

Judicial Democracy

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Many scholars believe that it is procedurally undemocratic for the judiciary to have an active role in shaping the law. These scholars believe either that such practices as judicial review and creative statutory interpretation are unjustified, or that they are justified only because they improve the law substantively. This Article argues instead that the judiciary can play an important procedurally democratic role in the development of the law.

Majority rule by legislatures is not the only defining feature of democracy; rather, a government is democratic to the extent to which it provides egalitarian forms of political participation. One such form of participation can be the opportunity to influence the law through the courts, either directly by participating in a case or indirectly by advocating litigation. Arguing from several examples, this Article shows that judicial decision-making allows different voices to be heard that may not necessarily have influence or power in majoritarian legislative structures or popular initiatives. Giving citizens the opportunity to change, to preserve, and to obtain authoritative clarification of the law through the courts can thus make a government procedurally more democratic.

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INTRODUCTION

According to one well-established view, the judicial development of law is basically undemocratic, functioning only as an occasionally required adjunct to political democracy. This theory views democratic government as self-government through legislation adopted by majority rule, and it holds that the judicial role is very limited. While the judiciary's role in authoritatively interpreting statutes may be necessary, given legislatures' unavoidably limited foresight and precision, judicial interpretation of law is not itself properly understood as a form of democratic activity.¹ Defenders of this view of democracy therefore see creative interpretation of constitutional provisions, statutes, or cases as anti-democratic.² If powers such as judicial review of legislation are defensible at all, they are defensible only as a way of correcting the worst abuses or injustices of majoritarian democracy.³

1. The need for authoritative judicial interpretation of statutes is indisputable. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921) ("I take judge-made law as one of the existing realities of life.").

2. For a skeptical view of judicial creativity in interpreting statutes and constitutions, see generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). For mixed praise of the democratic credentials of the common law, see Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 410–11 (1997). On Peters' view, common law adjudication is democratic when decisions set only a narrow precedent, since the interests of affected persons, the parties, and others similarly situated have been represented before the court. Judicial opinions that attempt to set out more broadly applicable rules are democratically suspect. *Id.*

3. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102–103 (1980) (footnote omitted) ("The approach to constitutional adjudication recommended here is akin to what might be called an 'antitrust' as opposed to a 'regulatory' orientation to economic affairs—rather than dictate substantive results it intervenes only when the 'market,' in our case the political market, is systematically malfunctioning."). For a recent philosophical challenge to the democratic credentials of judicial review, see generally JEREMY WALDRON, *LAW AND DISAGREEMENT* 211–312 (1999) [hereinafter WALDRON, *LAW AND DISAGREEMENT*]; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) [hereinafter Waldron, *The Core of the Case*]. For discussion of majoritarian challenges to the democratic

This Article rejects traditional skepticism about the judiciary's democratic credentials. It offers a novel defense of an active role for the judiciary in developing the law, both through judicial review of legislation and through the ordinary legal process of common law interpretation. More specifically, the Article defends the *judicial democracy thesis*: a government is in most cases *procedurally* more democratic if it permits judicial development of law and enables citizens to influence the law through the courts. The term “judicial development of law” refers to the processes by which courts change, preserve, or authoritatively clarify the law. The most controversial of these processes is judicial review, which allows courts to strike down statutes and executive actions as unconstitutional or to authoritatively clarify statutes to ensure their compatibility with constitutional provisions.⁴ But the judicial development of law also includes authoritative statutory interpretation generally, as well as the process by which courts develop bodies of common law that remain to some extent independent of statutory texts.⁵ The judicial democracy thesis asserts that judicial development of the law is consistent with legislative expressions of democracy and promotes democracy itself as a deeper value. The courts are as important to democracy, on this view, as the legislature and the ballot box. Courts are not merely mechanical, law-applying conveyor belts. We should celebrate rather than decry the courts as an additional institutional source of democratic rule-making and legal development.

Although many think majority rule is essential to democracy,⁶ identifying democracy *only* with majority rule is an error.⁷ A government

credentials of judicial review in legal academia in the latter half of the twentieth century, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 176–215 (2002).

4. The power to interpret statutes authoritatively with the aim of reconciling statutes with constitutional requirements can be used in a counter-majoritarian way. See, e.g., Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 417–26 (2005) (showing that early Warren Court decisions used the constitutional avoidance canon to narrowly construe the Smith Act and other McCarthyite legislation that had Congress's continued support).

5. See FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 103–19 (2009) (discussing the extent of common law's independence from statute).

6. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 224 (1971) (stipulating that any departure from majority rule constitutes a restriction of citizens' political liberty, possibly justified by other considerations); WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 88–118 (arguing that majority rule is central to democracy); James Allan, *Thin Beats Fat Yet Again—Conceptions of Democracy*, 25 L. & PHIL. 533 (2006) (defending a conception of democracy centered on majority voting against “thicker” conceptions of democracy).

7. This Article does not argue against majority rule in legislatures as a permissible and perhaps even a recommended decision rule. This procedural rule is open to exceptions, however; super-majority voting and consensus are alternatives.

is democratic to the extent that it offers its citizens equal opportunities for political participation.⁸ Though voting is undeniably an important and even essential form of political participation in modern democratic governments, it is not the only form that matters. This Article argues that enabling citizens to influence the law through the courts can give citizens important opportunities for participation in government. It can do so both by giving citizens the opportunity to influence the law directly as parties to cases, and by enriching the potential effectiveness of using rights to political speech. Even in a society with a well-designed, properly-functioning legislative branch, access to the judiciary provides an important participatory venue for citizens to advance minority views; either about what the law should be or about what defects in the law most urgently need attention.⁹ If the judicial process is well-designed, this opportunity can be provided without denying members of the majority the same opportunity. In a society in which private money has a large influence on legislative politics, the opportunity to influence the law through the courts can serve as an equalizing force for participation by citizens whose views are in the majority, as well as for citizens with minority views.¹⁰ Of course money can also affect access to effective legal representation, but the financial barriers to effective political agency in the legislature may sometimes be greater.

In focusing on non-instrumental, process-oriented democratic values, this Article's argument differs from most defenses of normative judicial decision-making against democratic critiques. Most defenses of judicial review, in particular, are concerned with substantive justice. They argue

8. See ROBERT A. DAHL, *ON DEMOCRACY* 13, 37, 49 (2d ed. 2015) (discussing how a "right to participate" and "effective participation" as essential qualities of democracy).

9. This is the case whether judges are appointed or elected. In Pennsylvania, state judges are elected, and some may think that electing judges recognizes that they are making decisions that should be subject to some degree of democratic oversight via elections. Other states, such as New Jersey, have appointed judges, and the idea here (as in the United States federal courts) is to remove judges from an explicitly political role: to make them, in effect, less directly accountable to recall in democratic elections. This Article takes no position about the relative merits of elected and appointed judges.

10. For evidence that private money has strong influence in American legislative politics, see Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens* 12 *PERSP. ON POL.* 564, 576 (2014) ("In the United States, our findings indicate, the majority does *not* rule—at least not in the causal sense of actually determining policy outcomes. When a majority of citizens disagrees with economic elites or with organized interests, they generally lose."). The democratic importance of the judiciary's role in shaping law may be heightened in the United States in the wake of *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (holding that legal restrictions on expenditures by political candidates and independent expenditures in a political campaign violate the First Amendment) and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371–72 (2010) (holding that the First Amendment protects independent expenditures on political speech by corporations).

that a political system with judicially enforced restrictions on the content of legislation will have substantively more just law than a system that has no such constitutional restrictions, or a system in which the legislature's enactment of a statute is treated as an authoritative determination that the statute is constitutionally sound.¹¹ Others have argued that judicial enforcement of certain constitutional requirements, such as freedom of speech and voting rights, indirectly contributes to procedural justice by protecting the democratic character of elections and of legislatures.¹² By contrast, this Article claims that the process by which the judiciary develops law is itself democratic insofar as it provides meaningful opportunities for citizen participation, distinct from voting and activities such as political speech that indirectly affect voting.¹³ The argument agrees with, but goes beyond, the observation that the judicial practice of giving public justifications to those governed by a decision exemplifies an aspect of the democratic ideal.¹⁴ The judiciary can give meaningful opportunities for political agency to many citizens, including citizens who may not be directly affected by a particular judicial decision but who have strongly held views about the laws that will be carried out in their

11. These defenses differ in how they regard the democratic character of judicial review. Some argue that the value of justice in legislative outcomes sometimes outweighs the value of democratic participation. *See, e.g.*, Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 *LAW & PHIL.* 451, 456–465 (2003). A second approach maintains that a democratic government's legitimacy depends on its respect for certain individual rights and that judicial review is an acceptable limitation on majority rule if it helps to protect these rights. Thomas Christiano, *Waldron on Law and Disagreement*, 19 *LAW & PHIL.* 513, 525 (2000). A third strategy, which Ronald Dworkin has pursued, is to deny that majority rule is central to democracy. Instead, democracy should aim to treat all citizens with equal concern and respect. The ideal of democracy calls for restrictions on majority rule if these restrictions promote the equal status of all citizens (e.g., by protecting important rights). *See* RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 15–19 (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*]; RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 209 (2000) [hereinafter DWORKIN, *SOVEREIGN VIRTUE*].

12. *See, e.g.*, ELY, *supra* note 3, at 74.

13. As a spectacular example of a court decision that had important implications for individual liberty but that did not involve judicial review, see *Somerset v. Stewart*, 98 Eng. Rep. 499, 510 (1772) (“The state of slavery is . . . so odious, that nothing can be suffered to support it, but positive law.”); *see also* William R Cotter, *The Somerset Case and the Abolition of Slavery in England*, 79 *HIST.* 31, 37 (1994) (explaining that this case held that slaves could not be forcibly removed from England, as slavery could not exist in England without the express authorization of Parliament). For almost a century after *Somerset*, slavery continued in the United States under the explicit protection of the original United States Constitution. *See* PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 6–10 (2014) (identifying pro-slavery provisions).

14. *See* Matthew Steilen, *The Democratic Common Law*, 10 *J. JURIS.* 437, 439, 471–84 (2011) (arguing that the way courts justify decisions to the parties exemplifies one of the features of deliberative democracy); *see also* Peters, *supra* note 2, at 366–368 (arguing that the common law process ensures that the parties' interests are represented in the formation of legal rules that apply to them).

name.¹⁵ When opportunities to shape the law through the courts are available, litigation can be an important and effective form of political agency even for concerned citizens who cannot participate in a case directly. The judicial democracy thesis is an important special case of a more general position, namely, that government must sometimes depart from majority rule to be procedurally democratic. Others have defended this view, but on different grounds.¹⁶

The judicial democracy thesis and the argument for it do not depend on contingent features of institutions in the United States or any other country. Any legal or political process can frustrate democratic values if there are defects in its implementation, and the question of whether any actual country's institutions are well implemented is richly empirical. Instead, this Article defends the philosophical claim that even a well-designed, well-implemented majoritarian legislative process necessarily has democratic defects that can be addressed in part if supplemented by a well-designed, well-implemented process of judicial development of

15. This Article's emphasis on how judicial democracy can indirectly enhance all citizens' ability to exercise effective political agency—not only those who believe their rights have been violated—distinguishes its argument from Harel and Eylon's defense of judicial review in terms of the right to a hearing. See Alon Harel & Yuval Eylon, *The Right to Judicial Review*, 92 VA. L. REV. 991, 993 (2006) (arguing that judicial review is justified as a means of enabling people whose rights the government has infringed to challenge that infringement). Likewise, this Article's emphasis on the value of exercising political agency on behalf of others distinguishes it from Sager's democratic defense of the judiciary, which characterizes the right to participation in terms of an equal right to vindicate one's own rights and interests. See LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 202–03 (2004) (“The second way that a member of a political community can participate as an equal in the process of rights contestation is to have her rights and interests—as an equal member of the political community and as an equal rights-holder—seriously considered and taken account of by those in deliberative authority.”). This Article argues further that litigation over rights as well as other legal issues can often express and vindicate more general procedural democratic values.

16. Lani Guinier, for instance, has argued that if the electorate is polarized along racial or ethnic lines, it is undemocratic to give the majority every political victory. The problem with letting a persistent majority win every time is not merely that minorities' interests could be set back. The problem is that minorities will effectively have no political power. To distribute political power fairly, a government that fully respects democratic values must sometimes allow representatives of a persistent political minority to claim rights and have the opportunity to prevail in an authoritative judicial decision. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 1–20, 71–118 (1994). This Article supports Guinier's view that democratic values sometimes require those in the minority to win, but the concern here is not with the satisfaction of minority preferences, and the problem identified does not arise only when the electorate is polarized. Instead, the claim is that it is important in democratic government for arguments endorsed by a minority of citizens to get a fair hearing, and that a strictly majoritarian government, following only majoritarian decision rules, will often fail to provide this kind of procedural democracy to minority rights and interests even when the electorate is not polarized and the political culture is generally healthy. Giving the judiciary a role in developing the law is one way of ensuring that minority views about what justice requires will have at least an opportunity to be duly considered.

law. The argument for this philosophical claim suggests concrete ways in which the American judiciary could do more to enhance citizens' opportunities to exercise agency over the law. It would facilitate citizen participation in judicial democracy to loosen procedural restrictions on access to the courts, for instance, by adopting a more permissive interpretation of the standing requirement. It would also facilitate citizen participation in judicial democracy to provide public support for indigent parties to civil cases, in addition to providing better financial support for public defenders.

