TAKING DEMOCRACY SERIOUSLY: TOWARD A JURY-CENTERED JURISPRUDENCE

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Legal philosophers have long labored to articulate a single standard by which practitioners and, to a lesser degree, members and passersby in any political society can identify the demands law makes of them. The challenge has always been to reconcile competing moral concerns between legal philosophers who hold that morality informs the inquiry and those who hold that social facts inform the inquiry without regard to whether one considers the law's content good or evil. These debates, in large part, remain internal to legal practice, rarely inviting and hardly accessible to the general public.

Jeremy Waldron approaches the age-old inquiry by narrowing its focus. Rather than ask how law presents itself generally, Waldron asks how law presents itself in a democratic political system. Representatively enacted legislation epitomizes law in a democratic system for Waldron. To accept Waldron's exposition of what law is like in a truly democratic system is to adopt a new approach to jurisprudence. The challenge is to take the promise that democracy makes seriously, that anything that aspires to the status of law permeate with an ethos of equality of participation. Although Waldron does not explicitly offer a vision for the judiciary in his democratic jurisprudence, this Article argues that his works implicitly offer such a vision. The jurisprudential inquiry no longer turns to what a traditional judge or judges do in courts; rather, a jurisprudential challenge is issued to increase the opportunities for and capacity of citizens to actively participate on an equal basis in choosing the laws that govern them. Jurisprudes are led, that is, toward a jury-centered jurisprudence.

INTRODUCTION

> "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them."[1]

THE constitutional promise to a trial by jury is not merely an individual right; it is necessary to validate law in a democratic system. American history is replete with this notion. John Adams declared, "the

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[1] 3 THOMAS JEFFERSON, *Letter to L'Abbe Arnond, July 19, 1789*, *in* THE WORKS OF THOMAS JEFFERSON 81, 82 (H.A. Washington ed., 1854).

common people . . . should have as complete a control, as decisive a negative" in courts as they do in other governmental decisions through their representatives.[2] The Declaration of Independence listed deprivation "of Trial by Jury" amongst many other grievances against King George III.[3] Alexis de Tocqueville proclaimed, "[t]he jury system as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail."[4] So central is the right to trial by jury that it makes a primary appearance in the United States Constitution four times.[5]

Historically, the right to trial by jury not only ensured a criminally accused person or civil litigant that her peers, not the State, would decide her fate; the right to trial by jury equally protected the people's right to judge. With respect to federal jurisdiction, since the jury was thought to protect individual rights and to compete with centralized government power, an accused person or litigant could not waive a jury.[6] Only a guilty plea in a criminal case could cut the jury out.[7]

Moreover, juries determined both law and fact in criminal and civil cases.[8] This was not only recognized by the founders, such as Jefferson and Adams,[9] but also recognized by the United States Supreme Court. In *Georgia v. Brailsford*[10] (a civil case), Chief Justice John Jay admonished the jury, "the courts are the best judges of law," but the jurors have the "right to take upon . . . [themselves] to judge of both, and to determine

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[2] 2 JOHN ADAMS, *Diary, Feb. 12, 1771*, THE WORKS OF JOHN ADAMS 253 (1850); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 88 (1998).

[3] THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

[4] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 273 (J. P. Mayer ed., George Lawrence trans., Doubleday & Co., Inc. 1969) (1840).

[5] Twice the constitution secures the right to a jury trial in criminal cases. U.S. CONST. art. III, § 2 & U.S. CONST. amend. VI. The Fifth Amendment secures the right to indictment or presentment by a grand jury. U.S. CONST. amend. V. The Seventh Amendment secures the right to a jury trial in civil cases. U.S. CONST. amend. VII. The Northwest Ordinance also memorialized the right to trial by jury. The Northwest Ordinance (1787).

[6] Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 969 (2010) (pointing out that juries were considered necessary to a court's jurisdiction to enter judgment).

[7] *Id.*

[8] *Id.* (citing William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1660 (2008), which claims that "[b]y preserving powerful juries that determined both law and fact, the Seventh Amendment protected local communities from the metropole.").

[9] *See* JEFFERSON, *supra* note 1; ADAMS, *supra* note 2.

[10] 3 U.S. 1 (1794).

the law as well as the fact in controversy."[11] The jury's role as check on government—both legislative and judicial—rendered its "law-finding power" paramount,[12] and it reinforced a democratic vision of self-governance.

Today, due to historical mishap,[13] juries are limited to a fact-finding role in courts. Courts have fashioned rules to ensure jury pools represent a community's makeup, focusing not on the people's right generally, but on civil litigants' and criminal defendants' right to a jury of their peers. Often, accused persons or litigants contest unfavorable jury verdicts and judgments under the Sixth Amendment for failure to represent a "fair cross-section of the community," or under the Fourteenth Amendment's Equal Protection Clause.[14]

When courts view the jury's role in this manner, however, they dilute the democratic promise that the people equally participate in making the laws that purport to govern them. Predominately black and Hispanic communities are often disparately underrepresented in jury pools.[15] If the problem is viewed as simply a defendant's Sixth or Fourteenth Amendment right, then a court might reverse the lower court's judgment. This Article argues that something more happens when the right to a jury trial is lost or diminished by excluding some persons over others: the laws that purport to govern the community are impugned.

This Article proceeds in five parts. Part I utilizes Waldron's democratic jurisprudence to form a framework through which to generally view law in democratic systems. Part II marries Waldron's Rule of Law

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[11] *Id.* at 4; *see also* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964) [hereinafter *Changing Role of the Jury*].

[12] Larsen, *supra* note 6, at 972 (pointing out that juries were considered necessary to a court's jurisdiction to enter judgment).

[13] The Supreme Court of the United States would put an end to any notion that the jury played a role in deciding questions of law in federal courts in Sparf v. United States, 156 U.S. 51 (1895). But even before this, Justice Story, when serving as a district court judge, argued against the wisdom of leaving any question of law to the jury. *See* U.S. v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545). For a history of how juries were stripped of their lawmaking power in the various states in the United States, see generally *Changing Role of the Jury*, *supra* note 11; *see also* STACY PRATT MCDERMOTT, THE JURY IN LINCOLN'S AMERICA (Ohio Univ. Press 2010); M. D. Howe, *Juries as Judges in Criminal Law*, 52 HARV. L. REV. 582 (1939); Larsen, *supra* note 6.

[14] *See generally* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing it with Equal Protection*, 64 HASTINGS L.J. 141 (2012).

[15] *See, e.g.*, Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 325–33 (2005) (providing case studies demonstrating Hispanic jury representation disparity); Craig D. Frazier, *Study Find Blacks and Latinos are Underrepresented in Jury Pools*, NEW YORK AMSTERDAM NEWS (Dec. 26, 2012), http://amsterdamnews.com/news/2012/dec/26/study-find-blacks-and-latinos-are/.

vision and his democratic jurisprudence to demonstrate their compatibility, rather than their apparent disjunction. Part III argues that Waldron leaves a democratic gap with respect to the judiciary's role in his democratic jurisprudence. Part IV argues that the jury best fills Waldron's democratic gap. Part V addresses concerns raised by opponents of lay juries, and argues that institutional design can allay those concerns.

Waldron offers a challenge to persons willing to adopt a jurisprudence that takes seriously the democratic promise of equal participation and popular governance. That challenge requires that we shift our focus from what judges *do* or what they *ought* to do to how we can replicate a democratic decision-making body akin to legislatures in the judiciary. Our concern must center on who gets to judge? Or, who gets to decide?[16] A governance system that aspires to democratic norms commits to answer, the people through their representatives, or the people themselves.

I. JEREMY WALDRON'S DEMOCRATIC JURISPRUDENCE

In a recent article, Jeremy Waldron asked a seemingly uncontroversial question: *Can There Be a Democratic Jurisprudence?*[17] This question permeates many of his writings, although not always explicitly. Waldron argues in his recent essay that this question can be the focus of a particular jurisprudence—one that "involves the study of a particular legal system[]" and that "tr[ies] first to get a sense of what law *in that area* is like . . . to build up [an] account of law as such."[18] This task stands in contrast to general jurisprudence—the study of law as it presents itself in any legal system.[19]

Waldron posits three necessary components that must align for something to qualify as law in a democratic jurisprudence: it must have (1) a democratic provenance; (2) it must be oriented to the public good from a body publicly known by all to serve a/the lawmaking capacity; and (3) it must adhere to the Rule of Law principle of generality.[20] An elected legislature represents the people ideologically, geographically, and jurisdictionally. For this reason, legislation provides our primary example of democratic provenance. So long as its dictates apply equally to all persons and purport to promote the public good, we can properly call legislation law.

A. Law's Democratic Provenance

Waldron's democratic jurisprudence aspires to take democracy seriously on its face. As Josiah Ober explains, "[i]n its original Greek form,

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[16] Jeremy Waldron, *Can There Be A Democratic Jurisprudence?*, 58 EMORY L.J. 675, 688–91 (2009).

[17] *Id.*

[18] *Id.* at 678.

[19] *See id.* at 676–79.

[20] *See generally* Waldron, *supra* note 16.

democracy (*demokratia*) meant that 'the capacity to act in order to effect change' (*kratos*) lay with a public (*demos*) composed of many choice making individuals."[21] Our desire for democratic systems of governance is driven by an ethos of equality of participation. Anything that aspires to the status of law must be imbued with an ethos of equality of participation, which means that laws must come from the right place in the right way.[22] To capture this ethos, Waldron develops his democratic jurisprudence around three positivist tenets: source thesis, rule of recognition, and separability thesis.[23]

Legislatures, or legislative assemblies, epitomize democratic decision-making bodies in Waldron's democratic jurisprudence. From the House of Representatives to the House of Commons, a legislative institution explicitly designated as lawmaking differs from judicial adjudicatory institutions by the fact that the former are "the product of (or [their] production has been authorized by) a large popular assembly."[24] For Waldron, large legislative assemblies are epistemically superior to and more representative than smaller decision-making bodies. Once we understand the central role legislatures and legislation play in a democratic jurisprudence, we can use this framework to understand how to approach the question: what role do courts and judges play in a democratic jurisprudence?

1. Legislative Epistemic Superiority

Waldron provides two major arguments to support legislative epistemic superiority: strength in numbers[25] and strength in diversity.[26] The strength in numbers argument invokes Condorcet's Jury Theorem. Competency to decide is measured by each person's ability within the decision-making body to identify, above randomness, the policy between alternatives that best promotes the public good. If average competence of a group is 0.5 or above, a majority decision will more likely yield a better answer "than the average member of the group," and "the bigger [the group] is the more likely it is that the majority answer will be right."[27]

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[21] JOSIAH OBER, DEMOCRACY AND KNOWLEDGE: INNOVATION AND LEARNING IN CLASSICAL ATHENS 12 (Princeton Univ. Press 2008).

[22] Waldron, *supra* note 16, at 684–91.

[23] *Id.* at 682–700.

[24] JEREMY WALDRON, LAW AND DISAGREEMENT 49 (Clarendon Press 1999).

[25] *See* Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 340–45 (2009) ("We have a sort of constitutional instinct that the lawmaking branch . . . should consist of large numbers of people.").

[26] *See id.* at 343 ("The key here is diversity. Different people bring different perspectives to bear on issues under discussion and the more there are the greater the richness and diversity of viewpoints are going to be.").

[27] WALDRON, *supra* note 24, at 51. Consider that the probability that a majority of three independent voters (V, W, and X), each with an individual compe-

Condorcet conversely found that if average competency dropped below 0.5, the greater the risk that the majority yields an incorrect or incomplete decision, and competency decreases as the group size increases.[28] Condorcet held that as group size increases it is more likely to include persons "of great ignorance" and with "many prejudices."[29] Larger crowds also pose a greater risk for factious tempers to override reason.[30] Even Rousseau held that the majority would err as to the general will in its decisions when factions arise.[31]

On Rousseau's account, an individual's decision best approximates the general will when the individual reflects alone on the public good. This reduces the opportunity for factious tempers to influence individuals.[32] Rousseau's charge that each person should approach public issues individually as the best means to approximate the general will[33] shares Condorcet's additional requirement that voters, or legislators in this instance, individually cast their votes.[34] Absent empirical evidence, Condorcet's argument—that competency decreases with increased numbers—is difficult to assess. The challenge, then, is to find a counterargument. In this vein, Waldron argues that we should expect that a legislative body (persons elected by individuals to represent a public segment) will orient their interest to some conceived public good.[35]

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tency of 0.6, is "0.36 (VWX or VW) + 0.144 (VX) + 0.144 (WX) = 0.648 . . . ." *Id.* at 135 n. 43.

> For a sense of the difference that an increase in group size can make, consider that if we add to the group two additional voters of the same individual competence (0.6), we get a competence of 0.68256 for the five members deciding as a majority. To get a group competence of higher than 0.9, we need only an additional 36 members with individual competencies of 0.6.

Id. See also MARQUIS DE CONDORCET, *Essay on the Application of Mathematics to the Theory of Decision-Making, in* CONDORCET: SELECTED WRITINGS 33–70 (Keith Michael Baker ed. & trans., 1976) (1785).

[28] *See* WALDRON, *supra* note 24, at 51.

[29] *Id.* at 51–52 (quoting CONDORCET, *supra* note 27, at 49).

[30] *See id.* at 52.

[31] Jean-Jacques Rousseau, *On Social Contract, in* ROUSSEAU'S POLITICAL WRITINGS 84, 100–01 (Alan Ritter & Julia Conaway Bondanella, eds., Julia Conaway Bondanella, trans., W. W. Norton & Co. 1988) (1762).

[32] *See id.* at 101; *see also* Jeremy Waldron, *Rights and Majorities: Rousseau Revisited, in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 411–12 (Douglas MacLean, ed., Cambridge Univ. Press 1993).

[33] *See* Rousseau, *supra* note 31, at 100–01.

[34] *See* WALDRON, *supra* note 24, at 135; *see also* Waldron, *supra* note 32, at 412–13 (connecting Rousseau's independence requirement with Condorcet's).

[35] This orientation to the public good anticipates another condition of democratic jurisprudence. *See infra* Part I.C.

