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Constitutional Citizenship

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Our practices for determining issues of public morality are deeply flawed. We rely too heavily on the Supreme Court of the United States to determine them for us. We give too much responsibility to the Court, and too little to other institutions; we evade our own responsibility as citizens in a democratic polity. The problem is not that too many issues are "constitutionalized," for many of our most important public moral issues are quite properly treated as constitutional questions. The problem, rather, is that we assume that only the Court is authorized to decide, or is capable of deciding, constitutional questions.

These are controversial assertions. In this paper, I shall explain what I mean by them, and at least begin to justify them.

Although I shall not try to define "morality" as such, I want to take note of some aspects of the *method* or *process* of moral decisionmaking. Let me mention two different approaches. In the rationalistic tradition that has dominated Western philosophical thought since Kant, moral decisions must be made from "the moral point of view" or, to use another philosophical term of art, they must be "universalizable." In brief, this means that we must be willing to apply any moral judgment we make to all similar situations—even if we were in the other person's shoes. For example, if I believe that all abortions should be prohibited, I must be willing to prohibit them even if I were a pregnant woman desperately wanting an abortion. The moral point of view does not demand that moral principles be absolute. For example, I might believe that pregnancies resulting from rape should be excepted from the anti-abortion principle. But I must then be willing to apply the exception universally.

In recent times, there has been a renewed interest in alternative approaches to ethics. For example, in *After Virtue*,[1] Alasdair MacIntyre argues for a virtue-based ethics that has its roots in Homeric Greece. Another example, which I will describe in somewhat more detail, has been called feminist ethics or the ethics of "caring" or "responsibility."

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[1] A. MACINTYRE, AFTER VIRTUE (1981).

Much of this nascent work has been inspired by Carol Gilligan's *In A Different Voice*.[2]

To put Gilligan's work in context, one should understand it as a challenge to Laurence Kohlberg's theory of moral development. Kohlberg describes six stages of moral development, in which individuals' ability to develop and apply abstract, universalizable principles signals the attainment of higher stages. At the highest stage,

> [R]ight is defined by the decision of conscience in accord with self-chosen ethical principles appealing to logical comprehensiveness, universality, and consistency. . . . At heart, these are universal principles of justice, of reciprocity and equality of human rights, and of respect for the dignity of human beings as individuals.[3]

In repeated experiments, boys and men attained higher stages than girls and women of like age.

In A Different Voice argues that women tend to approach moral issues in a different manner from men: While the male "conception of morality as fairness ties moral development to the understanding of rights and rules,"[4] the female conception focuses on care and responsibility. "In this conception, the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract."[5] By contrast to the morality of rights which sees the autonomous individual as primary, the morality of responsibility emphasizes our connections or relationships with each other.

Gilligan's findings are controversial among social scientists, who have argued with her methodology and analysis of the data, and even with the claim that she has identified something especially feminine.[6] This ought not be of great concern to philosophers. What is important is that Gilligan has identified an aspect of moral decisionmaking—the concrete focus on the effects of decisions on ongoing relationships—that plays a significant role in many of our actual day to day judgments. One may be concerned that an "ethics of caring" tends toward judgments that are overly particularistic and that improperly favor people one actually knows over strangers, or that prefer people of one's own race, religion, sex, nationality, or class. On the other hand, an ethics based solely on universaliz-

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[2] C. GILLIGAN, IN A DIFFERENT VOICE 19 (1982). *See also* N. NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984).

[3] L. KOLHBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE 19 (1981).

[4] C. GILLIGAN, *supra* note 2, at 19.

[5] *Id.*

[6] 11 SIGNS 304, 304-10 (1986)(Discussing C. Gilligan's IN A DIFFERENT VOICE).

ability may be abstract to the point of being empty and incapable of guiding the resolution of real-world problems.

In our society, a workable moral system involves some combination of an ethics of rights and caring. The important point for present purposes is that both of these approaches require decisionmakers to look beyond their own interests and extend concern to others. Although the phrase "moral point of view" has generally been associated with universalizability,[7] I will use the term in this broader sense.

I said that our practices for determining issues of *public* morality are flawed. By "public morality" I mean the moral judgments underlying government decisions to regulate or to refuse to regulate the behavior of citizens and institutions. The domain of public morality includes subjects as disparate as minimum wage and maximum hours regulations, welfare and other redistributive programs, the death penalty, abortion, and the treatment of people based on their race or sex.

At any particular time, some moral issues are public matters and others are not. How you should treat a friend who has betrayed your trust is certainly a moral question but not (in our society) a question of public morality. No moral issue is in principle, however, excluded from the public realm. Indeed, the contemporary disputes concerning the government regulation of private sexual conduct, and the earlier debates over regulation of employees' wages and hours, show that disputes over the *boundaries* between the "public" and "private" realms are among the central issues of public moral discourse.

By "*determining*" public morality, I mean *officially* deciding whether and how the state shall act with respect to an issue. I mean to exclude the writings of political and moral philosophers, which do not have the force of law, as well as society's morality as it might be described by a sociologist or cultural anthropologist. Although shared moral principles underlie most legal norms, I am addressing the *ways by which moral norms become legal norms.*

The most obvious methods for determining public morality are legislation and adjudication. A legislature's decision to impose the death penalty for certain offenses is a determination of public morality, as is a court's decision to uphold or reject a constitutional challenge to capital punishment. Public morality may also be determined by informal processes, such as the practices of government officials and agencies. A police department's policy of refusing to enforce a law punishing the possession of marijuana may reflect such a determination.

In a society that values freedom and equality, almost every law of any significance implicates public morality because legislation almost always

[7] *See* K. BAIER, THE MORAL POINT OF VIEW (1958).

interferes with people's freedom—benefitting some and imposing burdens on others. Sometimes this fact is disguised by the breadth of the consensus supporting the decision. But the grounds on which some seemingly innocuous laws are criticized by libertarians, socialists, or religious fundamentalists should remind us of their latent moral content. Robert Nozick believes that a redistributive income tax is tantamount to slavery; the Old Order Amish believe that compulsory public education is immorally secular.[8]

In our society, most significant issues of public morality are, or once were, or eventually will be, *constitutional issues*. Wage and hours regulations were constitutional issues at the turn of the century; their constitutionality was settled (for the foreseeable future) in 1937. Lest one conclude too hastily that certain issues of public morality could never become constitutional issues, imagine how absurd it would have seemed, say in 1900, to argue that legislative apportionment, birth control, and abortion presented constitutional questions.

