On the Incompatibility of Political Virtue and Judicial Review: A Neo-Aristotelean Perspective

Ralph F. Gaebler

Indiana University Maurer School of Law, gaebler@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Recommended Citation
http://www.repository.law.indiana.edu/facpub/605
ON THE INCOMPATIBILITY OF POLITICAL VIRTUE AND JUDICIAL REVIEW: A NEO-ARISTOTELEAN PERSPECTIVE

Ralph F. Gaebler*

I. INTRODUCTION

II. A. INTRODUCTION
   B. THE SUPREME GOOD
   C. TRAINING THE DISPOSITIONS (AND PRACTICAL REASON)
   D. THE SCOPE OF DELIBERATION
   E. DELIBERATION IN THE POLIS
   F. FRIENDSHIP AND POLITICAL FRIENDSHIP
   G. POLITICAL VIRTUE AND THE LOGIC OF CONSENSUAL DECISION-MAKING

III. A. INTRODUCTION
    B. THE NEO-ARISTOTELEAN CRITIQUE OF JUDICIAL REVIEW
    C. TWO DEFENSES OF JUDICIAL REVIEW AS A DEMOCRATIC INSTITUTION
    D. JUDICIAL REVIEW AS A COMPONENT OF PLURALIST DEMOCRACY
    E. JUDICIAL REVIEW AS THE GUARANTOR OF POPULAR SOVEREIGNTY

I. INTRODUCTION

One of Aristotle's concerns in the Nicomachean Ethics (Ethics) is to explain his theory of how people acquire virtue. He states that "one becomes just by doing just acts and moderate by doing moderate acts." Those who merely "take refuge in discussing virtue think that they are pursuing

* Associate Librarian and Lecturer in Law, Indiana University School of Law, Bloomington, Indiana.
1 The author has consulted both ARISTOTLE, NICOMACHEAN ETHICS (Terence Irwin trans., Hackett 1985) [hereinafter Irwin], and ARISTOTLE, NICOMACHEAN ETHICS (H. Rackham trans., Harvard Univ. Press 1926) [hereinafter Rackham]. However, all translations of the Ethics in this work are by the author, based on the standard Greek text contained in the Rackham edition. For the purpose of citation to the Greek, the author has provided the Bekker numbers, which is the standard form for citing Aristotle's Greek texts.
2 1105b9-11.
philosophy and will become good, just like the sick, who listen attentively to their doctors, but ignore their prescriptions." The latter will never have healthy bodies, and the former will never have healthy souls.

As one may infer from these passages, Aristotle takes the position that action is central both to the acquisition and (by extension) to the exercise of virtue. The healthy soul (psyche) is somehow an active soul. Therefore, the Ethics seeks to explain the nature and source of virtuous action, or what I shall call the mechanics of virtue. The core of these mechanics is composed of the elements that drive moral choice, namely disposition and practical reason. However, the forces that shape these elements are also very important. Therefore, as we shall see, the mechanics of virtue also comprehend Aristotle’s theories of moral education and friendship. Finally, shaping these theories is Aristotle’s view of moral principle as something normative, yet, at the same time, proximate and subject to contextual variation. This view, in turn, is shaped by Aristotle’s initial insight that moral goodness inheres in specific actions, rather than in knowledge of transcendent universal truths.

Part II of this essay outlines the mechanics of virtue and seeks to extract from it a normative theory of political virtue, which is simply one form of virtue in general. Specifically, it attempts to demonstrate that the establishment of binding general rules of conduct, i.e., laws, for members of the polis requires consensual choice-making by its members. This theory follows from three primary considerations. First, human flourishing requires virtue. Because virtue is a matter of deliberate choice and action, rather than pure thought, human flourishing requires such choice and action. Therefore, to the extent that virtue involves, as a form of activity, the codification of general principles of conduct, members of the polis must contribute to the process of codification in order to flourish with respect to that aspect of virtue. Second, because the achievement of virtue in deliberation and choice-making in general requires extensive, even life-long practice, political virtue also requires such practice in the form of political participation. Third, because the insights of even the most virtuous are limited by the narrow scope of an individual human being’s experience, the best political choice requires the pooling of insights through a consensual process.

It is important to note that the theory of political virtue offered is neo-Aristotelean; Aristotle himself did not endorse democracy in the Ethics, nor does the Ethics concern itself much with political life per se, as we would understand that term. In part, the theory of political virtue offered here depends upon an understanding of moral education that is far greater in scope than the straight-forward relationship between teacher and student presented by Aristotle in his brief remarks on the subject. Ultimately, it views the scope of moral agency and moral training as co-terminus. However, this essay does assert that the theory of political virtue upon which

3 1105b14-16.
it depends is implicit in the *Ethics*. It may be inferred without misappropriating or misconstruing the spirit of Aristotle’s argument. In short, it recontextualizes Aristotle’s *Ethics* in order to address concerns to which a modern sensibility is susceptible, but which did not concern Aristotle himself.⁴

Part III of this essay applies the theory of political virtue, and its requirement of consensual decision-making, to make a normative argument against the practice of strong judicial review (hereinafter judicial review, unless specifically contrasted with weak forms of judicial review).⁵

Obviously, the primary example of strong judicial review, and this argument’s target, is that practiced in the United States. From the point of view of this theory, judicial review is problematic for several reasons. By referring the articulation of binding general principles of conduct to the judiciary, judicial review isolates the members of the *polis* from sufficient engagement in a process, which is necessary for their moral development and self-actualization. Moreover, to the extent that it fails to incorporate the widest possible array of virtuous perspectives, judicial review leads to

---

⁴ Investigation of the precise relationship between the neo-Aristotelean theory of political virtue and the views of Aristotle himself is a historical matter that lies outside the scope of this essay. In the *Politics*, Aristotle endorses a mixed constitution under which government is divided between the many and the best. If judges exercising judicial review are analogous to the best, then it may turn out that judicial review is compatible with Aristotle’s most developed views on government. In that case, the neo-Aristotelean theory of political virtue will have to simply set aside those views (much as one must, to some degree, set aside Book Ten in order to extract an internally consistent set of views from the *Ethics*) or assert that they do not in fact follow from the *Ethics* (as interpreted here) and are therefore irrelevant. Alternatively, it may prove to be the case that apparent inconsistency between the *Ethics* (as interpreted here) and the *Politics* dissolves in light of some persuasive argument that the many and the best are not separate groups. Should such an argument hold up, then judges exercising judicial review obviously cannot be analogous to the best, since they are not analogous to the many. In that case, the theory of political virtue will turn out to be more Aristotelean and less neo-Aristotelean. The point here is only that: (1) the theory of political virtue is consistent with Aristotle’s claim in the *Ethics* that the purpose of the *polis* is to promote and maintain the moral virtue of its citizens; (2) the implication of this theory, i.e., consensual decision-making, is not inconsistent with the *Ethics* more generally; and (3) the theory is, in fact, implicit in Aristotle’s concepts of moral education and friendship.

⁵ For present purposes, strong judicial review may be defined generally as the process through which courts are empowered to set aside a legislative enactment on the ground that it violates a more fundamental constitutional norm. By legislative enactment it is meant a statute duly enacted by a democratically elected body. It does not include administrative regulations set aside as *ultra vires* under the terms of the statute empowering a subordinate agency to adopt them. By court it is meant any judicial body not directly accountable to the citizenry through elections, and whose decisions are not directly reviewable by a democratically elected body. The term would therefore include such bodies as the French *Cour Constitutionnel*, although that body is not a court of law. Under this general definition, fundamental norms need not be embodied in a written constitution, nor must judicial review necessarily be exercised after the fact in a case or controversy. The critical attribute of strong judicial review is that it involves a process through which enactments of a democratically chosen legislature are subject to annulment through the action of an appointed body applying fundamental, constitutional norms.
principles that are less likely to be satisfactory than they would be if forged in the crucible of consensual politics.

The bulk of Part II attempts to determine the nature and depth of the apparent incompatibility between the neo-Aristotelean theory of political virtue and judicial review. It does so by comparing the theory of political virtue with two theories of democracy that assert the opposite, i.e., that judicial review is compatible with democracy and, therefore, with the requirement of consensual decision-making. In concluding that the neo-Aristotelean theory is incompatible with either of these theories, the essay demonstrates that the ethical concerns underlying the neo-Aristotelean theory are indeed likely to be incompatible with any theory of strong judicial review.

Two threshold objections might be interposed to this entire project. First, one might object that the proposed argument places too high a value on political activity in the acquisition of virtue. Why, one might ask, must members of the polis develop virtue specifically with respect to political choice-making, rather than with respect to some other field(s) of activity? Does Aristotle insist that human flourishing depends upon achievement of complete virtue in every realm of human activity? Is the acquisition of such complete virtue even possible within the limits of a single human life? Couldn’t an individual quite reasonably choose to develop his or her expertise as a guitarist instead of spending precious time participating in politics? All of these questions point to the rejoinder that members of the polis enjoy quite sufficient opportunity to develop virtue, without worrying about their exclusion, through judicial review, from participation in the solution of a sub-set of political problems referred to courts.

One response to this first objection is to assert that it hits wide of the mark. One could claim that the argument presented here is not a general one that judicial review precludes the development and exercise of virtue tout court, but that it does so only by those who wish to participate in the solution of what are now constitutional problems rather than spend time becoming guitarists. On the assumption that there are many such individuals, judicial review does in fact present a problem from the neo-Aristotelean standpoint because it prevents those individuals from acting as responsible agents in the solution of “constitutionalized” problems.

This response is sound, and the fact that many political constituencies self-evidently are interested in constitutional questions is significant. But this response nevertheless leaves the argument presented here in a somewhat weakened state because the argument can only be deployed on behalf of a subset of citizens, even if that subset is large. A better response, one that is anchored within the Ethics, is to rely upon the peculiar importance Aristotle assigns to political science in promoting virtue. As we shall see, Aristotle believes that people are by nature political beings. By this he means that they seek the good life (insofar as the good life is not equated with pure contemplation) in the highest and most generalized sense,
in the context of association with others. Therefore, politics is the master science of the supreme good because politics orders the community of the polis and thereby establishes the norms that shape people's lives most comprehensively. As a result, all people have, or should have, a special interest in politics.  

One might still object that political participation is possible for members of the polis without limiting the scope of judicial review. After all, most questions of public policy are still determined in the United States by the political branches of national, state, and local government and, in other democracies, by analogous representative bodies. Many such questions are of profound significance, affording ample opportunity to the citizens of the polis to engage in significant political action. The response to this objection must be that constitutional questions relating to human rights, for example, the nature and extent of due equality in a pluralist and cosmopolitan democracy, the proper scope of privacy, the appropriate balance between security and freedom, and the nature and limits of free speech, are of overwhelming moral and political significance. Therefore, while it is important that citizens be afforded an opportunity to act on questions such as the location and financing of local parks and the merits of all-day kindergarten, such activity is no substitute for the opportunity to take politically decisive action on questions of deeper significance. Aristotle's conception of political science as the master science of the good recognizes the connection between politics and the working out of such questions. Although there may be individuals (such as the single-minded guitarist) who are agnostic concerning politics, Aristotle nevertheless asserts that human beings ought to develop their most comprehensive conception of what it means to lead a good life within the context of political life.

The second threshold objection is more in the nature of a question, or request for further explanation. At first blush, it might reasonably seem unpromising to rely upon Aristotle for a critique of contemporary judicial review. In more general terms, one might ask: why rely on virtue ethics, rather than upon a consequentialist or deontological argument? The short

---

6 Martha Nussbaum agrees that the achievement of human flourishing requires political participation. She states that "an essential element in the complete good life is political activity." Martha Nussbaum, Aristotelian Social Democracy, in Liberalism and the Good 203, 243 (R. Bruce Douglass, Gerald M. Mara & Henry S. Richardson eds., 1990) [hereinafter Nussbaum, Aristotelian Social Democracy]. This follows from the fact that "planning the conception of the good that shapes a citizen's life is a job that goes on, in part, in the political sphere." Id. at 233. Therefore, "good functioning in accordance with practical reason requires that every citizen should have the opportunity to make choices concerning this plan." Id. Like the argument above, this argument emphasizes the instrumental value of political participation in shaping the contours of community life, and the important influence community life has upon its members' lives. Nussbaum also asserts that there are two kinds of sociability involved in "fully good human functioning," namely "close personal relationships . . . and also relationships of a political kind . . . ." Id. This argument correctly emphasizes the virtuous nature of political participation as an end in itself, rather than its instrumental value in ordering other aspects of life.
answer is that Aristotle, and virtue ethics in general, have not been applied in this way, and it is worth determining whether they have anything important to say on the subject. A longer, related answer is that it would perhaps be particularly persuasive if all three approaches—consequentialist, deontological, and virtue-based—could be deployed successfully to reach the same conclusion. As we shall see, strong consequentialist and deontological cases have in fact been made, if not directly against judicial review, then in favor of legislative determination of moral-political questions. Therefore, it remains to show that virtue ethics, in particular, can be used to reach this same conclusion. Finally, the fully developed virtue-based argument is uniquely appealing, at least when based upon Aristotle. This is especially clear in comparison to the deontological case for moral legislation.

7 Miriam Galston has considered the relevance of Aristotelian's concept of character (and character formation) to the functioning of deliberative democracy, but not the relevance of deliberative democracy to judicial review. See generally Miriam Galston, Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy, 82 Calif. L. Rev. 329 (1994).

8 The consequentialist argument has been made by many, including Robert Dahl. ROBERT DAHL, DEMOCRACY AND ITS CRITICS (1989) [hereinafter DAHL, DEMOCRACY]. The deontological argument has been made by Jürgen Habermas. E.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996).

9 The deontological approach is represented by Jürgen Habermas's discourse theory, which asserts that social cooperation depends upon the intersubjective validity of various sorts of claims, such as truth claims about the natural world, rightness claims about moral propositions, technical claims about effective means, etc. The task of discourse theory in general is to analyze the argumentative practices and presuppositions characteristic of each type of validity claim. Such practices include notions of logical sufficiency (which, in Habermas's view, usually depends on, inter alia, induction, analogy, and narrative, rather than deductive certainty), dialectical obligations (meaning criteria of sufficient proof), and pragmatic presuppositions about "what it would mean to assess all the relevant information and arguments . . . as reasonably as possible, weighing arguments purely on the merits in a disinterested pursuit of truth." James Bohman & William Rehg, Jürgen Habermas, in STAN. ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2007), http://plato.stanford.edu/archives/sum2007/entries/habermas. Such presuppositions are counterfactual in the sense that "actual discourses can rarely realize—and can never empirically certify—full inclusion, non-coercion, and equality." Id. Thus, they represent a highly idealized form of communication, or "ideal speech situation." Id. Habermas summarizes his discourse theory for all questions involving the application of practical reason in a discourse principle that can be stated as follows: "A rule of action or choice is justified, and thus valid, only if all those affected by the rule or choice could accept it in a reasonable discourse." Id. Habermas's neo-Kantianism is most evident in the application of this principle to the realm of moral discourse. "Like Kant, he considers morality a matter of unconditional moral obligations . . . . The task of moral theory is to reconstruct the unconditional force of such obligations as impartial dictates of practical reason that hold for any similarly situated agent." Id. Thus, moral discourse rests upon the pragmatic presumption of universal consensus, i.e., "in making a . . . rightness claim one counterfactually presupposes that a universal consensus would result, were the participants able to pursue a sufficiently inclusive and reasonable discourse for a sufficient length of time." Id. Given Habermas's view that moral validity claims must be established dialogically, as a function of discourse, rather than by logical deduction (as a pure Kantian would suppose), the discourse principle can be further
specified, in the context of moral discourse, as a dialogical principle of universalization: “A [moral norm] is valid just in case the foreseeable consequences and side-effects of its general observance for the interests and value-orientations of each individual could be jointly accepted by all concerned without coercion (i.e., in a sufficiently reasonable discourse).” Bohman & Rehg, supra (alteration in original) (citation omitted) (internal quotation marks omitted). Habermas’s principle of universalization thus depends upon a highly counterfactual, and therefore highly idealized, form of consensus. The “ideal warranted assertability” of a moral norm, i.e. its rightness, depends upon its validity “in a fully inclusive and reasonable discourse.” Id.

Habermas’s theory of legal and political discourse is closely related to his theory of moral discourse, but distinctively shaped by two additional factors. First, it responds to the “conflict potentials inherent in modernization.” Id. Law is valid only if it secures private autonomy and thereby “reduces the burden of questions that require general (society-wide) discursive consensus.” Id. Second, it must recognize that law-making involves a combination of validity claims, such as technical claims about means, truth claims about the likely consequences of following various policy options, and rightness claims about the purposes of policies themselves. As a result, laws are valid only if they pass the discursive tests characteristic of all validity claims supporting them.

Both of these factors lead to the following democratic discourse principle for the domain of political-legal validity claims: “[O]nly those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted.” Id. (citation omitted) (internal quotation marks omitted). This principle is consistent with, even required by, the constraints of modernization because private autonomy rights are expressions of freedom (a precondition of voluntary assent) only if citizens are authors of the laws that guarantee and interpret the scope of those rights, “that is, only if the laws that protect private autonomy also issue from citizens’ exercise of public autonomy as lawmakers acting through elected representatives.” Id. “The idea of public autonomy means that the legitimacy of ordinary legislation must ultimately be traceable to robust processes of public discourse that influence formal decisionmaking in legislative bodies.” Bohman & Rehg, supra. The principal of democracy follows also from the requirement of multi-faceted discursive validation because such validation leads to the need for an institutional framework capable of working out and reconciling the complex set of discursive practices underlying the process of lawmaking. Legislative bodies embody sufficiently inclusive deliberative processes of “opinion- and will-formation” to permit “something like a warranted presumption of reasonableness.” Id. (citation omitted).

The democratic discourse principle parallels the concerns and conclusions of the neo-Aristotellean argument, presented here, in its recognition of legislation as the institutional framework best suited to reconciling complex discursive practices. Moreover, Habermas believes that private and public autonomy are purely abstract rights generated by the functional requirements of law in modern states, and that “each polity must further interpret and flesh them out for its particular historical circumstances . . . .” Id. Thus, the democratic discourse principle seems to depend upon at least some of the contextual particularity that plays such an important role in Aristotle’s mechanics of virtue.

But as a component of discourse theory, the democratic principle presumably specifies the principle of validation for claims made in a particular kind of practical discourse, i.e., political-legal discourse. In other words, its purpose is to settle disputes over the cognitive validity of competing claims within the context of that particular discourse. Like the principle of universalization in moral discourse, it operates under a highly idealized presumption of consensus, driven by the unconditionality of obligations issued as commands by impartial reason. Thus, “reasonable political discourse must at least begin with the supposition that legal questions admit in principle of single right answers” acceptable to the entire affected community. Id. This follows not only from the analogous function of the democratic discourse principle and the principle of universalization within moral discourse theory, but from the inevitable fact that many political-legal questions involve moral discourse directly. Thus, the
II.  

A. Introduction

The purpose of Part I is not to present a systematic exposition of Aristotle's ethical views, but to focus on those aspects that lay a foundation for the neo-Aristotelean theory of political virtue. It begins with an introduction to Aristotle's core concept of the supreme good. This will lead in subsequent sections to consideration of Aristotle's concepts of moral education, deliberation, and friendship. Each of these sections discusses, in turn, certain problems in these concepts, which are resolved through a notion of warranted reasonableness conceals the fact that such reasonableness often must include the idealized universal consensus of moral discourse.

The deontological character of practical discourse theory is difficult to square with the notion that cultural, and even compositely evaluated individual particularity, must influence the content of laws actually adopted as general rules of conduct. It stands in contrast to the neo-Aristotelean emphasis on the approximate, conditional, and possibly non-exclusive character of general norms of conduct. The more one accepts the variety of human experience, the more idealized, and therefore less satisfactory, the presupposition of universal consensus becomes.

Habermas might reply that if democratic deliberation results in multiple valid conceptions of correct laws, then the political community in question must simply consign the matter to the sphere of private autonomy. After all, if political-legal deliberation differs categorically in any way from moral deliberation, it must be in its capacity to make pragmatic adjustments to the demands of modernity. But there are two problems with this response. First, it is impossible to eliminate moral conflict from the political-legal realm in this way for the simple reason that such conflict does not always involve questions of individual behavior. For example, issues involving allocation of resources rather than regulation of personal conduct cannot just be consigned to the private sphere, even when they engender deep moral conflict. Second, the notion that irreconcilable conflict necessarily (i.e., as a condition of political legitimacy) remains outside the democratic process, combined with the stipulation that modernity engenders conflict (and perhaps is locked into a trajectory of ever increasing conflict), leads inexorably to the conclusion that public autonomy is constrained (and perhaps will eventually disappear altogether), at least with respect to decisionmaking that involves moral discourse. But if public autonomy is a vital prerequisite to private autonomy (the two are "co-original" or "equiprimordial"), the effective curtailment or disappearance of public autonomy will also lead to the curtailment or disappearance of private autonomy, and therefore to the possibility of voluntary assent that underlies discourse theory. Id.