Part I begins the argument for the judicial democracy thesis by identifying democratic values important for modern government. One of these values is providing all citizens opportunities for effective political agency and participation. All citizens who believe a law is unjust or who believe it violates their rights should have genuine opportunities to try to challenge it. Citizens who believe that challenged laws are in fact just *should* have opportunities to defend them.

Part II argues that even a legislature functioning under ideal political conditions fails to give all citizens opportunities for effective political agency and participation. Judicial development of law can help to cure this defect in conceptions of democracy that privilege only legislatures and ignore the necessary role of the courts.¹⁷

Part III argues that the judicial development of law is at least compatible with, and in some cases promotes, the other values relevant to a modern democracy. Since judicial development of law promotes at least one important democratic value without frustrating any of the others, it contributes to the advancement of democracy. Forms of judicial activity that can contribute to democracy include the development of common law, authoritative statutory interpretation, and some forms of judicial review. This Article's argument takes no position on the relative merits of "strong" judicial review and "weak" forms of judicial review practiced in some other countries.¹⁸

Part IV argues that the judiciary can make this contribution to a significant degree even in non-ideal political conditions. It is true that courts can fail with respect to upholding norms of democracy. For example, corruption of judges no less than legislatures or the executive branch is anti-democratic. But this Part shows that in non-corrupt

17. The structure of the argument here follows the structure of Jeremy Waldron's comparison of the democratic merits of legislative and judicial decision-making. Waldron, *The Core of the Case*, *supra* note 3, at 1353–59. This Article challenges Waldron's view about the democratic merits of judicial decision-making. The aim here is not to defend a strong version judicial review, however, but rather to advance the broader claim that the judiciary plays an important role in democratic representation.

18. *See infra* note 72.

circumstances within relatively well-functioning democracies, courts and judges can significantly enhance citizens' opportunities for political agency and participation.

Part V summarizes the Article's main conclusions and suggests some possible implications of the argument for future research and policy.

I. DEFINING DEMOCRACY AND ITS VALUES

Many critics of judicial review and of other roles for the judiciary in shaping law presuppose that a government is democratic to the extent that it is majoritarian.¹⁹ One might be tempted to think that by definition, a procedure for developing the law is not democratic unless it aims to reflect the preferences of a majority of citizens.²⁰ Judicial review is, by definition under these views, undemocratic because it authorizes courts to strike down laws that come out of a majoritarian legislative process. The process by which courts develop common law and authoritative statutory interpretation is not undemocratic, since the legislature can overturn court decisions on these matters. Still, it is not a positively democratic procedure, since it does not aim to reflect majority opinion. We may sometimes need courts to clarify law or even to create law, since we cannot vote on everything. But since voting and electing legislatures is the defining feature of democracy, we should minimize our reliance on the courts and develop law through the legislative branch as much as possible.²¹

It is implausible, however, simply to define democracy as a form of government that responds only to majority opinion. Plainly, a public decision procedure can be democratic without being majoritarian. A procedure that requires unanimity, for instance, is subject to various

19. See *supra* note 6.

20. More precisely, it must reflect the preferences of a majority of qualified voters, and any restrictions on voting must have a good justification. Below, the phrase "a majority of citizens" will be used without further mention of age restrictions, residency requirements, or other justified voter qualifications. John Locke defends a majoritarian conception of democracy along these lines. On his view, consent to be part of a political community is necessarily consent to rule by majority only the majority vote of the people or their representatives can justify the government in imposing taxes or taking other actions that deprive people of their property. JOHN LOCKE, TWO TREATISES OF GOVERNMENT II.88 (Peter Laslett ed., Cambridge 2d ed. 1967) (1690). Jeremy Waldron does not assert that equal respect for citizens requires majority rule, but he argues that there should be a strong presumption in favor of it. WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 116 ("I suspect (though, again, I doubt that one can prove) that majority-decision is the only decision-procedure consistent with equal respect in this necessarily impoverished sense."). The "impoverished" notion of equal respect Waldron refers to here is the form of respect that can be publicly acknowledged as equal under conditions of widespread disagreement about justice. *Id.*

21. See *supra* note 6.

objections, but not to the objection that it is undemocratic.²² A country can also select leaders or make policy decisions by majoritarian voting without being democratic. Consider a country that elects its head of government by a majority vote of citizens but in which state-run media organizations strongly promote the incumbent party, independent news organizations are heavily censored, and opposition leaders are frequently imprisoned on spurious charges before they gain enough popularity to win an election. Such a country is not a democracy in any meaningful sense.²³ This kind of “illiberal democracy” is democracy in name only.²⁴

Whether a country is democratic or not depends on whether it offers all or almost all its adult citizens a meaningful form of participation in shaping the law. The opportunity to vote in fair elections for government leaders is one important form of political participation. But there are other forms of participation that make a society more democratic or contribute to a society’s democratic character. If there is more than one form of participation in lawmaking that a government could make widely available to its citizens, which forms of participation contribute to the government’s democratic character is not a matter of the definition of the word “democracy.” Rather, it depends on the extent to which each possible form of political participation realizes the values that widespread opportunities for political participation help to achieve.²⁵

This Part examines the values that widespread opportunities for participation in government promote. Part I.A presents five values that have been widely acknowledged in the philosophical literature on the justification of democracy. Part I.B explains a value that has been underappreciated: the non-instrumental value of giving citizens opportunities to try to make their reasoned views of justice effective. Taking all six of these values into account, this Article shows why it advances democracy

22. See ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM*, 22–27 (1970) (arguing that unanimous direct democracy has legitimacy that other forms of democracy lack).

23. See Allan, *supra* note 6, at 552 (“There is a range stretching from people raising their hands in the presence of men with machine guns to voting by secret ballot but with the votes counted by unscrutinised henchmen to voting by secret ballot but in a state with only government controlled news and swingeing defamation laws to voting by secret ballot in a state with a vigorously free press and no potential penalties (in terms of food distribution or roads being built) for living in a constituency that votes against the government.”).

24. On the rise of what has been called “illiberal democracy” or “democracy without rights,” see YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* 9–11, 14 (2018).

25. This Article does not attempt to offer a complete account of the ways in which democratic values can best be realized. To do that would require consideration of a wide range of possible venues for political participation, including the opportunity to influence regulations through the administrative state as well as direct and indirect opportunities to influence legislation and judicial decision-making. The aim here is limited to establishing that a conception of judicial democracy belongs as an important component of any larger and more complex modern theory of democracy.

to give the judiciary an active role in shaping the law.

A. Five Widely Acknowledged Values

There are many values that citizen participation can be thought to promote.²⁶ Five values have been particularly salient to arguments that majority rule, together with universal suffrage, is central to the democratic ideal. Of these, two are instrumental values, i.e., desirable ends that citizen participation arguably helps to cause or to bring about. These are the value of producing just law and the value of moral education. Three other widely acknowledged values are non-instrumental values, i.e. reasons to think that citizen participation or the opportunity for citizen participation is valuable for its own sake. These are the value of affirming citizens' equal status, the value of expressing equal respect, and the value of collective self-rule.

The first value is the instrumental value of producing just law. Enabling widespread participation in the political process is valuable as a means of improving the outcomes of the political process. There are many reasons to believe this. Most notably, one might think that the opportunity to participate in politics is an important way to protect one's interests.²⁷ Enabling all citizens to participate in politics helps to ensure that law and policy adequately respect the interests of citizens from all segments of society.²⁸ One might think, then, that the extent to which a government realizes the ideal of democracy depends on the extent to which it provides forms of political participation that promote just law. Participation in government can also play a role in citizens' moral education, e.g., by encouraging people to think about the interests of strangers.²⁹ This is another way in which citizen participation matters instrumentally.

26. The non-instrumental value of legitimacy is intentionally omitted from this list. The widely-held view that democracy is needed for government to be legitimate is presumably linked with other values; there must be some reason why legitimacy requires democracy. On Christiano's account, legitimacy requires democracy because democracy is needed both to express respect for citizens' judgment and to protect their interests equally. Thomas Christiano, *The Authority of Democracy*, 12 J. POL. PHIL. 266, 285 (2004). Buchanan takes a similar stand, though he does not explicitly identify respect for citizens' judgment, in particular, as one of the grounds of the demand for democracy. See Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 707–708, 713 (2002). Estlund's view combines concerns about legitimacy with instrumentalist considerations. There are publicly acceptable reasons to regard democratic decision-making procedures as more likely than other procedures to get the right result, and whatever reasons there are to think other procedures more accurate need not be accepted by all reasonable citizens. DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 8 (2007).

27. See JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 43 (Currin V. Shields ed., 1958) (1861).

28. *Id.* at 43–46.

29. *Id.* at 54–55.

Other democratic values are non-instrumental; they are unrelated to the quality of political outcomes.³⁰ One is the value of affirming citizens' equal status.³¹ Some ways of excluding citizens from the political process establish social hierarchies in law. For example, the state legally establishes a social hierarchy if it denies a class of citizens the franchise or if it limits political office to members of a hereditary nobility. Giving all citizens a say in politics that is by some measure equal is a way of affirming citizens' equal standing.

A related but distinct value is the value of expressing equal respect for citizens' capacity for moral judgment.³² Citizens can reasonably disagree about political decisions, including decisions that raise questions of justice.³³ In the face of reasonable disagreement, a political decision-making procedure fails to express respect for each citizen's capacity for moral reasoning if it pretends that some citizens' views about justice are beneath notice.³⁴

Finally, one might think that a people or a nation has a collective interest in being self-governing. If peoples or nations can have interests (apart from the interests of their members), perhaps they have an interest in being governed by themselves, not by an outside force or by a proper subset of the group's members.³⁵

30. This claim is controversial. Some political philosophers defend a purely instrumentalist account of the value of democracy. *See, e.g.*, Richard Arneson, *The Supposed Right to a Democratic Say*, in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 197–212 (Thomas Christiano and John Christman, eds., 2009).

31. This view has been most fully developed in Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFF. 287, 288 (2014). Concern for social equality also plays a role in Dworkin's and Rawls's democratic theories. *See* RAWLS, *supra* note 6, at 544–45; DWORKIN, SOVEREIGN VIRTUE, *supra* note 11, at 200–01.

32. *See* WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 108–11 (discussing how the principle of majority-decision equally respects the opinion of each individual whose vote is counted); *see also* Waldron, *Core of the Case*, *supra* note 3, at 1387–88 (explaining how the principle of majority decision is neutral in treating voters equally and in giving weight to all opinions).

33. *See* WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 151–53; *see also id.* at 102 (“We may say, along similar lines, that the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are *the circumstances of politics*.”) (emphasis in original).

34. *See id.* at 108–13. On the temptation to treat some views as beneath notice, *see also id.* at 111, stating: “The more dangerous temptation is not to pretend an opposing view does not exist, but to treat it as beneath notice in respectable deliberation by assuming that it is ignorant or prejudiced or self-interested or based on insufficient contemplation of moral reality.”

35. *See generally* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2009); Richard Ekins, *How to Be a Free People*, 58 AM. J. JURIS. 163 (2013).

B. Effective Political Agency

There is another value that democratic government should promote, a value which the argument for judicial democracy will emphasize. In some contexts, the judiciary can promote this value more effectively than legislatures can. This value is the value of *effective political agency*.³⁶ A robustly democratic government gives all citizens meaningful opportunities to try to make the law conform to their reasoned political views. Citizens who believe for sensible reasons that the law under which they live is currently unjust should have genuine opportunities to try to change the law.³⁷ Citizens who believe that a just law is under threat should have genuine opportunities to try to preserve it.

To have a genuine opportunity to try to change or to preserve the law, however, it is not enough to be able to speak freely. One cannot genuinely try to do something one knows to be impossible. One cannot really try to turn lead into gold. Likewise, political advocacy does not count as an attempt to change or to preserve the laws under which they live if advocates know it will fail, not only in the short term but also in the foreseeable future.³⁸ They know their advocacy will fail if they know that those who have the power to change or to preserve the law will not hear the advocates' arguments, that they will persistently dismiss the arguments without giving them due consideration, or that they will be unable to appreciate the arguments' rational force.

That said, to have genuine and meaningful opportunities for effective political agency, citizens do not need an assurance that every thoughtful and diligently advocated argument about political justice will succeed in bringing about the change or stability advocates seek. That would be neither possible nor desirable, since political advocates sometimes defend

36. This value is further explained and defended in Robert C. Hughes, *Responsive Government and Duties of Conscience*, 5 JURIS. 244, 244–64 (2014).

37. The word “sensible,” here, is an original term of art. A judgment about what justice or morality requires will be called a “sensible” judgment if either (a) it is true or (b) it is false, but people who make this judgment commit a worse wrong if they act against conscience (but in accordance with what justice or morality in fact requires) than they would if they act on their mistaken judgment. An argument for changing or preserving the law will be called a “sensible” argument if its moral premises are sensible, its empirical premises are justified, and the argument is logically valid. An argument for changing or preserving the law can be sensible and yet mistaken. People have a legitimate interest in getting a hearing for sensible arguments about what the law should be even when those arguments are (unbeknownst to them) unsound. *See id.* at 251–52 (detailing further the legitimate interests of people with sensible arguments).