An individual's competency to identify the policy most conducive to the public good before a vote is cast is not decreased by disagreement, whether due to factious tempers or ignorance. Waldron suggests:

> If the issue is one where rational argument is possible, and if the people involved in the debate are susceptible to rational argument and immune to mere rhetoric . . . and not motivated by particularistic interest, we would expect that at the end of the debate the chances of a given person arriving at a correct answer would be greatly enhanced.[36]

Discussion increases and improves a group's knowledge, which can increase individual competency.[37]

It is important to distinguish Waldron's public good consensus procedure from John Rawls's procedure. Rawls buffers legislative discussion with preconceived, commonly accepted public good principles, primarily respecting justice.[38] "Rational legislators" enact just laws by adhering to Rawls's two principles of justice—all persons are entitled to compossible liberties, and social and economic opportunities must fairly be open to all on an equal basis with inequalities inuring to the benefit of the least well-off.[39] Rawls does not conceive of legislative debate as "a contest between interests, but an attempt to find the best policy as defined by the principles of justice."[40]

Waldron takes the legislature as it is, in a nonideal setting, where disagreement—even about what justice entails—is the rule. Waldron's claim thereby retains individual independence, as far as Condorcet's condition is concerned, "[p]rovided that the probability of each individual reaching a correct decision can be determined independently [after] deliberation and before the votes are cast."[41] Oriented properly, we can expect individual competency in the legislature to exceed randomness on any given policy issue.

In addition to strength in numbers, Waldron's second argument supporting legislative epistemic superiority considers a legislature's strength in diversity. Diversity shares an obvious connection to the first argument. Certainly the size of the group is related to its diversity—a larger body potentially represents more ideas and perspectives. The diversity argument differs from the first in that Condorcet's formula does not require any deliberation and/or persuasion on the part of individuals, though we introduced it as a way to maintain individual competence above 0.5.

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[36] Waldron, *supra* note 32, at 413.

[37] *See* JOHN RAWLS, THEORY OF JUSTICE 315 (Harvard Univ. Press rev. ed. 1991).

[38] *See id.* at 314.

[39] *Id.* at 53.

[40] *Id.*

[41] Waldron, *supra* note 32, at 413.

Waldron's second argument derives its strength specifically from its focus on deliberation and persuasion.

Waldron draws on Aristotle's wisdom of the multitude doctrine: "The people acting as a body are capable of making better decisions, by pooling their knowledge, experience, and insight, than any individual member of the body, however excellent, is capable of making on his own."[42] The doctrine speaks to the fact of plurality under the circumstances of politics.[43] Pluralism, whether reasonable or not,[44] is a permanent fact of modern politics. Pluralism's virtue lies in dispersed knowledge. Friedrich Hayek observed that the "central theoretical problem of all social science" was how to utilize knowledge "dispersed among many people."[45] Before this, John Adams opined, "the preservation of the means of knowledge among the lowest ranks is of more importance to the public than all the property of all the rich men in the country."[46] Public policy decisions depend for their strength on a democratic system's ability to organize and utilize what diverse and disparate people know.[47]

Public policy decisions present complex issues with many facets. No one person can possibly identify the many issues that arise or that need to be addressed. "The many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole."[48] Likewise, with respect to public policy, Waldron provides an example: an Athenian assembly sits to decide whether to invade Sicily; one person may know the geography, another the topography; one may have experienced similar campaigns in the past gone awry; one or more may have a cost-benefit perspective; et cetera.[49]

A diverse legislature, whose members individually represent different constituent bases with distinct social, economic, and political needs

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[42] Jeremy Waldron, *The Doctrine of the Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics*, 23 POL THEORY 563, 564 (1995).

[43] *See* WALDRON, *supra* note 24, at 144; *infra* Part I.B.1, p. 10–13 and note 68.

[44] *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 3 (Harvard Univ. Press 2001) (The fact of reasonable pluralism, according to Rawls, "is the fact of profound and irreconcilable differences in citizens' reasonable comprehensive religious and philosophical conceptions of the world, and in their views of the moral and aesthetic values to be sought in human life.").

[45] F. A. Hayek, *The Use of Knowledge in Society*, *in* THE LIBERTARIAN READER 215, 219–20 (The Free Press 1997).

[46] JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 28 (Liberty Fund 2000) (1765).

[47] *See* OBER, *supra* note 21, at 2, 117–67 (discussing how Athens developed a complex democratic system to aggregate dispersed knowledge).

[48] ARISTOTLE, POLITICS 66, book 3, chap. 11, 1281b7-8 (Stephen Everson, ed., Benjamin Jowett & Jonathan Barnes trans., Cambridge Univ. Press 1988).

[49] *See* WALDRON, *supra* note 24, at 137.

from distinct geographical locations, "enables the group as a whole to attain a degree of wisdom and practical knowledge that surpasses even that of the most excellent individual member."[50] Equally—if not more—important, each representative has the ability to draw on her constituents' knowledge. And, of course, the diversity we are looking for spans knowledge, experience, persons, gender, and interests.[51] To include diversity of interests by no means detracts from a legislative commitment to orient laws to the public good because a legislative proposal may negatively impact one's constituency, which may, thereby, negatively affect her conception of the public good.[52] Diversity and disagreement add to the deliberative process.

The process by which legislators pool and aggregate diverse knowledge to render a superior decision than could possibly be devised by any individual member—however exceptional that member may be—may occur through individual synthesis or group synthesis. On the individual account, a legislator with "a modicum of rationality and comprehension" incorporates into her mental repertoire diverse views expressed in a group discussion, which she reflects in her vote.[53] She would possess an epistemically superior view compared to other persons unexposed to diverse perspectives. Legislative majorities whose views reflect the same or similar synthesis, likewise, render epistemically superior decisions.[54]

On the group synthesis view, individual synthesis need not take place or occur. Public deliberation amongst a diverse group exposes the group to conflicting opinions and disparate experiences. This view tracks John Stewart Mill's marketplace of ideas. No individual need understand the various opinions and/or experiences, nor need the group, but the exposure leads to truth by an invisible hand process: "quite incommensurable ideas may yet have dialectical effect on one another, so that something better emerges in the discussion, even though the 'adjustment' between the various views has not been made by the deliberate synthetic activity of any 'single mind.'"[55] A large and diverse legislative body whose decisions follow deliberation issues epistemically superior decisions compared to the output of a single mind, or a smaller group with less diversity.

The wisdom of the multitude thesis does not deny that some individuals may possess knowledge and expertise that surpasses any other individual's knowledge and expertise within a group. It denies that any one individual holds a monopoly over "truth" or "right" concerning public

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[50] Waldron, *supra* note 42, at 577.

[51] *See* Waldron, *supra* note 25, at 343–45.

[52] *Id.*

[53] *See* WALDRON, *supra* note 24, at 137.

[54] *Id.* at 137–38.

[55] *Id.* at 138.

policy.[56] That we disagree over truth, morality, and justice, and sometimes even fact, respecting public policy, only supplies partial support for the doctrine. The doctrine's strength lies in its reliance on as many perspectives as possible to move toward "truth" or "right" with respect to public policy issues that affect a wide range of persons, all of whom differ in one respect or another as to opinion, belief, interests, ethnicity, race, gender, sexual orientation, socioeconomic status, geographical location, et cetera.

2. Representative Democracy Respects Millions

Waldron favors representative democracy over direct democracy. Rousseau held that "[s]overeignty cannot be represented" for what he considered the obvious reason that one cannot represent the individual will of another.[57] He equated sovereign will with self-government—making law for oneself. Only an individual can bind herself.[58] On Rosseau's account, equal participation only takes place in a direct democracy or through direct democratic procedures.[59] Waldron rejects Rousseau's view with respect to legislation. Instead, Waldron argues that legislation "is a function of which representation, rather than direct participatory choice, is the better democratic alternative."[60] Representatives stand for their constituent base in a way that requires an abstraction from each individual's particular interests and opinions to a general view cognized by the generality of law.[61]

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[56] *Cf.* Richard J. Arneson, *The Supposed Right to a Democratic Say*, *in* CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 198, 206–07 (Thomas Christiano & John Christiano eds., Wiley-Blackwell 2009). Arneson argues against the idea that a right to participate is an intrinsic good. Many citizens, in his view, lack the knowledge, competency, information, and reasonableness necessary to reach sound public policy in the face of two types of disagreement: (1) disagreement where "competent judges would not disagree," and (2) "disagreement among people where reasonable, well-informed, competent judges would disagree, because some reasonable, well-informed, competent judges are here making a demonstrable mistake." *Id.* at 206. Nevertheless, he argues on instrumentalist grounds against the idea that moral experts ought to rule, because it is empirically and practically impossible to create a reliable mechanism to select moral experts, and rule by moral experts poses the risk of "alienation from public life." *Id.* at 207.

[57] Rousseau, *supra* note 31, at 143–44.

[58] *Id.* at 143; *see also* Waldron, *supra* note 25, at 348–49.

[59] Waldron, *supra* note 25, at 345–46.

[60] *Id.* at 346.

[61] *See id.* at 348–50; *see also* Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1560–66 (1996) (discussing the Kantian requirement that persons living side by side enter civil society to avoid the violence that ensues in a State of Nature situation where every person strives to prevail in her individual judgment, which conflicts with others, and where civil society offers leg-

Representatives stand for their constituents in many ways other than simply geographically. A representative "stands for [her constituents] jurisdictionally, in a federal system; and she stands for them ideologically, in systems of party representation."[62] Parties under a representative system are better equipped to compress diverse concerns and opinions of constituents and to channel them into a deliberative process in a coherent form than would be possible in a direct democracy, where every single contrasting opinion competes for time and expression.

Rousseauian sympathizers may claim that society loses something salient in democracy when it substitutes representation for individual sovereignty, since the "individual is the best judge of his or her own interest."[63] But this is not so. Rather, society gains something salient in law in a democratic system: the people direct their attention appropriately to common interests, rather than particular persons.[64]

Representative democracy also preserves the epistemically superior process discussed above. Waldron argues, "if the problem affects millions, then a respectful decision procedure requires those millions to listen to one another and to settle on a common policy in a way that takes everyone's opinion into account."[65] Under representative schemes, deliberation necessary to frame legislation—"extensive thinking, speaking and listening, . . . the successive rounds of proposals, reply, amendment and reconsideration"—becomes not only manageable, but also possible.[66] A gathering of the people as a whole "can barely contrive the space, let alone the time, for genuine engagement. The masses will melt away unless a decision is made simply and quickly. Yet simplicity and haste are the obverse of responsible legislative decision-making . . . ."[67]

B. Legislation and the Importance of Provenance

Legislation is the output of an epistemically superior decision-making body—a legislature. By virtue of its enactment, legislation purports to be authoritative. The authority attributable to legislation tracks Joseph Raz's service conception of authority, but with a democratic twist. Waldron employs Raz's conception to introduce three positivist tenets to his democratic jurisprudence: (1) the source thesis; (2) the rule of recognition; and (3) the separability thesis.

Law's essence lies in its authoritative nature, according to Joseph Raz. We establish legitimate authority when

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islative processes to facilitate a universalized perspective with mutual assurance of compliance to settle otherwise intractable disputes).

[62] Waldron, *supra* note 25, at 348.

[63] OBER, *supra* note 21, at 36 (citing ROBERT DAHL, DEMOCRACY AND ITS CRITICS (Yale Univ. Press 1989)).

[64] Waldron, *supra* note 25, at 349.

[65] WALDRON, *supra* note 24, at 110.

[66] Waldron, *supra* note 25, at 352.

[67] *Id.*

> the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly.[68]

When one turns to an attorney, for example, to determine whether an action she contemplates would constitute a breach of a fiduciary duty, she does so because she recognizes that she would fare better by conforming to her attorney's advice than her own reasons, since her attorney is an expert in the particular field. She would defeat her purpose of securing an attorney's advice if she had to repair to her own reasons for action—for example if she decides not to perform because she considers performance onerous, unprofitable, or unjust—to decide whether her conduct would constitute a breach. The criteria employed to identify something as law must not include "the merits of the issue which the law purports to address," if law is to "be seen as *an alternative* to trying to figure out for oneself what is to be done about the matter that the law addresses."[69]

Waldron argues that we cannot negatively state the criteria for identifying law, so that tossing a coin serves as authoritative in lieu of one's own reason.[70] One may not have to repair to a practical problem's merits to figure out what to do if she resolves to obey a coin flip. Likewise with majority vote and dictatorship. That is, one's rule of authority may be to defer at all times to a majority or dictator decision. But it is not sufficient that the criteria simply exclude substance; it must include some way to identify law as a better alternative to follow than one's own judgment.[71]

1. Democratic Jurisprudence and the Source Thesis

The source thesis, as envisaged by Raz, enables one to identify law and its content by reference to its provenance. Such identification merely requires one to point to facts about, for example, a rule's promulgation

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[68] *See* JOSEPH RAZ, *Authority, Law, and Morality, in* ETHICS IN THE PUBLIC DOMAIN 194, 198 (Oxford Univ. Press 1994). *But see* Thomas Christiano, *The Authority of Democracy*, 11.2 J. POL. PHIL. 1, 12–15 (2003). Christiano argues that the normal justification thesis does not take seriously disagreement about political obligations insofar as these differ amongst and between political communities. The normal justification thesis, Christiano contends, does not require that the lawmaking body consider the views of those to whom the law applies. From a democratic view, this is unjustifiable. *Id.* Waldron's democratic gloss on the service conception of law rebuts Christiano's argument, whether Waldron intended this or not.

[69] WALDRON, *supra* note 24, at 96; *see also* Waldron, *supra* note 16, at 686–87.

[70] WALDRON, *supra* note 24, at 96.

[71] *Id.*

(was it promulgated in the right way?) and/or the body that enacted the rule (was it enacted by the right person or people?), or something like H. L. A. Hart's rule of recognition (acceptance by those with a "life in the law"—public officials, legal scholars and lawyers—of rules to make, change, and communicate law).[72]

Waldron annexes the source thesis to his democratic jurisprudence. A democratic proponent considers a rule's provenance most important. "He believes that in principle *everyone* who stands to be governed by a given norm if it is adopted has the right to participate on equal terms in determining whether it should be adopted."[73] Democracy is only one theory of political legitimacy, but it is the one theory that a democratic jurisprudence espouses. Waldron's democratic jurisprudence reduces political legitimacy to a simple formula: legitimacy is tied to the political system's ability to keep the promises it makes.[74] A democratic society

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[72] *See, e.g.*, Liam Murphy, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW (Cambridge Univ. Press 2014); RAZ, *supra* note 68, at 214–19; Waldron, *supra* note 25, at 347–48.

[73] Waldron, *supra* note 16, at 688.

