THE LOGIC OF MAJORITY RULE

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I. INTRODUCTION

Representation holds the promise of self-government for a large republic. The importance, innovation, and genius of this feature of our constitutional scheme cannot be overstated. But it is in some rough waters. The possibility of common ground, which is at the heart of the notion of representation itself,[1] seems more elusive than ever. The meaningfulness of accountability, so important to the legitimacy of representation as a vehicle for self-government, is diminishing noticeably. The epidemic of gerrymandering to protect incumbents is more widespread and entrenched than ever thought possible.[2] Decades of efforts to overcome race discrimination in access to voting and in districting have led to little sense of success in eradicating the lasting effects of de jure segregation or stemming the trend toward de facto segregation.[3] These horrors do not even include mention of the interest-group issues that have widely undermined confidence in the possibility of meaningful representativeness of legislative voting.[4]

This list of laments is long and serious and in some ways overwhelming. Each of the problems is the subject of specialized research and policy study by scholars in different fields doing both empirical

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[1] *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1512–20 (2002) (discussing eighteenth-century ideas of shared interests and shared burdens as basis for representation).

[2] *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 572–74 (2004) (noting that gerrymandering allows incumbents to ensure their reelection with relative ease).

[3] *Cf.* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 638–40 (2002) (discussing continued racialization of districting law and process).

[4] *See, e.g.*, William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 379–93 (1988) (arguing that majority rule does not protect the minority from violations of its rights for the temporary benefit of the majority). *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (providing an overview of the influence of interest groups on legislative voting).

and theoretical work to try to address them one by one. But the overall prognosis is quite bleak, not offering much to give an objective observer any confidence that the system of representative government is doing the work that we count on it to do as the pivot of our improvisation in self-government. We count on representative government, not only to carry out the daily work of making and enforcing policy for the country, but also to meet our collective psychic need for a sense of legitimacy as it does so.

Courts have always maintained a posture of respect for political, or representative, decision making as the most legitimate for a democracy. Even at the heights of the most activist judicial periods, courts departed from legislative decisions in only a tiny fraction of extraordinary cases relative to the number of laws to which they deferred on the ground of legitimacy.[5] Mostly, courts have accepted the idea that they are a deviant institution in a democracy and have fashioned substantive rules to reflect that role.[6]

Indeed, the principle of majority rule, widely accepted as both a shorthand for *the will of the People* and, in turn, the animating force of representation, is prized by the laity and privileged by the law. It boasts a moral claim of fairness and enjoys an iconic status in a system rhetorically devoted to popular self-government.

There is reason to be concerned about whether that well-loved tenet is capable of bearing the load for our democracy that the Constitution envisioned or that we depend on it to bear in a constitutional scheme crafted to accord primacy to representative government. But if well-founded concerns exist, it is not obvious that the Supreme Court has, or should have, anything to say about the matter. Any hope that judicial review could solve these deeply institutional and political malfunctions is surely optimistic at best. Thus, the question is, what should a court do when faced with significant structural concerns about whether the machinery of representative government is running properly?

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[5] The *Lochner* Court, for example, upheld many more state labor laws than it struck down. *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 21–38 (2003) (giving a brief overview of the legislation the *Lochner* court upheld and struck down). Similarly, the Warren Court was responsible for according an absolutely toothless "rational relation" scrutiny, at least in the absence of suspect criteria. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963) (according high degree of deference to state law); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (affirming that "[t]he day is gone when this Court uses the Due Process Clause . . . to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought").

[6] *See* Washington v. Glucksberg, 521 U.S. 702, 728–35 (1997) (recognizing Washington's state interest in protecting life and upholding the state's assisted suicide ban); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282–87 (1990) (upholding Missouri's heightened evidentiary requirement for withdrawing life support).

This essay will argue that there is a role, and that there traditionally has been a role, for the Court in holding out at least a minimal safety net of control over the renegade legislative process of state and federal government. It suggests that a long and consistent practice of the Supreme Court supports indirect judicial supervision of legislative functions through scrutinization of resulting legislation for evidence of malfunction or structural compromise. This, I argue, is the heart of the role of liberty protection under the Constitution, whether it be under the Due Process Clause[7] or the Privileges or Immunities Clause.[8]

II. THE COURT'S "COMPENSATORY" APPROACH TO JUDICIAL REVIEW

Historically, when the integrity of a constitutional structure or process—one that a court cannot prudently or practically supervise directly—has appeared to be at risk, the Court has responded by aggressively applying some specific constitutional provision, not always obviously correlated, that it *could* supervise directly. In the face of such a structural concern, the Court tends to identify a constitutional standard that is susceptible to judicial supervision and apply the standard in hopes of indirectly ameliorating the consequences of the original structural or procedural problem. For example, after the rise of the administrative state, concerns increased regarding the structural compromise in separation of powers that it necessarily engendered. The three powers of legislation, execution, and adjudication frequently merged in one government agency. Moreover, the agencies themselves were vulnerable to the criticism that they were an unaccountable fourth branch of government, making law without the structural protections that had characterized the original design of the federal government.[9] The Court responded to these concerns, not by interfering directly in the political decisions that resulted in the creation of the administrative state,[10] but instead by recognizing new procedural rights in individuals affected by agency decisionmaking. It crafted new rules regarding separation of functions within

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[7] U.S. CONST. amend. V, cl. 4; *id.* amend. XIV, § 1, cl. 2.

[8] *Id.* amend. XIV, § 1, cl. 3.

[9] *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575–78 (1984).

