Public Reason*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS*, *supra* note 9, at 93 [hereinafter Rawls, *Public Reason*].

²⁰ See, e.g., Bohman & Rehg, *supra* note 9, at ix, xii. The pluralist model is most closely associated with the work of Robert Dahl. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956).

²¹ On the distinction between the two conceptions, see DWORKIN, *supra* note 15, at 15-19; Bohman & Rehg, *supra* note 9, at ix, x-xiii; Cohen, *supra* note 10, at 410-16; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689 (1984).

of *persuasion*—of a process of argument resting on reasons that the decision-maker (the judge) can accept. That same mechanism can confer legitimacy upon majority rule by transforming free and equal deliberation into a truly collective decision. But it can do so only so long as deliberation proceeds according to reasons that truly are persuasive ones—reasons that the decision-maker (the majority) can accept.

In Part II of this Article, I explain why American constitutional theorists have focused on the countermajoritarian difficulty to the exclusion of the majoritarian difficulty. I contend that this emphasis has been misallocated, because majoritarian politics presents the same problem of legitimacy that afflicts judicial review: at bottom, a problem of *self-judging*. In Part III, I explain how meaningful participation can produce democratic legitimacy in both adjudication and majoritarian politics. In Part IV, I offer a model of majoritarianism as a form of adjudication, and I explain how the same mechanism of participation by *persuasion* that lends legitimacy to the latter also lends legitimacy to the former. I conclude in Part V by connecting the majoritarian to the countermajoritarian difficulties and noting that, somewhat ironically, the idea of persuasion is a key to solving (or at least mitigating) both of them.

II. THE UBIQUITOUS PROBLEM OF SELF-JUDGING

American writers about constitutional theory have spilled much more ink on the question of the political legitimacy of judicial review than on the question of the political legitimacy of majoritarian politics. Theorists of the American Constitution have been preoccupied with Bickel's countermajoritarian difficulty, but, with few exceptions, they have ignored Madison's majoritarian difficulty.

Consider what one might call the "mainstream" of recent American constitutional theory: middle-of-the-road, perhaps somewhat left-leaning defenses of judicial review like those of Bickel and Ely and contemporary variants on their approaches like that of Cass Sunstein. Bickel was concerned with limiting the Supreme Court's intrusive role vis-à-vis majoritarian politics in order to preserve its political capital for those relatively rare moments when its principled intervention was necessary.²² Ely too has been concerned with limiting the Court's role with respect to politics, by confining the Court to maintaining and repairing the conditions under which politics can operate fairly.²³ More recently, Sunstein has taken up Bickel's minimalist theme, calling on the Court to decide cases "narrowly" and "shallowly" in order to give the political branches maximum room to operate.²⁴ Each of these theorists has focused on the perceived problem of

²² See BICKEL, *supra* note 3.

²³ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

²⁴ See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); see also Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV.

the Court's legitimacy while taking for granted the general legitimacy of the political system the Court's decisions sometimes displace. Each has limited his critique of majoritarian politics to small-scale tinkering, focusing on the occasionally troublesome lack of principled commitment in politics (Bickel), the sporadic need to reinforce representative processes (Ely), or the desirability of promoting reasoned deliberation (Sunstein).

Consider also two contemporary critics of judicial review from opposite ends of the political spectrum. From the right, Robert Bork asks: "[I]f judges are . . . unelected, unaccountable, and unrepresentative, who is to protect us from the power of judges? How are we to be guarded from our guardians?"²⁵ Bork's answer is that judges must adhere to an originalist philosophy in constitutional interpretation;²⁶ his barely acknowledged premise is that judicial review poses a legitimacy problem that majoritarian politics does not. After all, "[t]he Constitution preserves our liberties by providing that all those given the authority to make policy are directly accountable to the people through regular elections."²⁷ For Bork, electoral accountability avoids the problem of political legitimacy in majoritarian politics, while the absence of such accountability presents that problem in spades when it comes to judicial review.

From the left, Mark Tushnet recently has advocated a "populist constitutional law"—the independent interpretation of the Constitution by the political branches, with consideration but no special deference for how it has been interpreted by the courts.²⁸ Tushnet argues that the political branches are no less capable of effective constitutional decision-making than the judicial branch,²⁹ and that judicial review poorly serves its primary purpose of checking majoritarian excesses.³⁰ Like Bork, Tushnet operates by the mostly unspoken presumption that majoritarian politics has a greater claim to political legitimacy than judicial decision-making, a presumption embedded in Tushnet's casual equation of decision-making by the political branches with decision-making by "the people."³¹

There certainly is nothing wrong with worrying about the immense authority wielded by the Supreme Court in our system, and by the federal judiciary more generally. The Court often renders controversial decisions with which a great many people, sometimes a majority of Americans, disagree. Sometimes those decisions prove courageous and visionary, as many

1454 (2000) (describing and critiquing Sunstein's minimalism).

²⁵ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 5 (1990).

²⁶ *See id.* at 5-11, 139-41, 143-85, 251-65.

²⁷ *Id.* at 4-5.

²⁸ *See* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

²⁹ *See id.* at 54-71.

³⁰ *See id.* at 129-53.

³¹ *See id.* at 177-94, *passim*.

people would describe *Brown v. Board of Education*³² and some would describe *Roe v. Wade*.³³ Sometimes they prove wrongheaded and reactionary, as with *Dred Scott*³⁴ and *Lochner v. New York*.³⁵ Sometimes they appear wrongheaded and radical, as others might describe *Roe*. Often those decisions involve the invalidation of decisions made by representatives elected by the citizenry or by officials responsible to such representatives. Since the members of the Supreme Court are neither elected nor responsible to elected officials in any meaningful sense, it does indeed seem problematic, in a nation built on participatory democracy, that their decrees sometimes should rule. Compared with political decision-making, judicial review looks an awful lot like rule by fiat.

I have argued extensively elsewhere that this perception is inaccurate, because judicial review is not inherently nondemocratic.³⁶ Here I want to attack the perception from the opposite direction, by undermining the premise of unassailable majoritarian legitimacy. Once that premise is shaken—once majority rule and judicial review are seen to stand on the same trembling foundation of legitimacy—then we can begin to shore up that foundation with the concept of participatory government.

A. Self-Judging and Judicial Discretion

For Locke, government, and particularly democratic government, was the solution to the problem of “every Man’s being Judge in his own Case,”³⁷ a problem endemic to the state of nature. In a democracy, no man truly could judge his own cause, because no man would enjoy greater political power than his adversaries.³⁸ Madison, in *Federalist No. 10*, turned on its head Locke’s solution to the self-judging problem, comparing “acts of legislation” to “judicial determinations”³⁹ and noting that in a democracy, “the parties”—that is, the citizens—“are, and must be, themselves the judges.”⁴⁰ Madison implicitly contrasted democratic government with adjudication in this respect: In adjudication proper, there is a third party, a neutral arbiter, a *judge*, who “hold[s] the balance between”⁴¹ the competing parties.

One might think, then, that the presence of a neutral arbiter in adjudi-

³² 347 U.S. 483 (1954).

³³ 410 U.S. 113 (1973).

³⁴ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

³⁵ 198 U.S. 45 (1905).

³⁶ See Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997) [hereinafter Peters, *Adjudication*]; Peters, *supra* note 24, at 1477-92.

³⁷ LOCKE, *supra* note 6, at 369.

³⁸ See *id.* at 374-77.

³⁹ THE FEDERALIST NO. 10, *supra* note 1, at 124.

⁴⁰ *Id.* at 125.

⁴¹ *Id.*

cation avoids the self-judging problem. Contemporary American constitutional theory, however, is built upon the premise that the opposite is true—that adjudication, and particularly judicial review, poses the ultimate dilemma of self-judging.

Consider Robert Bork's central problem of constitutional theory: "[W]ho is to protect us from the power of judges? How are we to be guarded from our guardians?"⁴² Bork's question recognizes two inescapable truths about adjudication in the Anglo-American tradition. First is the fact that judges *make law* when they decide cases, just as legislatures do when they enact statutes, and sometimes—when judges render constitutional decisions that cannot, without great difficulty, be overridden by the political branches—in a seemingly more permanent and fundamental sense than legislatures. Any institution with the power to make law in this way has the power to *coerce*, to bind, to govern; and this is a power to be feared, a power that raises the question of political legitimacy.

Second is the fact that judges, in an important sense, seem to be *less constrained* in their lawmaking than legislators, executives, and officials of the political branches typically are. Here is Bork's straightforward statement of this problem:

It is as important to freedom to confine the judiciary's power to its proper scope as it is to confine that of the President, Congress, or state and local governments. Indeed, *it is probably more important, for only courts may not be called to account by the public.* For some reason unintelligible to me, Lord Acton's dictum that "[p]ower tends to corrupt and absolute power corrupts absolutely" is rarely raised in connection with judges, who, in our form of government, possess power that comes closer to being absolute than that held by any other actors in our system.⁴³

Acton's worry about the corrupting influence of power is in fact the foundation, often unspoken, of anxieties about judicial review. Those anxieties, as expressed here by Bork, turn on the apparent fact that judicial power (at least federal judicial power) is not subject to the same sources of "confinement" as executive or legislative power. While the President, members of Congress, and officials of state and local governments are either elected by the citizenry or appointed and removable by those who are elected, judges are "unelected" and "are given life tenure," and thus are mostly "unaccountable" and "unrepresentative."⁴⁴ As unaccountable wielders of great power, judges are especially susceptible to "corruption"—to the "temptation" to "do justice"⁴⁵ rather than apply the law, to reach results

⁴² BORK, *supra* note 25, at 5.

⁴³ *Id.* at 141 (emphasis added, footnote omitted) (quoting Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), in G. HIMMELFARB, LORD ACTON: A STUDY IN CONSCIENCE AND POLITICS 160-61 (1952)).

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 1.

(and thus make laws) that *they* (the judges) like, regardless of whether those bound by them agree.

