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Christopher L. Eisgruber

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CIVIC VIRTUE AND THE LIMITS OF CONSTITUTIONALISM

*Christopher L. Eisgruber**

I.

Scholars have occasionally suggested that if the Supreme Court were to interpret the Constitution differently, American civil society would be richer and American citizens would be more virtuous. Some of these scholars blame judicial review in general, while others complain about the substance of Supreme Court doctrine. The first group includes, among others, Mary Ann Glendon and Michael Sandel, who contend that the Court's concern with individual rights has harmed American political culture. According to Glendon and Sandel, judicial enforcement of individual rights has rendered Americans less deliberative, less concerned with one another's well-being, and less likely to live well.¹ The second group of scholars includes Stephen Carter, who believes that the Supreme Court's religious liberty jurisprudence has produced a culture that trivializes religion,² and Ronald Dworkin and Burt Neuborne, who maintain that

* Faculty Fellow, Program in Law and Public Affairs, Princeton University; Professor of Law, New York University School of Law. I would like to thank the other Conference participants for their comments on an earlier draft of this paper. I am especially grateful to Sotirios Barber for his thoughtful comment on my article; I have tried to answer some of his specific concerns in the footnotes. Finally, I wish to acknowledge the generous financial support provided to this research by the Max E. and Filomen D'Agostino Greenberg Research Fund at the New York University School of Law.

1. See generally Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991); Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (1996). Glendon contends that "a gradual evolution in the role of courts" has "propelled" American political discourse to take the form of what she calls "rights talk." Glendon, *supra*, at 4. She blames this development for a remarkable range of political maladies. "[R]ights talk," according to Glendon, "promotes unrealistic expectations, heightens social conflict, [] inhibits dialogue that might lead toward consensus, accommodation, or . . . the discovery of common ground . . . [and] undermines the principal seedbeds of civic and personal virtue." *Id.* at 14. Sandel says that "constitutional discourse has come to define the terms of political discourse in American public life." Sandel, *supra*, at 108. According to Sandel, the Supreme Court presides over a misguided quest to "banish moral and religious argument from the public realm," and that quest is "impoverishing political discourse and eroding the moral and civic resources necessary to self-government." *Id.* at 23.

2. See generally Stephen L. Carter, *The Culture of Disbelief: How American*

the Supreme Court's decision in *Buckley v. Valeo*³ has done dramatic damage to the quality and depth of American political debate.⁴

In this article, I suggest that all of these theories exaggerate the capacity of free democratic institutions to form virtuous citizens and good societies. My critique emphasizes two basic points. First, I argue that in a free nation, the laws must give citizens liberty enough to waste their lives and to govern themselves poorly. For that reason, whether or not a democratic community lives virtuously will likely depend on historical circumstances (such as economic crises and military conflicts) and on the quality of its leaders and teachers; a nation's laws and constitution will have relatively little power to influence how people use their freedom. Second, I argue that democratic constitutions in large nations have an inevitable tendency to reduce citizens to "voters" and "taxpayers." As discussed in Part III, the office of "voter" carries with it a particular set of incentives that are damaging to civic virtue, and those incentives are exacerbated when "voters" think of themselves as "taxpayers." The reduction of citizens to voters and taxpayers restricts how much civic engagement one can reasonably expect from a democratic society. I conclude that some of the people who criticize Supreme Court doctrine in the name of civic virtue are not only picking on the wrong institution, but also asking for too much.

These arguments are provoked by criticisms of the American Supreme Court, but neither of them is special to the American system or to judicial review. We might frame the general point this way: in any democratic constitutional system, there will be powerful limits on the capacity of legal rules, norms, and institutions to improve the quality of civil society. Of course, recognizing such limits does not require us to deny that there is an important relationship between constitutional interpretation and the good society.⁵ Toward the end of this article, I consider some of the forms that connection might take.

Law and Politics Trivialize Religious Devotion (1993).

3. 424 U.S. 1 (1976).

4. Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 351-52, 369-70 (2000); Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & Pol'y 111, 115 (1997).

5. In his comment on this article, Sotirios Barber says that he is unsure about whether I take "a positive view, or a welfarist view of the Constitution, as opposed to either a negative or a proceduralist view of the Constitution." Sotirios A. Barber, *On Professor Eisgruber's View of the Constitution and the Good Society*, 69 *Fordham L. Rev.*, 2151, 2151 (2001). He is also unsure about whether I believe that "constitution-making and maintenance can be separated from the concern for virtue and the good society." *Id.* at 2156. I wonder whether these ambiguities might be more of Barber's making than of mine, but in any event let me state for the record that I accept what Barber calls "a positive or welfarist view of the Constitution." I also agree with him that constitution-making and maintenance cannot be separated from concern about virtue and the good society. What I argue in this paper is, first, that there are limits (rather severe limits, I think) to the kind of virtue and the kind of good society that constitutionalists may reasonably hope to achieve, and second, that many

II.

There is a long and venerable pedigree to the idea that constitutions shape the character of citizens who live under them.⁶ I have no quarrel with that general proposition. On the contrary, in Part III of this article, I argue that one essential feature of large democracies—namely, the practice of national elections—has a damaging effect on how citizens think about themselves. There are also happier stories to be told about the influence of democratic constitutionalism on citizen character. For example, rights of religious freedom presuppose that it is good for citizens to respect people of different faiths. A constitution that contains such rights does not force citizens to be religiously tolerant—on the contrary, intolerant sects will enjoy the same legal rights as do their competitors. Nevertheless, the constitution will encourage tolerance, and intolerant faiths are likely to become unpopular because they offend value judgments embodied in the law.

Yet, Glendon, Sandel, and others who criticize Supreme Court doctrine in the name of civic virtue need to draw a very strong connection between constitutional interpretation and the good society. They suppose not only that citizens are shaped by the basic features of democratic constitutions in general (such as the practice of voting or the principle of religious freedom), but also that citizen character can be fine-tuned and elevated on the basis of contested choices within the democratic paradigm—choices, for example, about the extent to which judges should enforce rights or about the details of Free Exercise and Establishment Clause doctrine.

