Voters as Fiduciaries

Edward B. Foley
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INTRODUCTION

This essay employs Rawlsian political philosophy to argue that voters, like jurors and soldiers, should be understood as holding a public office. As such, voters owe a fiduciary duty to act on behalf of all inhabitants of the polity, rather than to advance their own self-interests. This duty extends not only to the polity's current inhabitants, but also to all anticipated future generations of inhabitants.

Understanding the role of voters as fiduciaries has implications for Evenwel v. Abbott, the case recently granted plenary review by the U.S. Supreme Court to consider whether states, when drawing legislative districts, must endeavor to equalize the number of voters or residents in those districts. Once one recognizes that voters represent, not themselves, but the totality of residents in their community, then it becomes apparent that legislative districts should be apportioned based on total population, rather than just the population of the electorate.

The argument proceeds in stages. It is first presented intuitively, using in particular the topic of environmental protection to explain its "common sense" quality. Then, in the bulk of the essay, the argument is presented more formally, using the philosophical method of Rawls's famous "original

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position” and its “veil of ignorance” to derive the voter’s role in the governance of society. This role, the Rawlsian analysis shows, is not to enable voters to benefit themselves by casting ballots, but to enable voters to elect legislatures that will better serve the public interest than if voters did not play this role.

All the while, this essay endeavors to explain that understanding the role of the voter in this Rawlsian way is not antithetical to a vigorous enforcement of voting rights, and thus we shall start with laying the foundation for this particular point.

I. VOTING RIGHTS—AND RESPONSIBILITIES

On the fiftieth anniversary of the Voting Rights Act, our nation is appropriately celebrating the transformative expansion of voting rights that the Act wrought. In particular, we justly celebrate the Act’s commitment to eradicating racial discrimination in voting rights. For a century, the Fifteenth Amendment’s promise of equal voting rights regardless of race seemed an empty gesture, but the 1965 Act changed that. Let us hope that we never slide back to the point where, as a practical matter, the ability to cast a ballot turns on the color of one’s skin.

The very title of the Voting Rights Act also signified an important cultural shift in the nation’s understanding of, and expectation of, what it means to be a voter. As a citizen, one has the right to vote, like the right to free speech or the right to personal autonomy as reflected in such decisions as Griswold v. Connecticut. It is not entirely coincidental that Griswold was decided the same year as the enactment of the Voting Rights Act; both are of the same era. Indeed, the Sixties brought about a new mindset about the primacy of personal rights, including the rights to be whoever you want to be and to express yourself accordingly (whether through your clothes, your hairstyle, or other aspects of your personal lifestyle), as well as the new insistence on the protection of voting rights.

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3 381 U.S. 479 (1965).
To a considerable extent, the attitudes about personal rights and voting rights that blossomed in the Sixties merged. Voting came to be seen as a personal right, just one of the new clusters of personal rights to be pursued. It is my right to vote, and I get to assert it in the way that I deem best. From the perspective of the Sixties, voting is an exercise of self-expression, just as is wearing a jacket that vehemently protests the Vietnam War. Moreover, since voting is my right, I get to advance my personal interests (however I choose to define them) through the exercise of casting a ballot, just as I get to advance my personal interests (as I determine them) by the clothes I wear, the music I listen to, and the friendships I choose to pursue.

With voting rights understood this way, electoral democracy becomes nothing more than just the arithmetical aggregation of all these assertions of self-expression in the ballot box. I want x; you want y; to determine which of us prevails insofar as x and y conflict, let’s count up the number of those in favor of x, and then count the number in favor of y, and see which is larger. Majority rules.

This simplistic vision of democracy is powerful. Whole fields of political science are premised on the hypothesis that voters do simply vote in their self-interest, as they see it, when they cast their ballots. The haves tend to vote for candidates that will...


Public choice theory examines the procedural rules by which groups make decisions. One basic question is whether to let individuals assert preferences through the mechanism of free market choices, or instead whether the particular matter requires a collective choice binding on all. If the latter, then problems of agenda-setting emerge, as it has been mathematically demonstrated that the outcome chosen may depend on the order in which multiple alternatives are considered. Nonetheless, it is generally believed that some form of majority rule is required, because the only alternative is minority rule, which is mathematically less preferable if each voter’s preferences are supposed to count equally. See generally ROBERT DAHL, DEMOCRACY AND ITS CRITICS (1989). The broader public choice literature is vast. See generally DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

See generally, e.g., WILLIAM H. FLANIGAN & NANCY H. ZINGALE, THE POLITICAL
protect what they have, while the have-nots tend to support politicians in favor of redistributing wealth.

Politics, however, is not merely about who has how much wealth, but instead encompasses other matters (such as social policies concerning marriage, divorce, child rearing, education, and the like). Consequently, the electorate will divide into a multiplicity of narrower "interest groups"; each trying to maximize the chances of achieving its objectives, in part by entering coalitions with other such interest groups. This "interest-group pluralism" model of voting thus assumes that political parties will organize around different sets of these coalitions, and voters will determine which party more closely aligns with their own overall self-interest.

This interest-group pluralism model of voting, moreover, reinforces the need to emphasize the right of each voter to participate in this process by casting his or her own ballot. If all other citizens are pursuing their own self-interests when casting a ballot, then each individual citizen needs to be able to do the same, so that his or her own self-interest does not get left out of the overall arithmetical aggregation of asserted interests. I have the same right to have my assertion of self-interest added to the overall calculus as everyone else does.

There is evidence, however, that voters attempt to vote their perceptions of the public interest, rather than attempting to use their ballots to advance their own self-interests. See JASON BRENNAN, THE ETHICS OF VOTING 202 n. 2 (2011) (collecting authorities for this point). If that were true, it would support the claim that voters are willing to see their role in government as fiduciaries. But, as Brennan himself acknowledges, this evidence is contrary to the prevailing "commonsense" perception, which is that "voters vote for their self-interest." Id. at 161.

I shall leave the evidentiary debate to the empiricists. My normative claim is that voters should vote for the common good, as best they can determine it—and so much the better if voters are actually doing so.

See generally, e.g., CHARLES R. BEITZ, POLITICAL EQUALITY (1989); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989).
A half-century after the Sixties, there is no denying that this vision of democracy is culturally prevalent. But it is not the only vision, or even the most desirable vision, of democracy. Democracy, I shall argue, is not best understood as merely the aggregation of egotistical preferences. Instead, democracy should be conceived of as citizens equally participating in the opportunity to determine what is best for society as a whole. According to this alternative vision, voters do not—or at least should not—endeavor to advance their own personal self-interest when they cast ballots. Instead, they should attempt to advance their considered judgment about what would be most conducive to the public interest, recognizing that the polity itself is an ongoing enterprise to be nourished so that it can thrive.¹²

This alternative vision of democracy emphasizes that voters are responsible to the public interest when they cast their ballots.¹³ Voting should be viewed as an act of public service, akin to jury service. Voters perform a public, not personal, function when they vote—just as they perform a public, not personal, function when they serve on a jury.¹⁴ In essence, to be a voter is to hold a public office within a democratic system of government, just as to be a juror is to hold a public office within the criminal justice system.¹⁵

The office of voter as a component of government is most easily seen in the context of direct democracy, which comes in two forms: (1) the old-fashioned town meeting and (2) the more modern plebiscitary practice of putting referendums or other forms of policy proposals directly on the ballot for the voters to embrace or reject as if they were members of the legislature. But we should also see voters as performing a government function

¹² See generally, e.g., DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1997) [hereinafter DELIBERATIVE DEMOCRACY]; AMY GUTMANN & DENNIS F. THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004). Insofar as an affluent citizen argues against redistributive taxation on the ground that such taxation will harm the poor, and not just the rich, the argument (if sincere) is not motivated by selfishness, but instead by a conception of the public interest. Whether it is a sound argument about what best serves the public interest is debatable, but it is an argument of the correct kind.

¹³ See DELIBERATIVE DEMOCRACY, supra note 12, at xiii–xvii.


¹⁵ For the argument that jurors owe fiduciary duties to the public, see Ethan J. Leib, Michael Serota & David L. Ponet, Fiduciary Principles and the Jury, 55 WM. & MARY L. REV. 1109 (2014).
when they elect the members of the legislature. Members of the legislature are public functionaries when they appoint administrators to engage in more hands-on administration of the government’s policies and programs. So too are voters public functionaries when they choose the members of the legislature to adopt the government’s policies and programs. In each instance, it is one level of public authority delegating more specific responsibilities to another, either the legislature delegating to the administrators, or the voters delegating to the legislature. In both cases, however, the authority making the delegation has the responsibility to do so in accordance with its best judgment about the public interest. Thus, in electing members of the legislature, voters have the responsibility to make their choice in accordance with their conception of the public interest, not their personal self-interest.16

Emphasizing this responsibility of voters is not inconsistent with a robust protection of voting rights. Just as all citizens have the equal right to exercise the responsibility of being a juror, so too all citizens have the equal right to exercise the responsibility of being a voter. There must be no racial discrimination in the opportunity for jury service,17 and so too there must be no racial discrimination in the opportunity to serve as a member of the electorate. But while this alternative, responsibility-oriented vision of democracy does not negate the imperative of protecting voting rights, it does change the understanding of what voting rights are for. They are not for the equal right to pursue self-interest, but rather for the equal right to serve the public interest.