This latter conclusion helps to reveal another problem with, or limitation in, Habermas's deontological approach, namely that it tends to view political participation instrumentally. If the democratic discourse principle yields multiple contested valid conceptions of what is right or good in a given case of legal-political deliberation, that must be counted as something of a political failure since that result fails to meet the pragmatic goal of universal assent and, therefore, decreases the effective scope of public autonomy. But in Aristotle's virtue-based ethics, excellent political participation is itself a form of virtuous activity, and therefore an end in itself; persistent disagreement is not necessarily a failure, as long as the virtue of political friendship permits citizens to continue to cooperate in the effort to identify desirable policy. In sum, Aristotle's virtue-based analysis of the good, with its focus at least as much on the process of decisionmaking as on the specific decisions made, provides both a better justification of democracy, and a better explanation of its continuing value, even in the face of persistent failure to achieve agreement.

10 See infra Part II.B.
consideration of their relationship to the broader concept of the supreme good. Solution of these problems then leads in the final section to the theory of political virtue and the normative argument for consensual political decision-making.

**B. The Supreme Good**

Aristotle conceives ethics as an investigation into the nature of the best life available to human beings and the means of achieving it. In Book One, he makes three basic claims about living well, which together place the *Ethics* within a teleological framework: (1) he claims that the supreme human good is happiness (*eudaimonia*); 11 (2) he claims that *eudaimonia* is an activity of the soul in conformity with the soul’s own proper excellence or virtue (*kat' aretein*); 12 and (3) he claims that *eudaimonia*, thus defined, constitutes the proper excellence of mankind. 13 To achieve this excellence in activity of the soul is to perform one’s function as a human being well, thus to be virtuous, and therefore *eudaimon*.

Aristotle begins Book One with the concept of a hierarchy of goods, the apex of which is the supreme good, at which all actions aim. 14 The formal criteria of the supreme good are (1) that it is the final, “unconditional end” of all action, meaning that it is “chosen always for its own sake and never for the sake of something else” 15 and (2) that it is self-sufficient, meaning that which “by itself makes life choiceworthy and lacking in nothing.” 16 *Eudaimonia* alone meets these criteria, and is, therefore, the supreme good for man. 17

It should be emphasized that the supreme good is something which by definition is manifested in action. As Aristotle puts it, possession of a disposition (*hexis*) by itself accomplishes nothing good. But potential motion or energy (*energia*) acts (*praxei*) of necessity, and “acts well” when it achieves some good result. 18 Thus, *eudaimonia* is a state that characterizes a life (of normal duration), in which virtuous actions are regularly performed. 19

11 1097a28-b1. *Eudaimonia* is typically translated into English as “happiness” or “flourishing,” but neither word captures precisely the meaning of the Greek term. The term “happiness” is particularly misleading in its suggestion that *eudaimonia* is a feeling. While it involves the regulation of feeling, and often is accompanied by a feeling of pleasure, *eudaimonia* itself is not a feeling. Nevertheless, I follow common practice in translating *eudaimonia* as happiness because the latter term is at least a noun. The term “flourishing” comes closer in meaning to *eudaimonia*, as Aristotle uses the term, but says nothing about the sort of flourishing Aristotle specifically associates with the term.

12 1098a13-16.

13 *Id.*

14 1094a19-23.

15 1097a31-35.

16 1097b16-17.

17 1097a36-b1; 1097b17-18.

18 1098b32-1099a4.

19 1098a-19. Aristotle also states that virtue (i.e., a well trained disposition)
Since a life of action is directed outward towards the world in some way, it follows that excellence is exercised routinely in interpersonal relations. Man is by nature a political being, that is to say, more exactly, a creature of the polis; so eudaimonia is sought, to a great extent, in the context of association with others. Thus, although eudaimonia is self-sufficient, people are not. Since eudaimonia involves participation in the community of the polis, self-sufficiency is not defined by reference to oneself alone, but depends upon appropriate interaction with family, friends, and fellow citizens. Therefore, politics is the master science of the supreme good because politics orders the community of the polis and guides public action.

The science of politics aims at the right kind of activity, namely actions that are virtuous. But no action is unconditionally good, i.e., virtuous or just in all conceivable circumstances. Aristotle states that what constitutes virtuous action differs from case to case and is subject to variation. Therefore, it is possible to draw only generally valid conclusions about the first principles of virtuous action. Because the application of first principles is context-specific, inferences of those principles must be drawn from experience of life. Aristotle's insistence on this point leads to his observation that the young are unfit students of political science, for lack of life experience prevents them from recognizing the nuances of situational context.

Aristotle's claim that the supreme good is manifest in context-specific action influences his treatment of Plato's Form of the Good. Since the supreme good is a matter of action rather than knowledge, Plato's Form cannot be the supreme good by itself because "it seems possible to possess virtue even while being asleep." (1095a32-33).
of the Good is considered irrelevant.\textsuperscript{29} According to Aristotle, knowledge of the Form of the Good cannot ensure efficacious action, just as contemplation of the form of health will not make one a better physician.\textsuperscript{30} Determining how to act begins with what is known to us, not what is knowable unconditionally.\textsuperscript{31} The starting point is the fact that a thing is so, and it does not matter why it is so.\textsuperscript{32} Thus, the mechanics of virtue is a matter of coming to first principles by inductive inference, rather than by theoretical deduction. To continue Aristotle’s medical analogy, it is not knowledge of the metaphysically distinct form of human health, but knowledge of the structure, function, and maintenance of the human organism, together with detailed observation of organic deviance in a given case, that permits the physician to cure his or her patient.\textsuperscript{33}

Aristotle’s second and third claims in Book One are that \textit{eudaimonia} is an activity of the soul in conformity with the soul’s own excellence or virtue, and that engagement in this activity in an excellent manner is the proper excellence of mankind.\textsuperscript{34} He makes these claims in the form of an argument analogizing the function of a human being to that of a musician.\textsuperscript{35} The argument can be summarized as follows:

1) Every function has its proper excellence, and is well performed when it is performed according to its own proper excellence.
2) The good and doing well of anyone who has a function to perform (for example, a flute-player) reside in the excellent performance of that function (such as playing the flute well).
3) Human beings have a function to perform as human beings. Therefore, the good and doing well of a human being resides in his performance, in an excellent manner, of his function.
4) Mankind’s function is unique to mankind.
5) Exercise of the rational faculty resulting in purposeful activity is the only activity unique to mankind.
6) Therefore, the good and doing well of a man resides in the activity of the soul, or \textit{psyche}, that conforms to reason in an excellent manner.

This so-called function argument has two distinct elements. Steps

\textsuperscript{29} 1096b33-35.
\textsuperscript{30} 1097a11-14.
\textsuperscript{31} 1095b2-4.
\textsuperscript{32} 1095b7-8.
\textsuperscript{33} 1097a10-11. Aristotle’s approach thus seeks to separate normative ethics from metaphysics altogether. Yet in apparent opposition to his claim that political science is the master science of the supreme good, Aristotle asserts in Book Ten that the greatest human good lies in imitation of the perfect contemplative activity of the Gods. In doing so, he explicitly introduces a metaphysical foundation into the \textit{Ethics}.
\textsuperscript{34} \textit{See supra} text accompanying note 12.
\textsuperscript{35} 1097b24-1098a18.
one to three make the crucial assertion that human beings have a
characteristic function. Steps four to six then link the good and doing well of
mankind to the uniqueness of that function. This permits Aristotle to identify
reasoned purposeful conduct as the characteristic human function, rather than
nutrition and growth, or sentient perception, all of which mankind shares
with plants and animals.

There are several obvious objections to Aristotle’s claim that
mankind has a unique function. First, “man” is not, like “flute-player,” a
clearly functional term. Therefore, even if it is true that human beings have a
function, it is not obvious that their goodness consists in performing that
function well. In short, there is a kind of mono-functional purposiveness built
into the term “flute-player,” which is not built into the term “man.”

Second, Aristotle’s assertion that the characteristic human function is
unique to humans does not square with his argument in Book Ten that the
supreme good for human beings is \textit{theoria}. As background to this
objection, it should be noted that the rational activity of the soul, to which
Aristotle refers in his functional argument, comprehends both practical
reason (\textit{phronesis}) and \textit{theoria}, through which individuals achieve \textit{episteme}
(i.e., knowledge of scientific laws). Arguably the latter is also active
(\textit{praktikei tis}), even though it need not result in purposeful action, because it
involves the use, not merely the possession, of an intellectual faculty.
Moreover, Aristotle states that if the soul’s faculties should have more than
one excellence, then the good for man involves the activity of the soul in
conformity with the best of them. This claim lays the foundation for his
argument in Book Ten that the supreme good for human beings is \textit{theoria},
rather than any other virtuous activity or combination of virtuous activities,
because \textit{theoria} is the highest excellence of the human soul, and affords the
greatest pleasure. Viewed against this background, the human function
includes, and possibly achieves its highest expression, in \textit{theoria}. But this
claim runs afoul of Aristotle’s uniqueness assertion because the gods also
engage in \textit{theoria}, according to Aristotle, and presumably do so better than
human beings because their contemplative activity is perfect and eternal.
Thus, if the term “function” or “characteristic function” requires that the
object or being that performs that function do so uniquely, or better than any
other object or being, then Aristotle has failed on his own terms to identify
mankind’s function in this argument.

These objections are not fatal. However, the most important
objection to Aristotle’s function argument is that it seems to rest on
metaphysical premises that are incompatible with modern science. Aristotle

\begin{itemize}
\item 1177a18.
\item 1139b14-36.
\item 1146b31-35.
\item 1098a16-19.
\item 1177a12-18.
\item 1178b7-24.
\end{itemize}
holds that the soul of an organism is the potentiality of matter to act or perform in ways characteristic of the living thing to which it belongs. In other words, the soul is the organizing principle of a living thing, that which determines its purpose or telos (e.g., in growing, reproducing, moving, perceiving, thinking, etc.). Pursuant to its organizational structure, the well-being of a living thing consists in the coordinated and integrated functioning of its capabilities. If an axe were alive, then cutting would be the activity proper to the soul of the axe, and cutting well the virtuous fulfillment of its function. Analogously, rational activity is the kind of activity most proper to the soul of a human being, and acting well in accordance with reason is the fulfillment of a human being's function.

According to Richard Kraut, Aristotle's metaphysical views on the soul and its relationship to the body are open to possible objection on several counts. Among them, the following are particularly salient. First, Aristotle's belief "in the fixity and eternality of species" leads to the objection that it precludes the possibility of species change. Kraut's own response to this objection is that ethics is a practical science and, therefore, "should leave aside anything that makes no practical difference" to the analysis of correct action. Thus, although modern science accepts the view that species develop and change over time, we are entitled to treat human beings as unchanging for the purpose of ethical analysis because possible future alteration of the species makes no difference to how we ought to act here and now.

One possible rejoinder to Kraut's response is that it licenses disregard of the consequences moral decisions often have for the lives of future human beings. But Kraut's response does not entitle moral agents to disregard the future moral consequences of present actions. It entitles them only to disregard the possibility that human beings in the future may be functionally distinct from themselves. This is justified because: (1) it is impossible to anticipate the consequences of actions for (human?) beings

---

42 This concept of soul underlies step three of Aristotle's function argument. See supra text accompanying note 37. It also underlies several other arguments made by Aristotle elsewhere in the Ethics. First, it underlies his claim that friends are a choiceworthy object of a virtuous person's perception because it is good, and therefore pleasant, to perceive their performance of the human function, namely active engagement in perception and thought. (1170a16-1170b13). It also underlies Aristotle's claim that people should engage in theoria because the activity of the intellect. (1177b30-1178a3).

43 Irwin, supra note 1, at 426. Two important qualifications follow from this analogy. First, organizational purposiveness implies a built-in end or aim, but not in the sense of conscious intentionality. It implies only the existence of typical behavior. Second, the soul is not a thing separate from the body so an organism's true self includes the various parts that compose its living physique. Rather, the soul is that which unifies (or describes) the various parts of an organism into (as) a single, purposive thing, characterized by typical functional capabilities.


45 Id. at 91–92.

46 Id.
with yet-to-be-determined functions; and (2) functionally relevant species change would have to be very great and, presumably, the result of a process whose completion would therefore be in the very remote future.

A second, perhaps more significant, objection asserts that Aristotle’s metaphysics “is an unsustainable hybrid: because he holds that corporeal organization is caused by an animal’s good, he illegitimately brings together two spheres that must be kept apart—the normative and the explanatory.” Kraut’s response to this objection is that Aristotle’s conception of well-being remains viable even when detached from his metaphysics because it is intuitively appealing. Thus, “[b]y reflecting on our ideas about proper human development from childhood to adulthood, and the central role played in a well-lived life by skills of thought, feeling, and social interaction, Aristotle’s conclusion—that well-being consists in the skillful deployment of our capacity to give and respond to reasons—can be sustained.” Kraut’s response concedes the unpersuasiveness of Aristotle’s metaphysics, but has the merit of employing Aristotle’s own common sense form of argumentation in the Ethics, in that it begins with what is known to us, i.e., experience, as the foundation for further analysis. Based upon this approach, it asserts that the entire edifice of Aristotle’s Ethics should not fall simply because it rests, in part, upon metaphysical premises that seem primitive from the standpoint of modern scientific theory.

Two other objections to Aristotle’s metaphysics might be mentioned only to be dismissed, since they are both canards. The first asserts that Aristotle’s definition of the characteristic human function as activity of the soul in conformity with reason is too broad because there are many activities included under the general rubric of this definition that are not uniquely human. For example, many animals care for their young, remain faithful to their mates, and sacrifice themselves for the sake of the community to which they belong. The obvious response to this objection is that activity is not characteristically human unless it is undertaken in conformity with reason, and that animals, even though some do engage in similar activities, do so more in conformity with instinct than reason. Even if some animals do engage in reason to some extent when engaged in such activities, human reason is nevertheless sufficiently more powerful and determinative to constitute a difference in kind.

The second objection asserts that Aristotle’s definition of the characteristic human function is too narrow, i.e., that there are many important human activities, such as eating, that do not seem to fall within the definition, but which are characteristically human activities. The answer to this objection is that such activities, while not intellectual in themselves, are

---

47 Id. at 85.
48 Id.
49 Id.
50 For a general discussion of these two objections, see Gerald J. Hughes, Aristotle on Ethics 38–41 (Tim Crane & Jonathan Wolff eds., Routledge 2001).
(or should be) pursued in conformity with reason, and therefore do fit within Aristotle’s definition of human function. A better form of this objection is to attack Aristotle’s further qualification (in Book ten) that the characteristic human function, when exercised in the most excellent manner, comprises not every activity in conformity with reason, but only the best such activity, i.e., theoría. For this qualification does leave out of the picture many important rational activities that are characteristic of human beings. However, Aristotle’s qualification does not commit him to the idea that activities other than theoría have no value. He can still assert that such activities are important and characteristic. His claim is only that such activities are not essential to achievement of the highest degree of human well-being. Moreover, Aristotle’s qualification is necessary only to Book Ten of the Ethics, and its removal does nothing to weaken the argument developed by Aristotle in the first nine books.

Steps one to three of Aristotle’s function argument also introduce the claim that each function has its own proper excellence, according to which the quality of the performance of that function may be measured. This assertion establishes the normative foundation of Aristotle’s Ethics, but to place the notion of normative correctness in its proper perspective, one should observe that Aristotle himself was not particularly concerned with the universal application of moral virtues, and considered it sufficient for his purpose to provide practical guidance to his audience of wealthy young Athenian citizens. Thus, in the Ethics he repeatedly asserts that one should not expect as much precision in political science as in the study of the sciences. 51 This is because the great variety of circumstances that surround human action make it impossible to define moral virtues in any but rough, general terms. Thus, even though Aristotle would say that the correctness of any given action is an objective matter, he would nevertheless resist any effort to define virtues precisely.

In contrast, Martha Nussbaum argues that at least one major task of Aristotelian ethics is to approach ever greater precision and completeness in the specification of moral virtues and the disjunction of actions that comprise correct functioning under them. “Success in the eliminative task,” she argues, will result in “a (probably small) plurality of acceptable accounts” of any given virtue. 52 As a hypothetical example of this process, she notes that “if we should succeed in ruling out conceptions of the proper attitude to one’s own human worth that are based on a notion of original sin, this would be moral work of enormous significance . . . .” 53 Nussbaum asserts that the process of eliminative specification applies not only to the “concrete fillings” of moral virtues, but to the identification of moral virtues themselves. Thus,

51 See, e.g., 1194b23-27.
53 Id. at 44.
according to her, the fact that “one can . . . imagine forms of human life that do not contain the holding of private property” renders the moral virtue of generosity questionable on the ground that it is not truly universal in applicability.\textsuperscript{54}

The eliminative task leads Nussbaum to propose a list of functions that rests upon “an account of what it is to be a human being,”\textsuperscript{55} or “what it is to function humanly.”\textsuperscript{56} The precise normative role of this list of functions is somewhat unclear. On the one hand, it is a “working list,”\textsuperscript{57} an “open-ended list” that specifies “vaguely certain basic functionings that should, as constitutive of human life, concern us.”\textsuperscript{58} On the other hand, [a]s far as capabilities go, it is clear that calling them part of humanness is making a very basic sort of evaluation. It is to say that life without this item would be too lacking, too impoverished, to be human at all. \textit{A fortiori}, it could not be a good human life. So this list of capabilities is a kind of ground-floor, or minimal conception of the good.\textsuperscript{59}

Taken as a composite statement of what the human function is, and therefore what individuals must perform well in order to achieve \textit{eudaimonia}, Nussbaum’s list is highly problematic. Consider items three (“Being able to avoid unnecessary and non-useful pain, and to have pleasurable experiences”) and four (“Being able to use the five senses; being able to imagine, to think and reason”).\textsuperscript{60} As Mary Beard points out, item four appears at a stroke to exclude persons with certain physical disabilities from the possibility of functioning in a human way, and thereby being able to lead virtuous lives.\textsuperscript{61} As for item three, Beard states,

What is to count as [non-useful] pain that none of us ought to suffer? . . . Does it, for example, include piercing? Or is that [useful], in the sense that it provides a means of self-expression (another desideratum on her list) or brings kudos within a particular social group? And what of orthodontics? [Useful] because it allows one to conform to certain socially approved norms of appearance? Or [non-useful] for precisely the same reason . . . ?\textsuperscript{62}

Nussbaum tries to accommodate cultural variety through the concept of “local specification,” which recognizes that “the constitutive circumstances of human life, while broadly shared, are themselves realized.

\textsuperscript{54} Id. at 50; see also id. at 42–43.
\textsuperscript{55} Nussbaum, \textit{Aristotelian Social Democracy}, supra note 6, at 217.
\textsuperscript{56} Id. at 208; see also id. at 205, 225.
\textsuperscript{57} Id. at 219.
\textsuperscript{58} Id. at 224.
\textsuperscript{59} Id.
\textsuperscript{60} Nussbaum, \textit{Aristotelian Social Democracy}, supra note 6, at 225.
\textsuperscript{61} Mary Beard, \textit{The Danger of Making Lists}, \textit{TIMES LITERARY SUPPLEMENT}, Mar. 17, 2000, at 6.
\textsuperscript{62} Id.
in different forms in different societies.”63 But if the list of human functions is accommodating in this respect, it will, as Beard implies, end up accommodating opposites, in which case it is rendered meaningless. Therefore, “the Aristotelian does not simply defer to local traditions . . . .”64 But going in this direction quickly commits Nussbaum to a highly specific and detailed list of definitions of the human good that is insufficiently attentive to cultural and individual context.

Whatever the merits of Nussbaum’s approach to the task of normative ethics, it is not an approach Aristotle himself would endorse. With respect to Nussbaum’s observation about the virtue of generosity, Aristotle would likely reply that there are forms of generosity that do not require the possession of private wealth. Alternatively, he might reply that generosity, defined specifically as giving away one’s wealth, might exist as a virtue in one place, where there is private property, but not in another, where there is no private property. Both of these answers rest upon the circumstantial particularity of Aristotelian correctness. Neither in his definition of the characteristic human function, nor subsequently even in his discussions of individual virtues, does Aristotle seek or achieve the degree of specificity in the definition of universally valid moral virtues Nussbaum wishes to obtain. Because of this, one might more reasonably push in the opposite direction towards a more (though still neo-) Aristotelian assertion that it just is the mechanics of virtue, combined with a basic set of broadly defined moral virtues, that constitute the proper human function and therefore establish the limits of the normative and universal elements of ethics.

It is also noteworthy that even though Aristotle does draw a link between excellent performance and doing well, his general evaluative criteria for measuring the correctness of human action are remarkably underdeveloped by contemporary standards. Aside from his well known endorsement of moderation in the exercise of dispositions (itself a notion relativized to individual characteristics),65 Aristotle offers little beyond a circular argument that goodness is measured according to what a good individual would do.66 Such evaluative criteria could not possibly support the “eliminative task” Nussbaum wishes to undertake.

