The Distrust of Politics

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THE DISTRUST OF POLITICS

Terrance Sandalow*

In this Article, Dean Sandalow considers the justifications advanced by those who favor the removal of certain political issues from the political process by extending the reach of judicial review. He begins by examining the distrust of politics in a different context, discussing the proposals made by the Progressives for reforming municipal government, as a vehicle to expose the assumptions underlying the current debate. His comparison of the two historical settings reveals many similarities between the Progressives' reform proposals and the contemporary justifications for the displacement of politics with constitutional law. Dean Sandalow concludes that the distrust of politics rests not on deficiencies in the political process, as commentators like Professor Ely have suggested, but rather on a disagreement with the substantive results that the political process yields.

INTRODUCTION

The day after his inauguration, President Reagan convened the first meeting of his cabinet and publicly instructed its members that in discharging their responsibilities, they were not to be swayed by politics, but were to be guided solely by the best interests of the American people. Sophisticates no doubt chuckled and promptly dismissed the statement as a bit of rhetorical fluff. Yet, however little the President's statement may tell us about the future behavior of his administration, it is not without interest. Even when its credibility is suspect, a statement may reveal a great deal about attitudes, either of the speaker or of his audience. In this instance, it seems likely that the statement reveals less about the President's attitudes than it does about those of his real audience, the public.

The popular distrust of politics which is reflected in President Reagan's statement is one of the continuing undercurrents of the American political tradition. Its force may be felt, to take a more consequential example, in the increasingly frequent proposals for a constitutional amendment that would limit the President to a single term of six years, a reform that would, it is argued, reduce the need for the President to attend to politics and thereby "enhance the objectivity and public acceptance of the measures he urges in the national interest." The distrust of politics is evident also in much recent discussion of constitutional law. During the past quarter century, the answers to an extraordinary variety of questions of public policy have

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2 Cutler, To Form a Government, 59 Foreign Aff. 126, 142 (1980).
been found in the Constitution. Issues that traditionally were regarded as within the domain of the legislature have thus come to be decided by courts. The justifications advanced in support of this trend often rest on the notion that there are important areas of public policy in which the political process cannot be trusted to achieve an appropriate resolution of the competing claims.

Of course, a judicial decision that the Constitution dictates an answer to a question of governmental policy does not entirely remove that question from the political arena. Public controversy regarding the content of governmental policy in respect of abortion continues despite the decision in *Roe v. Wade.* In this as in other situations in which the Constitution has been read to limit governmental power, the way is open through the political process for a constitutional amendment that would restore that power. Or, over time, the political process might produce a change in the composition of the Supreme Court that would lead to a reinterpretation of the Constitution enlarging legislative authority. Neither possibility is fanciful; but experience demonstrates that both are too remote to disturb the common understanding that a constitutional decision is an alternative to a political decision, and not merely a step in the political process.

The displacement of politics by constitutional law now extends across a broad front. I need not attempt the imposing task of describing the full extent of the displacement, but a few illustrations will make more vivid the understanding of how far the distrust of politics has carried us.

1. For various reasons, many parents prefer (or, all other things being equal, would prefer) that their children attend private schools. Some believe that their children will be better educated or safer or better disciplined in such schools; others, that instruction in secular subjects should be integrated with the inculcation of religious values; and still others have reasons many of us would find morally objectionable, such as that they wish their children to attend racially homogeneous schools. Many citizens, moved by self-interest, by a conception of fairness, or by a belief in the desirability of fostering pluralism in the educational system, have insistently demanded that government

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2 410 U.S. 113 (1973).
3 Elsewhere, I have argued for changes in constitutional doctrine that would permit judicial review to become merely a step in the political process, rather than a means of imposing limits upon it. See Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1183-94 (1977); Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653, 693-703 (1975). Although a growing body of decisions supports that position, the conventional view is still dominant and I shall, accordingly, assume it throughout this paper.
facilitate parental capacity to choose between private and public schooling by subventing private schools, either directly or through tax relief for parents who choose such schools for their children. Their claims have been opposed, with equal vigor, by persons holding an equally broad spectrum of views. Some believe that all private schools should be prohibited in the interest of national unity; others would permit private schools, but contend that governmental funding of religious schools, which account for most private school enrollment, would violate our national tradition of the separation of church and state; still others oppose state aid for reasons many of us would find morally objectionable, as for example anti-Catholic sentiment.

The accommodation of these competing views presents a classic political problem. Constitutional law has, however, displaced politics in defining the main outlines of governmental policy. Pierce v. Society of Sisters established the constitutional right of parents to choose private schools for their children. More recent decisions prohibit the states from facilitating that choice by disallowing either direct aid to religious schools or reimbursements or tax credits to parents for their tuition payments to such schools. Issues of the utmost importance in defining the nation’s educational policies, whose resolution significantly affects our social and political structure, have thus been determined by the Supreme Court rather than the political process.

2. Throughout the past century, but in recent years at an accelerating pace, our society has been engaged in reassessing the role of women. The consequence has been continuing movement toward legal equality between the sexes. Many men and women believe that full equality entails the abolition of all distinctions based upon sex. Yet, it follows from the pervasiveness of the distinction in our law that many different issues are raised by the call for its total abolition. Proposals to equalize liability for alimony engage interests different from those at stake when the issue is whether men and women may purchase alcohol at the same age; and both affect interests different from those that must be considered in deciding whether men and women shall be equally subject to compulsory military service. Controversy regarding the call for total abolition of sex-based legal distinctions is assured by the breadth and depth of the societal patterns and traditions affected.