[10] The Court struck down only two statutes for violation of the nondelegation doctrine, for example. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 419 (5th ed. 2005). *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the Live Poultry Code, Exec. Order No. 6675A (Apr. 13, 1934), *reprinted in Schechter*, 295 U.S. at 525 n.5); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (striking down part of the National Industrial Recovery Act, ch. 90, § 9(c), 48 Stat. 195, 200 (1933)).

an agency,[11] reason-giving and accountability of agencies to the outside world, and rights to certain procedures and impartiality[12]—all under the auspices of the Constitution.[13] Thus, individual protections under the Due Process Clause served to ameliorate some of the consequences of the perceived structural deficiencies in the government.

The Court's concerns over proper functioning of state legislative processes—again, a place where the Court could not have intervened directly[14]—yield a similar story. Concerned about the corrosive and antidemocratic effects of racism and other we/they motivations underlying government action, the Warren Court developed a host of individual rights claims that were amenable to Court resolution. The development of tiers of scrutiny under the Equal Protection Clause, for example, brings to the Court, in a form judicially accessible and manageable, the outputs of the suspect legislative processes and subjects them to a test designed to smoke out a certain type of representative malfunction. This accomplishes an indirect judicial supervision of the basic representative obligation in the states. Similarly, the Court developed the one-person-one-vote test, strangely translated into an individual right, as a judicially manageable window into the otherwise inaccessible processes of state apportionment, about whose integrity the Court had reason to worry.[15] This way of understanding the ethos of the Warren Court is all very familiar, thanks to John Hart Ely.[16]

It is important to recognize, however, that this kind of approach is not unique to the Warren Court. More recent examples follow a pattern reflecting an intuition that is comparable in some significant respects. The Rehnquist Court had occasion to consider the boundaries of the congressional commerce power in *United States v. Lopez*,[17] as applied to the Gun-Free School Zones Act of 1990,[18] and again in

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[11] *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 47–50 (1975) (holding that administrative examiners need not be disqualified from a case simply because they had previously ruled against one of the parties).

[12] *See generally* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1491–94 (1983) (describing general principles of agency decision-making).

[13] The Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2000), facilitated this process; some think it is constitutionally required.

[14] *See* Colegrove v. Green, 328 U.S. 549, 553–56 (1946) (dismissing a challenge to the validity of congressional districts in Illinois because the judiciary is not the appropriate forum to seek remedies).

[15] *See* Reynolds v. Sims, 377 U.S. 533, 561–64 (1964) (holding Alabama's reapportionment plan invalid because it violated the Equal Protection Clause by overvaluing the votes of preferred groups).

[16] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (characterizing the Warren Court as a "referee" of the political process).

[17] 514 U.S. 549, 551–52 (1995).

[18] Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45.

United States v. Morrison,[19] as applied to the Civil Rights Remedies for Gender-Motivated Violence Act.[20] In a departure from a prior deferential stance toward Congress's determinations of the bases for its own powers,[21] the Court made clear that it was worried about the processes that had produced these laws. It speculated as to both motive and need for the legislation. Unstated, but palpable, in the skeptical discussions about Congress was a concern over inappropriate influences in the legislative process and a sense on the part of the Court that it should take a nondeferential stand in light of public-choice insights into the susceptibility of Congress to interest-group influence.[22] Although expressing its concerns in the language of federalism, the Court seemed to truly be uncomfortable with the way that, in exercising its previously expansive power over interstate commerce, Congress did not appear to be taking seriously its fundamentally majoritarian obligation to legislate for the common good or general welfare.[23] The Court chose to police that procedural obligation by creating a substantive limitation on the kinds of laws that would be permitted to emerge from the legislative process under the aegis of the commerce power.[24]

The Court's effort to encourage good legislative practice indirectly through the vehicle of the Commerce Clause engendered an irony: In the name of federalism, a federal law enacting a policy that was *in agreement* with existing state policies (such as prohibiting guns on school property or gender-motivated violence), because it seemed redundant and therefore perhaps motivated by inappropriate reasons, was less likely to be upheld as within the powers of Congress than a federal law *opposed to* existing state policies. If, conversely, the

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[19] 529 U.S. 598, 605–08 (2000).

[20] Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941–42 (1994).

[21] *See* Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964) (holding that where legislators "have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce" courts should defer to Congress).

[22] Different observers have perceived the phenomenon in different ways, and each has described a sense that the Court was worried about how congressional legislation is made. *See* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 40 (2003) (suggesting that the Gun-Free School Zones Act "might have been 'feel good' legislation," permitting members of Congress to grandstand or win cheap political points without seriously thinking about policy implications); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 84 (2001) (noting Justice Scalia's defense of the Court's activism on the ground that "Congress has an 'attitude'").

[23] For an example of the burgeoning body of literature in the decades leading up to *Lopez* that had brought attention to the basic insight that small, well-organized groups may have advantages over more diffuse and numerous coalitions that give them the opportunity for greater influence in the political process, suggesting that legislatures may be vulnerable to a charge of not effectuating majoritarian preferences, see MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

[24] *See* United States v. Lopez, 514 U.S. 549, 559–68 (1995) (requiring that Congress limit its reach to economic activity substantially affecting interstate commerce).

federal law were imposing an unwelcome policy on unwilling states, as when it sought to outlaw race discrimination in the 1964 Civil Rights Act,[25] or to criminalize the state-approved medicinal use of marijuana through the national drug laws,[26] then the Court would be more likely to uphold the federal law, trusting that Congress was acting for appropriate policy purposes and not merely to score easy political points with popular—but not necessarily majority-supported—interests. The irony cannot be explained by federalism considerations. It does make sense, however, if one concludes that the Court was motivated by a desire to control what it viewed as a wayward legislative *process* by substantively restricting the scope and type of legislative programs available to Congress.