However, drawing the link between excellent performance of the human function and doing well does allow Aristotle to conclude in a separate argument that virtuous action is essentially pleasant (by nature) because it is pleasant to those who excel in performing the function of man.67 In contrast, a morally inferior person likes activity that is pleasant owing only to something extraneous and contingent, such as idiosyncratic taste, and not to

---

63 Nussbaum, Aristotelian Social Democracy, supra note 6, at 234.
64 Id. at 236.
65 1106a29-33; 1107a2-3; 1108b11-13.
66 1105b22-24; 1106b36-1107a2.
67 1099a10-22.
goodness inherent in the activity itself. As a result, the pleasures of a morally inferior person often conflict with one another, as when an individual has conflicting tastes and urges simultaneously. In contrast, the pleasure of a virtuous person is never subject to conflict since it arises from the inherent goodness of virtuous activity, and virtues, at least those recognized by Aristotle, if not all virtues in principle, never conflict. There can be no such conflict when all capacities are engaged in activity that is in harmony with reason. Thus, the pleasure of the virtuous person is a stable condition of the soul, while that of the morally inferior person is hostage to passing fancy or peculiar tastes.

Aristotle adds an important qualification to the definition of eudaimonia. Virtuous activity must occupy a complete lifetime. In part, this requirement recognizes that severe and repeated reversals of fortune can destroy the eudaimonia of a virtuous person. Yet, according to Aristotle there is no human occupation in which eudaimonia enjoys such permanence as that which is obtained in virtuous activity. The eudaimon will never be miserable; he will accept misfortune nobly, and retain his stability throughout life.

This qualification relates far more significantly to the notion that the full development and expression of virtue requires experience gained from a complete lifetime. Since virtue in the polis is not a matter of theoretical knowledge, but of choosing the correct action in an indefinite variety of situational contexts, there can be no substitute for experience in developing judgment capable of gauging the nuances of specific facts. It is for this reason that ethics is not a fit science for the young.

This argument introduces the idea of a hierarchy of pleasures. All pleasures are a condition of the soul, but those of the virtuous man are superior because they are derived from fulfillment of the human being's unique function. Aristotle makes this hierarchy explicit in Book Ten, in which he asserts that the greatest pleasure is that derived from theoria. (1175b37-1176a3). It should be noted that the virtuous man's pleasure, although stable, is not continuous. For example, the courageous man cannot be pleased by the prospect of his own death, precisely because his virtue makes his life worth prolonging. Nevertheless, the pleasure taken from the prospect of continued life does not conflict with the pain arising from the anticipation of virtuous self-sacrifice, because they are arranged hierarchically, and therefore harmoniously, in accordance with reason.

Aristotle adds a closely related qualification as well, though one less important for the purposes of the argument made here. He asserts that one must realize complete, lifelong goodness in action (or at least steady progress towards achieving complete goodness) and be adequately furnished with external goods, such as adequate financial resources and friends. (1101a15). Without these, even the stable moral agent's opportunities for virtuous action are
C. Training the Dispositions (and Practical Reason)

It is clear from the above that eudaimonia depends on virtue, and that virtue is an activity of the soul that conforms to reason. It constitutes the good and doing well of a human being. However, it is also clear that virtue is not easy to achieve. First principles are only a starting point, and it takes years to develop the capacity to sift through context-specific facts in order to determine just how to act in every situation. Since possible factual combinations are infinite, the virtuous agent must somehow learn to extrapolate from experience in order to determine which actions are appropriate even in novel situations. Given the apparent difficulty of the task, how is one to become virtuous?

Before answering this question, one must consider Aristotle’s effort in Book Two to define moral virtue (arete), a state of the soul that logically precedes virtuous action itself. Aristotle considers three possible states of the soul and concludes that arete is neither an emotion (pathei) nor a capacity (dunamis), but rather a disposition (hexis). An important aspect of this argument is Aristotle’s suggestion that the three states of the soul are interrelated. Specifically, pathai are states of consciousness accompanied by pleasure or pain, such as desire, anger, fear, confidence, envy, or joy; dunameis are the faculties through which we are subject to pathai; and hexeis are the formed states of character, in virtue of which we are well or ill disposed with respect to the various emotions that motivate and accompany action. Since virtues are dispositions, they therefore amount to a tendency to act in, or react to, a situation with a particular kind of emotion and with a particular level of intensity, and to feel pleasure or pain accordingly. As Aristotle puts it, moral virtue is the quality of acting (praktikei) in relation to constrained.

Both qualifications relate tangentially to the question of whether our virtue is up to us, or the result of good fortune. In Book One, Aristotle brackets the issue, stating simply that since it is better to flourish as a result of one’s own exertions than by the gift of fortune, it is reasonable to suppose that this is how eudaimonia is won. Thus, his formal definition of virtue in Book Two states that virtue involves choice (proairesis). In Book Three, which takes up the question of what makes action praiseworthy or blameworthy, Aristotle defines choice as the deliberate desire of things in the agent’s power to achieve, and assimilates this requirement to the notion of moral responsibility. Book Three also considers the distinct question of voluntariness, or what it means for action to be the result of one’s own exertion. According to Aristotle, a voluntary act is one of which the origin lies in an agent who knows the relevant circumstances in which he acts. Voluntariness is implied by choice. Therefore, issues related specifically to voluntariness are of no special significance other than to highlight the importance of choice as a pre-condition of moral responsibility. Without choice, actions may be good or base, but the actor neither vicious nor virtuous.

Arete logically precedes action because it is a hesis proairetike, a state of the soul that determines the choice of action.
pleasure and pain as the best men do, and vice is the opposite.  

In more concrete terms, Aristotle asserts that virtuous dispositions lead to actions that avoid excess and deficiency, hitting the mean relative to the particular agent.  

Thus, for example, "liberality (eleutherioteis) is the mean in regard to giving and receiving money, wastefulness (asotia) and illiberality (aneleutherioteis) the excess and deficiency." The requirement that the mean be measured in relation to the particular agent, rather than in relation to an objective standard, indicates Aristotle's view that the characteristics of the agent comprise part of the complex factual specificity of each situation.

Having defined arete, Aristotle makes a number of important observations about it. First, neither moral virtue nor vice is the product of nature. Human beings are blank slates, though not characterless, since that slate is provided by nature with the capacity to receive either virtue or vice. Second, "virtue is the product of habit," formed through repetition of corresponding actions. We acquire arete only by having practiced virtue-like behavior first. For example, "we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts." Third, Aristotle notes that it is necessary for us to control the character of our activities, since the quality of our dispositions depends upon the quality of our actions. Thus, "it is necessary that the moral agent be well trained in his habits concerning the good and the just and all things that are involved in..."
politics generally."  

This last point indicates the importance of moral education. Aristotle states that "it matters not a little whether we are trained from earliest childhood in one set of habits or another; rather it is very, or even supremely, important." In a sense, the whole purpose of politics is to provide this moral training. "Lawgivers make the citizens good by training them in habits of virtue, and this is the aim of every lawgiver; those who do not do this well are failures, and in this way the good state differs from the bad." Barring exceptional luck, it is clear that one does not acquire virtue, or become an *eudaimon*, without the help of others.

Moral training motivates through the medium of pleasure and pain. Aristotle notes that susceptibility to pleasure has grown up with us from the cradle, and indeed is ingrained in us. As a result, "we do base actions for the sake of pleasure, and avoid doing noble ones in order to avoid pain."  

---

93 1095b5-7.  
94 1103b23-25.  
95 1103b3-7. This conception of politics as a source of moral education leads Aristotle in Book Eight to endorse kingship as the best form of government in principle. (1160a36). Perhaps Aristotle takes this view because, in his mind, the relationship between king and subject resembles that of teacher and student. The inference of this resemblance follows from the explicit comparison of the relationship between king and subject to that between father and child, (1160b23-26), for parents are obviously the most important teachers of character. If the king is like a teacher, then he is ideally suited to carry out the function of political science. However, Aristotle's complete presentation of friendship in Books Eight and Nine indicates, or at least hints at the possibility, that a form of alternative, continuing moral education is derived, to some degree, from a complex web of friendships, rather than through a single, idealized relationship. In turn, this supports an inference that interaction among political friends is important for the achievement of best political results. This interpretation of Aristotle's view on the role of friendship in moral education and the inference it supports concerning political decision-making, although justified by the text, are perhaps inconsistent with the view that kingship is the best form of government.

96 1104b9-10; 1105a13-16.  
97 1105a2.  
98 1105a3-4.  
99 1104b10-11. This assertion comes perilously close to suggesting that human beings have a natural tendency towards vice. In fact, Aristotle elsewhere reiterates his fear that human beings are easily led astray. For example, in Book Seven, he states that many people pursue excessive bodily pleasures in order to drive out the pain caused by lack of pleasure. They are drawn to the intensity of bodily pleasures because they are incapable of enjoying other pleasures. Like children in a state of exhilaration, excitable natures always need remedial action. They are exposed to a constant gnawing sensation, a state of vehement desire, which leads them to become self-indulgent. (1154a26-1154b16). If that is indeed what Aristotle believes, it contradicts his prior assertion that human beings are born with a capacity for virtue and vice, but an inclination towards neither. One could argue that if, in fact, more people lack moral virtue than possess it, the fault lies in the de facto absence of a sufficiently large group of sufficiently good teachers of virtue, rather than in any flaw of human nature. However, this line of argument begs the question of why there should consistently be a de facto lack of sufficiently good moral teachers, if not as a result of a flaw in human nature. It is implausible to assert that moral training simply got off on the wrong foot, so to speak, and as a result mankind is doomed to moral mediocrity through an unbreakable chain of repeated instances of poor training. On the other hand, if this were Aristotle's argument, it would
Thus, “[v]irtue has to do with pleasure and pain” because one must be taught to like and dislike the proper things.\textsuperscript{100}

Although it motivates through the promise of a reward, the essence of moral training, or proper habituation, is that it causes the student ultimately to do virtuous acts for their own sake, and to take pleasure in doing so, even if such acts were originally onerous.\textsuperscript{101} Early in the course of one’s training, one engages in just (or temperate, brave, magnanimous, etc.) acts, without oneself being just (or temperate, brave, magnanimous, etc.).\textsuperscript{102} The student may not realize that the acts are virtuous, or do them only reluctantly and without pleasure. But virtue is not achieved without the proper mental element that accompanies habituation.\textsuperscript{103}

Several significant problems or inconsistencies lie hidden beneath Aristotle’s observations about moral education. For example, since virtue requires activity accompanied by a particular mental state, it is clear that it engages an intellectual capacity as well as trained dispositions. But moral training focuses on habituation of dispositions alone. In fact, Aristotle states explicitly at the beginning of Book Two that intellectual virtue is the product of precept rather than habit.\textsuperscript{104} Therefore, it seems to fall outside the scope of explain his insistence upon the significance of moral education in the cultivation of both virtue and vice.

\textsuperscript{100} 1105a13.
\textsuperscript{101} 1105a29-1105b1.
\textsuperscript{102} 1105b9-12.
\textsuperscript{103} 1105b5-9. Aristotle distinguishes moral virtue from craft-knowledge (techne) on the basis of its mental requirement. (1105a26-1105b12). Techne concerns expertise in the making of things that may either exist or not exist, and the efficient cause of which lies in the maker, not the thing made. (1140a11-14). But the products of techne determine by their own character whether they are excellent or not. Thus, a word is well spelled if and only if it is spelled correctly; it does not matter whether it was spelled correctly by chance or intentionally as the result of expertise in spelling. (1105a3-7). In contrast, actions do not determine by their own character whether they have been done well or not. This is because the agent must not only act in conformity with virtue, but in doing so must have a certain state of mind, i.e., in addition to acting from deliberate choice, the agent must, as a result of proper training of the relevant disposition, choose the action for its own sake. Virtue requires that the act be done for its own sake because virtue is an end in itself, something with intrinsic, rather than merely instrumental, value. Aristotle summarizes the importance of the mental element in moral virtue when he states that “one who acts in a temperate and just manner is not just and temperate by reason of his actions alone, but only when he acts in the way a temperate and just man would act.” (1105b8).

Having drawn this distinction between techne and arete, Aristotle nevertheless fails to address the issue of just how the student learns to do an act for its own sake. He asserts that moral training motivates through pleasure and pain. Pain is used as corrective treatment for failure to learn properly. (1104b117-19). This implies that bribery is also used to encourage a student to do well. But the pain and pleasure of punishment and bribery will teach the student to act for the sake of the bribe or the avoidance of punishment, not for the sake of the goodness inherent in the act. How does the student learn to act for the sake of the act itself? The best answer may be that repetition of actions actually increases the pleasure they afford, so that the bribe eventually becomes irrelevant, but Aristotle himself has no answer to this conundrum.

\textsuperscript{104} 1103a15-16.
moral training, and Aristotle's description of moral training seems to be incomplete.

This is even more puzzling when one considers that the mental aspect of correct moral choice must require not only the desire to do an act for its own sake, but also the ability to recognize the proposed act as one that is correct. In other words, *arete* requires reason so that one will know how to act virtuously in novel situations. By definition, novel situations present one with the need to engage in actions one has never previously undertaken, much less undertaken repeatedly. It is hard to imagine how habituation, without more, could prepare one for such a task. Presumably, it is the application of reason that allows one to extrapolate by analogy from accumulated experiences, and perhaps vicariously from those of others, in order to determine how one should act when faced with a variety of possibilities in a completely new situation. If moral excellence demands the exercise of both reason and stable dispositions, moral education must account for the development of each. It must include the guided, habitual accumulation of appropriate dispositions and also the development of sufficient intellectual maturity to engage successfully in the inferential and analogical thinking applied reason requires.

The best solution to this puzzle is to treat Aristotle's comment about the training of intellectual virtues as an overgeneralization rather than an inconsistency. According to this interpretation, Aristotle's claim really applies only to the intellectual virtues involved in *theoria*, i.e., scientific knowledge (*episteme*), intuition (*nous*), and wisdom (*sophia*), which combines the two. These intellectual virtues all involve the apprehension of things that cannot be otherwise, truths that are necessary, eternal, and universal. Such are the truths that can be taught by precept.

In contrast, technical knowledge (*techne*) and practical reason (*phronesis*) are forms of grasping the truth about things that can be otherwise than they are. *Phronesis* is the intellectual capacity through which we grasp truth with respect to action and, therefore, is the intellectual virtue involved in moral choice. It proceeds from the last thing, i.e., particular facts, whereas *episteme* proceeds from the first thing, i.e., first principles. In method, *phronesis* relies upon intellectual perception (*aisthesis*) of the

---

105 1141a16-20; 1141b3-4. 1139b20-25; 1140b31-32. *Episteme* proceeds by demonstration, which is deduction from first principles. (1139b28-32; 1140b32-34). Therefore, what is known scientifically is demonstrable. But the first principles of scientific knowledge are not. (1139b28-32; 1140b33-35). One arrives at first principles through a process of induction (*epagogoi*), working upward from known facts. *Nous* is the state that grasps the truth about the origins of what cannot be otherwise. (1139b28-29; 1141a3-8). It is not a form of *episteme*, (1140b30-34), but a necessary pre-condition to *episteme*. (1139b33-34).


107 1140a1-2; 1140a32.

108 1140b6-8; 1140b20-22.

109 1140b31-34; 1141b15-17; 1142a24-28.
relevant facts of a particular situation and, by means of the so-called practical syllogism, applies general principles to them in order to determine by deductive inference what action is to be done.\textsuperscript{111} The general principles are themselves extrapolated from the deductive inferences made in many particular instances, and are therefore subject to revision by the same iterative process in which they are applied.\textsuperscript{112}

The development of excellence in constructing the practical

\textsuperscript{111} 1142a24-28; 1144a31-34.

\textsuperscript{112} Aristotle’s analysis of phronesis and nous is somewhat opaque. As noted, he refers to phronesis as a quality or state (hexis) that is rational (meta logou) and concerned with attaining the truth in matters of action (hexis praktikei) that are good or bad for human beings. Indeed, Aristotle explicitly indicates that phronesis is a form of deduction that operates through the practical syllogism. See supra notes 109–111 and accompanying text. Moreover, in his discussion of deliberative excellence, he states that “it is possible to arrive at the truth through a false syllogism” (sullogismus), “and to determine what one should do, but not why one should do it, by means of a false middle term” (mesos horos, i.e., minor premise). (1142b23-25). Thus, phronesis seems to be a form of deductive reasoning through which general principles are applied to specific facts in order to determine how to act.

However, Aristotle also refers to phronesis as a form of aisthesis, or perception, that intuits both the particular, relevant facts of a situation (for example, that the masked man who breaks into a house and runs out again with a television under his arm is engaged in a theft), and the general principles that govern correct action (for example, that one should notify the police in the event of a theft). (I 142a24-28; I141b14-15). This is a quite different description of phronesis. In addition, Aristotle also describes nous as a similar capacity that intuits the relevant facts of a situation. (1 143a35-1143b4).

Several related problems follow from these definitions. First, if phronesis and nous both involve a kind of intuition, how do they differ? Second, if nous involves a form of intuition, how can it also be a form of knowledge that results from induction (epagogei)? Third, if phronesis involves a kind of intuition, how can it also involve a process of deliberative reason?

It seems unlikely that all these problems can be completely untangled because they seem to involve using the terms phronesis and nous to denote both intellectual qualities or states of apprehending truth, and capacities associated with attaining those states. In his initial division of the rational part of the soul into different faculties or capacities, Aristotle states that “when the objects are different in kind, the parts of the soul corresponding to them also differ in kind, since knowledge of the objects depends upon a likeness or affinity between the parts of the soul and their objects.” (1139a9-12). Concerning the first problem, one could perhaps then say that phronesis and nous, though functionally similar, are different in kind because their objects (i.e., the truth of things that can and cannot vary) differ. However, one is still left with the problem that nous seems to be involved in attaining both kinds of truth. Concerning the second problem, one might argue that induction is just a special case of intuition, so that there is no contradiction in the various applications of nous. In support of this view, Aristotle does state that the first principles underlying scientific deduction cannot themselves be the product of reason. (1142a27). With respect to the third problem, a closer reading of key passages indicates that phronesis is concerned with particular facts, which are discovered through intuition or intellectual perception, but one needn’t conceive of phronesis itself as the capacity through which the relevant facts become known. (1141b14-16; 1142a26-28). This interpretation nicely solves both the first and third problems up to a point, but we are still left with Aristotle’s unequivocal assertion that phronesis involves the use of intellectual perception or intuition to discover general principles of action. Nevertheless, one can then understand nous and phronesis as similar forms of inductive intuition that discover first principles, in one case that ground the process of scientific deduction and in the other that ground choice of action.
syllogism depends little upon learned precept and much more upon practice in actual choice-making, and therefore seems to accompany the development of moral virtue. This follows from the fact that *phronesis* depends upon moral virtue, without which it is merely cleverness, a capacity to calculate well to achieve vicious as well as fine ends, without the guidance of moral virtue.\textsuperscript{113} Given the interdependence of *phronesis* and moral virtue, it is implausible to conclude that Aristotle did not understand their development as interlinked in a single educative process.

Another problem is that Aristotle’s account of moral education is unpersuasive in its attribution of moral autonomy, and therefore responsibility, to the moral agent. This follows from the fact that good moral training seems to depend upon the student’s ability to secure a virtuous teacher. Unfortunately, there does not seem to be any way to retrieve Aristotle’s account of moral education on this point, for his commonsensical notion of personal responsibility does not address deeper questions about human freedom.\textsuperscript{114}

The single greatest problem in Aristotle’s description of moral education is its lack of any specificity regarding its scope. Who teaches? How long does the process take? What does instruction consist of? Aristotle does not answer such questions because his comments are not intended to be a comprehensive theory of education. However, it is clear that Aristotle imagines the process of moral education taking place between parent and child, or between tutor and student, in either case a specific, finite undertaking defined by a single, formal relationship. Within this straightforward relationship, the student acts only as his or her tutor tells him or her to do, thereby so internalizing his or her tutor’s teachings that the student thereafter acts on the basis of the teachings alone. The former student will then have developed dispositions and matured into a responsible moral agent. However, one might also imagine moral education as a more

\textsuperscript{113} 1144a128-36. *Phronesis* is by definition the application of practical reason guided by moral virtue. When moral virtue is absent, practical reason is not *phronimos* (i.e., intelligent, in the sense of wise), but *deinoteita* (i.e., intelligence, in the sense of cleverness in obtaining one’s end).

\textsuperscript{114} Aristotle does anticipate this problem in a slightly different context. In Book Three he poses a hypothetical objection, which asserts that morally inferior men cannot be blamed for the conception of the good their characters cause them to seek, if they do not control the development of their characters. (1114a30-1114b13). This objection is based upon the supposition that character is determined by nature, not by education. However, it addresses the same issue, for the crucial claim is that character is beyond the agent’s control, whether by reason of nature or nurture.