It is a mistake to hope that constitutional choices could improve civic virtue so dramatically. The problem is that in order to respect basic and relatively uncontroversial principles of liberty, a nation's laws must give people a tremendous amount of freedom to behave badly. For that reason, constitutional norms and institutions cannot themselves induce a community to live well. Moreover, any good constitution will stand in the way of most laws that are designed (effectively or not) to make citizens virtuous.

I do not mean to suggest that the government must be indifferent about whether people pursue virtue—on the contrary, the government can, and should, take stands in favor of virtue and against intolerance, laziness, materialism, and selfishness, to say nothing of violence and criminality. Nor do I wish merely to call attention to the fact that people quite reasonably disagree about what counts as virtue,

constitutional theorists have been insufficiently attentive to those limits.

6. An excellent short treatment of the influence constitutions exert on citizen character is found in Martin Diamond, *Ethics and Politics: The American Way, in The Moral Foundations of the American Republic* 75-108 (Robert H. Horwitz ed., 3d ed. 1986).

although that is getting closer to the mark. I want instead to insist upon two more affirmative points: first, that there are many ways to live a good life, and, second, that it is important that individuals should be free to live whichever such way of life most appeals to them.⁷ These widely accepted propositions have a crucial consequence. If we recognize that there are diverse ways to live well, we will be able to protect the pursuit of those ways only by establishing rights so broad that they will also protect some unethical behavior. Put the other way around, if we tinker with constitutional rights so that government can effectively discourage people from living badly, we will inevitably trample on a freedom that we should value highly: the freedom to act upon one's own, personal convictions about *how* (not *whether*) to pursue the good life.⁸

Michael Sandel obscures this point in his book *Democracy's Discontent*, where he suggests that the American political system is unable to promote civic virtue only because it has been guided by a mistaken obsession with moral neutrality. Sandel complains in particular about Supreme Court doctrine, which in his view presupposes that "it is illegitimate to base laws on judgments about morality and immorality, because to do so violates the principle that government should be neutral among ends."⁹ Sandel is right to contend that neutrality is an incoherent goal for a political system and that the pursuit of neutrality would be a dispiriting foundation for public life. Sandel is wrong, however, to suggest that constitutional doctrine insists upon moral neutrality. American law is, for example, not neutral about whether a racist life is a good one; on the contrary, the Supreme Court's interpretation of the Equal Protection Clause condemns racism, and it does so on moral grounds. Sandel falls into error because he repeatedly conflates two distinct propositions. He says that under American law, the "government may not impose a particular conception of the good life,"¹⁰ which is true, and he says that under American law, the "government [must] be neutral on the question of the good life," which is false.¹¹ Supreme Court doctrine rightly reflects an attitude toward ethics which is pluralist, not neutral.

7. Sotirios Barber seems to interpret this sentence to mean that people should be free to live *any* life that appeals to them. Barber, *supra* note 5, at 2154-55. He then goes on to prove (without much difficulty) that I cannot really be serious about this proposition, since I do not believe that people should be free to pursue lives that are violent and racist. But I never say that people should be free to live any life that might appeal to them; what I say is that there are many good lives, and people should be free to decide which "*such* life"—that is, which of the many lives that are truly good—they will live.

8. This justification for liberal political rights has been elaborated by Joseph Raz. See, e.g., Joseph Raz, *The Morality of Freedom* 418-19 (1986).

9. Sandel, *supra* note 1, at 76.

10. *Id.* at 54.

11. *Id.* at 55. Sandel makes a related mistake by confusing the truthful claim that constitutional doctrine requires "[g]overnment . . . to respect the capacity of persons

For example, one need not hold any particular religious convictions in order to live a good life. There are important ethical differences among (for example) atheism, Islam, Judaism, and Christianity, but it is possible to live well while subscribing to any of these philosophies and traditions. A good constitution must therefore include very broad principles of religious freedom. On the other hand, the government has no obligation to be neutral on all questions about religious ethics (e.g., “Which is better—Christianity or Satanism?”). Somebody who wants to practice a religion that recommends intolerance or violence should find the law obstructing his path at every turn. Nevertheless, a good constitution will permit people to espouse religious doctrines that recommend hatred, violence, and inhumane discrimination. That is partly because the freedom to do what one wants, or to make choices, is valuable for its own sake.¹² But it is also because there is no way to formulate any principle or design any institution which could be trusted to draw reliable distinctions between good and bad religions. A broad right of religious liberty is the only satisfactory means for respecting the great diversity of good lives that a diverse people might reasonably desire to lead.

Or consider television. Robert Putnam casts television as one of the principal villains in his story about the decline of American civic engagement.¹³ Even if Putnam overstates his case,¹⁴ he presents strong evidence that television-watching not only has had a bad effect on American society, but also has made people unhappy.¹⁵ Surely, one might think, it would be legitimate and desirable for the government to craft policies designed to preclude Americans from

to choose their values and relationships for themselves,” with the false claim that constitutional doctrine presupposes that “what matters above all . . . is not the ends we choose but our capacity to choose them.” *Id.* at 12, 92. Constitutional doctrine rightly values the freedom to make choices about matters of moral and ethical importance, but it does not follow that it values *only* the capacity for choice, much less that it treats all choices as equally good.

12. Sandel tends to characterize Supreme Court doctrine as concerned with “making choices” rather than with “doing what one wants”; as a result, he can criticize the Court for assuming, implausibly, that basic commitments and values are “chosen” rather than, say, “held,” “discovered,” “recognized,” or “accepted.” *See, e.g., id.* at 118 (“[T]he freely choosing, autonomous self has come to prevail in constitutional law just at the time it has faded as a plausible self-image in contract law, and in economic life generally.”). Sandel’s distinction is a red-herring: even if values are “discovered” or simply “held” rather than “chosen,” constitutions should put some value on the freedom of people to do what they want (within limits, of course) rather than what the polity deems virtuous.

13. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 221-46 (2000).