Perhaps an even more striking example in this regard is the Rehnquist Court's approach to affirmative action. In *Adarand Constructors, Inc. v. Pena*,[27] the Court once again created a new enforceable standard under the Constitution for the purpose of policing the legislative obligation to represent majoritarian preferences. In that case, it recognized the right of a member of a nonsuspect class to strict scrutiny in the absence of invidious motivation.[28] John Hart Ely had suggested decades ago that there is reason for suspicion when the "ins" burden the "outs," for fear of self-serving corruption of legislative obligation;[29] the Rehnquist Court went further to suggest that, even if the "ins" burden the "ins," there is still reason for suspicion because such a counterintuitive act of altruism must be motivated by some undue influence not appropriate to proper functioning of the legislative body. It therefore contributed to the continuation of what might strangely claim to be the new "representation-reinforcing" approach to judicial review of congressional legislation. Unlike the Warren Court-Ely version of representation-reinforcement, which guarded against too-vigorous majoritarianism, the new version appears to ward off legislative motivations that may not be majoritarian enough.[30] While the Court's approach may assume an overly cynical view of legislative obligation, it is, I suggest, precedent for the proposition that, when the Court has concerns about the integrity of legis-

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[25] Pub. L. No. 88-352, 78 Stat. 241. *See generally Katzenbach*, 379 U.S. 294 (holding the Civil Rights Act constitutional despite state objections).

[26] *See generally* Gonzales v. Raich, 125 S. Ct. 2195, 2203–04 (2005).

[27] 515 U.S. 200 (1995).

[28] *Id.* at 236.

[29] *See* ELY, *supra* note 16, at 153. On the subject of what he called "reverse discrimination," Ely even went so far as to say, "Whether or not it is more blessed to give than to receive, it is surely less suspicious." *Id.* at 171. The Rehnquist Court disagreed. *Adarand*, 515 U.S. 200.

[30] *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46, 48–61 (1989) (recognizing the trend in the Rehnquist Court toward reading a principle of majoritarian supremacy into all provisions of the Constitution).

lative processes, it consistently responds with aggressive interpretations of substantive constitutional standards that are within its sphere of enforcement, such as individual rights provisions. Again and again, across different Courts with different senses of democracy and different commitments about the judicial role, the abiding theme is the willingness of the Court to police the operations of government institutions indirectly by applying judicial scrutiny to their outputs.[31]

A more recent example that can be understood to reflect this intuition is the *Hamdi* case.[32] There, the government made several radical claims. Not only did it argue that it enjoyed the statutory and/or inherent constitutional authority to seize and detain citizens as enemy combatants, but it also urged that this *power* necessarily implied the nonexistence of due process *rights* in the detainee.[33] While the plurality of the Court indulged the executive on its claim to power,[34] it declined to subsume in that power the elimination of any judicial check in the form of minimal due process review. The opinion made clear that, while it had accepted the executive's far-ranging structural claim, the Justices harbored concerns about the implications of such a claim for the principle of separated and limited powers. The opinion warned that the government's assertion "that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme . . . serves only to *condense* power into a single branch of government."[35] In short, judicial worries over structure emerged in the form of protection of rights.

This dance between structural and individual rights aspects of the Constitution, particularly in areas involving the internal workings of a representative branch of government, is familiar and useful. In some ways, it is reminiscent of the important idea of structural reasoning introduced by Charles Black in the sixties.[36] Although Black's approach was distinct in some ways, there is common ground in his emphasis on drawing on the large themes of the Constitution—the coex-

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[31] Some have suggested that this motivation also explains the infamous *Lochner v. New York* opinion. According to this view, the Court struck down the labor statute out of concern that a law protecting a small subset of citizens, vulnerable to a label of partial legislation, might represent a failure of the impartiality obligation of the state legislative process that produced it. *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

[32] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[33] *Id.* at 526–28.

[34] The plurality found that the executive's action was authorized by the congressional Authorization for Use of Military Force resolution, *id.* at 517, and thus had no need to consider whether there would be authority in the absence of congressional authorization.

[35] *Id.* at 535–36.

[36] *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (analyzing the Constitution from a structural perspective).

istence of national and state government, the nationhood of people—in seeking to derive specific applications of cryptic text.

Black argued that, even in the absence of the Fourteenth Amendment, certain state actions would have to be deemed unconstitutional as interfering with basic structural guarantees in the body of the Constitution. He focused primarily on the implicit structural relationship between the states and the federal government, and less on its counterpart, the implicit structural relationship between an individual and representative government. But his defense rings true for the method writ large: "There is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text."[37] For Black, "[i]t is the best wisdom of every system of law to seek and to cleave unto such intellectual modes" as lead "directly to the discussion of practical rightness."[38] The benefit of this approach is its aspiration of long-term preservation of important constitutional values, even when changing times, acting on forces completely outside the Court's supervisory control, subvert the institutions on which those values rely. By responding to structural concerns in a way that seeks to compensate for the new threats with judicially cognizable inquiries, the Court contributes to the longevity of the Constitution. It avoids the stark choice between utter sacrifice of constitutional principle and an overly aggressive judicial role that risks relegating the Court to disrespect or possible disregard by the other branches. It is in the spirit of such compensatory integration between structure and rights that this essay will proceed to consider the role of unenumerated rights in our constitutional scheme.