38. Advocacy can qualify as a genuine attempt to change the law under which dissenters live if there is a realistic hope of bringing about change in a matter of years, even if there is no hope of bringing about change immediately. Sometimes, however, political dissenters attempt to start a long-term movement for change, hoping that change will come in several generations. These dissenters' activities do constitute an attempt to change the law, but they do not constitute an attempt to change the laws *under which the dissenters live*.

their views on the basis of reasoning that, though not foolish, is flawed in a way that other citizens (or judges) can recognize. Nor must a democratic government be structured so that political advocates will always succeed if they are in the right and have sound arguments for their views. Rational persuasion about matters of justice is possible but difficult. Sometimes the rationally best argument for the correct position on an issue of justice is complex or subtle. Sometimes the best argument defenders of a correct view can formulate rests on moral premises that are true but not self-evident to all competent moral reasoners. If an argument is complex, or if its premises are true but not self-evident, failure to appreciate the argument's force may not reflect closed-mindedness, laziness, or moral blindness.

Proponents of a cause have a meaningful opportunity to advance it through rational persuasion if they justifiably believe that their arguments ought to persuade people and if they can realistically hope that these arguments will be heard, accepted, and acted on. This hope may be only a hope, not an expectation. Hope is justified if those who have the power to change, to preserve, or to clarify the law will listen to the arguments seriously and with an open mind and if these decision-makers are competent moral reasoners without major moral blind spots. If advocates approach such an audience, and if they justifiably believe that their arguments are good and ought to persuade, their advocacy is not futile. There is a possibility of failure, but the advocates do not attempt something impossible. When advocates incorrectly believe that their arguments should persuade, e.g., because they do not realize that the arguments rely on a value premise about which reasonable people can reasonably disagree, it is not their audience's fault or the political system's fault that the arguments fail to persuade. When decision-makers choose not to act on a flawed argument, explaining the arguments' flaws to advocates demonstrates that the argument was heard. People have meaningful opportunities to try to make the law conform to their reasoned views if those who have sensible arguments about what the law should be can present those arguments with a realistic hope either that decision-makers will accept the arguments and act accordingly, or that decision-makers will give a good explanation about why they reject the arguments.

Opportunities for effective political agency may be important in part for instrumental reasons; a government that listens with an open mind to citizens' arguments *may* be more likely to produce just law. But opportunities for effective political agency also matter for a non-instrumental reason: they enable citizens to fulfill a duty of conscience. Citizens with sensible views about what justice requires have a moral duty to try to make the law conform to their views even when they are mistaken.

This duty arises from two moral pressures.³⁹ First, it is wrong to participate willingly in an activity one sensibly believes to be unjust. Willingly contributing to an activity one regards as unjust shows disrespect for those one regards as the victims of injustice. It shows disrespect even if there is, in fact, no injustice. If A mistakenly thinks that he owes B a debt, and A willfully chooses not to pay it, A does not violate B's rights, but A still treats B disrespectfully. So it is *pro tanto* wrong to comply willingly with laws one regards as unjust, even if one is mistaken. But there is another pressure in another direction. It is valuable for citizens to identify with their society's laws and to comply with them willingly, not merely because of governmental coercion. People are sometimes justified in disobeying the law or in complying with law only unwillingly. But when people have to respond to law in this way, it comes at a moral cost. Moreover, disobeying the law (or obeying solely to avoid sanction) is sometimes an inappropriate response to a real or perceived injustice, since the law in question serves morally important ends despite its injustice.

There is only one way for citizens to respond to both pressures. That is to try to make the law conform to their judgments about what justice requires. An attempt to change law one regards as unjust or to preserve a law one regards as just and under threat helps in two ways. First, it may succeed. Then one can comply with the law willingly without treating fellow citizens in a way one regards as wrong. Second, if the injustice one perceives is a run-of-the-mill injustice, not a horror, a genuine attempt to address the injustice can make it morally acceptable to comply with the unjust law willingly while pursuing the change.⁴⁰

Democratic governments should enable citizens to fulfill duties of conscience. Since government should try to make the law just, clearly it

39. Hughes, *supra* note 36, at 246–56.

40. Attempting to change a group's activity alters the participatory intention one has in joining the group's activity. Accounts of joint action generally agree that participation in joint action requires an intention of a special sort. On some accounts, participants must intend to participate in something the group does. CHRISTOPHER KUTZ, *COMPLICITY* 81–84 (2000). On others, participants must intend that the group do something. Michael E. Bratman, *Shared Intention*, 104 *ETHICS* 97, 98 (1993). For argument that participants' intentions need not have identical content, see KUTZ, *supra*, at 89–96 (providing examples of ways in which persons may be thinking and performing differently, yet still acting jointly). If a person believes that she may be able to get a group that is doing activity A to transform its activity into activity B, she can join the group with the intent of doing B with them. If one can only hope that the group will start doing activity B in future generations, however, one cannot join the group with the intent of doing activity B with the group. One need not hope for an immediate change, but one must have a realistic hope for change in the near future. If people are genuinely trying to change laws they regard as unjust, they can identify with their society's laws without intending simply to contribute to injustice. They can instead intend to participate in a legal practice that is coming to be just.

should listen to citizens' arguments with an open mind if doing so tends to produce just law. But even if it does not, government has two reasons to enable citizens to fulfill duties of conscience with respect to law. First, all individuals and institutions have moral reasons not to put others in a position of having to violate a *pro tanto* moral duty.⁴¹ There are many examples of this principle in interpersonal ethics. If one knows that a friend has made a promise to someone, one should not ask this friend to make a conflicting promise. One should not confide in a friend if one knows that the friend will probably have to choose between betraying one's confidence and telling a lie. This principle implies that government has a reason not to establish institutions or practices that prevent citizens from fulfilling duties of conscience with respect to law.

The second reason is that government acts on all citizens' behalf; it acts as citizens' agent.⁴² A person or institution that acts as others' agent should act in a way that is compatible with the conscience of those it represents (at least if the represented have sensible views). Government cannot do what all reasonable citizens think it should do; reasonable disagreement about justice is inevitable and pervasive.⁴³ But government may be able to let everyone it represents act on their duties of conscience. It may be able to give all citizens genuine opportunities to *try* to make the law conform to their views about justice. So government has two moral reasons to give all citizens opportunities for effective political agency. This assertion entails that the ideal of democracy requires more than

41. One way of defending this claim would be to appeal to Thomas Nagel's argument that all genuine reasons for action are objective reasons, i.e., reasons for or against bringing something about that potentially bear on what everybody should do. THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 96–97 (1970) (“Whenever one acts for a reason, I maintain, it must be *possible* to regard oneself as acting for an objective reason, and promoting an objectively valuable end.”). Duties are genuine reasons for action. Since a person's fulfillment of a duty is objectively valuable, other people have reason to avoid interfering with this person's fulfillment of this duty.

42. The idea that government acts on behalf of the people is implicit in the language of the U.S. Constitution, which identifies “We the People” as the Constitution's author. U.S. CONST. pmbl. This idea is standard in social contract theory. See THOMAS HOBBS, *LEVIATHAN* II.xvii.13 (Edwin Curley ed., Hackett 1994) (1651) (“[I]t is a real unity of them all, in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man *I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorise all his actions in like manner.* This done, the multitude so united in one person, is called a COMMONWEALTH, in Latin CIVITAS.”); LOCKE, *supra* note 20, at II.89 (“Where-ever therefore any number of Men are so united into one Society, as to quit every one his Executive Power of the Law of Nature, and to resign it to the publick, there and there only is a *Political, or Civil Society.*”); JEAN-JACQUES ROUSSEAU, *ON SOCIAL CONTRACT* I.v (1762), reprinted in *THE BASIC POLITICAL WRITINGS* 148 (Donald A. Cress. trans., Hackett 1987) (“*Each of us places his person and all his power in common under the supreme direction of the general will; and as one we receive each member as an indivisible part of the whole.*”).

43. See WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 102, 159–61 (arguing that in the “circumstances of politics,” reasonable disagreement about matters of justice is inevitable).

giving citizens an equal but trivial say in political decisions. Democracy calls for all citizens to have richer opportunities to participate in the shaping of the law.

II. EFFECTIVE POLITICAL AGENCY THROUGH THE JUDICIARY

A system of majority rule together with legal protection of free speech does not, without more, reliably provide sufficient opportunities for effective political agency. Indeed, the goal of giving all citizens genuine opportunities for effective political agency is fundamentally at odds with the unqualified goal of making government strongly accountable to majority opinion. Allowing the judiciary to play a role in developing the law can help to remedy this defect. Of course, giving the judiciary this role will not promote citizens' political agency in every conceivable society. For instance, it will not promote citizens' political agency if the judiciary is systematically corrupt. Likewise, there are possible situations in which it is obvious that giving the judiciary a role in shaping the law would contribute to citizens' agency. For instance, giving the judiciary a role in shaping the law would contribute to citizens' political agency if the legislature is thoroughly corrupt and the courts are not. To show that giving the judiciary an active role in shaping the law typically contributes to citizens' political agency, it is necessary to consider societies in which the judiciary and the legislature function about equally well.⁴⁴

Accordingly, the argument unfolds in two stages. This Part and Part III argue that judicial decision-making contributes to citizens' effective political agency when both the judiciary and the legislature are functioning as well as one could reasonably hope. This Part and the next will assume that both the judiciary and the legislature satisfy three criteria of good functioning. First, legislators, judges, and voters generally try to perform their jobs in good faith. For legislators, this could mean that they aim to represent the views of the majority of their constituents, or it could mean that they always vote their conscience. Judges generally listen sincerely to the arguments presented to them, and they aim to produce

44. The argument in this Part and the next mirrors the form of Waldron's argument about the relative merits of legislative and judicial power. Waldron's argument presupposes a reasonably well-functioning legislature and a reasonably well-functioning judiciary, as well as a population in which most people are committed to the idea of individual rights. See Waldron, *Core of the Case*, *supra* note 3, at 1360. The aim of this presupposition, both for Waldron's argument and for this Article's argument, is to avoid "stacking the deck" by making optimistic assumptions about one branch of government while making realistic or pessimistic assumptions about the other. This Article also accepts Waldron's premise that disagreement about matters of justice is widespread and that this disagreement does not always imply that anyone's powers of moral reasoning are systematically defective or that anyone is arguing in bad faith. See *id.* at 1366-69.

opinions that sincerely describe their reasons for their decisions.⁴⁵ Voters, for their part, make reasonable efforts to be well-informed. Second, it is assumed that legislators, judges, and voters all have a degree of skill in moral reasoning. If an argument about justice is sound and rests only on premises that ought to be uncontroversial, citizens who reflect carefully on the argument can come to see its force.⁴⁶ If an argument about justice is unsound, or if it rests on legitimately controversial premises, citizens who are unpersuaded are typically able to say why. Third, if the legislature and the judiciary are functioning well, wealth inequality is not a barrier to access to either branch. Thus, it is assumed here, for the sake of argument, that the influence of money in legislative politics has been addressed, and that lower-income citizens have access to legal representation in both criminal and civil cases.⁴⁷

Of course, many actual societies do not satisfy all three of these assumptions. Perhaps most notably, in the United States, citizens' financial resources affect both their access to quality legal representation and their ability to influence legislative politics. Part IV will argue that judicial decision-making can sometimes contribute to citizens' effective political agency even when these assumptions do not obtain and,

45. This view of judicial decision-making may be in tension with some of the more cynical forms of Legal Realism, but it is compatible with the two core claims of Legal Realism as identified by Frederick Schauer. First, that most judges have a "preferred outcome . . . that precedes consultation of the formal law." SCHAUER, *supra* note 5, at 138. Second, that "in looking for a legal justification for an outcome selected on other grounds, judges in complex, messy common-law systems will rarely (but not never) be disappointed." *Id.* The view defended above is consistent with the Realist view that judges often form a preference about the outcome of a case on the basis of the facts of the case, other empirical facts, and non-legal value judgments. The view presupposes that reasoning about matters of value is possible and that judges are often (if not always) open to rational persuasion about matters of value. An argument that existing legal authorities require a certain outcome often involves or includes an argument about the values at stake. Regarding the propriety of making appeal to matters of value in legal argument, note that scholars on both sides of the debate about legal positivism acknowledge the need for judges to make value judgments in applying the law. Compare H. L. A. HART, *THE CONCEPT OF LAW* 124–25 (2d ed. 1994) (explaining why law has an "open texture"), with RONALD DWORKIN, *LAW'S EMPIRE* 37–43 (1996) [hereinafter DWORKIN, *LAW'S EMPIRE*] (developing an anti-positivist view).

46. There are arguments about justice fitting this description. At least sometimes, people on one side of a disagreement about justice can offer an argument that ought to persuade people on the other side. But some truths about justice are not self-evident and are discoverable by reason only with time and effort.

47. In the United States, criminal defendants in both state and federal cases have a right to government-appointed legal counsel if they cannot afford legal representation of their own. *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963). Effective access to counsel is nevertheless limited in practice. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1072 (2006). There is no right to counsel in civil cases that do not involve the threat of incarceration. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981). It would facilitate judicial democracy for there to be public funding for legal representation in civil cases. For another argument for a right to civil counsel, see Robert W. Sweet, *Civil "Gideon" and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998).

consequently, both the judiciary and the legislature have significant flaws. This Part and Part III make the above three assumptions to show that the judicial development of law contributes to citizens' agency when both the judiciary and the legislature are functioning well.