For Bork, adjudication, and especially judicial review, thus poses the ultimate dilemma of self-judging. Bork recognizes that in many cases—cases where important law is being made and will be difficult, if not impossible, to change—judges are far from the neutral arbiters that Madison implicitly supposed. Judges are in fact intensely interested parties, because judges, no less than the rest of us and perhaps more than many, have beliefs about what the world should be like and interests that are affected by the world turning out a certain way. A judge may not care a whit about the result of the *particular* case before her—whether that particular plaintiff or that particular defendant wins—and indeed judges are required to recuse themselves when they have, or may be seen to have, this kind of case-specific interest.⁴⁶ But a judge often will care, sometimes very much, about the *rule*, the *law*, that will arise from the decision of a particular case. A judge might care very much about whether abortion is legal, or whether flag-burning may be prohibited, or whether affirmative action is permissible in the award of government contracts.

And thus a judge deciding a significant precedential case, one that lays down a constitutional principle or interprets an important statute in a particular way, is quite likely to be acting as the “judge in her own case,” because she is quite likely to be deciding, in a coercive way, an issue that is of some importance to her. *This* is the bogeyman that Bork and virtually every other influential constitutional theorist since Thayer have worried about: the bogeyman of *judicial discretion*, of judges deciding cases according to their own predilections or interests. It is why theorists like Bickel (with his “passive virtues”), Ely (with his “representation reinforcement”), and Bork (with his “original intent”) have written volumes trying to devise ways of limiting the power of unelected, life-tenured judges.⁴⁷ It all comes down to Locke’s problem of self-judging. Democracy, in which no person has disproportionate political power, apparently solves that problem; judicial review, in which a small handful of judges have disproportionate political power, seemingly resurrects it.

B. Self-Judging and Majoritarianism

But, as Madison recognized, even democracy cannot solve the problem of self-judging. For Madison, self-judging was an inherent feature of majoritarian decision-making in a democracy, where “the parties are . . . them-

⁴⁶ See, e.g., 28 U.S.C. § 455 (1994).

⁴⁷ In all fairness, Bickel might be considered an exception to this general tendency to fear judicial discretion, or at least a special case of it. His “passive virtues” were intended more to improve the quality and strengthen the authority of judicial decision-making than to limit its impact. See Christopher J. Peters & Neal Devins, *Alexander Bickel and the New Judicial Minimalism* (2001) (unpublished manuscript, on file with author).

selves the judges; and the most numerous party . . . must be expected to prevail.”⁴⁸ More recently, Robert Burt has conceptualized the problem as the “internal contradiction in democratic theory between majority rule and equal self-determination.”⁴⁹ I describe the problem above as the “majoritarian difficulty.”

The majoritarian difficulty is simply the fact that in a system of majority rule, interested parties can “judge their own cases” by outvoting parties with adverse interests. (I assume a catholic definition of the word “interest” here, encompassing ideological viewpoints as well as the narrow pursuit of self-benefit.) Locke, as well as Kant, believed that democracy overcomes self-judging because it gives each affected person an equal voice in determining the laws that will govern all.⁵⁰ But the voice, and more to the point the vote, of a member of the minority on a particular issue is not “equal” to the vote of a member of the majority: The vote of a member of the majority is rewarded with a policy she favors, while the vote of a member of the minority is rewarded with nothing. What distinguishes between the two parties is not some demonstrable claim to the best or right answer—those in the majority might very well be wrong—but rather that the majority is larger, pure and simple, than the minority. It is “might makes right” in the most elemental sense, with the “might” deriving from superior numerical strength rather than, as in the state of nature, superior physical strength.

The majoritarian difficulty of democracy, then, is no less problematic for political legitimacy than the countermajoritarian difficulty of judicial review. The lack of electoral constraint over judges poses the risk that they will make decisions in pursuit of their own preferences or self-interest; the numerical superiority of a political majority poses the same risk.

Constitutional theorists like Bork, Bickel, and Ely therefore are missing a large part of the point when they fret over the legitimacy of judicial review. It is quite true that an unelected, life-tenured judiciary poses the problem of judicial discretion, and thus of self-judging, because of the absence of electoral constraint on the judges’ behavior. But electoral constraint is hardly a solution to the problem of self-judging, because elections—and indeed all majority-rule decision-making procedures—allow members of the majority to self-judge at the expense of members of the minority. Majoritarian democracy replaces the problem of judicial discretion with the problem of majority discretion.

Why has American constitutional theory mostly ignored the majoritarian difficulty? I believe it is because American constitutional theorists typically focus on political decision-making as carried out by *government*, that is, by the officials charged with making, interpreting, and enforcing the

⁴⁸ THE FEDERALIST NO. 10, *supra* note 1, at 125.

⁴⁹ ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 29 (1992).

⁵⁰ See LOCKE, *supra* note 6, at 317-18, 369-77; KANT, *Perpetual Peace*, *supra* note 6, at 99 n*; KANT, *Theory and Practice*, *supra* note 6, at 74-79.

laws. Adjudication is seen as a process engaged in by judges, and at the highest level by the nine Justices of the Supreme Court; legislation is seen as a process carried out by members of Congress or of state legislatures; enforcement and administration are seen as functions of the President or the state governor, his or her cabinet, and the web of appointed officials operating below them.

But political decision-making by the government proper is only one level of political activity. The electorate itself engages in political activity—properly understood, political *decision-making*—on a different level when it votes for the officials who will represent it in the legislative and executive branches of government. More broadly, citizens engage in political decision-making when they exercise their right of political speech, in every context from letters to the editor, to political lobbying, to soapbox speeches on street corners. In adjudication, litigants engage in political decision-making when they file lawsuits, gather evidence, and present legal arguments to a court that will use these tools to make binding legal rulings.

It is not surprising that American constitutional theorists focus on the upper echelons of political decision-making, on the activities of elected and appointed officials; our original Constitution, after all, is primarily a set of principles for organizing and constraining the conduct of those officials. And given its focus on official political decision-making, it is not surprising that American constitutional theory has been concerned primarily with electoral accountability or the lack of it. If it is government officials who exercise the most significant power, then it is government officials whose exercise of that power must somehow be constrained. This is the role played by electoral accountability in the political branches, and the role played by various theories of judicial constraint in the judicial branch.

Once we assume that electoral accountability performs the task assigned to it, however, we are left, in majoritarian democracy, with a continuing problem of legitimacy, a problem stemming from the inevitability of self-judging. If elected officials do indeed pursue the interests of their constituents—if they are in fact constrained by the need for election and reelection—then they are acting, on any given matter of policy, the way a majority of their constituents wants them to act. But what about the *minority* of their constituents? They now are being coerced by the self-judging conduct of the majority, whose interests the government has now faithfully implemented. The problem of self-judging by *representatives* has been solved, but the problem of self-judging by the people themselves remains.

III. PARTICIPATION AND POLITICAL LEGITIMACY

We can begin to solve this problem by noting the centrality of the idea of *participation* to our notions of political legitimacy. Understanding this relationship can in turn lead to an understanding of the connection between adjudication and majoritarian politics.

To start, observe that majoritarian government and adjudication share the general property of *coerciveness*: Both produce decisions that bind people who otherwise would not agree to be bound by them. Madison's example of "a law . . . concerning private debts" from *Federalist No. 10*⁵¹ is a good one, not least because of its continued vitality. Suppose that in a period of economic depression, members of a state legislature introduce a bill allowing courts to postpone mortgage foreclosures.⁵² With respect to the bill, "the creditors are parties on one side and the debtors on the other."⁵³ When the bill becomes law, the creditors are forced to abide by a decision they do not agree with, one to which they likely would not adhere had it not been produced by the authoritative force of the legislature.

Imagine that after enactment of the "mortgage moratorium" statute, a court in the state is faced with the question of whether to postpone a bank's foreclosure on a particular mortgage pursuant to the statute. Here, a single creditor is a party on one side and a single debtor on the other. If the court rules that foreclosure should be postponed, the creditor is forced to abide by a decision it does not agree with, one to which it likely would not adhere had it not been produced by the authoritative force of the court.

Coercion is thus central to what both the political branches of government and the courts do; it is why we *have* governments and courts. But what separates these kinds of coercion, coercion in the form of democratically enacted law or pursuant to that law as interpreted and applied by a court, from coercion by a bandit with a pistol, or by a nonelected military junta?

There are of course many facets to this ancient question, most of them beyond the scope of this Article. Here I am concerned solely with the question as one of *political legitimacy*, that is, as a question of political philosophy rather than jurisprudence or ethics. The basic answer that political philosophy (or rather, that large branch of political philosophy concerned with justifying *democracy*) has given to the question of why democratically produced coercion is legitimate has to do with *participation*: Such coercion is legitimate, the answer goes, because it proceeds only pursuant to the opportunity for meaningful participation in governance by those who are governed. Political philosophy generally has neglected the question of legitimacy with respect to *courts* (except in the special context of judicial review), but, as I have argued elsewhere,⁵⁴ the basic answer to the question is the same in the adjudicative as in the legislative context: Coercion is legitimate because, and to the extent that, it proceeds pursuant to the opportunity for meaningful participation in decision-making by those who will be bound by the decision.

⁵¹ THE FEDERALIST NO. 10, *supra* note 1, at 125.

⁵² The specific example is based on *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

⁵³ THE FEDERALIST NO. 10, *supra* note 1, at 125.

⁵⁴ See Peters, *Adjudication*, *supra* note 36.

In this Part, I describe the linkage in democratic theory between political legitimacy and the concept of participation. In subpart A, I enumerate the most influential types of justificatory theories of democracy and explain how participation is central to each. In subpart B, I explain how coercion in the context of adjudication similarly can be justified by reference to the inherently participatory nature of the decision-making process. By illuminating the centrality of participation to both legislative and adjudicative legitimacy, I set the stage here for my argument in Part IV that the particular mechanism of participation in adjudication also is central to the legitimacy of majoritarian political decision-making.

*A. Participation and Democratic Legitimacy*⁵⁵

Justificatory theories of democracy can be divided into two general categories and, within each category, into multiple subcategories and sub-subcategories. Not surprisingly, the concept of participation by the governed is central to each type of theory.