III. THE JUSTIFICATIONS FOR MAJORITY RULE

In order to consider whether and how a court should recognize and enforce a general right to liberty, I wish to launch an analysis that approaches the question structurally, starting from common ground and proceeding to more controversial ground. In the ongoing debate about so-called unenumerated rights, at least two points are clear: First, it is clear that the notion of majority rule as a primary principle of democratic self-government has deep, strong roots in American jurisprudence and intuition. It is also true that the protection of liberty rights under the Constitution is often understood to be in tension with the principle of majority rule, and a threat to the self-government that is the right of free citizens. This part of the essay

[37] *Id.* at 31.
[38] *Id.* at 23.

examines the theoretical underpinnings of majority rule in our democracy in order to explore whether the common critique of liberty protection on this ground is well taken.

From among the many comprehensive treatments of the justifications underlying our polity's indisputable commitment to majority rule, several reasons have emerged as most salient.[39] This discussion considers the nature of the impetus that leads a democratic system to accept majority rule as a first resort for resolving issues of collective governance, to accord presumptive respect to decisions reached by largely majoritarian institutions, and to recognize a principle of judicial deference for the outcomes of majoritarian political processes. I will then explore the implications of these justifications for the process of representation more generally.

The literature reveals roughly three basic families of justifications for majority rule as a decision process for democracy.[40] First, a classic liberal argument defends majority rule as a way to "maximize[] the number of persons who can exercise self-determination in collective decisions."[41] This justification has roots in the belief that government should be "based on the consent of the governed."[42] If a system should accord a minority of citizens the power to decide vital issues of law and policy, then by definition the proportion of people who have given their consent to the law is smaller than in a democracy committed to majority rule. This argument invokes the importance of moral autonomy as reflected in a system that offers the greatest opportunity "[t]o live under laws of one's own choosing."[43]

Jeremy Waldron offers to this argument a powerful modification that seeks to cohere more explicitly with a belief in rights. His defense recognizes that people do not necessarily agree on the existence and content of rights.[44] Beyond the question of whether a democracy should determine and enforce rights lies the more difficult

[39] Observers have demonstrated that "majority rule" itself is far from noncontroversial, and indeed is quite elusive. *See* Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1583–85 (1988) (citing both "defects" in political processes and social- and public-choice insights about legislative decision making to show gaps between political outcomes and majoritarian outcomes). Nevertheless, it holds an intuitive meaning and appeal in both popular and constitutional discourse. *See, e.g.*, Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("[T]he Equal Protection Clause . . . requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

[40] *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 138–44 (1989) (offering four basic justifications, one of which—relying on Condorcet's theorem for jury factfinding—is not relevant to the present discussion); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 500–01 (1997) (canvassing arguments for majority rule as a preface to developing a justification for judicial review based on advancing majoritarianism).

[41] DAHL, *supra* note 40, at 138.

[42] *Id.* at 89.

[43] *Id.* at 91.

[44] JEREMY WALDRON, LAW AND DISAGREEMENT 85 (1999).

difficult question of how it should do so, given that its people do not agree on such basic questions as "what we owe each other in the way of tolerance, forbearance, respect, co-operation, and mutual aid"[45]—the very lifeblood of a viable organism of rights recognition. As Waldron reminds us, "[t]here are many of us, and we disagree about justice."[46]

Waldron argues captivatingly that majority rule is the most defensible decision rule for democracies because it values and respects these differences among individuals. In contrast to an authoritarian model by which a sovereign (or a judge?) selects one outcome that it favors, he champions majority rule because of its "commitment to give *equal* weight to each person's view in the process by which one view is selected as the group's" and because "it attempts to give each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others."[47] This powerful account thus defends majority rule as a decision procedure (perhaps the only decision procedure) consistent with fairness, respect, and, above all, equality.[48]

A second justification offers the utilitarian argument that majority rule increases aggregate utility of the society, on the assumption that "each citizen in the majority will gain at least as much benefit . . . as each citizen in the minority will lose."[49] This theory also assumes that the preference of each voter counts equally and that each vote accurately represents the preferences of the voters. A related rational-actor account posits that, at least for the initial decision as to whether to adopt majority rule, "majority rule maximizes each individual's chances of prevailing," assuming ignorance about how widely one's preferences would be shared.[50]

A third, more empirical argument in defense of majority rule is that it has the ability to advance the individual values of civic virtue and intellectual character that are important to republican theory.[51] This view places a premium on the act of participation itself, holding that the accord of primacy to decisions rendered in this aggregate way will encourage citizens to feel part of a common undertaking and

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[45] *Id.* at 1.

[46] *Id.*

[47] *Id.* at 114.

[48] *Id.* at 115. Waldron does not claim that majority rule is the only method theoretically consistent with these values, but suggests that it may be the only one that works in politics without permitting someone to impose a controversial judgment about the substantive content of equal respect. *Id.* at 116.

[49] DAHL, *supra* note 40, at 142–44.

[50] Seidman, *supra* note 39, at 1582.

[51] *See* CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 43 (1970) (discussing the effects of democratic participation on the socialization of individual participants).

therefore contribute to self-fulfillment through the shared participation in a political community.[52]

What is striking about all three of the different defenses of majority rule sketched out here is that, ultimately, they all rest on a foundational conception of equality, albeit in varying degrees of robustness. Perhaps it should not be surprising that the decision rule so often held out as the banner of democracy should, in all of its conceptions, privilege and rely on equality, since, after all, democracy itself is profoundly tied to that principle. Yet because the role of equality in the justifications of majority rule tends to be implicit rather than explicit, there is value in bringing it to the surface.

The first justification for majority rule, the liberal account, evidently envisions a strong assumption of equality in its quest to maximize the degree to which citizens can reap the benefits of self-determination. This argument necessarily assumes that the greater the number of people who live under laws of their own choosing the better, and that the entitlement of persons to moral autonomy is distributed equally among citizens.