[74] The philosophical question regarding political legitimacy—primarily, what makes a system of governance legitimate?—is not resolved by positing that a democratic state's legitimacy is tied to its ability to keep its promise that all members equally participate in choosing the laws that govern them. Antecedent questions remain. Did the democratic system form in a rights respecting manner, i.e., without violating each person's right to be free from coercion? Liberal traditions hold that a State's monopolistic claim on the use of force within its jurisdiction requires justification since the use of force is prima facie wrong. *See, e.g.*, John Locke, *Second Treatise of Government*, *in* Two Treatises of Government, §§ 4–6 (every person possesses the liberty to pursue her own ends unimpeded by others); Robert Nozick, ANARCHY, STATE, AND UTOPIA 6–9, 10–22 (Basic Books 1974). Nozick argues that people can move from a Lockean state of nature to a minimal state by an invisible hand process, whereby no one intends to create a state, but one necessarily results. This process does not violate anyone's rights because it begins, for Nozick, by a series of contracts entered into by each person's voluntary consent for protection against rights violations by others. *Cf.* A. John Simmons, *Justification and Legitimacy*, 109 ETHICS 739, 743–45 (July 1999) (arguing that Nozick's argument fails to account for persons who prefer to rely on themselves and who are capable of respecting other people's rights and protecting their own rights without assistance from a State or third-parties).

On the other hand, is it necessary that the State arise by the full consent of all? *See* G.E.M. Anscombe, *On the Source of the Authority of the State*, 20 Ratio 1 (1978). Anscombe holds, invoking Hobbes, that people need government (laws backed by force) to protect the rights they believe they have; if a right exists it follows that a government exists to protect and enforce that right. *See also* David Hume, *Of the Original Contract*, *in* POLITICAL WRITINGS 164–81(Stuart D. Warner & Donald W. Livingston eds., Hackett Publishing Co., Inc. 1994) (arguing against the natural rights argument in support of legitimate government, positing that experience and observation teach us that society (an arti-

promises equal participation by all to choose the laws that govern them. What constitutes or counts as law in a democratic jurisprudence, then, derives in the first instance from an institution imbued with a democratic ethos of equal participation.

Still, this does not necessarily distinguish the coin flip from majority rule with respect to authority. That is, it does not provide reasons to accept majority rule as an alternative to one's own reasons for action. If one is to substitute her reasons for action, which include her beliefs and opinions as to the right, the just, the good, et cetera, something affirmative must be understood or accepted about the source as somehow worthy of deference.

One answer we derive from Part 1.A is that legislative bodies are in an epistemically superior position to get at the right, better, or best answer to a public policy issue or dispute. Even in the face of intractable disagreement, most people would not accept that any decision would suffice. People may prefer to flip a coin if they must choose between no decision and bad consequences. But even in this worst-case scenario, when the choice is between any answer and the best possible answer, most people prefer the best answer.

On Raz's account of authority, an individual need not defer to reasons for action other than her own if she holds her own reasons for action superior or more trustworthy than those offered by any other person or institution. From a democratic standpoint, however, it does not matter whether one holds herself out as, or believes she is, or is even considered, an expert in a field—pharmaceuticals, for example.[75] Rather, no matter how strongly she disagrees with the merits of the law's content, she must respect the law as an expression of her community, which provided her an equal opportunity to shape the law. She would, after all, expect others to comply with a decision with which she agrees. And she should recognize that a large legislative body offers the best resolution to a matter over which disagreement persists in the face of a felt need for concerted action. She might know how best to avoid certain pharmaceutical dangers, but she cannot solely account for many other variables and considerations involved in safety measures that impact the whole community, including costs (needs of low-income persons), and moral issues pertaining to controversial drugs and their impact on society.

Another answer to our inquiry—what affirmative reasons exist to accept majority rule as an alternative to one's own reasons for action?—speaks to the circumstances of politics and the achievement that legislation stands for under these circumstances. For Waldron, the circumstanc-

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ficial convention) requires conventional government for stability and maintenance).

[75] *See* Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139, 146–48 (1984). Raz argues that if a person is the world's greatest living expert on pharmaceuticals, the law cannot serve as an authority over that person with respect to pharmaceutical safety.

es of politics transform majority rule into something worthy of respect in a way that flipping a coin or dictatorial command can never approach. The operative passage states:

> [T]he 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*. . . .
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> . . . Disagreement would not matter if there did not need to be a concerted course of action; and the need for a common course of action would not give rise to politics as we know it if there was not at least the potential for disagreement about what the concerted course of action should be.[76]

To act in concert requires coordination. If each person shares equal voting power and equal right to decide (equal claims to sovereignty), we lose the Hobbesian solution to an ordinary prisoner's dilemma, which is to set up a sovereign to impose sanctions that make noncompliance, noncooperation, or noncoordination too costly for any would-be defectors.[77]

Moreover, the conflict that arises within a majority rule scheme cannot be resolved as a simple coordination problem, where law can set the capital gains tax at thirty-five percent instead of fifteen percent, for example. Society must first decide in the face of disagreement about the desirable or favorable coordinative outcome.[78] A majority may think generating tax revenue from capital gains important to societal infrastructure. Some may think capital gains should be taxed higher than labor, or that a low capital gains tax for all does not benefit the less well-off; still others that a high capital gains tax discourages investment, which hurts overall infrastructure. In the face of these seemingly intractable disagreements, majority rule makes traction by reducing disagreement to a decision-making procedure that treats each person's opinion, belief, or preference fairly and equally, which, Waldron argues, is an achievement worthy of our respect. This achievement is embodied in representatively enacted legislation.

Majority rule in a legislative setting facilitates deliberation that aims to give expression to the interest and opinion of all those who will be governed by the law, even under circumstances where the felt need for concerted action is urgent. Legislation respects millions.[79] No person's position is treated as ignorant, idiosyncratic, or unworthy of considera-

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[76] WALDRON, *supra* note 24, at 102–03.

[77] *Id.* at 104, n.45.

[78] WALDRON, *supra* note 24, at 103–04.

[79] *Id.* at 108–10.

tion and subsequently silenced.[80] Every person gets a vote with equal weight. When connected with the epistemic superiority thesis and inherent procedural fairness, this renders legislation—law imbued with a democratic ethos—worthy of respect as legitimate authority.

What democratically governed people call law must have a democratic provenance in a democratic jurisprudence. It must come from the right body in the right way. Our concern with legislation coming about the right way shifts our focus to the procedures used in the deliberative and voting processes to ensure political equality—that no group or individual is disadvantaged by the procedures such that his or her vote is diluted or uncounted.[81] Law is identified content-independent by reference to its democratic source, and "a legal system is democratic because of who produces the laws and the way they are produced."[82]

2. Democratic Jurisprudence and the Rule of Recognition

All persons in a society that adheres to a democratic jurisprudence can point to legislative outputs as derived from a source with legitimate authority. This is so because legislatures publicly hold themselves out as lawmaking institutions.[83] But even with legislative text setting forth the obligations and duties of those to whom the legislation is directed, the legislation's scope will remain underdefined due to Waldron's generality requirement[84] and also due, in part, to disagreement and compromise. Ambiguities arise as well, as statutes, "though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[85]

Hart aimed to resolve ambiguity and indeterminacy in law with his rule of recognition. The rule of recognition gives the source thesis force. Primary rules—duty-imposing rules that tell persons what they can and cannot do—govern prelegal societies, according to Hart.[86] Complex legal societies require secondary rules—power-conferring rules.[87] Secondary rules are rules that guide legal practitioners when they wish to

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[80] *Id.* at 111–14.

[81] *See* WALDRON, *supra* note 24, at 73–76 (focusing on diversity and rules of order in legislative proceedings); Waldron, *supra* note 16, at 690–91.

[82] Waldron, *supra* note 16, at 691.

[83] *See id.* at 693; Waldron, *supra* note 25, at 336. The importance of transparency will be explained below. *See infra* Part I.C.

[84] *See infra* Part I.D.

[85] THE FEDERALIST NO. 37, at 198 (James Madison) (George Stade ed., Barnes and Noble Classics 2006).

[86] H. L. A. HART, THE CONCEPT OF LAW 91–99 (Oxford Univ. Press, 2d ed. 1994) (1961).

[87] *Id.*

amend, alter, or supplement primary rules or the legal system.[88] The rule of adjudication tells members the process by which legal disputes may be resolved and by whom. The rule of change tells members the process and formalities by which laws may be made and by whom. Secondary rules, in other words, tell legal practitioners which rules are valid legal rules.

The rule of recognition stands atop a hierarchy of secondary legal rules.[89] Liam Murphy aptly describes the rule as the "ultimate criteria of legal validity."[90] Hart considers the rule a social fact that is neither valid nor invalid.[91] It is the rule of all rules internal to law.[92] Legal practitioners (those making, applying, practicing, or professing law), according to Hart, treat the rule of recognition as governing legal practice.[93] The rule of recognition serves to "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."[94] Only social facts identified by legal practitioners matter under Hart's rule of recognition.[95] These are facts that judges, attorneys, legislators, and legal scholars point to when they wish to adjudicate a matter, change a law, or supplement the legal system (i.e. the content that informs the other secondary rules).

The union of primary rules and secondary rules forges a legal system, according to Hart, but this union does not guarantee political equality by any means. Rather, "[b]y constituting an efficient and well-administered apparatus of coercion, secondary rules may put a powerful group in a position to subordinate the rest of society."[96] Waldron's democratic jurisprudence requires that all persons in society recognize the same sources of law to identify the content of law. If the rules employed to identify sources of law remain opaque to the public at large, then the law cannot belong to the people, as they will remain ignorant, confused, or mystified as to how law is made.[97] Secondary rules could facilitate public officials leading the people as sheep to the slaughterhouse: "Those who make and can recognize enacted law may use that capacity

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[88] *Id.* at 94.

[89] Murphy, *supra* note 72, at 26.

[90] *Id.* at 32.

[91] *Id.* at 26.

[92] *Id.*

[93] *Id.*

[94] HART, *supra* note 86, at 94.

[95] Murphy, *supra* note 72, at 26; *see also* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 124–27 (Oxford Univ. Press 1998) (calling for an "electorate of law," composed of lawyers and legal scholars casting votes to ensure judicial decisions align with principles of justice).

[96] Jeremy Waldron, *All We Like Sheep*, 12 CANADIAN J.L. & JURIS. 169, 175 (1999).

[97] *See* Waldron, *supra* note 16, at 696.

and that specialist knowledge for their own benefit, and to the detriment of the rest, who find they know less and less about the detailed basis on which their society is organized."[98]

Waldron's democratic contribution to the rule of recognition aspires to make all rules for recognizing sources of law publicly accessible to all persons. The people should be able to point to the body publicly known as a lawmaking institution to ascertain their legal obligations, rights, and duties. Waldron gives the example that the text of legislation provides an interpretive source of law. We could not refer to legislative intent, as no one, two, or three opinion(s) about the purpose, goals, or intent of a statute deserve favor over the opinion of any other legislator(s).[99] Waldron emphasizes that "only the text has been enacted according to the procedures whose job it is to safeguard political equality."[100] Beyond this, Waldron does not *explicitly* state what role, if any, courts play in his democratic jurisprudence with respect to identifying sources of law. Whatever role courts play, it is obvious that all persons must be able to identify the same sources of valid law or interpretive material, and that those sources must be imbued with a democratic ethos of equal participation.

3. Democratic Jurisprudence and the Separability Thesis

Reduced to its basics, the separability thesis simply reiterates what the previous section discussed with respect to the source thesis: law's validity does not depend on its substantive content, that is, whether it is considered just or moral.[101] Majority rule provides the salient remedy in a democratic jurisprudence to the problems that arise in the circumstances of politics. The driving circumstance is disagreement. "We need something to play the role of law among us whose contents can be identified without recourse to moral judgment because moral judgment divides us and drives us into conflict, whereas what we need most is unity, peace, and coordination."[102]

Waldron's democratic jurisprudence centers on the fact of disagreement as the primary basis for the separability thesis. No matter how wrong one may consider a statute's substantive content, it is exactly because the content is contentious in the first place that the need for concerted action necessitates a democratic decision-making procedure. The democratic procedure society elicits to resolve these disputes yields winners and losers, and many may consider the output unjust or wrong. But this works in all directions. So long as the statute derives from a democratic body in the right way, winners and losers alike must accept the

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[98] Waldron, *supra* note 96, at 181.

[99] *See* WALDRON, *supra* note 24, at 144.

[100] Waldron, *supra* note 16, at 691.

[101] *Id.* at 697.

[102] *Id.* at 698.

outcome, recognizing that the democratic process remains open to change in the right way.[103]

C. Law's Public Character

The public character of law relates to Waldron's generality requirement. Part I.A.2 discussed the conception of law under a representative system as focused on what constituents have in common. Laws serve as norms (i) "that purport to stand in the name of the whole society, and (ii) as norms that address matters of concern to the society as such, not just matters of personal or sectional concern to the individuals who happen to be involved in formulating them."[104] These two public characters of law stand for the proposition that, when we say law must come from the right source (democratic) in the right way (equal participation), we must note that a law's validity depends also on it being oriented to promote a conception of the public good.[105]

This public character of law does not violate the separability thesis. One need not repair to her own public good conception to ascertain a law's content, nor need she repair to her own sense of justice and morality to ascertain whether what purports to be law *is* in fact valid law. Waldron does not claim that law must promote *the* public good to constitute valid law, but that law must "*purport*[] to promote the public good."[106] We are concerned with political legitimacy when we take up the question whether we can have a democratic jurisprudence. In this respect, "the state must be understood as an entity permeated by an orientation or at least a purported orientation to the public good."[107] Law serves to reconcile our disagreements. The legislative process and its output serve as our remedy, but law does not do away with disagreement.

Laws that flow from a democratic body, a legislature for example, must evidently "represent public solutions to public problems, public ways of addressing public issues."[108] Thus, a democratic society's concern is not with whether what purports to be law promotes one's personal conception of the public good. A democratic society is only concerned with how its legal institutions represent law. A directive aimed to benefit a particular party or group, excluding all others, would not constitute law in a democratic society unless the directive purported to stand as the community's will, to the community's benefit, and its decision-making

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[103] *See id.* at 697–99.

[104] *See* Waldron, *supra* note 16, at 700.

[105] *See* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 31 (2008).

[106] Waldron, *supra* note 16, at 702 (emphasis added).

[107] *Id.* at 703.