First, we can distinguish between *proceduralist* and *functionalist* justifications of democracy. On a proceduralist justification, the very *process* of democratic decision-making has value, quite apart from the substantive decisions it produces. On a functionalist justification, democracy is valuable because it tends to produce good *outcomes*, that is, substantively good decisions.

1. Proceduralist Justifications of Democracy.—Let us focus first on proceduralist justifications. There are two general types, or subcategories, of such justifications: *deontological* proceduralism and *consequentialist* proceduralism. Deontological proceduralism holds that the process of democratic decision-making itself has *inherent* value, regardless not only of the quality of the decisions it produces but also of any ancillary effects it might cause (such as individual character improvement or social vitality; more on these below). The paradigm deontological proceduralist justification of democracy is based in some notion of individual autonomy. Kant, for instance, connected democracy with an “a priori principle” of autonomy by which “[n]o-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end.”⁵⁶ This principle of autonomy has both “negative” (that is, passive) and “positive” (that is, affirmative) dimensions: Construed negatively, it incorporates freedom *from* coercion by others; construed positively, it incorporates freedom *to* shape the conditions of one’s own life.

Autonomy-based theories hold that democracy promotes negative

⁵⁵ The discussion in this subpart follows the more extensive treatment in *id.* at 320-37.

⁵⁶ KANT, *Theory and Practice*, *supra* note 6, at 74.

autonomy by ensuring that no individual will have disproportionate power over others, thus solving the problem of "might makes right" inherent in the state of nature and in nondemocratic forms of government like absolute monarchies and oligarchies.⁵⁷ Democracy also promotes negative autonomy (such theories hold) by transforming government decisions into consensual ones, making them essentially the decisions *of* the people bound by them.⁵⁸ Finally, democracy promotes positive autonomy by permitting each individual to participate actively in the authorship of the social rules that will constrain her behavior (in contrast to Kant's "paternal government" or "despotism," whose subjects are "obliged to behave purely passively and to rely upon the judgment of the head of state as to how they *ought* to be happy"⁵⁹).

Note how the participatory character of democracy is central to the autonomy-based justification. Allowing equal and meaningful participation of all citizens in government promotes negative autonomy by preventing a few citizens from exercising nonconsensual power over others, and by giving each citizen a stake, or authorship role, in the decisions government actually makes. Allowing equal and meaningful participation also promotes positive autonomy, by permitting each citizen to take an active part in shaping the conditions under which she lives her life. On an autonomy-based theory of democracy, equal and meaningful participation does virtually all the heavy lifting: It is the feature that ties government decision-making directly and essentially to the actions and moral responsibilities of the governed.

The other variety of procedural justifications of democracy is *consequentialist* proceduralism, which holds that democratic processes, while not *inherently* valuable, tend to produce some valuable effects quite apart from good decisions. This theme dates back to Aristotle, who defined the ideal state in part by its tendency to cultivate virtuous citizens.⁶⁰ Rousseau valued democracy partly as a means of improving the character of citizens by encouraging them, even forcing them, to abandon selfish thinking and consider the common good.⁶¹ John Stuart Mill similarly believed that democracy "tend[s] to foster in the members of the community the various desirable qualities, . . . moral, intellectual, and active,"⁶² including "indus-

⁵⁷ John Locke's *Second Treatise* is the classic text here. See LOCKE, *supra* note 6, at 316-18, 369-74.

⁵⁸ On this point, see *id.* at 374-84 (ch. VIII, §§ 95-122); KANT, *Metaphysics*, *supra* note 6, at 136-43; KANT, *Theory and Practice*, *supra* note 6, at 79-87; ROUSSEAU, *supra* note 6, at bk. 1, ch. VI, 17-21; bk. 1, ch. VII, 22-27; bk. 4, ch. II, 168-70.

⁵⁹ KANT, *Theory and Practice*, *supra* note 6, at 74.

⁶⁰ See ARISTOTLE, *POLITICS* bk. III, ch. 4; bk. VII, chs. 2-3, 14 (Benjamin Jowett trans.), in *THE BASIC WORKS OF ARISTOTLE* 1113, 1180-82, 1279-82, 1296-99 (Richard McKeon ed., 1941).

⁶¹ See ROUSSEAU, *supra* note 6, at bk. 1, ch. VII, 24-25. This description of Rousseau's theory owes much to the discussion in CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 22-35 (1970).

⁶² JOHN STUART MILL, *Considerations on Representative Government* (1861), *reprinted in*

try, integrity, justice, and patience.”⁶³ Tocqueville focused more on democracy’s catalytic effect on society as a whole, writing that democratic government “spreads throughout the body social a restless activity, superabundant force, and energy.”⁶⁴

Here too the idea of participation is fundamental. The active, knowledgeable, virtuous citizens of Aristotle, Rousseau, and Mill get that way through dynamic *participation* in government, by *doing* rather than being done to. The energy and restlessness of Tocqueville’s body social comes from *self-government*, from the institutionalized ritual of participatory politics.

2. *Functionalist Justifications of Democracy.*—Now consider functionalist justifications of democracy. Functionalism justifies democracy as a means of producing good decisions, quite apart from any inherent or ancillary benefits of the procedures for producing them. There are four basic variants of functionalist theory and, like the variants of proceduralism, each of them turns on the value of participatory rather than dictatorial decision-making.

First is the idea that democracy promotes quality decisions by *effectively allocating decision-making power* to those assumed to be best qualified to wield it: the people affected by the decisions. J.S. Mill appealed to such a justification,⁶⁵ as did theorists as diverse as Herbert Spencer⁶⁶ and John Dewey.⁶⁷ (This justification is tidily captured by Dewey’s adage that “[t]he man who wears the shoe knows best that it pinches and where it pinches.”⁶⁸) Participation clearly is essential to this idea: A citizen who

UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 187, 208 (H.B. Acton ed., J.M. Dent & Sons 1972).

⁶³ *Id.* at 201. Carole Pateman’s discussion of the participatory nature of Mill’s democratic theory is particularly helpful. See PATEMAN, *supra* note 61, at 22-35.

⁶⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 244 (George Lawrence trans., J.P. Mayer ed., 1969). Here I owe a debt to the excellent discussion in Stephen Holmes, *Tocqueville and Democracy*, in *THE IDEA OF DEMOCRACY* 23 (David Copp et al. eds., 1993).

⁶⁵ See MILL, *supra* note 62, at 224 (noting that the “proposition . . . that each is the only safe guardian of his own rights and interests . . . is [an] elementary maxim[] of prudence.”).

⁶⁶ See HERBERT SPENCER, *Representative Government—What Is It Good For?*, in *THE MAN VERSUS THE STATE* 331, 375 (Liberty Classics 1981) (1892) (“The rationale of [democracy] is simple enough. Manifestly, on the average of cases, a man will protect his own interests more solicitously than others will protect them for him. . . . The general principle is that the welfare of all will be most secure when each looks after his own welfare . . .”).

⁶⁷ See JOHN DEWEY, *Intelligence and Morals*, in *ETHICS* (1908), reprinted in *JOHN DEWEY: THE POLITICAL WRITINGS* 66, 69 (Debra Morris & Ian Shapiro eds., 1993) (describing the democratic ideal as in part “the conception of a social harmony of interests in which the achievement by each individual of his own freedom should contribute to a like perfecting of the powers of all”); JOHN DEWEY, *The Ethics of Democracy*, in *THE EARLY WORKS* (1967), reprinted in *JOHN DEWEY: THE POLITICAL WRITINGS*, *supra*, at 59, 61 (“Personal responsibility[] [and] individual initiation . . . are the notes of democracy.”).

⁶⁸ JOHN DEWEY, *The Public and Its Problems*, reprinted in *2 JOHN DEWEY: THE LATER WORKS 1925-1953*, at 235, 364 (Jo Ann Boydston ed., S. Ill. Univ. Press 1984) (1927).

does not participate in decision-making cannot bring his or her particular practical expertise to bear.

Second is the closely related perception that democracy promotes good decisions by *appealing to a diversity of interests and viewpoints*, allowing a multiplicity and variety of perspectives to be reflected in the process of collective decision-making. This justification is a magnification of the aphorism that two heads are better than one. Madison's well-known *Federalist No. 10* invokes this idea in arguing for a large, diverse polity,⁶⁹ Mill⁷⁰ and Dewey⁷¹ espoused it; and Condorcet's Jury Theorem confirms the intuition behind it.⁷² Participation is essential here, too: The fewer the citizens that participate in a decision, the fewer the interests and viewpoints that will be reflected in it.

Third is the notion that democracy allows the *participation of talented decision-makers*—experts self-selected from the populace at large, rather than chosen through less reliable means like heredity or brute strength—in the creation of policy. As Mill and Dewey noted, democracy solicits the participation of the abler members of a community from the ground up, through participation in elections and public discussion.⁷³ In its representa-

⁶⁹ THE FEDERALIST NO. 10, *supra* note 1, at 127. Madison was primarily interested in what I have called the "checking function" of diversity: incorporating a wide variety of interests into the decision-making process to make formation of a majority faction more difficult. See Peters, *Adjudication*, *supra* note 36, at 333.

⁷⁰ See MILL, *supra* note 62, at 259 ("[A] representative assembly . . . [is a] place where every interest and shade of opinion in the country can have its cause even passionately pleaded . . . [which] is in itself . . . one of the most important political institutions that can exist anywhere, and one of the foremost benefits of free government.").

⁷¹ See JOHN DEWEY, *The Democratic Conception in Education*, reprinted in JOHN DEWEY: THE POLITICAL WRITINGS, *supra* note 67, at 110 (describing democracy as a process of identifying "more numerous and more varied points of shared common interest"); DEWEY, *supra* note 68, at 365 (explaining that in a democracy, "the masses . . . have the chance to inform the experts as to their needs"); *id.* at 364 (explaining that democracy "involve[s] a consultation and discussion which uncover[s] social needs and troubles").