Whether something becomes or ceases to be a constitutional issue and the institutions for which it is an issue are matters influenced by the text of the Constitution and the aims of its adopters. Slavery was a constitutional issue from the inception of the Republic, but the Founding Document's tacit acceptance of slavery made it an issue to be addressed by the amendment process (or extra-legally) rather than by the judiciary.[9] Racial discrimination as such did not become a constitutional issue until the adoption of the Thirteenth and Fourteenth amendments following the Civil War.

While the text and original history influence the outcomes of con-

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[8] All public issues are rooted in conceptions of morality, and many have moral implications. It would, however, trivialize the concept of morality to say that all public issues are moral issues. The precise bounds of the distinction are not crucial, but it is worth separating decisions concerning public *morality* from two other sorts of decisions. First, there are issues of public *policy*, which involve decisions about the best way to achieve an objective. Although the objective may itself be grounded in public morality, and the means for achieving it constrained by morality, these decisions are essentially instrumental. Imagine, if you will, the particular kinds of determinations that go into a regulation of air pollution, such as the kinds and quantities of emissions that should be prohibited and the enforcement mechanisms that should be employed. Second, many political theorists believe that at least some public issues are properly resolved through self-interested negotiation and bargaining—through the operations of the *political market place*. Locating the boundaries of this domain is itself a fundamental issue of public morality; but once within it, the morality of the market arguably takes over—every interest group for itself. Although this certainly describes the way much politics goes on, I am skeptical that it can be justified. *See* Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984). *Cf.* Michelman, *Political Markets and the Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1978).

[9] Some abolitionists argued that the due process clause of the Fifth Amendment prohibited slavery; but the argument was far out in terms of 19th century constitutional jurisprudence.

stitutional disputes they are far from determinative. No amendment explains how birth control became a constitutional issue, or how wage and hours regulations ceased to be one.[10] The prohibition of school segregation now seems like an intrinsic part of the equal protection clause of the Fourteenth amendment, but for three-quarters of a century the Court interpreted the clause to permit segregation. The text of the Fourteenth amendment is vague, to say the least. The history surrounding its adoption is at best ambiguous, and provides no guidance on questions such as unequal legislative apportionment, poll taxes, and sex discrimination. Indeed, even some of the landmarks of our constitutional history are not mandated by either the text of the Constitution or its original history. These include *Marbury v. Madison*,[11] which established the authority of federal courts to review the constitutionality of acts of Congress, and *McCulloch v. Maryland*,[12] which gave an expansive reading to Congress' delegated powers under Article I of the Constitution.

Of course, even these decisions are not beyond criticism. One may argue, for example, that Chief Justice Marshall misinterpreted Article III in *Marbury* and strained the Constitution in *McCulloch* in order to enshrine the partisan ideology of the Federalists; or that *Brown v. Board of Education*[13] is premised on a misinterpretation of the original history of the Fourteenth amendment. Even if these particular decisions were erroneous, however, the Court was not *doing* something fundamentally wrong. It was not "making" law when it should have been "interpreting," for it is literally impossible to read the Constitution literally—or to apply it only to the adopters' specific intentions. Interpreters' experiences and beliefs, including their *moral* presuppositions, inevitably affect their interpretations of the document. That, more than anything else, explains the difference between *Brown* and *Plessy v. Ferguson*,[14] which upheld school segregation a half-century earlier.

Any document, and certainly one as "open textured" as our Constitution, necessarily delegates to future interpreters the resolution of many important issues.[15] Although the Constitution both reflects and shapes public morality, it delegates to its interpreters no small amount of responsibility to engage in moral decisionmaking themselves. This makes it crucial to ask *who* the decisionmakers shall be. We often tend to link "constitutional" with "judicial," as if constitutional questions

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[10] *But cf.* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

[11] 5 U.S. (1 Cranch) 137 (1803).

[12] 17 U.S. (4 Wheat) 316 (1819).

[13] 347 U.S. 483 (1954).

[14] 163 U.S. 537 (1896)(overruled by Brown v. Board of Ed., 347 U.S. 483 (1954)).

[15] Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950).

were exclusively the concern of courts. Of course, we understand that the Constitution and its amendments were *adopted* by conventions and legislatures, not by courts. But isn't the *interpretation* of a constitutional provision, once it has been adopted, a judicial function?

The answer is both yes and no. Yes, because during our two-hundred year history, the courts—especially the United States Supreme Court—have tended to be our chief constitutional interpreters. Indeed, legislators often talk and act as if *only* the courts have any business deciding constitutional questions.

No, because the Constitution does not appear to assign a privileged, let alone an exclusive, role to the judiciary. On the contrary, it implies that all legislators and public officials, both state and federal, are obligated to interpret the Constitution. In other words, paradoxical as it may seem, legislatures must act not only in a legislative mode, but in a constitutional mode as well. They must determine whether proposed legislation is permitted by the Constitution.

Although there are good reasons, besides tradition, for according respect to the Court's interpretations, I shall argue that the notion of judicial exclusivity is dead wrong, and pernicious to boot. Indeed, even the Court's claim to be the "ultimate" interpreter is not self-evidently correct.

At this point, it may be helpful to outline the main justification for judicial review and the concerns to which the practice has given rise.

Underlying most justifications for judicial review are two claims. First, judges have special expertise in interpreting legal documents, including the Constitution. Second, when the Court goes "beyond" the text to make moral judgments, it is relatively well situated to do so—relative, that is, to legislatures—because of its insulation from partisan politics and by virtue of the systematic, "argumentative" procedures by which issues are presented, heard, and decided.