[108] *Id.*

procedure included all members. What constitutes law must be oriented to a conception of the public good.[109]

Publicness also requires transparency, which ties into the source thesis and rule of recognition and their focus on democratic provenance. Legislative bodies publicly hold themselves out as lawmaking institutions, or, more appropriately perhaps, as "institution[s] *publicly dedicated to making and changing law*."[110] If people do not know which institution to turn to in order to change or amend the law, then equal participation can be thwarted in the legal system.[111] Moreover, this transparency requirement speaks to accountability, which also implicates equality of participation, for individuals must know whom to hold accountable to properly and effectively employ their votes and possibly effect change.[112]

A democratic legal system requires for its legitimacy that it orient laws to the public good.[113] For law to guide each person's conduct it must be publicly promulgated and publicly known.[114] People must, in turn, know where to look to ascertain what law requires of them, so it is incumbent upon the institutions that make law to make that fact (that the institution is a lawmaking institution) publicly and unequivocally known.

D. Law's Generality

Waldron ties his generality requirement to nonprocedural Rule of Law elements—publicity (which speaks to transparency and clarity),[115] predictability,[116] and systematicity.[117] Particular directives, like court orders, are not ruled out by the requirement that all laws consist of norms general in scope and applicability. This is so for two reasons. First, Raz argues that particular orders "should be subject to general norms and,

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[109] *See* Waldron, *supra* note 105, at 31–32 (positing publicness as part of the essence of a legal system, and therefore a requirement of the Rule of Law).

[110] Waldron, *supra* note 25, at 336 (emphasis added).

[111] Thomas Christiano has a similar, though not identical, view of publicity, which he calls, "weak publicity." "The weak notion of publicity . . . requires only that each person can see that he or she is being treated justly given a reasonable effort on his part." Christiano, *supra* note 68, at 5. If law is publicly promulgated by an institution publicly known for this purpose, we can satisfy the weak publicity requirement with equality of participation. *Id.*

[112] *See* Waldron, *supra* note 16, at 688.

[113] *See* Waldron, *supra* note 105, at 24.

[114] *See id.* at 7.

[115] *See* Waldron, *supra* note 105, at 7; Waldron, *supra* note 25, at 339.

[116] *See* Waldron, *supra* note 16, at 706.

[117] *See* Waldron, *supra* note 105, at 32–36; Waldron, *supra* note 61, at 1557–58.

where possible, derived in a way that has a general norm as its major premise."[118]

The second reason stems from Waldron's democratic gloss on generality and the law. Representatives stand for their constituent base in a way that requires an abstraction from each individual's particular interests and opinions to a general view cognized by law's generality.[119] And valid laws are those oriented by the lawmaking institution to the public good. A democratic jurisprudence, then, requires that particular orders issue under the same general auspices, always oriented to the public good. It remains to be argued whether courts are capable of orienting judgments in such a way.

To adopt a democratic jurisprudence is to adopt a firm commitment to equality of political participation. All persons governed by a law should have a say in its making. If the same laws govern all persons, including the representatives promulgating the laws in their representative capacity, then generality of law may act as a prophylactic against tyranny. It is important, in this regard, that our representatives "have lives which are just like" ours, insofar as their condition is not so far removed from ours that they effectively remove themselves from harsh effects imposed on all persons when the law is enforced.[120]

A democratic society is a single-status community, notwithstanding different legal status accorded minors, noncitizen residents, and prisoners.[121] No person or group carries superior legal or political status than any other. Every person carries equal political authority and participates as an equal in lawmaking by voting for her representative or voting as a representative.

E. Democratic Jurisprudence Spelled Out

Waldron's democratic jurisprudence aims to align democratic provenance, publicness, and generality to forge a democratic conception of valid law. Directives that flow from a diverse body imbued with a democratic ethos of equal participation that publicly and unequivocally holds itself out as dedicated to making, changing, and amending laws oriented to the public good count as law. Legislative bodies obviously play the primary lawmaking role with respect to their output.

But the question remains: what role do courts and judges play in Waldron's democratic jurisprudence? Courts have traditionally played the role of ascertaining law in cases where the statute on point, or the claim of right asserted by a party pursuant to law is unclear, uncertain, or ambiguous. If this is so, then it matters whether we view courts as find-

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[118] Waldron, *supra* note 16, at 705 (citing JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 212 (1979)).

[119] *See supra* Part I.A.2.

[120] Waldron, *supra* note 16, at 706–07.

[121] *Id.* at 707–08.

ing or making law in these cases, because the primary question in a democratic jurisprudence concerning the legitimacy of a norm that aspires to the status of law is: who decides?

II. DEMOCRATIC JURISPRUDENCE AND THE RULE OF LAW

Thus far this Article has considered Waldron's democratic jurisprudence as a particular jurisprudence—the study of how law presents itself in a particular legal system. Waldron utilizes the three positivism tenants we considered to introduce what we might call the democratic conception of authority: law presented by a democratic body as *an alternative* to trying to figure out for oneself what is to be done about a matter over which a felt need for concerted action in the face of (intractable) disagreement gave rise to the need for a resolution that considered the choice, position, interest, and opinion of all persons governed by the law.

By introducing Rule of Law principles to the Concept of Law, as occurs in a democratic jurisprudence, Waldron parts ways with "casual positivism"—positivism that simply accepts a legal system as such on the basis of some authoritative figure(s) calling it a legal system.[122] But Waldron's Rule of Law conception does not diverge from his positivist account of democratic provenance. Waldron's democratic jurisprudence is a specific jurisprudence: the study of law as it presents itself in a particular system of governance. Waldron's Rule of Law conception relates to general jurisprudence: the study of law as it presents itself in any legal system.

Waldron claims that law is not a purely descriptive concept but interpretive insofar as we understand the Rule of Law and the Concept of Law as a package.[123] This claim appears to undermine his reliance on positivist tenets to support his democratic jurisprudence. In a somewhat cryptic footnote, Waldron seems to suggest that he accepts Ronald Dworkin's moral reading approach to law: "I do not dissent from Ronald Dworkin's view that law is an interpretive concept."[124] The contrast between Dworkin's moral reading and a positivist's account of law is stark. On Dworkin's account judges are charged to interpret a community's legal practice to ascertain what the law is. Judges are not limited in their interpretation to simply precedent and text, but must consider the political community's adopted principles, reading the practice in its best light.[125] Such an account of law directly opposes the democratic conception of authority, wherein legislation settles moral disputes.

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[122] Waldron, *supra* note 105, at 13–19.

[123] *See id.* at 10.

[124] *Id.* at 47.

[125] *See* RONALD DWORKIN, LAW'S EMPIRE 224–75 (Harvard Univ. Press 1986) [hereinafter LAW'S EMPIRE]; RONALD DWORKIN, JUSTICE IN ROBES 9–21 (Harvard Univ. Press 2006) [hereinafter JUSTICE IN ROBES].

Joseph Raz considered the Rule of Law instrumentally, as a tool used to "minimize the danger created by the law itself."[126] The need for clarity, predictability, coherence and the like arise only because law exists. Law, for Raz, is like a knife: it can be used for good or evil; it can dull if not sharpened. The Rule of Law provides the tools to sharpen law and wield law to beneficial ends. But positivists do not consider Rule of Law principles necessary to make something law.

Waldron rejects Raz's positivist view, yet Waldron does not claim to reject positivism writ large. He makes clear that he has "more faith in positivist jurisprudence than [Ronald] Dworkin does."[127] Waldron merely annexes Rule of Law values to his understanding of the Concept of Law.

Waldron argues that a people's description of law (what makes law) is inextricably linked to their evaluation of law (what makes good law or what makes law good). His claim refutes positivists' contrary claim, that is, that legal description and evaluation are separate inquiries. When people characterize a legislative act or a judicial decision as an instance of either lawmaking or application of law, they impose an evaluation on their description. "We look for certain patterns and features that matter to us when we are looking to characterize something as law."[128] The Rule of Law, contrary to Raz and according to Waldron, constitutes those values people seek when they characterize something as law or a legal system. Law does not create "a danger of arbitrary power" to which people enlist Rule of Law values to curb those dangers;[129] rather, the Rule of Law "is an ideal designed to correct dangers of abuse that arise in general when political power is exercised" to which law provides a remedy by delineating appropriate exercises of power.[130] The very Concept of Law limits what a society might call law and imposes aspirations toward improved governance. Disagreements over and criticism of what constitutes law and over whether a legal system suffers a deficiency in one or more Rule of Law requirements have improved governance as their objective.

Systematicity provides a strong basis for Waldron's claim that Rule of Law values inform the Concept of Law. Systematicity means that the legal system's rules—its legal norms—"present themselves as fitting or aspiring to fit together into a [coherent] system," one in which citizens are not confronted with "contradictory demands—for example, with rules that require and prohibit the same conduct at the same time and in the same circumstances."[131] Waldron associates this systematicity re-

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[126] Joseph Raz, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 224 (1979).

[127] Waldron, *supra* note 16, at 683.

[128] Waldron, *supra* note 105, at 12.

[129] *Id.* at 11–12.

[130] *Id.* at 11.

[131] *Id.* at 33–34.

quirement with "Rule of Law requirements of consistency *or* integrity," where integrity is understood in Dworkin's sense that treats law as an interpretive concept.[132]

Waldron reiterates his claim that courts "make law" by subterfuge, whereas legislatures make law explicitly "through a process publicly dedicated to that task."[133] Nevertheless, he argues systematicity helps explain how it is that judges can present judicial directives as "the product of reasoning rather than will."[134] Legal systems, as Dworkin claims, consist of more than just enacted norms. Legal principles underlie legislative enactments, judicial applications of law, and other formal holdings, and courts utilize these principles as well as logical tools—such as analogy, disanalogy, and legal text (legislative, judicial, executive)—to project "the existing logic of the law into an area of uncertainty or controversy."[135] At this point it appears Waldron has certainly adopted Dworkin's interpretive Concept of Law and denounced positivism.

Waldron's claim that he does not dissent from Dworkin's view that law is an interpretive concept, however, is not the same as concurring in Dworkin's full opinion. Rather, Waldron simply concurs in Dworkin's judgment that "disagreements about what constitutes law in [cases where what the law *is* is unclear] and about what the Rule of Law requires amount to the same disagreement."[136] Law is an interpretive concept in the following sense: In general jurisprudence, we must account for disagreement between competing conceptions of what law is, and these competing conceptions make corresponding claims to what the Rule of Law requires. A claim that common law is no law corresponds to a claim that judge-made law violates the Rule of Law. Likewise, a claim that common law *is* law corresponds to a claim that judge made law does not violate the Rule of Law.[137]

Nothing in Waldron's Rule of Law article compels one to conclude he has adopted Dworkin's moral reading. Waldron's position is that law is evaluative in total, since any reference to law imposes our normative understanding of what law entails—an exercise of power, tempered by Rule of Law values. Rule of Law values inform our understanding of the concept and content of law, which inform how we conceive valid exercises of power. We might adopt a narrow or broad conception of law (broad or narrow systematicity), and depending on which one we adopt, judicial interpretation will take a more or less Dworkinian moral reading character or a more or less positivist character. A broad systematicity would consider text, precedent, principles, and any other interpretive tools that inform a judge's understanding of the legal practice as required

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[132] *Id.* at 44 (emphasis added).
[133] *Id.* at 29.
[134] *Id.* at 35.
[135] *Id.*
[136] *Id.* at 53 (emphasis added).
[137] *Id.* at 52.

by the Rule of Law because law is what a moral reading yields. A narrow systematicity would consider text only, or text plus precedent perhaps, as required by the Rule of Law because law is what an authoritative source has publicly and officially enacted ex ante.[138]

Waldron constructs his democratic jurisprudence as a particular jurisprudence. This task stands in contrast to general jurisprudence—the study of law as it presents itself in any legal system. Waldron's general jurisprudence understanding of law and the Rule of Law does nothing to detract from his democratic jurisprudence. A democratic jurisprudence is committed to democratic norms and concerned with how law presents itself in a democratic system of governance. No inconsistencies arise between Waldron's *Concept and the Rule of Law* article and his *Democratic Jurisprudence* article, which were both published around the same time, and both of which condemn judicial lawmaking by subterfuge and champion legislation.[139]

Thus, Waldron's rule of law does not diverge as greatly as first appeared from a positivist account of law. Raz argues that conflating law to the Rule of Law confuses the Rule of Law for the rule of good law, which can essentially inhibit our ability to morally evaluate laws in place.[140] His point is that we cannot accept that only good laws are laws without creating moral hazards, such as blind adherence to law or passive acceptance of authority. But this problem does not arise within a democratic jurisprudence. Our inquiry into what law *is* takes place within a particular political framework: a democratic legal system. We establish criteria to help us identify what the law *is*—provenance being most important.

Laws that purport to promote the public good may certainly be bad for some, and others may disagree with the public good promoted by the law. They do not accept it because it is in fact good (they might even consider it bad for them, like a higher tax), but because it flowed from a democratic body that considered the issue from many perspectives, including a perspective held by one who disagrees with its import. One who truly disagrees can always disobey, but whether one has a moral duty generally to obey the law is a separate inquiry.[141]

III. THE ROLE OF COURTS AND JUDGES IN WALDRON'S DEMOCRATIC JURISPRUDENCE

Waldron does not set out a role for courts or judges in his democratic jurisprudence. He does, however, offer criticisms against judicial practices that may serve to inform our inquiry. Waldron argues against

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[138] *Id.* at 52–53.

[139] Waldron, *supra* note 105; Waldron, *supra* note 16.

[140] *See* Raz, *supra* note 126, at 227.

[141] Raz persuasively argues against a general moral duty to obey law. *See generally* RAZ, *supra* note 68.

"strong judicial review"—a practice whereby the judiciary reviews legislation with an option to decline to apply it.[142] He also criticizes judge-made law for its lack of transparency and democratic legitimacy. These criticisms provide support for the notion that Waldron envisions a limited role for traditional judges in his democratic jurisprudence.

With respect to courts, however, Waldron considers them necessary to any valid legal system.[143] When we pair these points with his democratic jurisprudence, we must conclude that courts are necessary, but judges as we have traditionally conceived of them cannot serve a primary role in adjudication. This role belongs to a democratic, representative decision-making body that is large enough to facilitate diversity and render a more accurate decision.[144]

A. Waldron and Judicial Review

Waldron's position on judicial review is both well known and not without controversy. This section does not rehash the controversy, but rather aims to place Waldron's judicial review position within his democratic jurisprudence framework.