A. Effective Political Agency and Majority Rule

Consider first whether all citizens have meaningful opportunities for political agency in a large direct democracy. Even if a direct democracy combines the opportunity to propose and to vote on laws with freedom of speech, the political system may fail to give each citizen a genuine opportunity to try to change laws she regards as unjust. Suppose that most voters are firmly persuaded that current law on some matter is just. They are not open to considering other views, and they would regard proposals to change the law as eccentric and not worth discussing. This attitude need not reflect culpable closed-mindedness on their part. It may simply result from the awareness that their time is limited. In a society with a complex legal system and a politically diverse electorate, it is not possible for most private citizens to follow every political issue and to engage thoughtfully with every argument for every position. Responsible voters can reasonably limit their political engagement to issues that are currently on the agenda and positions that have garnered enough support to seem viable. But if this is the case, citizens whose views are shared only by a small minority and citizens who want to address an issue that is not currently on the political agenda will not be able to make genuine attempts to change the law.⁴⁸ They know that if they attempt to persuade a majority of voters that current law should change, their arguments will not get an adequate hearing.⁴⁹

Citizens may find themselves in a similarly difficult position if they believe that a popular movement for change in the law is misguided. If

48. Citizens could get an issue on the agenda through an initiative process. To prevent the initiative process from becoming unduly burdensome on voters and to make sure that each initiative that appears receives due consideration, there needs to be a mechanism for limiting the number of initiatives that appear. One mechanism is to require a large number of signatures. California's statutory initiative process requires a number equal to five percent of the votes for all candidates in the most recent gubernatorial election. CAL. CONST. art. II, § 8(b). To obtain such a large number of signatures typically requires either that the issue already be significant in the public eye or that the sponsor of the initiative make a major financial investment. On the prevalence of paid rather than volunteer signature gathering, see Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 52–59 (2003).

49. See Charles Aull, *Fact Check: How Much Does it Cost to Get an Initiative on the Ballot in California?*, BALLOTEDIA (October 14, 2015), https://ballotpedia.org/Fact_check/How_much_does_it_cost_to_get_an_initiative_on_the_ballot_in_California [https://perma.cc/Y4R2-6BMX] (“When you look at all California initiatives that have qualified for the ballot between 2005 and 2016, the average amount spent on meeting signature requirements totals \$2,092,020.”).

most voters would see these citizens' reasons for resisting change as eccentric, an attempt to resist change would fall on deaf ears. This could occur without citizens in the majority being culpably dense, ill-informed, or closed-minded. Often the flaws in current law are easier to perceive than the flaws in a proposed replacement, since only the consequences of the current law have been played out.⁵⁰ In the face of a popular and rhetorically effective argument for change, it may take unusual imagination, expert knowledge, or a grasp of subtle reasoning to see that the case for the status quo deserves serious consideration.

A system of representative democracy has the same problems. Elected representatives may choose to vote in various ways. They may aim to represent the views of a majority of their constituents, or they may vote their conscience.⁵¹ There are other, less savory possibilities—e.g., that they will vote with the aim of acquiring campaign contributions—but this Part will set these possibilities aside, as its aim is to identify a limitation of even idealized legislatures in which the corrupting influence of money has been addressed. A representative democracy that tracks majority opinion by district may fail to give citizens with minority views genuine opportunities to try to change the law for the same reason that a direct democracy may fail to do so.

Matters are more complex if, instead of aiming to represent constituent opinion, representatives vote their conscience. If representatives vote in this way, citizens with minority political views will sometimes have more meaningful opportunities to try to make the law conform to their political values than they would if the political process was designed to track majority opinion closely. Unlike private citizens, legislators think about politics full time, and they typically have staff members whose job it is to read and to listen to opinions from constituents. A reasonably diligent legislator will have to think about a wider variety of political issues and a wider variety of views on those issues than will a responsibly informed voter. For this reason, it may sometimes be easier to persuade a large number of legislators that an issue belongs on the political agenda than it is to persuade a large number of voters.⁵² Likewise, it may sometimes be

50. See Michael Oakeshott, *On Being Conservative*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 168–96 (1962) (arguing that the proper disposition towards change and innovation is cautious, in part because radical changes can cause unpredictable harms that outweigh the benefits of attempting to correct a real or perceived shortfall in existing institutions).

51. In pursuing either of these ends, they may choose to make agreements with other representatives to increase their influence on the issues that matter most to them or to their constituents.

52. Financial costs can be a major barrier to citizens seeking change through the initiative process, especially in large states. On the costs of access to the ballot in California, see Aull, *supra* note 49 (“Constitutional amendments, which require more signatures than statutes and

easier to get legislators to consider unusual views.

That said, even legislators who always vote their conscience cannot stray too far from majority opinion among their constituents while remaining in office.⁵³ If they vigorously pursue causes their constituents regard as peripheral, or if they zealously advocate positions their constituents regard as misguided, they will not be reelected. They may to some degree be able to persuade their constituents of a currently unpopular position, but voters do not have an obligation to give their representatives' opinions special weight in forming their own views.⁵⁴ So there is only a limited degree to which citizens can try to change popular laws, or prevent change to unpopular laws, by petitioning legislators.

Neither direct democracy nor legislation by elected representatives, even if combined with freedom of speech, is sufficient to guarantee all citizens genuine opportunities to try to make the law conform to their political values. To have such opportunities, citizens need a justified expectation that those with the power to change or to preserve the law will listen with an open mind to arguments about what the law should be.⁵⁵ This expectation will often be unjustified either in a direct democracy or in a society governed exclusively by an elected legislature. The root of this shortcoming in the legislative process is accountability to public opinion. Within a system of representative government, citizens have less reliable opportunity for effective political agency the more their representatives are held accountable to public opinion. Since all elected legislatures are accountable to public opinion to some degree, a purely majoritarian legislative process can only provide citizens limited opportunities for effective political agency.

referendums, average \$2.5 million. Statutes and referendums, which have the same signature requirements as one another, average \$1.7 million.”).

53. For evidence of the existence of issue accountability in legislative politics, see Brandice Canes-Wrone, William Minozzi & Jessica Bonney Reveley, *Issue Accountability and the Mass Public*, 36 LEGIS. STUD. Q. 5, 26 (2011) (“When only a small percentage of the public deems an issue to be one of the most important problems, we find no evidence of issue-specific accountability. However, with greater levels of public concern, members from the party that is less popular on the issue suffer from voting out of step with public opinion, even controlling for their voting records on other policies.”).

54. One might think that a remedy for the problem is for citizens to vote not for candidates with whom they agree, but for the candidates they regard as most open-minded and thoughtful. This is only feasible if voters have the information necessary to make this assessment. Though some ideologues wear their closed-mindedness on their sleeves, it is not generally easy to tell which politicians are most likely to take a diverse range of views seriously. Even if voters could assess politicians' open-mindedness reliably, there would remain the problem that a jurisdiction has only one legislature with limited time to deliberate about its agenda.

55. In a direct democracy, citizens need a justified expectation that their fellow citizens collectively will listen with an open mind.

B. Citizen Agency in the Common Law Process

In certain areas of law, the process by which courts develop law can provide opportunities for effective political agency more reliably than majoritarian legislation. Judicial development of law, again, includes the process by which courts develop bodies of common law not already contained in statutory texts. In the United States, much of the law of contract, tort, and property has been developed in this way. Judicial development of law also includes courts' development of authoritative statutory interpretation. Judicial review, along with the associated interpretation of constitutions or charters, is a special case to be discussed in the next Section.

To see how litigation can give citizens opportunities to try to make their views about justice effective, in a way that the legislative process does not, consider an example involving the law of landlord and tenant. The example is drawn from an actual American case, but the question in this Part is not about whether an active role for the judiciary in developing the law contributed to American citizens' agency at the time the case arose.⁵⁶ The question here is whether an active role for the judiciary in shaping law contributes to citizens' political agency when the legislature and the judiciary are both functioning well.

Before the 1960s, the common law in most of the United States had a "no repair" rule.⁵⁷ This rule held tenants responsible for rent even if buildings on the land they rented were damaged and the landlord failed to repair them. The "no repair" rule made sense in an agrarian society, where the land itself was generally more valuable than the buildings on it.⁵⁸ But it makes no sense in the context of urban apartment rental, where tenants' whole purpose in having leases is to obtain habitable dwellings.⁵⁹

56. See generally *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). For discussion of the significance of *Javins*, see KERMIT L. HALL, *THE MAGIC MIRROR* 294 (1989). Seeking change through the normal legislative process would have been complicated by the fact that the District of Columbia did not have an elected city council until the 1973 Home Rule Act.

57. See *Javins*, 428 F.2d at 1076 ("[M]any courts have been unwilling to imply warranties of quality, specifically a warranty of habitability, into leases of apartments."); see also *id.* at 1077 ("The common law rule absolving the lessor of all obligation to repair originated in the early Middle Ages.").

58. *Id.* at 1077 (footnotes omitted) ("Such a rule was perhaps well suited to an agrarian economy; the land was more important than whatever small living structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself.").

59. *Id.* at 1078 (footnotes omitted) ("It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in 'a house suitable for occupation.' Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee.").

The rule places an unfair burden on tenement dwellers. Suppose that a society with a well-functioning judiciary and a well-functioning majoritarian legislature has a “no repair” rule, and that tenement dwellers and their advocates seek to change this rule. They could petition their state legislature or city council to enact a statute eliminating the “no repair” rule for apartment leases. Depending on political conditions, this petition may or may not have a significant chance of success. Because the “no repair” rule is a rule of common law, tenement dwellers and their advocates have another option: to pursue a change in the law through litigation. They could get in front of a court in two ways. First, some renters could stop paying rent and wait to be sued.⁶⁰ In a legal system with permissive rules concerning declaratory judgment, renters could initiate a case themselves, seeking a judgment that they do not owe rent.⁶¹ In advocating a revision of the rule before a court, renters cannot simply appeal to considerations of justice. They can, however, formulate legal arguments that are informed by the considerations of justice that motivate their challenge.

A well-designed judicial system has two features that ensure that tenement dwellers who seek to change the law through litigation will have a meaningful chance of success.⁶² The first is that courts provide an assurance that plaintiffs’ and defendants’ arguments will receive a reasoned response. A court guarantees that it will respond in one of two ways to each party’s arguments for applying common law standards in a particular way or for declining to apply a particular common law standard to the case.⁶³ Either the court will accept the party’s arguments and do as the party requested, or the court will publicly explain its reasons for rejecting the party’s arguments. The defendants in this case have no guarantee that they will win their case, but they have an assurance that their argument against applying the “no repair” rule to their case will be sincerely considered. It will be sincerely considered whether or not a majority of citizens or their elected representatives would be inclined to give the argument a thorough hearing.

Courts’ assurance that they will sincerely consider parties’ arguments about how to decide their cases does not, by itself, provide opportunities

60. That is what happened in Washington, DC. *See generally Javins*, 428 F.2d 1071.

61. For considerations bearing on the question whether it would be desirable to allow litigation prior to any non-payment of rent, see generally Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275 (2010).

62. These features may not obtain in actual judicial systems; not all judicial systems are well-designed.

63. Matthew Steilen has developed this first point. *See supra* note 14, at 453–57; *see also* Peters, *supra* note 2, at 346–78.

to change the common law through litigation. The possibility of changing the common law through litigation depends on a second feature of litigation, namely, that a court's decision does not only affect the case at bar. It sets a precedent that will affect how other, legally similar cases are decided.⁶⁴ In the tenancy case, if advocates of tenement dwellers can persuade the court to rule in their favor, the court's ruling will affect not only their case but also the law affecting all tenement dwellers in the jurisdiction. This feature of litigation has consequences for the form that parties' arguments to the court must take. Plaintiff and defendant must not merely argue that the outcome they seek would be fair in their particular case. They must show that the outcome they seek and the reasoning that would justify it are consistent with relevant precedent. If they seek to overturn a relevant precedent, they must show that the change they propose would cohere with the body of common law that is to remain.⁶⁵

That courts give weight to precedent admittedly places some limits on citizens' use of the courts as a venue for political agency. Because courts must give weight to precedent, they cannot consider new arguments for revising the common law purely on grounds of justice. They must also consider the coherence of a proposed clarification or change in the common law with the existing body of common law standards.⁶⁶ Some arguments for changing the common law will thus be entirely excluded from consideration. Someone who thinks, for instance, that the system of tort law should be replaced with a no-fault system of compensation cannot seek this change through the courts, as it would require not a change to a particular standard of tort law, but the replacement of the

64. For a general discussion of the precedent, see SCHAUER, *supra* note 5, at 36–60.

65. In the actual case in which Washington, DC tenement dwellers successfully sought to change the “no repair” law, the court noted that a New York court had refused to apply the “no repair” rule to a case in which an apartment building had been destroyed by fire. *Javins*, 428 F.2d at 1078. The New York case was *Graves v. Berdan*, 26 N.Y. 498, 501 (1863). The court also noted a growing trend toward treating leases like other contracts and that contract principles in other areas of law would support treating the lease as including an implied warranty of habitability. *Javins*, 428 F.2d at 1080.