14. Margaret Talbot, in her review of *Bowling Alone*, plausibly suggests that Putnam assigns too much blame to television. Margaret Talbot, *Who Wants to Be a Legionnaire?*, *N.Y. Times*, June 25, 2000, § 7 (Book Review), at 11.

15. Watching television is positively correlated with headaches, stomachaches, and insomnia. Putnam, *supra* note 13, at 240-41.

becoming “couch potatoes.”¹⁶ Yet, it would be hard for the government to do that without violating basic principles of free speech. That is not because the government has some obligation to pretend that “being a couch potato” is a plausible conception of the good life, but rather because television is an important medium for the dissemination of information, opinions, art, and social commentary (and some of that commentary is embedded in shows such as *Saturday Night Live*, *Murphy Brown*, *The Simpsons*, and *Buffy the Vampire Slayer*, which are likely targets for William Bennett, Dan Quayle, Joseph Lieberman, and other self-appointed guardians of national morality). Television-watching may feed the stupor of couch potatoes, but it may also be an ingredient in many versions of the good life. It is hard to imagine how the government could prevent people from becoming couch potatoes without at the same time preventing them from becoming, for example, newshounds.¹⁷

In sum, good constitutions (and, more broadly, good democracies) must take a pluralist attitude toward ethical questions. They must recognize that there is a wide variety of ways to live well. For that reason, any good constitution will define rights broadly enough that people will have the freedom to live badly (else they would not have the freedom to live well). If America suffers from an ethical malaise, we should not assume that we can cure it by tinkering with its laws. Public opinion is an independent variable in politics. Neither the Constitution nor the nation’s ordinary law can control it—and, in the

16. In the draft of this paper which I presented orally at the Conference on the Constitution and the Good Society, I made a less precise claim: namely, that it would be hard for the government to “reduce the number of . . . ‘couch potatoes’ . . . without violating principles of free speech.” In response, Sotirios Barber and others correctly pointed out that the government could pursue that goal by funding schools, the arts, and the sciences. Barber, *supra* note 5, at 2155 n.25. There is, of course, a difficult empirical question about the impact of any such scheme: funding the sciences, for example, might produce better, more seductive televisions rather than an intellectually active citizenry. Still, as I say at the end of this article, it seems undeniable that the government can improve civic culture by increasing certain kinds of public expenditures, especially those related to education. See *infra* text accompanying note 55. But none of that is inconsistent with my basic point: the government will still have to give people the freedom to live badly. Even if the government can reduce the number of American couch potatoes, it cannot preclude people from becoming couch potatoes: the government can spend money to educate people, but it will also have to give educated citizens the freedom to spend their hours lounging in front of television sets. And many Americans, blessed with a decent (if not good) education and publicly-funded recreational opportunities, choose to do just that.

17. Putnam claims that watching TV news, unlike watching TV entertainment, has positive correlations with civic engagement: “TV news viewing is positively associated with civic involvement. Those of us who rely solely on TV news are not quite as civic in our behavior as our fellow citizens who rely on newspapers, but we news watchers are nevertheless more civic than most other Americans.” Putnam, *supra* note 13, at 220.

long run, it will control them.¹⁸ Public opinion will evolve in response to all sorts of factors, including human nature, historical accident, patterns of immigration, and leadership.¹⁹ Of course, immigration and leadership, unlike human nature or historical accident, may be subject to constitutional guidance; we shall return to that possibility in Part IV.

III.

Good constitutions must give citizens freedom to live badly, but, as we have already seen, constitutions can provide citizens with some modest incentives to use their freedom well. Thus, for example, laws and institutions that uphold religious freedom will encourage citizens to be tolerant of other religious faiths. Modest incentives of this kind are entirely consistent with the argument of the preceding part. We might hope that a well-formed democratic government would be rich with incentives for good behavior, either in the constitution itself or in ordinary law. Or we might hope that insofar as the nation needs leaders, the Supreme Court and the other national institutions charged with interpreting the Constitution could be counted on to supply that leadership.

Unfortunately, there are features basic to any democratic constitution that are likely to provide citizens with incentives of exactly the wrong kind—incentives that lead them to be selfish and lazy rather than public-spirited and active. Ironically, large democracies will inevitably have an aristocratic or oligarchic element: very few citizens will be able to serve as public officials or to achieve prominence in national political debate. Most citizens will exercise formal political responsibility only through two very limited roles, those of “voter” and “taxpayer.” Indeed, on the occasions when ordinary citizens speak out in public fora or write letters to their representatives, they often brandish these roles to certify their political authority—as in, “I want you to know that I am a taxpayer!” or “You should listen to the people who vote!”

Critics of judicial review rarely worry about the reduction of citizenship to voting and taxpaying. On the contrary, they tacitly

18. “In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed.” *The Ottawa Debate, reprinted in Created Equal? The Complete Lincoln-Douglas Debates of 1858*, at 128 (Paul M. Angle ed., 1958) (Abraham Lincoln, Reply to Stephen Douglas at Ottawa, Illinois (Aug. 21, 1858)).

19. Cf. Joseph Cropsey, *The United States as Regime and the Sources of the American Way of Life*, in Horwitz, *supra* note 6, at 165, 166-67 (“[W]hile the coercive fragment of the political fraction can be thought of as under our deliberate control through suffrages and process of known law, every other element of the regime is subject to ongoing thought, which, in its political effect, if not in its origin, has so much in common with chance that we may for the moment count the two as equivalent.”).

equate "the electorate" with "the people," and they assume that judicial review is problematic precisely because it transfers power from voters to unelected judges. But it is an error to identify "voters" with "citizens" or "the electorate" with "the people." "Voter" is a political office, and, like other political offices, it carries with it a set of incentives that affect the behavior of those who occupy it. The key features of voting in a large nation are these: voters act in secret; they are not obliged to give reasons for their vote; they choose among a very limited set of options (such as two or three candidates for political office, or "yes" or "no" to a ballot proposition); and each voter's individual ballot has almost zero weight in determining the outcome of an election. Under these circumstances, each voter can be sure that her ballot will have no impact upon either her own reputation or the nation's policy. Voters therefore have an incentive to dismiss political deliberation and research as a waste of time—indeed, they have an incentive to regard voting itself as a waste of time (and, of course, turn-out for American elections is notoriously low). Moreover, because voters need not defend their vote in public, they have an incentive to act on the basis of self-interest or partisan ideology. We therefore expect voters to "vote their pocketbooks" or to cast their ballots on the basis of their personal answer to such questions as, "Are you better off today than you were four years ago?"