Judicial review, especially review of an activist sort, has been the object of various criticisms. One is that many so-called "constitutional" issues really have nothing to do with the Constitution and that courts therefore lack authority to address them. Although this position deserves lengthier consideration, I have already indicated why I do not find it persuasive.[16] Let me mention two other criticisms, which I will

[16] Most of these critics do not deny that these issues raise moral questions, or even that the process of adjudication is conducive to informed deliberation about public moral issues. The problem, rather, is one of jurisdiction. By contrast, a few critics of judicial review deny the existence of any such thing as morality—public or private—except as a description of people's attitudes or emotions. They tend to regard all claims about public morality simply as personal preferences or "tastes," which should be treated in the same way as other preferences. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). If enough people hold a preference with enough intensity, whether they label it "moral" or anything else, and if they can mobilize to enact it in the Constitution, so be it.

call the problems of *demography* and *exclusivity*, and then focus on the latter.

The problem of *demography*, simply put, is that courts are highly unrepresentative institutions. Judges have traditionally been, and still are largely white, male, well-to-do, and professional—members of America's elite.[17] This seems to present a problem because so many of the moral issues that come before courts—discrimination, the death penalty, abortion, the rights of workers and welfare recipients—directly concern America's non-elite, and because moral decisions so often depend on knowledge of the circumstances of those affected—not merely factual information, but the kind of understanding that comes from experience. With the judges drawn from as narrow a range of society as they are, the danger is that, whether through ignorance or bias, they will be sympathetic to and further the interests of some groups while ignoring or frustrating others. Although the Supreme Court is singularly unrepresentative in these respects *no* group of nine people could reflect the broad range of viewpoints and experiences in our society.

The problem of judicial *exclusivity* has several dimensions. First, some constitutional issues never come before courts at all because access is expensive or impracticable. If legislatures, officials, and agencies ignore constitutional issues on the assumption that only courts can hear them, then *no one* will hear them. Second, when courts *do* adjudicate constitutional matters, they often defer to the judgements of fact, value, and law supposedly made by the body whose decision is under review. If the legislature itself has not considered the constitutional issues at stake, they may fall between two stools.

A more fundamental problem with judicial exclusivity concerns the role of citizens in a democratic polity. If the judges exercise a monopoly over constitutional decisionmaking, then other citizens and their representatives are excluded from participating in what are among the polity's most fundamental decisions. This view was eloquently stated by the 19th

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Otherwise, preferences must be bargained for through ordinary majoritarian processes. What ever else may be said about the positivist view of morality, it cannot provide a basis for *criticizing* judicial review. If all is preference, why should the preferences of a majority of legislators prevail over those of nine Supreme Court justices? This is a question that cannot be answered without ultimately referring to some sort of a moral principle. Not surprisingly, most criticisms of judicial review are not positivistic. They implicitly or explicitly rely on moral theories—typically theories premised on equality. Some, though by no means all, critics of judicial review hold to some sort of utilitarian theory—one which aspires to produce the greatest good (in terms of subjective preferences) for the greatest number of people. For these critics, majoritarian political processes are desirable because they respect the equality of citizens or because they tend to maximize aggregate preferences. But this is no less a moral theory than any other.

[17] This point is elaborated in Brest, *Who Decides*, 58 S. CAL. L. REV. 661 (1985).

century jurist James Bradley Thayer, who wrote that judicial review expresses a form of distrust of the legislature:

> The legislatures are growing accustomed to this distrust, and more and more readily incline to justify it, and to shed the consideration of constitutional restraints, . . . turning that subject over to the courts; and, what is worse, they insensibly fall into a habit of assuming that whatever they can constitutionally do they may do,—as if honor and fair dealing and common honesty were not relevant to their inquiries.
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> The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives . . . .[18]
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> . . . [I]t should be remembered that the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors.[19]
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> . . . The tendency of a common and easy resort to this great function . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.[20]

Thayer's proposed remedy, which became the panacea for a generation of legal scholars and judges, was "judicial restraint" pure and simple: If judicial activism impeded the people's moral development, then the courts should just stay out. He thought that if the courts simply stopped intervening, the people and their representatives would take up the task. If this seems somewhat far-fetched,[21] his basic insight nonetheless reflects our common experience: We gain responsibility by exercising it.

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[18] J. THAYER, JOHN MARSHALL 103-04 (1901).

[19] *Id.* at 106.

[20] *Id.* at 107.

[21] The reduction of this position was Justice Frankfurter's suggestion, in a case challenging a state legislature's egregious malapportionment, that "[i]n a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." Baker v. Carr, 369 U.S. 186, 270 (1961)(Frankfurter, J., dissenting).

In sum, constitutional decisionmaking, in the form both of amending and interpreting the Constitution, is one of our central forms of public moral decisionmaking. To paraphrase Clemenceau, it is too important to be left to the Justices.

The aim of the broader project, of which this article is a part, is to explore how citizens, legislatures, and other institutions besides courts can assume responsibility for constitutional-moral decisionmaking by participating in the enterprise. Let me say a word about what this could mean.

Perhaps the most visible form of participation—visible because it is so extraordinary—is through constitutional amendment. Although the power to amend the Constitution pursuant to Article V is beyond question, the American political tradition is strongly disposed against popular "tampering" with the Constitution. We are disposed against amendment altogether, preferring to leave important constitutional decisionmaking to the judiciary. On the several dozen occasions that the Constitution has been amended, the amendment has usually been proposed by Congress and ratified by state legislatures. The alternative of convening a constitutional convention has not been employed since the Constitution was adopted. Much opposition to the "convention" method of amendment is based on the fear of a run-away convention that might irresponsibly undercut existing constitutional protections. This concern is a natural byproduct of the practice of judicial exclusivity. The writing of constitutional provisions, no less than their interpretation, demands habits of mind, attitudes, and commitments that are not readily acquired on the spur of the moment.

Another form of participation involves constitutional decisionmaking by nonjudicial institutions such as legislatures, city councils, and school districts. The proposition that these institutions should consider the constitutional implications of the policies they adopt is not very controversial if it only means that they should apply the constitutional doctrine announced by courts. It is highly controversial if it means that they can make independent judgments that contradict those made by courts.

It would be an exaggeration to say that *only* courts engage in constitutional decisionmaking. Legislatures and other nonjudicial institutions sometimes consider constitutional issues—occasionally with impressive care and sophistication. But most of these institutions, including the United States Congress, lack strong traditions of constitutional decisionmaking. They also lack procedures that are conducive to deliberating and deciding constitutional issues. There is a widespread tendency to leave controversial questions to the courts.