66. Ronald Dworkin describes this principle as the requirement that law must have “integrity.” DWORKIN, *LAW’S EMPIRE*, *supra* note 45, at 225–75. Though this Article makes use of a Dworkinian conception of integrity in the law, it emphatically does *not* rely on or build on Dworkin’s defense of judicial review. Dworkin’s defense of judicial review is unlike this Article’s defense of judicial authority in that it presupposes that judges are better able than citizens or elected legislators to make judgments about the application of constitutional principles. See DWORKIN, *FREEDOM’S LAW*, *supra* note 11, at 17 (“[T]he constitutional conception requires these majoritarian procedures out of a concern for the equal status of citizens, and not out of any commitment to the goals of majority rule. So it offers no reason why some nonmajoritarian procedure should not be employed on special occasions when this would better protect or enhance the equal status that it declares to be the essence of democracy . . .”).

entire system. Even some changes that would not require a radical replacement of a body of common law may be unavailable through common law litigation. The justification of changes to common law must cohere with the justifications of the body of law that will remain unchanged, so incremental changes supported alone by considerations of justice may be indefensible if coherence with existing law must also be considered. This limitation on the opportunity to change common law through litigation is the price of providing a forum for citizens to have opportunities to try to change the law without having to persuade a majority of fellow citizens of their views. Litigation works as a means of enabling citizens to try to influence the law beyond their own cases only if precedent has some weight.⁶⁷ That said, precedent must not be given *unlimited* weight. That would enable parties currently before a court to exercise agency over the law at the cost of denying other parties that opportunity in the future. The institution of binding precedent best facilitates democratic participation in shaping the common law when courts are able to revise doctrine in light of new arguments—or in response to the realization that a past decision was clearly in error.⁶⁸

Thus far, the discussion has focused on citizens' opportunity to change the common law by participating directly in court cases, either as parties

67. Legal systems could take various positions on the weight of precedent. Stephen Perry describes three possibilities. On an "exclusionary" conception, precedent would prohibit a court from reconsidering its own prior reasoning. On a "weak Burkean" conception, a court would be expected to follow a prior decision unless the court is convinced that the opposite conclusion should have been reached. Precedent has force, on this model, when the present court is unable to assess the balance of reasons in the previous case or when it thinks the balance of reasons is an equal balance. On a "strong Burkean" conception, a court should reverse itself only if the weight of reasons against the prior decision exceeds the weight that would be have been required to reach a result considering an issue *de novo*. Stephen Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 221–23 (1987).

68. In Perry's terms, defined *supra* note 67, at 221–23, a Burkean conception of precedent is better than an exclusionary conception as a way of facilitating democratic participation. The view of *stare decisis* advocated in this Article would support overturning past decisions on the basis of new empirical evidence, as in as in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (overturning *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), partly in response to "an additional and compelling consideration which recent economic experience has brought into a strong light"). This view of *stare decisis* would sometimes also support overturning past decisions without relying on new empirical findings. For the courts to provide meaningful opportunities for citizens to exercise political agency, the courts must be open to reconsidering the reasoning in past cases concerning the interpretation of constitutional principles and other legal principles. An example of reconsideration of principles without relying on new empirical facts is *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("The rationale of *Bowers* does not withstand careful analysis."). That said, this Article's position on *stare decisis* is compatible with the view that courts should be reluctant to overturn a decision that protects a liberty on which people have relied. *See id.* at 577 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 855–56 (1992)) ("In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.").

or as attorneys. But not all citizens have the opportunity to try to make the law conform to their values through direct participation in a case. Suppose, for instance, that some citizens who own their own homes believe that the law regulating the relationship between landlords and tenants is unjust. Perhaps they observe that some of their fellow citizens are living in uninhabitable tenements, and they come to believe that these poor living conditions resulted from an injustice in the law. These citizens have a moral interest in being able to try to change the law. They rightly do not want laws that purport to speak on their behalf to be unjust. But there are good reasons for a legal system not to give citizens a general entitlement to initiate litigation on behalf of others whom they believe are wronged. One reason against allowing such an entitlement is avoidance of paternalism. People can disagree about what moral or legal rights people have. If some people do not believe that their rights have been violated and are thus uninterested in becoming parties to a case supposedly vindicating their rights, litigation initiated by third parties in defense of these people's rights would arguably be paternalistic. So it is likely that neither actual nor idealized common law systems would allow citizens who do not think they have been injured to try to address perceived injustice in the common law directly, by becoming a party to a case.

Nonetheless, the process of common law litigation does give these citizens an indirect way of trying to address the injustice: they can publicly advocate litigation.⁶⁹ For their efforts to change the law to be successful, they need not persuade a majority of their fellow citizens or a majority of their elected representatives that the law should change. Instead, they must persuade one attorney that the law ought to change. This attorney must then find a client who has been injured by the (real or perceived) flaws in current law and thus is in a position to be party to a case seeking a change in the law. The attorney will then have to persuade a court that it has the power to bring about the desired change. When legal laypeople try to persuade lawyers to pursue litigation aimed at changing the law, they typically will not be in a position to present lawyers with the very argument that a lawyer will bring before a court. Partly because courts are concerned with integrity in the law, formulating an argument that will persuade a court to change the common law requires legal

69. Advocating litigation in the public sphere can affect what courts ultimately do. For an example, see generally Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and the Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006) (demonstrating that the public debate about the Equal Rights Amendment and the application of the Equal Protection Clause of the Fourteenth Amendment to cases involving sex discrimination influenced legal doctrine).

expertise. But legal laypeople can point to an apparent injustice in the law, explain why it is unjust, and urge lawyers to formulate an argument that is legally sound. So the process by which courts formulate legal standards in common law gives citizens meaningful opportunities to make the common law comply with their political values.

Litigation about statutory interpretation provides a similarly robust opportunity for citizens to exercise political agency.⁷⁰ If citizens believe that they or others are being harmed by the improper application of an otherwise fair statute, they can initiate a case attempting to persuade a court that the statute should be interpreted and applied in another way.⁷¹ The courts provide assurance that citizens' arguments for applying statutes in a particular way will be duly considered. As an alternative to litigation, citizens could petition the legislature for a new statute that clarifies existing law. Whether they have a significant chance of success will depend on political conditions, such as what other issues are on the legislative agenda. Compared with the legislature, the courts provide a more robust guarantee that arguments for authoritatively clarifying an unclear statute will be adequately considered.

C. Citizen Agency through Judicial Review

Judicial review also provides opportunities for citizens to try to make the law conform to their political values.⁷² It provides such opportunities

70. Though this form of political agency is perhaps more readily available in common law legal systems, it is possible in civil law systems to some degree. Civil law systems do make some use of precedent in interpreting statutes. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW* 47 (3d ed. 2007) ("Those who contrast the civil law and the common law traditions by a supposed nonuse of judicial authority in the former and a binding doctrine of precedent in the latter exaggerate on both sides. Everybody knows that civil law courts do use precedents. Everybody knows that common law courts distinguish cases they do not want to follow, and sometimes overrule their own decisions.").

71. Those seeking change or clarification in the interpretation of a statute must not appeal solely to considerations of justice or morality. They must, of course, address the text of the statute. They may also have to discuss the intent of the legislature, canons of construction, or both. See SCHAUER, *supra* note 5, at 148–70. But it is appropriate to include considerations of justice in the interpretation of a statute. See *supra* note 45.

72. The argument here is neutral between the strong form of judicial review practiced in the United States and weaker forms of judicial review practiced in some other countries. In the United States, the power to "say what the law is" with respect to judicial review of statutes based on an application of constitutional principles was announced in *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The form of judicial review the United States has had since *Marbury* is not the only possible form. For example, under Section 33 of the Canadian Charter of Rights and Freedoms, the "notwithstanding clause," Parliament or a provincial legislature may put a statute into effect notwithstanding a possible or actual judicial finding that the statute violates one of the fundamental freedoms, legal rights, or equality rights protected by the Charter. *Charter of Rights and Freedoms*, s. 33, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The legislature's invocation of the notwithstanding clause sunsets after five years but can be renewed. *Id.* at s. 33.3–33.4. In the United Kingdom, the Supreme Court may declare a statute

at two levels: the level of the statutes and executive actions subject to review, and the level of constitutional law itself. Regarding the first, judicial review provides citizens an opportunity to persuade the courts to strike down laws and executive actions that conflict with commitments to principles of justice that have been expressed in a constitution.⁷³ Judicial review also gives citizens a venue in which to seek change in the courts' authoritative interpretation of the constitution itself. Typically, many of the restrictions on government action that are expressed in a constitution are described vaguely. Consider the requirement in the United States Constitution that "no state shall deny to any person in its jurisdiction the equal protection of the laws."⁷⁴ In applying political principles that have been expressed in a constitution, courts formulate more concrete constitutional doctrine to guide their application of these abstract constitutional requirements. For example, in American constitutional law, the principle that laws are subject to strict scrutiny if they treat people differently on the basis of race is one of the standards attempting to give concrete content to the Equal Protection Clause.⁷⁵ The process of judicial review enables citizens to try to change or to preserve the doctrines that the courts have established as authoritative interpretations of constitutional requirements.⁷⁶

The body of constitutional doctrine that courts use in applying constitutional norms is essential for judicial review to perform its democratic function. To see why, consider what would happen if courts exercised judicial review without using judicially formulated constitutional doctrine that has force as precedent. Suppose that some citizens believed that a statute, a common law standard, or an executive

incompatible with the European Convention on Human Rights. Such a declaration does not invalidate the statute and is not binding on the parties to the case. HUMAN RIGHTS ACT, 1998 c. 42. Cf. STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM* 51–61 (2013) (criticizing strong forms of United States-style judicial review, while expressing support for weaker forms in which the legislature can decide by majority vote whether to accept a court decision striking down a law).

73. Examples of principles of justice expressed in the U.S. Constitution include the right to freedom of speech, the right to due process, the prohibition on cruel and unusual punishment and the right to equal protection of laws. *See generally* U.S. CONST. amends. I, V, VIII; *id.* amend. XIV § 1.

74. U.S. CONST. amend. XIV, § 1.

75. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U. S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.").

76. For discussion of the recent evolution of equal protection doctrine, see generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

action violates a constitutional requirement, a requirement that they endorse. Suppose that they believed they are harmed by this constitutional violation, and that they thus have standing to challenge the law.⁷⁷ If they initiated a case challenging the law, they would be assured of a judicial response to their argument. The courts would listen to their position seriously and either address the constitutional violation or explain why they do not accept the argument that there was a constitutional violation. In making this assessment, however, the courts would not be required to consider the views of people who are not parties to the case.⁷⁸ Courts would decide whether to strike down a law based only on the parties' views and the judges' personal views about how to interpret a vague constitutional requirement. Their judgment would not attempt to be responsive to the views of citizens throughout the population. The process would offer a guarantee that citizens who manage to get in front of a court will have their arguments considered, but it would do so at the expense of excluding citizens not involved in the case from having a direct or indirect say.

Courts' fashioning of constitutional doctrine remedies this problem. In applying abstract constitutional principles, such as the principle expressed in the Equal Protection Clause, courts do not simply form a judgment about whether a given statute is compatible with the constitutional principle in question. Instead, courts formulate doctrine to guide judgments about how to apply these abstract constitutional requirements. Parties may present arguments either about how doctrine should be applied or about how it should be revised to better respond to the values the more abstract constitutional requirements articulate. Over time, courts are required to consider and either accept or rationally reject a wide variety of arguments for change in constitutional doctrine. In this way, constitutional law comes to be rationally responsive to the views of many citizens, not only of citizens in the majority.

77. In American law, the doctrine of standing requires that federal cases, including challenges to the constitutionality of statutes and other governmental actions, be brought only by citizens who can claim to have been injured. This doctrine arises in part from U.S. Const. art. III, § 2, which confines judicial power to "cases" or "controversies." The Supreme Court recently articulated the central requirements for standing in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) and *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000)) ("Our cases have established that the 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.").

78. Courts may solicit *amicus* briefs, but in the American legal system, they have no obligation to respond publicly. Perhaps a legal system would be more democratic if it required courts to respond publicly to *amicus* briefs in constitutional cases. Meeting this requirement would be resource-intensive. It would also make legal opinions longer, more complex, and less accessible to lay readers.

III. THE JUDICIARY AND OTHER DEMOCRATIC VALUES

The previous Part argued that when both legislature and judiciary function at their best, allowing the judiciary to play an active role in developing the law promotes an important value. It enhances citizens' opportunities to try to make their reasoned views about justice. To show that judicial development of law promotes democracy all-things-considered, it is necessary to consider the effects it has on other values relevant to political participation. One might think that though judicial development of law promotes one of these values, it hinders or frustrates others. This Part argues that when the judiciary and the legislature both function well, a role for the judiciary in developing the law is at worst neutral with respect to the other five values relevant to political participation. Thus, at least when the judiciary is functioning well, judicial development of law contributes to democracy, on balance.

Part III.A considers the two values at the heart of one of the most prominent objections to judicial power, Jeremy Waldron's argument against judicial review.⁷⁹ Waldron's argument that judicial review is anti-democratic draws on two of the values relevant to political participation: the instrumental value of promoting just outcomes, and the non-instrumental, process-related value of expressing equal respect for citizens.⁸⁰ Contra Waldron, this Part argues that both of these values are compatible with judicial review and with judicial development of law more generally. Part III.B considers the other major values that democracy promotes. It argues that judicial development is consistent with citizens' equal status and that promotes collective self-rule. It is likely to be consistent with citizens' moral education; it may promote moral education in some ways and hinder it in others.