The best analyses of American democracy have recognized that electoral politics may actually discourage vigorous citizenship. Benjamin Barber, for example, argues that "[e]lectoral activity reduces citizens to alienated spectators—at best, watchdogs with residual and wholly passive functions of securing the accountability of those to whom they have turned over their sovereignty."²⁰ Robert Putnam describes "[v]oting and following politics" as "relatively undemanding forms of participation" in which citizens behave like "fans" who stay "in their seats, following the action and chatting about the antics of the star players."²¹ Sidney Verba, Kay Schlozman, and Henry Brady report that the "nationalization and professionalization" of American politics "have redefined the role of citizen activist as, increasingly, a writer of checks and letters."²²

When Verba and his colleagues describe citizens as "writers of checks," they have in mind voluntary contributions to political campaigns and interest groups, but the phrase is equally apt to the citizen's second major formal role in national democracy, that of

20. Benjamin R. Barber, *Neither Leaders Nor Followers: Citizenship Under Strong Democracy*, in *A Passion for Democracy: American Essays* 95, 98 (1998).

21. Putnam, *supra* note 13, at 37.

22. Sidney Verba et al., *Voice and Equality: Civic Voluntarism in American Politics* 73 (1995); see also Putnam, *supra* note 13, at 159-64 (describing the rise of professionalized interest group politics in which citizens are "fans" not "players").

“taxpayer.” Like “voter,” “taxpayer” carries with it a distinctive set of incentives; the incentives of taxpayers are substantially different from, but no less corrupting to the public spirit than, those of voters. Whereas voting is optional and relatively costless, taxpaying is mandatory and burdensome. Voters exercise infinitesimal amounts of policy-making power; taxpayers exercise no power and must comply with instructions specified by others. “Taxpayer” places the citizen in a position that is simultaneously subordinate and adversarial to her government; whereas voting inspires passivity, taxpaying inspires resentment. There is an understandable tendency for citizens to regard the two roles as flip sides of one another: taxing is what the government does to us, and voting is what we do to stop it (or to get our money’s worth, which amounts to much the same thing).

During peacetime, “voter” and “taxpayer” are the two principal roles through which citizens will participate in their government. Matters are different, of course, if the nation is fighting a war. Under those circumstances, the most visible facet of citizenship will be neither voting nor paying taxes but military service. If the people are not firmly behind the war effort, citizens may regard military service as an especially onerous form of taxation. If, however, the people support the war, opportunities for heroism by ordinary citizens will be relatively numerous (at least if one is disposed to regard risking horrible death as “an opportunity for heroism”), and many families will endure tremendous hardships and make extreme sacrifices for the public good.²³ This experience will profoundly influence the way people conceive of citizenship.²⁴ It may also provide leaders with unique opportunities to influence the development of society, for people will want them to interpret the country’s struggle in a way that makes the pain and bloodshed meaningful—triumphal rather than merely catastrophic.²⁵ Indeed, it is possible that efficacious moral

23. Some commentators who envy the solidarity and civic-mindedness sometimes produced by wartime citizenship have suggested that something similar might be achieved in peacetime through a compulsory “national service” program in which young people would be forced to render public service of one kind or another. See, e.g., Philip Selznick, *The Idea of a Communitarian Morality*, 75 Cal. L. Rev. 445, 456 (1987) (endorsing such a plan). Such proposals overlook the need for public support. A crucial feature of the political context for military service in World War II was that most Americans felt themselves united by “shared adversity and a shared enemy.” Putnam, *supra* note 13, at 268, 270-71. That is not true of every war; for example, it was not “repeated in the 1950s in Korea or in the 1960s in Vietnam.” *Id.* at 272. Nor is there any shared sense of crisis in the United States now. On the contrary, the proposed “national service” programs would be created not to meet an external threat to the national community, but because policy-makers feel that America’s young people are too foolish to be trusted with control of their own lives. Under these circumstances, a mandatory “national service” program likely would be experienced principally (although by no means exclusively) as a form of taxation.

24. Putnam describes the profound, and for the most part salutary, effects of World War II on American civil society. See Putnam, *supra* note 13, at 267-72.

25. The best American example of such leadership is the Gettysburg Address,

leadership in a large nation like the United States will be almost impossible when the country is not at war or facing some other dire crisis.²⁶

In light of the limited roles played by democratic citizens in large nation-states, especially during peacetime but even during wartime, it seems almost disingenuous for Jeremy Waldron and other critics of judicial review to complain that it reduces public deliberation to an “impotent” “debating exercise” in which a “star-struck people may speculate about what the Supreme Court will do next.”²⁷ It is true, of course, that most citizens have no power to alter Supreme Court jurisprudence. But most citizens have no power to alter the outcome of elections, either. In large nations, policy-making is inevitably a professional activity carried out by elites. There is no other way for the government to operate. In a nation of more than 200 million people (or even in cities and states with millions of people), most people will never get a turn on the public stage—to say nothing of regular, continuing influence over public policy.²⁸

Under these circumstances, constitutional adjudication may actually be preferable to electoral politics from the standpoint of democratic flourishing. Citizens will be spectators in either case, but at least in the case of constitutional adjudication they will be spectators to an argument about moral and political principle, rather than to an interest group deal.²⁹ I do not want to make too much of that point. Whether or not the impact of judicial review on democratic

where Lincoln self-consciously revised the meaning of the Civil War and, with it, the American nation. See generally Garry Wills, *Lincoln at Gettysburg: The Words that Remade America* (1992). The point applies more generally, however; thus World War II helped to launch an extended period of civic engagement in the United States because “most Americans in 1945 felt that the war had been a just one and that their terrible collective sacrifice—all those sons and daughters who would not come home—had been in some measure vindicated by victory.” Putnam, *supra* note 13, at 271-72.