Strong judicial review of legislation pits the general will against the will of unelected (at least in federal cases) and unaccountable (save for the extremely rare impeachment process) judges. This system allows losers in the democratic process to undermine hard fought compromises in the face of intractable disagreement by asserting rights over which equal disagreement exists after the legislature in its representative capacity resolved the issue by equal vote. Furthermore, judicial review allows an epistemically inferior institution to override an epistemically superior body's decision. We need not conclude, however, that judicial review of legislation is outright undemocratic. Other legislation review procedures closely hewn to democratic norms may replace strong judicial review,

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[142] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1354 (2006).

[143] *See* Waldron, *supra* note 105, at 55.

[144] For want of space, this Article will not take up in detail the question of whether judges are in fact representatives within our meaning of representatives (democratically accountable persons selected by the people to enact norms to settle disagreement). No one truly considers judges to be representatives of the people; rather, judges are considered representatives of higher values, see ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 24 (Yale Univ. Press, 2d ed. 1986), and Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013, 1015 (1977), representatives of the law, see Erwin Chemerinski, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988), or as servants, rather than representatives, of the people, see Wells v. Edwards, 347 F. Supp. 453, *summarily aff'd*, 409 U.S. 1095 (1973) (affirming district court ruling that the principle of one-person, one-vote arose out of democratic concerns to "preserve truly representative government," which is not relevant to judiciary makeup).

such as weak judicial review,[145] or citizen-jury panels (including or excluding trained judges). We must conclude, however, that strong legislation review by traditional judges alone has no place in a democratic jurisprudence.

1. The Argument Against Strong Judicial Review

The case against strong judicial review's place within a democratic jurisprudence centers on the same premises that inform our focus on legislative authority. First, judicial review is politically illegitimate: "[B]y privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights."[146] Second, judicial review "does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights; on the contrary, it distracts them with side-issues about precedent, texts, and interpretation."[147]

With respect to the first argument, in a democratic jurisprudence, we resolve disagreement with respect to rights under the circumstances of politics. We do not disagree solely on factual matters; we disagree about justice and what it entails; we disagree about morality; and we disagree about rights. What is the scope of a given right? Should the assertion of some right outweigh societal goals? Are rights so fundamental that they should be recognized and deferred to at all costs? If so, which rights fall under this category? Is the "right to bear arms" so fundamental as to restrict the city of Chicago from enacting strict purchasing limits on guns, strict possession laws, or a strict automatic weapons ban, despite increasing gun violence and gun-related deaths in the city?[148] Is the right to freely exercise one's religion so fundamental as to insulate closely held corporations whose owners hold pro-life religious beliefs from adhering to a generally applicable law that requires employers to provide health insurance that includes access to contraceptives that potentially destroy an embryo?[149]

Democratic legitimacy requires that every person have an equal say in laws that purport to govern her. When our disagreement calls for a common decision, we must accept that every person possesses the right to participate. Waldron has gone so far as to claim that this right is "the right of rights."[150] But even this right is not immune to disagreement. People disagree about the correct procedure to decide issues. The very

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[145] *See infra* Part III.A.4.

[146] Waldron, *supra* note 142, at 1353.

[147] *Id.*

[148] *See* McDonald v. City of Chicago, 561 U.S. 742 (2011).

[149] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[150] WALDRON, *supra* note 24, at 232.

debate about judicial review reflects this fact. One question that is not up for debate, however, is whether we should have near universal adult suffrage.[151] Democratic legitimacy requires near universal adult suffrage.

People disagree about the "content of the right to democratic, political participation."[152] For example, disagreement exists over minimum voting ages—at what age is one considered an adult?—or whether felony convictions should disqualify one from voting for a period of time or permanently. Rights that many consider essential to democracy—free speech, free press, free assembly,[153] et cetera—meet with disagreement, especially respecting their scope. Such disagreement over the core of rights associated with or essential to democracy calls for resolution, and it does not seem obvious that majority decision by the legislature settles the controversy when the procedure's legitimacy is at issue, or when the challenged legislative act allegedly violates a right deemed essential to democracy.

An argument by Ronald Dworkin that aims to refute the objection to judicial review deserves attention here. Dworkin claims a background condition exists in a democratic system that decision-making processes treat each person with equal concern and respect.[154] Though Dworkin's conception of equal concern and respect has broad implications, we will restrict it here to the claim that democratic laws and procedures depend for their legitimacy on whether the decision-making body respects all community members' rights.[155] For Dworkin, we do not experience a loss to democracy by subjecting legislative decisions to judicial review when the issue at stake bears on democratic legitimacy.[156]

For example: A group of citizens challenge in court a recently enacted piece of legislation that prohibits protesting within 100 yards of any funeral for military service members. They claim the law violates their right to free speech—a right essential to democracy and, thereby, democratic legitimacy. Undoubtedly, other citizens disagree that protesting

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[151] *See* Waldron, *supra* note 142, at 1360.

[152] Richard Stacey, *Democratic Jurisprudence and Judicial Review: Waldron's Contribution to Political Positivism*, 30 OXFORD J. LEGAL STUD. 749, 766 (2010).

[153] *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 25 (Harvard Univ. Press 1996); Christiano, *supra* note 68, at 24; Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. POL. PHIL. 335, 342 (1998).

[154] *See* DWORKIN, *supra* note 153, at 25.

[155] Legitimate government for Dworkin depends on the system's attempt to treat people with equal concern for their fates, and respect for their "personal responsibility for their own lives." This requirement implicates economic distribution schemes. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 352 (Harvard Univ. Press 2011). Economic justice concerns exceed the scope of our present discussion.

[156] *See* DWORKIN, *supra* note 153, at 7; *see also* Waldron, *supra* note 153, at 337.

near funeral services is essential to democracy, and these same and other citizens may disagree that the right to free speech includes the right to protest near funerals.[157] Whether society experiences a loss to democracy by leaving the constitutional decision to unelected judges depends for Dworkin on whether those judges make the right decision.[158]

If the judge(s) decide(s) that the challenged statute violates a right essential to democracy, and if that decision is the right decision, then we experience no loss to democracy; rather, we gain in democratic legitimacy. If the decision is wrong, then we do experience a loss to democracy. Dworkin points out, however, that the same is true if a legislature gets the answer wrong, so the "possibility of error is symmetrical."[159] But symmetry in error does nothing to refute the asymmetrical nature of the probability of getting the answer right. Democratic systems favor legislatures deciding issues over which disagreement and a need for concerted action exists because legislatures are in the best epistemic position due to their size and diversity to get at the best answer, the "right" answer.

Nor is it just a matter of size and diversity that matters here in terms of getting the right or best answer in the face of disagreement. This invokes the second argument against judicial review. As Waldron points out, "the real issues at stake in good faith disagreement about rights get pushed to the margins."[160] The deliberative process in legislative debates differs dramatically in a legislative setting than a judicial setting insofar as "courts focus on what other courts have done, or what the language of the Bill of Rights is, whereas legislators—for all their vices—tend at least to go directly to the heart of the matter."[161] There is little reason to trust a handful of judges on a constitutionally important issue, concerned, as they are, with precedent, analogy, and interpretation, more than the judgment of the people themselves through their representatives, who focus their concern directly on the rights at issue and over which persistent and often intractable disagreement exists.

Waldron makes four key assumptions that inform his arguments against judicial review, but only two need concern us here: "a commitment on the part of most members of society and most of its officials to the idea of individual and minority rights; and . . . persisting, substantial, and good faith disagreement about rights."[162] Since he assumes a com-

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[157] *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

[158] *See* DWORKIN, *supra* note 153, at 32–33.

[159] *Id.*

[160] Waldron, *supra* note 142, at 1383.

[161] *Id.* at 1384.

[162] *Id.* at 1360. Waldron also assumes "(1) democratic institutions in reasonably good-working order, including a representative legislature elected on the basis of universal adult suffrage; [and] (2) a set of judicial institutions, again in reasonably good order, set up on a non-representative basis to hear individual lawsuits, settle disputes, and uphold the rule of law[.]" *Id.* at 360. This Article addresses the latter assumption in Part III.C.

mitment to rights, Waldron need not confront Dworkin's condition that people take one another's rights seriously. More important, this assumption must be made in any democratic system if we are to account for the possibility that judges and legislators are capable of respecting rights. Judges, like legislators and the people themselves, are all citizens of the same community; they are all subject to the same laws. If we are to assume that judges are somehow morally superior to the rest of society, then we should ask how this is so, if anything, to replicate it among the population. We must assume a general commitment to individual and minority rights among the population; otherwise, we would be hard-pressed to justify entrusting any individual or group of individuals with authority to decide whether essential rights are being or have been respected.

We lose something salient in democracy when we take the final decision from a rights-respecting population engaged in good faith disagreement and hand it to a few unelected judges: we undercut the people's right to decide. Even were the court to get the answer right, which is difficult to know in rights-related cases, the community loses its ability to participate in the decision on equal terms. All decisions that claim the force of law must flow from a body imbued with an ethos of equal participation in a democratic jurisprudence.

2. Tyranny of the Majority and Legislative Pathologies

John Hart Ely provides a powerful argument in favor of judicial review under circumstances he describes as democratic process failures. These are situations where, among others, majorities in power use the law to entrench themselves by "systematically disadvantaging some minority" without necessarily denying these minorities a right to vote.[163] An example might be racial gerrymandering or partisan gerrymandering.[164] The people in a democratic state must decide, must have a say in

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[163] JOHN HART ELY, DEMOCRACY AND DISTRUST 102–03 (1980).

[164] It is interesting to note that the Supreme Court interprets the 14th Amendment to prohibit racial gerrymandering, see Shaw v. Reno, 509 U.S. 630 (1993), but the Court has been less clear in cases of partisan gerrymandering, see Veith v. Jubelirer, 541 U.S. 267 (2004) (holding that no manageable standard exists to apply to claims of partisan gerrymandering) (plurality opinion), even though both have the same effect of voter dilution. The Court sought to end voter dilution by its one-person, one-vote rule in Reynolds v. Sims, 377 U.S. 533 (1964). For an interesting discussion on the incoherent nature of this distinction by the Court, see Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 116 (2000) (arguing that racial gerrymandering can promote effective majority rule by "bringing minority strength closer to what it would be under a system of proportional representation," whereas the sole purpose of partisan gerrymandering is to entrench a political party).

the choice of political procedures for decision-making and political institutions.[165]

Ely's concern translates to both a tyranny of the majority argument and a tyranny of the minority argument, where legislative pathologies give rise to self-entrenchment. Waldron does not deny that occasions may arise in which such tyranny occurs. But Waldron confines tyranny of the majority to situations where "topical minorities are aligned with decisional minorities."[166] These cases occur outside of our core cases, wherein people are committed to minority rights. For example, imagine a wholly single party state, where the party is composed heavily of white persons. The legislature reflects the party. It passes a law that prohibits African Americans from participating (voting) in the majority party's primary for the selection of its candidates for elected office.[167] African Americans are both the topic of the legislation and hold only a minority of decisional power (let's imagine they have at least one vote out of fifty in the legislature). Waldron concedes that his argument against judicial review fails in cases like these, where citizens or the representative body do not take individual and/or minority rights seriously. It does not follow, of course, that judicial review would be legitimate, because the judiciary may be infected by the same prejudices.[168]

Janos Kis has argued a defense of judicial review that mirrors Ely's and Dworkin's concerns.[169] Kis argues that electoral pathologies are a permanent condition of representative government. Legislators must worry about the next election. Some legislators may compromise their duty to their minority constituents to appease the majority to ensure the legislators' reelection, even when those legislators are committed to individual and minority rights. A society aware that these pathologies arise would do well to precommit itself to an epistemically superior procedure such as judicial review to prevent these pathologies that naturally arise out of "competitive politics from undermining justice and rights which lie at the foundation of democratic self-government."[170] The judiciary, Kis argues, is free from the pathologies that arise from competitive politics, and courts, unlike legislatures, remain open to individuals whose voices might otherwise fall below the legislative radar.[171] Courts, in other words, remain open to discrete and insular minorities.

Institutional pathologies within Kis's formulation become both a permanent condition of electoral politics and a justification for judicial review. It does not follow, however, that the answer to electoral patholo-

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[165] *See* Waldron, *supra* note 153, at 349.

[166] Waldron, *supra* note 142, at 1398.

[167] *See* Nixon v. Herndon, 273 U.S. 536 (1927).

[168] *See* Waldron, *supra* note 142, at 1404.

[169] Janos Kis, *Constitutional Precommitment Revisited*, 40 J. SOC. PHIL. 570 (2009).

[170] *Id.* at 589.

[171] *Id.*

gies is judicial review of legislation; the answer may lie elsewhere. For example, electoral pathologies of the sort with which Kis concerns himself might arise most dramatically in first-past-the-post and single district electoral institutions, which most often produce two-party systems. A different electoral scheme, such as proportional representation,[172] or some sort of cumulative voting scheme,[173] or a combination of the two, might better address minority rights while respecting the right of the people to decide than judicial review. Moreover, setting legislative term limits and longer terms might better address legislative pathologies.

Additionally, Kis argues that democratic self-government is not compromised by subjecting legislation to judicial review so long as a democratic process exists to overrule judicial decisions, like an amendment process.[174] This is another way of phrasing Dworkin's argument that nothing is lost in democracy by a practice of judicial review when rights essential to democracy are at issue. The difference is that Kis argues that legislatures are in an epistemically superior position to make correct judgments, compared to direct democracy schemes and compared to individuals,[175] but he does not argue that judges are in an epistemically superior position to make correct judgments compared to legislatures, except in cases where competitive politics cloud legislators' judgment. Similarly, Ely argues that judges are in a better position to objectively assess individual claims of process failures because appointed judges are removed from electoral pathologies.[176]

These claims are dubious for reasons already discussed. Courts focus on text, precedent, and analogy to interpret abstract principles in a Bill of Rights, whereas legislatures wrestle with a diversity of opinions, concerns, and interests, directly addressing principles and issues of morality over which intractable disagreement exists. And neither Kis's nor Ely's claims account for the judiciary being infected with similar prejudices or irrational passions of the majority, or to pathological loyalty to party platforms or to political elites.[177] After all, federal appellate judges might

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[172] For a discussion on how electoral laws shape representation, and how the strength of multi-seat districts in proportional representation schemes promote greater representation of often underrepresented groups, see DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS (Yale Univ. Press rev. ed. 1971).

[173] For a discussion on how cumulative voting schemes address problems of racial underrepresentation, see Richard H. Pildes, *Gimme Five: Non-Gerrymandering Racial Justice*, NEW REPUBLIC, Mar. 1, 1993, at 16–17.

[174] *See* Kis, *supra* note 169, at 589.