5 268 U.S. 510 (1925).
The Supreme Court has not entirely withdrawn from the legislative domain the question whether government may continue to discriminate on the basis of sex. It has, however, very substantially narrowed the range of permissible political decisions regarding sex-based distinctions. In declaring sex an almost-but-not-quite suspect basis of classification, it has served notice that it will tolerate political decisions to discriminate on the basis of sex only rarely, in circumstances in which it determines that the reasons are sufficiently weighty. Authority to render a final decision concerning the direction and pace of the law’s response to a central problem of social change has, thus, shifted from the political process to the judicial forum.

3. The mounting cost of political campaigns poses painfully difficult questions. Democracy depends upon a broad dissemination of information and ideas. Competition among political candidates and among competing interest groups is the best method yet devised for ensuring that the public receives the knowledge that it requires. The declining influence of political parties and the increased importance of the mass media have, however, considerably added to the cost of communicating with the public. The consequence, in the view of many observers, is that the outcomes of political campaigns have become dangerously dependent upon the support of those individuals and interest groups that can most easily raise funds to promote the candidates or causes that they favor. Adherents of this view frequently cite the risk of corruption, but their deeper concern is the potential distortion of democratic processes if money permits some individuals and interest groups to exercise what these adherents regard as disproportionate influence on the formation of public policy. They conclude that government should impose limits upon the power of individuals and corporations to make expenditures in political campaigns.

There is, of course, an opposing view. Individuals and groups spend money in political campaigns because they wish to communicate with others and to gain support for their views. A restriction on the amount of money that can be spent on political communication during a campaign necessarily reduces the capacity of individuals or groups to communicate their views and, thus, diminishes the public’s access to those views. Expenditure restrictions may also inhibit the rise of third parties, thus limiting not only the public’s access to informa-

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tion and ideas, but also the range of choices available for expressing its preferences.

The choice between these arguments is in the end a choice between differing views about the desirable shape of the American political system, views that rest upon strikingly different conceptions of the meaning and requirements of democratic government. Congress addressed this exquisitely difficult problem in the Federal Election Campaign Act by enacting comprehensive restrictions on contributions to political campaigns and expenditures in relation thereto.12 In *Buckley v. Valeo,*13 the Supreme Court, although sustaining the Act's contribution limitations, invalidated a number of important provisions restricting expenditures, provisions that were, in the view of many observers, necessary to the effectiveness of the congressional scheme. Two years later, in *First National Bank of Boston v. Bellotti,*14 the Court imposed additional limits upon governmental power to reduce the influence of money in politics, invalidating a state statute that prohibited certain corporate expenditures made to influence the vote in referenda. The full reach of these decisions is not yet clear, but it is evident that they will have a significant effect on the structure of the national political system and, indeed, on the most important issue in any political system—"who governs?"

My purpose in offering these illustrations is not to raise questions about the wisdom of the policies advanced by the Court's decisions, but to demonstrate how far we have gone in removing from politics issues that, in a democracy, one would expect to be resolved through a political process. Most recent justifications for the displacement of politics, as suggested above, rest upon an explicit or implicit claim that there are conflicts that ought not to be entrusted to the political process. I propose in the remainder of this Article to consider some of the reasons that have been advanced in support of that claim. Although I am principally concerned with the justifications that have been advanced for extending the reach of constitutional law, it may be useful to begin the discussion by considering the distrust of politics in another setting. A brief examination of the phenomenon at a historical remove, in a setting that is no longer emotionally charged, may

aid us in understanding some of the contemporary justifications for narrowing the sphere of politics through constitutional law.

Accordingly, I want to examine briefly the proposals made by the Progressives at the turn of the century for reforming municipal government. In doing so, I do not intend to suggest that the Progressives' reform proposals and contemporary justifications for constricting the role of politics through constitutional law can be forced into a single mold. The historical contexts, the particular problems addressed by the Progressives and by those who would substitute constitutional adjudication for politics, and the attitudes and goals of the two groups differ too much for any such attempt to be useful. Moreover, just as there are important differences among those who look to courts for the resolution of important societal conflicts, the Progressive movement was not monolithic. An effort to establish that the Progressive reform proposals and contemporary justifications for judicial review rest upon precisely the same foundation would ignore or distort all these differences. Nevertheless, a comparison may help to expose some of the assumptions underlying current discussion of the appropriate relationship between politics and constitutional law, and to suggest some of the problems created by the tendency to resolve controversies by constitutional adjudication rather than by the political process. At least, that is my thesis.