Waldron's variation on this account identifies respect for the individual as the core value to be pursued by a decision rule for collective decision making, also a value derived from a base of equality. Majority rule, Waldron argues, best respects individuals by recognizing that there are different conceptions of justice and the common good. By not pretending to give universally recognized correct answers to moral questions, it thereby more honestly values the fact of disagreement and concomitantly the respect for the views and contributions of all citizens. This, he acknowledges, is at bottom an argument from equality.

The utilitarian defense of majority rule also relies on a principle of equality: the accord of the same value to each citizen's vote, along with the assumption that each person's vote is the best indication of that person's interest.[53] Indeed, criticisms from within utilitarianism highlight the implicit value judgment in this account, demanding a justification for the decision to accord each vote the same value, as opposed to valuing certain people's interests more based on any number of possible variables, such as talent, wealth, or intensity of

[52] *See* ELAINE SPITZ, MAJORITY RULE 151–53 (1984) (attributing this view to Aristotle); *id.* at 215 (defending majority rule directly on the ground that it fosters both individuality and community).

[53] *See* DAHL, *supra* note 40, at 99 (discussing the presumption that each person is the best judge of his own interests).

preference.[54] But the utilitarian defense of majority rule rejects that departure from the principle of equality.

Similarly, the participatory-process justification of majority rule also emphasizes the equality-promoting aspects of that decision rule. It seeks to invigorate civic virtue and enhance self-determination in the polity by assuring each citizen an equal say in collective decisions. The core emphasis on participation and interaction highlights an awareness of equal worth correlated to the equal potential power that each person brings to the process that will ultimately be resolved by majority decision.[55]

Equality lies in some form at the heart of each defense of majority rule. But at the same time, each chooses to confine or tailor its notion of equality to some limited conception that supports the proffered justification of majority rule, and compels nothing more. For example, the liberal account values the right to self-determination among political equals, but it tolerates a scenario in which a member of the minority is compelled to obey a law imposed by others and thus, depending on the nature of the law, may be rendered less free than they. Robert Dahl accepts this critique with the response that other forms of decision making fare worse on this measure, and at least by definition more people will have the self-determination if the majority is given the power to rule.[56] So the principle of equality goes only so far in this theory.

Waldron, for whom an equality-based respect for the diverse views of individuals in society requires majority rule, makes a similar move, even more explicitly. He acknowledges the critique from equality, which says that a true commitment to respect and equality would have to take account of "the substantive impact on individuals of the outcome itself."[57] That is, one would have to see just what it is that a majority is imposing on the minority to be sure that it does not, by its nature, rob members of the minority of the "substantive respect to which they are entitled."[58] Waldron responds, reminiscent of Dahl, that since people will disagree about what measure of substantive respect to use, there can be no way to protect against that problem without privileging some set of views over others. Thus, he accepts that equality both informs his defense of majority rule and suggests a problem with it. In resolution, he adopts a view of equality that is, by

[54] *See* Michael C. Dorf, *The Coherentism of* Democracy and Distrust, 114 YALE L.J. 1237, 1248 (2005) (exploring the congruence or incongruence between the number of votes and the amount of utilitarian good).

[55] *See* SPITZ, *supra* note 52, at 150–51 (arguing that majoritarian democracy can represent both diversity of views and unity of purpose).

[56] DAHL, *supra* note 40, at 89–90.

[57] WALDRON, *supra* note 44, at 116.

[58] *Id.* (discussing a critique raised by Charles Beitz).

his own admission, "necessarily impoverished" so that it stops short of requiring substantive evaluation of the laws to which a minority are subjected.[59]

The second defense of majority rule indulges the same evasive tactic. For the utilitarian, equality suggests counting all preferences equally, but does not recognize an equality principle thick enough to suggest that some preferences (to enslave others, for example), may have implications for equality that cannot be resolved by mere aggregation in the form of majority rule. Again, the animating principle of equality is given a thin reading to avoid awkward complications.

For the participatory democratic theorist, who supports majority rule as a means to promote civic virtue, the equality that gives rise to robust citizenship roles also could present problems if good-faith deliberation fails and power politics takes over. While I have found no solution in this literature, it appears that adherents of that school are at least willing to face the problem candidly. "All agree with Madison's conclusion: Majority rule demands special safeguards against majority tyranny."[60]

If equality truly is the universal impulse that serves as a springboard for any discussion of decision rules in a democracy, and if equality truly is the profound commitment that leads participants in a democracy to favor majority rule as a first resort, then an honest inquiry requires that we also consider the entire array of implications to which a commitment to equality might lead, including some variations or limitations on majority rule itself. It is not enough to say that our commitment to equality takes us only so far—to a principle of majority rule—and no farther.

IV. THE IMPLICATIONS OF EQUALITY FOR REPRESENTATIVE GOVERNMENT

So far, we have seen that the most prominent justifications for majority rule as the best decision rule for a democracy spring from a foundational commitment to equality. If the common ground is a commitment to equality, it remains to be considered what implications that commitment will have for a decision rule in a representative democracy. Pursuing the structural inquiry into the role of liberty protection under the Constitution, the next question is what the basic structural requirements of a representative system of government would be, if we are to adhere to the bedrock commitment to equality that undergirds the constitutional democracy.

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[59] *Id.*

[60] SPITZ, *supra* note 52, at 181.