It would also be an exaggeration to suggest that only lawyers, judges, and public officials *discuss* constitutional matters. Abortion, the death penalty, affirmative action, and school prayer are debated in magazines and newspapers, on television, in bars, and at dinner parties. In recent years, some of these issues have been the focus of partisan controversy

between candidates for the presidency. The legal and moral aspects of these matters are so intertwined that citizens often grasp the underlying constitutional issues even without addressing them as such—the conflict between the fetus' existence and the woman's freedom, between the claims of a racial underclass and the individual dignity and security of a white worker. Citizens exercise indirect power over constitutional decisions by electing Presidents who tend to appoint ideologically compatible lawyers to the federal bench.[22]

Yet, because our representative institutions do not systematically address constitutional issues and because citizens have no occasions to participate in constitutional decisionmaking, popular talk about constitutional issues is often ill-informed and poorly reasoned. Under these circumstances, one might find the judiciary's insulation from popular meddling in constitutional decisions cause for relief, if not celebration. Perhaps it is for the short run. The burden of this article, however, is that citizen nonparticipation in constitutional decisionmaking is cause for regret.

The core of my argument concerns the nature of citizenship in a democratic polity. Although I focus on the connection between citizenship and constitutional decisionmaking, constitutional issues are not radically discontinuous from other political issues. I therefore must make the more general case for a participatory conception of citizenship. I proceed by examining three different theories of democracy and their cognate conceptions of citizenship.[23]

Let me begin with a conception of democracy that has dominated

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[22] Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284 (1957). Indeed, the 1984 Republican Party platform prescribed what beliefs judicial appointees ought to hold, and the likely composition of a Reagan Court figured prominently in the presidential campaign.

[23] These may be viewed from a relatively descriptive or normative perspective. For example, we might agree that the "consumer conception" (described below) accurately describes the behavior of citizens and officials in the contemporary United States. One of us might believe that this was an entirely satisfactory state of affairs. For example, in A PREFACE TO DEMOCRACTIC THEORY 150-51 (1956), Robert Dahl wrote that such a system "provides a high probability that any active and legitimate group will make itself heard effectively at some stage in the process of decision. . . . [I]t appears to be a relatively efficient system for reinforcing agreement, encouraging moderation, and maintaining social peace . . . ." The other might believe that it was inconsistent with the ideals of citizenship and in need of radical reform. *Cf.* Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285 (1966). The distinction between descriptive and normative is not sharp, however. Our understanding of the world is colored by our interests and values, and our values are affected by how we perceive reality. For example, a writer who deems himself part of the elite, may, on that account, draw a complacent picture of society under an elitist theory of politics, while an outsider may depict the scene more critically. Someone who holds an Athenian ideal of citizenship, but believes it is impracticable in a large modern society, may scale the ideal itself down to a practicable size. *cf.* A. GOULDNER, THE FUTURE OF INTELLECTUALS AND THE RISE OF THE NEW CLASS (1976).

American political science since the Second World War. It is associated with scholars including Joseph Schumpeter, David Truman, and the earlier Robert Dahl,[24] and is variously described as elitist, equilibrium, revisionist, pluralist, or polyarchal.[25] I shall call it the "consumer" conception because of its two most salient features. First, citizens participate in government mainly to promote and protect their own interests—to assert them against other citizens and safeguard them against the abuse of power by government officials.[26] Second, citizens are thought of as consumers in a market in which leaders compete for their votes. The Marxist critic, C.B. MacPherson, has written: "Democracy is simply a market mechanism; the voters are the consumers; the politicians are the entrepreneurs." [27] Most proponents would not disagree with this characterization. For example, Schumpeter writes: "The democratic method is that institutional arrangement for arriving at political decisions in which [leaders] acquire the power to decide by means of a competitive struggle for the people's vote."[28]

The consumer conception views democracy as a procedure that permits efficient public decisionmaking by legislators and bureaucrats, while assuring a degree of responsiveness to the interests of citizens through elections. As Carole Pateman explains:

> The characteristically democratic element in the method is the competition of leaders (elites) for the votes of the people at periodic, free elections. Elections are crucial to the democratic method for it is primarily through elections that the majority can exercise control over their leaders. Responsiveness of leaders to non-elite demands, or 'control' over leaders, is ensured primarily through the sanction of the loss of office at elections; the decisions of leaders can also be influenced by active groups bringing pressure to bear during inter-election periods. 'Political equality' in the theory refers to universal suffrage and to the existence of equality of opportunity of access to channels of influence over leaders. Finally, 'participation,' so far as the majority is concerned, is participation in the choice of decision makers. Therefore, the function of participation in the theory is solely a

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[24] *See, e.g.*, R. DAHL, *supra* note 18. *But see* R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY (1982).

[25] Walker, *supra* note 18; C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 78 (ch. 4 *passim*) (1977).

[26] In this respect, the consumerist conception has roots in the writings of Jeremy Bentham and James Mill. *See, e.g.*, 9 J. BENTHAM, THE WORKS OF JEREMY BENTHAM 47 (Bowring, ed. 1962)("A democracy . . . has for its characteristic object and effect, the securing of its members against oppression and depredation at the hands of those functionaries which it employs for its defence . . . .").

[27] C.B. MACPHERSON, *supra* note 25, at 79.

[28] J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (3rd ed. 1950).

> protective one; the protection of the individual from arbitrary decisions by elected leaders and the protection of his private interests. It is in its achievement of this aim that the justification for the democratic method lies.[29]

How does the consumer conception of democracy comport with constitutionalism? I have suggested that constitutional decisionmaking—whether by interpretation, amendment, or otherwise—requires considering the interests of others. But if citizens in a consumer democracy participate in politics only to further their own interests, then to consider issues from the moral point of view would seem an act of altruism, perhaps laudable, but no part of a citizen's duty. How, then, can defensible constitutional decisionmaking take place in a consumer democracy? There are two possible answers, neither of them satisfactory.