I

The decades bracketing the beginning of the present century, the era of Populism and Progressivism, were marked, as the past two decades have been, by profound social change. Rapid industrial growth and concentration of capital, increasing urbanization, and a massive tide of immigration, composed largely of persons whose ethnic origins differed from those of earlier immigrants, produced severe dislocations in the existing order. One of the more interesting chapters in the history of the period concerns the attempts of the Progressives to reform municipal government.15

The agenda of reform was lengthy. It included proposals for establishing nonpartisan government; separating local from state and national elections; instituting a city manager form of government; adopting procedures for initiatives, referenda, and recall; strengthening the municipal executive; and electing members of the local legislative body at-large rather than from districts. Although each of the

15 The following account is drawn primarily from E. Banfield & J. Wilson, City Politics (1963), and R. Hofstadter, The Age of Reform (1955).
proposals had a somewhat distinctive rationale, all rested in some measure upon the desire to reduce, if not eliminate, the influence of politics in municipal government. Cities, it was often argued, are not truly political entities; they are, like businesses, engaged in the provision of services, and they ought therefore to be managed on the same principles as a business. The notion that cities should be managed on a "business-like" basis was in part a reaction to the extraordinary level of corruption in the politics of the period. But it also rested upon more fundamental ideas about city government. The reformers argued that the location of a school or library, the management of police and sanitation departments, and a host of other matters that are the staples of municipal government should be decided disinterestedly, i.e., impartially in the interest of the community as a whole. Politics, in their view, merely diverted municipal governments from the proper performance of their responsibilities; it was a vehicle for expressing private and special interests, not the public interest of the city "as a whole." Since the task of discovering the content of the public interest was regarded as more technical than political,

[what was necessary was to put affairs entirely in the hands of the few who were "best qualified," persons whose training, experience, natural ability, and devotion to public service equipped them best to manage the public business. The best qualified men would decide "policy" and leave its execution ("administration") to professionals ("experts") who would work under the direction of an executive (mayor or manager) in whom authority over administration would be highly centralized. Interference in the management of public affairs, especially attempts to assert private or other partial interests against the public interest, would not be tolerated.]

We are apt to think of the reform proposals on the Progressives' agenda more as attempts to restructure politics than to eliminate its influence, and in a sense they were. But the political order that the reformers sought to establish was one that, in retrospect, seems remarkably bloodless. It appears to have been assumed that persons of good will and sound judgment would arrive at the same understanding regarding the public interest. Richard Hofstadter illustrates the prevailing attitude by quoting Josiah Strong's statement that "[i]f public opinion is educated concerning a given reform—political, social, industrial, or moral—and if the popular conscience is sufficiently awake to enforce an enlightened public opinion, the reform is accom-

10 E. Banfield & J. Wilson, supra note 15, at 139-40.
The reformers’ conception of the tasks confronting municipal government thus left little room for the clash of sharply diverging interests and irreconcilable values. Issues that might arise in the course of performing those tasks were to be decided in accordance with “the public interest,” an interest that was determinable, if not in some ultimate philosophical sense, at least in the sense that it corresponded to a broad societal consensus about the goals of the community. It should occasion no surprise that, holding this conception of the municipal political order, the reformers tended to stress goals such as honesty, efficiency, and municipal growth and prosperity.

From the perspective of our own time, the assumptions of the Progressive reformers are likely to seem either naive or disingenuous. Few contemporary observers would deny that the issues faced by cities are political. The contemporary appreciation of the political character of the issues rests not only upon the understanding that they are often controversial—technical issues, after all, may also produce spirited disagreement—but upon an awareness that issues often will have

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17 R. Hofstadter, supra note 15, at 200.
18 Id. at 258-59. “[T]he Man of Good Will,” Hofstadter observed, was “the same innocent, bewildered, bespectacled, and mustached figure we see in the cartoons today labeled John Q. Public—a white collar or small business voter-taxpayer with perhaps a modest home in the suburbs.” Id. at 258.
19 Like any political movement, the Progressives were not monolithic, and they did not have a fully consistent program. There was, for example, substantial support among the Progressives for proportional representation, a proposal that rested on premises quite different from those underlying most of the Progressives’ reform proposals. See generally id. at 258-67.
become controversial because they bring important interests and values into conflict. The Progressive reformers' assumption that the questions confronting local governments were more technical than political, and that the disinterested analysis of experts and of the Man of Good Will would therefore yield answers to them, depended on the further assumption that there were right answers to those questions, an assumption that was plausible only because the Progressives ignored many of the interests and values that might have been affected by a municipal decision. Thus, issues that the reformers regarded as technical may, on a broader view, have involved fundamental political questions about the legitimate ends of government and the appropriate ordering of those ends in the event of a conflict among them. The question of where to locate a new school, for example, appears to present merely a technical problem if the only end in view is to minimize travel time for students or to reduce the number of major thoroughfares that they will be required to cross. But these objectives may, in some instances, collide with the goal of racial integration. Disinterested analysis will not yield an answer to the problem of determining which of these goals should be pursued and at what cost. A choice is required, and the experience of daily life teaches that different citizens, moved by their private interests or by differing conceptions of the public interest or by both, will choose differently.