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16 Michael Serota and Ethan Leib make the argument that voters in the context of direct democracy have the same fiduciary duty to act in the public interest as members of the legislature, but they stipulate that this same duty does not apply to voters when they elect the legislature’s members. See Serota & Leib, The Political Morality of Voting in Direct Democracy, 97 MINN. L. REV. 1596 (2013). They premise their argument on the assertion that, in the context of direct democracy, voters are representatives of the populace as a whole, whereas in the context of candidate elections they see each voter as representing only herself or himself. My argument is that Serota and Leib are mistaken precisely in their unduly narrow conception of voters in candidate elections. In this context as well as in direct democracy (for the Rawlsian reasons I articulate), voters should be understood as representing the populace as a whole, and not only themselves. Thus, the fiduciary duty that Serota and Leib identify as applicable to voters in the context of direct democracy should extend to candidate elections.

17 See generally Strauder v. West Virginia, 100 U.S. 303 (1879), one of the first and most important cases interpreting the Equal Protection Clause of the Fourteenth Amendment.
Even before the Sixties, African-Americans insisted upon—and secured—the equal right to serve in the military, not for the sake of personal self-interest, but for the egalitarian dignity inherent in the equal opportunity to make the ultimate sacrifice on behalf of one's country. Stripped of the excesses of egoism associated with the "me generation" that came of age in the Sixties, voting rights can be understood as a parallel to the equal right to serve in the military or to serve on a jury—essential to the equal dignity of all citizens regardless of race (or other irrelevant factors). But voting rights understood this way is not currently the dominant model. Instead, voting rights as a form of "consumer" empowerment is. Thus, if the current egotistical model of democracy is to be replaced with the responsibility-oriented alternative, what can be said in favor of the latter?

II. THE ELECTORATE, THE GOVERNMENT OF CITIZENS, AND THE ENVIRONMENT

Sometimes, the term "self-government" is used to signify democracy, as if rule by the people (popular sovereignty) were synonymous with the electorate ruling itself. But even in a democracy that attempts to realize universal adult suffrage, there is an inevitable gap between the class of citizens eligible to serve as part of the electorate (the governors) and the class of citizens to whom the laws apply (the governed). Children are the most obvious part of the gap: they must obey the laws even if they have no say in the making of them. Still, they can expect to grow up and be part of the governing group, and so maybe for them democracy is just deferred self-government.

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18 President Truman desegregated the military in 1948 with Exec. Order No. 9,981, 13 Fed. Reg. 4313 (July 26, 1948). He did so in response to the compelling moral claims advanced in the aftermath of World War Two by the civil rights community. See Patterson, Grand Expectations, supra note 4, at 150.


21 In showing the inevitable gap between citizens and voters, even in a society that aspires to universal adult suffrage, I set aside the issue of immigration and the fact that noncitizens will live in the society, some lawfully and others not. Noncitizens may eventually become citizens, depending upon the society's naturalization policies. But some citizens will never become voters.
There are, however, adult citizens who never will be part of the electorate: the severely mentally disabled. It is fortunate that numerically they are only a small subset of society. But conceptually it is important to recognize that the citizens who can vote have ethical obligations to make sure that the laws of society are fair to the relatively few adult citizens who lack the mental capacity to cast a ballot. Society's health care policies must determine what share of society's resources should be devoted to the care and well-being of citizens whose mental disabilities are so severe that they are unable to participate in the formulation of social policy. They cannot assert their self-interest in an electoral process designed merely to aggregate the assertions of self-interest of all voters. Instead, the voters of the society have a responsibility, at a minimum, to consider the interests of these non-voters along with their own self-interest when deciding which candidates to support in the casting of their ballots.

The same point applies to the growing number of citizens who in their later years suffer from acute dementia, like Alzheimer's disease, which makes it impossible for them to vote. These elderly citizens used to be able to vote, unlike the few who throughout their entire adult life have extreme cognitive impairments. Even so, we cannot and do not expect the voters who later will suffer from dementia to plan for that contingency and thus adequately protect their self-interest during the time when they can vote (before their dementia sets in, thereby depriving them of the ability to vote). Instead, we can and should expect all eligible voters to act in the best interests of all present and future citizens with dementia, as well as in the best interests of all other adults suffering from severe cognitive impairments, as part of their overall obligation as voters to act in the best interests of all members of society as a whole. Voters, in other words, represent all members of society, voters and non-voters alike, and thus have an obligation to represent the best interests of non-voters as well as voters when deciding how to cast their ballots.

The clearest way to see this obligation is to consider the policies that the current generation of voters adopts concerning the use of natural resources and the protection of the environment. Today's environmental laws affect not just a small additional number of non-voters relative to the size of the participating electorate. Instead, today's environmental laws
affect all members of future generations, none of whom have a say in the current electorate's determination regarding the use and protection of natural resources. If today's electorate decides to exploit the Grand Canyon for its mineral deposits, rather than preserve it as a place of unparalleled natural beauty, that decision will affect every future member of society, all of whom are unable to cast their own votes as part of making this democratic decision. Assuming that the number of future generations is far greater than today's electorate (an assumption that is inevitable if one hopes that society lasts indefinitely into the future), then with respect to this crucial question of environmental policy the size of the governing group is far smaller than the total size of those being governed. On this issue, the current electorate is making an irrevocable decision binding on all future citizens.

Given this unavoidable reality, the current electorate should not see itself entitled to cast its ballots based solely on its self-interest, without regard to equal consideration of the interests of future generations. If current voters approach the question “Should we exploit the available natural resource or protect it for the future?” solely from the perspective of “What policy is in my best interest?”, the current generation will excessively deplete natural resources to the detriment of future generations. On this approach, the selfishness of the present will deprive future generations of their fair share, or fair enjoyment, of the same natural resources.

22 See, Dennis F. Thompson, Representing Future Generations: Political Presentism and Democratic Trusteeship, 13 CRITICAL REV. OF INT'L & POL. PHIL. 17 (2010). Thompson's approach in this essay shares some strong affinities with my account here, in terms of the need for democracy theory to develop a conception of trusteeship to protect the interests of future generations. But Thompson's conception differs from mine in its details insofar as he believes that the present owes to the future only the protection of the democratic process itself. Rather, I maintain the present owes duties of justice to the future, even if there can be reasonable disagreement on what those duties of justice entail, thereby requiring democratic procedures to choose among those reasonable conceptions.

23 One cannot assume that future generations will view the tradeoff between environmental protection and exploitation of natural resources in the same way as the current generation does. For example, the current generation might think that the material benefits of carbon-fuel consumption is worth the cost in terms of air pollution and global warming, whereas future generations might have preferred less air pollution and global warming even at the cost of fewer material benefits. Thus, to be fair to future generations, the current generations needs to do more than think of the well-being of the future measured by current values, but also the capacity of the future to determine its own well-being according to its own values.
Instead, the current generation of voters should see themselves obligated, as voters when choosing among competing candidates, to act in the best interests of all members of society, present and future. Society is an ongoing enterprise, and each generation of citizens has an obligation to preserve and nurture it so that it flourishes indefinitely into the future. Society and all its assets—its stock of natural resources as well as all the extra value created by human manipulation of those natural resources—is something that the current generation inherits from the past and then, after taking a turn as custodian, passes down to the future.

The old term “commonwealth,” preserved in the official names of Massachusetts, Pennsylvania, and Virginia, nicely captures this perspective. The full resources of the polity are its wealth, held in common for the sake of its members, both present and future. The current generation holds the commonwealth in trust for the benefit of posterity. Thus, when making decisions concerning the best use of the assets belonging to the commonwealth, the current generation of citizens acts as trustees, owing a fiduciary obligation to all citizens present and future. Each member of the current generation, as a voter, shares in this fiduciary obligation. As a voter, each citizen is supposed to consider and exercise conscientious judgment concerning what would be in the best interests of all citizens, whether alive today or at some point in the future.

The office of voter, in other words, is the office of a trustee. Each voter is charged with the responsibility of acting on behalf

Nor can one assume that the current generation is naturally altruistic with respect to the interests of its offspring. The share of national wealth devoted to Social Security, compared to early childhood education, suggests that older generations are willing to benefit themselves at the expense of younger generations. A similar point is often made about the current generation saddling future generations with excessive national debt.


25 See generally Thompson, supra note 22.

26 My point here is to say that a person alive a century from now has equal moral worth as a person alive today. Therefore, that future person’s interests regarding the disposition of the commonwealth’s resources deserve equal consideration to the equivalent interests of the currently living person. To make this point, I do not need to know whether any particular person will be alive a century from now. I only need to assume, as I am entitled to do given the inherent human desirability of perpetuating human existence, that some such persons will be alive one hundred years hence. For this reason, I do not need to wrestle with the so-called “non-identity” problem that has vexed philosophers. See Thompson, supra note 22, at 11–12.
of society as a whole, present and future. Just as any other trustee breaches his or her fiduciary duty when using the trust's assets to promote the trustee's own personal self-interest, so too voters breach their fiduciary duties to society as a whole, present and future, if they exploit the electorate's power over the assets of commonwealth to promote their own personal self-interest.