A. Waldron's Critique of Judicial Power: Outcomes and Respect

Waldron's critique of judicial review structurally parallels this Article's defense of judicial power. Waldron starts with the assumption that both the judiciary and the legislature are functioning well.⁸¹ He also assumes, as this Article does, that people can sometimes reasonably disagree about what is just and about what rights people should have.⁸²

79. See WALDRON, LAW AND DISAGREEMENT, *supra* note 3; Waldron, *Core of the Case*, *supra* note 3; see also Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO L.J. 2185 (1996). This Part will focus on the version of the argument presented in *Core of the Case*.

80. See Waldron, *Core of the Case*, *supra* note 3, at 1369–76.

81. *Id.* at 1359–69 (stating the four assumptions he is making at the start of his argument).

82. *Id.* at 1366–69. Note that this assumption is consistent with the view that there are correct and incorrect answers to questions about what is just and about what rights people should have. There could be reasonable disagreement about these questions even if they have right and wrong

Waldron then considers two values the law-making process could hinder or frustrate: the instrumental value of achieving just outcomes, and the non-instrumental value of expressing equal respect for all citizens' judgment.⁸³ He argues that it is empirically uncertain whether legal systems with judicial review are likelier than other legal systems to produce just laws and to protect rights effectively.⁸⁴ He then argues that in the absence of strong evidence that judicial review promotes just outcomes, instituting judicial review is objectionable for procedural reasons. Majority rule is procedurally sound because it expresses equal respect for citizens' moral judgment.⁸⁵ Judicial review is a large departure from majority rule, especially if (unlike legislators) they are not regularly held accountable to the views of the electorate.⁸⁶

Waldron argues that the evidence regarding the instrumental effectiveness of judicial review is equivocal.⁸⁷ There have undeniably been cases in which exercises of judicial review by the United States Supreme Court advanced important legal rights and promoted just outcomes. Waldron points out that the Supreme Court has an uneven record of protecting individual rights against "the tyranny of the majority." He cites *Korematsu*, *Schenck*, *Dred Scott*, and *Prigg* as examples of judicial failures.⁸⁸ He also notes that it is unclear whether there has been a better record of respect for individual rights in the United States or in the United Kingdom, which does not have a practice of strong judicial review.⁸⁹ These points of course concern the institutions of two specific countries. Regarding the general tendency of judicial review to promote or to frustrate just legislative outcomes, Waldron considers points on both sides. He dismisses the argument that courts are better equipped than legislatures to reason about rights because they are confronted with the concrete details of specific cases, rather than with mere abstractions.⁹⁰ In most cases that reach the appellate level, argument

answers, since finding the right answers could be very difficult.

83. *Id.* at 1372.

84. *Id.* at 1375–86 (“[T]he outcome-related reasons are at best inconclusive.”).

85. *Id.* at 1388 (“Better than any other rule, [majority decision] is neutral as between the contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions.”).

86. *Id.* at 1391–93.

87. *Id.* at 1376–86.

88. *Id.* at 1377.

89. WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 287–91 (“My experience is that national debates about abortion are as robust and well-informed in countries like the United Kingdom and New Zealand, where they are not constitutionalized, as they are in the United States . . .”).

90. Waldron, *Core of the Case*, *supra* note 3, at 1379–80. (“[A]lmost all trace of the original flesh-and-blood right-holders has vanished, and argument such as it is revolves around the abstract

is conducted in abstract terms.⁹¹ Having an institutional commitment to considering the compatibility of legislation with a document such as a Bill of Rights, and to articulating reasons for finding statutes compatible or incompatible with that document, can have good and bad effects.⁹² On one hand, it can help to focus attention on the rights expressed in that document. On the other hand, it may lead decisions to reflect ill-considered past textual choices, rather than thinking seriously about the values at stake. It may also lead to certain rights (e.g., freedom of contract) being given too much weight. Waldron concludes that the evidence that judicial review promotes just legislative outcomes is “inconclusive.”⁹³

This Article will not challenge Waldron’s conclusion that it is unclear whether judicial review tends to promote just outcomes. Indeed, there are additional reasons both for and against the empirical expectation that judicial review will protect rights. A point in favor of judicial review, raised by Fallon, is that the institution of judicial review protects constitutional rights by requiring legislation to pass constitutional muster twice.⁹⁴ First, the legislature itself has the opportunity to assess the constitutionality of a bill, and it may reject a bill on constitutional grounds. If the new statute arguably affects constitutional rights, the statute’s constitutionality may then be tested in the courts. Giving both the legislature and the judicial branch the opportunity to reject laws that threaten important rights may be more effective than leaving the protection of these rights to the legislature alone.⁹⁵ On the other hand, there is a risk that judges’ timidity about overruling the legislature may lead the judiciary to under-enforce important constitutional requirements. Legislators and voters may wrongly infer that legislation not struck down by the courts is constitutionally sound. So it is conceivable that important rights would be better protected, in general, if the legislature had sole responsibility for ensuring that its legislation did not violate these rights.⁹⁶ It is safe to say that it is a hard question whether a purely majoritarian system of legislation tends to produce more substantively

issue of the right in dispute.”).

91. *Id.*

92. *Id.* at 1380–86.

93. *Id.* at 1375.

94. Richard H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1704–09 (2008).

95. *Id.* at 1706 (“[A] stronger case for judicial review in morally and politically nonpathological societies rests on the assumption that if either a court or the legislature believes that an action would infringe individual rights, the government should be barred from taking it.”).

96. See GARDBAUM, *supra* note 72 at 53–54 (“[L]egislative reasoning about rights may often be superior to legal/judicial reasoning.”).

just law than a legislature constrained by judicial review.

Given that there is no clear evidence whether judicial review promotes just outcomes or protects important rights effectively, Waldron then argues that judicial review is objectionable for non-instrumental, procedural reasons.⁹⁷ The value at stake here, according to Waldron's view, is the demand that government should express equal respect for citizens' moral judgment.⁹⁸ Waldron argues that a direct democracy with universal adult suffrage expresses respect for citizens' judgment in two ways. By giving all citizens a say, the state ensures that every citizen's moral reasoning plays a role in determining each political outcome.⁹⁹ By ensuring that citizens' role in the decision is equal, the state avoids sending the disrespectful message that some citizens' views are beneath notice or that some citizens' moral judgment is demonstrably better than others.¹⁰⁰ Waldron further argues that having an elected legislature make laws by majority vote is a way of giving approximately equal weight to the views of each citizen.¹⁰¹ Of course representative legislatures do this imperfectly. But if the legislature is functioning reasonably well, citizens' views will be represented equally enough that the law-making process in a representative democracy can be said to express equal respect for citizens' judgment.

Waldron's argument relies on the assumption that the only ground for empowering courts to review legislation is the belief that judges have better judgment on certain matters than legislators or the citizens they represent.¹⁰² It is true that many arguments for judicial review do suppose that judges have better judgment than legislators, in some respects.¹⁰³ But

97. Waldron, *Core of the Case*, *supra* note 3, at 1386–95 (“The preponderance of the process-related reasons weigh in favor of legislatures.”).

98. See WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 105–14 (“But I want to stress the regards in which majority-decision respects the individuals whose votes it aggregates.”).

99. Waldron, *Core of the Case*, *supra* note 3, at 1375, 1386–95.

100. WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 111–13 (“[M]ajority-decision requires each of us not to pretend that there is a consensus when there is none, merely because we think that there ought to be . . .”).

101. WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 108–16 (arguing that while representation reduces deliberation to a politically manageable scale, it is done as a way of respecting citizens' views, not as an alternative to their views); Waldron, *Core of the Case*, *supra* note 3, at 1389 (“And we believe that our complicated and electoral representative arrangements roughly satisfy that demand for political equality—that is, equal voice and equal decisional authority.”).

102. Waldron suggests that it can be legitimate, and consistent with fairness and equal respect, for some citizens' views to be given more weight when they have superior experience or wisdom according to publicly acceptable criteria. He doubts that superior wisdom can be adequately proven under social conditions of widespread disagreement about matters of justice. WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 115.

103. See, e.g., DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 11; Kavanagh, *supra* note 11; see

the defense of judicial review (and other forms of judicial power) in this Article in no way presupposes that judges have superior judgment. The purpose identified here for empowering the judiciary to review legislation, and more generally to give the judiciary a role in developing the law, is to give citizens a venue for effective political participation. Empowering judges to play their necessary role in this institution does not imply that they are wiser than ordinary citizens or their elected representatives. It only assumes two things about the institutional competence of courts and legislators. First, judges regularly conduct impartial consideration of law, a degree of dedication that goes beyond what is expected of ordinary citizens. Second, though legislators (like judges) work full-time on improving the law, the legislature has limited resources for considering changes, and legislators are constrained by popular opinion about what problems in the law should be top priorities for the legislature. It does not express disrespect for citizens' or legislators' judgment to assert that a well-designed judiciary has resources for considering changes to the law that a well-designed legislature lacks. Moreover, empowering the judiciary to shape the law can express respect for citizens' judgment if the purpose for doing so is to enhance citizens' opportunities to try to make their views of justice effective.

Waldron argues that if a government departs from majority rule by having judicially enforced constitutional restrictions on the content of legislation, it fails to show equal respect for citizens' judgment.¹⁰⁴ The principles of political morality that are candidates for inclusion in a constitution or a charter are, in general, controversial.¹⁰⁵ Citizens may reasonably disagree about what principles should be included in a constitution and about how they should be applied. Authorizing courts to strike down legislation that a majority of citizens think is justified carries the implication that judges' understanding of political morality is superior to that of most citizens. This implication is disrespectful because there are no publicly acceptable criteria of expertise in political morality.¹⁰⁶ Waldron concludes that judicial review is, on balance, anti-democratic.¹⁰⁷ It does not demonstrably make the content of the law more

also WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 292 (explaining why Dworkin is committed to this view). Note that Fallon's defense of judicial review, *supra* note 94, does not make this presupposition.

104. See Waldron, *The Core of the Case*, *supra* note 3, at 1386–95.

105. See generally WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 211–31.

106. See WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 115 (“If the mark of wisdom is having come up with just decisions in the past, and people disagree about what counts as a just decision, then it is not clear how we can determine who is wise and who is not . . .”).

107. Waldron, *The Core of the Case*, *supra* note 3, at 1375–76 (“Thus, it seems to me the

just, and in the absence of uncontroversial evidence that judicial review improves the content of the law, judicial review undermines the non-instrumental, procedural value of showing equal respect for citizens' judgment.¹⁰⁸

The temptation to think that empowering the judiciary expresses disrespect for citizens or their representatives in the legislature may result from a misunderstanding of the nature of political power. There is a strong temptation to think of individuals' political power only in terms of their roles in a final decision (for instance, their votes), rather than looking at all opportunities to influence political outcomes. Citizens' share of power in a final decision is zero-sum. Giving some citizens more votes or representation disproportionate to their numbers requires diluting the power of other citizens' votes. Giving judges the power to strike down legislation entails excluding other citizens from the final decision whether a given statute shall remain the law. But participation in final decisions about what the law shall be is not the only kind of participation that matters. All the morally permissible ways that citizens can influence legislative outcomes are potentially important. Opportunities to influence outcomes through rational persuasion are not zero-sum. A political system can provide rich opportunities for agency through rational persuasion to all citizens, or it can provide impoverished opportunities.¹⁰⁹ Enabling citizens to use the courts to change, to preserve, or to clarify the law can enrich all citizens' opportunities for effective political agency. Doing this admittedly involves a trade-off: private citizens gain richer opportunities to influence the law, at the cost of having a lesser say in the final decision-making procedure. But nothing about this trade-off expresses disrespect for citizens' judgment; rather the opposite.

legislative side wins on either formulation of the question. And that will be the core of the case against judicial review.”).

108. *Id.*

109. At one extreme, a nominally democratic government might place limitations on political speech while funding propaganda, thereby greatly curtailing citizens' ability to influence policy. In a society with legal protection of free speech and freedom of the press, those with minority opinions may have more or less extensive opportunities to persuade. The availability or unavailability of the opportunity to influence law through the courts is but one factor. Some contributors to the opportunity to persuade are cultural rather than institutional. Those with minority views will have more meaningful opportunities to influence political outcomes in a culture in which many citizens are open-minded and willing to listen to arguments for views that differ from their own. *See Hughes, supra* note 36, at 261–62 (“For political speech to be an effective means of bringing about political change, legal protection of free speech is not sufficient. There also needs to be a culture in which different parts of society listen to each other.”).

B. Moral Education, Equal Status, and Collective Self-rule

Three values relevant to political participation remain to be considered. Consider first the instrumental value of promoting citizens' moral education. John Stuart Mill maintained that the opportunity to participate in politics can promote people's moral development by giving them occasion to think about others' interests.¹¹⁰ Supposing Mill is correct, how does the existence of judicial review, or more generally of an active role for the judiciary in developing the law, affect citizens' moral development? This is an empirical question. Very likely, the opportunity to try to influence the law through the courts is in some ways good for citizens' moral education and in some ways bad. On one hand, it facilitates public discussion of people's rights and of the concepts of liberty and equality by producing judicial opinions and soliciting legal arguments that invoke these concepts. On the other hand, if the discussion of moral concepts that can be discussed in judicial opinions becomes too prevalent, these concepts may crowd out concepts or interpretations of concepts (e.g., the concept of justice) that are not susceptible to judicial enforcement or remediation.¹¹¹ A culture in which judicial reasoning about political morality figures prominently may thus tend to facilitate citizens' moral development in some ways while hindering it in others.