First, a central tenet of the consumer view is that citizens are *not* participants in government.[30] It is therefore an error to look to the citizenry to satisfy the conditions for constitutional decisionmaking. One should look instead to their leaders. For example, V.O. Key writes: "The critical element for the health of a democratic order consists of the beliefs, standards, and competence of those who constitute the influentials, the opinion leaders, the political activists in the order."[31] Indeed, some proponents of the consumer conception argue that citizen participation must be restricted in order to promote stability and protect against majoritarian excesses.[32] To say that citizens cannot assume the moral point of view in deciding constitutional questions, does not mean that their leaders can't.

The consumer conception of democracy cannot plausibly premise constitutional decisionmaking on the insulation of high-minded officials from the self-interested demands of citizens. To be sure, the market is not perfect, and sellers may influence demand as well as respond to it. Although the consumer conception allows for a high degree of elitism, it also demands that leaders *ultimately* respond to the electorate—just as sellers in a relatively free market ultimately cater to the tastes of their consumers.

Of course, the electorate's views *do* influence the actual course of constitutional decisionmaking. This position is most obvious with respect to constitutional amendments, which are promulgated and ratified by the same representative institutions that enact ordinary legislation. Citizens' views also affect the essentially non-participatory process of constitutional adjudication. Although it is an exaggeration to say that the

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[29] C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 14 (1970).

[30] "The role of the people is to produce a government." J. SCHUMPETER, *supra* note 27, at 269.

[31] V.O. KEY, PUBLIC OPINION AND THE AMERICAN DEMOCRACY 558 (1961).

[32] *See, e.g.*, B. BERELSON, VOTING (1954); S.M. LIPSET, POLITICAL MAN 14-16 (1960).

Court follows the election returns,[33] popular opinion influences the trend of judicial appointments and constrains the range of possible decisions. The judiciary's power depends on public acceptance of its judgments, and the justices' own values are shaped by prevailing attitudes.[34]

Alternatively, one might try to limit the consumer conception to ordinary politics and treat constitutional decisionmaking as a unique domain, which citizens as well as officials approach with a more public-regarding attitude.[35] The distinction is between designing the rules of a game and playing in it. Almost all games assume that the players are self-interested. But those who design the rules have a different role and perspective from the players; they stand outside the play to design rules conducive to a good game—rules that are, indeed *premised* on the player's self-interested behavior and which both reward and constrain such behavior. On this analogy, citizens and officials participate in ordinary politics as players, but when they engage in constitutional decisionmaking they assume the attitude of the rule-maker.

This procedure may recall the notion of a social contract, in which self-interested citizens agree to "constitutionalize" certain procedural or substantive rules in order to promote their long-run interests. Locke, Rawls, and other political philosophers have used such a hypothetical agreement as a metaphor for the moral point of view, a device for producing morally defensible constitutional rules. There is, however, a significant difference between the circumstances of the hypothetical citizen of the contractarian philosophers and the actual citizens of a consumer democracy. To assure that they assume the moral point of view, the delegates to Rawls' convention are not permitted to know their actual situation; they enact a constitution behind a "veil of ignorance."[36] The constitution produced by actual, self-interested citizens, however, is quite a different item. Citizens are aware of their interests and, according to the political psychology of the consumer conception, are determined to promote them.

As a descriptive matter, this is true even of the greatest constitutional moment of American history. Some of the Federalists, who urged ratification of the Constitution of 1787, and some of the Anti-Federalists, who opposed it, undoubtedly took the long view. The proponents and opponents were also concerned with immediate economic problems, and the solutions provided by the new Constitution—for example, a strong

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[33] F.P. Dunne, Mr. Dooley's Opinions, "The Supreme Court's Decisions."

[34] *See* DAHL, *supra* note 24; Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975).

[35] *See* Ackerman, *supra* note 10.

[36] This is not quite accurate. Rawls uses the original position to derive the basic principles of justice, but his constitutional convention seems to have "actual" participants. But the participants are concerned with the general welfare of the polity, not with their constituents' parochial interests.

central government—were widely understood to serve the interests of some groups at the expense of some others.

I noted earlier that constitutional decisionmaking is not radically discontinuous from ordinary politics. A legislative bill prohibiting discrimination on account of sex raises essentially the same issues as an Equal Rights Amendment to the Constitution. Nor is the actual operation of legislative process very different. This suggests a more fundamental institutional or psychological point. Considering issues from the moral point of view requires habits and attitudes that come from regular practice and that are not readily acquired on the spur of the moment. It is simply not plausible to expect citizens or officials to act out of self interest day to day, and adopt a very different perspective when the word "constitutional" is invoked.

The consumer conception provides a fairly accurate description of many aspects of modern political life—one that any realistic proposal for reform must take into account. However, the consumer conception is incompatible with the very idea of a *normative* theory, and hence with any theory that treats constitutional decisionmaking as moral decisionmaking. It allows no space for public moral discourse or, indeed, for justice. Rawls' assertion that justice is the *first* virtue has been cogently contested,[37] but no one has doubted that it is *a* virtue of social institutions, and a central aim of constitutional discourse.[38]

The consumer conception of democracy treats political participation as a cost—"protection"—that we must pay for living in a society with other self-interested and potentially predatory people. There is a radically different view of participation, which regards political action as neither a cost nor a benefit, but as an essential human activity. Participation is embodied in the classical Greek notion of man as a political being—*zoon politikon*—who fulfills his own life, creates his identity, affirms his citizenship, and constitutes his community by participating in the affairs of the *polis*. It is reaffirmed in the 18th century vision of the Republican community and its understanding of "liberty" and "freedom" as public rather than private concepts. Referring to post-Revolutionary America,

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[37] *See* M.J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

[38] The consumer conception must account for the fact that moral arguments pervade both ordinary and constitutional politics. Even if such arguments are nothing more than rhetorical strategies designed to achieve one's own ends, they imply that at least some people—those whom the arguments are designed to persuade—take moral argument seriously. Otherwise, the strategies would be ineffectual. I imagine that many proponents of the consumer conception acknowledge that people believe in moral principles, can be persuaded by them, and may even act on them. The role of morality in this theory remains essentially different from its role for, say, Locke, Rousseau, or Rawls. These philosophers are concerned with justice as such, while for a consumer theorist people's *perceptions* of justice or, as the more economically-minded would say, their *tastes* for justice, are phenomena to be reckoned with and used for instrumental purposes.