[175] *See id.* at 578–83.

[176] *See* ELY, *supra* note 163, at 103.

[177] Tocqueville famously wrote:

> Study and specialized knowledge of the law give a man a rank apart in society and make of lawyers a somewhat privileged intellectual class. The exercise of their profession daily reminds them of this superiority; they are the masters of a nec-

equally be subject to partisan pathologies as they seek appointment to a higher bench, pathologies that may play a permanent role in a judge's judgment.[178]

Judges, likewise, undoubtedly possess their own, partial conception of what democracy or political legitimacy requires. We might say an appointed judge who adopts originalism as her theory of adjudication is impartial in Ely's sense, perhaps, but we cannot say she is impartial as to Constitutional interpretation, or even party politics, especially when she adopts her theory of adjudication based on her political ideology. In fact, a minority party excluded from political processes by the majority today might fare better by the legislative restriction than by a restriction faithful to the original understanding of the Bill of Rights in 1791 or the Fourteenth Amendment in 1868.

Moreover, to claim that democratic self-government is not compromised by judicial review so long as the people rule their officials in the final analysis by way of amendment begs the question. Kis does not state what democratic process should exist to overrule a judicial decision by a legislative body.[179] By all accounts it could be by a majority vote. This would retain democratic self-government by vesting each representative with a single vote of equal weight. But it would also render the judicial review process superfluous and trivial. Perhaps judicial review is just a stalling mechanism to bring to light the concern of a minority group or individual. Nothing renders judicial review a necessary venue for this purpose, especially when we have a legislative process in good working order and/or a hardy press and civic organizations dedicated to bringing such issues to the fore. More likely than not, an amendment process will be onerous, requiring supermajority support. In such cases naysayer

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> essary and not widely understood science; they serve as arbiters between the citizens; and the habit of directing the blind passions of the litigants toward the objective gives them certain scorn for the judgment of the crowd. Add that they naturally form a body. It is not that they have come to an understanding among themselves and direct their combined energies toward one objective, but common studies and like methods link their intellects, as common interests may link their desires.

TOCQUEVILLE, *supra* note 4, at 264 (emphasis in original).

[178] *See* Bruce Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L. J. 1808, 1836 (2012) (arguing that empirical evidence exists to support the argument that judges in redistricting cases tend to favor the party that elected or appointed them); *see also* Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413, 417 (1995).

[179] *See* Kis, *supra* note 169, at 590 ("[D]epending on *how stringent the rules of amendment are*, representatives have a certain capacity to overrule a controversial judicial decision by passing a constitutional amendment.") (emphasis added).

votes count more than those in favor of overruling, with the result that some people rule their officials in the final analysis more so than others without adequate justification. It is no justification to say democratic self-government is not compromised because we need judicial review.[180]

3. Judges in Their Own Case?

A final argument against the objection to judicial review states, "allowing the majority to decide upon the conditions under which majority-decisions are to be accepted may be objectionable because it makes them judge in their own case."[181] This argument poses no problem for the pure democrat, because it yields a simple reply: "that is exactly what democracy is all about!" Perhaps the argument that one should not be a judge in her own case is convincing when she is a single plaintiff, deciding whether she is entitled to recover damages in a tort case, because this situation calls for resolution between two competing versions of an event under specific circumstances. We might consider such a procedure unjust that leaves the defendant without a say in the dispute. In the case where a law passes by majority vote, however, we utilize the procedure to resolve disagreement over rights, interests, and the like that affect the whole community and over which each member possesses an equal vote to participate. Under circumstances of disagreement and a felt need for concerted action, a community needs a "final decision and a final decision-procedure."[182] Better to give that decision to an epistemically superior institution.

We must trade fact for fiction to believe that handing the final decision to a judge or judges somehow shields the judge(s) from being judge in her/their own case in a democratic system that espouses the Rule of Law. Judges, as citizens, equally benefit from rights adjudicated in the public's favor.[183] A democratic society has very good reason to reject the notion that judges should have final authority over individual rights. When a majority vote yields a final decision on rights, a majority can undo a seemingly (or truly) unjust law by a majority of votes. When the Supreme Court of the United States yields a final decision on rights, only a supermajority may undo a seemingly (or truly) unjust law.

4. Democratic Alternatives to Strong Judicial Review

To return to Waldron's concession that cases may arise when some sort of legislation review may become necessary, due in large part to topical minorities aligning with decisional minorities, we might concede that cases may arise where pathologies of competitive politics compel extralegislative intervention. Even so, all this argument does is concede

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[180] *See* Waldron, *supra* note 142, at 1350.

[181] Waldron, *supra* note 153, at 349.

[182] *Id.* at 350.

[183] *See id.*

that we need not conclude that legislation review is outright undemocratic. As far as democratic legitimacy in a democratic jurisprudence is concerned, however, we must conclude that judicial review as a practice of judges alone is undemocratic and, therefore, illegitimate, because it takes the final decision away from the people as equal participants through their representatives.

There is no good reason to assume that judges have greater sympathy than legislators or the people themselves for individual and minority rights. It hardly seems a sufficient answer that education or some combination of education and other factors infuse a greater sympathy for minority rights in judges than in the general population, because this assumes an uneducated populous, something intolerable to democracy. If we assume that sympathy exists at all in society, then it must be because such support exists among ordinary people in the population from which even political elites are drawn. And if sympathy lies equally with ordinary people, then the legislature would be best "at protecting minority rights because electoral arrangements will provide a way of channeling popular support for minority rights into the legislature."[184]

Democratic alternatives to judicial review exist. Waldron's arguments against judicial review focus on "strong judicial review," like that practiced in the United States, whereby judges have the power to invalidate legislation.[185] Other legal institutions utilize "weak judicial review," which primarily serves to make a legislative body aware that a piece of legislation may not conform to individual rights, but the court cannot invalidate the legislation.[186] This process has the benefit of respecting democratic processes, while contributing to democratic dialogue to work toward a change in the right way—through the legislative body.

Other democratic alternatives to judicial review may be envisioned as well. A democratic society might institute citizen juries to review legislation that touches upon individual or minority rights before legislators vote on the bill. Such a procedure has the benefit of respecting democratic processes and imposing constraints on legislative pathologies by requiring legislators to tailor legislation to its intended audience—the people as a whole. Legislators may think twice before attempting to introduce measures that disadvantage minority groups, knowing that members of that group may have to approve the legislation. Other democratic alternatives may exist. A democratic jurisprudence firmly rejects strong judicial review and aims to work toward a democratic alternative.

Whether appointed or elected, the judiciary lacks the representative body we envision for a legitimate lawmaking institution. We consider numbers and diversity important. Without concerning ourselves with the number aspect directly, we may consider the diversity of a judicial body compared to a legislative body. Appointed judges very rarely come from

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[184] Waldron, *supra* note 142, at 1405.

[185] *Id.* at 1354.

[186] *Id.* at 1355.

the rank and file of ordinary citizens. These judges represent the political elite, often hailing from some well-respected law school. Additionally, all thirty-eight states that select judges by election require candidates to possess a law license and to have practiced law for some period of time.[187] The risk, of course, is that legally trained practitioners learn and utilize specific legal analytical methods, which after an extended period of time may cause tunnel vision when it comes to addressing novel legal issues or just legal issues in general. The judiciary so constituted removes itself from the diversity of thought, character, and personality of ordinary persons that signifies the epistemic success of a legislature as a lawmaking institution, geared toward addressing complex societal problems under conditions of disagreement.

Judicial review plays no role in a democratic jurisprudence. Traditional judges do not represent the people, nor hold themselves out to do so. The legislature is better equipped to address contentious issues over the scope or content of rights in society than is the judiciary. Law in a democratic jurisprudence must flow from a body imbued with a democratic ethos of equality of participation; however, judicial review favors a select few political elites to make the final decision on issues over which intractable disagreement and a felt need for concerted action exists. This is unacceptable when a procedure that facilitates equal participation of each citizen to have a say resolved the issue. Though cases may arise wherein tyranny of the majority appears likely, nothing within the arguments for or against judicial review requires judicial review by judges alone; at best, such cases may require a legislation review procedure, which may or may not involve courts.

B. The Role of Judges in a Democratic Jurisprudence—Finding or Making Law?

Waldron does not explicitly state what role courts play with respect to "filling gaps" in legislation, or fashioning common law rules in a democratic jurisprudence. Should a judge considering whether a mother has a right to recover for negligent infliction of emotional distress buckle down and interpret the community's legal practice to ascertain whether such a right is consistent with the practice? Or should the judge rule for the defendant automatically absent a statute on point or if a statute is ambiguous or vague?[188]

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[187] See *Judicial Selection in the States*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us (last visited Jan. 15, 2015), which outlines the requirements for judicial selection in every state in the United States. For example: Alabama (licensed 10 years); Alaska (retention elections, licensed 8 years); Arizona (retention elections, licensed 5 years); Arkansas (licensed 6 years); California (retention elections, licensed 10 years). *Id.*

[188] See DWORKIN, LAW'S EMPIRE, *supra* note 125, at 23–29 for Dworkin's description of the *McLoughlin* case.

The common law tradition would have us believe that judges find law. A custom exists that people within a community immanently know, much like Hart's primary rules. In one sense, we might say that custom or the law in a given place is always publicly accessible, insofar as everyone knows where to turn to refer to or ascertain his or her duties and/or rights. But complex societies must adopt secondary rules to adjust laws when circumstances change and to respond to conflict and disagreement regarding primary rules. Complex societies make it harder to justify the notion that any person can point to her own conception of "what we do around here" as valid law. We would be hard-pressed to justify privileging a single judge or handful of judges to find what everyone else already knows, as the common law tradition requires.

If, on the other hand, a community's political practice evolved to a complex scheme with distinct political principles (liberty, equality, etc.), public procedures, and written rules (whether statute or case law), we might justify privileging certain political actors to interpret the practice when complex issues arise.[189] But when disagreements arise over the interpretation and the sources utilized for this interpretation, it becomes more difficult to justify the idea that these political actors are simply finding law, rather than making law, even were one to subscribe to Ronald Dworkin's "right answer" thesis (a right answer exists to legal problems).[190] Even under the right answer thesis, no one is privileged with access to the right answer over another. Judges and plumbers alike may stumble across or methodologically divine the law on point.

When a judge "finds" law, however—and unlike when a plumber finds law—she lends an air of legitimacy to her "find," whether or not her "find" resembles anything close to ordinary folks' understanding or expectations. This inevitability stems from the opaque nature of common law or judge-made law. "Courts," as Waldron argues, "present themselves publicly and acquire their legitimacy among the public generally as though lawmaking by them were out of the question."[191] Courts present themselves as merely interpreting or applying law.[192] But we advance too simplistic and naïve a view of interpretation and application that presents a judicial decision as if it were always there or an inevitable flow of logic from a text without explicit pronouncement on the matter. If ordinary folks are led to believe that what courts do is interpret, or apply the law only, then the people will perceive judicial outputs as merely interpretations of already existing law instead of what those outputs really are—judge-made law.[193]

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[189] We might view this like Dworkin's view of a chain novel that binds legal practice into a story that all persons can get-at. *See* DWORKIN, LAW'S EMPIRE, *supra* note 125, at 238–40.

[190] *Id.* at 76–78.

[191] Waldron, *supra* note 16, at 693.

[192] The issue of applying law will be better addressed in Part III.C.

[193] Waldron, *supra* note 16, at 693.

Waldron's primary concern in fashioning a democratic rule of recognition lies in the common law's opacity. His democratic jurisprudence takes up Jeremy Bentham's project to "present[] law as something which could be recognized and identified by the people (and not just the officials) whose law it was."[194] For this reason, Waldron does not focus on common law or the doctrine of precedent in his democratic jurisprudence. Legislative enactments play the primary role precisely because the people can identify legislation as theirs in a real sense. They, after all, participate in selecting representatives and in holding those representatives accountable for the laws their representatives make that purport to resemble a common practice and/or promote common interests. Most importantly, the legislature is publicly dedicated to lawmaking; there is no law by subterfuge. The idea of judges "finding law" plays no role in a democratic jurisprudence, as if law were out there somewhere, disassociated from real-world conditions where disagreement necessitates and informs democratic practices.

Though Waldron may not explicitly state that judges play no lawmaking role in his democratic jurisprudence, he makes this fact evident in his work. He considers judge-made law

> deviant and undesirable—not only on account of the evaluative inadequacy of courts as sources of law, so far as democratic legitimacy is concerned, but also on account of the pervasive confusion and misapprehensions that are likely to be associated in the public mind with the idea that courts make law as well as apply it.[195]

All persons whom the law purports to govern must participate directly or through their representatives in determining the law's content.

Legislation aims to serve as a "single, determinant community position on [a] matter" over which moral disagreement exists.[196] It cannot serve this purpose if judges engage in lawmaking by reproducing the disagreement legislation purports to settle. "It is for the people or the legislators they have elected to make that sort of determination; it is not for the judges to take the determination of social principle and social value into their own hands."[197]

C. *The Rule of Law and Democratic Jurisprudence, Again—Role of Courts*

Let us return to our question whether a judge or judges should interpret the community's legal practice (its moral political history and at-

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[194] *Id.*

[195] *Id.* at 696–97; Waldron, *supra* note 25, at 336–37.

[196] Waldron, *supra* note 61, at 1540.

[197] WALDRON, *supra* note 24, at 168.

tendant principles and legal precedent)[198] to ascertain whether a plaintiff's claim to damages under a negligent infliction of emotion distress theory is consistent with the practice and, therefore, available. From our discussion so far the answer may seem simple: in a democratic jurisprudence, the answer is "no" when there is no statute on point or when the statute is ambiguous or vague. However, before we can settle on a definitive answer to the question—what role, if any, do courts and judges play in a democratic jurisprudence?—we must consider a complication that arises from Waldron's Rule of Law conception.[199] Waldron argues that courts are necessary components to any valid legal system, and "[n]o conception of law will be adequate if it fails to accord a central role to institutions like courts, and to their distinctive procedures and practices, such as legal argumentation."[200]

Courts are essential to any legal system, according to Waldron, because they reinforce the idea that "law is a mode of governing people that treats them with respect, as though they had a view of their own to present on the application of a given norm to their conduct or situation."[201] Citizens in a democratic society, undoubtedly, will not always agree on how general norms apply to their specific situation, circumstances, or actual conduct. Courts serve as public venues to air this disagreement, while providing an orderly procedure by which to submit relevant evidence "oriented to the norms whose application is in question."[202] This orientation invokes the Rule of Law requirement of general public norms as those norms are publicly acknowledged and oriented to the public good. Courts that are properly oriented issue particular commands that bear on the public good.