III. THE ROLE OF THE TRUSTEE IN RAWLSIAN POLITICAL PHILOSOPHY

Thus far, the argument for viewing voters as trustees of all society, present and future, has proceeded intuitively, relying primarily on environmental policy as an intuitively obvious area in which voters must undertake this fiduciary responsibility. It is possible, however, to present the idea more formally. To do so, I shall invoke a version of John Rawls's justly famous philosophy for the pursuit of a fair society.

In his first and most celebrated book, *A Theory of Justice*, Rawls developed the idea of an original position to model the concept of a fair social contract. As initially conceived, this idea of an original position imagined that all adult citizens of a society were behind a veil of ignorance that deprived them of knowing anything about their own personal characteristics. They would not know their race, their gender, their family or socio-economic circumstances, or even their talents or other attributes. They would know only that they were each a citizen of the society. Rawls reasoned that whatever social contract the individuals behind this veil of ignorance would reach would be an inherently fair one, since each individual was on an equal footing behind the veil.

Although theoretically attractive, this conception of the original position had its obvious difficulties. Since none of us ever are, or can be, behind a veil of ignorance, it is impossible to know exactly how we would deliberate about the terms of the social contract if in that situation. Given the artificiality of the conception of persons in the original position, stripped as they

28 Id. at 102–68.
29 Michael Sandel has been a leading critic of Rawls on this point. See MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 122–32 (1982).
are of all personal identity, it is almost like imagining a group of identical computers agreeing upon the terms of a social contract. But a computer would not know what considerations are important when making the bargain unless programmed in a particular way, and thus whatever went into the program would be determinative of the outcome. Why would we need the computers at all if we knew what views about justice to program them with? In this way, the idea of the original position seemed circular or self-defeating.

It also had particular difficulty with the same problem of future generations that makes questions of environmental policy so tricky. How could members of future generations be parties to the same social contract as members of the current generation? It is one thing to imagine all members of the current generation behind a veil of ignorance. It is quite another to imagine the current generation, in ignorance, bargaining with a currently nonexistent future generation. To do so stretched the artificiality of the imaginative exercise beyond the breaking point.30

In a subsequent book, *Justice as Fairness: A Restatement*, however, Rawls began to reconceive the idea of the original position, using a different formulation.31 The individuals in the original position should be understood as “trustees” of actual persons, although these trustees do not know any particular details about the actual persons they are entrusted to represent. Here is how Rawls described it: “The parties [to the social contract in the original position], as representatives of free and equal citizens, act as trustees or guardians. Thus, in agreeing to principles of justice, they must secure the fundamental interests of those they represent.”32

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30 Rawls himself recognized this point. Accordingly, he opted for what he called the “present time entry interpretation” of the original position, meaning that the parties are all members of the present generation. But this interpretation, in turn, led to the difficulty that the present generation could favor itself over the future. See *Theory*, supra note 27, at 140. To deal with that problem, Rawls altered the psychology of the parties to the original position by making them altruistically care for the welfare of future generations, at least as far as their children and grandchildren are concerned. See *Theory*, supra note 27, at 128, 292.


32 Id. at 84.
“In short,” Rawls added, “the original position is to be understood as a device of representation.” Each party in the original position “is responsible for the fundamental interests of a free and equal citizen” and must negotiate a fair social contract on behalf of that citizen. The key point, however, remained that the parties in the original position are not permitted to “know the social position of the persons they represent.”

This new conception of the original position is easier to comprehend, especially for attorneys who are trained to be able to represent the interests of clients regardless of their clients’ particular circumstances. Thus, imagine the original position as a convention of attorneys each of whom is charged with the responsibility of negotiating the best agreement feasible on behalf of a particular client, but the attorneys are deprived of knowing any details about their clients other than the fact that they are, or will be (if they are members of a future generation), citizens of the society. The attorneys are all members of the current generation of citizens, living in the here and now. They have full knowledge of their own identities, as well as full knowledge of their society’s past. Thus, there is nothing artificial about their capacity to deliberate and bargain on behalf of their clients. They each use their training and skill, acting as a fiduciary on behalf of their particular client, to strike the most favorable deal they can. What counts as most favorable under the circumstances, however, is constrained by the attorney not knowing whether the particular client is a man or woman, black or white (or of another race), rich or poor, lazy or industrious, or indeed having any other personal characteristic.

This alternative conception of the original position also mitigates the problem of future generations. To be sure, the future remains inherently unknowable. But the idea of the future is not inconceivable, nor the idea that there will be citizens of society in the future. For this reason, the attorneys in the original position, knowing their own identities in the here and now, can be ignorant of whether their particular clients are members of the current or instead a future generation. In this

33 Id. at 18.
34 Id. Rawls also developed the idea of the parties in the original position as trustees for citizens in POLITICAL LIBERALISM. See JOHN RAWLS, POLITICAL LIBERALISM 64, 75, 106, 225, 381, 413 [hereinafter POLITICAL LIBERALISM] (1993).
way, in their bargaining today, the attorneys can represent equally the interests of individuals living in either the present or the future. There is no awkward attempt to think of the social contract as an agreement between present and future generations of citizens. Indeed, under this alternative conception of the original position, the citizens themselves are not the parties to the social contract, whether those citizens are alive now or in the future. Instead, it is the trustees, all alive here and now, who negotiate and accept the terms of the social contract on behalf of the unknown clients they are charged with the responsibility of representing as best they can in this condition of ignorance.

To be candid, Rawls does not go as far in developing this alternative “trustee” model of the original position as I do. In this respect, my approach is “Rawlsian” in spirit and derivation, but not a rigid application of Rawls’s views exclusively. In his later words, Rawls continued to conceive of the trustees in the original position as entirely “artificial” persons. This artificiality, however, I believe is both counterproductive, given our inability to be confident about how artificial persons might think (since they, by definition, do not exist), and unnecessary, given our ability based on experience to consider how attorneys trained in the professional responsibility of exercising fiduciary duties on behalf of clients would actually think if told they had a client but one whose identity remained anonymous.

Rawls also excessively limits the general knowledge of history and social circumstances that the trustees in the original position have about their society, although his later writings are somewhat unclear on this point. Initially, in a Theory of Justice, Rawls emphatically asserted that “the parties do not know the particular circumstances of their own society . . . or the level of civilization and culture it has been able to achieve.” Rawls did

35 The trustee conception is also an improvement on Rawls’s admittedly rigged (and sexist) motivational assumption, presented initially in a Theory of Justice, that the parties to the original position were present-day “heads of families” motivated by concern for the well-being of the next two generations of their families. Concern for grandchildren, but not for generations beyond them, might not be sufficient to protect environmental resources adequately for all posterity. Conversely, an attorney charged with the responsibility of representing the best interests of a citizen alive one hundred years from now, or even one thousand, would be sure to secure a social contract that did not prejudice the interests of posterity for the sake of the more immediate future.

36 See Justice as Fairness, supra note 31, at 83.

37 Theory, supra note 27, at 137.
this in the hope that the principles of justice derived from the original position would have a kind of transcendent, universalistic status, applicable to all times and places (at least for those societies with adequate resources for which social justice among all members could be conceivable). But as Rawls later developed his explicitly political conception of political philosophy, meaning that it entailed no metaphysically transcendent claims, he apparently relaxed these universalistic assumptions and aspirations.  

In *Justice as Fairness: A Restatement*, Rawls speaks of the trustees knowing "the presently accepted facts of social theory" and "the same information about the general circumstances of society." In this formulation, it is unclear how much of the particular history of their own society the trustees are entitled to know.

In both his earlier and later work, Rawls distinguished between the original position and an idealized constitutional convention: although both would be governed by a veil of ignorance, the extent of the veil would differ in the two situations. While the veil would be complete for the original position, blocking even general knowledge about one's own society, the veil would be "partially lifted" for the idealized constitutional convention, permitting knowledge of "the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on"—although the delegates to this idealized constitutional convention still have "no information about particular individuals... their place in the distribution of natural attributes, or their conception of the good."

My account of the original position, in contrast, essentially collapses this distinction between it and the idealized constitutional convention. As will become clearer later in this essay, the trustees as I conceive of them can be considered delegates to an ideal constitutional convention just as easily as they can be considered negotiators of a fair social contract. The distinction between the two alternative conceptions is not important.