The reformers' concentration on the public interest and their failure to take account of private or special interests also led them to ignore one of the most important tasks of government at every level: the management of conflict. Their assumption that the public interest could be defined, or perhaps that it merely awaited discovery, led them to suppose that all governmental decisions should be made "on the merits," that is, in accordance with a limited (though not necessarily well-defined) set of criteria, such as "efficiency," and without reference to the "special interests of particular individuals or groups." Yet it is, as Banfield and Wilson maintain, "entirely possible that in some circumstances it is more important to manage conflict than to make the most 'efficient' use of resources." Conciliation and compromise are, in a free society, essential to the continuing operation of government and at times to its stability. The need runs deeper than that which can be satisfied by a mere awareness of the importance of searching out compromise solutions to issues viewed in isolation. In the ideal world of the Progressive reformers, each issue would be judged on its own merits; logrolling would be regarded as one of the

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20 E. Banfield & J. Wilson, supra note 15, at 19.
vices of politics. But in the real world, in which all values cannot be achieved simultaneously and individuals or groups differ both about objectives and their importance, logrolling offers opportunities for achieving results that, if not optimal from any one perspective, are at least satisfactory to the contending interests. The trading of votes is, of course, anathema to those who suppose that every issue of governmental policy should be decided in accordance with an ascertainable public interest, an interest that exists apart from the special interests of those whose lives will be affected by the policy. The practice may, however, be viewed more sympathetically if private and public interests are not so sharply differentiated: if, that is, we are prepared to recognize that conceptions of the public interest shape and are shaped by private interests and that the satisfaction of human desires has some relationship to any plausible meaning that can be assigned to “the public interest.”

Although I suggested earlier that there is a temptation to view the assumptions underlying the Progressives’ reform proposals as naive or disingenuous, I do not mean to charge them with insincerity. It is worth noting, however, that their proposals for reforming municipal government rested upon a conception of the public interest that was not entirely divorced from their private interests. The Progressives arose out of and drew most of their support from a class that was, or felt itself to be, under siege. In his Autobiography, William Allen White described the Bull Moose Movement as “a movement of little businessmen, professional men, well-to-do farmers, skilled artisans from the upper brackets of organized labor . . ., the successful middle-class country-town citizens, the farmer whose barn was painted, the well-paid railroad engineer, and the country editor.” The status and the political influence that traditionally had been enjoyed by such individuals were threatened by the changes in economic and social order to which I adverted above. The threat came from two directions: on the one hand, from the increasing importance of the men who controlled major industrial enterprises and concentrations of capital, and on the other from the swelling urban population, including particularly the large number of immigrants from Eastern and Southern Europe. Disparate as these groups may have been, in one respect they posed a common threat to the middle class. For different reasons and in different ways, both supported the “machines” and the “bosses” that had come to dominate politics in many cities.

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21 Quoted in R. Hofstadter, supra note 15, at 132.
All the reforms of municipal government proposed by the Progressives were shaped by their desire to rid cities of machine politics. Machine politics was characterized by corruption, inefficiency, and the concentration of political power. The reforms were aimed at producing honesty, efficiency, and broad citizen participation in politics. It does not depreciate the seriousness of the evils they opposed or the value of their goals to recognize that, in seeking to destroy the machines, the Progressives were attempting to diminish the influence of those who had supplanted them in governing the nation's cities. They sought to restore what they perceived to be the politics of an earlier time. It is not beside the point that it was a politics in which their influence, or the influence of those like them, had flourished.

The Progressives' desire to establish a style of politics that would restore their diminished influence was related to more tangible interests. They saw themselves as the inheritors of an American tradition that, as Hofstadter wrote,

had been one of unusually widespread participation of the citizen in the management of affairs, both political and economic. Now the growth of the large corporation, the labor union, and the big impenetrable political machine was clotting society into large aggregates and presenting to the unorganized citizen the prospect that all these aggregates and interests would be able to act in concert and shut out those men for whom organization was difficult or impossible.22

The divergence of interests of the Progressives and the newly emerging groups is illustrated by the different demands made upon urban political systems by the newest wave of immigrants and by the middle class. The former, who in many cities outnumbered the native-born population, were the products of a political culture very different from that of the typical Progressive, and their needs differed from those of the middle class just as significantly. The immigrants tended to view government in personal terms, in relation to their needs and their relationships with political leaders, rather than in terms of such abstract concepts as efficiency and the public interest. They sought from government, or what to them was the same thing, from political leaders, such tangibles as jobs, a street vendor's license, protection from the law, and a measure of security from the economic uncertainties of their lives. In return, they offered their votes. The alliance between the immigrants and the machines thus rested upon a foundation quite different from that which the Progressives believed essential

22 Id. at 213-14.
to good government. It also threatened the more immediate interests of the Progressives, at the very least by increasing the cost of municipal services and perhaps also by altering the package of services provided by municipal government.

I do not mean to suggest that the Progressives' private interests dictated their conception of the public interest. It may be that their ideas regarding the obligations of citizenship and the nature of good government influenced the demands that they made upon government. My point, rather, is that there was an intimate relationship among the Progressives' private interests, their conception of the public interest, and the reforms of municipal government that they proposed. Their reform program was cast solely as a reform of the political process. The goals articulated in its support were, by and large, presented as neutral or technical process goals. There is no reason to doubt their sincerity in advancing those goals, but it should also be recognized that the reform program promoted private interests and a particular conception of the public interest. Of necessity, it did so at the expense of other private interests and other conceptions of the public interest.