⁷² Condorcet's Jury Theorem

is a mathematical result showing that if independent voters are, on average, better than chance at getting the correct answer to any class of yes-no questions (such as "is *x* in the common interest?"), then the chance of at least a majority being correct on such questions goes up rapidly with the size of the group. Even if voters are only barely better than chance, the group as a whole is virtually infallible in groups the size of realistic political communities.

David Estlund, *Making Truth Safe for Democracy*, in THE IDEA OF DEMOCRACY, *supra* note 64, at 71, 92.

⁷³ See MILL, *supra* note 62, at 209-10 (explaining that democracy is "an organisation of some part of the good qualities existing in the individual members of the community for the conduct of collective affairs. A representative constitution is a means of bringing . . . the individual intellect and virtue of its wisest members, more directly to bear upon the government."); JOHN DEWEY, *Individuality, Equality and Superiority* (1922), reprinted in JOHN DEWEY: THE POLITICAL WRITINGS, *supra* note 67, at 77, 77-78 (explaining that democracy rests upon the idea "that every human being as an individual may be the best for some particular purpose and hence be the most fitted to rule, to lead, in that specific respect"); DEWEY, *The Ethics of Democracy*, reprinted in JOHN DEWEY: THE POLITICAL WRITINGS, *supra* note 67, at 59, 61 (noting that aristocratic government, as opposed to democracy, "always limits the range of men who are regarded as participating in the state"). Mill went so far as to propose double-counting of the

tive form, it also allows abler individuals to participate more directly as government officials, an idea returned to often in *The Federalist*⁷⁴ and invoked by another prominent Founder, Thomas Jefferson.⁷⁵

Fourth, and largely reliant upon the first three, is the idea that democracy fosters *reasoned deliberation* in decision-making by bringing together diverse interests and viewpoints and requiring them to reach a decision upon which most of them can agree. Burke was a progenitor of deliberative democratic theory, describing Parliament as “a *deliberative* assembly” in which members confer rather than simply voting and exercise “reason and judgment” rather than mere “inclination.”⁷⁶ Perhaps due partly to Burke’s influence, the connection between democracy and deliberation was a favorite theme of many American Framers.⁷⁷ In the first half of the twentieth century John Dewey championed this connection,⁷⁸ and more recently con-

votes of “wiser and better men,” as determined by occupation and level of education. See MILL, *supra* note 62, at 306-14.

⁷⁴ See, e.g., THE FEDERALIST NO. 10, *supra* note 1, at 126 (arguing that representative government “refine[s] and enlarge[s] the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations”); THE FEDERALIST NO. 57, at 344 (James Madison) (Isaac Kramnick ed., 1987) (“Who are to be the objects of popular choice [in the House of Representatives]? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.”).

⁷⁵ See Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in THOMAS JEFFERSON: WRITINGS 1304 (Merrill D. Peterson ed., 1984).

I agree with you that there is a natural aristocracy among men. The grounds of this are virtue and talents. Formerly bodily powers gave place among the aristoi. . . . There is also an artificial aristocracy founded on wealth and birth, without either virtue or talents May we not even say that that form of government is the best which provides the most effectually for a pure selection of these natural aristoi into the offices of government?

Id. at 1305-06.

⁷⁶ Burke, *supra* note 11, at 115.

⁷⁷ Alexander Hamilton wrote: “The differences of opinion, and the jarring of parties . . . often promote deliberation and circumspection” THE FEDERALIST NO. 70, at 405 (Alexander Hamilton) (Isaac Kramnick ed., 1987). James Madison extolled the deliberative nature of the 1787 Constitutional Convention:

[O]pinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. Meantime the minds of the members were changing, and much was to be gained by a yielding and accommodating spirit. . . . [N]o man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument.

3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 479 (Max Farrand ed., 1911) (from Jared Sparks’s notes of an 1830 visit to Madison). Roger Sherman told the first Congress:

I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions [from their constituents], there would be no use in deliberation.

1 ANNALS OF CONG. 736 (Joseph Gales ed., 1834).

⁷⁸ See JOHN DEWEY, DEMOCRACY AND HUMAN NATURE (1939), reprinted in JOHN DEWEY: THE POLITICAL WRITINGS, *supra* note 67, at 219, 228 (explaining that democracy involves “persuasion

temporary theorists of deliberative democracy have taken it up.⁷⁹

*B. Participation and Adjudicative Legitimacy*⁸⁰

The previous subpart elucidates the rather intuitive notion that democratic legitimacy relies to a large extent on meaningful participation in decision-making by the bound parties. Illuminating that idea proves helpful in comparing the processes of democratic government to the processes of adjudication, because adjudication too is a fundamentally participatory enterprise. If participation is central to democratic legitimacy, and if adjudication is significantly participatory, then adjudication might be seen to possess a type of legitimacy that is similar to that which we attribute to democratic politics.

In the case of adjudication, the parties to be bound are the litigants,⁸¹ and it is important to note the extent to which the process of adjudication is dominated by the litigants rather than by the court. A court case is initiated not by the court but by one of the parties, who does so by filing a civil lawsuit or criminal indictment. Each litigant, not the court itself, locates relevant facts and identifies relevant legal authorities, and each litigant determines whether and how to present those facts and authorities to the court in the form of legal arguments. When the court makes a decision, strong “norms associated with legal craft”⁸² demand that the decision be, and be *shown* to be, meaningfully responsive to the facts presented and ar-

through public discussion carried on not only in legislative halls but in the press, private conversations and public assemblies,” and implies “[t]he substitution of . . . the method of discussion for the method of coercion”); JOHN DEWEY, *Creative Democracy: The Task Before Us*, reprinted in JOHN DEWEY: THE POLITICAL WRITINGS, *supra* note 67, at 240, 243 (describing “democratic faith” as “faith in the possibility of conducting disputes, controversies and conflicts as cooperative undertakings in which both parties learn by giving the other a chance to express itself”); JOHN DEWEY, *John Dewey Responds* (1950), reprinted in JOHN DEWEY: THE POLITICAL WRITINGS, *supra* note 67, at 246, 248 (“[T]he act of voting is in a democratic regime a culmination of a continued process of open and public communication in which prejudices have the opportunity to erase each other; . . . [and] continued interchange of facts and ideas exposes what is unsound and discloses what may make for human well-being.”).

⁷⁹ See, e.g., JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994); GUTMANN & THOMPSON, *supra* note 18; RAWLS, *POLITICAL LIBERALISM*, *supra* note 19, at 212-54; CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 241-52 (1993); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17-39 (1993); Cohen, *supra* note 9; Jürgen Habermas, *Popular Sovereignty as Procedure*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS*, *supra* note 9, at 35, 46-47. For good contextual overviews of theories drawing this connection, see Bohman & Reh, *supra* note 9; Elster, *supra* note 11.

⁸⁰ The discussion in this section follows the considerably more extensive analysis in Peters, *Adjudication*, *supra* note 36, at 347-60.

⁸¹ And future similarly situated litigants, and others who will be affected by the precedential or ancillary effects of a court decision. We need not worry about these other bound parties to draw the comparison at hand between majoritarian politics and adjudication. Elsewhere I have considered the legitimacy of binding such parties. See Peters, *supra* note 24, at 1477-92; Peters, *Adjudication*, *supra* note 36.

⁸² SUNSTEIN, *supra* note 24, at 16.

guments made by the litigants. These norms are respected in most courts by a practice of memorializing judicial decisions in written opinions.

The judge may be the most public face of the adjudicative process, but in fact his or her role in that process typically remains relatively passive. The judge's primary responsibility is to render a decision that is responsive to the proofs and arguments made by the litigants. When a judge reaches beyond this reactive role, it is typically for the rather limited purposes of supervising scheduling and other docket-related matters,⁸³ narrowing and clarifying the issues that will be contested at trial,⁸⁴ or encouraging settlement.⁸⁵

As I have written elsewhere, “[i]t is thus rather narrowminded to think of adjudication as decision-making by *judges*. Adjudication is decision-making by *judges and litigants*”⁸⁶ The frequent complaint of lawyers and litigants that judges ignore important facts or reject good arguments only drives home this point: It demonstrates that judges who deviate from the strong legal norm of meaningful responsiveness to the participation of the litigants are subject to criticism for that reason.⁸⁷ The threat of criticism, and the norm of responsiveness that backs up the threat, mean that judges in our model of adjudication typically do not rely upon evidence outside the record, or engage in their own investigative efforts, or even rely on legal arguments other than those advanced by the parties.

I say “judges in *our* model of adjudication” because it is important to understand that this Anglo-American common-law mode, with its strong norms of participation and responsiveness, is not the only conceivable way of adjudicating, or even the only extant way.⁸⁸ Mirjan Damaška has demonstrated the close connection between a political system's philosophy re-

⁸³ See, e.g., FED. R. CIV. P. 16 (giving district judges broad authority to control scheduling of litigation); Civil Justice Reform Act, 28 U.S.C. §§ 471-482. (1994) (requiring district courts to create and implement “civil justice expense and delay reduction plans”).

⁸⁴ See, e.g., FED. R. CIV. P. 16(c) (allowing district judges to “take appropriate action” with respect to, *inter alia*, “the formulation and simplification of issues”); FED. R. CIV. P. 42 (allowing district courts to order consolidation of actions or separate trials).

⁸⁵ See, e.g., FED. R. CIV. P. 16(c)(9) (allowing district judges to encourage “settlement and the use of special procedures to assist in resolving the dispute”); 28 U.S.C. § 473(a)(3) (1994) (requiring district courts to “consider . . . careful and deliberate monitoring” of cases, including “explor[ing] the parties’ receptivity to, and the propriety of, settlement”).

⁸⁶ Peters, *supra* note 24, at 1482.