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38 See *Political Liberalism*, supra note 34.
40 But cf. *Justice as Fairness*, supra note 31, at 101 (asserting that the trustees "don't have the particular knowledge" that "history tells of more aristocracies and theocracies, dictatorships and class-states, than democracies").
41 *Theory*, supra note 27, at 197.
because an ideal constitution for a society can be viewed as equivalent to a fair social contract for the same society. The trustees behind the veil of ignorance are supposed to hammer out the fundamental terms by which governance of the society is organized; these fundamental terms can be considered the social contract or the ideal constitution. Whichever way does not matter, especially for the topic of this essay: the procedural rules, including election laws, which the trustees would choose for the governance of the society. Those procedural rules would be terms included within the ideal constitution for the society, whether or not we would also consider them part of the fair social contract for the society. Thus, if one prefers, one can take my essay as applicable to Rawls’s conception of an ideal constitutional convention, rather than being applicable to his theory of the original position, although I believe that the trustee version of the veil of ignorance (as I have described it) is the best account of both.

IV. DEMOCRACY AS A PROCEDURAL DEVICE FOR THE TRUSTEES IN THE ORIGINAL POSITION

With the original position understood this way, what provisions would the trustees adopt for the social contract to govern the relations among their clients, those alive both now and in the future? Particularly with respect to issues of environmental policy, would the trustees adopt rules that permit the exploitation of natural resources and, if so, on what terms, or would the trustees set aside at least some natural treasures (like the Grand Canyon) as permanently protected from any physical impairment? To what extent would the trustees adopt a system of private property to incentivize the efficient harnessing of exploitable resources to socially optimal ends, and to what extent would the trustees adopt a system of redistributive taxation to offset wealth inequalities generated by a system of private property and a free market economy?

Consideration of these and related questions among any group of attorneys endeavoring to simulate the original position, all bargaining on behalf of clients whose identities are unknown, will lead sooner or later to the realization that the attorneys will be unable to reach a consensus on what the terms of the social contract should be. Some attorneys will advocate greater
reliance on private property; others less so. Some will argue for stricter protection of natural resources; others less so.\footnote{Even in his more recent writings, Rawls held out the hope that the trustees in the original position would agree unanimously to the terms of a fair social contract. \textit{See JUSTICE AS FAIRNESS}, \textit{supra} note 31, at 86, 102. But as Jeremy Waldron (among others) has shown, this quest for unanimity is unrealistic even under the constraints that Rawls imposes for his idea of the original position. \textit{See JEREMY WALDRON, LAW AND DISAGREEMENT} ch. 8, 9 (1999).}

These differences of opinion among the attorneys will not be attributable to the attorneys advocating their own self-interests. On the contrary, even when attempting in utmost good faith to advocate on behalf of their anonymous clients, the attorneys will diverge in their judgment about what is in the best interest of the “average” or indeterminate citizen, present or future.\footnote{Rawls recognized that individuals motivated to make political judgments based on a sense of justice, rather than self-interest, would disagree in good faith about the best policies for society to adopt. \textit{See POLITICAL LIBERALISM}, \textit{supra} note 34 at 58 (“[M]any of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion.”). This recognition by Rawls comes close to acknowledging that even the trustees in the original position inevitably would have reasonable disagreements about what provisions to include in a fair social contract. When we conceive of the trustees in the original positions as real flesh-and-blood individuals ignorant only of the identity of the individuals they represent, good-faith disagreement among the trustees is roughly equivalent to good-faith disagreement among citizens motivated to act impartially rather than based on self-interest. One potential difference that might narrow, but not eliminate, the range of good-faith disagreement among the trustees in the original position as compared to ordinary citizens deliberating in good faith is the special training the trustees might receive concerning how to act as a fiduciary on behalf of a client. If law school is supposed to enable attorneys to better represent the interests of individuals who may be different from themselves in terms of social background, economic status, and the like, then it is not inconceivable that the trustees would do a better job than ordinary citizens converging upon principles of social justice that treat everyone fairly. But if there is nothing particularly special about law school education in this regard, and instead high school civics—if taught properly—could train all citizens in the capacity to assume the role of trustees representing the interests of clients whose identity is unknown, then the range of irreducible good-faith disagreement among the trustees in the original position would be essentially the same as the range of good-faith disagreement among ordinary citizens motivated to make political judgments impartially. \textit{See POLITICAL LIBERALISM, supra} note 34, at 57 (“To some extent … the way we assess evidence and weigh moral and political values is shaped by our total experience … and our total experiences must always differ. Thus, in a modern society … citizens’ total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.’’). Here, again, Rawls is speaking of ordinary citizens, rather than the parties
optimistic about the prospects of future technology to compensate for the depletion of resources in the present and thus more willing to permit exploitation of resources at a faster rate. Likewise, some attorney-trustees will judge that their client's best interest is pursued by an economic system that permits a substantial degree of economic inequality in order to maximize the likelihood of greater overall wealth as a result, even if conditions for worst-off members of society are inferior to what they otherwise might be (recognizing the possibility that the client might end up being one of the worst-off). Other attorney-trustees, by contrast, would forego the prospects of improvements for the rest of society in order to avoid inferior circumstances for the worst-off (recognizing, nonetheless, the likelihood the client would occupy a position in society other than among the worst-off). But difference of opinion of this sort among the attorney-trustees cannot be seen as a breach of fiduciary duty on the part of any of them. Rather, it is in the honest exercise of their fiduciary duty that these attorney-trustees come to their different opinions about what the specific terms of a fair social contract would be for their clients, all of whom remain behind the veil of ignorance.

What would the attorney-trustees in the original position do once they recognized this good faith and reasonable disagreement among themselves concerning the provisions of the fair social contract for their clients? They soon would realize the need to adopt the democratic principle of majority rule to resolve all disagreements that remain among themselves after exhausting the possibility of achieving consensus through deliberation. Why majority rule? Because the attorney-trustees would conceive of themselves as equally entitled to influence the choice of the terms of the social contract. They would see themselves as equals in this way in their role as trustees for two important reasons. First, the interests of each of their clients are entitled to equal consideration in the choice of the social contract. According to the basic egalitarian premise shared by utilitarian and Kantian moral philosophies (among many others), each citizen counts for one, and only one, in the formulation of the society's governing rules. Accordingly, as
proxies for their clients' interests, the input of each trustee must be given equal weight. Second, since each attorney-trustee exercises independent fiduciary duty on behalf of each of his or her client, each attorney-trustee must have an autonomous and equal vote when it comes to the necessity of all the attorney-trustees voting on what provisions to adopt in the social contract.

To be sure, as part of the deliberative process, some attorney-trustees may come to be persuaded by the superior reasoning and eloquence of other attorney-trustees. These attorney-trustees, being flesh-and-blood humans living in the real world and aware of the differences in aptitude among the attorneys themselves, may come to defer to what they perceive as the superior wisdom and analysis of some of their colleagues. Even so, each attorney-trustee still has an equal vote. In deciding how to vote on the terms of the social contract, each can factor in the extent to which he or she has been persuaded, or wishes to defer to, the reasoning of other attorney-trustees as part of one's own fiduciary responsibility to exercise one's best judgment on behalf of one's client. For instance, the best I might be able to do for my client is to accept the persuasive argument of a truly brilliant attorney-trustee who happens to be among us in the original position. But in the end, each attorney-trustee must make an independent judgment on what is in the client's best interest, and that judgment is reflected in the equal vote that each attorney-trustee has when it comes time to break the impasse caused by an inability to achieve deliberative consensus.

In aggregating all the separate votes of the attorney-trustees, majority rule is the single fairest way to give equal power to each of the votes. If some sort of supermajority rule is required to break a deadlock among the attorney-trustees—say a two-thirds requirement—the result will only be to give a minority of the attorney-trustees blocking power. That means more power for fewer trustees, or an unequal distribution of power among the trustees themselves. Once committed to the necessity of equality among trustees, in order to mirror the equal moral worth of all the citizens they represent, the trustees necessarily will gravitate to majority rule as the unique best method to resolve any disagreements among themselves.

Thus, for themselves in the original position, the trustees will create a regime of one-trustee-one-vote. They will do so not
because they are entitled to advance their own self-interest as trustees. On the contrary, as trustees they must always advance the interests of their clients as best as they determine these interests in the exercise of their fiduciary duties. Thus, in this context the democratic principle of equal voting rights and majority rule exist not to aggregate the multiple expressions of self-interest, but rather the multiple exercises of fiduciary duties.

V. DEMOCRACY AS THE FORM OF GOVERNMENT THE TRUSTEES WOULD ADOPT FOR SOCIETY

To say that the trustees would adopt democratic procedures for themselves, to resolve disagreements among themselves on what provisions the social contract should contain, is not the same as saying that the trustees would adopt democracy as the form of government for the society itself, by which their clients will be governed. To be sure, democracy as their own procedure may incline, or orient, the trustees towards some form of democracy as the procedural device for the operation of the actual government of society. Insofar as they anticipate creating a legislature for the enactment of society's laws (as we shall elaborate below), they can envision giving each member of the legislature one vote, just as each of the trustees themselves has one vote in their own deliberations. But adopting a rule of one-legislator-one-vote for parliamentary deliberations does not necessarily entail adopting anything like one-person-one-vote for determining participation in electing the legislators. The argument that virtually all adult citizens should have equal voting rights in legislative elections will need to be more complicated, involving an understanding of how trustees transition from the original position in which they set the terms of the social contract to the actual operation of the government of society pursuant to the terms of that social contract.