26. If so, that is not a good reason to wish for war, which is genuinely horrible, but yet another reason not to expect much from democratic citizens. Putnam acknowledges this point: “Creating (or re-creating) social capital is no simple task. It would be eased by a palpable national crisis, like war or depression or natural disaster, but for better *and* for worse, America at the dawn of the new century faces no such galvanizing crisis.” Putnam, *supra* note 13, at 402. Alan Ryan, in his review of Putnam’s book, underscores it. Alan Ryan, *My Way*, N.Y. Rev. of Books 47, 50 (Aug. 10, 2000).

27. Jeremy Waldron, *Law and Disagreement* 291 (1999).

28. There is, accordingly, an unrecognized irony in the title of the 1998 report of the National Commission on Civic Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It*, available at <http://www.puaf.umd.edu/civicrenewal> (last updated Sept. 27, 1999). The Commission intends *A Nation of Spectators* to describe a contingent, and changeable, feature of American politics; the title may instead capture a basic structural feature of large-scale democratic politics which renders the Commission’s entire project quixotic.

29. I elaborate this point in Christopher L. Eisgruber, *Constitutional Self-Government* (Harvard Univ. Press forthcoming 2001) (ch. 3, on file with author).

citizenship is beneficial, it is certain to be marginal by comparison to the impact of voting and paying taxes. In large nation-states during peacetime, most citizens will exercise formal political responsibility only as voters and taxpayers, and those roles will influence their conception of citizenship. Education and leadership may mitigate that tendency, but the tendency will in turn limit what teachers and leaders can reasonably hope to achieve.

That observation seems especially relevant to some of the extravagant claims made by critics of *Buckley*. Proponents of campaign finance reform occasionally contend that if *Buckley* were overturned and campaign spending were limited, America would enjoy a kind of political renaissance—political discussion would be better and deeper, and citizens would turn to public life with fresh enthusiasm. Thus, for example, my colleague Burt Neuborne says that “*Buckley* and the rules it fostered are responsible for much of what is wrong with our current political structure.”³⁰ He blames *Buckley* for, among other things, creating a world in which “voter turnout is plummeting” and that is “without new political ideas and almost bereft of serious political debate.”³¹

Whether or not *Buckley* was rightly decided,³² it is implausible to think that *Buckley*’s repeal could have such dramatic effects on the quality of public deliberation.³³ If Americans wanted more serious discussion, they could easily get it. They could subscribe to the *New York Times* or the *Wall Street Journal*; they could read *The New Republic* or *Foreign Affairs*; they could watch *Newshour with Jim Lehrer* or tune their car radios to National Public Radio. They do not—not because *Buckley* or campaign ads prevent them from doing so, but because they do not want to. That choice is relatively easy to understand in terms of the incentives that operate on voters: in a large nation, each voter’s ballot is effectively meaningless, and voters accordingly have no incentive to invest time to researching their choices.

These effects may be even more dramatic if we focus on the “swing voters” who are likely to decide any election. According to Kathleen Hall Jamieson, “[i]t is axiomatic among campaign professionals that

30. Neuborne, *supra* note 4, at 115.

31. *Id.* at 112-13.

32. There is more to be said on behalf of the decision than its liberal critics usually admit. See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663 (1997) (defending the core principles of *Buckley*).

33. It is an entirely different question whether overturning *Buckley* would affect the distribution of power within American politics—e.g., by transferring power from moneyed interests to those that are best equipped for grass-roots organizing, such as evangelical churches. See Putnam, *supra* note 13, at 162 (noting that “unlike [with] other newly mobilized groups, such as environmentalists, firm and enduring organizational foundations for the politicization of the evangelical community already existed”).

presidential races involve a 40-40-20 equation: Forty percent of the people will always vote for your party, 40 percent will never vote for your party, and the remaining 20 percent are up for grabs."³⁴ If so, a rational presidential candidate should have two objectives: ensuring high voter turn-out among the 40 percent who are favorable, and winning over the 20 percent who are up for grabs. Political campaigns will therefore be guided in significant part by the interests and political sophistication of the undecided 20 percent. Now what do we think that 20 percent looks like? In particular, if voters in general have few incentives to invest time in politics, do we think that the undecided 20 percent is likely to consist of the most knowledgeable voters, the least knowledgeable, or a random slice of the electorate?

I do not know whether there is empirical research to answer that question.³⁵ I am sure that there are some very thoughtful citizens who are "swing voters." I am astonished, however, by some of the things that seem to produce shifts from one candidate to another. So, for example, after the Republican Party Convention in July 2000, George W. Bush's support swelled to 54 percent of likely voters, up 9 percent from where it stood two weeks earlier.³⁶ When Al Gore selected Joseph Lieberman as his running mate two weeks later, Bush's share of registered voters dropped to 45 percent.³⁷ According to USA Today/CNN/Gallup Polls, Bush's lead among registered voters dropped (incredibly) from 19 percent to 2 percent in the space of three days.³⁸ Now, if these polls are accurate, there must be some significant number of American adults who had been unsure about how to vote but then saw the Republican Convention (at which nothing much happened), and said, "Wow! That was impressive! I think I'll vote for George Bush!" That would be amazing enough, but it appears that some of these same people³⁹ turned around after the

34. Kathleen Hall Jamieson, *Everything You Think You Know About Politics . . . And Why You're Wrong* 5 (2000).

35. To do the relevant empirical work, researchers would have to find a reliable way to identify accurately the pivotal twenty percent of the electorate. This group presumably includes any voter who reports herself to be "undecided," but it would also have to include any voter who reports herself firmly in the Gore camp, for example, but who (whether she admits it or not) might later change her mind.

36. Richard Benedetto, *Capitalizing on the Convention; Poll: GOP's Image Reform is Working*, USA Today, Aug. 7, 2000, at 2A.