⁸⁷ And “lower-court judges are subject to reversal on appeal when they ignore important facts or decisive arguments, so long as they have done so in an evident and material enough way. As such, the proclivities of a single non-responsive judge tend to be rendered less harmful by the discipline of the appellate system.” *Id.*

⁸⁸ As I hope the discussion below will make clear, the characteristic of Anglo-American common-law adjudication that is important for my purposes here is its participatory quality, not its typical gradualism or fact specificity. Common-law adjudication is crucially different from political decision-making in these latter respects, a point that I make and expand in Peters, *supra* note 24, at 1492-1513, and in Christopher J. Peters, *Participation, Representation, and Principled Adjudication*, in *LEGAL THEORY* (forthcoming 2002) (manuscript on file with author) [hereinafter Peters, *Participation*].

garding the relationship of the individual to the state and the mode of adjudication that system chooses to employ.⁸⁹ Legal systems such as those in the former Soviet bloc, and to a lesser extent those in the civil-law nations of western Europe, have employed much more court-driven, much less party-focused adjudicative procedures than the Anglo-American model, procedures that are often referred to as “inquisitorial” in contradistinction to our “adversarial” system. Not coincidentally, inquisitorial legal systems tend to spring from political regimes that generally de-emphasize citizen participation in favor of authoritative state control of decision-making.⁹⁰

Systems of adjudication, then, are to a great extent a matter of (collective) choice, just like any other institutions of government. And it seems no accident that the first viable modern democracies have chosen a participatory method of adjudication. The same arguments that justify democratic government rather than government by dictatorship or oligarchy also can justify participatory adjudication over adjudication by fiat. On a proceduralist approach, a system of participatory adjudication even “seems to address . . . concerns of autonomy, humanism, and social dynamism in a more salient and significant way than the relatively anonymous mechanism[s]”⁹¹ of majoritarian politics can do, because it operates on a smaller scale, giving a more meaningful role to the affected parties than is usually available through large-scale politics. On a functionalist approach, participatory adjudication allocates considerable decision-making responsibility to those likely to have the most knowledge about the impact of the decision—the litigants themselves—and necessarily involves the participation of a wider spectrum of interests and viewpoints than a system of adjudication by judicial fiat. Participatory adjudication also in effect creates more-talented decision-makers by facilitating the identification and presentation of facts and arguments to which a judge or panel, acting alone, might not have access. Finally—and most significantly for this Article, for reasons I develop in Part IV—“participatory adjudication is the essence of decision-making by reasoned deliberation among opposing viewpoints.”⁹²

Adjudication in the Anglo-American common-law tradition thus draws legitimacy from the same source as majoritarian political decision-making in the western democratic tradition. That source is the meaningful participation of the governed in the making of decisions that will bind them.

IV. PERSUASION AND THE DELIBERATIVE CONCEPTION OF POLITICS

On one view of political legitimacy, however, participation in adjudication might be thought crucially different from participation in majori-

⁸⁹ See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

⁹⁰ See *id.* at 154-73.

⁹¹ Peters, *Adjudication*, *supra* note 36, at 357-58.

⁹² *Id.* at 358.

tarian politics. Consider Martin Kotler's description of the apparent difference:

[I]magine that we lived in a monarchy and the monarch assigned to him- or herself the role of judge. Assume further that the monarch was a highly principled and very fair person entirely predisposed toward giving parties a fair hearing when disputes arose. Even if all the recognized trappings of the American judicial system existed—even if the parties initiated the action, framed the legal and factual issues, and participated in the resolution of the dispute by submitting proposed findings of fact and conclusions of law—this would not alter the fact that a fully participating litigant's essential position is still that of supplicant. While such a form of decision-making might be legitimate in a society committed to a monarchy, it is not in a democracy.

Democracy, at its heart, insists that the decision-making power resides in the people and must, thereafter [sic], either be exercised directly by them or freely delegated to someone else. While such delegation of power is clearly present in the case of legislative action, it is conspicuously absent within a judicial context and its absence compels the conclusion of illegitimacy.⁹³

As the discussion in Part II reveals, however, Kotler's critique is misguided in an important way. It is true that litigants are in a sense "suppliants" with respect to the judge, who holds the ultimate power of decision. But it is also true that advocates for a particular decision in the political realm are, in the same sense, supplicants with respect to the *majority*—which, like a judge, holds the ultimate power of decision. Rarely, if ever, is there any such thing as a "people" capable of acting as a unified whole. (The idea of a "people" is an evocative metaphor, but it is *only* a metaphor.⁹⁴) The fact is that ultimate power in a democracy resides only in whatever critical mass of "the people" is necessary to form a majority. For the remainder—the minority—the putative distinction between a democracy and a monarchy might not seem all that significant.

And, crucially, political majorities do not coalesce from the ether, preformed and ready-made. Majorities are *created* through a process of public deliberation about issues. This is one of the central insights of deliberative democratic theory.⁹⁵ An advocate for a particular policy must attempt to

⁹³ Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. KAN. L. REV. 65, 81-82 (2000) (footnotes omitted).

⁹⁴ That said, it is a metaphor to which the Framers frequently adverted. See, e.g., THE FEDERALIST NO. 28, at 206-07 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (comparing the power of "the people" to that of the government); THE FEDERALIST NO. 46, at 297-98 (James Madison) (Isaac Kramnick ed., 1987) (comparing federal and state governments' ability to attract the support of "the people"); THE FEDERALIST NO. 63, at 370-71 (Isaac Kramnick ed., 1987) (defending Senate as defense against "temporary errors and delusions" of "the people"); THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (asserting that "the power of the people is superior to both" the legislature and the judiciary). The metaphor, of course, finds its most famous expression in the Preamble to the Constitution: "We the People of the United States . . ."

⁹⁵ See, e.g., GUTMANN & THOMPSON, *supra* note 18, at 43-44 (describing centrality of persuasion to

convince a majority of her fellows to vote for that policy, just as an advocate for a particular judicial decision must attempt to convince the judge to make that decision. In this sense, citizens of a democracy are no less "supplicants" than subjects of a monarchy—or litigants in a court of law.

The process of *persuasion*—what Kotler refers to somewhat dismissively as "lobbying"⁹⁶—occurs at every level in the democratic process. It is perhaps most salient at the highest levels, those where policy actually is made—paradigmatically, in the legislative chamber, where legislators hold hearings, give speeches, and engage in backroom negotiation and public rhetoric in an attempt to persuade their colleagues to vote for or against a particular piece of legislation. These familiar incidents of the legislative process would not exist if legislative majorities emerged fully formed and remained unchanged and unchangeable. Persuasion in the service of majority-formation exists at the retail level, too, where candidates and issue-advocacy groups lobby for votes and fight the battle of public opinion. The special constitutional protection afforded political speech⁹⁷ would hardly make sense if such speech could have no effect—if majorities were fixed in stone with respect to every conceivable issue.

Once we recognize that political majorities must be formed, and can shift, with respect to any issue, we can see why Kotler's distinction between adjudicative and political participation is illusory. On any issue of public policy there are likely to be three groups of people: those firmly on one side of the issue, those firmly on the other side, and those somewhere in the middle—undecided about the issue and potentially allies of either side.⁹⁸ Rarely, if ever, will either committed group comprise a majority; each committed group usually will need the support of the uncommitted group in order to prevail. As such, the committed groups stand in positions analogous to those of litigants in a court case, while the uncommitted group stands in a position analogous to that of the judge. The committed groups, like litigants, must convince the uncommitted group (the "judge") to adopt their position and decide the issue in their favor.

process of majority formation); Habermas, *supra* note 77, at 35, 46-47 (describing majority rule as process of forming "conditional consensus"). For a similar observation from a perspective other than that of deliberative democratic theory, see SPITZ, *supra* note 18, at 66-96 (explaining processes of majority formation and dissolution).

⁹⁶ Kotler, *supra* note 93, at 82-83.

⁹⁷ See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Communist Party of Ind. v. Whitcomb, 414 U.S. 441 (1974); Brandenburg v. Ohio, 395 U.S. 444 (1969); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *stay denied sub nom.* Smith v. Collin, 436 U.S. 953 (1978).

⁹⁸ For the sake of simplicity I elide here the frequently realized possibility that an issue will have more than two "sides." This possibility exists, of course, whether the issue will be decided by adjudication or by majoritarian politics.

I also defer until later the possibility that my empirical (and somewhat intuitive) description of typical political conditions—committed groups on either side of an issue and an uncommitted group in between, with no group comprising a majority—is sometimes inaccurate. See *infra* text accompanying notes 107-111.

If there is a legitimacy gap in adjudication, then, that gap is shared by majoritarian politics. And one might think, with Kotler, that such a gap exists—that the position of citizen/litigants as “supplicants” to the majority/judge ultimately renders both types of decision-making, adjudication and majoritarianism, matters of rule by fiat rather than participatory democracy. In what sense is a citizen, or a litigant, really *participating* in the decisions that bind her? In what sense is she really practicing *self-government* if the final decision is out of her hands?

A. *Participation and Responsiveness*

The first step toward answering these questions is a recognition of the decision-maker’s duty of *responsiveness* to those bound by the decision. This duty becomes apparent when we consider the important difference between actual *participation* and mere performance. Consider an extreme example from adjudication: A judge accepts a bribe to decide a lawsuit in favor of the plaintiff. In such a case, the litigants are merely going through the motions of participation; nothing they do as litigants, no evidence they present or arguments they make, will have any effect on the judge’s ultimate decision. When that decision is rendered, then, it will not in any meaningful sense be the result of the litigants’ (legitimate) participation.

This example demonstrates that participation is not meaningful—is not real *participation*—unless the ultimate decision is in some sense *responsive* to that participation. Lon Fuller described this requirement as one of “congruence” between the litigants’ efforts and the judge’s decision: “[I]f this congruence is utterly absent . . . then the adjudicative process has become a sham, for the parties’ participation in the decision has lost all meaning.”⁹⁹ A decision that is unresponsive to—incongruent with—the litigants’ participation is nothing more than the fiat of the judge. If political legitimacy is tied to participation, then an unresponsive decision is illegitimate with respect to the litigants.