Gordon Wood writes that "[p]ublic liberty was the combining of each man's individual liberty into a collective governmental authority, the institutionalization of the people's personal liberty, making public or political liberty equivalent to democracy or government by the people themselves."[39] Such a view was central to John Stuart Mill's political philosophy.[40] In the 20th century, this position has been propounded by Hannah Arendt and by advocates of participatory democracy, many of whom deplore the alienating nature of mass pluralist politics and seek to give citizens control over ostensibly private as well as public institutions that affect their lives.[41]

Theorists in the "classical" tradition "were *not* primarily concerned with the *policies* which might be produced in a democracy; above all else, they were concerned with human development and the opportunities which existed in political activity to realize the untapped potentials of men and to create the foundations of a genuine human community."[42] Donald Keim has usefully summarized the common themes of the classical tradition:

> Political action is common action. Each actor partakes in a common activity, not as tasks are shared in the division of labor, but in the sense that a common ground is both created by and composed of noninstrumental political actions. Political action is therefore the activity of men when they are engaged in the joint human enterprise of creating a common matrix of political life. . . . Political life is one of the modes of existence available to man. As a political being man creates a world of common objects and meanings in 'political space.' . . . [P]olitics is not simply a technical instrument to be picked up and put down for the sake of achieving some primary, i.e., private goal. Instead, politics as an enterprise of common involvements is itself a primary (but not private) experience in which the end—fulfilling an aspect of one's nature—is realized in the enterprise itself. . . . Fundamental to this conception is the proposition that part of what it means to be a human being is to partake in the affairs of the community. It is not something done when all other means of achieving one's goals have been exhausted. Rather it is something that is necessary if one's full nature as a human being is to be realized.[43]

It might seem that political participation as self-realization is, if

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[39] G. WOOD, CREATION OF THE AMERICAN REPUBLIC 24 (1969).

[40] *See* D. THOMPSON, JOHN STUART MILL AND REPRESENTATIVE GOVERNMENT (1976).

[41] *See, e.g.*, B. BARBER, STRONG DEMOCRACY (1984); PATEMAN, *supra* note 29.

[42] Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 288 (1966).

[43] Keim, *Participation in Contemporary Democratic Theories*, Nomos XVI at 1 (1975).

anything, less germane to constitutional decisionmaking than a theory premised on self interest. In the most fundamental sense, the classical understanding of politics is however, a theory of how a political community is *constituted.* Let me illustrate this through the story of the creation and the almost immediate loss of the American political community following the Revolutionary War. Although the actual events obviously were far more complex and ambiguous, I am concerned with the Republican *concept* of citizenship and political community; for these purposes it isn't necessary to try to separate myth from actual events.

Through town meetings, committees, conventions, and a variety of other organizations, post-Revolutionary Americans participated directly in government to an extent never achieved before or afterwards. The constitutional convention was regarded with pride as the innovation of the Revolutionary period. Whereas "conventions" had previously been extra-legal bodies, sometimes (justifiably) viewed as mere mobs, Americans transformed them into the very source of governmental authority. "A constitution," wrote Thomas Paine, "is not an act of government, but of people constituting a government."[44] A crucial aspect of 18th century participatory democracy was the people's continuing power to amend the Constitution. A contemporary writer observed that though the early state constitutions had many defects, "in one thing they were all perfect. They left the people the power of altering and amending them, whenever they pleased."[45]

Whatever actual or symbolic opportunities constitutional conventions provided for citizen participation, the states were too populous even in 1776 to permit direct participation in the day-to-day affairs of the legislatures. The inevitability of representation was acknowledged, though often grudgingly. What ultimately emerged was a concept of representation quite at odds with Republicanism—what J.G.A. Pocock describes as the universal intervention in government of the relation between represented and representative.[46]

> [A]ll government was the people's and . . . the people had withdrawn from government altogether, leaving its exercise to a diversity of representatives who . . . took on the characteristics of the old aristocracy.
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> . . . Once representation became a means to the creation and establishment of a sovereign,the act of choosing—or acknowledging—a representative became almost the reverse of participation; it was rather the act of saying that there existed a person whose acts were so far authoritative that they were to be taken as

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[44] *Quoted in* H. ARENDT, ON REVOLUTION 145 (1963).

[45] G. WOOD, *supra* note 39, at 613.

[46] J. POCOCK, THE MACHIAVELLIAN MOMENT 518 (1974).

> equivalent to one's own. . . . The choice of representative was a surrender, a transfer to another of one's plenitude of power and one's persona if not individuality.[47]

How does one prove that participation in the public sphere is an integral aspect of the good life? This seems as fundamental a premise, as say, the libertarian's belief that the good life consists of being free from interference by others. At most I can ask you to consider whether the classical conception is consonant with your own conception of self and society.

Imagine, if you will, living in a nation that had been ruled for centuries by a succession of autocrats so benign, fair, knowledgeable, and modest in their own desires, that the citizens' material goods were great and equitably distributed. The autocracy was highly stable, with rulers selected automatically from a family bred for the task. Civil liberties were also great: for example, citizens enjoyed unrestricted freedom to criticize government policies, indeed to criticize the very form of government, and the ruler listened to all grievances with a sympathetic ear. The only liberty citizens were denied was the power to govern themselves.

The only liberty they were denied, in other words, was the liberty to act as democratic citizens. If living in such a regime troubles you, then you share the intuition that participation is a valuable aspect of citizenship. This does not commit you to believing that all persons must participate in all public decisions. For example, you might believe that certain decisions require special expertise, knowledge, or judgment, or that participation is sometimes impracticable or too costly. But you would *value* participation and hope to find ways to facilitate it—especially when it came to making fundamental constitutive decisions.