Aristotle’s response to the objection is to assert that if a virtuous man’s character is given by nature, but his actions voluntarily done (*prattein hekousios*), so that his virtue is voluntary, then the same can be said of the vicious man. (1114b18-21). However, Aristotle does not explain why virtuous actions voluntarily done in conformity to a pre-determined conception of the good render the virtuous man responsible for his virtue, and therefore praiseworthy. His answer seems to endorse a naive form of free will compatibilism, according to which the moral agent’s responsibility would cease only if he were prevented from acting according to choice, or his actions were compelled contrary to his will.
comprehensive, diffuse, and informal process. In fact, warrant for this is provided by Aristotle's own contrast between the precision of theoretical reason and the fact-specific, proximate nature of moral reasoning from general principles of action. Recalling from Aristotle's discussion of political science that principles of correct action are only generally valid, that they must be drawn by inference from experience of life, and that their application is context-specific, one might reasonably envision moral education as an ongoing process, in which appropriate dispositions and the ability to apply intellectual discernment to questions of action emerge and coalesce only gradually. On this view, virtue is not a matter of learning unconditional principles, but of mastering an approach to life, and this requires time and the filtering of vast amounts of factual data until a general picture comes into focus. One imagines that the moral student might learn in many ways, such as by example, direct exhortation, through critical evaluation and re-evaluation. He or she might learn from many sources, including direct experience, observation of others, advice, even from consideration of the experiences of fictional as well as real people. Finally, the variety of sources is also important, so one imagines the student learning from a wide variety of moral tutors, ranging across the spectrum, from moral experts to moral rogues, in a wide variety of relationships with varying degrees of formality and consistency. Only moral education viewed across such a sprawling landscape captures the richness and complexity of moral life, as well as the provisional character of all moral choices.

This picture of moral education identifies its scope with that of moral practice. One learns to be a moral agent in precisely the same contexts in which one acts as a moral agent. This version of moral education is at least compatible with, if not directly suggested by, Aristotle's insistence that achievement of virtue, and therefore the supreme good, requires the accumulation of vast experience and must be practiced throughout life. Moreover, Aristotle's discussion of friendship elaborates a number of the relationships that furnish the material for both moral doing and moral learning in the wide sense suggested here. Finally, the diffuse form of moral education outlined here does helpfully mitigate for modern sensibilities the problem of moral responsibility that Aristotle himself fails to address. For if it is true that the moral agent learns from many sources, rather than from one tutor alone, then he or she is less subject to the misfortune of poor moral instruction, for which he or she cannot be held responsible.115

115 In adopting this neo-Aristotelean account of moral education, I do not wish to minimize the extent to which it is problematic from a strictly Aristotelean point of view. For example, equating the scope of moral education with the scope of moral practice obscures the point at which one passes from the status of a moral student to that of a mature moral agent. Aristotle places the accomplishment of this transition at the point of internalizing the instructor's teachings, but such relative precision is impossible in the account presented here. In fact, it follows from this account that the mature moral agent remains a moral student, an idea that Aristotle would reject.

Nor would Aristotle endorse the idea that virtuous friends teach each other to be
D. The Scope of Deliberation

In simple terms, deliberation (boulesis) is the process through which the virtuous moral agent, employing the intellectual virtue of phronesis, chooses to undertake an action, or course of action, in order to accomplish some end that conforms to the agent's character (hexeis). As a functional part of the mechanics of virtue, deliberation is the distinctive feature of choice that differentiates it from both wish and non-rational desire and, therefore, makes a crucial contribution to the exercise of virtue and vice.

First and foremost, deliberation is an intensely practical undertaking. According to Aristotle, we do not deliberate about the eternal and immutable, or matters of necessity in the natural world, or things subject to chance, or about matters already formulated by the sciences. We deliberate only about human affairs that relate to us. For it makes sense to deliberate only about things subject to our control and achievable through our action. Therefore, choice "is a deliberate desire of things in our power." This account of deliberation corresponds to that of political science as inexact, for questions of appropriate human conduct are matters subject to rules that generally hold true, but which lead to uncertain results in application. One must, in the course of deliberation, weigh alternative possibilities and consider, insofar as one is able to do so, all the circumstances at work in a given situation, to determine just which action will best achieve the end desired.

Throughout his discussion of deliberation, and especially in Book Three, Aristotle also portrays deliberation as a kind of rational calculation, or virtuous, despite various references indicating the possibility of some mutual influence. By definition, the roles of tutor and virtuous friend are mutually exclusive, since virtuous friends are both virtuous, whereas tutor and student are not. Thus, Aristotle could not endorse an account that requires the virtuous individual to be at once both student and friend of another. However, the account offered here does not require that virtuous friends teach each other to be virtuous in any systematic way. Hence, it may not be in conflict with Aristotle's own views, insofar as Aristotle seems to distinguish between informal influence and systematic training.

Appetite (epithumia) is an element of desire (orexis) that is non-rational and usually associated with gratification of bodily cravings. It leads to actions taken for the sake of the pleasure they bring, not for the sake of the action, as being something good in itself. However, vicious acts may also involve shrewd deliberation and choice, and therefore result in blameworthiness. A virtuous choice must be the product of morally excellent deliberation, i.e., deliberation about how to achieve some good that is an end in itself.

It is important to note that the difference between actions motivated by epithumia and those involving virtuous choice does not consist in the object of desire, but in the relationship of the desire to the human good. It would be perfectly fine for a virtuous man to choose to indulge bodily cravings in a manner appropriate to his psyche, so long as he did so in moderation, and so as not otherwise to distort his pursuit and achievement of that which is good for a human being.
instrumental thinking, engaged in selecting among alternative actions the one most likely to achieve an end already specified. Thus, he states that "one does not deliberate about the end, but about means towards the end." This instrumental account of deliberation implies a conception of moral decision-making in which the specification of ends is entirely separate from the identification of means. Thus, Aristotle states in Book Six that "virtue makes the choice correct, but to do those things that it is necessary to do to achieve the right end belongs not to virtue but to a different faculty." This account of deliberation as purely instrumental reasoning ultimately lacks something in explanatory power. On any common-sense account of moral life, individuals do not engage merely in isolated instances of rational calculation in order to determine how to act to achieve static, pre-specified ends. In fact, it is quite clear that Aristotle himself does not understand deliberation exclusively in such simple terms. In analyzing Aristotle's conception of deliberation, one must keep in mind the teleological structure of the Ethics, especially Aristotle's assertion that the only end chosen for its own sake is eudaimonia itself. Any other end chosen by the virtuous moral agent is also a means to eudaimonia and, therefore, the subject of deliberation.

Realization that what we normally take to be ends are also means leads to a much broader account of the scope of deliberation and suggests that moral excellence is not just a matter of hitting the mean in separate, individual actions, though it is just that. More fundamentally it involves choosing a life plan and hitting the mean in a vast number of interrelated actions, as one seeks to realize that plan across the trajectory of many years' experience. Within this process, the role of deliberation must be not only to identify means, but to specify, co-ordinate, prioritize, and possibly revise ends that together contribute to the achievement of eudaimonia.

In addition to the teleological structure of the Ethics, there is also direct textual warrant for the conclusion that Aristotle does indeed endorse this broader account of the scope of deliberation. He states in Book Six that "it seems to be characteristic of a prudent man to be able to deliberate well concerning that which is good and advantageous to himself, not in respect to particular categories of good, such as what will lead to health or strength, but in respect to those things that lead to a good life in general." This passage suggests that the morally virtuous person deliberates first about the ends that contribute to or comprise eudaimonia, then about the specific means that serve to achieve those general ends.

Another passage in Book Six leads to the same conclusion. Aristotle states that there is both unconditional good deliberation, and good deliberation towards a particular end. The former leads

[1112b34-35.]
[1144a20-23.]
[1140a25-28.]
towards the unconditional end, the latter is a particular form of deliberative excellence leading to its particular end. If it is characteristic of prudent men to have deliberated well, then good deliberation must be a kind of correctness in determining what is expedient as a means to the end, a true conception of which constitutes prudence.¹²⁴

Though admittedly somewhat confusing,¹²⁵ this passage suggests that the moral agent must deliberate at two levels, first selecting ends in relation to the general end of living well, then choosing more particular ends and actions to achieve his or her particular ends.¹²⁶

To summarize, the moral agent deliberates not only about means, but also about ends. Therefore, the agent must meditate not only upon general principles applicable to categories of action that correspond to particular moral virtues, for example, principles of magnanimous action, but also upon principles of good life in general, i.e., what life a morally virtuous person should pursue in order to achieve eudaimonia. However, even if deliberation is responsible for the selection of ends that lead to eudaimonia, as well as the selection of actions calculated to achieve those ends, moral character still has an important role to play. For both the ends selected, and the conception of moral excellence they reflect, are influenced by dispositions. The moral student who learns to take pleasure in doing acts that are intrinsically good will adopt ends calculated to achieve the supreme human good. Therefore, it is no surprise that Aristotle emphasizes the inter-dependence of moral virtue and deliberative excellence.¹²⁷

¹²⁴ 1142b28-34.
¹²⁵ There is some syntactic ambiguity in the last sentence because it isn’t clear whether the antecedent of “which” is “the end” or “correctness in determining what is expedient.” If it were the former, then this sentence would constitute an explicit statement that good deliberation involves a true conception of the unconditional end, which is eudaimonia. But this cannot be Aristotle’s claim, since he asserts in Book Three that one deliberates only about means.
¹²⁶ In addition to these passages, several themes in the Ethics suggest the appropriateness of understanding deliberation broadly as a process that applies to the adoption of coordinated life plans rather than as an instrumental calculus applicable to individual actions only. First, there is Aristotle’s emphasis on the need for dispositions to be stable and consistent, implying that virtue is not a matter of a single action. Second, there is Aristotle’s assertion that virtuous activity must occupy a complete lifetime. As we have seen, Aristotle’s meaning here is not so much that happiness is subject to fortune, but that happiness is the product of an entire life well lived. In part, this is because only experience can provide the deliberative capacity needed for complete virtue. However, the requirement also implies the need for a life plan, in which virtue is found not just in single acts, but in a string of interrelated acts.
¹²⁷ 1144a6-9; 1144b30-33. Moral virtue depends upon phronesis because its realization in virtuous action depends upon excellent choice, and excellent choice is the product of phronesis. (1144b9-14). Phronesis in its turn depends upon moral virtue, because without the guidance of virtuous dispositions it is merely cleverness, a capacity to calculate well either bestowed by nature or learned by precept or experience. See supra note 113.
E. Deliberation in the polis

The use of *phronesis* to identify ends and means that lead to *eudaimonia* leads in turn to the codification or specification of general principles of conduct. General principles of conduct are of particular interest because they are by definition an attempt to establish rules of behavior not just for oneself, but for everyone in the *polis*. They are not context-specific, and reflect a belief that there is a normatively correct standard of behavior applicable to all. In other words, there is in the process of deliberation and the exercise of *phronesis* an inescapable element of concern not only with oneself but with what is good for members of the *polis* in general.

Moreover, general principles of conduct are amenable to broader universalization. Aristotle never claims or implies in the *Ethics* that the process of deliberation or the derivation of general principles of virtuous conduct apply beyond citizens of the Greek *polis*, but there is nothing to preclude their extension in principle to all mankind. It is not possible, in Aristotle's view, that Greeks should have one characteristic function, and others (say Persians) another, since human beings comprise a single natural kind. Therefore, the proper excellence of life in the Greek *polis* would in principle be no different elsewhere. In recognition of this fact, the neo-Aristotelean interpretation of the *Ethics* advocated in this essay explicitly adopts a non-parochial version of the mechanics of virtue, according to which only children and those who are severely mentally handicapped are exempt from Aristotle's standard of human excellence and, therefore, from participation in the process of deriving (and abiding by) general principles of virtuous conduct.

Aristotle does recognize the political implications of deliberation in his assertion that man is a political being, that *eudaimonia* is sought in association with others, and that politics is therefore the master science of the good. The natural human tendency to extrapolate from unique experience to general principle is precisely what the science of politics is about. Aristotle also takes note of the political dimension of deliberation in Book Six. He states that *phronesis* is often thought to refer to wisdom concerned with oneself, as an individual, but that it actually includes also the function of drafting decrees and general legislation, which is nothing less than an effort to codify general principles of behavior. Here, Aristotle's thoughts echo his statement in Book Two that lawgivers try to make the people good by educating them in virtuous habits.

---

1096a34-1096b2.

It should be noted that universalization of the mechanics of virtue, based on natural, and therefore universal human characteristics, is a separate issue from universalization of substantive norms derived from application of the mechanics in ethical choice-making. While Aristotle's position justifies the former, it does not justify the latter. See supra text accompanying notes 51-64.

1141b30-31.

1141b24-27.
But how does politics harness deliberation to derive general political principles? Aristotle assumes that general principles will come from a wise lawgiver or lawgivers. However, Aristotle also recognizes that the experiences of any individual or small group of individuals are partial, incomplete, and limited in comparison with the accumulated experiences and viewpoints of the whole political community. This latter concern seems to suggest the advisability of a consensual form of decision-making, and political friendship is the means whereby it becomes operational. More specifically, it shall be argued presently that political friendship is the particular virtue through which deliberation is harnessed in a consensual process to the elaboration of general principles of political life, as one aspect of virtuous life in general.

F. Friendship and Political Friendship

Aristotle’s conception of friendship is very different from our own, and far more comprehensive. According to Aristotle, every association or relationship is a form of friendship, as long as it involves some kind of common undertaking. All that is required is that friends wish each other’s good and be aware of the reciprocal nature of their goodwill. Most friendships are of a limited nature and are based on pleasure or simple utility. The participants wish each other well only insofar as their mutual utility or pleasure causes them to care about each other. Such friendships are contingent, in that they are based on the accidental fact that the friends’ tastes or needs happen to bring them together. Limited friendships are broken off easily. When it no longer affords pleasure or utility, the friendship is dissolved, having existed only as a means to a particular end.

The complete or perfect form of friendship is based on the unconditionally good, that which is inherently desirable. Perfect friends, i.e., individuals who engage in the perfect or unconditional form of friendship even if they are not perfect in any other way, are individuals whose friendship is an end in itself, and therefore not accidental. In other words, A, who loves the good, befriends B because B is good. Therefore, he

---

1159b27.
1156a3-4.
1155b18-19.
1156a17-24.
1159b27.
1156a3-4.
1155b18-19.
1156a17-24.
1155a2.
1155a33-34.
1155a29.
1155a29.
1155b29.
1157b29.
1155a29.
1159a33-34.
1155a29.
1156b6-12.
betracks B for what B is, and wishes him well for his own sake. A derives pleasure from the friendship because A loves and desires the good, but the friendship is not instrumental. A does not enter the friendship in order to derive pleasure or benefit from B. But because perfect friendship is good and pleasant, both unconditionally and relatively (i.e., in relation to the friend), it is the best form of friendship and naturally permanent.\textsuperscript{138}

Aristotle states that friendship is the bond of the \textit{polis}.\textsuperscript{139} Therefore, it is not surprising that he identifies political friendship as an important form of perfect friendship. It is based on the friendly feeling of concord (\textit{homonoia}).\textsuperscript{140} In general, it motivates the lawgiver or lawgivers to seek the good and common advantage of the \textit{polis}.\textsuperscript{141} In more concrete terms, "cities are said to be in harmony when they agree as to their interests, choose policies to promote them, and do what seems correct to them in common."\textsuperscript{142}

In determining the scope of political friendship, it is important to understand what Aristotle means by "common interest" (\textit{koinon}). He states that concord cannot exist among the bad, for they seek only their own advantage rather than the common interest. They try to get more than their share of advantages while avoiding public burdens.\textsuperscript{143} This suggests that political friendship involves, at a minimum, the just distribution of benefits and burdens. In fact, Aristotle states explicitly that friendship and justice share the same objects and personal relationships.\textsuperscript{144} Thus, "in every kind of association there seems to be both justice and friendship."\textsuperscript{145}

\textsuperscript{138} 1156b18-24. Aristotle also divides friendships into equal and unequal types. Friendships are equal when both parties render the same benefit and wish the same good to each other, or exchange different, but equal benefits. (1158b1-4). Thus, perfect friendships are equal by definition, though unequal friendships may also be virtuous when based on mutual benefits reflecting the particular functional virtue of each party. (1162a25-27).

\textsuperscript{139} 1155a23.

\textsuperscript{140} 1167b3.

\textsuperscript{141} 1160a11-14.

\textsuperscript{142} 1167a37-39. What level of political agreement does political friendship require? Are citizens friends if they agree only on the need to seek consensus, or must they actually agree on the policy to be pursued? Aristotle seems to suggest that virtuous citizens will naturally agree with one another on political choices to be made, precisely because they are all virtuous. (1167a26-28; 1167b5-8). However, Aristotle does not say or imply that such agreement is a condition of virtuous political friendship, and from the standpoint of virtue ethics it is best explicitly to adopt a separation between the virtue of political participation, as an end in itself, and the achievement of any particular political outcome, at least under conditions in which political agreement is difficult to achieve. See supra note 9 (especially last paragraph). Hence the neo-Aristotelian version of political virtue offered here explicitly adopts a conception of political friendship requiring only goodwill in commitment to a choice-making procedure that takes account of all views presented.

\textsuperscript{143} 1167b9-13.

\textsuperscript{144} 1159b25-26.

\textsuperscript{145} 1159b27. If every association partakes of justice, then justice of a fashion obtains even when partners in crime split the burdens (risky assignments) and benefits (profits from stolen goods) of their association in proportion to their relative contributions to it. Although theft obviously does not partake of the virtue of justice in an unconditional sense, nevertheless Aristotle would recognize the partners' agreement as partaking of justice in a
On the other hand, political friendship seems to involve more than the virtue of justice. Since it is a form of perfect friendship, it follows that political friends wish the good for the object of their friendship. But in this case the object of each friend is not another specific individual, but the political community in general. If community life comprises more than the fair distribution of benefits and burdens, then good individuals, as political friends, must wish for a more comprehensive good than justice alone. Aristotle suggests that comprehensive good is the aim of political friendship in his claim that lawgivers aim to make the people good. On this reading, political friendship aims at the complete *eudaimonia* of all individuals within the *polis*, through the development of general principles of what constitutes a good life.\(^{146}\)

Perfect friendship between individuals in general has an instrumental value in preparing individuals for the specifically political version of that friendship. Aristotle makes several arguments that the reciprocal sympathy of good men is a source of goodness because it causes friends to treat each other as "another self."\(^{147}\) Thus, the virtuous acts of our friends are as pleasant to observe as our own and serve as a source of moral instruction since we are better able to observe the excellent actions of our neighbors and friends than our own.\(^{148}\) It is through this imaginative sympathy with the experiences of his friends that the moral agent is able to extend the scope of his own experience and obtain a more comprehensive understanding of the community's good.

Even limited friendships are a useful source of training for political friendship. Aristotle states that "all associations belong to the political community."\(^{149}\) In part, this is because both limited friendships and the *polis* itself exist to secure advantage. But it is also true that such relationships are a source of moral experience. The friends in such relationships do not exercise the kind of imaginative sympathy that is characteristic of perfect friendship, yet they can compare the attitudes and actions of others to their own, causing them to confirm or revise their own views accordingly. The particular

---

\(^{146}\) Aristotle also notes that the claims of justice vary according to the nature of the relationship. The nearer the relationship, the greater the claims of justice. (1160a2-5). Thus, if justice is an important factor in political friendship, then political friendship must be a near relationship. In that case, it seems likely that political friends are also concerned with one another's good in general.

\(^{147}\) 1166a32.

\(^{148}\) 1169b34-1170a4. There are a variety of ways in which Aristotle indicates explicitly that perfect friendship is an important, if informal, source of moral education. First, he states that a virtuous friend must try to "set right" a friend who has developed vicious tendencies before abandoning the friendship. (1165b16). Second, he states that "good people's life together allows the cultivation of virtue . . . " (1170a11). Third, he states that virtuous friends "become still better from their activities and their mutual correction." (1172a10). Fourth, he makes the same point by negative implication, in his claim that immoral people, "by becoming similar to each other . . . grow more vicious." (1172a9).

\(^{149}\) 1160a8.
intellectual virtue that accomplishes this is comprehension (\textit{sunesis}), a virtue similar to \textit{phronesis}, but which involves the use of opinion to judge the results of others' deliberations. One might then say that the function of \textit{sunesis}, within the context of political life, is to assimilate the experiences of others to the derivation of general rules of conduct. Therefore, \textit{sunesis} has an important role to play in moral education generally, as well as in the development of political friendship.

\textit{G. Political Virtue and the Logic of Consensual Decision-Making}

The role of political friendship, or political virtue, as it may be called when practiced in an excellent manner, implies the adoption of some consensual form of decision-making in the \textit{polis}, with respect to the codification of compulsory general rules of conduct, i.e., laws. This follows from the fact that political virtue is an instance of virtue generally, and that all the observations about moral education and practice therefore apply to it.