More to the point, an unresponsive decision is illegitimate with respect to the *losing* litigant. It is the losing litigant, after all, who is being coerced, or bound, in an important sense by the decision. In the final analysis, questions of political legitimacy are questions of coercion, of when it is justifiable to force someone to do something he or she otherwise would not do. In order to be politically legitimate, then, a judicial decision must be responsive, perhaps especially responsive, to the participation of the *losing* litigant—the party who is being coerced.

And we can see now that the duty of responsiveness applies not only in adjudication, running from the judge to the losing litigant, but also in majoritarian politics, running from the majority to the minority. A political minority is in the position of the losing litigant; its members have tried, but

⁹⁹ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978).

failed, to persuade the ultimate decision-maker—the majority-cum-judge—to decide in their favor. Their participation, in the forum of public debate, has not been meaningful unless the majority's decision is truly responsive to, congruent with, that participation. And meaningful participation is necessary for legitimacy.

But how can a decision (whether made by a judge or by a political majority) truly be responsive to the participation of the *losing* parties?

B. Responsiveness and Persuasion

Now we must take a second step, which involves understanding the importance of *persuasion*. The winning litigant has succeeded in persuading the judge, just as certain committed members of any political majority have succeeded in persuading their fellows to vote in their favor. It is the necessity of persuasion that ensures that the final decision in either context also is meaningfully responsive to the participation of the *losing* party.

The connection between persuasion and responsiveness, and the importance of that connection, can be understood by considering the difference between a decision that is the result of persuasion and a decision that is not. Compare, for instance, a default judgment with a judgment for the plaintiff in a contested lawsuit. In a default judgment, the plaintiff wins because the defendant, although properly served with process, has failed to appear in court to defend the lawsuit.¹⁰⁰ Such a judgment is not responsive, in any meaningful way, to the participation even of the winning plaintiff, because it is not the product of persuasion; the court has not decided based upon the force of the plaintiff's arguments.

But contrast a default judgment with a decision for the plaintiff in a contested lawsuit, where both parties have litigated vigorously. Such a decision truly is the product of persuasion; it is based upon the judge's conclusion that the plaintiff's arguments and proofs were superior to the defendant's. Obviously the decision in the contested lawsuit is responsive, then, to the participation of the plaintiff, the winning litigant. And it is important to understand that, for the same reason, the decision is responsive to the participation of the defendant, the *losing* litigant. Were it not for the defendant's participation, the plaintiff's participation would have been superfluous; as in the case of the default judgment, the unopposed plaintiff would not have been required to *persuade* the judge to rule in her favor. The participation of the defendant has triggered the plaintiff's duty of persuasion, which in turn has triggered the judge's duty of responsiveness to the arguments of the plaintiff. And in responding to the arguments of the plaintiff, the judge is also, and necessarily, responding to the arguments of the defendant; she is justifying her decision by explaining why the plaintiff's arguments were superior to the defendant's.

¹⁰⁰ See, e.g., FED. R. CIV. P. 55.

In other words, because each litigant in a contested lawsuit must attempt to persuade the court, each litigant, including the loser, has meaningfully contributed to the authorship of the court's decision. Were it not for the participation of the losing litigant, the winning litigant would not have been required to *persuade* at all. And without persuasion, the judge would not have been required to justify her decision as a *choice* between competing arguments. That decision would have been merely a formality, like a default judgment. The requirement of persuasion transforms the judge's decision from a ministerial act into an act of reason.

As we can see by now, the same can be said of a contested political decision. When there are two (or more) sides to a political issue, each side must do more than simply show up and vote; each side must attempt to persuade a majority to adopt its preferred resolution of the issue. This requirement of persuasion changes the nature of the decision by forcing the members of the majority to *choose* between competing arguments. Persuasion thus transforms the majority's decision from a simple aggregation of individual acts into a decision that is necessarily responsive to the participation of all—even the minority—and for that reason is truly the product of collective action. In Ronald Dworkin's words, the resulting decision becomes "a matter of individuals acting together in a way that merges their separate actions into a further, unified, act that is together *theirs*."¹⁰¹ It becomes *legitimate* in the same way that a judge's decision in a court case can be legitimate.

C. Persuasion and the Deliberative Versus the Aggregative Conceptions of Politics

We can now begin to glimpse a justification for the mysterious condition that theorists of deliberative democracy impose, in various forms, upon the process of political decision-making: the requirement that political decisions proceed from public discussion among citizens conducted according to mutually acceptable grounds, rather than from mere aggregation of citizens' individual interests or preferences. That requirement arises from the central role persuasion plays in the political legitimacy of majority rule.

Note first the extent to which the obligation of responsiveness on the part of the decision-maker—judge or majority—is triggered only when there is some attempt at persuasion on the part of those who will be bound by the decision—litigants or committed political advocates. The relationship is one of *quid pro quo*: The bound parties attempt to persuade the decision-maker to make a particular decision, and in return the decision-maker makes the resulting decision in a way that is responsive to those efforts at persuasion. The bound parties cannot expect responsiveness unless they are willing to engage in persuasion. This is why a default judgment in the ad-

¹⁰¹ DWORKIN, *supra* note 15, at 20.

judicative context is legitimate: The losing defendant is legitimately bound despite the absence of persuasion, because he has chosen *not* to participate in the proceedings. For the same reason, binding a citizen who chooses not to participate in public debate is legitimate, even if the binding law was made in a way that was not at all responsive to that citizen's interests or concerns.

A bound party, then, *must* participate in the decision-making process, in the form of persuasion, if she wants a decision that is responsive to her (and that therefore is in a sense *her* decision, even if it is not the one she would have made). Persuasion thus becomes something of a *duty* devolving on bound parties; the penalty for violating that duty is (the risk of) a binding decision that is nonresponsive to one's concerns and interests.

Justification for choosing a deliberative conception of politics over an aggregative conception now begins to emerge. An aggregative conception, remember, holds that legitimate political decisions proceed from the simple aggregation of individual preferences or interests through the act of voting. Note that a political decision that is purely aggregative in this sense is emphatically *not* a *responsive* decision, because it is not the product of persuasion by the interested parties. The decision-makers have simply voted based on their own interests or preferences and the votes have been tallied; no one has based his or her decision on persuasion by anyone else. Thus the "losing" parties to the decision—the members of the dissenting minority, who have been outvoted—have not truly *participated* in that decision, and the decision therefore lacks political legitimacy with respect to them.

It is not the case, of course, that a purely aggregative decision is *inherently* illegitimate, any more than a default judgment in court is inherently illegitimate. It is conceivable (if unlikely) that, in some cases, every citizen will be content simply to vote her own preferences, and to allow her fellow citizens to do the same, without any attempts to persuade those fellows to vote a certain way. If so, then the resulting aggregative decision would be legitimately binding on the minority in the same way a default judgment is legitimately binding on the absent defendant: In each case the losing party has *chosen* not to participate, through persuasion, in the decision-making process.

Assuming, however, that some citizens are not content simply to "shut up and vote,"¹⁰² the aggregative conception results in the illegitimate coercion of those citizens whenever they find themselves in the dissenting minority. Suppose, for instance, that a group of citizens attempts to persuade others to vote against a ballot measure that would prohibit affirmative action in public employment. If their fellow citizens simply ignore the advocacy group's arguments—if they vote entirely on the basis of their own

¹⁰² I take this phrase from James A. Gardner, *Shut up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421 (1996). As Gardner's title suggests, he employs the phrase in critique of the deliberative democratic conception.

self-interest, or on the basis of racial bias, or on the basis of a coin toss—then the resulting decision is *nonresponsive* to the participation of the members of the advocacy group, in the same way that a court decision based on bribery or racial bias or the judge's own self-interest is nonresponsive to the participation of the losing litigant. The decision, in other words, is *politically illegitimate* with respect to the members of the dissenting minority who now are bound by it.

We have a powerful reason, then, to prefer a deliberative conception of politics to an aggregative one. An aggregative conception endorses decisions that are not responsive to the participation of the dissenting minority and thus are not truly *collective* decisions in the sense meant by theorists of deliberative democracy.¹⁰³ But a deliberative conception endorses decisions that are responsive to the efforts of all those who choose to participate, through persuasion, in the process of making them. As such, they are legitimately binding upon even the members of the defeated minority.

And we should not shy away from the potentially radical implications of this way of justifying the deliberative conception. Understanding the deliberative conception as an implication of the duty of persuasion leads to the conclusion that it is usually *illegitimate*—not merely unwise or unseemly—for citizens to cast votes based solely, or even primarily, on their own self-interests or preferences.¹⁰⁴ A vote based entirely on one's own self-interest, without regard for the arguments of others the resulting decision will affect, is nonresponsive to those arguments; it renders the participation of the losing parties entirely ineffectual, just as a judicial decision based entirely on the judge's own interests or preferences would do. At the very least, a voting citizen must weigh the arguments of others against her own interests and preferences in deciding how to vote.¹⁰⁵

Finally, once we recognize that it is illegitimate for a voter to act based solely on unreflective self-interest, we are led to the conclusion that the lineup of preexisting interests or preferences with respect to an issue doesn't, or shouldn't, matter very much. Above, I posited a litigation-like

¹⁰³ See, e.g., Cohen, *Democracy and Liberty*, *supra* note 14, at 185.

¹⁰⁴ It also implies, perhaps less radically, that citizens may not legitimately vote based upon irrational grounds like racial bias, coin toss, and the like.