It is because people disagree on both the Concept of Law and the Rule of Law, both of which make particular demands that invoke one or another vision of proper exercise of political authority within society, that courts become necessary. People need a venue to air and resolve disagreements as to the law's interpretation and application. People need a venue also to air and resolve disagreements about what rights and remedies they might have. In general jurisprudence, some might adhere to a narrow conception of law corresponding to a narrow focus on sources of law available to render the legal system coherent with respect to its demands on citizens, while others have a broader focus.

However, Waldron's conception of law and the Rule of Law alters how one understands his democratic jurisprudence. First, Waldron's democratic jurisprudence criteria must be amended to include courts as necessary to a valid and legitimate democratic legal system. Courts play

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[198] *See generally* DWORKIN, LAW'S EMPIRE, *supra* note 125; DWORKIN, JUSTICE IN ROBES, *supra* note 125.

[199] Waldron, *supra* note 105.

[200] *Id.* at 55.

[201] *Id.* at 23.

[202] *Id.*

a pivotal role in facilitating a forum for disagreement over law's application and interpretation.

Courts inform the Concept of Law and the content of law as much as a statute's text. Thomas Jefferson's quote at the beginning of this Article emphasizes this fact: Law's enforcement is more important than the making of it. The way the law is applied directly affects individuals, groups, and the public. Application of law fleshes out a once abstract general directive. Moreover, citizens do not agree on how the law should apply to certain cases, especially to their cases. Waldron makes clear that a valid legal system must contain courts to facilitate argumentation on the merits of such disagreement.

One must also remember that not only ordinary citizens but also judges and lawyers disagree at times over how to apply the law. Statutes do not read or interpret themselves. Not every case lends itself to an easy answer. At some point, and possibly more often than not, a decision maker must legislate on issues when legal materials leave the answer unclear.[203] There is no inconsistency with Waldron's positivistic principles in his democratic jurisprudence with judges interpreting law in this manner, so long as the body acting as judge is democratically composed. Every particular directive oriented to a general norm that addresses a different circumstance and different facts is a pronouncement of law; so courts inevitably make law.

1. First- and Second-Order Disagreement

This Article argues that a democratic version of the source thesis settles disagreement for the time being through the legislative process and that we defer to its dictates as authoritative.[204] A new disagreement arises once legislation is introduced: how to apply general legislation to particular cases. How is it that one can claim to defer to legislation as a substitute for personal reasoning for action, but also disagree with its application to her? What about prospectiveness? How can law be prospective to guide our behavior if it is subject to indeterminacy or disagreement all the way down? Even Waldron admits that leaving legislation open to constant disagreement and resolution by courts can appear destabilizing.

No tension, however, exists between Waldron's democratic jurisprudence and his procedural Rule of Law. Two types of disagreements predominate in democratic systems. This Article visited first-order disagreement when discussing democratic provenance. In the face of a felt need for concerted action and disagreement over the best course of conduct, a democratic procedure offers the best epistemic resolution.

Although persons in a democratic society defer to legislation to guide their actions rather than rely on their own reasons, enactment of

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[203] *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–15 (1958).

[204] *See supra* Part I.B.1.

legislation does not settle all disagreements. Second-order disagreements persist. These are disagreements over the law's applicability and interpretation. These second-order disagreements are natural and inevitable in any legal system. There would be nothing to adjudicate if we agreed on all applications of law to facts or all interpretations of law. A core of meaning may exist in legal rules, but judges, lawyers, legal scholars, and nonlegal professionals often disagree on correct applications and interpretations, and may even disagree on proper legal sources to consider in applying and interpreting law. But no hardy legal system falls apart because such disagreements persist. Rather, a hardy legal system institutes procedural safeguards for orderly argumentation.

Also, consider the democratic rule of recognition. We might disagree on how to interpret words, but we can easily identify the sources of the words that we take as valid sources to apply and interpret legal rules. To admit that legal rules are "incurably incomplete" is not to admit an unstable legal system.[205] Rather, to admit that legal rules are incurably incomplete in a democratic system is to create space for legal argumentation, which in turn, leaves room for democratic self-government. If rules were considered complete in themselves, there would be little or no room for self-development or independent thought by rational agents with respect to legal issues, which can negatively impact moral development in the citizenry.[206] The legal system could treat persons as cattle, prodding them along according to the institutional whims of persons claiming authority.

A legal system that admits that rules are naturally incomplete creates democratic breathing room for the citizenry. We might admit that we cannot adhere to prospectivity in rules at all times, but that the legal system admits some retrospectivity in law's application and interpretation. Still, the law can equally guide citizen behavior. A democratic legal system tells each citizen where to look for law and tells her where to go when she disagrees with a certain application or interpretation of those laws. It tells her, effectively, that in some instances to determine whether her conduct falls under a certain legal proscription or whether she has a remedy for a perceived wrong requires legal judgment, which in turn, requires legal argumentation. In other words, she may not know the answer until well after the act has occurred. So long as the legal system openly admits this minimal amount of retrospectivity in norm-applying institutions, the legal system retains ex ante prospectivity.[207]

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[205] *See* Hart, *supra* note 203, at 614.

[206] *See infra* Part IV (making clear the connection between democratic self-government and moral development).

[207] *See* Raz, *supra* note 126, at 214 (arguing that when it is known that retroactivity may occur, the Rule of Law is not violated).

2. Democratically Resolving Second-Order Disagreements

Second-order disagreements call for a process that reflects the democratic processes that gave rise to the first-order resolution in a democratically authoritative way. If in the first-order disagreement, under the circumstances of politics, we need a democratic body to reach a resolution, then in the second-order disagreement we need a similar democratic body to reach a resolution, given our discussion of what a democratic jurisprudence requires. We must be committed to answering the fundamental question—"who decides?"—with "the people themselves or through their representatives."

Waldron's conception of law and the Rule of Law alters how we understand his democratic jurisprudence by leaving open our question: how much lawmaking power should courts have in a democratic jurisprudence, if any? Courts serve an essential role in facilitating argumentation in the face of disagreement over the application or interpretation of law. But, depending on how broad one conceives law's systematicity, courts might serve an essential role in making law where no legislative enactment or judicial pronouncement exists or speaks directly on point. Waldron does not provide clear guidance on how broadly one should conceive systematicity and courts' role in a democratic jurisprudence.

Arguably, with his focus on legislation, the role of courts is limited. Yet Waldron is clear that courts as public-argument venues buttress our confidence in our legal system and exhibit respect for each citizen as a rational agent. A democratic society might also consider its legal system overburdened by the idea that every single issue should go through a legislative process. A division of labor may be discerned in legal institutions, whereby courts hear and adjudicate particular issues concerning rights to a remedy for torts, contracts, property law, et cetera. Once adjudicated, legislative bodies can always take up the issue in cases where widespread disagreement or widespread consensus exists. None of these possibilities is rejected by either Waldron's democratic jurisprudence or conception of law and the Rule of Law. The role of courts is open in this regard.

What is not open, however, is the role of judges in a democratic jurisprudence when it comes to lawmaking. Judges as traditionally envisioned cannot serve a lawmaking role in a democratic jurisprudence. This role belongs to the people and/or their representatives. Judges are not representatives in the sense that matters in a democratic jurisprudence.[208] It is no argument in favor of judicial application of law that judges are merely applying law, not making law, because applying law in the face of disagreement and fleshing out the applications of abstract general norms found in legislation is lawmaking.

Many cases, if not most, may resolve by simple reference to precedent; even reference to precedent, however, requires decision in the face

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[208] *See supra* notes 144, 178.

of disagreement. All sources of law must flow from a body imbued with a democratic ethos of equality of participation. A democratic body must have either decided the precedent or must explicitly and publically recognize the precedent as an authoritative source of law. We are confronted, therefore, with a democratic gap in fashioning our courts in a democratic jurisprudence. Waldron does not offer a resolution, nor does he address this democratic gap.

It is a substantive requirement of a democratic jurisprudence that all rules flow from a body imbued with a democratic ethos of equality of participation. To overcome this requirement with respect to the judiciary requires an argument that supports the notion that judicial decisions (decisions by judges as traditionally conceived) are sufficiently imbued with an ethos of equality of participation. Waldron's democratic jurisprudence and his judicial review and judge-made-law criticism deny this connection. Nevertheless, a democratic resolution exists. I submit that the best answer lies in a time-honored democratic institution that jurisprudes often overlook or neglect: the jury. Part IV presents this argument.

IV. THE PEOPLE'S ROLE IN A DEMOCRATIC JURISPRUDENCE: FILLING THE DEMOCRATIC GAP IN THE JUDICIARY

Waldron's requirements that lawmaking institutions permeate an ethos of equality of participation and that democratic institutions maximize opportunities for persons to exercise their moral responsibility by choosing the laws that govern them lead to the conclusion that a political institution such as, or with equal democratic credentials to, the traditional jury must serve as final arbiter of law and fact in the judiciary. This Article has already belabored the first point, so this Part focuses on the second.

With regard to maximizing exercise of personal moral responsibility, Waldron adopts Rousseau's moral agency and Kant's treatment of rational agents within a political community. For self-legislating agents, lawmaking and moral responsibility are active, not passive. Waldron's democratic jurisprudence, then, does not envision a primary role for traditional judges, who do not represent people, to serve in a decision-making capacity in courts; rather, it envisions an active role for the people themselves or a representative body (large and diverse) of elected or democratically selected (such as by lot) officials, actively reducing disagreement over a law's application, meaning, or projection to a final decision.

That democracy stands for rule by the people is not lost on Waldron, or any democratic proponent for that matter. Rousseau held above all that human beings are self-legislating agents who realize and exercise their moral autonomy in society. Morality is only possible in society,

according to Rousseau.[209] This is so because individuals become free moral agents through self-legislation. On Rousseau's account, a person is only free if she gives law to herself—that is, if the laws she obeys are those she gives to herself through reflection. Becoming a moral being means exercising this freedom in society by reflecting on those laws conducive to the general will (common good), of which her will is but a part, and participating in a majority decision.

One consequence of this morality, according to Rousseau, is that one whose vote does not conform to the general will comes to accept that her conception of the common good was wrong, so this process corrects her error.[210] Though Waldron rejects this latter aspect,[211] what is important for this Article's purpose is Rousseau's connection between morality and lawmaking, which becomes possible through majority-decision procedures.

Kant's categorical imperative tracks Rousseau's self-legislation vision. When a person subjects her maxims to the categorical imperative, she gives law to herself insofar as she checks her actions against a self-imposed normative posture that itself considers, hypothetically, how her actions impact others. This is found in Kant's contradiction in the will test: whether one could will the universalization of her maxim not to give assistance to the needy requires her to envision a world in which the roles were reversed, so that if she finds a contradiction—here, her maxim would lead, hypothetically, to her not receiving assistance from others though she is in dire need—she should reject the maxim.[212] The most salient aspect of Kant's philosophy lies in its consequence, as a matter of practical reason, that rational nature exists as an end in itself. And, therefore, human beings as rational agents ought to be treated as ends in themselves and never as means.[213]

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[209] Rousseau distinguished between Amour de soi, which might be understood as self-interest in material goods found in the State of Nature, and Amour proper, which might be understood as love of glory or power found in society. Both types of self-love corrupt individuals. In a state of nature, for Rousseau, morality is not possible. In society morality is possible but might be corrupted. The resolution to perfect one's moral self is to enter society, first, and submit his judgments of right and wrong to a self-legislating process that incorporates the general will. A person becomes a moral agent when he gives law to himself through this process. *See generally* Jean-Jacques Rousseau, *Discourse on the Origin and Foundations of Inequality Among Men*, *in* ROUSSEAU'S POLITICAL WRITINGS 3–57 (Alan Ritter and Julia Conaway Bondanella, eds., Julia Conaway Bondanella, trans., W. W. Norton & Co. 1988).

[210] *See* Rousseau, *supra* note 31, at 151.

[211] *See* Waldron, *supra* note 16, at 711.

[212] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, *in* ETHICAL THEORY: AN ANTHOLOGY 485, 494 (Russ Shafer-Landau ed., Wiley-Blackwell 2d ed. 2013).

[213] *See id.* at 496.

Waldron adopts the Kantian view of citizens as moral agents and applies Rousseau's tie of moral agency to democratic decision making. He claims:

> 'The reasons which make me think of the human individual as a bearer of rights are the very reasons that allow me to trust him as the bearer of political responsibilities. It is precisely because I see each person as a potential moral agent, endowed with dignity and autonomy, that I am willing to entrust the people *en masse* with the burden of self-government.'[214]

Waldron attributes to Kant a view that political morality—the morality one takes up when she recognizes that she shares political space with others—requires that every person act under the circumstances of politics to resolve disagreement in a way that promotes the public good. Persons are self-legislating agents, but they do not find or promote the public good by reflecting on their own view of political morality alone, as Rousseau held. Rather, "one is only *thinking* for oneself when one exposes one's views to the 'test of free and open examination.'"[215]

Waldron's vision of courts must be considered within the confines of his democratic jurisprudence. Rousseau envisioned that democratic decision making would produce every rule. One might think it completely onerous to submit every single case that might arise in court to the legislature for a final decision on what the rule is on the matter. One might also think it unjust to create a default judgment in favor of defendants in cases where the law on point is unclear or where no statute exists, especially if a party has no realistic alternative for relief because the legislature is overburdened, or because direct democracy measures prove too onerous for such cases. But Waldron does endorse Rousseau's democratic provenance requirement, understanding fully its implications: all that we call law must come from a body imbued with a democratic ethos of equality of participation.

This Article submits that one can glean from Waldon's Rousseauian-Kantian view that his democratic jurisprudence is dedicated to the populist notion that the people's opportunities for self-government ought to be maximized.[216] Democratic governance aspires to maximize the oppor-

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[214] WALDRON, *supra* note 24, at 223.

[215] Waldron, *supra* note 61, at 1552 (quoting IMMANUEL KANT, CRITIQUE OF PURE REASON 9 (Norman K. Smith trans., St. Martin's Press 1965)).

[216] Indeed, even in Waldron's *Democratic Jurisprudence* article, he adheres to the view that "the polity must take responsibility for *the whole* of the law that it administers and be ready to subject *any of it* to critical evaluation at the hands of the people through the medium of the political process." Waldron, *supra* note 16, at 704.

tunities of citizens to "live under laws of [their] own choosing."[217] These opportunities are tied to one's moral responsibility, as emphasized by Waldron's Rousseauian-Kantian view.