First, consensual decision-making is implied by the fact that political virtue involves activity. Purely intellectual virtues, such as \textit{theoria}, are manifested in activity of the soul alone, but moral virtues require an activity of the soul (deliberation) combined with a choice that issues in an action of some sort. General principles of political life are the product of this latter process, issuing in the active choice of rules, or laws, to govern conduct in the \textit{polis}. \textit{Eudaimonia}, the supreme good for human beings, is achieved through virtuous activity. Therefore, if the moral agent is deprived of an opportunity to engage in virtuous activity, he or she is deprived, to the extent of that deprivation, of the opportunity to achieve \textit{eudaimonia} (insofar as the activity is virtuous activity). Since the codification of general principles of conduct is a kind of virtuous activity involving the moral virtues, members of the \textit{polis} must have an opportunity to engage in active choice-making in order to achieve \textit{eudaimonia} with respect to that type of virtuous activity.

Second, consensual decision-making is implied by the fact that moral practice is the source of moral education. On the neo-Aristotelean account of moral education, moral agents continue to improve their virtue throughout their lives. Though their dispositions may be determined at an early age through habituation, moral agents at the very least continue to improve their deliberative capacity as they face myriad factual contexts requiring correct appraisal. Thus, even the moral choices of mature adults with stable characters constitute a kind of continuing education. As they face new situations, or receive guidance from new sources through the faculty of \textit{sunesis}, they must reassess their beliefs about how they should act in pursuit of a well-lived life. Friendships of all kinds provide much of the context in which moral agents continue to learn and apply their virtue. Political friendship is the means through which members of the \textit{polis} continue to
sharpen their ability to discern and articulate appropriate general principles of conduct suitable for codification. To be deprived of the opportunity to practice political virtue not only curtails the opportunity to achieve eudaimonia, but also to sharpen the deliberative capacity upon which political virtue rests.

Third, consensual decision-making is implied by the fact that the experiences of any given individual are inevitably limited. This is especially critical with respect to matters that are not strictly personal, but are of interest to the entire polis. For if a person is limited in judging matters that affect himself alone, so much the more must this be so in judging matters that potentially affect large numbers of people. Discerning the common good requires assessment of a larger and more complex set of circumstances, some of which must by necessity be less known to, or appreciated by, one citizen than another. Therefore, the general principles of conduct codified in legislation will be satisfactory only if they reflect the combined wisdom of all virtuous members of the community. General principles must somehow overcome the partial and incomplete experiences of even the most virtuous individuals. Political friendship, effected through some form of consensual decision-making process, has a particular role to play in combining the virtuous wisdom of all.

This view of the importance of political friendship in usefully combining the views of the many is supported by Aristotle’s own conclusion that the perspective of even a morally excellent person is limited. This conclusion is implicit in his views on moral education and friendship. Thus, he claims that it is fitting for friends to spend time together. Virtuous friends “seem to become still better from their joint activities and mutual correction. For each moulds the other in respect to those things that give him pleasure, whence the saying ‘of noble men come noble deeds’”.

Given the high interpersonal demands placed on perfect friends in general, one might object that consensual decision-making among political friends, as presented here, could function only in poleis, or possibly in other very small-scale communities. Aristotle does indeed assert that perfect friendship in general is rare and requires time and intimacy to flourish. However, Aristotle imposes no such condition on political friendship specifically. The latter is a form of perfect friendship because it obtains only between fellow citizens who are virtuous. But it imposes no obligation of intimacy as a pre-condition to effective operation. It requires only that one

1171b30-1172a14.
1172a12-14.
1156b25-29.

151 Aristotle’s position on the status of political friendship qua friendship is somewhat ambivalent. Political friendship is based on concord (homonoia). See supra text accompanying note 140. Homonoia is a form of friendly feeling (philikon), (1167a22), as is goodwill (eunoia). (1166b30). But eunoia is not a form of friendship because it can be felt towards strangers, whereas friendship requires reciprocal feelings. (1155b31-1156a1; 1166b30-32). This suggests that philikon and homonoia might not be forms of friendship
wish and act for the good of the community for its own sake.\textsuperscript{155} In fact, insofar as one cannot know the whole community with any degree of interpersonal intimacy, even in small-scale \textit{poleis}, political friendship by definition forecloses the kind of relationship between individuals that perfect friendship in general presupposes. Perfect friendship, and all other forms of friendship as well, affect the character and degree of virtue with which the member of the \textit{polis} views questions of public interest, but the intimacy of perfect friendship in general is not a part of addressing such questions or forming general principles of conduct. Therefore, the large scale of modern political society does not, in principle, preclude consensual decision-making, through the medium of political friendship, from consideration as a plausible account of the best method of political decision-making even in the modern state.\textsuperscript{156}

\section*{III.}

\textbf{A. Introduction}

According to the theory of political virtue offered in Part II, citizens of the \textit{polis} engage in a consensual process to codify appropriate general principles of conduct for themselves as a community. They do so through the medium of political friendship, a form of perfect or unconditional friendship, in which citizens desire and act to achieve the good of the community and take pleasure from their membership in a community that is well ordered.

\textsuperscript{155} This follows from the definition of perfect, or unconditional, friendship in general. (1155b31-32).

\textsuperscript{156} The argument here is that the mechanics of virtue can be translated to large-scale political communities. A different question is whether such translation is sensible, even if possible. Richard Kraut notes that, as a matter of formal definition, “differences in size do not by themselves constitute differences in kind.” \textsc{Kraut}, \textit{supra} note 44, at 13. Formally speaking, Aristotle defines the \textit{polis} as “a certain number of citizens.” (Pol. 1274b41). Citizens still exist, and modern states have a certain number of them; so such states qualify as \textit{poleis} under Aristotle’s definition. More to the point, “The polis and the modern state are kindred institutions, because they must confront kindred predicaments, having to do with the distribution of power and wealth and the proper ends to which these resources should be put.” \textsc{Kraut}, \textit{supra} note 44, at 13–14. I agree with Kraut’s conclusion in general, but not with the possible inference from his remark that the predicaments of political life focus exclusively, or even just principally, on matters of political justice. For as the master science of the good, political science aims at the comprehensive well-being of the citizens, not just in matters relating to the virtue of justice. In other words, it is not a specialized skill, such as horsemanship or generalship, but a skill that relates to the achievement of well-being in general.
Through participation in a deliberative and consensual process, citizens of the *polis* engage in a form of virtuous activity that contributes, in part, to their achievement of *eudaimonia*.

Part III now considers what implication this theory of political virtue might have for the institution of judicial review. In general terms, political friendship implies a widespread consensual or mutually consultative form of decision-making as the method of operationalizing political virtue for the largest number of citizens and as the best method for achieving satisfactory results in the choice of appropriate, binding general rules of conduct. Therefore, to the extent that judicial review precludes or overrides such decision-making, it seems to be incompatible with political virtue. This assertion does not imply a link between political virtue and any specific form of democracy, but it does push in a generally democratic direction.

After critiquing judicial review in a preliminary fashion, Part III will consider two democratic arguments in favor of the practice. The first is an empirical argument that judicial review demonstrably responds to the public will and is, therefore, not only compatible with democracy, but is an integral part of it as practiced in pluralist democracies, such as the United States. The second is a normative argument that judicial review, exercised on the basis of an originalist form of interpretation, follows from the logic of popular sovereignty underlying the Constitution. The argument asserts that an originalist form of judicial review, properly understood, reinforces popular sovereignty, and therefore democracy. The purpose of rehearsing these arguments is to examine, in a more extended and comprehensive way, whether, and to what extent, judicial review is incompatible with the neo-Aristotelian theory of political virtue.

---

157 See infra Part II.C–D.
158 See infra Part II.E.
159 These arguments are democratic in the strong sense that they view judicial review as embodying popular will. Other arguments defending judicial review are democratic in a weak sense. They understand judicial review as counter-majoritarian, but defend it insofar as it enhances or reinforces democracy more broadly. In his now classic work, John Hart Ely interpreted the Constitution purely as a procedural blueprint for democracy and justified judicial review as a means of correcting imperfections of democracy in fact. See generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). In more recent years a renascent version of republicanism has justified judicial review as a means of reinforcing the reasoned deliberation, as opposed to interest group pluralism, of democratic politics. See generally CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993). Both of these arguments view judicial review as a necessary adjunct to democracy, but not itself a democratic practice.

Most contemporary justifications of judicial review are rights-based theories, explicitly anti-democratic in their conclusion that majorities should be trumped by judicial decisions whenever majorities place impermissible burdens on non-voidable rights. These justifications form a line of argument descending from Alexander Bickel. See generally ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). Bickel argued that government of “the good society” has two distinct functions: “to satisfy the immediate needs of the greatest number,” and “to support and maintain enduring general values.” *Id.* at 27. The former function is the province of the
B. The Neo-Aristotelean Critique of Judicial Review

According to Aristotle, virtuous action requires discernment of relevant circumstances by an agent with properly trained dispositions. Through the application of phronesis, the agent then determines which action, under the relevant circumstances, will best serve the agent’s ends. Phronesis operates through the device of the practical syllogism and legislator, but the latter function calls for “a habit of mind, and for undeviating institutional customs” characteristic of courts and judges, who “have . . . the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.” Id. at 23–28. Bickel claimed to be seeking a principled justification of judicial review, but conceded that “[w]e cannot know whether . . . our legislatures are what they are because we have judicial review, or whether we have judicial review and consider it necessary because legislatures are what they are.” Id. at 25. He therefore linked the justification of judicial review to a stipulated set of circumstances, without inquiring into the question of whether those alleged circumstances are contingent and local, or a necessary feature of democratically chosen legislatures.

Among contemporary writers, the most significant descendant of Bickel is Ronald Dworkin. See generally RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996). Dworkin rejects the “majoritarian premise” in favor of a “constitutional conception of democracy,” according to which the defining aim of democracy is that “collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.” Id. at 17. Dworkin concedes that “it may be controversial what the democratic conditions, in detail, really are, and whether a particular law does offend them. But, according to the constitutional conception, it would beg the question to object to a practice assigning those controversial questions for final decision to a court, on the ground that the practice is undemocratic, because that objection assumes that the laws in question respect the democratic conditions, and that is the very issue in controversy.” Id. at 18. Dworkin’s main point is that the principle of treating people with equal concern and respect outweighs (and often contradicts the results of) any procedural principle favoring legislative decision-making. However, it bears pointing out that Dworkin’s observation harbors a basic confusion. In fact, even within Dworkin’s constitutional conception of democracy, it does not necessarily beg the question to object to the assignment of controversial questions to the Supreme Court, since the issue in controversy would, in that case, not be whether the “laws in question” respect democratic conditions, but whether the Supreme Court is the institution “whose structure, composition, and practices” are best suited to determine whether or not they do. Id. Dworkin would doubtlessly reply that the two questions are the same, i.e., that to reject judicial review in favor of an alternative, presumably democratic, procedure as the proper basis to evaluate the compatibility of an enactment with “democratic conditions” implies that the democratically enacted legislation, by definition, meets those conditions in the first place, the very assumption in question. Id. But this reply ignores the possibility of a democratic review procedure subsequent to enactment, such as reconsideration by the same, or a different, democratically elected body. Thus, it is Dworkin who begs the question of the suitability of judicial review, by assuming that there is no conceivable alternative form of review.

Obviously rights-based justifications of judicial review are antithetical to the consensualism favored by the neo-Aristotelean theory of political virtue. Therefore, there is little insight to be gained from an analysis of these theories concerning the compatibility of the neo-Aristotelean theory with judicial review. To a lesser extent, this is also true with respect to the weakly democratic theories mentioned above. If the neo-Aristotelean theory of political virtue is found incompatible with strongly democratic arguments for judicial review, there is little hope that it will be found compatible with these less democratic arguments.
therefore involves the application of principles of action, which themselves are extrapolated through a process of generalization across a variety of analogous sets of circumstances. To illustrate through a simple example, let us suppose that a properly trained moral agent wishes to acknowledge in some fashion the help of a benefactor. In accordance with the general rule that one should show gratitude through a small, but appropriate, token of acknowledgment, the agent might purchase an amusing tie if he or she knows that his or her benefactor especially likes such ties, but might choose instead just to write a note, if he or she knows that his or her benefactor is embarrassed by gifts.160

This example illustrates the mechanics of virtue in its simplest, most instrumental form. However, phronesis and the deliberative process are employed not only to determine how to achieve short-term goals, but also much more broadly to determine what kind of life will lead to eudaimonia. Within this larger enterprise, the role of political virtue is to articulate those general rules of living well deemed sufficiently fundamental to the achievement of eudaimonia to merit codification as mandatory norms of conduct in the polis.

In the United States, judicial review is one of the most critical processes, if not the most critical process, through which this larger task of political virtue is carried out, for it often involves both the articulation and application of such broad, fundamental principles. In order to determine the constitutionality of enacted legislation, reviewing courts must apply very general, value-laden constitutional clauses, such as the Due Process Clause, the Equal Protection Clause, or the Eighth Amendment's ban on "cruel and unusual punishment," to legislation challenged under a specific set of circumstances. Since these clauses of the Constitution are not self-executing, their application (in the absence of a mechanical interpretive strategy, such as originalism or adherence to the surface meaning of the language) requires the use of phronesis to determine their meaning and scope. The result in a given case is a constitutional norm applicable to a generalized or categorical description of the facts presented.

Of course this may, and often does, result in the explicit override of democratically enacted legislation. To cite one recent example, the Massachusetts Supreme Judicial Court voided a statutory ban on single-sex marriage, stating that only a "destructive stereotype" could motivate such a statute, working "a deep and scarring hardship on a very real segment of the

---

160 In reality, one supposes that the various processes that occur within the mechanics of virtue are interrelated, overlapping, and even simultaneous. Thus, the moral agent discerns, through nous, that his benefactor's penchant for funny ties is a relevant fact, just because of the applicable general principle that one should show gratitude by giving a small gift. In its turn, the general principle is itself the product of (past instances of) the use of phronesis, as is the agent's recognition of the principle's applicability to the facts of this situation. Nevertheless, the operations of nous and phronesis remain analytically distinct elements of the mechanics of virtue.
community." The court concluded that the limitation of the availability of marriage to opposite-sex couples violated both a fundamental liberty interest of the Massachusetts Constitution's Due Process Clause and could not possibly serve any legitimate public purpose under Massachusetts's Equal Protection Clause.

Alternatively, a reviewing court may defer to legislative judgment. Thus, the Washington Supreme Court held, inter alia, that the Washington Constitution's Privileges and Immunities Clause does not grant a fundamental right to marry a person of the same sex. The court also held that the limitation of the availability of marriage only to opposite-sex couples through the Washington Defense of Marriage Act is rationally related to legitimate purposes, namely the encouragement of procreation and the cultivation of the most advantageous home environment for the rearing of children. Granting a presumption of constitutionality to the challenged statute, the Washington Supreme Court relied in part on the assertion that fundamental liberty interests exist only if those interests are "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." In like fashion, the court deferred to the legislature's finding that the challenged statute (and the classifications it created) reasonably promoted an end within the scope of legitimate state action.

Making the opposite presumption, the Massachusetts Supreme Judicial Court stated that statutes constraining liberty must "bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."

At bottom, these courts disagreed about three interrelated things: whether the state has a legitimate interest in encouraging a particular home environment for the rearing of children; whether the statutes created classifications that discriminated against a vulnerable group; and whether the right to marry anyone, regardless of gender, is a fundamental liberty interest. All of these matters involved the use of phronesis in the interpretation and application of very general norms (liberty and equal protection) to determine the legitimacy of a more specific norm (the legality of prohibiting same-sex marriage). In setting aside a statutory ban on single-sex marriage, the Massachusetts Supreme Judicial Court obviously overrode the people's conception of what constitutes virtuous conduct leading to eudaimonia, manifested in the adoption of the overruled statute. In contrast, the

162 Id. at 968.
163 Andersen v. King County, 138 P.3d 963, 976–79 (Wash. 2006).
164 Id. at 985.
165 Id. at 976 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)) (internal quotation marks omitted).
166 Id. at 990.
Washington Supreme Court applied norms advanced through a more or less inchoate consensual process. In so doing, it sought to defer to, rather than preempt, the judgment rendered democratically by the citizens through their legislature. However, the Washington Supreme Court’s deference resulted from its own first-order analysis of the issues. Therefore, like the Massachusetts court, the Washington court effectively substituted its own judgment for that of the citizens expressed in the reviewed statute.

According to Aristotle, morally significant conduct is a form of action that operationalizes various elements of the psyche, i.e., hexeis, orexis, nous, and phronesis, in such a way that the agent is able to achieve his or her final end as a human being. From the Aristotelean point of view, judicial review in both cases impeded the development and practice of political virtue by curtailing its opportunity for decisive political action. It is true that in each case the legislature acted before review occurred. However, in Massachusetts, the court voided the effect of the legislature’s deliberation by overriding the statute that resulted from it and impeded its future practice and development by insulating the subject matter of the statute from any further political consideration. In Washington, the Supreme Court neither voided the result of legislative deliberation, nor removed the topic from future political consideration. Nevertheless, in making the final decision, the Washington Supreme Court supplanted the legislature and the efficacy of its legislation.

If constitutional decisions such as these were subject to further political deliberation and revision, i.e., if they constituted a weak rather than strong version of judicial review, they would perhaps be compatible with the neo-Aristotelean theory of political virtue. In the first place, they would then be corrigeable. This is a significant advantage from the neo-Aristotelean standpoint, given its focus on the necessary limitations of any individual’s or small group’s experiences as the foundation for the codification of general rules of conduct. In the second place, the very possibility of further political review would, by definition, implicate the citizens’ political judgment, for they would have to choose either to revise or uphold the result of the decision. Even acquiescence in a decision would constitute morally significant action, i.e., a choice to accept its consequences as preferable to the voided statute, or as preferable to working to re-enact the voided statute, or simply as preferable to paying any further attention.

In theory, political control of even strong judicial review is made possible, as a matter of constitutional design, through the process of constitutional amendment. Through this process the polity is given an

---

168 See generally supra Part II.C and accompanying notes.

169 According to Miguel Schor, American judicial review is atypically strong, partly as a result of being the first form of constitutional judicial review to develop; some of the more recent incarnations have tried to avoid the political consequences flowing from the American version by building some possibility for political correction into the review procedure. See generally Miguel Schor, Judicial Review and American Constitutional Exceptionalism, 46 OSGOODE HALL L.J. 535 (2008).
opportunity directly to repeal the effect of an unwelcome constitutional decision through alteration of the constitution’s text. However, at least under the U.S. Constitution, the amendment process fails to fulfill this promise because the mechanics of amendment impose a disproportionate burden on those who wish to alter a constitution’s meaning. The various methods of amendment are intentionally difficult in order to promote stability in fundamental principles and to avoid cluttering the Constitution with overly specific language intended to solve transient political problems. Moreover, given that judicial review itself is not entrenched in the text of the U.S. Constitution, it follows that constitutional amendment was not foreseen or intended by the Constitution’s drafters as a means of redressing errant judicial review. Since judicial review affects a constitution’s meaning through interpretation of its language rather than alteration of the text, procedural symmetry suggests the logic of some corresponding political method of reviewing such interpretations without having to alter the language interpreted. Otherwise, those who wish to overturn a constitutional decision are left with a cumbersome and inaccessible instrument that overcompensates for the problem perceived to be in need of solution.

One such political method of review is the so-called legislative override, which permits legislatures to re-enact legislation previously held unconstitutional. A well known example is the the “notwithstanding clause” of the Canadian Charter of Rights and Freedoms. This provision affords an

---

170 The procedures for amendment under the U.S. Constitution are governed by Article V. There are two possibilities: either (1) two thirds of both houses of Congress shall adopt a proposed amendment, or (2) Congress shall call a convention for the consideration of proposed amendments at the request of two thirds of the state legislatures. U.S. CONST. art. V. In either case, ratification requires formal adoption by either the legislatures or conventions of three quarters of the states. Procedures for amendment of state constitutions vary from state to state.

171 According to political scientist Donald Lutz, “[T]he U.S. Constitution is the most difficult [constitution in the world] to amend.” Donald Lutz, Toward a Formal Theory and Practice of Constitutional Amendment, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment 237 (Sanford Levinson ed., 1995). According to Sanford Levinson, “Article V makes it next to impossible to amend the Constitution with respect to genuinely controversial issues, even if substantial—and intense—majorities advocate amendment.” Sanford Levinson, Our Undemocratic Constitution 21 (2006) (citing Lutz, supra). One consequence of the difficulty of amendment is that courts might feel justified in filling the void with increased judicial invention. See generally Anne Twomey, Constitutional Alteration and the High Court: the Jurisprudence of Justice Callinan, 27 U. QUEENSL. L.J. 47 (2008).