¹⁰⁵ And, a fortiori, a voting legislator must weigh the arguments of other legislators against the interests and preferences of her own constituents in deciding how to vote. Although John Rawls, who considers himself a theorist of political liberalism, has reached similar conclusions about the duties of the voter, see RAWLS, *POLITICAL LIBERALISM*, *supra* note 19, at 215, 219-20, some have thought such a position anti-liberal. Robert Bennett, for example, describes the "liberal approach" to politics as one in which "[e]ach voter votes to further his own interest [T]he liberal voter is under no illusions that he is somehow obliged by virtue of participation in the process of voting to consider the interests of others" Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 860-61 (2001). On this definition, my conclusion about voters' duties here is indeed anti- (or at least non-) liberal. Whether Bennett's conception of liberalism is satisfactory (and thus my position here is contrary to liberalism) is an interesting question, but not one with which I am concerned in this Article.

model of majoritarian politics according to which two mutually opposed groups must compete for the allegiance of a third, as-yet-uncommitted group in order to create a majority.¹⁰⁶ One might now present two objections to this account.¹⁰⁷ The first is a simple empirical point: Majoritarian politics might not always work that way; sometimes (despite Madison's hope in *Federalist No. 10*)¹⁰⁸ one of the committed groups might form a sort of ready-made majority, without the necessity of persuading any noncommitted citizens or legislators to join them. The second objection is a normative one, directed at the supposed connection between the adjudicative model of majoritarianism and the deliberative conception of politics: Doesn't the existence of *any* precommitted citizens (whether in a minority or a majority) undercut the emphasis on openminded discussion that seems central to the deliberative conception?

The answer to both objections turns out to be the same. Precommitment *is* antithetical to the deliberative conception of democracy, just as it is antithetical to our conception of neutral judging in adjudication. But nothing about the adjudicative model of majoritarian politics assumes, or requires, that anyone will be "precommitted" about anything—quite the contrary. The obligation of responsiveness in voting rests not only on disinterested or "uncommitted" voters; it rests on *every* voter. Even a voter with a powerful self-interested reason to take one side of a particular issue has a duty to listen, in good faith, to the reasons offered by those taking the other side of the issue, and to vote in accordance with her own self-interest only if she believes the (non-self-interested) reasons for doing so outweigh the (non-self-interested) reasons against doing so.¹⁰⁹ This is true for the same reason that a judge who is self-interested (financially, ideologically, or whatever)¹¹⁰ in the outcome of a case still has a duty to decide based on a

¹⁰⁶ See *supra* text accompanying note 98.

¹⁰⁷ I am grateful to Michael Abramowicz and James Gardner, respectively, for suggesting these objections.

¹⁰⁸ See THE FEDERALIST NO. 10, *supra* note 1, at 125-28 (theorizing that a large republic will prevent the formation of majority factions).

¹⁰⁹ It is possible that a voter might justifiably weigh her own interests more heavily than other reasons in deciding how to vote—that is, that she might give her interests extra weight, over and above their independent merits, by virtue of the fact that they are *her* interests. This might be justifiable by reference to the fact that the voter, after all, is likely to be more familiar with her own interests than with most other relevant considerations. If so, then it is possible that collective decisions resulting from a deliberative process in which voters give extra weight to their own interests will be functionally superior to decisions resulting from a process in which voters do not do so. I do not mean here to take a position on whether, or how, voters should give additional weight to their own interests in the deliberative process. My point is simply that voters cannot legitimately consider *only* their own interests in that process; they must, at minimum, also consider, in good faith, the relevant non-self-interested reasons offered by others in deciding how to vote.

¹¹⁰ Of course, financial self-interest requires recusal in most procedural systems. See, e.g., 28 U.S.C. § 455(b) (requiring recusal where judge or judge's family member has "financial interest" in proceeding). "Ideological" self-interest, in the sense described in subpart II.A, above, is not normally considered grounds for recusal.

good-faith balancing of the (non-self-interested) reasons offered by the competing litigants. The difference is that, in majoritarian politics, every citizen is also a judge; “the different classes of legislators”—and of voters—“[are] but advocates and parties to the causes which they determine.”¹¹¹

So my initial model of majoritarian politics, in which two “committed” groups vie for the support of a third “uncommitted” group, is merely shorthand for the more nuanced understanding that the duty of persuasion implies. Those citizens advocating a particular side of an issue—who are both advocates and judges—must not, in their capacity as judges, have reached a position on the issue without first undergoing the process of persuasion themselves. They must not have committed to their position based solely on self-interest (or, as I explain below, on the basis of other unacceptable, nonpersuasive reasons). Rather, they themselves must have adopted that position only after considering, as thoroughly as is practicable, the competing non-self-interested reasons for and against it. And—a corollary of this conclusion—they themselves must remain open to persuasion throughout the decision-making process, in case new and superior arguments are presented to them.

The premise, then, upon which the two potential objections must be based—the idea that an adjudicative model of majoritarian politics requires some degree of actual precommitment, nonreflectively attained and inalterably fixed—is a false one. The model, with its engine of persuasion, in fact *precludes* this kind of inalterable precommitment to a political position. Voters or legislators who become advocates for a position must have reached that point only through a reflective process involving the good-faith weighing of competing arguments. They can then use those same arguments to attempt to influence others. When majoritarian politics is viewed from this angle, there is, ideally, no such thing as a precommitted, fixed majority on any issue—or even a precommitted, fixed minority.

D. Persuasion and Acceptable Reasons

The argument from persuasion in support of the deliberative conception is not a one-way street, however: The obligations it imposes do not fall entirely on the ultimate decision-makers, the voters. Persuasion, remember, is in a sense a *duty* of parties who will be bound by a decision. Part of that duty must therefore be an obligation to make arguments that are likely actually to persuade.

For this reason, irrational arguments are ruled out as grounds for public deliberation; no fellow citizen is likely to be persuaded by them. (Of course, the definition of what is “rational” may be contested, at least at the margins, and may shift over time. But a citizen who makes an argument at

¹¹¹ THE FEDERALIST NO. 10, *supra* note 1, at 123.

the margins is, in so doing, taking the risk that she is not actually engaging in persuasion.) By the same token—and this is a crucial point—arguments based on the pure self-interest, or the “naked preferences,”¹¹² of the party making them are out-of-bounds. A citizen will not have any reason to accept an argument based on the naked preferences of her fellow citizens; it is not *persuasive* to argue that you should give me something I want, merely because I want it.¹¹³

In this way, the requirement of persuasion explains not only the deliberative conception of politics favored by theorists of deliberative democracy, but also the grounds upon which, those theorists argue, public deliberation must be based. On the deliberative democratic view, a participant in public debate must offer only arguments or reasons that are *acceptable* to the other participants.¹¹⁴ A convincing reason for this requirement, we now can see, is simply that arguments that are unacceptable to one’s fellow citizens are not, for that reason, capable of persuading them to vote in a certain way. Offering unacceptable reasons amounts to choosing not to participate in the debate at all.

It is important to note here that a reason (or an argument, or a ground) that is *acceptable* to another is not necessarily a reason that the other ultimately *will* accept, in the sense of agreeing with or adopting it. Consider again the hypothetical example of a debate about whether to prohibit affirmative action in public employment. A citizen in favor of such a prohibition might argue against affirmative action on the ground that it stigmatizes members of the racial and ethnic groups that are supposed to benefit from it, or on the ground that it is counterproductive because it fosters resentment against members of those groups, or on the ground that it violates certain rights of people who are not members of those groups. All of these are likely to be mutually *acceptable* reasons, in the sense that they are not irrational, or inherently offensive, or openly based on the self-interest of the

¹¹² This resilient and perfectly apt term seems to have been coined by Cass Sunstein. See Sunstein, *Naked Preferences and the Constitution*, *supra* note 21.

¹¹³ This insight undergirds Lon Fuller’s distinction between the “two basic forms of social ordering”: “organization by common aims” and “organization by reciprocity.” See Fuller, *supra* note 99, at 357. Adjudication, according to Fuller, is a type of the former, and thus it must proceed in a rational way, according to the presentation of proofs and reasoned arguments. See *id.* at 363-72. Contract is a type of the latter, and so it need not proceed according to rational argument (except to the extent that one party might seek to persuade another that a contract is to the other’s advantage); naked preferences will suffice. See *id.* at 359-64. This is another way of saying that adjudication, as a type of organization by common aims, proceeds according to *persuasion*, while contract ordinarily does not. To Fuller’s analysis, I add in this Article the notion that democratic politics, too, as a type of organization by common aims, must proceed according to persuasion.

¹¹⁴ See, e.g., GUTMANN & THOMPSON, *supra* note 18, at 52-94 (describing “principle of reciprocity” by which “a citizen offers reasons that can be accepted by others”) (quotation at 53); Cohen, *supra* note 10, at 413 (“[P]articipants [in political deliberation] . . . aim to defend and criticize institutions and programs in terms of considerations that others have reason to accept.”); Cohen, *Democracy and Liberty*, *supra* note 14, at 194 (to the same effect).

person offering them. The fact that they are acceptable in this way, however, does not mean that other citizens necessarily will agree with them or will find them decisive.¹¹⁵

If, however, the citizen instead argues against affirmative action on the ground that members of certain races are inherently inferior and deserving of detrimental treatment, he is offering what is likely to be an *unacceptable* reason—one that is irrational, inherently offensive, and perhaps even based on naked self-interest. It is not just that other citizens are unlikely to agree with such a reason; it is that they are unlikely even to *consider* such a reason in assessing the merits of the issue. Such a reason simply will *not* be persuasive to any degree. The requirement of persuasion implies a duty to avoid arguments or reasons that are unacceptable in this sense; it does not (of course) imply a duty to offer only arguments or reasons that the decision-maker ultimately *will* accept.

The most deeply theorized account of acceptable reasons belongs to John Rawls. On Rawls's view, political legitimacy in a pluralistic society stems from an "overlapping consensus" on basic issues of justice, a consensus that can be endorsed by adherents to each of the many reasonable comprehensive religious or philosophical doctrines that exist in such a society.¹¹⁶ Coercive decisions on certain "fundamental" matters, in order to be legitimate, must be justifiable by reference to the features of this overlapping consensus, and not only by reference to features that belong to some comprehensive doctrine but are not shared by the overlapping consensus.¹¹⁷ Thus arguments about how political power should be exercised—about what coercive decisions should be made—must themselves be based upon reasons stemming from the overlapping consensus—upon what Rawls refers to as "public reasons."¹¹⁸ Those arguments, that is, must be based on reasons that are acceptable to others because they are grounded in the overlapping consensus that everyone shares.