John Hart Ely must be the starting place for addressing the question of what equality requires of a process of representative government. Part of his contribution was the recognition of a link between equality on the one hand and legislative motivation on the other.[61] In his view, the concept of representation that had been at the core of the Constitution from the beginning was carried forward in the Fourteenth Amendment as a notion of equality. It precluded representatives from refusing to "represent" minority interests, by which he meant denying them the "'equal concern and respect in the design and administration of the political institutions that govern them.'"[62] For starters then, it appears that a commitment to equality obliges representatives to consider, or have regard for, the interests of all constituents, even political minorities. One way this obligation might manifest itself is in refraining from passing laws that accord negative value to the interests of citizens.[63]

But today, there is more to be learned from Supreme Court cases on the question of representative obligation beyond just the duty of a legislature to govern without malice against members of powerless groups. A window into a deeper understanding of the representative obligation can be found in the law and theory addressed to the question of access to the political process itself. Equal participation in the selection of representatives has been the focus of considerable thought and discussion. Many constitutional scholars have written about what is a fair, inclusive, and democratic way to select the representatives who will govern us. Scholars and the Court have debated the implications of the one-person-one-vote principle now for half a century and are still actively grappling with the very important issues involving the ways that the Constitution may constrain a state's freedom to draw its district lines for various purposes.[64] Little has been said from any quarter, however, about what a voter is entitled to once the election is over. Is it possible, for example, that full-fledged political and judicial warfare could be waged in the name of democracy to achieve a majority-minority district, just so that the representative elected from that district could be sent to the legislature to be walled

[61] *See* ELY, *supra* note 16, at 103 (noting that the political process malfunctions when elected representatives are motivated to retain their positions by "choking off the channels of political change" or by "systematically disadvantaging" a minority and thus denying them the same protection given other groups).

[62] *Id.* at 82 (quoting Dworkin).

[63] *Id.* at 83–84 (noting that the Framers tied "the interests of those without political power to the interests of those with it" to give "virtual representation" to the politically weak and ensure their interests are represented).

[64] *See, e.g.*, Issacharoff & Karlan, *supra* note 2, at 541–43 (noting the "ever-increasing [] vigor of partisan line drawing" as well as the attendant increase in the "array of doctrinal tools litigators and courts have invoked in attempts to rein it in").

out of influence and simply outvoted on every issue? If there were no constraints on what it means to represent, then it seems that the heated debates over increasing fair and open participation in selecting representatives would ring quite hollow.[65]

Little has been said on this question, in part, no doubt, because it raises the frightening specter of substantive obligations of legislatures. This is not an idea that has ever gained much purchase in American constitutional law, and there is no reason to think it would fare any better now. Nevertheless, in the course of considering aspects of the right to vote, the Supreme Court has also had something to say that may well be relevant to the question of how to conceive of a minimum expectation of how legislatures are supposed to operate once elected. In *Davis v. Bandemer*, for example, the Court considered whether a claim of partisan political gerrymandering is cognizable under the Equal Protection Clause.[66] The question is relevant here because, in the process of considering what kind of harm an intentional gerrymander can cause, the Court necessarily had to say something about what kind of interest an individual has in being represented, or correspondingly, what obligation a representative body has to her. In *Bandemer*, the Court talked a bit about what claimants would need to show in order to make out a claim that the state's districting scheme had abridged their right to participate in the political process. One factor worthy of consideration in a case like this, four Justices said, is whether a group claiming to be shut out of the political process can show "the lack of responsiveness *by those elected* to the concerns of the relevant groups."[67] This appears to contemplate action by elected representatives once they have entered office—a hint, perhaps, of a constitutional obligation to represent.

The plurality lent support to this reading when it explained that

> the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have *as much opportunity to influence that candidate* as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected *will entirely ignore the interests* of those voters.[68]

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[65] *See id.* at 564 (criticizing Justice Kennedy's focus on looking to "burdens [on] representational rights" on the ground that such rights "are as yet undefined").

[66] 478 U.S. 109 (1986); *see also* League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2607 (2006) (declining to revisit justiciability issue).

[67] *Bandemer*, 478 U.S. at 131 (emphasis added) (White, J., joined by Brennan, Marshall, & Blackmun, JJ.).

[68] *Id.* at 132 (emphasis added).

The negative inference, of course, is that, if a candidate did entirely ignore the interests of certain voters, a constitutional problem would arise. The Court went on to emphasize that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently *degrade a voter's or a group of voters' influence on the political process as a whole.*"[69] Thus it appears that the electoral process is not itself the end of the Constitution's domain of concern. After the election, winning and losing voters are entitled, at least, not to be systematically ignored. That seems to provide a beginning for understanding what it is that a principle of equality demands from the representative process that the Constitution establishes. It underscores the correctness of Ely's observation that representation requires that minority interests not be "left out of account or valued negatively in the lawmaking process."[70]

Further help can be found in the Court's consideration of "influence districts," designed to spread minority voters throughout several districts in such proportions that, even though they may not have enough votes to elect a candidate of their choice in any one district, they have sufficient numbers in each of several districts to compel a person seeking election in that district to be responsive to their interests. The Court has explicitly recognized and endorsed the idea of protecting voting rights through this method of districting.[71] Although the concept has been developed primarily through the requirements of the Voting Rights Act, not the Constitution, the statutory requirement is predicated on an obligation not to "deny or abridge the right to vote,"[72] which clearly can be instructive on the broader question of what it is that a person can claim an entitlement to in the electoral process and beyond. By the Court's reasoning, a state can satisfy its obligation to avoid abridging a group's right to vote by explicitly designing the electoral plan so as to assure underrepresented groups the opportunity to have influence.