As we begin to explore that transition, we should first observe that when the trustees create the legislature as a core part of the government of society, they do so knowing that it necessarily will exercise government power as one among several institutions of government. There will also be courts exercising judicial power and executive officials implementing legislation. The exact relationship of these different institutions of government will be something for the trustees to consider. For
example, is it better to create three co-equal branches of government, or instead make the judiciary and executive subservient to parliamentary supremacy? However the trustees choose to answer this question, merely raising it forces the recognition that considering whether to adopt democratic voting procedures for the government of society is different from considering whether to adopt democratic voting procedures for deliberations among the trustees themselves. Along with choosing rules concerning who can vote for members of the legislature, the trustees will also be determining the scope of the legislature’s powers and its relationship to the other branches of government. Thus, we can see the possibility that the trustees, when establishing the government of society, would deviate from a simple model of parliamentary democracy in multiple ways.  

A. The Protection of Fundamental Rights from Even Democratic Governments

First, the trustees may be tempted to fix in the social contract itself certain inalienable rights, which no part of the government, including the legislature, would be entitled to breach. These rights would be fundamental and antecedent to the operation of government. Of course, the trustees might need to specify some sort of social institution that would be empowered to identify and remedy breaches of these fundamental, pre-political rights, and that institution might be considered to be itself a branch of government, exercising a form of government power. But the nature of that institution, the way its members are to be selected, and the procedures by which it

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45 It is also conceivable that, rather than establishing a single legislature, with responsibility to enact law in all domains of public policy, the trustees would create multiple special-purpose legislatures, each one for a different public policy domain. For example, there could be one legislature for environmental regulation, another for health care regulation, a third for taxation, and so forth. In this scheme, specialized legislatures would function much as specialized administrative agencies do in the United States today. There would need to be some institution, perhaps a court, empowered to adjudicate any jurisdictional conflict arising among more than one of these specialized legislatures. On an ongoing basis, citizens—or their trustees, if reconvening to assess the merits of the system they had established originally—would need to make judgments about the capacity of the specialized legislatures to handle all the issues of public policy that government might need to address. For example, what if a new technology arose, like the internet, which did not seem to be within the jurisdiction of any existing specialized legislature? There would need to be a mechanism to assign the new technology to one of the existing legislatures, or else to create a new one for the regulation of the new technology.
operates, might be very different from the rest of the governmental system that the trustees adopt for the formation of the legislative and administrative processes of the society.\textsuperscript{46}

Set apart from the rest of government in this way—and limited to protection of the fundamental, pre-political rights—this distinctive institution might be viewed as not really part of the political governance of society, serving an altogether different function than the enactment and implementation of legislative and administrative policies. If the members of this institution were some sort of political elite, appointed because of perceived expertise or wisdom rather than democratically elected and accountable, the undemocratic character of this distinctive institution would not prejudge whether or not the trustees separately would choose democratic procedures for the core legislative and administrative components of the society’s government.\textsuperscript{47} The idea of a specialized constitutional court, empowered to enforce a fundamental—indeed even inalienable—Bill of Rights, which no government is entitled to abridge, would be a specific conception of this type of specialized social institution. The extent to which appointing members of the constitutional court might be considered undemocratic, because these members are unelected and unaccountable and are selected based on elitist criteria of superior expertise and wisdom, would not negate the possibility that the rest of society’s government, including its legislative and executive branches, could be thoroughly democratic in character.

It is an interesting question whether the trustees, by majority vote, would choose to include in the social contract the specification of some fundamental and inalienable rights, which no government would be entitled to abridge and thus would require the protection of some institution other than the ordinary government. Worthwhile arguments can be made for either outcome, and we need not resolve them here.\textsuperscript{48} Even if

\textsuperscript{46} See generally Jeremy Waldron, Essay, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346 (2006) (noting that courts, including those in charge of the enforcement of individual rights, “are mostly not elective or representative institutions... [and] the judiciary is not permeated with an ethos of elections, representation, and electoral accountability in the way that the legislature is.”).


\textsuperscript{48} See generally Fallon, supra note 47; Waldron, supra note 46.
some sort of pre-political Bill of Rights is essential to a fair social contract, or at least a majority of trustees would so determine, it is obviously the case that not all issues of social policy would be predetermined in advance in the social contract itself. Instead, on many questions—including many issues of environmental policy—the trustees would recognize that the government of society would need to adopt and revise legislation and administrative practices on an ongoing basis. The social contract would not set a specific level of acceptable air or water pollution. The social contract would not specify a fixed rate for the depletion of known oil reserves. Instead, the trustees would recognize that society would need ongoing procedures of government by which to address these recurring questions of social policy. Thus, the task of the trustees would be to establish in the social contract a fair set of government procedures by which these issues of social policy could be regularly addressed, rather than fixing a definite policy on each of these environmental issues within the social contract itself.49

B. Who Should Elect the Legislature?

The question remains whether the trustees would choose democratic procedures for the legislative and administrative institutions of government empowered to adopt and implement, on a regular basis, the environmental policies (as well as other ordinary social policies) for the society. Although the trustees would choose democratic procedures for themselves, in order to settle an disagreement among themselves upon which provisions to include in the social contract—including provisions concerning the procedures for the legislative and administrative institutions of society—can we be confident that they would write into the social contract the same sort of democratic procedures that they use for their own deliberations? We must at least consider the possibility that, in sincerely considering the best interests of their clients, the trustee might be open to adopting some sort of nondemocratic legislative and administrative processes for the operation of the society's government.50 We have seen that the trustees would be willing

49 See POLITICAL LIBERALISM, supra note 34 at 133-40 (exploring how a constitutional regime could be legitimate despite the pluralistic, conflicting views of its citizens).

50 Rawls himself considered this possibility in A THEORY OF JUSTICE, supra note 27,
to consider some sort of nondemocratic, elitist institution for the protection of fundamental pre-political rights. Given this, would they not at least be willing to consider arguments that it would be in the best interest of their clients to have the social contract specify that the legislative power of society should reside in an institution whose members, rather than been selected through a mechanism of universal suffrage, would be selected by some other method?

Given their ignorance of their client's identity, the trustees would need to consider both (a) the risk that their clients would be disenfranchised under any regime that granted less than universal suffrage, an obvious serious concern given the attorneys' fiduciary obligation to protect the clients' interests, and (b) the possibility that a regime with less than universal suffrage might produce social policies—superior economic growth, superior environmental protection, more equitable distribution of resources, and the like—that better advance the clients' well-being than a regime of universal suffrage. The question, considered solely from the perspective of the fiduciary obligation to the unidentified client, is whether or not universal suffrage would be in the client's best interest, when compared to any other alternative that might be proposed for the trustees' consideration. Thus, we need to confront the theoretical possibility that the trustees, in exercising their fiduciary duty, might be tempted to deviate from democracy in this second, and ultimately more significant, way—by deciding (even though the trustees themselves vote democratically) to establish in the social contract a legislature that itself is not chosen democratically.

Having considered this possibility, however, I now wish to show why the trustees would reject an undemocratic legislature. Instead, after deliberation, the trustees decisively (even if not necessarily unanimously) would believe that the interests of their clients are best served by a legislature elected in accordance with the principle of universal suffrage, one-person-one-vote, or at least as universal as practicable given the inevitable mental incapacity of some adult citizens. In other words, the trustees ultimately would extend democracy to the operation of the society's legislative processes, including the

at 232, when he discussed John Stuart Mill's defense, from egalitarian premises, of giving extra voting rights to "persons with greater intelligence and education."
VOTERS AS FIDUCIARIES

election of the legislature's members and the use of referenda and other instruments of direct democracy for the purposes of having the citizenry exercise the legislative power directly. Understanding why the trustees would make this choice requires consideration of the charge that the trustees would give the legislature in the governance of society and the judgment that they trustees would make on how the legislature most likely would best fulfill that charge.

First and foremost, the trustees would stipulate that the legislature would be required to exercise the same fiduciary responsibility on behalf of all citizens, present and future, that the trustees themselves must exercise.\(^{51}\) The legislature exists because the trustees themselves cannot specify all the laws in the social contract itself. The trustees must create the legislature so that, on an ongoing basis, the society itself can adjust the rules regulating environmental protection and other policy issues confronting the commonwealth. In this respect (as mentioned at the end of Part III, above), we can consider the trustees in the original position akin to an idealized constitutional convention, and the social contract that they would adopt on behalf of their clients an idealized constitution for the society. The constitution might specify some paramount rules and principles to be enforced by a constitutional court (or some comparable institution), but the constitution's primary function would be the specification of the legislative powers for the regular government of the society.\(^{52}\) But in making this specification, the trustees would insist that the members of the legislature stand in the same relationship to the citizenry of society, present and future, as the trustees themselves do: as

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\(^{51}\) To clarify, we can envision the members of the legislature imaging themselves as if they were these trustees (although no longer in the original position, but instead in the here and now). In other words, when asking themselves what laws to adopt, the legislators can consider themselves trustees of individuals, present or future, whose identities they do not know. This, indeed, is the best way for the legislators to model their duty to act in the public interest when considering what legislation to enact. Thus, on this Rawlsian account, when speaking of the legislators as acting "impartially" or "in the public interest," that terminology is shorthand for saying that the legislators view themselves as fiduciaries for individuals whose specific identities they do not know, including whether the particular individuals are alive today or in the distant future.