Consider next the value of affirming citizens' equal status. This value clearly requires that all citizens have opportunities to participate in politics. Limiting political participation to an aristocracy would deny citizens equal status. As would arbitrary restrictions on the right to vote. If political leaders are selected by voting—as opposed to, say, selection by lot—then suffrage should be universal. But it is unclear why affirming citizens' equal status would require a purely majoritarian system of government. Those who object to judicial review or to other forms of judicial influence on the law generally are not worried that the law gives judges an unacceptable form of elevated social status. Moreover, judicial systems (and other institutions that influence the law) can express a public commitment to citizens' equal standing by giving all citizens an opportunity to play a role in shaping the law through a mechanism other than voting.

Finally, consider the value of collective self-rule. It is controversial whether a collective can have interests apart from the interests of their members.¹¹² Among those who believe that collective self-rule is

110. See MILL, *supra* note 27, at 54 (“Still more salutary is the moral part of the instruction afforded by the participation of the private citizen, if even rarely, in public functions. He is called upon, while so engaged, to weigh interests not his own . . .”).

111. See Waldron, *The Core of the Case*, *supra* note 3, at 1380–86.

112. For discussion of the controversy, see Peter Jones, *Group Rights*, THE STANFORD

valuable, there is dispute about the criteria for collective self-rule.¹¹³ It is agreed that for a people to be self-ruling, it must not be ruled either by an outside force or by a subset of the population. A people ruled by an aristocracy or a plutocracy is not self-ruling. Nor, however, is a people ruled by a majoritarian government if the majority is persistent and always votes for the interests of its members at the cost of those in the political minority. Defenders of the idea of collective self-rule disagree about whether judicial review is consistent with collective self-rule.¹¹⁴ The issue at stake is not whether judicial review is counter-majoritarian. The issue is whether the judiciary speaks on behalf of the people, as the legislature does, and whether the deliberation of the judiciary can count as the people's deliberation.

The judiciary arguably is able to speak on behalf of the people when courts give weight to precedent. In an adversarial judicial system, courts are only required to consider the arguments of the parties before the court. They are not required to solicit opinions from the population at large. Requiring courts to give weight to precedent is a way of forcing courts to engage with some of the views of people who are not before the court. Over time, common law standards are modified in response to arguments from many plaintiffs and defendants. The common law thus comes to be rationally responsive to many of the views that are held throughout the population. The common law could thus be plausibly thought to speak for the people, not only for the views of a transient political majority. If it is possible for a people to have an interest in self-government, distinct from the interests of individual citizens in political participation, common law is compatible with this interest.¹¹⁵

Judicial development of law thus promotes two of the non-instrumental values that are arguably relevant to modern democracies: the value of collective self-rule and the value of giving individual citizens opportunities for effective political agency. Judicial development of law is compatible with the two other relevant non-instrumental values: affirming citizens' equal legal status and expressing equal respect for citizens' moral judgment. As for the two instrumental values relevant to democracy—producing substantively good legislation and promoting citizens' moral education—there is no conclusive evidence whether

ENCYCLOPEDIA OF PHILOSOPHY (last updated Mar. 17, 2016) <https://plato.stanford.edu/archives/sum2016/entries/rights-group/> [<https://perma.cc/G5G6-8FQ4>].

113. See generally EISGRUBER, *supra* note 35; Ekins, *supra* note 35.

114. For argument that the American form of judicial review is consistent with the people's self-rule, see EISGRUBER, *supra* note 35, at 82–96. For argument that judicial review is inconsistent with collective self-rule, see Ekins, *supra* note 35, at 165–70.

115. In civil law systems that give precedent some weight, the same could be said of the body of standards that courts articulate over time.

judicial review or other forms of judicial power are helpful or harmful. Thus, if the judiciary and the legislature are both functioning well, judicial development of law makes the government more democratic. It does not do so primarily by producing good outcomes. Rather, it does so by making the government *procedurally* more democratic.

IV. EFFECTIVE POLITICAL AGENCY IN NON-IDEAL THEORY

Honoring a role for the judiciary in developing law serves a democratic function. It gives citizens meaningful opportunities to try to change, to preserve, or to authoritatively clarify the law—opportunities that would be lacking if the ordinary legislative process were the only way to pursue change or preservation of the law. The significance of this conclusion would be limited, however, if it held only in an idealized society. Can the judiciary make a similar contribution to democracy in a society in which not all officials and voters perform their duties in good faith, decision-makers have cognitive biases and moral blind spots that interfere with their assessment of arguments, and citizens' financial resources affect their access to the courts and to the legislature? Clearly there are possible circumstances in which the judiciary fails to provide meaningful opportunities for political agency (e.g., rampant corruption). That is no threat to the significance of the judicial democracy thesis. The relevant question is whether there are features of all or almost all actual or feasible human societies that would prevent the judiciary from performing this democratic role.

Consider first the possibility that judges may fail to perform their duties in good faith. A judge might intentionally or negligently fail to give due consideration to a sensible argument presented by a party to a case. Corruption or laziness could motivate this failure. So too could sympathy for one of the parties, together with unwillingness to seriously consider arguments supporting an outcome that would be contrary to this party's interests. The failure could also be motivated by a strong commitment to a political or legal view, accompanied by a belief that any argument for an opposing position must be a non-starter and thus does not merit serious reflection.¹¹⁶

A failure with respect to the second theoretical assumption—that judges are competent moral reasoners, free from major moral blind spots—could have similar effects on judges' consideration of arguments presented to them. A cognitive bias or a moral blind spot could prevent

116. Judges can also fail to perform their duties in good faith by giving parties' arguments adequate thought but failing to give an adequate public explanation of their reasons for their decisions. For a defense of a duty of sincerity in judicial opinions, see Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008).

judges from appreciating the rational force of certain arguments, despite sincere efforts to understand them.¹¹⁷ Any of these failures, if common, could prevent the courts from giving citizens genuine opportunities to try to make the law conform to their views about justice. If citizens know that a court would not give a certain argument due consideration, presenting that argument will not constitute a genuine attempt to change, to preserve, or to authoritatively clarify the law. So if judges routinely fail to give sensible arguments due consideration, the courts will fail in their democratic function.¹¹⁸

Undoubtedly, in many societies there will be times when sound or unsound but sensible arguments cannot get a meaningful hearing in the courts for one of these reasons. For these failings to prevent the courts from giving citizens *any* meaningful opportunity to try to make their views about justice effective, they must be both pervasive and severe.

Suppose citizens know that there is a substantial chance that a legal argument they present to the courts will not be adequately considered, but that there is also a substantial chance that it will. Then for these citizens, the opportunity to present a legal argument to the courts constitutes a meaningful opportunity to try to change, to preserve, or to authoritatively clarify the law. Of course, it would be better if they could be certain that their argument would be adequately considered. But a substantial chance of having an argument adequately considered is still a meaningful opportunity. This is especially so if the failings and limitations of most voters and most legislators prevent the ordinary legislative process from

117. The argument here presupposes that moral reasoning can influence people's judgments about matters of value, including the value judgments of judges. The social intuitionist model of moral judgment might be taken to imply that reasoned argument rarely persuades people to change their minds about moral questions. See Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001) ("Moral reasoning is usually an ex post facto process used to influence the institutions (and hence judgments) of other people."). But Haidt acknowledges that interpersonal sharing of moral reasons can affect people's moral judgments. *Id.* at 828–29 ("Reasons and arguments can circulate and affect people, even if individuals rarely engage in private moral reasoning for themselves."). For argument that the social intuitionist model greatly underestimates the influence of moral reasoning, see Herbert D. Saltzstein and Tziporah Kasachkoff, *Haidt's Moral Intuitionist Theory: A Psychological and Philosophical Critique*, 8 REV. GEN. PSYCHOL. 273, 275 (2004) ("[T]here is ample evidence that reasons can be motivating. We are often moved to change our minds and sometimes alter our behavior in response to the reasoned exhortations and arguments of others. . . ."). See also Cordelia Fine, *Is the Emotional Dog Wagging Its Rational Tail, or Chasing It?*, 9 PHIL. EXPLORATIONS 83, 85 (2006) ("[P]rivate moral reasoning may potentially play a more important role in the development of an individual A's moral judgments than is currently allowed by the SIM.").

118. If courts manage to conceal this failure, citizens may be able genuinely to attempt to shape the law through the courts. One can attempt to do something one justifiably, but falsely, thinks possible. The opportunity to pursue change, preservation, or clarification of the law through the courts is not meaningful, however, if the hope of success is based on deception.

providing a meaningful opportunity to pursue a given change or clarification in the law or a given form of stability.¹¹⁹

Suppose, then, that many judges have a cognitive bias or moral blind spot that makes them less likely to appreciate the rational force of an argument, but that does not make it impossible for them to appreciate the argument's force. Then citizens do have a meaningful opportunity to try to change, to preserve, or to authoritatively clarify the law by presenting this argument to the courts. They would have a more meaningful opportunity if there were no cognitive obstacle to appreciating the force of their argument, but the opportunity to present the argument to cognitively flawed judges is a meaningful opportunity nonetheless. To consider another scenario, suppose that some judges have a cognitive failure that makes it impossible (not merely unlikely) for them to appreciate the force of certain arguments. Other judges have a moral failing that makes them unwilling to give these arguments the attention they deserve. Still other judges, however, are both able and willing to give the arguments adequate consideration. If citizens considering impact litigation do not know which judges will decide their case, the courts may provide a meaningful opportunity to seek change, preservation, or clarification of the law.¹²⁰

Is there good reason to think that in any actual or feasible society, the judiciary will never or rarely enhance citizens' opportunities for effective political agency? One worrisome possibility is that in any society in which there is widespread prejudice against some minority group, members of this group may find that their arguments cannot get a fair hearing. Even if societies can largely eradicate serious forms of prejudice, the judicial democracy thesis would have limited significance if it only applied to societies that achieved this happy state. But prejudice prevents members of disliked minorities or their advocates from exercising political agency through the courts only if most judges either deeply despise or deeply misunderstand the interests of these groups and their

119. Those who are skeptical about possibility of persuading judges on questions of value through reasoned argument should be at least as skeptical about the possibility of persuading legislators or ordinary citizens. If one takes a deeply skeptical view about the possibility of persuading officials or fellow citizens, one must take a cynical view of the value of democracy. It is unclear how one could view democratic participation as an opportunity for moral education if one is cynical about the possibility of rational persuasion. It is likewise unclear how one could view a people as collectively self-governing. A skeptical view of the possibility of rational persuasion in politics lends itself to the cynical view that political life can never be anything other than the domination of one group of people by another.

120. Citizens may know which judges will decide their case if they know that (a) if they prevail in the lower courts, the case will almost certainly be appealed to the jurisdiction's highest court, and (b) the highest court decides cases by a majority vote of all of its members. But not all impact litigation is appealed to the highest court, and the court of highest appeal could choose to hear some cases in panels.

members. If many judges have prejudices that make it more difficult for them to appreciate the force of certain arguments, but only a small minority of judges are so blinded by prejudice that proponents of sensible views have no hope of persuading these judges, the judiciary can still contribute to citizens' opportunities for political agency.

A second worrisome possibility is that, because judges lack accountability, judges will lack an incentive to perform their jobs in good faith. Though it is plainly possible to avoid pervasive outright corruption, subtler breaches of judicial duty may be harder to prevent. Some judges may consciously choose to use their position to advance a personal or political agenda and to write opinions that obscure the real reasons for their decisions. Other judges may hold firmly a view about justice that is legitimately controversial, one that well-informed, competent moral reasoners may not regard as self-evident. If judges are over-confident about such a view, so that they regard any argument for a contrary position as manifestly absurd and not worth thinking about, they will fail in their duty to listen to sensible arguments with an open mind. Though it may be that some judges will fail in one of these ways in any feasible society, it is not obvious that these tendencies will always be pervasive. Their prevalence will depend in part on the extent to which either moral duty or concern for professional reputation motivates judges to write clear and thoughtful opinions defending their decisions. The most blatant failures of both kinds can be partly deterred by a form of accountability that is designed to sanction judges for failures of judicial duty, including the duty of sincerity, but not for lack of compliance with majority opinion. One such form of accountability is the possibility of impeachment by supermajority vote.¹²¹ Another is the risk that the courts will lose their perceived legitimacy, and with it their power, if the public perceives them as failing to engage properly with the arguments presented to them.¹²²

The other assumption was that citizens' finances do not affect their

121. In the United States, conviction and removal from office after an impeachment requires a two-thirds vote of the Senate. U.S. CONST. art. I, § 3, cl. 6 ("And no person shall be convicted without the Concurrence of two thirds of the Members present.").

122. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 204 (Yale University Press 2d ed. 1986) (arguing that American courts would erode their own power if they "push" their "dominion past natural limits," if they engage in "manipulation . . . of principles that are not tenable for their own sakes," or if they "call the name of principle in vain"); see also THE FEDERALIST NO. 78 (Alexander Hamilton) ("The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

access either to the legislature or to the judiciary. This assumption does not obtain in most actual societies. Lack of access to legal representation in civil cases is often a major barrier to less well-off citizens' use of the judiciary as a venue for political agency.¹²³ This problem has a remedy: governments can provide or subsidize access to legal representation in civil matters for less well-off citizens, as many governments do (not always effectively) for indigent defendants in criminal cases.¹²⁴ A subtler concern is that there is arguably a tendency for constitutions to contain entrenched rights that protect the interests of elites against majoritarian politics.¹²⁵ But this is not an objection to judicial review or to judicial power as such. It is an objection to judicial enforcement of constitutional provisions that are unjust or that citizens could reasonably regard as unjust. For judicial review to serve its democratic function, constitutional rights and other judicially enforced constitutional principles must be both justifiable and normatively uncontroversial. That is, they must be stated in such a way that competent moral reasoners who are factually well-informed and free from moral blind spots could not object to them as stated. For this reason, the text of judicially enforced constitutional principles may have to be vague. Vagueness in constitutional principles is tolerable and perhaps even valuable, as long as courts can formulate more concrete principles to give them precise content in a manner consistent with democratic values.

One other possible real-world obstacle to judicial contribution to democracy deserves mention. The judiciary may aim to make its decisions loosely track majority opinion for fear that very unpopular rulings could undermine the judiciary's legitimacy in the sociological sense.¹²⁶ The fear is that unpopular rulings could undermine citizens' belief that the judiciary is normatively legitimate and that its decisions should be obeyed. This sort of responsiveness to majority opinion would

123. *See supra* note 47.

124. On resource limitations for public defenders in the United States, see Backus & Marcus, *supra* note 47, at 1046–53 (discussing the lack of funding for public defenders in various states).

125. Ran Hirschl describes a possible mechanism for this: when elites have influence over the legislative and executive branches of government but believe that their power is threatened, they use their influence to secure the judicial enforcement of entrenched rights. *See* Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 *LAW & SOC. INQUIRY* 91, 103 (2000) (“When their hegemony is increasingly challenged in majoritarian decision-making arenas, powerful elites and their political representatives may deliberately initiate and support a constitutionalization of rights in order to transfer power to supreme courts, where they assume, based primarily on the courts’ record of adjudication and on the justices’ ideological preferences, that their policy preferences will be less contested.”).

126. For argument that the American judiciary, in particular, is often highly sensitive to public opinion, see generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

undermine the judiciary's ability to contribute to political minorities' opportunities for effective political agency. It is most likely to occur, however, in a society in which many citizens falsely believe that majority rule is the core of democracy and that any deviation from it undermines law's normative legitimacy. Unpopular decisions are less likely to undermine the judiciary's sociological legitimacy if citizens recognize the judiciary's democratic function.

There is no good reason, then, to think that the judiciary cannot contribute to citizens' effective political agency in any feasible society. The problem of access to legal representation can be straightforwardly addressed. The risk that the judiciary will aim to track majority opinion in the interest of protecting its empirical legitimacy is mitigated if many citizens appreciate the judiciary's potential contribution to democracy. In any actual or feasible society, judges will sometimes fail to perform their duties in good faith and will sometimes have cognitive biases, prejudices, or moral blind spots that make it difficult or impossible to see the force of some arguments. This will make the judiciary's contribution to citizens' effective political agency less extensive than it would be if judges reliably lacked these failings. But there is no reason to think these failings so universally extensive that the judiciary cannot contribute significantly to citizens' effective agency in any feasible society.

Same sex marriage arguably presents a good example in which the courts contributed to citizens' political agency. The first major legal victory for marriage equality advocates came in 1993, when the Supreme Court of Hawaii decided that the state's prohibition on same sex marriage was subject to strict scrutiny under the state's equal protection clause—a demanding standard that few laws can meet.¹²⁷ At the time, no state had allowed either marriage or civil unions for same sex couples, and to the extent that the general public had considered the issue at all, public sentiment on the issue was largely negative.¹²⁸ Litigation offered

127. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (“Accordingly, we hold that sex is a ‘suspect category’ for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that HRS § 572-1 is subject to the ‘strict scrutiny’ test.”). The court remanded the case to the trial court for consideration of whether the state’s prohibition met this standard. The trial court found that the state’s prohibition on same sex marriage did not survive strict scrutiny and that Hawaii must therefore allow same sex marriage. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). The court stayed its decision pending appeal. A 1998 amendment to the Hawaii Constitution prohibiting same-sex marriage rendered the appeal moot. The first successful challenge based on a state constitution to a law restricting marriage to opposite-sex couples was *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). The United States Supreme Court ruled that the Fourteenth Amendment requires same-sex couples to be allowed to marry in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

128. In 1996, when the Gallup Poll first asked respondents their views concerning attitudes about legalizing same-sex marriage, more than two-thirds of respondents were opposed. See Justin

advocates a genuine opportunity to try to change the law at a time when advocates could not realistically hope to bring about change through legislatures in the foreseeable future.

Recent cases concerning gun possession are also examples in which courts contributed to citizens' political agency. In Washington, D.C., and in Chicago, IL, opponents of gun control raised successful Second Amendment challenges to city laws prohibiting handguns.¹²⁹ Prior to the United States Supreme Court decisions affirming the holdings in these cases, handguns were already legal in many American states and cities, and advocates of more permissive gun laws had recent legislative successes.¹³⁰ That said, gun control measures were (and remain) popular in Chicago, in the state of Illinois, and in the District of Columbia.¹³¹ It is unlikely that opponents of gun control laws could have gotten a serious hearing for their views at the legislative level, much less a substantial chance of success. The Second Amendment arguments against handgun regulations are problematic. Ever since the founding of the American republic, state governments have had the authority to regulate the ownership, licensing, and restrictions on the use of guns.¹³² Nevertheless, opponents of gun control believed in good faith that they had a Second Amendment argument for their position, and it contributed to their political agency to have an opportunity to persuade a court that the standards of Second Amendment jurisprudence should be revised.

McCarthy, *U.S. Support for Gay Marriage Edges to New High*, GALLUP.COM (May 15, 2017), <https://news.gallup.com/poll/210566/support-gay-marriage-edges-new-high.aspx> [<https://perma.cc/VW6U-GZJW>] (“Americans’ support for same-sex marriage has more than doubled since Gallup first polled on the issue in 1996, when 27% said it should be recognized as valid by the law.”). Prior to 1993, there were several unsuccessful efforts to legalize same sex marriage through litigation. William N. Eskridge, Jr., *A History of Same Sex Marriage*, 79 VA. L. REV. 1419, 1427 (1993) (“As of October 1993, none of the legal efforts to gain statewide recognition of same-sex marriage in the United States has been successful . . .”).

129. *District of Columbia v. Heller*, 554 U.S. 570, 572 (2007); *McDonald v. City of Chicago*, 561 U.S. 742, 742 (2010).

130. In 2015, for example, Texas enacted a law permitting people to carry handguns openly in public, leaving only five states with blanket prohibitions on “open carry.” *Texas ‘Open Carry’ Law Passes, Allowing Guns in Holsters on the Street*, THE GUARDIAN.COM (May 29, 2015, 9:03 PM), <https://www.theguardian.com/us-news/2015/may/30/texas-open-carry-law-passes-allowing-guns-in-holsters-on-the-street> [<https://perma.cc/M2FA-JRFS>].

131. Shortly after the ruling in *Heller*, both Houses of Congress in Washington, D.C. passed a new gun control law, aimed at compliance with *Heller*. See Council of the District of Columbia, Firearms Registration Amendment Act of 2008 (DC 2008) (amending the Firearms Control Regulations Act of 1975).

132. For historical and legal background, see generally ROXANNE DUNBAR-ORTIZ, *LOADED: A DISARMING HISTORY OF THE SECOND AMENDMENT* (Greg Ruggiero ed., 2018); ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011).

V. PHILOSOPHICAL AND LEGAL CONSEQUENCES

This Article has argued that there is a non-instrumental, procedural value of democracy to which judicial development of law contributes. Providing opportunities for effective political agency is an important non-instrumental democratic value: it enables citizens to satisfy duties of conscience with respect to law. Unqualified accountability only to majority opinion frustrates this value. Neither a system of direct democracy nor an elected legislature can, by themselves, provide all citizens genuine opportunities to try to change laws they think unjust or to try to preserve laws they think just. They will sometimes deny these opportunities to those with very unpopular views about what justice requires and to those who think an issue that others consider minor belongs on the political agenda. Judicial development of law can partially remedy this problem.¹³³ It can provide genuine opportunities to exercise political agency to all citizens, including citizens whose views are shared by few as well as citizens who find themselves in a majority or a strong minority.

These conclusions support the judicial democracy thesis: a government is typically more democratic if it provides opportunities to try to change, to preserve, or to obtain authoritative clarification of the law through the courts. There are important democratic values that the judiciary promotes, and there are no democratic values that judicial power clearly and reliably frustrates. There are no guarantees. Judicial decision-making can become corrupt or ideologically slanted just as legislatures can. Likewise, both judges and legislators can fail in their duty to provide a check on improper or even tyrannical actions by the executive branch. This Article's argument, though, is that judicial development of law can, both in theory and in practice, enhance and morally strengthen democratic regimes.

The argument for judicial democracy has implications for law and policy both within the United States and internationally. Within the United States, unequal access to legal representation prevents the judiciary from providing citizens a truly egalitarian form of political participation. Again, there is no legal right to publicly-funded representation in most civil cases.¹³⁴ Though there is a constitutional right to criminal representation, in practice, public defenders often face resource constraints that limit their ability to represent clients

133. The remedy is only partial because there are some forms of injustice or perceived injustice that cannot be appropriately addressed through the courts. To take an earlier example, if citizens believe that justice requires tort law to be replaced with a no-fault compensation system, they can only pursue this change through the legislature. *See supra* pp. 41–42.

134. *See supra* note 43.

effectively.¹³⁵ Of course it is impossible for all plaintiffs and defendants to be represented by the country's best lawyers. It would enhance the democratic function of the judiciary to provide better public support for legal representation, including better-funded public defenders and some level of support for representation of indigent defendants and plaintiffs in civil cases.

This Article's argument for judicial democracy also has normative implications for civil procedure. Restrictions on access to the judicial process should be interpreted liberally, to maximize citizens' opportunity to exercise agency over the law. The Case or Controversy Clause places a limitation on citizens' use of the judiciary to make their views of justice effective.¹³⁶ Only those who have been directly harmed by a perceived misinterpretation of a common law doctrine, a statute, or a constitutional requirement can seek to change this misinterpretation as a participant in a lawsuit.¹³⁷ To the extent that the standing doctrine is open to interpretation, courts should consider citizens' individual and collective interest in having a public response to reasoned *arguments* for interpreting the law (including the Constitution) in one way rather than another. Courts should thus hesitate to use the standing doctrine as a way to avoid making a decision on the merits of a case.¹³⁸ Likewise, there are democracy-related reasons to make it easier, rather than harder, to use class action lawsuits as a form of impact litigation.¹³⁹ Facilitating class action lawsuits helps financially less well-off citizens to exercise agency over the law through the courts.

The judicial democracy thesis also has normative implications for countries other than the United States. It suggests that in countries where the role of the judiciary is unsettled, there is a reason to give it an active role. In civil law countries, there is reason to give precedent some weight,

135. See Backus & Marcus, *supra* note 47, at 1072 ("Although constitutionally entitled to legal representation, a surprising number of indigent criminal defendants are denied counsel entirely."). Courts do explicitly try to "construe pro se complaints liberally." Arnett v. Webster, 658 F.3d 742, 751 (7th Cir. 2011); see also Parker v. Four Seasons Hotels, Ltd., 845 F.3d 807, 811 (7th Cir. 2017) ("A trial court is obligated to liberally construe a *pro se* plaintiff's pleadings."). This is a commendable practice but falls short of addressing the problem of limited access to legal representation.

136. U.S. CONST. art. III, § 2, cl. 1.

137. See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (stating the elements that are required for a citizen to have standing).

138. For example, there are reasons for democratic theory to be troubled by the holding in *Hollingsworth v. Perry*, 570 U.S. 693, 720 (2013) (explaining that official sponsors of a ballot initiative do not have standing to appeal a court ruling when the state has refused to do so).

139. See Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 850 (arguing that recent limitations on class action lawsuits interfere with the opportunity to use class actions, including class actions other than the aggregate damages subtype, as vehicles for impact litigation).

though not necessarily as much as it has in common law countries, so that litigants and advocates of litigation can express agency over the interpretation of law. In countries that give precedent at least some weight and where the question whether to have judicial review is live, the argument provides support for adopting some form of judicial review.¹⁴⁰ In countries with nascent or declining democratic institutions, an independent and effective judiciary can provide a crucial venue for citizen participation in political life.

140. It does not indicate a preference between the American model, on which the legislature can legally act contrary to the Supreme Court's interpretation of the Constitution only by amending it, and the Canadian model, on which the legislature can temporarily resist a Supreme Court decision on the meaning of the Charter of Rights and Freedoms by invoking the notwithstanding clause, Section 33. *See supra* note 72 (highlighting the differences between American and Canadian political and legal systems).