II

The language of discourse changes markedly when we move from proposals for the reform of city politics at the turn of the century to contemporary discussion of constitutional law. We speak less of "interests," either public or private, and more of "rights" and "values." Those who seek to restrict the domain of politics rest their claims upon "law," not upon assertions regarding the characteristics of "good government." Nevertheless, there are important similarities between the reform proposals and the justifications that recently have been advanced for judicial review.

In broad terms, both address the same problem, the means by which governmental policy should be determined in a community whose members have significantly differing interests and values. At times, moreover, the language employed in justifying judicial review is strongly reminiscent of that employed by the Progressive reformers. Thus, Abram Chayes, in arguing for an expansion of the judicial role, observes that judges are insulated from "narrow political pressures"; they are characterized by "disinterestedness" and are "governed by a professional ideal of reflective and dispassionate analysis."23 Jesse

Choper similarly maintains that the judicial process offers the prospect of more “dispassionate decisionmaking” and greater “objectivity” than does the legislative process because of the judges’ “aloofness from the political system and . . . lack of dependence for maintenance in office on the popularity of a particular ruling” and “the more deliberative, contemplative quality of the judicial process.”

The unarticulated and perhaps unrecognized premise of these arguments is that the questions judges are called upon to decide in giving meaning to the Constitution are technical ones, technical in the sense that answers to them can be ascertained by employing the correct techniques. In the absence of such a premise, it is difficult to understand how the qualities with which judges are credited can be thought to be sufficient to justify the role that they play in deciding those questions. The notion that constitutional questions are technical, and that those who have the requisite training and expertise in the law are especially qualified to answer them, is familiar and has played an important part in our constitutional history. It is accepted, even today, by some students of constitutional law.

For at least a half century, however, it has been common ground among most students of constitutional law that the choice and ordering of values is an element of constitutional decision. Differences persist about the range of discretion and the nature of the limits by which choice is confined, but its existence is commonly if not universally accepted.

Once the necessity of choice is recognized, however, it is apparent that the qualities Chayes and Choper attribute to judges are insufficient to justify the power they would vest in courts. Questions like those that I described earlier—e.g., questions concerning the proper direction and pace of the law’s response to changing ideas regarding the role of women or the appropriate governmental policy toward private (including church-affiliated) schools—will not yield to disinterested analysis and reflectiveness. Those qualities are, of course, indispensable in identifying and clarifying alternatives and their consequences, but they cannot alone enable judges to select from among the alternatives that have been identified. Nor will our national experience permit us to indulge an assumption, akin to that made by the Progressive reformers about the issues confronted by municipal government, that persons of good will, aided by technical

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25 E.g., R. Berger, Government By Judiciary (1977); R. Dworkin, Taking Rights Seriously (1977). As these references demonstrate, the claim that there are right answers to constitutional questions is made by persons who hold widely diverging views about the source of those answers and the techniques by which they may be ascertained.
experts, will all respond similarly to those issues for which answers are sought in the Constitution. How, then, is a court to choose from among the welter of interests that is likely to be at stake whenever an attempt is made to substitute constitutional adjudication for political decision? Whose values, given the diversity of our population, are to guide a court in making a selection from among the competing interests?

The principal objection to the constitutionalization of our law is not that courts lack the means to answer these questions. It is, rather, that reliance upon constitutional adjudication to determine governmental policy weakens law's responsiveness to those who are governed by it. The relative insulation of courts from politics is not, in other words, a reason for preferring judicial to legislative decisions, but the weightiest argument for the opposite conclusion. Political responsibility is, as I have urged elsewhere, the ultimate source of law's legitimacy in a democratic society, an essential means of realizing

the democratic ideal that governmental policies ought to respond to the wishes of the citizenry. . . . First, it provides a means by which government is made more sensitive to the impact of a policy upon the various segments of the society and thereby contributes to the calculation of gains and losses resulting from that policy. Second, since an appraisal of the consequences of policy involves not merely a measurement of gains and losses, but a judgment of what is to count as a gain or loss and how these shall be balanced, political responsibility helps ensure that governmental policy will not depart too far from the values of the citizenry. Finally, the political responsibility of the legislature creates an incentive for compromise and accommodation that facilitates development of policies that maximize the satisfaction of constituents' desires.2

Reducing the influence of politics upon governmental policy is, in short, a means of reducing the influence on policy of those whose lives are affected by it.

Contemporary apologists for judicial review do not in general dispute the force of these considerations. They maintain, instead, that there are issues of governmental policy that the political process cannot be trusted to decide. Just because they are politically responsive, it is often argued, democratic governments cannot be trusted to respect the rights of unpopular minorities and individuals. Courts are the proper agency to determine those rights, the argument continues,
precisely because they are not politically responsive. As customarily stated, however, this argument fails to distinguish between two quite different problems for which government must provide responses: on the one hand, the protection of individual and minority rights and, on the other, the definition of the rights that individuals and minorities should have. There is good reason to suppose that courts are indeed best able to perform the former role, but contemporary proponents of judicial review seem primarily concerned with defending courts in the latter role. It is, however, far more difficult to understand what mandate courts can claim for exercising power to determine what the rights of individuals and minorities should be, especially since decisions regarding those rights will have an important impact upon the interests of others.