\(^{52}\) On this point, compare Rawls's own discussion of the four-stage sequence—(1) original position, (2) constitutional convention, (3) legislation, (4) administration and adjudication—which he developed in both A THEORY OF JUSTICE and subsequent work. See THEORY, supra note 27, at 195–201; POLITICAL LIBERALISM, supra note 34, at 397–99. See also note 33, supra.
fiduciaries, required to act in the best interests of all such citizens.\textsuperscript{53}

How then to select the members of this legislature, so that they most likely would act in accordance with this fiduciary obligation and be the best fiduciaries possible? In making this determination, the trustees would be aware of what in history has caused legislators to fall short of acting as optimal fiduciaries. The biggest risk that the trustees would perceive is for legislators to serve the interests of only a portion of society, rather than serving society as a whole. If the legislators come only from an aristocratic class, they will tend to serve only the interests of the aristocracy, even if they sincerely believe that they are serving the interests of society as a whole impartially.\textsuperscript{54}

The best way to counteract this tendency is to have the legislators selected from as broad an electorate as feasible. For example, permitting only an educated elite to select the members of the legislature, or even just giving an educated elite extra votes or weighing their votes more heavily (as some, like John Stuart Mill, have contemplated), will only cause the legislature to be skewed in favor of the interests of the educated elite, rather than the legislature equally weighing the interests of all.\textsuperscript{55} It is remarkable, for example, how the educated elite can rationalize disproportionate government expenditures for programs from which the educated elite disproportionately will benefit, like taxpayer subsidies for opera. If the educated and uneducated participate equally in the election of the legislature, then the legislature less likely will be inadvertently biased in favoring the interests of the educated or the interests of the uneducated.\textsuperscript{56}

Based on this argument so far, one might think that the trustees would permit, even encourage, voters to follow their own self-interests when electing members of the legislature. The uneducated would be free to counteract the educated. But that interpretation would be incorrect. Rather, given the fiduciary function the legislators are supposed to serve, the voters are

\textsuperscript{53} For an extended discussion of legislators as fiduciaries, see generally D. Theodore Rave, Politicians as Fiduciaries, 126 Harv. L. Rev. 671 (2013).

\textsuperscript{54} See POLITICAL EQUALITY, supra note 11.

\textsuperscript{55} In A THEORY OF JUSTICE, Rawls himself discusses, and refuses to condemn, Mill's view on this point. See THEORY, supra note 27, at 223.

\textsuperscript{56} See POLITICAL EQUALITY, supra note 11.
supposed to ask themselves, “Which of the competing candidates would better fulfill the fiduciary role?” The voters are not supposed to ask themselves, “Which candidate would better serve my personal self-interest, or the self-interests of my family, clan, or class?” The fact that human nature indicates an inevitable tendency of voters, and legislators, to make political decisions based on self-interest does not alter the normative point that voters, and legislators, should strive to serve the broader public interest, and that well-designed political institutions can be structured to make it more likely to achieve this normative goal.

The point, then, is that by empowering all mentally competent adult citizens to ask the question, “Which candidate would be a better fiduciary on behalf of all citizens, present and future?,” there is a better chance of electing legislators more capable of exercising this fiduciary responsibility successfully than if only a subset of the mentally competent adult citizens are permitted to participate in the election of the legislators. One can think of this point as “crowdsourcing,” the task of identifying the most promising of candidates to exercise the fiduciary responsibility of serving as a legislator. The alumni of Harvard College might do a decent job of picking fiduciaries to serve as lawmakers for society. But the alumni of all the nation’s high schools would do an even a better job in the selection of the lawmaking fiduciaries, because they would draw upon their full array of backgrounds and perspectives when deciding which candidates would most likely best serve the public interest as a whole, both now and into the future.

By extending in this way the power to pick the fiduciary legislators, the principle of universal suffrage draws upon the common sense of the commonwealth. It is similar to the judgment that juries perform best when drawn from the full body of the public. Government undoubtedly requires the consideration of scientific expertise when addressing issues of environmental protection, health care, and a wide range of public policy issues. The capacity to address those issues successfully is undoubtedly aided by education. Thus, the

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57 Cass Sunstein, for one, has written extensively on the advantages of crowdsourcing. See generally CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006) [hereinafter INFOTOPIA]; CASS R. SUNSTEIN & REID HASTIE, WISER: GETTING BEYOND GROUPTHINK TO MAKING GROUPS SMARTER (2014) [hereinafter WISER].
legislators themselves presumably will need education, whether on-the-job training or otherwise, in order to exercise their fiduciary responsibilities intelligently. And they will need to hear the testimony of society's scientific experts before enacting laws aimed to serve the long-term interests of society. Still, at bottom, the selection of the legislators themselves will work best if refracted through the lens of common sense. "Is this candidate better suited to serve the common good of society?" On this question, which is the crucial one for determining who should be entitled to participate in the election of the legislature, society is better served in the long run if all mentally competent adult citizens get to participate equally in the answering of it.

By now, we should see from the development of the argument that bias in the legislature is avoided, not by encouraging voters to vote their own biases so that these biases counteract each other, but instead by giving all voters an equal chance to participate in the judgment of which candidates will best serve society as a whole. The voters themselves may inevitably, even unintentionally, let their own biases creep into their judgments of which candidates would make the best fiduciaries, just as the legislators themselves may unintentionally let their own biases in when attempting sincerely to exercise their fiduciary duty to all society as best they can. But inadvertent bias, either at the level of the voter or the legislator, is not a reason to give either participant in the lawmaking process a license to willfully impose their own self-interest on the formation of society's laws. Instead, it is a reason to redouble the effort to make the performance of the government function to serve the public interest as faithfully and as optimally as possible, and this is true at the level of the voter as well as the level of the lawmaker. The best way to maximize the likelihood that voters will act in the overall public interest when electing members of the legislature is, again, to "crowdsource" this function, so that any biases that inadvertently creep into the process tend to cancel each other out.58

58 See INFOTOPIA, supra note 57, at 25–28 (outlining the Condorcet Jury Theorem). Crowdsourcing, here, refers specifically to the idea that errors of judgment will be reduced by increasing the number of individuals who collectively participate in the exercise of the judgment. In this specific context, the crowdsourcing argument is premised on the notion that errors of judgment caused by self-interest are reduced by minimizing the degree to which any single individual's self-interest might affect the
One might raise the following quibble: while the argument shows that the legislators themselves are fiduciaries, and further shows that the voters themselves are fiduciaries when selecting the legislators, it has not yet established that the voters themselves are fiduciaries when selecting the legislators. I think this quibble, however, misses the point about the relationship of the voters and the legislators they elect. From the perspective of the trustees in the original position, as they exercise their fiduciary duties to all citizens present and future, they see both the voters and the legislators as two components of the overall government designed to implement the fair social contract on a regular, ongoing basis—with the government having the same fiduciary responsibility to the society as a whole that the trustees themselves do. The government, in other words, stands in the shoes of the trustees themselves insofar as the trustees cannot undertake all the decisions of government at the time of negotiating the terms of the social contract. If the trustees could do that, they would; but since they cannot, they delegate the implementation of their own fiduciary duties to the operation of the government pursuant to the procedures specified in the fair social contract.

From this perspective, it is not just the members of the legislature who have been delegated a significant portion of the trustees' fiduciary duties. It is also the voters who elect the members of the legislature who have been delegated another portion of the trustees' fiduciary duties—the portion that the trustees would exercise if they were electing the members of the legislature. One way to think of this is to suppose, just for a moment, that the trustees contemplated confining the electorate to a much narrower group than all mentally competent adult citizens. Suppose, in other words, that the trustees seriously contemplated limiting the electorate to only those citizens who graduated with a bachelor's degree from an accredited liberal arts college or university. If the trustees were to do this, they would not be empowering this group of college graduates to consider solely their own personal self-interest when deciding which legislators to elect. Instead, the trustees would be

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collective decision. The argument, however, depends on the participating individuals being adequately educated to engage in the collective judgment, so that the reduction in bias that they contributed is not outweighed by excessive inclusion of ignorance. This point about adequate education is pursued further in the next part of this essay.
charging this group of college graduates with the fiduciary responsibility of endeavoring in the best interest of the society as a whole, now and into the future, to select the individuals who will make the best legislators for the commonwealth's long-term welfare. Consequently, when the trustees decide to expand the electorate to include all mentally competent adults, and not just college graduates, the trustees are imposing this same fiduciary duty on this expanded electorate. The trustees are doing so based on their belief that the expanded electorate will do a better job exercising this particular delegated fiduciary duty than the more confined electorate. By expanding the electorate, the trustees emphatically are not absolving the electorate of its fiduciary obligation to choose legislators based on a considered judgment of which candidate most likely will best serve the public interest as a lawmaker.