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[47] *Id.* Hannah Arendt similarly observes that "the Revolution, while it had given freedom to the people, had failed to provide a space where this freedom could be exercised. Only the representatives of the people, not the people themselves, had an opportunity to engage in those activities of 'expressing, discussing, and deciding.'" H. ARENDT, *supra* note 44, at 235. The problem was, if anything, deeper and less tractable. Hannah Arendt notes further:

> The revolution . . . had come to an end with the establishment of republic. . . . But in this republic, as it presently turned out, there was no space reserved, no room left for the exercise of precisely those qualities which had been instrumental in building it. . . . [I]f foundation was the aim and end of the revolution, then the revolutionary spirit was not merely the spirit of beginning something new but of starting something permanent and enduring. . . . [But] a lasting institution, embodying this spirit and encouraging it to new achievements would be self defeating. From which it unfortunately seems to follow that nothing threatens the very achievements of revolution more dangerously and more acutely than the spirit which has brought them about. . . . [Hence the] perplexity . . . that the principle of public freedom and public happiness without which no revolution would ever have come to pass should remain the privilege of the generation of founders. . . . *Id.* at 232-33.

The question remains whether the classical conception of democracy provides any more space for *moral discourse* than does the consumer conception. The Greek idea of ethics linked virtue with action in ways that cannot readily be mapped onto the post-Enlightenment tradition of rationalistic ethics in which American constitutional law seems so deeply rooted.[48] And the 18th century American version of Republicanism depended on an assumption that seems implausible in our own time. It assumed, as Gordon Wood writes,

> that the people were a homogeneous body whose 'interests when candidly considered are one.' Since everyone in the community was linked organically to everyone else, what was good for the whole community was ultimately good for all the parts. . . . This common interest was not, as we might today think of it, simply the sum or consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private interests of groups and individuals. Because politics was conceived to be not the reconciling but the transcending of the different interests of the society in the search for the single common good, the republican state necessarily had to be small in territory and generally similar in interests.[49]

If the classical idea of citizenship has any bearing on constitutional decisionmaking in our own time, it must be through a political discourse that recognizes the diversity of interests of a heterogeneous society and the inevitability of representative government.

John Stuart Mill's argument for participatory democracy focused on the effects of participation on the character of citizens. Government could be a "great influence acting on the human mind," and political institutions should be measured by "the degree in which they promote the general mental advancement of the community, including under that phrase advancement in intellect, [and] in virtue . . . ."[50] Mill thought it particularly important that participation in civic affairs teaches a citizen "to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the general good."[51] Mill thought that an open legislative process, in which government acts are subject to "adverse controversy" and the demands of public justification, conduced to morally justifiable political action.

Since Locke, liberal political philosophers have derived fundamental moral and political principles from assumptions about what people would

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[48] *See* A. MacIntyre, *supra* note 1.

[49] G. Wood, *supra* note 39, at 57-58.

[50] J. Mill, Considerations on Representative Government 43 (1873).

[51] *Id.* at 79.

agree to in certain idealized circumstances—for example, behind Rawls' "veil of ignorance" or in Habermas' "ideal speech state." These are heuristic devices for assuring that fundamental political decisions are made from the moral point of view—that they are not based on the decisionmakers' personal interests. Mill's conception of democracy can be understood as a *procedural implementation* of the moral point of view in an acutal society where people know and care about their own interests.

In *On Justifying Democracy*,[52] William Nelson elaborates the connection between Mill's conception of democracy and liberal political theory. Nelson argues that democracy is instrumentally valuable because it tends to produce just laws:

> [W]hen matters of public policy are subject to frequent public debate, and when most individuals are called upon, from time to time, 'to exercise some public function,' . . . citizens will attempt to formulate principles in terms of which they will be able to defend their position to others. Similarly, to the extent that political leaders must defend their positions publicly, they will have to formulate principles and conceptions of the common good in terms of which they can justify their positions.[53]
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> . . . The advantage of democracy is that it *moralizes* the process of government. It encourages both citizens and representatives to think of legislation and policymaking in terms of what can be justified; and it leads them to formulate principles and conceptions of the common good in terms of which they can carry out the process of justification.[54]

In a similar vein, Hannah Pitkin has written:

> [A]ctual participation in political action, deliberation, and conflict may make us aware of our more remote and indirect connections with others, the long-range and large-scale significance of what we want and are doing. Drawn into public life by personal need, fear, ambition or interest, we are there forced to acknowledge the power of others and appeal to their standards, even as we try to get them to acknowledge our power and standards. We are forced to find or create a common language of purposes and aspirations, not merely to clothe our private outlook in public disguise, but to become aware ourselves of its public meaning. We are forced, as Joseph Tussman has put it, to transform 'I want' into 'I am' entitled to, a claim that becomes negotiable by public standards. In the process, we learn to think

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[52] W. NELSON, ON JUSTIFYING DEMOCRACY (1980).
[53] *Id.* at 117.
[54] *Id.* at 119.

> about the standards themselves, about our stake in the existence of standards of justice, of our community, even of our opponents and enemies in the community; so that afterwards we are changed. Economic man becomes a citizen.[55]

I will call the process by which this moralizing or externalizing occurs "*discursive participation*"—participation that induces us to listen to other people's positions and justify our own. Justifying our positions does not guarantee that we will move beyond our own interests and see issues in terms of others' interests as well, but it tends in this direction. It induces us to assume the moral point of view.

Discursive participation plays an essential role in a Kantian ethics of universalizability—a role similar if not identical to that of judicial opinions in legal decisions. Richard Wasserstrom writes:

> [T]he justification for any proposal should be submitted to and should be able to withstand public examination. For the prerequisite of publicity provides what has consistently proved to be the most effective means by which the enthusiasms of the advocate and the visions of the would-be seer can be measured against the less personal and more sober and disinterested wisdom of the community . . . .[A]ll the grounds or reasons for a decision [must] be both revealed and evaluated. . . . [T]he processes of argumentation, justification, and enlightened persuasion [must] continue until the 'ultimate' premise upon which any decision stands and from which it draws its claim for acceptability is fully revealed.[56]

Wasserstrom quotes John Dewey's strong assertion:

> It is highly probable that the need of justifying to others conclusions reached and decisions made has been the chief cause of the origin and development of logical operations in the precise sense; of abstraction, generalization, regard for the consistency of implications.[57]

Discursive participation in an ethics based on caring or responsibility is different but no less essential. "Justifications" here may consist of thick descriptions of our perceptions and feelings, which are then tested and may be revised based on others' expression of their perceptions and feelings. Without discourse, we are in danger of partial or myopic vision and in danger of reaching conclusions premised on incomplete understandings of their consequences for others.