37. Laurence McQuillan, *Gore Turns To Lieberman; First Jewish VP Pick Lifts Dems' Standing in Poll*, USA Today, Aug. 8, 2000, at 1A.

38. *Id.* Note that the USA Today/CNN/Gallup Poll immediately following the Lieberman selection produced numbers for registered voters, whereas the post-convention poll distinguished between registered voters and likely voters and produced numbers for both samples of the electorate. The "likely voters" numbers are considered more reliable indicators of likely electoral outcomes, but since the later of the two polls surveyed all registered voters, it is impossible to say how dramatically the Lieberman selection altered Gore's momentary support among likely voters.

39. I can't prove they were the same people, of course; it is possible that all the

Lieberman selection and said, “Whoa! That’s impressive, too! Now I think I’ll vote for Al Gore!” If candidates must aim to capture an electorate that swings so wildly in such gentle political breezes, should we be surprised that they become blowhards?

Moreover, at the same time that candidates are pursuing the most capricious 20 percent of the population, newspaper publishers and television broadcasters are trying to get the biggest possible audience for their campaign coverage—and, by hypothesis, only 20 percent of that potential audience is undecided, whereas 80 percent of it already knows which candidate it will support. That means the news media has a tremendous incentive to cover the campaign as a “horse race”: most of its audience wants information that will answer the question, “Is my candidate doing the right things to win?” not the question, “For whom should I vote?”⁴⁰

That, of course, complicates the task of the candidates, who are trying to reach the undecided 20 percent. It is possible that the undecided segment of the population pays little attention, or no attention, to the news;⁴¹ but even if undecided voters do pay attention, they are likely to find the media covering the candidates’ positions as strategic moves, rather than as substantive policies. The candidates must therefore find some way to cast their message so that it reaches the undecided 20 percent even after being filtered by publications and broadcasters whose interests are largely dictated by the committed 80 percent majority.

No doubt this analysis oversimplifies. Nor should we casually assume that the current state of affairs is so bleak as its critics sometimes allege—there is evidence, marshaled by Professor Jamieson among others, that American political debate is more substantive than people commonly suppose.⁴² Nevertheless, all of the incentives I have just described arise rather directly from the existence of national elections in a two-party system. Even if those incentives are not quite as strong as I have implied, it seems implausible to think that overturning *Buckley* or tinkering with Supreme Court jurisprudence would have any substantial impact on the quality of American political debate.

people who switched to Gore after the Lieberman announcement were voters who had been undecided or who had supported Bush prior to the Republican Convention.

40. Jamieson and her colleagues present evidence that the media does indeed cover campaign speeches as strategic ploys rather than substantive policy discussions. Jamieson, *supra* note 34, at 13, 38-40. Jamieson criticizes this tendency and attributes it to various self-serving motives on the part of journalists. *Id.* at 39. In my view, however, it is also a rational response to the interests and needs of the audience for campaign news—an audience that consists principally of people who want to know who’s winning, not for whom they should vote.

41. One of the more depressing statistics collected by Putnam (in a book filled with depressing statistics) is that fewer than one in three Americans under the age of forty reads a newspaper on a daily basis. Putnam, *supra* note 13, at 219.

42. See, e.g., Jamieson, *supra* note 34, at xiii, 8-10, 106, 211-12.

If one really wanted to alter the incentives facing American citizens, one would have to consider reducing the professionalization of politics in general—and that would mean, among other things, reducing the extent to which policy-making was dependent upon national or statewide elections. One would probably have to engage in constitutional reform rather than (or in addition to) constitutional interpretation. Benjamin Barber, who is exceptional in his unflinching recognition of the hard choices that must be made to secure vigorous democratic citizenship, has recommended some reforms designed to renew citizen involvement in policy-making. He has suggested, for example, the creation of a nationwide system of neighborhood citizen assemblies and the use of lotteries, rather than elections, to fill some local and regional political offices.⁴³ I am, however, inclined to think that such reforms are impractical (in the case of the neighborhood assemblies) or undesirable (in the case of the lottery system) despite their very real benefits from the standpoint of participation. Whatever we think of our current political discourse, we may just have to live with it. To paraphrase Winston Churchill: representative democracy is a miserable form of government, and the only thing to be said in its favor is that all the alternatives are worse.⁴⁴

IV.

It is a mistake to hope that legal reform, constitutional design, or constitutional interpretation can bring about a rich, deliberative civic life in a large-scale modern democracy. Such hopes are bound to be disappointed for two reasons: first, any good constitution must give people substantial freedom to be bad, and second, any democratic political system will give citizens incentives to be selfish and apathetic. On the other hand, it would also be a mistake to suppose that law or constitutional interpretation should be unconcerned with civic virtue. In this part, I briefly consider three areas which are promising venues for further research into connections between the Constitution and the good society.

1. *Citizenship and Leadership*. Even if the Constitution exerted no control over the trajectory of American culture, there would nevertheless remain at least one connection between constitutional interpretation and civic virtue. Constitutional citizens should ponder how to use the freedom that the Constitution gives them, and leaders should deliberate about how best to guide the people. Reflections of this kind will not be matters of constitutional law—they will not be

43. Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* 267-73, 290-93 (1984).

44. Winston Churchill said, "Democracy is the worst form of government except all those other forms that have been tried from time to time." *The International Thesaurus of Quotations* § 231(7), at 146 (1970) (quoting Sir Winston Churchill, speech to the House of Commons (Nov. 1947)).

enforceable by courts or, for that matter, by any other political institution; they will owe whatever efficacy they have to the free choices of citizens and leaders. But while the personal commitments of citizens and leaders will not have the character of "law," they should be informed by constitutional interpretation. What it means to be a good citizen or a good leader in the United States will likely differ from what it means to be a good citizen in, say, Canada or Britain or France. To comprehend the responsibilities of citizens and leaders in America, one will have to reflect upon, among other things, American political institutions, and that will be an exercise in constitutional interpretation.