In the eyes of the trustees, then, the voters they empower to elect the legislature are fiduciaries, just as are the members of the legislature. The voters obviously are fiduciaries insofar as, in the context of referenda and other ballot measures, they function directly as legislators. But the voters also are fiduciaries when they exercise their more ordinary role of selecting members of the legislature. They are fiduciaries in this capacity because, in exercising this particular function, they are acting on behalf of the trustees who have empowered them with this responsibility and, indeed, have delegated to them this particular portion of the trustees' own fiduciary responsibility to act on behalf of society as a whole.

VI. A HIGH SCHOOL DIPLOMA AS A PREREQUISITE TO VOTE?

Even if the trustees in the original position would not limit the electorate to college graduates, why would they not limit the electorate to high school graduates, so long as each mentally competent citizen has a full and fair opportunity to receive a high school education? “We will guarantee every citizen a full and fair opportunity to complete high school, but in exchange we will require every citizen to take advantage of that opportunity in order to participate in the fiduciary responsibility of electing the legislators of society.” Would that quid pro quo be one that the trustees would write into the social contract?

In theory, we cannot rule out the idea entirely. Some trustees might be inclined to contemplate it as a reasonable
balance between the advantage of crowdsourcing the fiduciary responsibility of selecting the legislators and the value of assuring that members of the electorate have some degree of education concerning the responsibilities to the public interest they have when undertaking this election of the legislature. Given the opportunity of everyone to attain a high school education, some trustees might see an electorate of high school graduates as broad enough to avoid implicit socioeconomic biases, while at the same time fostering the expectation that the electorate acts not on behalf of their own personal interests, but instead on behalf of society as a whole, both now and into the future.

But it seems far more likely that most trustees would rule out this quid pro quo, even if they would be willing to guarantee the opportunity to complete a high school education as part of the social contract.\textsuperscript{59} The trustees would know that the attainment of a high school diploma is far from universal. Instead, only about three-quarters of citizens complete high school, and in some segments of society the percentage is even lower.\textsuperscript{60} Even worse, high school graduation rates vary by race, with a significantly lower percentage of blacks completing high school than whites.\textsuperscript{61} The reasons for this are varied and complicated, including inferior quality of high schools available to black students as well as increased economic pressure on low-income blacks to quit school in order to find means of financial support. Whatever the reasons, however, if having a high school diploma were a prerequisite to being a voter, the electorate would be disproportionately skewed on the basis of race, creating a significant risk that the electorate would have an inadvertently implicit racial bias when undertaking its fiduciary responsibility of selecting members of the legislature.\textsuperscript{62} The trustees, impartial and responsible for the well-being of all

\textsuperscript{59} See Keyssar, \textit{supra} note 5, at 114–18 (describing historical abuse of literacy tests and other educational requirements as bases for restricting the franchise).


\textsuperscript{61} Id.

members of society, would want to rule out this risk of implicit racial basis.

For similar reasons, the trustees would reject literacy tests and other measures purportedly designed to produce a more competent electorate. They would have full knowledge of the way in which literacy tests and similar devices have been used historically to discriminate on the basis of race with respect to the opportunity to participate in the election of lawmakers.\textsuperscript{63} Charged with the responsibility of protecting the interests of all, the trustees would want to write into the social contract strong guarantees to prohibit any form of racial discrimination with respect to voting. In this respect, the trustees would insist upon robust protection of voting rights, of the kind embodied in the Voting Rights Act of 1965.

But the protection of voting rights by the trustees would not be for the purposes of enabling voters to pursue their own self-interests. Rather, it would be to ensure the equal opportunity of all citizens, regardless of race, to exercise the fiduciary responsibility of serving as an elector. Just as the trustees would write into the social contract prohibitions on racial discrimination with respect to military or jury service, so too would they include a prohibition on racial discrimination with respect to electoral service. But none of these forms of government service would entitle citizens to pursue self-interest instead of the public interest. Thus, we can see that the conception of voting as a fiduciary responsibility, derived from a Rawlsian theory of a fair social contract, is entirely consistent with a strong commitment to voting rights understood as protecting the equal opportunity of all citizens, regardless of race or other social circumstance, to perform this important form of public service.

VII. IMPLICATIONS OF VIEWING VOTERS AS FIDUCIARIES

What follows from this Rawlsian conception of voters as fiduciaries? In particular, what changes would there be to the laws and procedures for regulating the process of voting, and what effect would adopting this perspective have on the so-

\textsuperscript{63} See Keyssar, supra note 59, at 114–18.
called “voting wars” that have afflicted our own society for the last decade?64

A. Voting Rules and Procedures

The answer, in part, is that there would not be a radically wholesale shift in voting rights jurisprudence. Precisely because (for the reasons just stated) the Rawlsian perspective embraces a strong commitment to voting rights, including a robust prohibition on racial discrimination with respect to voting, the Rawlsian perspective would not tolerate measures designed to discourage the electoral participation of racial minorities. Thus, insofar as it could be shown that voter identification laws, or other voting rules, were adopted for the racially discriminatory purpose of making it more difficult for minority citizens to vote, then these laws should be vociferously condemned as violations of a fair social contract.65

Still, adopting the Rawlsian perspective would have some implications. For one thing, there would be less concern about maximizing voter turnout, as long as all citizens (regardless of race or other social circumstances) have equal and ample opportunities to cast a ballot. A citizen must have an equal and fair opportunity to participate in the fiduciary responsibility of electing society’s lawmakers. But if a citizen chooses not to take advantage of this opportunity and thus not to participate in this fiduciary responsibility, then the task will be performed by those who choose to do so. This fiduciary responsibility is important and not to be undertaken lightly. If some citizens decide that they cannot be bothered to participate, then the fiduciary duty will be better performed by those who take the responsibility seriously. Unless one adopts the idea of compulsory voting, so that everyone must serve, then citizens are entitled to opt out of the obligation.66 From a Rawlsian perspective, society does not

66 Australia has compulsory voting, and although it has been advocated for adoption here, it is unlikely to take hold. Richard L. Hasen, Voting Without Law?, 144 U. Pa. L. Rev. 2135, 2138 (1996) ("Enactment of a compulsory voting law in the United States . . .
need every citizen to participate in the service of selecting the lawmakers. Rather, society needs those who choose to participate to do so from the perspective of endeavoring to elect lawmakers most likely to act in the public interest, and society needs that there be no barriers to participation in this form of public service.67

Similarly, adoption of the Rawlsian perspective would cause some adjustment of the trend towards so-called “convenience voting,” including no-excuse absentee voting.68 The Rawlsian perspective certainly does not want voting to be inconvenient or

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67 Jason Brennan shares the view that voters should attempt to promote the common good, rather than their own self-interest, when they cast their ballots. But Brennan goes further to claim that citizens have a moral duty to refrain from voting if they are unwilling or unable to undertake the effort to become well-informed voters, since their mistaken views about what the common good requires might inflict serious harm on members of society—and thus would be contrary to the public interest that voters are supposed to promote. See JASON BRENNAN, THE ETHICS OF VOTING (2011). In my conception of voters-as-fiduciaries, I make no such claim about the obligation of citizens to refrain from voting. Rather, I am inclined to believe that citizens should feel entitled to participate as long as they are willing to do so in good faith, on behalf of their sincere view of the public interest. They should not feel pressured to abstain if they have not gone to considerable lengths to inform themselves about issues on the public agenda. Rather, as long as they have given some consideration to the different positions of opposing candidates and parties, they are entitled to assert their point of view about which side is more likely to produce policies that serve the public good. My point about voter turnout, which does not go nearly as far as Brennan’s, is only that it need not be considered a moral wrong if citizens decide for themselves not to cast a ballot because they do not desire to participate in this fiduciary function of citizenship. In other words, rather than having a duty to refrain from voting (as Brennan would claim), or a duty to vote despite no desire to do so (as many others would argue), my Rawlsian account would remain neutral in this regard—as long as citizens, when they decide to vote, do so with a willingness to exercise this fiduciary function of citizenship to the best of their ability in good faith.

In stating the point this way, I may be underestimating the “crowdsourcing” value of citizens participating in the election of legislators even if these citizens have no desire to do so. (I am grateful to Eli Poupko for bringing this point to my attention.) If the electorate’s decisions on average will more likely promote the public good as the electorate grows in size, that “crowdsourcing” point would argue in favor of all citizens feeling a moral obligation to cast a ballot even if they otherwise would be disinclined to do so. As against this valid point, however, is the kind of counterargument that Brennan might make: if voters are not sufficiently motivated to do a good job in exercising their fiduciary duty to cast their ballot in the public interest as best they can, then their suboptimal participation will tend to negate the crowdsourcing conception, at least at the margin. I am inclined to let these counterarguments cancel each other out, leaving the ordinary citizen neither morally obligated to participate when disinclined to do so nor morally obligated to refrain unless willing to undertake extensive efforts to become well-informed.

for there to be unnecessary obstacles to participation. But the Rawlsian perspective is dubious about the increasingly prevalent consumer model of voting, pursuant to which voters are to be treated as customers who deserve to have a positive voting experience comparable to the kind of positive shopping experience that a Wal-Mart or even Amazon might provide them. Voters, unlike shoppers, should not be “in it” for themselves. The goal is not to maximize their own utility.