In describing the Progressive proposals for reform of municipal government, I suggested that the proposals—though cast only as reforms of process—had important substantive objectives. The attempt to reduce the influence of politics in municipal government was in significant part an attempt to advance certain private interests and certain conceptions of the public interest and to do so, inevitably, at the expense of other private interests and other conceptions of the public interest. A similar objective seems generally to underlie the attempt to substitute constitutional adjudication for legislative decision. The minorities and interests that are held to require judicial “protection” are almost invariably those that, it is said, will not receive through the political process what their sympathizers regard as their due. During the first third of this century, thus, the inadequacies of the political process were felt most keenly by those who feared that legislative majorities could not be trusted to give due recognition to economic freedoms and the “rights” of property. These were perceived as the interests of minorities, and judicial intervention was thought to be necessary, in part, because the affected minorities would not be protected adequately by the political process. More recently, the political process has been thought to be inadequate to ensure appropriate recognition of very different interests and minorities. During both periods, it seems fair to conclude that, as with the Progressive reform proposals, views about the desirable process for determining policy are bound up with private interests and conceptions of the public interest.

The extent to which claims about the inadequacies of the political process are dependent upon judgments about the content of gov-

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ernmental policy is strikingly demonstrated by Professor John Hart Ely's recent elaboration of the argument that courts have a special responsibility to protect (some) minorities. Ely's argument is of special interest because of his insistence that courts may not properly employ the power of judicial review to impose limits upon the political process. Unless limits are set by the Constitution, he maintains, courts lack authority to concern themselves with the "substantive merits of the political choice." Nevertheless, he argues, democratic legislatures cannot be trusted to represent (some) minorities fairly and courts should, therefore, police legislative decisions to compensate for that deficiency of the political process. In the remainder of this Article, I hope to show that the distrust of politics that underlies Ely's argument has little to do with the asserted deficiencies of the political process. It rests, rather, on unarticulated views about the proper direction of public policy. Like the Progressives, he seeks to structure the process by which governmental policy is made on the assumption that there are right answers to the question of what that policy ought to be.

Ely's argument for the judicial protection of minorities begins with the premise that the equal protection clause entitles all persons to "equal concern and respect," to have their interests equally taken into account when government acts and to participate on equal terms in the political process. Legislation that expresses no purpose other than that of harming a minority (or that intentionally or inadvertently ignores its interests) violates that requirement. Determining whether the legislature had the illicit intent requires an examination of legislative motive, and though Ely sanctions such an inquiry, he recognizes that it alone will provide little protection for minorities. He argues, however, that the "suspect classification" doctrine serves as a "handmaiden" of motivation inquiry, extending the protection that courts can offer minorities. In a brilliant reconstruction of the doctrine fashioned by the Supreme Court, he maintains that the familiar elements of "strict scrutiny"—the requirements of "close fit" and of "a compelling state interest"—are techniques for determining whether a classification is designed to serve the illicit purpose of harming a minority. If the (legitimate) purpose that is advanced to justify the legislation can be served as well by another classification, he contends, a court should conclude that the legislation was illicitly motivated.

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29 Id. at 181.
30 Id. at 77.
31 Id. at 145.
The requirement of "fit" thus serves as a way of "flushing out" unconstitutionally motivated statutes. The same purpose is served, on Ely's analysis, by the second element of "special scrutiny." If the legislative goal offered to support the statute is not sufficiently important, a conclusion is justified that the legislation was prompted by the impermissible motive of harming the minority.\footnote{See id. at 145-70.}

The object of the entire inquiry, as Ely puts it, is "to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending,"\footnote{Id. at 151.} those who cannot obtain the protections that pluralist politics normally accords minorities. We need now examine the ways in which he goes about identifying those groups, for it is in the discussion of that question that he reveals the extent to which his theory depends upon value choices regarding the appropriate direction of public policy.

The paradigm of the "discrete and insular minority" is, of course, blacks in the years preceding the decade between Brown \textit{v. Board of Education}\footnote{347 U.S. 483 (1954).} and the Civil Rights Act of 1964. It is important to understand why that is so. Throughout the South, where most blacks lived, they were with rare exception denied the opportunity to vote or otherwise to participate in political life. Moreover, and of at least equal importance, in both the South and the North they were the victims of social practices (and in the South a legal system) that systematically denied them opportunities to associate with members of the white majority. Employment, education, housing, recreation—in short, all areas of life—were racially segregated, or near enough to being so that we need not worry overly much about the exceptions. Blacks were, to make the point directly, deprived of all those opportunities that democratic pluralism normally offers groups to protect their interests. They were not permitted to participate in politics directly nor to maintain relationships that would permit them to establish common interests with others. Within the past two decades, however, the position of blacks in the United States has dramatically changed. Though a deplorable degree of segregation remains, blacks are now effectively protected in the exercise of the franchise and are substantially, if not proportionately, represented throughout American life. Relationships have been established that permit them to draw upon the support of others, both institutions and individuals, in defense of their interests. The question, then, is whether in 1981 blacks can claim the protection of Ely's "suspect classification" anal-
ysis; are they, in other words, one of "those groups in society to whose needs and wishes elected officials have no apparent interest in attending"?