2. *Political Unity.* We noticed earlier that some constitutional norms (such as those that guarantee religious freedom) inculcate certain virtues (such as religious tolerance) in American citizens. Most of these norms can be justified without reference to civic virtue or the good society. For example, most aspects of religious freedom can be explained by their value to individual liberty or equality; the production of religious toleration is a by-product of these norms, rather than an essential part of their justification. A few norms, however, might flow more directly from concerns about the good society. An example is the principle that the government ought to treat Americans as capable of flourishing together as a unified political community, rather than as a conglomeration of separate and perhaps antagonistic sub-groups. I have elsewhere suggested that this principle of political unity is an essential component of Establishment Clause and Equal Protection Clause jurisprudence.⁴⁵ The principle explains, for example, why the state of New York behaved unconstitutionally when it created a separate school district for the Satmar Hasidim in *Board of Education of Kiryas Joel Village School District v. Grumet*,⁴⁶ even though the district was desired both by the Hasidim and by their non-Hasidic neighbors. It is wrong for the government to take actions that depend on the idea that Americans of different faiths will live better if they live apart from one another.

3. *New Americans: Immigrants and Children.* Leadership and political unity suggest links between the Constitution and the good society, but neither will help those who want constitutional law to make Americans less selfish. Are there any ways to do that? If government must give citizens enough freedom that they can live badly, then perhaps the government's best chance to govern social development is by influencing who becomes a citizen. The United

45. See Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 *Cumb. L. Rev.* 515 (1996); Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 *UCLA L. Rev.* 1297 (1994); Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 *Colum. L. Rev.* 87 (1996).

46. 512 U.S. 687 (1994).

States replenishes its citizenry from two sources: immigrants who come here and children who grow up here (the sources overlap, since some children may grow up in the United States after immigrating here with or without their families). For that reason, scholars concerned with connections between constitutionalism and the good society should pay special attention to immigration and to the family and the schools, which are the two most obvious institutions through which the American government shapes child development.

It is an open question to what extent the law in any of these areas ought to be constitutional rather than statutory or administrative. It is also an open question whether, insofar as the law is constitutionalized, it might be more or less fully determined by considerations related to individual liberty and equality, rather than to civic virtue and the good society.⁴⁷ I make no effort to resolve such questions in the brief discussion that follows; for the time being, my only goal is to highlight domains likely to reward attention from those who are interested in specifying more fully the connections between constitutional interpretation and the good society.

I begin with immigration law, which seems to me perhaps the most important and least analyzed of these topics. There are three reasons why immigration law seems an especially promising subject for further research. First, immigration might affect the quality of American society in ways that are profound, complex, and surprising. For example, one might believe (and I am very tempted by this view) that immigrants have an especially vigorous appreciation for the privileges and responsibilities of American citizenship: because they are Americans by choice rather than merely by accident of birth, and because they have a concrete appreciation of what it means to be without the benefits of American citizenship, they often have a special commitment to the basic principles of democracy and a real willingness to work hard (often in unappreciated jobs) to take advantage of what American society has to offer. On the other hand, it is also possible that the influx of huge numbers of persons who have very different value systems and who do not speak English may make it impossible to forge a national community. Finally, there is a real, if awkward to acknowledge, possibility that immigrants from some cultures may enrich civil society more than others. So, for example, Robert Putnam's fascinating study of social capital in the United States includes the astonishing claim that "[o]ne surprisingly strong predictor of the degree of social capital in any [American] state in the

47. Linda McClain and James Fleming suggest that the best justifications for reviving civil society will often relate "as much to securing what we call 'deliberative autonomy'—enabling people to decide how to live their own lives—as to promoting 'deliberative democracy'—preparing them for participation in democratic life." Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 Chi.-Kent L. Rev. 301, 308 (2000).

1990s is . . . the fraction of its population that is of Scandinavian stock.”⁴⁸

Second, not only does immigration seem likely to influence the trajectory of American society, but also immigration law seems likely to have a real impact upon actual patterns of immigration in the United States. I do not mean, of course, that immigration law can control immigration entirely—after all, hundreds of thousands of illegal immigrants enter the United States annually.⁴⁹ But I do believe that if the United States changed its immigration quotas, or altered the resources devoted to enforcing immigration laws, it could substantially increase (and perhaps substantially decrease, although that might be harder) the number of new Americans entering the country each year. This observation may seem banal; people usually assume that the law is capable of influencing behavior. I am much less sure, however, that this crucial point will hold true when we turn, in just a moment, to consider the family and education—in other words, child development in America, unlike patterns of immigration, may be driven principally by sociological forces too powerful for law to tame.

Third, immigration law poses thorny questions of principle that have been too much neglected by constitutional theorists.⁵⁰ On the one hand, it is possible that governments have much more discretion about whom to admit than about how to treat people after they have arrived—so that, for example, the government might be able to favor immigration by Scandinavians on the ground that they are good for social capital, even though that kind of ethnic discrimination would be completely unacceptable in any other venue of government action. The justification for this extraordinary discretion might have something to do with basic, if ugly, facts about the inherent exclusivity of any real community—an idea captured, if slightly sweetened, by Michael Walzer’s well-known suggestion that “[n]eighborhoods can be open only if countries are at least potentially closed.”⁵¹ On the

48. Putnam, *supra* note 13, at 294.

49. Official estimates suggest that the number of illegal immigrants residing in the United States increases by around 275,000 persons each year. See *Illegal Alien Resident Population*, at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last modified Dec. 20, 2000).

50. For example, not everybody has neglected the constitutional questions raised by immigration law. See, e.g., Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (1996); Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997); T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 Mich. L. Rev. 1471 (1986); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. Rev. 1047 (1994); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992); Peter J. Spiro, *The Citizenship Dilemma*, 51 Stan. L. Rev. 597 (1999) (book review). My own foray into the field is Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. Rev. 54 (1997).

51. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 38 (1983).

other hand, it is extremely difficult to explain why a liberal regime “dedicated to the proposition that all men are created equal”⁵² should be able to cast that principle aside when policing its borders. And even if the government is entitled to have some discretion in administering immigration law, it is not clear that discretion should be so broad as constitutional doctrine currently allows.