Consider Waldron's Rule of Law conception. The Rule of Law and the Concept of Law come as a package, both geared to promote improved governance. The Rule of Law offers governance through law as the remedy to abusive dangers that inhere in the exercise of political power.[218] "The procedural side of the Rule of Law presents a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontations with power."[219] The procedural side, of course, deals with the role of courts in a legal system. When we consider the procedural Rule of Law in connection with the particular mode of democratic governance, we can extract the same fervor that drove Thomas Jefferson, John Adams, and others to champion the jury as a political institution, the palladium of free government.[220] The power of the people directly or through a representative body, such as a jury, to decide both questions of law and fact increases political opportunities for the people to live under laws they choose.

V. TOWARD A JURY-CENTERED JURISPRUDENCE

Undoubtedly, one may envision many permutations of democratic decision-making bodies that can serve in a judicial capacity. This Part aims to make a brief case that the traditional jury institution is the most natural fit for this purpose in a democratic system. The institution of the jury has an impeccable democratic origin. As mentioned earlier, "[i]n its original Greek form (*dēmokratia*), democracy meant that 'the capacity to act in order to effect change' (*kratos*) lay with a public (*dēmos*) composed of many choice making individuals."[221] Ancient Athens grappled with the problem of how to design lawmaking institutions that facilitate equal participation of all citizens without at the same time overburdening the workforce or disrupting the people's daily lives. The solution rested in instituting a representative body of the community to decide for the whole. This was the jury in the People's Court.[222] The jury, under the

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[217] ROBERT DAHL, DEMOCRACY AND ITS CRITICS 89 (Yale Univ. Press 1989).

[218] Waldron, *supra* note 105, at 11.

[219] *Id.* at 8.

[220] *See* THE FEDERALIST NO. 83, at 460 (Alexander Hamilton) (George Stade ed., Barnes and Noble Classics 2006).

[221] OBER, *supra* note 21, at 12.

[222] DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 33–35 (Cornell Univ. Press 1978). The jury in ancient Athens was composed of volunteers. Any citizen who wished to serve as a juror put his name in for selection. Volunteers were selected by lot to serve as jurors. *See* MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES 181–86 (J.A. Crook trans., Univ. of Oklahoma Press 1999). The other decision-making

Athenian model, constituted the very essence of democratic government, whereby the people themselves rule in the final analysis of law.

The same passion for popular government vested in a powerful jury is replete in United States history.[223] But not all persons in United States history have been fans of lay juries. By the mid-nineteenth century, judges began to strip the jury of any right to determine questions of law in the United States.[224] The jury's power to determine civil law was the first to go.[225] A struggle ensued between the right of the jury to decide questions of law and fact and the rising legal profession that sought consistency and transparency in the law in the form of canonized legal materials. This struggle is captured in a pivotal debate in Massachusetts concerning the right of the jury to decide questions of law and fact in criminal trials.

An amendment to the Massachusetts Constitution sought to articulate the right of the jury to decide questions of law in response to the Supreme Judicial Court decision to the contrary in *Commonwealth v. Porter*.[226] Amendment proponents argued that the jury had the right not only to "interpret applicable laws" but also to ascertain whether the law was just, and thereby valid.[227] Invoking arguments reminiscent of Jefferson and Adams, proponents argued that the jury had access to the natural law as much as any trained lawyer, and that it belonged to the people to rescue themselves, "in the name of their declared rights, from an unconstitutional law, or from an unconstitutional interpretation of that law."[228]

Amendment opponents argued, instead, that the jury was subject to irrational passions and easily swayed by public opinion. Opponents called on Rule of Law values, namely predictability and consistency in the law, to protect a criminal defendant. They argued, additionally, that interpretation of law must be left to professionals trained to broach law's complex structure. One opponent expressed, "does not every gentleman who has studied the common law as much as I have—and I have studied it considerable—know that the common law is not always common sense? . . . In the case of criminal law, who knows exactly what murder

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body considered central to Ancient Athenian governance was the citizen Assembly. *See* OBER, *supra* note 21, at 161.

[223] *See supra* Introduction.

[224] *See supra* note 13.

[225] *See* Larsen, *supra* note 6, at 977.

[226] 51 Mass. (10 Met.) 263 (1845) (holding against the argument that defense counsel had been wrongfully denied the right to address the legal argument to the jury for them to decide the question of law, and interpreting the state constitutional guarantee of a trial before an impartial judge as overriding any right of the jury to decide questions of law).

[227] *Changing Role of the Jury*, *supra* note 11, at 178.

[228] *Id.* at 178; *see also* 1 THE PAPERS OF THOMAS JEFFERSON 134 (Julian Boyd ed., 1950) ("The great principles of right and wrong are legible to every reader: to pursue them requires not the aid of many counselors.").

is?"[229] Even modern opponents of lay juries, especially in civil cases, resort to the same arguments, especially with respect to the complexity of law and limited capacity of laypersons to comprehend the law as such and the interplay of laws in the total legal scheme.[230]

The debate, in short, was between a natural law vision and a positive law vision. Ultimately, the positive law vision would win. Waldron's democratic jurisprudence provides a new lens through which to view this debate. It is clear that opponents of extending to juries—nonlegal-profession citizens—the role of finder of law and fact fail to consider that rule of law concerns are on both sides and fail to take additional imaginative steps to work toward facilitating institutional measures to educate and train jurors for success as moral agents who are willing and able to exercise their right to self-government.

A. Between Predictability and Clarity: Formal Rule of Law on Both Sides

One of the most, if not the most, important shortcomings on the part of jury opponents is a failure to consider the Rule of Law implications on the other side. For law to garner the stability and predictability necessary to guide human conduct, law must achieve and maintain a level of consistency in its application.[231] But in order for the law to achieve predictability, the legal order needs more than mere consistency; it also needs clarity and publicity. Publicity requires governing bodies to reduce all laws to publication for public access. Clarity requires that the law's dictates, its demands, must be understandable to those persons it purports and aims to govern; in other words, clarity shares with publicity the requirement that laws be publicly accessible to all persons.

If a person cannot understand the law, then she does just as well to act on her own reasons for action. In that case, she would not know exactly what the law requires of her until her actions are reduced to judgment by a judge who expounds the meaning of law after she has already acted, thus thwarting predictability. Although we admit of good faith second-order disagreement, for which courts serve as forums for resolution, a serious concern arises when a people are presented with laws that they cannot understand. From the democratic conception of authority, one draws the conclusion that opaque, or incomprehensible rules cannot

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[229] *Changing Role of the Jury*, *supra* note 11, at 180–81; *see also* Larsen, *supra* note 6, at 975–79.

[230] JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 155–56 (Oxford Univ. Press 2010) (setting out various arguments by legal scholars against lay juries in civil cases); Daniel Solove, *Should We Have Professional Juries?* CONCURRING OPINIONS (Mar. 20, 2009), http://www.concurringopinions.com/archives/2009/03/should_we_have.html (arguing that lay juries in complex litigation is antiquated).

[231] Waldron, *supra* note 105, at 7.

serve the purpose the law is meant to serve. From publicness and generality requirements, one draws the conclusion that this same opacity or incomprehensibility renders the law only accessible to a few, legally trained individuals, which promotes their individual good.

Society may gauge law's clarity, publicity, and predictability by its accessibility to the public. Early proponents of juries held that natural duties of justice and common sense were guides enough to access legal demands. For law to stray from people's actual experience seemed an anomaly. Further, for law to stray from the public's normal reasoning seemed an affront to free, democratic government.

From a democratic jurisprudence standpoint, one cannot deny positivism's superiority to natural law in sustaining a consistent legal scheme. What justice or morality requires is subject to great disagreement. What a democratic society recognizes as law is supposed to settle the disagreement, but it is also supposed to flow from a body imbued with a democratic ethos of equality of participation. There is nothing dangerous in itself about instituting more positivity in law, which itself is another Rule of Law requirement, and allowing the jury to retain its role as final arbiter of law and fact. If we admit that democracy stands for the proposition that the people choose the laws that govern them, either directly or through their representatives, and if we accept that positive law is accessible to all persons of average intellectual capacity, then what reason have we to defer to traditional judges over juries with respect to judgments of law under a democratic system of governance?

The jury institution facilitates a democratic decision-making procedure through which the legal system can take full advantage of the Doctrine of the Wisdom of the Multitude. The strength of public policy decisions depends on a democratic system's ability to organize and make use of what diverse and disparate people know.[232] On the first front, a large legislative assembly resolves first-order disagreements. On the second front, a fair cross-section representative of the community that is randomly selected resolves second-order disagreement.

Perhaps most important, the jury institution provides citizens more opportunities to participate in democratic processes, which in turn, serves to offer citizens more opportunities for moral development. Public deliberation amongst a diverse group exposes the group to conflicting opinions and disparate experiences. No individual need understand the various opinions and/or experiences, nor need the group, but the exposure leads to truth by an invisible hand process: "quite incommensurable ideas may yet have dialectical effect on one another, so that something better emerges in the discussion, even though the 'adjustment' between the various views have not been made by the deliberate synthetic activity of any 'single mind.'"[233] The deliberation is informed by the total adju-

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[232] *See* OBER, *supra* note 21, at 2, 118–67.

[233] WALDRON, *supra* note 24, at 138.

dication experience: attorneys arguing legal principles; traditional judges acting as mentors to and/or possibly codeliberators with jurors; and jurors of diverse backgrounds deliberating. The democratic system can utilize the adjudicatory forum not only to improve legal norms, but also to improve the total system of governance by including and appropriating the knowledge of its citizens, who are better situated to comport the law to various local contingencies.

B. Allaying Rule of Law Concerns with Institutional Design

Any fears that vesting jurors with the right and power to decide questions of law may lead to instability, inconsistency, or the like, may be allayed by turning to institutional design. If juror capacity to understand complex legal schemes and technical legal jargon is a concern, then a democratic society can implement institutional practices to increase juror competency. The whole litigation process should facilitate educational instruction jurors need to put them in the best possible position to understand legal material so they can make an informed judgment.

Attorneys already serve an instructional role to both judge and jury. Attorneys brief judges on the law on point in a case. Judges are not all knowing sages of the law. They too come to learn what law demands through an educational process, whereby opposing attorneys research and draft legal conclusions, instructing the judge on one view of law or another. The judge may adopt an adjudicatory theory that guides her interpretive method, such as originalism or some active liberty position. But nothing should prevent her from instructing the jury on her methodology, or prevent the attorneys from briefing the jurors on the legal issues and various interpretation methods. If the democratic rule of recognition means anything, it necessitates that people know the rules that govern how to identify sources of law.

Much concern about vesting juries with authority, power, and the right to decide questions of law in a democratic judicial system can be allayed by translating that concern into positive action geared toward improving, not reducing, the institution itself. The Rule of Law is less threatened under a more powerful jury regime than it is by a regime that considers the average citizen incapable of grasping "the law," especially if that regime is democratic. Clarity more easily translates into coherence and stability than does obscurity and opacity.

Other institutional design questions inevitably arise. For example, should appellate courts have authority to overturn jury decisions? What conditions must exist for an appellate court to overturn jury decisions? This Article implicitly provides an answer to these two questions. Appellate courts can be possessed with authority to overturn democratically decided judicial decisions, so long as the practice is consistent with democratic norms. The conditions required for an appellate court to overturn a democratically decided judicial decision should be decided by

a legislature. Ideally, the appellate courts should be democratically composed. Professional, law-trained judges may serve alongside a handful of randomly selected citizens, or volunteer citizen committees where members serve for a year or two on a rotational basis.

An appellate court may be viewed purely as an instructional institution to the first-line, second-order adjudicatory procedure (the jury trial). The standard of review should not leave an appellate court with very much discretion since reasonable minds may differ on the matter already democratically decided. Perhaps the best rule would be that a jury decision cannot be overturned absent manifest error, meaning the decision is incompatible with the law under which it is decided by making contradictory demands, such as prohibiting and requiring the same conduct under the same circumstances. On remand, the jury pool would hear instruction on the matter.

This Article undoubtedly raises many similar institutional design questions. For want of space, these questions must be addressed in another article. However, the people's right to decide questions of law in a democratic jurisprudence is not itself an institutional design issue. Rather, as this Article argues, it is a substantive requirement of a democratic jurisprudence, when coupled with the necessity of courts to any valid legal system. Democratic governance systems make a promise that the people equally participate in choosing the laws that govern them. Laws that flow from the judiciary purport to govern the people. So the question truly is not if, but how a democratic society can facilitate a legal system where the people equally participate in the lawmaking process all the way down. A democratic jurisprudence is not a call to theorize, but a call to action.

CONCLUSION

When jurisprudes take seriously the notion that democracy stands for rule by the people, they are led, like Waldron, to reconceptualize how democratic societies discuss the concept and content of law. Waldron's vision of a democratic jurisprudence is active, not passive. To accept his exposition of what law is like in a truly democratic system is to adopt a new approach to jurisprudence. Society's focus no longer turns to what a traditional judge or judges do in courts, but to increasing the opportunities for and capacity of our citizens to actively participate in choosing the laws that govern them. The law's legitimacy is tied directly to the state's ability to keep its democratic promise.

Systemic exclusion, whether intentionally or unintentionally, of any group from jury pools goes beyond a Sixth or Fourteenth Amendment violation once jurisprudes consider that the way law presents itself in a democracy matters. The issue speaks to the legitimacy, or lack thereof, of the laws that purport to govern the community. The jury pool must represent the community whose norms are implicated or at stake in litigation. The community must resolve second-order disagreements. The

way a state incentivizes and encourages jury participation by all community members matters to us not only or primarily because we are worried about equal protection under the law or a defendant's right to a trial by a fairly representative jury, but because we are concerned with law's legitimacy generally.

Democracy entails at a minimum that the people govern themselves. Law *is* what a democratically selected body decides through a majority vote, when that body publicly makes known that it serves a lawmaking, amending, or repealing function, and when its dictates purport to promote the public good with rules that govern generally in scope and application. Courts must exist to address good faith disagreement with respect to the interpretation and application of the law to particular facts. A democratic legal system seeks to maximize its citizens' opportunities to exercise their capacity for self-government, if anything, to facilitate their moral development. Anyone willing to take democracy seriously on its face considers the law's validity strictly tied to its provenance—a provenance whose normative character aspires to improved democratic governance.

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