Rather, the experience of being a voter should be well-designed to the purpose of voting, which is the exercise of the fiduciary responsibility of selecting society’s lawmakers. While that experience should not be hampered by features that make it more difficult for voters to perform this public service, the voting experience need not be designed with the goal of doing everything to make it as easy as possible. For example, from the perspective of voters as consumers the number of days devoted to so-called early voting would be extended as long as doing so was cost-effective given the government’s fiscal budget. But from the Rawlsian perspective, the number of days of early voting might be limited to only a couple of weeks if it could be shown that making the period longer was counterproductive in terms of having voters do their best in exercising their fiduciary duty of electing lawmakers (as might be the case, for example, if voters in the earliest days of early voting had inferior information concerning the candidates on the ballot).69

B. *Evenwel* and the Determination of One-Person-One-Vote

There is one major issue of contemporary election law for which it makes a crucial difference whether one embraces the Rawlsian conception of voters as fiduciaries or, instead, accepts the view that voters are just self-interested consumers who maximize the benefits they can obtain through the casting of their ballots. This important issue is the one now pending before the U.S. Supreme Court in *Evenwel v. Abbott*.70 The issue is whether, for the purpose of the one-person-one-vote doctrine of

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Reynolds v. Sims,\textsuperscript{71} population equality is to be determined based on the total population of each legislative district, or instead based on the number of eligible voters in each district.

If democracy is just a procedure for aggregating the preferences of self-interested voter-consumers, then it is easy to see why the logic of one-person-one-vote would require equalizing the number of eligible voters in each legislative district. This logic would be based on the premise that each voter is equally entitled to have his or her own preferences count the same in the computation of the social calculus, and thus the only way to achieve this equally weighted vote is legislative districts with the same number of voters.

But if alternatively one adopts the Rawlsian conception of democracy, then one quickly see why legislative districting should aim for equality of total population in each district, rather than equal numbers of eligible voters. Under the Rawlsian conception of voters as trustees for the interests of all people in the polity, voters—like the legislators they elect—are representatives of the people as a whole. All the people of the territory, at least all those legally entitled to reside there (including non-citizens who may become eligible for citizenship in the future), are the ones whose interests are entitled to equal consideration in the formation of the public policy for the polity.\textsuperscript{72} Given this need to treat the interests of all lawful residents equally, the legislative mapmakers should seek equal number of persons in each district, without regard to whether doing so also equalizes the number of eligible voters in each district. From this Rawlsian perspective, the voters in each district (however many there may be) should cast their ballots with the goal of serving the interests of all the people of their district, indeed all the people of the polity as a whole. There is no need, on this Rawlsian account, to make sure that each voter has an equal chance of having his or her self-interested preferences prevail. Instead, viewing the electorate as a large assembly of fiduciaries acting on behalf of the public as a whole, the relevant question is whether each member of the public is

\textsuperscript{71} 377 U.S. 533 (1964).

\textsuperscript{72} I set aside the issue of illegal aliens, who even on a Rawlsian account might (or might not) be excluded from calculating the equality of population in each legislative district. The status of illegal aliens under Rawlsian theory is a topic beyond the scope of this paper, requiring separate attention.
receiving equal treatment in the drawing of legislative districts. Once this districting determination is made, then each eligible voter has an equal opportunity to exercise this fiduciary function on behalf of the public at large.\footnote{Recall that each voter gets one vote, regardless of the number of residents in the voter's district. If some voters received two votes, while others one, that would violate the principle of each fiduciary receiving an equal vote when the fiduciaries gather to exercise collectively their fiduciary duties. (We saw the principle of one-trustee-one-vote as applied to the original position.) It is consistent with Rawlsian principles that the number of fiduciaries not correspond exactly to the number of individuals on behalf of which fiduciary duty is exercised. Indeed, this is a basic premise of the Rawlsian approach. A trustee in the original position may be acting on behalf of an unknown member of a future generation, and there are obviously many more of them than members of the current generation. Thus, it does not violate the equality of voters, as having the same fiduciary duty as the trustees (indeed delegated to them by the trustees), that some voters act as fiduciaries for more individuals than other voters. When setting up districts in order to represent the interests of individuals, however, the goal is equalize the consideration of interests of the represented individuals—not to equalize the number of individuals each fiduciary is responsible for.}

One might argue that the Rawlsian conception of democracy should be seen as sufficiently compelling to be incorporated into the one-person-one-vote doctrine of Reynolds v. Sims. On this jurisprudential view, all fifty states would be constitutionally obligated to draw their legislative districts based on equality of total population. They would not be permitted to adopt the alternative “consumer” approach of equalizing the power of each voter to pursue self-interest through the casting of ballots.

This jurisprudential view does not simply entail a belief in the Rawlsian conception of democracy. It also entails a belief about the propriety of constitutionalizing that conception of democracy as an interpretation of the Fourteenth Amendment’s Equal Protection Clause. The merits of that interpretive belief might be challenged by those who espouse judicial restraint as the primary objective of constitutional adjudication.\footnote{See, e.g., J. Harvey Wilkinson, Cosmic Constitutional Theory (2012).} This essay, confining itself to a defense of the Rawlsian conception of democracy as a matter of normative theory, does not take a position on the separate jurisprudential matter of whether the Supreme Court, in interpreting the Fourteenth Amendment, should be guided by judicial restraint or instead feel entitled to constitutionalize its normative judgment concerning the best conception of democracy. But even if the principle of judicial restraint should prevail in Evenwel, that conclusion would mean that the Court should not constitutionalize the “consumer”
C. Civics Education and the Inculcation of Civic-Mindedness

Beyond the significance of *Evenwel*, the Rawlsian perspective also draws attention to the need for high-quality civics education. Even though the trustees would not require a high-school education as a prerequisite to voting, they nonetheless would want to put in place a curriculum that prepared citizens appropriately for the fiduciary responsibility of being a voter. Civics education thus would not be shunted as an afterthought, subordinated to the so-called “STEM” subjects of science, technology, engineering, and math. These other subjects are undoubtedly important. Nonetheless, preparing citizens for productive roles in the economy cannot be the only goal of public education. Instead, public schools must address the societal imperative, at least equally as important, of preparing citizens for their role as voters.

Nor would civics education be a matter of rote learning. Instead, it would include education on the philosophy of democracy itself, why voters are given the fiduciary responsibilities they have, and what it means to cast a ballot as an act of serving the best interests of society. Civics education thus would be the training of voters for their role as fiduciaries, just as military education trains citizens for their role as soldiers.

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75 See generally M. VICTORIA COSTA, RAWLS, CITIZENSHIP AND EDUCATION (2011).
77 See id. at 48–70.
If we were to embrace this Rawlsian perspective wholeheartedly, we might consider other ways in which we could enhance the capacity of voters to perform their fiduciary duty to act on behalf of the public as a whole when electing lawmakers. For example, we could consider the adoption of a "voter's oath" analogous to the oaths that the legislators themselves must affirm. Jurors and soldiers also have their own oaths, appropriate for the particular kind of public service they perform. Voters, too, could be given an oath, suitable for this particular form of public service.

Indeed, Vermont is one state that has such a voter's oath. Adopted in the eighteenth century, it has recently been reaffirmed in the twenty-first. It states:

You solemnly swear or affirm that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person.78

This oath captures the essence of the fiduciary obligation to act in the overall public interest when serving as a voter. Were this kind of voter's oath to be adopted more generally, it might cause more voters to be in the appropriate public-service frame of mind when they cast their ballots, rather than thinking of how their vote might serve their own self-interest.79

CONCLUSION: RESPECTING THE TRUE IMPORTANCE OF VOTING

Thinking of voters as fiduciaries might also elevate the value we attach to voting. When voting is considered simply a

78 VT. CONST. ch. II, § 42.
79 See Sanford Levinson, Taking Oaths Seriously, 2 YALE J. L. & HUM. 113 (1990) (discussing efficacy of similar Connecticut oath, including references to earlier scholarship on the point).
form of self-expression, its status is inevitably limited by self-serving nature of this conception. While self-expression deserves protection in a free society, it is not an inherently noble activity. The pursuit of self-interest, whether through voting or otherwise, is ultimately about how best to benefit oneself. But once voting is understood to be a mode of public service, it takes on an entirely different character. It becomes a noble enterprise, a high and solemn function that citizens perform on behalf of the betterment of their commonwealth. If all of us collectively come to understand voting in this way, we might eventually accord it the significance and the protections it truly deserves.

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80 The theory of "expressive voting" posits that voting provides an intrinsic benefit to voters by serving as a means of self-expression. See GEOFFREY BRENNAN & LOREN LOMASKY, DEMOCRACY & DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE (1993).

81 See Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1556 (1988) ("[P]olitical participation is not only instrumental in the ordinary sense; it is also a vehicle for the inculcation of such characteristics as empathy, virtue, and feelings of community.").