Ely acknowledges that changes have occurred over the past twenty years, but concludes nonetheless that blacks continue to be entitled to special judicial protection. His reasons for that conclusion are not pellucidly stated, but they appear to rest on the belief that the interests of blacks are not yet sufficiently well recognized by government. Thus, he writes that the pluralist model does work sometimes, "[b]ut sometimes it doesn't, as the single example of how our society has treated its black minority (even after that minority had gained every official attribute of access to the process) is more than sufficient to prove." 35 The judgment that is being made is, plainly, a judgment about the content of public policy, i.e., about whether blacks receive from government all the benefits that they should receive, not about the process by which policy is determined. To justify special judicial solicitude for blacks by appraising the outcomes of the political process is, however, to assume a standard for such an appraisal.

To be sure, Ely does not purport to base his analysis upon an assessment of the outcome of the political process; indeed, he repeatedly claims to eschew such judgments on the ground that they are appropriate for the legislature. Rather, he argues that the touchstone for determining whether a group is entitled to special judicial solicitude is whether it is the object of widespread hostility and prejudice. Legislation that marks out such groups for distinctive treatment, he argues, is especially likely to ignore the right of their members to be treated with "equal concern and respect." Ely does not directly address the question of how a court is to determine whether one or another group meets the specifications that would entitle it to special judicial protection, but the issue is, seemingly, to be the subject of judicial notice. It is far from evident, however, how a court is to make the necessary determinations and how likely it is that those determinations will be uninfluenced by judgments about whether a group has fared well or badly in the legislative process. Professor Ely believes, for example, that "the poor" meet his specifications for special judicial protection. One wonders whether the same conclusion would be reached by a judge who thinks that the array of benefits that the law provides for the poor is exceedingly generous.

In any event, it is plain that an evaluation of legislative policy is necessary to the further judgments that courts would be required to

35 J. Ely, supra note 28, at 135.
make in determining whether legislation employing a "suspect classification" reflects adequate concern for the interests of the minority it disadvantages. The point is most obvious when a court is required to determine whether the governmental interest is sufficient to overcome the suspicion that the classification was prompted by a desire to harm the minority. But it is equally true when the court is required to determine whether the classification fits the objective advanced in support of the legislation. Since the classification can be abandoned only at a cost, the court must evaluate those costs in relation to the harm imposed upon the minority by use of the classification. Both prongs of Ely's "strict scrutiny" analysis require, therefore, that courts reassess the balance struck by the legislature. Although Ely may wish to rationalize the inquiry as a search for illicit motive, the determinations that judges would be required to make are indistinguishable from those that would be required if they were to undertake directly to evaluate the merits of the legislative choice. The conclusion that legislation manifests an illicit motive, to put the point somewhat differently, will almost invariably turn upon a judgment regarding the costs that the minority should be expected to bear in furtherance of the legislature's conception of the public interest.

The dependence of Ely's argument upon judgments about the outcomes of the political process can be demonstrated by considering the claim to special protection of a group that Ely interestingly fails to mention, the wealthy. The omission is especially striking because the protection of property and of propertied classes was surely more central to the objectives of the Framers than was the protection of those groups (other than blacks) whose claims to special protection Ely does discuss—aliens, women, homosexuals, and the poor. In discussing the claims of the latter, Ely rests heavily upon the argument that legislators are apt to give insufficient weight to the costs of discrimination against groups that are victims of widespread prejudice and that are a minority in the legislative body itself. Now the wealthy—or if you prefer, the very wealthy—are surely a minority in our legislatures and are the victims of widespread prejudice that denies them the empathetic understanding of legislators. How many legislators appreciate the costs imposed upon the wealthy by progressive income and estate taxation? Significantly, our statute books contain far more legislation that discriminates on the basis of wealth and income than legislation that employs racial classifications. Why, then, are blacks but not the wealthy entitled to the benefit of special judicial protection?

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36 See generally Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123 (1972).
Since Professor Ely does not address the question, I do not know what his answer would be. I have, however, often put the question to students, who invariably respond that the wealthy do not require judicial protection. The political system is not stacked against them, it takes account of their interests, as demonstrated by the "fact" that they, unlike blacks, derive a great deal of benefit from the system. The conclusion that the political process adequately protects the wealthy is, however, not a judgment on the internal fairness of the process, but a reflection of attitudes toward the outcomes that it yields. Like the contrary judgment about blacks, it presupposes some standard by which a determination can be made whether one or another group adequately benefits from the political system.

Counsel for the legislature might advance a quite different justification for discrimination against the wealthy. He might concede that the wealthy are entitled to the protection of the "suspect classification" doctrine, but contend that discrimination against them is nonetheless justified because of the importance of the legislature's purpose (say, reducing income inequality) and because the classification perfectly fits that purpose. Since this is precisely the argument that Ely makes in regard to legislation that discriminates against burglars, it will be more illuminating to consider that illustration of his theory. Laws discriminating against burglars, either by prohibiting burglary or by prohibiting burglars from obtaining medical licenses, are valid on Ely's analysis, even though burglars are the object of widespread hostility, because

[t]here is so patently a substantial goal here, that of protecting our homes by penalizing those who break and enter them, and the fit between that goal and the classification is so close, that whatever suspicion such a classification might under other circumstances engender is allayed so immediately it doesn't even have time to register.38

For reasons that are unstated, however, Ely reaches a different conclusion about laws that discriminate against homosexuals. He is at pains to establish that homosexuals are a "suspect class"39 and, although acknowledging that the state may legislate against homosexual activity, he intimates that laws denying homosexuals employment opportunities should ordinarily be held invalid.40 Precisely why such

37 And, presumably, not a majority of the legislature.
38 J. Ely, supra note 28, at 154.
39 Id. at 162-64.
40 Id. at 255-56 n.92.
laws should not be sustained on the same basis as those denying employment opportunities to burglars, i.e., a desire to deter activity that the legislature considers immoral, is never made clear. We are left to speculate that Ely believes homosexual activity is not the moral equivalent of burglary and that the law should not, therefore, treat homosexuals in the same way that it treats burglars.