172 Constitution Act, 1982, being Schedule B to the Canada Act 1982 c.11 (Can.) art. 33. Under this article, either the national Parliament or any provincial legislature “may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.” Sections 2 and 7–15 list various “fundamental freedoms” and “legal rights,” respectively. “Democratic rights” protected by sections 3–5 are thus excluded from the operation of this override power. A sunset provision requires that statutory overrides of rights contained in sections 2 and 7–15 be re-enacted every five years. Constitution Act, 1982, art. 33 subd. 3
interesting alternative to the axiomatic view that the existence of a written constitution, containing binding and not just aspirational norms, entails a judicial monopoly on the determination of its application. By granting override power to the legislature, this solution partially embeds the application of constitutional principles in the political process.173

Another interesting attempt to reconcile legislative and judicial roles in the elaboration of general norms can be found in the several human rights acts adopted by various jurisdictions of the British Commonwealth. These acts represent an effort to introduce textually entrenched rights into political-legal systems that share a tradition of parliamentary supremacy. Thus, they differ in purpose somewhat from the legislative override, which is a method of limiting strong judicial review in jurisdictions which already have

Article 33 was intended as a method of overturning the effect of judicial decisions, but in most instances has in fact been used preemptively to immunize legislation from anticipated judicial review. The Québec government was the first to employ article 33. In Bill 62 (1982), it amended all in-force Québec statutes to include a notwithstanding clause, and then inserted a standard notwithstanding clause in every legislative enactment from 1982 to 1985. See Michel Bastarache, Section 33 and the Relationship Between Legislatures and Courts, 14 Const. F. 1 (2005); see also Howard Leeson, Section 33, The Notwithstanding Clause: A Paper Tiger?, in Judicial Power and Canadian Democracy 297, 313–15 (Paul Howe & Peter H. Russell eds., 2001). For a comprehensive review of legislative action under article 33, see generally Colloquy, Charter Dialogue: Ten Years Later, 45 Osgoode Hall L.J. 1 (2007).

The article 33 power to enact non-compliant legislation is a safety valve that comes into play only if the legislation in question does not pass muster under a separate general limitation clause contained in article 1. This article states that “the rights and freedoms set out in [the Charter] are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Constitution Act, 1982, art. 1. A possible problem lurks in the question of whether the scope of article 1 includes article 33. Presumably the “reasonable limits” of article 1 are in accord with the Charter, and therefore the article 1 requirement of reasonableness does not apply to statutes enacted under article 33 “notwithstanding” the content of the Charter’s rights-granting articles. To read the article 1 requirement as applying to article 33 would essentially read article 33 out of the Charter altogether and defeat its purpose, i.e., to preserve parliamentary supremacy.

Israel has also adopted a very limited form of legislative override in the context of its Basic Law, a quasi-constitutional statute that the Supreme Court has been empowered to use to nullify other legislation. In 1992 the Knesset adopted an amendment to the Basic Law, entitled Basic Law: Freedom of Occupation, 1992, S.H. 114. Shortly thereafter, the Supreme Court held in Meatreal v. Prime Minister, HCJ 3872/93 [1993] IsrSC 47(5) 485, that under this Basic Law the government could not legally prohibit the importation of non-kosher meat. In response, the Knesset adopted a new Basic Law: Freedom of Occupation, 1994, S.H. 90, with a section stating that “[a] provision of a Law that violates freedom of occupation shall be of effect... if it has been included in a Law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law.” The Knesset then immediately adopted the Import of Frozen Meat Law, 1994, S.H. 104, banning the importation of non-kosher frozen meat. This statute was then upheld by the Supreme Court in Meatreal v. Knesset, HCJ 4676/94 [1997] IsrSC 50(5) 15. For a discussion of this sequence of legislation, see Nicholas Stephanopoulos, The Case for Legislative Override, 10 UCLA J. Int’l L. & Foreign Aff. 250, 259–61 (2005). The non-compliant Israeli statute must be re-enacted every four years. Basic Law: Freedom of Occupation, 1994, S.H. 90 subd. 8.
entrenched constitutional rights.\(^{174}\)

Judicial review of legislation under human rights statutes is declaratory in nature, i.e., courts do not have power to set aside statutes found to be inconsistent with human rights norms. Parliamentary supremacy remains undisturbed, and inconsistent statutes remain in force subject to non-compulsory legislative revision. Therefore, review does not trigger a possible legislative override, as it does in Canada, where a finding of incompatibility is fatal to the challenged statute, subject only to (prospective) re-enactment. Moreover, inconsistent statutes are not subject to sunset provisions, as are legislative overrides in Canada.

Human rights acts are a problematic compromise between judicial review and parliamentary supremacy for two reasons. First, although intended only to give courts a limited, advisory role in the elaboration of basic rights, their application has upset the relationship between courts and legislatures in unexpected and unintended ways. The result may undermine, rather than preserve, parliamentary supremacy.\(^{175}\) Second, human rights acts

\(^{174}\) New Zealand and the United Kingdom both have human rights acts. Neither of these jurisdictions has a written constitution with entrenched rights (as Canada now does) but instead enacted statutory protection of fundamental rights. \textit{E.g.}, Human Rights Act 1998 (U.K.) (incorporating rights created under the European Convention on Human Rights into the municipal law of the U.K.); Bill of Rights Act 1990 (N.Z.). In addition to New Zealand and Great Britain, both the Australian state of Victoria and the Australian Capitol Territory have adopted their own human rights acts. \textit{Charter of Human Rights and Responsibilities Act, 2006 (Vic.) (Austl.)} [hereinafter Victorian Charter]; \textit{Human Rights Act 2004 (A.C.T.)} (Austl.). So far as it is within the jurisdiction of the State of Victoria to do so, the Victorian Charter is designed to incorporate into the law of Victoria the human rights norms contained in the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966). The Victorian Charter also incorporates elements of the Canadian Charter of Rights and Freedoms, tracking article 1 of the Canadian Charter when it states that protected rights are subject "to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom . . . ." Victorian Charter § 7(2). Moreover, in a manner analogous to that of the Canadian "notwithstanding clause," section 31(1) empowers the Victorian Parliament to declare expressly that an Act of Parliament will operate despite its incompatibility with a right protected by the Charter. \textit{Id.} § 31(1). However, since a judicial "declaration of incompatible application" is purely advisory in its effect, there is no need for Parliamentary declarations under section 31(1), and the existence of this provision is curious.

\(^{175}\) For example, in the U.K., a post-Human Rights Act common law rule of interpretation has developed, according to which inconsistent later statutes cannot repeal provisions of a “constitutional statute” by \textit{implied repeal}. See \textit{Thoburn v. Sunderland City Council} [2002] EWHC (Admin) 195, [2003] Q.B. 151 (Eng.). Since “constitutional statute[s]” are those that “condition the legal relationship between citizen and state in some general, overarching manner or enlarge[] or diminish[] the scope of what we would now regard as fundamental constitutional rights,” it seems clear that Parliament could no longer alter the scope of European Convention rights incorporated into domestic law by the Human Rights Act without an express statement to that effect in a later statute. \textit{Id.} at 186 (defining “constitutional statutes”). This requirement is problematic in that it may require Parliament to anticipate the manner in which courts might subsequently determine that its statutes violate the substantive provisions of the Human Rights Act. Ambiguity arises from the imprecision of the \textit{Thoburn} court’s test of what constitutes express repeal. The court held that “the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible.” \textit{Id.} at 187.
However, it is unclear whether the specificity required relates to the specific effect found objectionable or requires merely a specific expression of intent to override the constitutional statute in question, or any constitutional statute, regardless of any specific effect at issue in subsequent litigation, or whether either of these would be sufficient independently. In any event, should Parliamentary repeal in subsequent legislation be found insufficiently express or specific, a court may in fact strike down the offending statute under the Thoburn rule, subject to re-enactment with the required override language. Since declarations of incompatibility under the Human Rights Act itself are purely advisory, the operation of the Thoburn rule, as an alternative to any such declaration, would obviously undermine the remedial structure of the Human Rights Act.

Equally surprising, and perhaps more significant, is the fact that the power to issue non-binding declarations of incompatibility has been completely eclipsed in its impact by the obligation typically imposed on reviewing courts by human rights acts to interpret challenged statutes in a manner that conforms to applicable human rights norms, if possible. See, e.g., Human Rights Act (U.K.) § 3. Section 3 of the Human Rights Act imposes on the judiciary an obligation to interpret English legislation in a manner that renders it consistent with the European Convention on Human Rights, "[s]o far as it is possible to do so." This injunction is qualitatively different from the general common law obligation courts are under to interpret ambiguous statutory language, in that the interpretive requirement does not specifically depend upon statutory ambiguity to trigger it. Moreover, the Thoburn requirement, that derogations from "constitutional" norms be made explicitly, forces courts to ignore the plain intent of statutory language when the intention to override Convention rights is not expressly articulated. Thoburn, [2003] Q.B. at 187. Thus, applying section 3 of the Human Rights Act in conjunction with the Thoburn rule, courts may significantly alter the meaning of reviewed legislation. As one commentator has observed,

If section 3 permits a UK court to read into every provision of every Act a qualification that "nothing in this provision shall operate in a way that would be incompatible with a Convention right," . . . [then] section 3 permits judicial invalidation, in the guise of interpretation, of Acts of the UK Parliament that are clearly incompatible with Convention rights.

Robert Wintemute, The Human Rights Act's First Five Years: Too Strong, Too Weak, or Just Right?, 17 KINGS C. L.J. 209, 214 (2006) (quoting Human Rights Act (U.K.) § 3). In fact, the Judicial Committee of the House of Lords applied this directive very broadly in 2004 to hold that the phrase "surviving spouse" in the Rent Act of 1977 must be read to include the survivor of a single-sex couple, in order to give same-sex partners the same rights to take over a protected tenancy as the survivor of a married or cohabiting heterosexual couple. See Ghaiden v. Godin-Mendoza, [2004] UKHL 30, [2004] A.C. 557 (appeal taken from Eng.).

Given the plain meaning of the term "spouse," this amounted to a very significant amendment to the Rent Act. It remains to be seen whether the new U.K. High Court will continue to apply section 3 in such broad terms. At least one commentator views the section 3 obligation as giving courts a power analogous to the "principle of legality," but stronger and likely to become increasingly influential. See generally Philip Sales, A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998, 125 L.Q. REV. 598 (2009). "Under the principle of legality, the interpretation of statutory provisions is modified to take account of background rights or interests judged to be fundamental in some way, and which are not distinctly overridden by Parliament by the words used in the statute." Id. at 598. But "[i]n relation to individual human rights, the [Human Rights Act] provides the better defined and stronger protection and is likely in practice largely to eclipse the principle of legality." Id. at 615. Clause 6 of the New Zealand Bill of Rights Act includes the same directive, and section 32 of the Victorian Charter obligates courts to interpret challenged statutes in a manner compatible with protected rights, though only if they may be so interpreted "consistently with their statutory purpose." Bill of Rights Act (N.Z.), cl 6; Victorian Charter § 32. Otherwise, courts must issue a non-binding "declaration of inconsistent application" under section 36.
(and also the Canadian Charter of Rights and Freedoms) have elicited a substantial literature asserting their value in encouraging constitutional dialog between legislatures and courts, but the nature, scope, and value of any such dialog remains unclear.176 In the end, even if such provisions

Finally, the Human Rights Act has become a foundation upon which some judges and commentators have sought to erect the quite novel doctrine of "common law constitutionalism." According to this doctrine, Parliamentary supremacy is the product of common law, and can therefore be limited by common law. It therefore asserts the existence of broad power inherent in the common law to subject Parliamentary acts to general principles enunciated by courts. This doctrine was explicitly endorsed by the Justices in R. (on the application of Jackson) v. Att'y Gen., [2005 UKHL] H.L. 56 (Eng.). However, most judges and commentators reject this doctrine. See, e.g., Lord Bingham of Cornhill, The Rule of Law and the Sovereignty of Parliament, 19 KING'S L.J. 223 (2008); Michael Gordon, Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade, 2009 PUB. L. 519. Nevertheless, David Jenkins argues that the Human Rights Act has led to the emergence of a common law power to declare statutes unconstitutional. Specifically, he claims that (1) some common law rights, conventions, or fundamental statutes have acquired a higher, constitutional status over ordinary laws; (2) that constitutional principles judicially derived from these privileged legal sources empower courts to interpret statutes in accordance with them, subject only to Parliament's clear intent to depart from them; (3) that there now therefore exists within English common law a discretionary judicial power to (unenforceably) declare that Parliament has enacted an unconstitutional statute; (4) that these constitutional principles have a distinct origin outside the Human Rights Act and would be applicable even if the Human Rights Act were amended or repealed, even though these principles have been discovered only in light of the application of the Human Rights Act. David Jenkins, Common Law Declarations of Unconstitutionality, 7 INT'L J. CONST. L. 183 (2009); see also Dawn Oliver, Vers une Constitution Britannique Fondées sur des Principes Normatifs, 60 REVUE INTERNATIONALE DE DROIT COMPARÉ 807 (2008). For a recent comprehensive review of the Human Rights Act in practice, see Aileen Kavanagh, Constitutional Review Under the UK Human Rights Act (2009).

176 For a summary of much of this literature, see Julie Debeljak, Parliamentary Sovereignty and Dialogue Under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making, 33 MONASH U. L. REV. 9 (2007). The principal contribution on this question in the Canadian context is Peter W. Hogg & Allison A. Bushell, The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All), 35 OSGOODE HALL L.J. 75 (1997) (updated by Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, Charter Dialogue Revisited—Or "Much Ado About Metaphors", 45 OSGOODE HALL L.J. 1 (2007)). Hogg and Bushell argue that article 1 of the Charter, the general limitations clause, plays a key role in ensuring dialogic cooperation between legislative bodies and reviewing courts. Under the article 1 analysis developed by the Canadian Supreme Court in R. v. Oakes, [1986] 1 S.C.R. 103 (Can.), judicial review has rarely questioned the objective of challenged legislation, or the rationality of the means adopted to achieve the objective. Hogg & Bushell, supra, at 93–94. Rather, Hogg and Bushell found in their initial study that in over eighty-five percent of cases (forty-three out of fifty) in which legislation was struck down during the period 1982–1997 for failure to satisfy the requirements of the Oakes analysis, the reason was failure to pass a "minimum impairment test", according to which the means chosen to achieve the statute's objective "must impair the objective no more than necessary to accomplish the objective." Id. at 84–85 (citing R. v. Oakes, [1986] 1 SCR 103 (Can.). Failure of the minimum impairment test does not foreclose pursuit of valid legislative objectives by less restrictive means. Id. at 85. Thus, Hogg and Bushell found that, in most cases striking down legislation for violation of article 1, there was some kind of legislative sequel, and in most instances this involved minor amendment of the statute that did not sacrifice its original
objective. Id. at 97 tbl. I, 101 tbl. III.

Many commentators are not persuaded by Hogg and Bushell. According to Christopher Manfredi, declining use of article 33 reflects inevitable loss of political credibility, which results from the fact that, in overriding court decisions, legislatures are viewed as narrowing pre-existing rights. See Christopher P. Manfredi, The Unfulfilled Promise of Dialogic Constitutionalism: Judicial-Legislative Relationships under the Canadian Charter of Rights and Freedoms, in Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia 239, 249–52 (Tom Campbell et al. eds., 2006); see also John D. Whyte, Sometimes Constitutions are Made in the Streets: The Future of the Charter’s Notwithstanding Clause, 16 CONST. F. 79, 81 (2007). Whyte agrees that the characterization of article 33 as a “suspensive power” within a rights regime will inevitably undermine its legitimacy. It is also worth noting that the negative perception of legislative action is encouraged by the fact that Supreme Court decisions, once overridden, remain authoritative interpretations of the Charter rights in question. In other words, since re-enacted statutes take effect “notwithstanding” their unconstitutionality, it is clear that Parliaments do not themselves engage in interpretation of Charter provisions, but are merely empowered to override them. This explains the sunset provision in article 33. Thus, article 33 simply does not facilitate inter-agency dialog on the meaning of Charter provisions. In contrast to Manfredi and Whyte, Mark Tushnet does not view judicial primacy as inevitable, but does argue that weak judicial review is inherently unstable and will result in the primacy of either the judiciary or legislature. See generally Mark Tushnet, Weak-Form Judicial Review: Its Implications for Legislatures, 2 NEW ZEALAND J. PUB. INT’L L. 7 (2004). Rosalind Dixon argues that Charter dialogue has largely been illusory and has failed to prevent Canadian judicial review from replicating U.S.-style strong judicial review; she suggests that real dialogue will depend upon judicial deference developed under the general limitation clause of article 1 in “second-look” cases. See Rosalind Dixon, The Supreme Court of Canada, Charter Dialogue, and Deference, 47 OSGOODE HALL L.J. 235, 235, 240 (2009).

Hogg and Bushell would presumably respond to these critics that focusing on article 33 simply misunderstands the complexity of possible legislative responses. Statutory amendment in response to a judicial decision is as much a function of dialog under the Canadian Charter as is re-enactment under article 33, in that all subsequent legislative action “is a conscious response from the competent legislative body to the words spoken by the courts.” Hogg & Bushell, supra, at 98. However, response does not necessarily imply dialogue. Only article 33 provides the Parliament with a means of re-asserting its will, and if article 33 fades out as a realistic option, then the resulting “inter-agency dialogue” will merely be a new name for strong judicial review. For a skeptical view that is conceptual, rather than based on pragmatic objections to the dialogic capacity of the so-called “Commonwealth model,” see Sara Jackson, Designing Human Rights Legislation: “Dialogue, the Commonwealth Model and the Roles of Parliaments and Courts, 13 AUKLAND U. L. REV. 89, 115 (2007). Jackson regards the idea of inter-institutional dialogue as wrong-headed in principle, an “unhelpful concept, which has perhaps been over-emphasized at the expense of other beneficial innovations, such as the strengthening of representative institutions to encourage legislative responsibility for rights.” Id.

In a fascinating analysis of judicial rather than legislative deference, James B. Kelly notes a decline in judicial activism that “reveals the central weakness of the judicial-centered paradigm,” which “overlooks the fact that many activist responses to the Charter exist and that judicial deference is the result of a rights culture within the legislative process.” James B. Kelly, Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent 262 (2005). This culture is reflected in the fact that, at least in the federal and selected provincial bureaucracies, “new procedures have been instituted to ensure that policy objectives are explicitly linked to Charter commitments.” Id. at 258. Kelly thus refers approvingly to the Commonwealth model as emphasizing “the intra-institutional attempts to safeguard rights within advanced parliamentary democracies,” rather than “the inter-institutional relationships created between courts and legislatures through bills of rights.” Id.
provide a meaningful way for legislatures to control the interpretation of entrenched human rights guarantees, and therefore remove the most objectionable aspect of judicial review, there seems to be no reason, from the neo-Aristotelean point of view, to prefer the insertion of judicial review into the political decision-making process in the first place.'
C. Two Defenses of Judicial Review as a Democratic Institution

The strong version of judicial review found in the United States rests upon the idea that courts stand outside the political process and therefore trump possible incursions against fundamental rights arising within the political process. Therefore, it rests upon a particular version of separation-of-powers doctrine that is unlikely to permit limits on judicial hegemony over the determination of constitutional questions. However, there are several ways to argue that judicial review in the United States is part and

rights, rather than on the allegedly lesser capacity of the legislature to resist “[t]he self-interested and non-rights preferences of the majority[, . . . which] correctly compete with . . . protected rights.” Debeljak, supra note 176, at 39 n.150. Moreover, this argument models the very process of phronesis-driven norm creation that lies at the heart of the mechanics of virtue. This argument may be reflected in the language of the Victorian Charter, which designates an advisory judicial decision as a “declaration of inconsistent application,” Victoria Charter § 36, not (in the manner of the British Human Rights Act) a “declaration of incompatibility.” Human Rights Act (U.K.) § 4.

The neo-Aristotelean critique of the concept of functionally differentiated dialog applies also to neo-Kantian efforts to justify judicial review on the basis of the relative institutional capacities of judiciary and legislature. To take a rather pro-legislative example, Christopher Zurn agrees that strong judicial review violates the “deliberative” element of legitimate governance. CHRISTOPHER ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW (2007). He states that “public reasoning practices among citizens and officials should have some direct or indirect influence over the formulation of, decisions upon, and execution of governmental action.” Id. at 70. He theorizes a link between this deliberative concept of political legitimacy and democracy on the ground that deliberative, “reason-responsive government” embodies “an ideal of the equal justifiability, to each citizen, of the use of their collective political power.” Id. at 71. Strong judicial review is a form of quasi-guardianship that violates the criterion of “legitimate collective autonomy.” Id. Borrowed from Rousseau, as well as Habermas, this criterion states that “I, as a citizen, can only understand myself as autonomous (as a self-ruling agent) while living under a set of collectively-binding and coercive laws, to the extent that I can understand those laws as, in some sense, self-authored and thus self-imposed.” ZURN, supra, at 70–71, 224–25.