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[55] Pitkin, *Justice: On Relating Private and Public*, 9 POLITICAL THEORY 327, 347 (1981)(quoting J. TUSSMAN, OBLIGATION AND THE BODY POLITIC 78-81 (1960)).

[56] R. WASSERSTROM, THE JUDICIAL DECISION 95-96 (1961).

[57] Dewey, *Logical Method and Law*, 10 CORN. L.Q. 17, 24 (1924).

Discursive participation constrains, and thereby legitimates, the role of self interest in constitutional politics. The consumer conception of democracy correctly understands that interests often do conflict; it treats politics as a method for accommodating competing interests. It is incomplete, however, because of its indifference to the justice, or regard for others, involved in resolving conflicts among competing interests. Under the consumer conception, public argument is not a procedure for arriving at just or responsible outcomes but only a rhetorical strategy for gaining votes. By contrast, discursive participation continually subjects the pursuit of private interest to the constraints of justice and responsibility for others. Benjamin Barber has written:

> The participatory process of self-legislation that characterizes strong democracy attempts to balance adversary politics by nourishing the mutualistic art of listening. 'I will listen' means to the strong democrat not that I will scane my adversary's position for weaknesses and potential trade-offs, nor even . . . that I will tolerantly permit him to say whatever he chooses. It means, rather, 'I will put myself in his place, I will try to understand, I will strain to hear what makes us alike, I will listen for a common rhetoric evocative of a common purpose or a common good.'[58]

Discursive participation also compensates for some difficulties in applying classical political theories to our own situation. Greek conceptions of ethics were linked to notions of virtue and action that seem very remote from our moral and constitutional traditions. Whatever may have been the situation in other times and places, our society is not homogenous; the interests of citizens often seem diverse and conflicting. Discursive participation supplements or replaces an action-based ethics; it also replaces the nightmare fantasy of a polity of like-minded and like-interested citizens with procedures that induce a diverse citizenry to treat each other with justice and respect.

The possibility of discursive participation rests on two assumptions. First, that people generally "want to be able to justify their conduct to others. They want their own actions and their institutions to be acceptable from the perspective of mutally acceptable principles;"[59] they want "to live openly and in good faith with their neighbors."[60] Second, that citizens are capable of considering issues from the moral point of view even when their own interests are at stake.

The first claim comports with much of our everyday experience. Even an ideological libertarian of the Ayn Rand school feels the need to justify her radical individualism. *That* is not a question of ideology but of human

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[58] B. BARBER, *supra* note 41, at 175.
[59] W. NELSON, *supra* note 52, at 119.
[60] *Quoted in id.* at 108.

sociability. The second claim is highly contingent: it depends on the *situations* in which the activity takes place. Discursive participation among people who are misinformed or who represent a relatively narrow spectrum of interests or perspectives may create or reinforce a distorted but strongly-held consensus.[61] Discursive participation which demands that one consider the interests of a wider constituency may broaden parochial perspectives as well as the political community of which citizens feel a part.[62]

The argument for discursive participation does not imply that a decision discursively reached by a thousand laypersons is better than one made by a handful of experts. One could agree that discursive participation is necessary for morally defensible decisions—thus rejecting the consumer conception of democracy—yet believe that the citizenry at large cannot practicably participate in this role. One might doubt that most citizens could ever be seriously concerned with constitutional issues, or well enough informed to address them, or capable of considering them from the moral point of view. One might, indeed, think that even representative institutions suffer from these limitations and that the current system, in which courts have a near monopoly on constitutional decisionmaking, comes as close to the discursive ideal as is feasible in a large modern society.[63]

It is worth repeating, however, that the exclusion of citizens because they are uneducated or incurably self-interested builds a structural defect into the very foundation of constitutional decisionmaking in a democratic polity. For even if citizens do not participate in government, and even if judges and other officials enjoy considerable autonomy from the electorate, popular views that are widely and strongly held help shape the ideological environment in which constitutional decisions are made and influence their outcomes.

It is probably fanciful to think that an increase in discursive participation would dramatically change the terms of debate on most constitutional issues. However, citizens and legislators, as well as judges and

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[61] *See generally*, D. THOMPSON, THE DEMOCRATIC CITIZEN (1970).

[62] *See generally*, B. BARBER, *supra* note 41.

[63] It should be recalled that the Athenians and later European theorists were no democrats. Participation was the prerogative, responsibility, or way of life for an elite group, not for the people at large. Except for some 18th century Americans, Republican theorists limited participation to an aristocracy of talent and property, for only economic security could assure a disinterested concern for the common good. "The ideal Athenian citizen during the 'Golden Age' of Pericles was . . . a strange sort. Leaving the administration of his household to his wife, the cultivation of his fields to his slaves, and the conduct of foreign affairs to foreigners, he sallied forth into the *polis* to act and speak in the company of his true peers. Here alone he could breathe the air of freedom, because he had left behind everything that had to do with his merely 'private' concerns—those governed by standards of utility as well as those under the sway of necessity." Peter Fuss, [in collection of essays, and also 3 IDEALISTIC STUDIES 260].

philosophers, are at least sometimes capable of understanding and acting on public issues from the moral point of view. To accept the possibility of moral discourse at all is to believe that at least some of our opinions are open to change through reflection and persuasion; one can never know in advance which ones.

To summarize, I believe that citizen participation in constitutional discourse and decisionmaking is desireable for several reasons. First, it can bring to bear on the decisionmaking process relevant perspectives and information that would otherwise be excluded. Second, it can educate the public about constitutional issues. Because popular opinion influences the outcomes of constitutional decisions—even decisions made by courts—citizens should have an informed, critical understanding of constitutional law. Third, participation in the basic political decision of one's society is an intrinsic good.

The question remains whether there are practicable means of increasing the role of legislatures, other government bodies, and citizens themselves in constitutional decisionmaking. I will have succeeded in my mission for the moment if you think the question is worth further exploration.