By comparison to immigration, child-rearing has received a great deal of attention from constitutionalists.⁵³ That should not be surprising: children are “our own” in a way that immigrants are not, and virtually everybody agrees that there are important constitutional principles relevant to schools and the family. Since others have written so much about these topics, I offer only a few mildly skeptical reflections about the capacity of law to influence child development. What is true of citizen behavior in general may also be true of parenting and teaching in particular: the Constitution and the law more generally may have little capacity to determine whether citizens are good parents or good teachers. The government’s conception of the good in this domain, as in all others, must be pluralist: it will have to respect multiple different conceptions of what it means to be a good parent or good teacher, and it may be impossible for the government to honor that pluralist ideal without at the same time giving citizens the freedom to parent or teach badly. Now, of course, the government’s obligations to respect the freedom of parents and teachers will be limited by its interest in protecting the well-being of children, and that countervailing interest may authorize the government to regulate citizen behavior toward children more intrusively, and hence more effectively, than it can other forms of citizen behavior. Cutting in the opposite direction, however, is another, more purely practical consideration: it may be impossible for the government to monitor effectively the crucial decisions of parents and teachers. The government may prohibit child abuse (although even doing that effectively is not easy) and prescribe reading lists for schools, but it will not be able to ascertain, much less regulate, how much time parents spend reading to their children, or what sort of attitudes teachers convey when they are alone in their classrooms with students.⁵⁴

52. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in Wills, *supra* note 25, at 263.

53. The literature is extensive; among the notable works are: Amy Gutmann, *Democratic Education* (1987); Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (2000); *Seedbeds of Virtue: Sources of Competence, Character and Citizenship in American Society* (Mary Ann Glendon & David Blankenhorn eds., 1995); see also Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *Fordham L. Rev.* 1617 (2001).

54. I pursue some implications of this point in Christopher L. Eisgruber, *How do Liberal Democracies Teach Values?*, in *Nomos XLIII: Moral and Political Education*

To some extent, then, the upbringing of American children will depend upon leadership, teaching, and other sociological forces beyond the control of both the Constitution and the laws more generally. Still, it seems self-evident that children's well-being will depend substantially on whether the government devotes enough resources to education,⁵⁵ day care, and children's medical needs, and on how the government regulates such matters as reproductive freedom, divorce, and child support obligations.⁵⁶ Insofar as that is true, the government's treatment of schools and families will be an important locus for research into the relationship between constitutional interpretation and the good society.

V.

Constitutional theory is a practical discipline. In order to determine how any country's constitution should be interpreted, maintained, and reformed, we must make comparisons among real alternatives. If, for example, we want to assess some feature of American constitutional practice, we must identify other policies or procedures that might be implemented in a diverse, large-scale, federal democracy with American characteristics.⁵⁷ We accomplish nothing if we simply lament the respects in which America might be deficient by comparison to some imagined democratic utopia—such as a quasi-mythical version of ancient Athens, filled with vigorous democratic citizens who gather together in public spaces to deliberate respectfully about matters of state (and who, it should be added, assign their household chores to slaves), or a sanitized, somewhat nostalgic vision of the United States itself just after World War II, when televisions were rare and Americans were united by their shared commitment to defeat the Axis powers (and when, it should be added, schools were segregated and women were barred from many professions).⁵⁸

(Stephen Macedo ed., N.Y. Univ. Press forthcoming 2001).

55. One of Putnam's most remarkable claims is that North Carolina could bring its public schools up to Connecticut's (significantly better) standards if North Carolina citizens were to "double their frequency of club meeting attendance," but that "it would be virtually impossible [for North Carolinians] to achieve the same progress simply by reducing class size." Putnam, *supra* note 13, at 301. If Putnam is correct, then the correlation between educational quality and government spending might turn out to be astonishingly small. On the other hand, Putnam himself seems to think that much can be accomplished by reducing *school* size, rather than *class* size; his rationale is that "more students in smaller schools have an opportunity to play trombone or left tackle or King Lear." *Id.* at 405.

56. A controversial study by John Donohue and Steven Levitt, for example, provides empirical evidence for the possibility that expansions in abortion rights, by reducing the number of unwanted children, will eventually produce reductions in crime rates. See Erica Goode, *Linking Drop in Crime to Rise in Abortion*, N.Y. Times, Aug. 20, 1999, at A14 (discussing the study).

57. This point is an organizing theme of Eisgruber, *supra* note 29.

58. McClain and Fleming rightly complain that "some [civil society] revivalists seem to engage in selective retrieval [of historical details], evidently assuming that

Constitutional theory's practical character requires, among other things, that we develop a lively sense of constitutionalism's limits—of what we cannot realistically hope that constitutions will accomplish in the United States or elsewhere. In this article, I have emphasized two limitations relevant to civic virtue and the good society. First, because a nation's laws must respect a pluralist conception of virtue, good constitutions will inevitably leave citizens with considerable freedom to live badly. Second, because constitutions must rely upon large-scale elections to implement democracy, they will inevitably make voting and tax-paying the most conspicuous elements of citizenship; as a result, they will provide soft incentives for citizens to be selfish and passive. If we keep these limits in mind, we can identify some modest, but still important, connections between constitutional interpretation, law, and the good society. If, on the other hand, we neglect the limits of constitutionalism, there is a risk that we will damage or destroy valuable constitutional rights in a well-intentioned quest to create societal virtues that, no matter how noble or commendable, are simply not achievable through constitutionalism or law.

th[e] history of exclusi[ve practices] was an unfortunate element . . . that can be easily removed . . . and they fail to consider whether such a history seriously undermines the very notion of a more virtuous past." McClain & Fleming, *supra* note 47, at 338-39. See also Dorothy E. Roberts, *The Moral Exclusivity of the New Civil Society*, 75 Chi.-Kent L. Rev. 555, 556 (2000) (discussing how civil society revivalists have "a conception of civil society more concerned with rescuing a disappearing way of life than with ending persistent economic and social disparities").