Like Habermas’s neo-Kantianism, Zurn’s concept of deliberative democracy is obviously sympathetic to the generally democratic implications of the neo-Aristotelean theory of political virtue. Also like Habermas, Zurn anticipates problems in democracy that could undermine the deliberative requirements of autonomy. But where Habermas simply excises irresolvable conflict from the democratic process in order to preserve autonomy, Zurn insists upon the necessity of some “proceduralist” form of constitutional review designed to prevent the perversion of democracy by “certain predictable consequences of the structural features of representative democratic institutions.” Id. at 160. More specifically, proceduralist constitutional review must protect a broad array of civil liberties necessary to “private autonomy,” upon which effective democratic deliberation depends. Id. at 225, 232, 235, 239. Thus Zurn provisionally endorses a variety of horizontally and vertically dispersed forms of constitutional review, including specialized constitutional courts, legislative and regulatory self-review panels, devices (like the legislative override) designed to achieve inter-branch debate and decisional authority, and public constitutional fora, such as “deliberative public opinion polls.” Id. at 325. However, Zurn’s argument is unpersuasive to the neo-Aristotelean because it does not investigate the normative foundation of the deliberative element in legitimate self-government, and therefore lacks a conceptual framework within which to evaluate its compatibility with weak, but still independent, constitutional review. He merely assumes such compatibility.
parcel of the democratic process, rather than a check upon its possible excesses. The following sections review two of these arguments, in order to determine whether they are able to salvage strong judicial review from the standpoint of the neo-Aristotelean theory of political virtue.

D. Judicial Review as a Component of Pluralist Democracy

The argument that judicial review is a component of pluralist democracy is well represented by Terri Jennings Peretti’s work, In Defense of a Political Court. Peretti borrows from the theory of pluralist democracy to argue that strong judicial review is not only compatible with democracy, but an essential instrument for the fashioning of political consensus. In particular, she asserts that the United States Supreme Court serves “as an institutional recourse for legislative or administrative losers.” Thus, she agrees with non-democratic defenders of judicial review that the primary function of the Supreme Court is to protect personal rights against majority encroachment, at least in the context of constitutional litigation. However, she also asserts that it is not necessary to understand the Supreme Court as “a deviant and undemocratic institution” on the way to justifying that function.

As presented by Peretti, pluralist democracy has several major, interrelated components. The first feature is representational diversity. Pluralist democracy places no premium on direct, majority rule. For example, within the American context, the Electoral College and Senate confirmation of executive branch nominees, as well as of nominees to the Federal Judiciary, are examples of indirect representation. Different forms

178 TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999).
179 Peretti borrows principally from Robert Dahl in developing her concept of judicial review within a pluralist democracy. Dahl endorses a utilitarian view of democracy, according to which it efficiently aggregates the interests of citizens, and he asserts that “the legitimacy of the constitution ought to derive solely from its utility as an instrument of democratic government.” ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 39 (1989). Having asserted the primacy of democratic process, Dahl also argues that “no interests should be inviolable beyond those integral or essential to the democratic process.” DAHL, DEMOCRACY, supra note 8, at 182. Thus, judicial review is limited to protecting the “polyarchal” decision procedures necessary to or convenient for the efficient aggregation of citizens’ interests. In this respect, Dahl supports a weakly democratic form of judicial review, much like that which Ely supports. See ELY, supra note 159.

Peretti understands pluralist democracy as a descriptive theory. She claims that as an empirical matter the theory of democracy as pluralist governance better explains the operation of American politics, and the role of the Supreme Court, than does the theory of democracy as majority rule, achieved through “regularized elections.” PERETTI, supra note 178, at 210, 216. However, to the extent that judicial review, in the context of American politics, goes beyond the monitoring of democratic decision procedures, Peretti describes a phenomenon that goes well beyond what Dahl himself would endorse.

180 PERETTI, supra note 178, at 212, 219.
181 Id. at 217
182 Peretti is confusing on the point of the distinction between direct and indirect
of representation are designed to achieve different types of democratic responsiveness, none of which is more democratic, more paradigmatic of democracy, or empirically more significant than any other. Direct democracy codifies the will of the majority, while indirect democracy works to refine and moderate the majority’s demands.

It is also a tenet of pluralist democracy that political institutions are arranged in a non-hierarchical manner, with the result that no institution has unilateral power over another. This aspect of pluralist democracy is closely linked to representational diversity, in that the extent of any political body’s majoritarian accountability is “inconsequential in determining an institution’s legitimacy, value, or power in the governing process.” Thus, “in a pluralist system, it is of no consequence that the Court is representative or responsive in a different—that is, nonelectoral—way.”

A third feature of pluralist democracy is systematic redundancy, achieved through structural fragmentation into separate branches and levels of government, and through staggered elections. This feature is also closely linked to representational diversity, in that such redundancy is designed to prevent the emergence of any single, dominant majority.

These three features are designed to ensure “political consensus of a broad, certain, and enduring nature.” Redundancy and lack of strict hierarchy reduce the possibility of error in codification of the public will by expanding opportunities for political action and disabling the force of momentary majority passion. Together with diversity of representational modes, they create various paths to multiple veto points, operationalized by different kinds of pressure and political action. “[O]pportunities for groups to gain access to and an effective voice in government policymaking are greatly expanded.” As a result, “the political system . . . will possess a greater capacity to discover, with more certainty and reliability, the stable and enduring bases of political consensus.”

representation. On the one hand, she suggests that representation is indirect when the polity does not itself decide, but chooses representatives by simple majority to decide for them. Thus, in describing the rationale underlying Madison’s argument in Federalist No. 10, Peretti states that “a republic or indirect democracy was preferred to a direct democracy . . . . Elected representatives could refine and moderate the majority’s selfish and emotional demands.” Then again, in contrasting direct and indirect forms of representation, she states that “only the House was to be directly elected by the people. Senators were selected by state legislators, presidents by the electoral college, and members of the judiciary by the president and Senate.” I use the term “indirect” to refer to this latter, two-step form of selection.

183 Id. at 218.
184 Id. at 214.
185 Id. at 218.
186 Id. at 219.
187 PERETTI, supra note 178, at 211.
188 Id. at 212.
189 Id.
190 Id. at 219.
191 Id.
each site of group access and influence is regarded as instrumentally valuable in providing a partial means to political consensus, rather than as having any normative, intrinsic value of its own.  

How is strong judicial review subjected to democratic control within the scheme of pluralist democracy? In answering this question, Peretti's key assertion is that the Supreme Court engages in "value-voting." First, she claims that "there is quite simply no alternative available [because] . . . constitutional theory fails to limit significantly the necessity of discretionary and subjective value choice in constitutional decision-making or to deny justices the opportunity to decide in accordance with their personal beliefs." Second, Peretti cites and summarizes a large body of empirical research suggesting that Supreme Court policy-making reflects the ideological preferences of the Justices. This preliminary assertion is critical to Peretti's overall claim that judicial review is embedded within the democratic process rather than an exception to it because, without value-voting, the Supreme Court would have no way to represent viewpoints or to contribute to political consensus.

The existence of value-voting allows Peretti to claim that judicial review is subject to democratic control through a process of indirect representation. Indirect representation occurs if the Justices' political views will have been consciously and deliberately vetted by elected officials competing for control of the Supreme Court through the appointment process. According to Peretti, empirical evidence suggests that the President and Senate do use ideology as a criterion in the recruitment and selection of Justices, and that there is some competitive balance between them, although the President holds the advantage if he selects a nominee not obviously unqualified or out of the mainstream. Indirect representation is ensured not only by the dominance of political considerations in the selection process, but by the reality of "dynamic representation," i.e., the statistically regular opportunity for appointments.

Indirect representation translates into political responsiveness only if the selection criteria shape the content of the Court's decisions. According to Peretti, empirical evidence "rather clearly and consistently supports the conclusion that there is a strong and direct relationship between presidential expectations and judicial decision-making." The stronger the President's commitment to ideology-based appointments, the stronger is the linkage

\[\text{\cite{id} at 214–15.}\]
\[\text{\cite{peretti} supra note 178, at 110–11.}\]
\[\text{\cite{id} at 101–02.}\]
\[\text{\cite{id} at 102.}\]
\[\text{\cite{id} at 84.}\]
\[\text{\cite{ld} at 84–86.}\]
\[\text{\cite{peretti} supra note 178, at 100.}\]
\[\text{\cite{ld} at 111–30.}\]
between his expectations and Justices’ voting.\textsuperscript{201} Failure occurs when the President has not taken sufficient care in evaluating nominees or lacks political support necessary to win Senate confirmation.\textsuperscript{202}

The question is whether strong judicial review, thus described as an element of pluralist democracy, is compatible with the neo-Aristotelean theory of political virtue. It is not, because pluralist democracy stumbles in its insistence that all forms of responsiveness are equivalent forms of democratic control. From the standpoint of the theory of political virtue, the indirect democracy of judicial review provides the polity with insufficient forms of both input and output control over the formation of constitutional doctrine.

The first point to consider arises from the concept of value-voting as described above.\textsuperscript{203} If the Supreme Court exercising judicial review is not explicitly or overtly representative, then citizens will not have the sense that their views explicitly influence those of the Justices making the decision. In Aristotle’s ethics, political friendship is an instance of virtuous friendship generally, and such friendship implies a conscious mutuality of influence based on virtuous conduct. There is a dialogic component to even the most cursory forms of friendship, which is lacking when friends do not explicitly recognize each other’s influence. There is something of this dialogic component in Aristotle’s requirement that friends must know each other and wish each other’s good. To the extent that Supreme Court Justices understand their roles as interpreting and applying doctrine, or even their own conceptions of what morality requires, rather than explicitly entering into a decisive conversation with the views of citizens, there is a failure of dialogue and therefore of friendship. Without political friendship there is no opportunity for virtuous political action and, therefore, no political self-actualization for the citizens.

Lack of meaningful representation can be viewed as a failure of input control. Whether a citizen who disagrees with the results of judicial review has adequate means of recourse is a question of output control. Adequate recourse means having an opportunity to engage in political activity (in the Aristotelean sense) designed to overturn the results of judicial review. Here the failure of pluralist democracy, at least in the American context, is equally great, for it offers nothing like the legislative override or any other method of subjecting judicial review to direct ex post facto political control.

\textsuperscript{201} \textit{Id.} at 119.\textsuperscript{202} \textit{Id.} at 120, 123. There are also informal avenues of influence over the Supreme Court. \textit{Id.} at 147–51. Most important is the influence of interest groups, which set the agenda by bringing the suits upon which constitutional challenges are based. \textit{Id.} at 147–48. In addition, such groups are largely responsible for amicus curiae briefs, which significantly increase the likelihood that the Supreme Court will hear a case on the merits. \textit{Peretti, supra} note 178, at 148. Finally, interest groups also apply political pressure, oftentimes by turning Supreme Court decisions into election issues. \textit{Id.} at 247.\textsuperscript{203} \textit{See supra} notes 193–199.
From the standpoint of the neo-Aristotelean theory of political virtue, Peretti's basic mistake is to understand the form of representation characteristic of legislative supremacy as essentially or merely majoritarian. The neo-Aristotelean theory asserts that the unique, qualitative significance of such representation arises from the fact that the citizens' views are understood explicitly as the substantive source of the decisions made. When the views of the citizens are regarded in this way, they are no longer just a form of judgment (sunesis), but a form of morally significant action, leading to political self-actualization. Without such action, citizens will not have an opportunity to fulfill their political natures and will to that extent be precluded from achieving their good.204

Peretti's argument raises the question of just how explicit and direct the community members' influence on decision-making must be to count as action rather than judgment about action. Must the citizens have both input and output control over the Supreme Court's decisions? Would one or the other suffice? Does judicial review, by its very nature, violate the requirements of political virtue? Certainly the neo-Aristotelean theory of political virtue does not require the populist panacea of instant Internet-based referenda. It does not even assert that high levels of participation in elections are necessarily a good outcome. It requires only that those who wish to cultivate political virtue be provided an opportunity to engage in morally significant political action. The kind of democratic representation Peretti describes does not satisfy this standard because it does not recognize the unique moral value of decisive, dialogic involvement in the determination of generally applicable rules of conduct.

E. Judicial Review as the Guarantor of Popular Sovereignty

Keith Whittington makes a normative argument for the legitimacy of judicial review based on originalist interpretation of the Constitution's
According to Whittington, the “critical originalist directive is that the Constitution . . . be interpreted according to the understandings made public at the time of the drafting and ratification.” Since ratifying conventions were the “specifically designated device for gathering public sentiment on the Constitution,” priority in interpretation should be given to direct evidence of the ratifiers’ intentions. Additional information may be taken from the drafting conventions, popular debates surrounding ratification, and contemporary commentary, as indirect evidence of the ratifiers’ intentions.

This is a standard definition of originalism, but unlike most originalists, Whittington does not justify it as a means of restraining judicial intervention. In fact, he is not specifically, or programatically, concerned with preventing the counter-majoritarian effect of judicial review at all. Whittington would probably concede that originalist interpretation will often, or even usually, result in a reviewing court’s determination to uphold a challenged law, but this is a contingent result, unrelated to the justification of originalism. What justifies judicial review according to Whittington is a reviewing court’s “claim to be enforcing the supreme law of the sovereign people.” Properly understood, originalism’s agenda is to uphold the will of the sovereign people, as embodied in the intentions of those who ratified the people’s fundamental law. The originalist court should strike down legislation that ignores, supplements, or strays beyond the value choices expressed by the Framers. An originalist court is not necessarily a passive court, even though it may be said to give “the presumption to the current majority’s legislative action.”

The first thing to note about Whittington’s argument is that it

---

206 Id. at 35.
207 Id. at 35–36.
208 Id. at 36. For the purposes of this “externalist” argument, Whittington assumes the existence of such intentions and the ability of courts faithfully to reconstruct them in order to justify judicial review. He elsewhere makes an “internalist” argument that assumes the desirability of judicial review and justifies the claim for the existence of recoverable intentions in order to further justify originalism as the proper interpretive strategy of courts exercising judicial review under the Constitution. See generally id. at 77–109. Of course, since government operates under state and federal constitutions, and each has been adopted and amended at different times, the relevant group of ratifiers, whose intentions must be recovered, will differ depending upon the particular constitutional text and clause at issue.

209 Whittington usefully identifies a variety of more typical reasons for endorsing originalism. Id. at 38–46. These include, inter alia, the desire to prevent judges from engaging in “willful or arbitrary behavior,” the commitment to the separation of judicial and legislative functions, and the related belief that courts should accept the will of present majorities expressed through legislation. Whittington, supra note 205, at 38–46. As Whittington points out, the first concern can be addressed by any theory of interpretation capable of generating clear rules of construction and, therefore, does not necessarily support originalism. Id. However, it is the last of these concerns to which he takes special exception. Id.

210 Id. at 46.
211 Id. at 36.
expresses a theory of popular sovereignty and only secondarily a theory of judicial review. Therefore, to critique Whittington from the point of view of the neo-Aristotelean theory of political virtue is to ask whether the form of government that follows from this theory of sovereignty (including the institution of judicial review) is sufficiently responsive to citizens’ need for occasion to exercise political virtue to enable them to achieve eudaimonia with respect to political friendship. As we shall see, Aristotle’s theory is in some respects sympathetic to Whittington’s, particularly to the latter’s insistence upon actual self-government. In the end, Whittington too will be found wanting from the neo-Aristotelean point of view, but for reasons distinct from those that apply to Peretti. In her case, it is the lack of dialogic representativeness in decision-making that leaves the citizens’ choices without direct causal efficacy. Whittington’s insistence on actual self-government, enforced in part through judicial review faithful to the expression of the citizens’ will in constitutional text, re-establishes the citizens’ direct responsibility for the creation of fundamental law. The problem with Whittington’s theory is that it is partial; it makes no provision for the possibility of continuous or complete self-government.

In developing his theory of popular sovereignty, Whittington’s primary concern is to preserve its democratic character. However, he locates the origin of popular sovereignty within a “positivist” tradition that is problematic from a democratic standpoint. Tracing the modern theory of sovereignty back to the sixteenth century, Whittington argues that it was then concerned with the need for political order in a world newly understood as composed of separate nations with identifiable populations and geographical limits. Against this background, the defining feature of sovereignty remains the imposition of order across space and through time; it is essentially “the power to decide.” As originally theorized by Bodin and Hobbes, the sovereign will is necessarily active, for it exists only in the act of deciding. Thus, sovereign power is necessarily indivisible and non-delegable, for any division or alienation of decision-making authority results in forfeiture of sovereignty itself. This leads to the conclusion that the supreme or sovereign will must be embodied in a single, all-powerful individual.

Against the background of absolutism, constitutionalism was, according to Whittington, conceived as a means to constrain the monarch. Its primary achievement was conceptually to separate the exercise of power by government officials from the source of sovereign power in the people at large. In Lockean terms, the people retain sovereign authority through a theoretical right to rebel against unfaithful agents, but the doctrine of parliamentary supremacy assumes that, in practical terms, sovereignty itself

212 Id. at 113–23.
213 WHITTINGTON, supra note 205, at 114.
is still alienated when the power to decide is transferred from the people to its agents.

According to Whittington, Montesquieu and Rousseau avoided the alienation of sovereign power simply by identifying popular will with legislative outcomes. In Montesquieu’s version of sovereignty, individuals are re-incorporated in the sovereign will through their virtue, which causes them freely to accept the law as a rule. Implicit in Montesquieu’s version is the notion of a controlling, collective will, for “the individual’s role as monarch is contingent upon his agreeing with the ‘people as a body.’”215 “One cannot remain sovereign and be separated from that will.”216 Unity of sovereign will was reified by Rousseau. In his version, the virtue of individuals is replaced by the indivisible, collective will of the citizenry as a single unit. “[T]he private interests of individuals’ particular wills have no bearing on the sovereign general will.”217 The collective sovereign does not transfer sovereignty to its agents because will cannot be transferred; so Rousseau’s version advocates periodic reformation of the sovereign assembly so that it can reestablish its authoritative will.

Whittington argues that all of these theories about the location of sovereignty are constrained by the original view that sovereign power cannot be delegated without alienation of sovereignty itself, together with the associated requirement that the sovereign be ever active. As a result, the constitutionalism of neither Locke nor Montesquieu limits the exercise of sovereign power by means of the device of popular consent.218 Locke’s version depends upon the idea that sovereignty itself is limited by the purposes for which civil society is formed. Thus, the source of sovereignty (i.e., natural reason, embodied in the social contract that creates the political community) imposes limits on the exercise of power.219 In Montesquieu’s case, the virtue of individual citizens aligns their views with government policy, but does not limit government’s political options. For Montesquieu, formation of the popular will and its fusion with government imply the necessity of separating the sovereign deliberative function of legislation from the purely ministerial functions of administration and adjudication, rather than the necessity of preserving the people’s political agency.220 Rousseau’s stronger version of Montesquieu’s collective will does impose popular limits by periodically taking authority back into its own hands, but his solution is

216 WHITTINGTON, supra note 205, at 121.
217 Id. at 123. Thus, the individual whose views place him in the minority must recognize that his personal views are mistaken as a statement of what he, as a member of the sovereign will, believes.
218 This can no longer be regarded as true in parliamentary democracies, where the concept of responsible government, carried out through regular, democratic elections ensures that parliament embodies the views of a broad constituency.
219 WHITTINGTON, supra note 205, at 119.
220 Id. at 121.
found impractical. At least in the context of the American Constitution’s founding, it was “impossible to go so far as to assemble the whole people” into ratifying conventions.221

Whittington proposes to reconceptualize popular sovereignty in such a way that it avoids the “continuing threat” posed by the tendency of sovereignty theory to transfer the locus of power from the people to the people’s government.222 His argument is a descriptive effort “to reconstruct a theory of popular sovereignty that can ground the authority of the Constitution and indicate why an originalist jurisprudence can play an integral role in maintaining that sovereignty.”223 Within such a theory, the Constitution itself embodies, and judicial review reinforces, popular sovereignty, while imposing limits on the exercise of power by government.