The connection between persuasion and legitimacy that we have been exploring lends support to Rawls's conclusion regarding public reason. It

¹¹⁵ Of course, it is always possible that some other citizens *should* find particular reasons decisive, but *won't*. If another citizen's failure to find a particular reason or balance of reasons decisive is due to that citizen's disproportionate weighing of self-interest in her decision-making process, then her decision is illegitimate, for the reasons explained in subpart IV.C, *supra*. But what if her failure to find a reason or reasons decisive is innocent in this sense but *foolish*—based on a good-faith but erroneous attempt to consider and weigh the relevant reasons? What if, that is, some voters (or legislators) are incompetent decision-makers? This seems to me an intractable problem of majoritarian democracy, however conceived—but also of adjudication and any other process of decision-making by human beings. Certainly a model of majoritarianism as adjudication cannot solve the problem, although it might mitigate it by demonstrating the centrality of party participation and of reasoned argument, both of which can operate to reduce the chance of error.

¹¹⁶ See generally RAWLS, *POLITICAL LIBERALISM*, *supra* note 19, at 133-72.

¹¹⁷ See *id.* at 212-30; Rawls, *Public Reason*, *supra* note 19, at 93-108.

¹¹⁸ See RAWLS, *POLITICAL LIBERALISM*, *supra* note 19, at 212-30; Rawls, *Public Reason*, *supra* note 19, *passim*.

also shores up a weakness in Rawls's account. Rawls's idea of an overlapping consensus is sufficient to explain why political decisions should not be made on the basis of nonpublic (that is, unacceptable) reasons; but it is one thing to prohibit political *decisions* from being based on such reasons, and quite another to prohibit public *discourse* from being based on such reasons. One might argue, for instance, that government should not use controversial religious tenets as the basis for its decisions, but that participants in public debate may argue for or against those decisions by reference to controversial religious tenets. Rawls's account does not explain why such an argument is wrong; but an understanding of the role of persuasion provides an explanation. Such an understanding recognizes that reasons offered in public debate must be *persuasive* in order to trigger the duty of responsiveness on the part of public decision-makers. And a reason based on a controversial religious tenet will not be persuasive to many or most of the decision-makers who ultimately count—namely one's fellow citizens, most of whom are unlikely to share a belief in that tenet.¹¹⁹

An understanding of the importance of persuasion thus makes explicit the connection between reasons as grounds for political decisions and reasons as tools of public debate, a connection that Rawls and other deliberative democratic theorists typically take for granted. That understanding also sheds light on another, closely related precept of deliberative democratic theory: that public deliberation should focus mainly or exclusively on *the common good*, and thus that arguments made in deliberation should be arguments about what will best serve the common good.¹²⁰ To a certain extent, the requirement that public discussion focus on the common good is

¹¹⁹ Rawls's idea of an overlapping consensus remains useful in determining what kinds of reasons are likely to be persuasive in public discourse, that is, acceptable to others. As explained in the text, *supra* notes 116-118, Rawls holds that coercive political decisions on fundamental matters must be justifiable by reference to the overlapping consensus that exists in a given society. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 19, at 212-30; Rawls, *Public Reason*, *supra* note 19, at 93-108. Once one recognizes the linkage between the content of coercive political decisions and the content of public discourse about those decisions, then one can define legitimate discourse, and not just legitimate decisions, by reference to the idea of an overlapping consensus. That is, one can understand a "persuasive" (or "acceptable") reason as one that is recognized as persuasive by the overlapping consensus that prevails within a given society—or, put another way, as a reason that refers to some feature of that prevailing overlapping consensus. The question of whether a reason is sufficiently persuasive, then, is primarily, if not wholly, the question of how strongly that reason can be connected to features of a society's overlapping consensus. (Reasons might also differ in persuasiveness depending upon their appeal to innate human reason, which is not a matter of consensus.) As a corollary, a reason that is persuasive within one society at a given time might not be persuasive within another society or at another time, because the content of overlapping consensus may vary according to time and place.

These thoughts about the nature of persuasiveness in public discourse are admittedly quite tentative, leaving a lot of work still to be done. But we can, I think, accept the skeletal notion of a requirement of persuasive reason-giving without needing to flesh out all the details of that idea.

¹²⁰ See, e.g., RAWLS, *POLITICAL LIBERALISM*, *supra* note 19, at 213; Cohen, *Deliberation*, *supra* note 9, at 68-69, 74-79; Jon Elster, *The Market and the Forum*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS*, *supra* note 9, at 3, 11-19.

simply an aspect of the requirement that the participants make only arguments that are acceptable to others. Arguments focused on the common good will, virtually by definition, be arguments that are acceptable to others. Thus a source, perhaps the primary source, of acceptable arguments will be considerations of the common good.

But arguments about the common good are not the only kinds of arguments that others might accept. A citizen might accept an argument about *rights* that other citizens claim to have, quite apart from what might serve the common good. For example, in deciding whether to allow affirmative action in public employment, a citizen might accept an argument that affirmative action is bad because it impairs the rights of those who are not members of the benefited groups—a right, perhaps, to be considered solely on one's merits rather than on immutable characteristics. Or the citizen might accept an opposing argument that affirmative action is good because it protects the rights of members of the benefited groups to avoid the effects of historical discrimination based upon the irrelevant factor of race. Of course, a citizen may reject one or both of these arguments of right in favor of arguments about the common good, or in favor of competing arguments of right. But the citizen need not find such arguments about rights to be *unacceptable* merely because they are not focused on the common good. Indeed, a citizen may think that considerations of rights often trump considerations of the common good.

Acceptable reasons, then, may be reasons grounded in claims of right. It is narrow-minded to assume that persuasion in politics can occur only by reference to the common good.¹²¹ At the same time, it is probably true that arguments based on the common good are especially likely to be persuasive, because by definition they will appeal to everyone's interests.

So now we can see how the connection between persuasion and political legitimacy underwrites the central claims of deliberative democratic theorists: the claim that a deliberative conception of politics is superior to an aggregative conception, and the claim that public discourse must proceed only according to mutually acceptable reasons (which often will involve the common good). A purely aggregative form of majority rule produces decisions that are not the products of persuasion and thus are not responsive to the participation of the dissenting minority. And majoritarian decisions cannot be responsive in this way unless those who will be bound by them truly attempt persuasion, which requires the offering of reasons that can be

¹²¹ Here is a sense in which majoritarian politics differs significantly from adjudication: Adjudication is primarily, perhaps entirely, a matter of making decisions about rights, while majoritarian politics can produce decisions about rights, decisions about the common good, or decisions that combine both types of justification. The basic reason for this distinction is the fact that adjudication primarily is concerned with assessing the consequences of conduct that already has occurred—a matter of implementing existing rights—while majoritarian politics primarily is concerned with creating prospective rules governing future conduct—a matter both of protecting rights and of pursuing the common good. I explore this distinction in much greater depth in Peters, *Participation*, *supra* note 88.

accepted by all.

V. CONCLUSION: THE ADJUDICATIVE MODEL OF MAJORITARIAN POLITICS

It seems we can understand a lot about majoritarian politics by modeling it as a type of adjudication. The role of the judge in majoritarian politics is played by the majority that eventually coalesces with respect to a given issue; as such, each citizen who votes in an election or plebiscite, and each legislator who votes in an assembly, is potentially a judge. The roles of the litigants are played by the citizens who first become committed to one side of the issue or the other. The task of each citizen/litigant is to persuade a majority of her fellow citizens/judges to make the decision she favors. If the resulting decision truly is responsive to these efforts at persuasion, then it renders those efforts meaningful and, like a judicial decision, becomes legitimately binding on the losing parties. A truly responsive majority decision is an example of participatory democracy, not of rule by fiat.

This model of majoritarianism as adjudication thus offers a way out of the majoritarian dilemma—the problem of how members of a dissenting minority legitimately can be bound by majority rule. It tells us that majority rule, properly understood, need not be simply a numbers game; it need not be merely a matter of coercing members of the minority for no better reason than the fact that they have been outvoted. Majority rule is better understood as a process of participatory decision-making through persuasion—that is, as a kind of adjudication. Like adjudication, majority rule draws legitimacy from its essentially participatory nature and from the persuasion that makes that participation meaningful.

And so it turns out that the majoritarian difficulty and Bickel's counter-majoritarian difficulty—the apparent tension between democratic self-rule and supposedly nondemocratic judicial review—are closely connected. Both can be resolved, or at least mitigated, by the recognition that political legitimacy turns on meaningful participation, not simply on majority rule. Majority rule is not a *necessary* condition of legitimacy, and thus judicial review is not illegitimate merely by virtue of being counter-majoritarian. Indeed, to the extent that judicial review is a participatory enterprise, it enjoys significant inherent democratic legitimacy.¹²² By the same token, however, majority rule is not a *sufficient* condition of legitimacy, and thus political decision-making is not legitimate merely by virtue of being majoritarian. For true legitimacy, the majority must do more than merely outvote the minority; it must make decisions in a way that is meaningfully responsive to the minority's arguments. Members of the majority must do what a good judge does: They must decide not on the basis of pure self-interest or

¹²² I have made this argument at length elsewhere. See Peters, *Adjudication*, *supra* note 36; Peters, *supra* note 24, at 1477-92.

rigid preferences, but on the basis of persuasion.

Ultimately, the greatest benefit of understanding majority rule as a type of adjudication may be that doing so exposes the second-best nature of majoritarian democracy. Rarely, if ever, is democracy *really* self-rule in its purest form; usually, if not always, democracy—like monarchy or dictatorship or adjudication—involves coercing someone. Even in Quaker meeting houses, where unanimity is the absolute rule, coercion is not completely absent: The requirement of unanimity allows the minority to coerce the majority. In a system of majority rule like ours, it is the majority that does the coercing. And yet decisions must be made; that is why we have politics. The question, in both majoritarian democracy and adjudication, is not how to eliminate coercion altogether. The question is how to make (inevitable) coercion as palatable, as legitimate, as we can make it. Participatory decision-making through persuasion is the closest we have yet come to an answer.