To summarize, there has been some recognition of a principle that groups of voters have an entitlement, beyond the right to cast a vote, not to be ignored by the person whom their district elects, even if it is not the person for whom they voted. This is not a personal right per se, but rather a structural concern about how the political process works. The process cannot constitutionally be set up in such

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[69] *Id.* (emphasis added). *See also* Rogers v. Lodge, 458 U.S. 613, 625 & n.9 (1982) (holding that evidence that "elected officials . . . have been unresponsive and insensitive to the needs of the black community" is a necessary element of a claim of vote dilution).

[70] ELY, *supra* note 16, at 223 n.33.

[71] *See* Georgia v. Ashcroft, 539 U.S. 461, 493 (2003) (Souter, J., dissenting) (noting that the majority expressed approval of "influence districts").

[72] Voting Rights Act of 1965, 42 U.S.C. § 1973a (2000); *cf.* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged . . . .").

a way as to permit, systematically, a representative to ignore the interests of constituents. Thus, the cases lay the groundwork, albeit still in underdeveloped form, for the more general observation that to represent may carry some substantive obligation to pay heed to the interests of one's constituents, even if they are not supporters. Conversely, to be represented carries some element of entitlement to having one's interests or preferences at least considered or taken into account by the legislative body, even if that body ultimately rejects those preferences. This idea of a minimal substantive content to the act of representation derives from the equality guarantees of the Constitution itself, although the contours of such a constitutional requirement remain to be clarified.

The Supreme Court has thus provided only the barest of indications of what the representative obligation entails, suggesting that the entitlement to having one's interests considered in the lawmaking process is derived from the Constitution. In seeking to understand this representative obligation better, I turn to a school of thought that has devoted a great deal of attention to the very question of what it means for a lawmaking process to take the interests of disagreeing participants into account. For the theory of deliberative democracy, the principle of having one's interests considered is a central tenet. While it is not established that our Constitution requires the deliberative-democracy approach, that theory finds its roots in the civic republican traditions that were influential in the framing of the Constitution and evident in many of its structural features.[73] Those traditions support a conviction that exposing people to influence and debate regarding one another's positions is the foundation of a well-functioning republic. Thus, the deliberative-democracy model recognizes the same essential place for consultation and persuasion in the making of law that appears to be included in the minimal constitutional principle of equal participation reflected in the Supreme Court's vote-dilution and equal protection decisions. Because the Constitution and the theory of deliberative democracy share this core idea, the latter, which has had the benefit of quite extensive theoretical development, can perhaps shed some light on the former, which has not.

V. LESSONS FROM DELIBERATIVE DEMOCRACY

Basic tenets of deliberative democracy overlap with principles that the Supreme Court has recognized in the Constitution: meaningful

[73] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 20 (1993) (emphasizing also that this initial influence has been reinforced by subsequent political and constitutional history); *id.* at 133–34 (outlining the historical sources of deliberative democracy).

inclusion and political equality.[74] Like the Constitution, deliberative democracy embraces the idea of an equal right of citizens to participate in political processes and to enjoy basic freedoms, along with the principle articulated by Amy Gutmann and Dennis Thompson that "individual citizens should be regarded as moral agents who deserve equal respect in any justifications of the basic structure of government"[75]—very close to the core of representation identified by John Hart Ely as inherent in our constitutional structure.[76] In developing these shared commitments, the deliberative democracy theorists have elaborated on the notion of equal respect, arguing that it should be understood as dictating a method for "manifest[ing] mutual respect [among citizens] as they continue to disagree about . . . important issues in politics."[77] That method contemplates that citizens and/or representatives will deliberate and consider competing claims, seeking to persuade and justify their own position to one another. The process of justification gives rise to a significant role for the offering of reasons: "[w]hen majorities are obligated to offer reasons to dissenting minorities, they expose their position to criticism and give minorities their most effective and fairest chance of persuading majorities of the justice of their position."[78]

The proponents of deliberative democracy assert two points significant for present purposes. First, the basic equality that is a starting point for all democratic theory requires both a chance to participate and a chance to be heard with dissenting views. Second, the chance to be heard gives rise in turn to an obligation on the dominant group to supply reasons for their decisions. The reason-giving is a way both to accord respect to the equal moral status of each citizen and to achieve better outcomes through meaningful accountability.

This account does not purport to be required as such by the Constitution. Some scholars have sought to link the structural and theoretical commitments of the Constitution to some version of the deliberative-democracy framework. In particular, this effort finds support in such areas as the Madisonian view of mandatory enfranchisement and protection of free speech, coupled with the various institutional accommodations in the Constitution to deliberation, compromise, and persuasion, such as bicameralism and indirect election of Senate and President.[79] The Republican Revival movement, indeed, was in-

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[74] *See id.* at 135–37 (deeming "citizenship" and "political equality" commitments flowing from the deliberative-democracy approach).

[75] AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 39 (1996).

[76] *See generally* ELY, *supra* note 16.

[77] GUTMANN & THOMPSON, *supra* note 75, at 43.

[78] *Id.* at 44.

[79] *See* SUNSTEIN, *supra* note 73, at 137 (tracing the historical roots of the link between the political equality and free speech to Madison).

spired by a conviction that the Constitution contains basic commitments, features, and arguably imperatives of the civic republican vision, including a premium on deliberation in politics.[80]

I seek to make a slightly stronger, although quite narrow, claim. The Constitution does contain an obligation of political equality, which gives rise to an entitlement to both fair participation in the process of selecting representatives and the opportunity to influence the decisions and positions of representatives once they are elected. This much the Supreme Court has told us, although it has not had occasion to expound fully on what the entitlement to participate meaningfully and not be ignored in the political process might mean.