The obvious question Whittington must address is how a constitutional text adopted in the eighteenth century, even though subsequently amended periodically throughout the nation’s history, can claim to continue to embody the sovereign will of the people. He rejects tacit consent, inferred from “actual behavior . . . construed as an indirect expression of consent.”224 He also rejects hypothetical consent to government that embodies or pursues that to which we ought to consent. Neither tacit nor hypothetical consent requires any actual causal nexus between citizens’ deliberate desires and political result. Therefore, they “undermine[] the [purpose of consent] by positing the existence of consent where no deliberative choice has been made.”225

Whittington’s solution is a theory of “potential sovereignty,” which does not assume the existence of a currently active sovereign.226 In his view, “The government was set in motion by consent, but it need not demonstrate our continuing consent in order to remain in motion. It is enough that it not change course, or . . . stop its motion, except by our new [expression of] consent.” In short, the sovereign will remains authoritative in its potential to alter the direction or trajectory of the Constitution’s current motion. As Whittington puts it, the Constitution is binding not in the strong sense of enjoying continuing consent, but “in a weaker, but still sufficient sense, in that it represents our potential to govern ourselves. By accepting the authority of the Constitution, we accept our own authority to remake it.”227

221 Id. at 125.
222 Id. at 135.
223 Id. at 126–27. Whittington claims that the founders were “mired in theoretical difficulties” and operated with a “confused concept of sovereignty,” which tended to attribute sovereignty to governments, once constituted by the people. Id. at 127.
224 WHITTNGTON, supra note 205, at 129.
225 Id. at 129–30.
226 Id. at 132–33.
227 Id. at 133; see also id. at 144, 149. In fact, potential sovereignty comes perilously close to being a form of tacit consent. Whittington might reply that he objects only to a form of tacit consent that justifies judicial invention, i.e., a form of tacit consent that permits the locus of sovereignty to shift from the people to the government itself. Potential sovereignty does not authorize such a shift and, therefore, is unlike the tacit consent to which
Potential sovereignty leads to a concept of “democratic dualism,” according to which there are two, hierarchically arranged kinds of political trust, granted at different times by different manifestations of the people. The lesser kind specifies the agent-wielder of power and results in the policies pursued by government. It is expressed in regular elections. The more important form of political trust specifies the nature and scope of power exercised by the wielders of power and legitimates the government itself. It is expressed when “the people emerge at particular historical moments to deliberate on constitutional issues and to provide binding expressions of their will, which are to serve as fundamental law in the future when the sovereign is absent.” Thus, democratic dualism (i.e., the presence or absence of the sovereign) distinguishes between “the constitutional and merely administrative” elements of politics. In other words, whereas Montesquieu distinguished between the legislative and administrative (including judicial) functions, democratic dualism distinguishes between constitutional and administrative (including both legislative and judicial). Legislation is demoted to a status less than law, i.e., it does not embody the sovereign will of the citizens.

Both judicial review and originalist interpretation necessarily follow in their turn from democratic dualism as understood by Whittington. The
existence of a written fundamental law entails the need for interpretation, hence the need for judicial review. Acting as the people’s agents, reviewing courts themselves become an expression of democracy, rather than an impediment, but only through the medium of originalist interpretation. Originalism adheres to the sovereign intent, rather than to a presumed source of sovereign intent. In so doing, courts recognize the possibility for a renewed, authoritative exercise of popular constitutional deliberation. Thus, originalism insists upon the reality of consent as the basis for government action. According to Whittington, “The American advance in constitutional practice was to realize popular sovereignty as a concrete force in historical time. Popular sovereignty ceased to be a hypothetical construct by which to measure government action and became an actual device for self-governance.”

As a result, originalism is not one among many possible interpretive strategies open to reviewing courts but, through democratic dualism, is built into the very fabric and logic of the Constitution.

From the perspective of the neo-Aristotelean theory of political virtue, the question is whether or not the consent envisioned by potential sovereignty and democratic dualism is sufficient to enable citizens to achieve eudaimonia. As already noted, the neo-Aristotelean theory is sympathetic to Whittington’s emphasis on the importance of self-government. The essence of popular sovereignty, preserved in the device of democratic dualism, is to protect the citizens’ power to decide. The power to decide is precisely what citizens must exercise in order to engage in the type of moral choice-making that the neo-Aristotelean theory requires.

In fact, the neo-Aristotelean theory improves Whittington’s version of constitutional democracy by giving it a normative basis. Whittington justifies self-government on the following alternative bases that: (1) the

---

Freeman recognizes that judicial review does not necessarily follow from the democratic “form of sovereignty . . . based in an ideal of the equality, independence, and original political jurisdiction of all citizens.” *Id.* at 327. Judicial review is appropriate “when the public sense of justice is not sufficiently developed or directed to influence legislative procedures to make the necessary corrections to democratic justice, or when the legislative branch is so controlled by particular interests (due, most often, to the influence of wealth on elections and legislative processes) that it does not accurately reflect considered public views in matters of justice.” *Id.* at 361. This is essentially an ad hominem argument, resting on a stipulated premise that democracy by definition presupposes the very rights associated with the U.S. Constitution, as elaborated by the Supreme Court. See *id.* at 338, 362. Unsurprisingly, from this premise Freeman concludes that democracy is compatible with a non-originalist version of strong judicial review.

*Whittington, supra* note 205, at 156. Whittington assigns judges the same status as legislators, stating that “[j]udges are as much the people’s agents as are elected representatives.” *Id.* at 124. “The judiciary can speak neither for nor to the absent sovereign. As part of the government, the judiciary is merely an agent of the sovereign . . . .” *Id.* at 154. Nevertheless, judicial authority comes from its “functional expertise,” which in turn benefits from the judiciary’s isolation from normal electoral forces. *Id.* at 153–54. Thus, Whittington shares with Zurn and Freeman the functionalist view that judicial review plays a special role in democracy.
power to decide constitutional forms must be lodged somewhere; (2) the power to shape government should reside with those who must live under it; or (3) good government requires participation of the people through popular sovereignty because the results of the people's deliberations will be reasonable.\textsuperscript{231} The first basis provides no justification of democracy at all. The second and third bases provide potential justifications for democracy, but are assertions rather than justifications as stated. In contrast, the neo-Aristotelean theory of political virtue provides a foundation for both assertions and therefore provides a foundation for democracy. With respect to the second basis, the achievement of \textit{eudaimonia} requires active participation in political choice-making.\textsuperscript{232} With respect to the third basis, the necessary limitation of individuals' experiences implies that the summing of those experiences in a deliberative process will lead to better results.\textsuperscript{233} At the very least, the neo-Aristotelean theory makes explicit what is merely implicit in Whittington's version of constitutional democracy.

But democratic dualism is problematic from the Aristotelean standpoint because it is not democratic enough, i.e., it limits the possibility of self-government (for contemporary citizens) to the determination of administrative issues that fall outside the Constitution. Such determinations

\textsuperscript{231} Id. at 138, 140.

\textsuperscript{232} The neo-Aristotelean argument also improves on the "core" (i.e., normative) argument for preferring democratic decision-making to decision-making by judicial review offered by Jeremy Waldron. See generally Jeremy Waldron, \textit{The Core of the Case Against Judicial Review}, 115 \textit{Yale L.J.} 1346 (2006). He asserts that only majoritarian decision-making, realized through legislative supremacy, protects the "deontological" right to equal and fair participation in society's decision-making, enjoyed by every citizen-member of a democratic political community; in other words, without democracy there is no equal and fair participation. However, he provides no genuine normative foundation for the right to equal and fair participation itself. Instead, he simply stipulates that respect for rights (and the right of equal and fair participation, in particular) is a systemic requirement of democracy; in other words, without equal and fair participation there is no democracy. Thus, Waldron's argument is tautologous: democracy justifies the protection of "deontological" rights, and those very same rights justify democracy. See generally id. In contrast, the neo-Aristotelean theory grounds its preference for democratic decision-making in a genuinely normative conception of the excellent performance of a human being's characteristic function.

\textsuperscript{233} This same point has been made recently by Francis Kieran. Francis Kieran, \textit{Dwelling with Dworkin: Political Morality in Constitutional Adjudication}, 6 \textit{U.C. Dublin L. Rev.} 30 (2006). Kieran argues that "the legislature is (in theory at least) a better forum for getting closer to the elusive moral 'right answer,' by allowing for interactive dialectic reasoning and by being less homogenous in its cultural perspectives than the judiciary." \textit{Id.} at 47. However, Kieran believes that "morality is inherently subjective," leading him to conclude that "there are some things that cannot be learned and . . . political morality is one of them." \textit{Id.} at 39. Morality and technical skill are in no way congruent." \textit{Id.} at 36. This view undercuts the argument that the legislature could, through the summing of more viewpoints, come closer than judges to the moral right answer, for the simple reason that it denies the existence of any such right answer. In contrast, the neo-Aristotelean theory of political virtue accepts the existence of truth conditions for moral propositions, though not the metaphysical reality of such propositions. In doing so, it provides the groundwork for a theory of moral education, expertise, and practice, which is a necessary condition of any argument that distinguishes between the relative merits of legislative (or consensual) versus judicial decision-making.
are "constitutional constructions" that fill gaps until the sovereign people choose to fill them directly.\(^{234}\) Constitutional questions themselves are insulated from routine, popular deliberation, and should the sovereign people emerge to fill constitutional gaps, then newly constitutionalized issues will henceforth be insulated from such deliberation as well. This suggests that the issues of greatest importance in contemporary democracies, including those involving the extent of personal liberty and the nature of equality, are precisely the ones that citizens will not be able to address.\(^{235}\)

This makes sense to Whittington, because of the demoted and secondary character of legislation. In his view, constitutional constructions are not only unauthorized by the sovereign, but are unstable because "maintained only by the continuing efforts of political actors themselves."\(^{236}\) The so-called "partial sovereign" is an always active sovereign whose actions result in "consistency," but not law. In contrast, the logic of neo-Aristotelean political virtue places great weight on the very process of "mere administration" that Whittington disparages, and therefore suggests that the most important issues should fall within the scope of the political process that "mere administration" describes. In fact, the locus of sovereignty is unimportant to the neo-Aristotelean theory of political virtue. Whether the legislature or the people are sovereign, all that matters is that citizens contribute directly to the choices that guide their public life. Thus, there is no reason to distinguish between "law," "administration," and "constitutional constructions." In fact, the notion of an active sovereign is superior to that of a potential sovereign from the neo-Aristotelean point of view because eudaimonia is a way of life rather than something that is achieved and completed. To the extent that eudaimonia depends upon political engagement, political engagement should never cease. The decision-maker should never lapse into being a "potential" sovereign. Moreover, since political choices, like all others, depend upon changeable circumstances, they ought to be viewed as provisional, subject always to further deliberation and revision. Thus, questions of basic public importance should not be regarded

\(^{234}\) For a discussion of gaps in fundamental law created by failures of agreement in expressions of will by the popular sovereign, see WHITTINGTON, supra note 205, at 157–59. Gaps cannot be filled by an active sovereign will because the sovereign will does not exist between its authoritative expressions embodied in constitutional texts. Id. at 157. Therefore, "constitutional constructions" do not rest on the consent of the governed, but on "something outside the sovereign will." Id. at 158. As a result, "[C]onstructions cannot claim a legally binding force," but are no more than a policy that remains consistent until altered by the sovereign's agents. Id. at 158.

\(^{235}\) The number and size of constitutional gaps, and therefore the scope of opportunity for public deliberation, depend upon the strictness of originalist interpretation. As Whittington elsewhere suggests, the strictest form of originalism will lead to the result that much, if not most, legislation will be upheld, on the ground that no original intent is now recoverable, or ever existed with respect to the specific question at issue. However, as this is a contingent aspect of originalism, it plays no role in Whittington's argument.

\(^{236}\) Id. at 158–59.
This view contrasts sharply with Whittington’s assertion that democratic dualism is valuable because it “limit[s] the times in which society places heightened demands on citizenship.”\(^{238}\) According to Whittington, the people cannot be constantly assembled; public virtue cannot always be kept at a fevered pitch. . . . [T]he heightened degree of virtue wished for by [Rousseau and Montesquieu] that would create an identity between self and polity and replace self-interest with an other-regarding ethos is unrealistic.\(^{239}\)

This reveals an underlying difference between Whittington and Aristotle on the question of what political virtue entails. For Aristotle, political virtue is simply an instance of virtue generally, which requires deliberation to determine how to act under a specific set of circumstances. The only distinctive features of political, as opposed to private, virtue are that it involves questions of public concern and results in legally binding general rules of conduct. There is nothing in it requiring a “fevered pitch” of engagement, the identification “between self and polity,” or the replacement of “self-interest with an other-regarding ethos.” From the Aristotelean point of view, taking a rest from forming and revising political views would be as odd as doing so with respect to matters of personal ethics.

To a large extent, democratic dualism is the descriptive device adopted by Whittington to provide a theoretical underpinning to the form of constitutional government we have. It explains the continuing authority of the Constitution in terms of a “regulative ideal” that preserves self-government. Whittington’s main point is that this regulative ideal requires an originalist form of judicial review.\(^{240}\) A larger question is whether Whittington’s argument provides any independent basis for choosing democratic dualism as a constitutional form. In other words, given a generalized preference for democracy, is there any reason to suppose that democratic dualism preserves or embodies self-government better than legislative supremacy? If one were designing a democratic political system from the ground up, rather than providing a best explanation for one that exists, would Whittington offer a reason to prefer separating the sovereign will from responsible government, in the form of a written constitution placing judicially enforced limits on the exercise of power by an elected government?

---

\(^{237}\) Whittington identifies finality as one of the virtues of constitutionalism, and one that distinguishes consensually authorized “law” from “mere administration.” With respect to constitutionally entrenched language, Whittington asserts that “[t]here is no sense in which the minority could say, ‘You won this vote and got your constitution; but we’ll be back tomorrow and we’ll see who wins then.’ The commitment is not to a continuing decision procedure. Each constitutional decision is regarded as final . . . .” \textit{Id.} at 146.

\(^{238}\) \textit{Whittington, supra} note 205, at 137

\(^{239}\) \textit{Id.} (emphasis added).

\(^{240}\) \textit{Id.} at 154.
According to Whittington, democratic dualism provides a way (through the assistance of originalism) to subject the exercise of government power to genuine consent. The “achievement” of democratic dualism is to distinguish between the constitutional and ministerial elements of politics. For “[t]he continuing threat to self-government is the tendency to reunite these elements in the hands of the governing officers.”\(^\text{241}\) But Whittington does not deny that the legislature is responsive to the potentially sovereign people when fulfilling its administrative functions. In fact, he states that “there is every reason to think that the government is highly responsive to the electorate.”\(^\text{242}\) Then why should we fear that elected officials will become “usurpers . . . assert[ing] their own authority to determine the public good”?\(^\text{243}\) In other words, why is the tendency to unite sovereignty and administrative power in the government a threat to self-government, if responsible government is actually responsible to those who elect it?

Whittington has two arguments in response to this question. First, he argues that legislative bodies are too “unfocused” to contemplate questions of fundamental public value successfully. In part, this is because “[i]n supporting a particular candidate for office, few voters deliberate on constitutional issues, for the good reason that the Constitution is not directly implicated in normal political elections.”\(^\text{244}\) Moreover, “political officials are faced with myriad concerns related to the daily operation of the government.”\(^\text{245}\) Hence, they are not disposed to approach issues with the sort of deliberative detachment that high politics requires.

The response to Whittington’s first argument is obviously that voters would deliberate on constitutional questions if such questions were directly implicated in normal political elections. This follows from the fact that voters do routinely focus upon such questions through the faculty of sunesis.

\(^{241}\) Id. at 135.

\(^{242}\) Id. at 131. There is some indication that Whittington would locate his justification of partial sovereignty precisely in the fact that the non-constitutionally authorized acts of government to fill constitutional gaps are uniquely suited to represent the majority. This may be inferred from his assertion that “the political nature of the task [of constitutional construction] [indicates] the inappropriateness of its pursuit by the judiciary with its limited access to external sources of authority.” Id. at 158. In other words, only the legislature is sufficiently attuned to respond to the circumstances of political reality, including the climate of public opinion. This inference is reinforced by Whittington’s discussion of how broadly to draw the principles contained in the clauses of the constitutional text. See WHITTINGTON, supra note 205, at 36–37. The more broadly they are drawn, the greater will be the scope for judicial interpretation. However, Whittington draws the line in favor of legislative gap-filling. He asserts that a high level of generality in interpretation “is excluded by a focus on the meaning of specific clauses rather than on the animating principle that resulted in those more specific clauses being drafted and ratified.” Id. at 37. This focus on surface language (understood through the recoverable intentions that inform that language) rather than underlying principle greatly limits the potential for judicial intervention on the basis of deductive or analogical reasoning.

\(^{243}\) Id. at 154.

\(^{244}\) Id. at 131.

\(^{245}\) Id. at 131.
Moreover, there is no evidence that legislatures cannot simultaneously address matters of administrative detail at close range and engage in the sort of deliberation that provisional settlement of fundamental matters requires. It is difficult to imagine how legislatures could avoid such deliberation. The flood of state statutes refining the definition of marriage is only an obvious recent example of such deliberation. If legislatures could not deliberate on fundamental questions, then they would not be able to create the constitutional constructions necessary to fill constitutional gaps. Thus, it seems that Whittington’s own theory requires legislatures to deliberate successfully on fundamental questions that the sovereign has not addressed.

Whittington’s second argument is more important. He describes the sovereign’s agent-government as a “partial sovereign” when it acts to adopt constitutional constructions because it does not fully represent the whole of the sovereign will.246 “The views of the minority are not fully represented in the construction . . . .”247 In contrast, the process of drafting and ratifying constitutional text necessarily does embody the whole sovereign will. In part, Whittington holds this view because he believes that the process of adopting a constitution actually encourages “genuine efforts at conversion and reconciliation,” and minimizes the temptation to codify immediate self-interest.248 But this tendency would not ensure the kind of unanimity of consent that allegedly separates sovereign consent from acquiescence in mere constitutional constructions. Far more important, Whittington accepts the idea, taken presumably from Montesquieu and Rousseau, that unity of will is somehow built into the concept of sovereignty. But unlike Montesquieu and Rousseau, Whittington believes that the sovereign will is present only in the grave circumstance of constitution-making and not in the continuous process of legislation. At the moment of constitution-making, “the popular sovereign gains substance for us”249 as “a regulative ideal.” We “are drawn into the sovereign” through our engagement with constitutionalism.250 What is more, unity of will animates potential, as well as active, sovereignty. “By accepting the authoritativeness of the Constitution, we accept our right to devise a new constitution, and incidentally become authors of the old.”251

The problem with these claims about the unity of will, even if taken at face value, is that they have no independent appeal from the neo-Aristotelean perspective. In particular, Whittington does not indicate how the formation of sovereign will differs from simple deliberation, which engages members of both the majority and minority in the decision-making process. Without more, there is nothing to deflect neo-Aristotelean political theory.

246 Id. at 157–59.
247 WHITTINGTON, supra note 205, at 158.
248 Id. at 147; see also Id. at 140–41, 145–49.
249 Id. at 143.
250 See id.
251 Id. at 144.
from the central question of how, and to what extent, a constitution engages current citizens in deliberation and solution of specific political questions that require an answer here and now.

Another, more general problem with Whittington’s theory is that constitutional gap-filling seems to involve all the attributes of sovereignty. Whittington would argue that constitutional constructions are effected under delimited authority delegated through the sovereign people’s consent and subsequent acquiescence. However, it is difficult to understand how the government acting in this capacity is anything less than fully sovereign, since it then operates with full, unhindered power. That is, within its authorized jurisdiction, there is nothing in Whittington’s theory to prevent the government from adopting whichever policy it prefers, subject to democratic ratification. It exercises an unhindered power to decide, with the result that sovereignty has been transferred, at least under the “positivist” definition Whittington recognizes as still essential to the concept of sovereignty. In short, there really is no space, between the authorized and unauthorized exercise of power, for a semi-authorized form of power. Therefore, to preserve his theory, Whittington ought to assert that when authority runs out, the sovereign will must be consulted through the device of constitution-drafting or amendment. The preservation of popular sovereignty demands nothing less. Whittington’s concept of partial sovereignty recognizes the impracticality of this demand, but in accepting the authority of acts taken by a fully sovereign legislature it renders unintelligible the distinction between “law” and “mere administration.”

Finally, Whittington’s argument depends upon the realistic possibility of effective action by the sovereign people. However, we have seen that the barriers to amendment are so high that any further amendment of the existing Constitution has been described as “next to impossible.” If the possibility of amendment is nil, then it is hard to see how Whittington can theorize the existence of meaningful consent in the people’s continuing acquiescence.

From the perspective of the neo-Aristotelean theory of political virtue, Whittington offers no compelling reason to desire either a written constitution or strong judicial review as the guarantor of self-government. The joint concepts of “potential sovereignty” and “democratic dualism” do nothing to enhance the opportunity for meaningful political decision-making on a continuing basis. In fact, they constrain political deliberation, for the faithful, originalist interpretation of the Constitution substitutes the judgment of a prior generation, if not of a sitting court, for that of the community who currently comprise the citizenry. Moreover, the concept of “constitutional construction,” which is the only attractive feature of Whittington’s theory of democratic governance, is arguably unsustainable within that theory, for it effects the very transfer of sovereignty the theory is designed to avoid.

\footnote{LEVINSON, supra note 171, at 21.}
Therefore Whittington’s argument, like Peretti’s argument from pluralist democracy, ultimately reveals the incompatibility of judicial review with the neo-Aristotelean theory of political virtue, which, as I have argued, implies consensual self-government. Moreover, if democracy also implies consensual self-government, and self-government is incompatible with judicial review, then democracy is also incompatible with judicial review, which implies the failure of both Peretti and Whittington’s argument.

253 See supra Part II.