The evaluation of public policy thus plays a central role in Ely's analysis. His conclusions about which of the innumerable minorities that constitute our polity are entitled to special judicial protection and the level of protection they should receive depend upon judgments about how those groups should fare at the hands of government. Nor is it surprising that that should be so. Democratic theory does not provide an equivalent of the economist's model of perfect competition; except in the most egregious cases, we have no means of ascertaining by an examination of the inner workings of the political system whether all or any of the interests in society are adequately represented. In the absence of a model of perfect democracy, it is difficult to understand how, without appraising results, judgments could be made about whether one or another group has the "right amount" of political influence, or at least sufficient influence to obviate the need for special judicial solicitude for its interests.

To be sure, our history does provide an example of a minority, blacks, that for nearly a century was for all practical purposes excluded from politics. The exclusion was effected not merely by a denial of formal participation, but by a social and legal order that may well have been designed, and in any event served, to prevent blacks from making common cause with other citizens. Whether or not judicial intervention is warranted in so egregious a situation, I do not see how it can be maintained that blacks or any other group confront a similar situation today. Even aliens, who are excluded from formal participation in the political process, have varied opportunities to influence the political process and to enlist the support of others who identify with them or whose interests are intertwined with theirs. The identification of one or another impediment to a group's influence, in other words, tells us very little about the ability of that group to influence the political system. Corporations also do not vote, but those who argue that aliens should be accorded the special protec-

41 It is possible that Ely means to distinguish between engaging in homosexual activity and "being a homosexual." But "being a homosexual" is not, in any legal setting of which I am aware, a condition like being a woman or a black. I know of no situation in which individuals have been subjected to disabilities for "being a homosexual," without proof of homosexual activity.
tion of a “suspect class” do not frequently complain that corporations should also receive that protection because they lack political influence. Any attempt to appraise the inner workings of the political process must, as the illustration of the corporation suggests, examine the entire process to ascertain the extent of a group’s influence. But once that inquiry is undertaken, what measure have we, other than an evaluation of outcomes, for comparing the influence of various groups and judging whether some have too little? The judgment that would be required of courts in performing the function Ely assigns to them would thus impose a burden that might cause even Hercules to buckle, for nothing less would suffice than a determination of whether each group claiming special judicial protection is, across the entire range of issues subject to governmental policy, being justly treated by government. How else is a court to know whether “the group is one to whose interests the legislature has any interest in attending”? No doubt, Professor Ely does not intend to impose any such burden upon the courts, but merely to require that courts make a judgment about whether minorities have been fairly treated in each instance in which they have been singled out for distinctive treatment. But even if we ignore the problem of deciding which minorities are to be the beneficiaries of such judicial scrutiny, there is the further question of determining whether, in the particular instance, the minority has been treated fairly or, in Ely’s terms, with “equal concern and respect.” A judgment about that question inevitably involves, indeed cannot easily be distinguished from, a judgment about the proper choice and ordering of values. Thus, even if we accept Ely’s argument that alienage should be held to be a suspect classification, the judgment whether any particular discrimination against aliens reflects inadequate regard for their right to “equal concern and respect” cannot be separated from the judgment whether the reasons advanced to justify the discrimination are sufficiently weighty. But the necessity for the latter judgment merely raises once again the question how judges are to justify their decisions. Although Ely elsewhere purports to deny judges authority to employ the equal protection clause or another of the Constitution’s open-ended provisions as a vehicle for reviewing the substantive merits of a political choice, the role he assigns judges in protecting minorities forces him to confer precisely that power. At virtually every step in the argument, his claims about the inadequacy of process resolve into an appraisal of substantive policies. Ely does not assert, indeed he denies, that judges

42 J. Ely, supra note 28, at 43-72, 181.
have access to a controlling norm by which they may justify such appraisals, yet his arguments for judicial protection of minorities tacitly assume that such norms exist and that there are right answers to the question how minorities should be treated.

CONCLUSION

The distrust of politics, in sum, often reflects merely a disagreement with the results it yields, and the attempt to reduce its influence on governmental policy nothing more than an effort to substitute a process of decision that will advance interests and values that might not prevail in the political process. It is, however, no small matter to narrow the domain of politics. In a democratic society, politics is the means by which governmental policy is made responsive to the interests and desires of those whose lives it governs. Of course, whether decisions are made politically or by some other means, setting policy necessitates that the interests and values of some individuals be sacrificed to those of others. Choice is inescapable. But when politically made, the decision rests upon the foundation of democratic theory. We have as yet no theory that explains how judges may justify preferring the interests and values of some individuals to those of others.