In order to pursue that question beyond the limited and sometimes tortured confines of redistricting jurisprudence, I have turned to the theory of deliberative democracy, which shares both the premise of political equality and its reflection in an entitlement not to be ignored. Deliberative democracy, now moving beyond what the Constitution has been held to require, pushes that premise toward an aspiration of mutual justification in political decision making, by which citizens and their representatives must make decisions that they can justify to everyone bound by them with reasons that are accessible to all. Deliberative democracy teaches us that equality in the political process, including the opportunity for meaningful influence, leads to an obligation on those who make the laws to offer reasons for their decisions. Decisions that fail to take into account the views of dissenters, or fail to address with explanations competing concerns with the public are not just bad politics. They are bad democracy, as they fail to accord the political equality to which the Supreme Court has held that all citizens are entitled.

The claim, then, is that the Constitution's premise of political equality coupled with opportunity to be considered in the legislative process gives rise to a constitutional obligation on representatives to provide reasons for their decisions. Only by providing reasons that are accessible to those bound to live under the laws can a legislature live up to its obligation to represent with the equal respect that is each citizen's due.

VI. A REQUIREMENT OF REASONS

I have argued that political equality leads to an obligation on legislatures to provide reasons for their actions. This obligation is in some ways reminiscent of Frank Michelman's discussion in this Symposium of the Rawlsian promise of public reason, which he eloquently de-

[80] *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (responding to the two main objections toward new republicanism).

scribes as "the guarantee that the right questions, at least, will be posed and sincerely debated . . . ."[81] This commitment is "rooted in commitments to . . . mutual and reciprocal respect and regard among persons conceived as reasonable and rational, equal and free . . . ."[82]

It may seem like an alien concept to expect legislatures to provide reasons for their actions. Often we think of legislatures as doing whatever they think best, while it is courts alone who have to provide reasons for their decisions. Yet that is not strictly true. The very heart of the Constitution's protection of liberty under the Due Process Clause invokes the concept of "ordered liberty," which has always represented a consideration of "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[83] Through this vehicle, the Constitution has required legislatures, when seeking to restrict important liberties of their people, to provide reasons that relate to the demands of organized society, generally referred to as the police power. It has been the job of courts to receive these reasons and to evaluate whether they, in fact, represent an effort to advance the common good. Even though there have been great changes in the application of this principle during the twentieth century, and even though there is a wide discrepancy between the degree of deference the Court now accords to some liberties as compared with others, the principle is still operative. Due process is "regulation which is reasonable in relation to its subject and is adopted in the interests of the community . . . ."[84] That standard contemplates that a state will justify its laws with reasons.

Concomitantly, the court will have the job of asking the state to justify its laws with reasons when they are challenged. The question of what is required to justify a law and how a court should apply the balance of ordered liberty in any given case is of course a hard one and not something I can resolve here. But we are not without guidance in approaching such a task. Because the obligation to supply reasons has been derived from the political equality of citizens and the need for a government to respect the independent moral status of each of its citizens, then a sense of the kinds of reasons one would look for begins to take shape. For one thing, it cannot be a reason that would degrade or devalue the basic conditions of equality for all. So, for example, the standard "because we don't like you" argument,

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[81] Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121, 151 (2006).

[82] *Id.* at 152.

[83] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[84] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

found wanting in equal protection jurisprudence,[85] would also not be sufficient here. Similarly, a claim that "the behavior you desire to do is immoral" would have to be considered carefully to ensure it is not just a rephrasing of the prior, inadequate justification. Deliberative democracy theory employs a sophisticated inquiry whose purpose is to determine whether a particular kind of reason is supported by a principle of reciprocity, and thereby consistent with equality principles: reciprocity requires the offer of "reasons that can be justified to all parties who are motivated to find fair terms of social cooperation."[86] While it is impossible to establish a mechanical definition to identify reasons that would satisfy such a standard, it is easy to think of some that would not. A law founded on contested religious beliefs, for example, would deny the fundamental equal status of citizens by asking them to accept reasons that are not accessible to them without adopting a particular religious creed.

The Supreme Court's opinion in *Lawrence v. Texas*[87] reflects something of this attitude. The Court found that the reasons offered by the state to justify its law criminalizing sodomy did not accord adequate respect to the equal status of those asked to live under that law.[88] The Court offered this analysis as an interpretation of the liberty component of the Due Process Clause, but, as all readers have noticed, it resounds deeply in equality.

VII. THE LOGIC OF MAJORITY RULE

Equality was the starting place for my argument. Those who defend majority rule as a first, last, or only resort in a democracy all rely on arguments based on a commitment to equality. It seems fair to say, therefore, that equality is the common ground from which to proceed to consider the appropriate role of majority rule in our constitutional democracy.

The next question was what a commitment to equality would require from the process of representation in a democracy. The Supreme Court has suggested that the principle of equality requires an opportunity for individuals or groups to have influence on elected of-

[85] *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996) (invalidating an amendment to the Colorado Constitution that would prohibit any state action to prevent discrimination against homosexuals); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (striking down a zoning ordinance prohibiting group homes for mentally retarded persons from certain districts); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding unconstitutional an amendment to the Food Stamp Act which "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program").

[86] GUTMANN & THOMPSON, *supra* note 75, at 65.

[87] 539 U.S. 558 (2003).

[88] *See id.* at 575–76.

ficials; John Hart Ely has suggested that it requires a legislature to take the interests of constituents into account at a value greater than zero.

Turning to what it might mean to enjoy this right to influence or to be taken into account, I have argued that, at a minimum, it involves the right to demand reasons for a law that places burdens on an individual or group. Reasons are the legislature's way of showing that it has met its obligation to represent in the constitutional sense.

The offering of reasons is the heart of the judicial protection of liberty under the Due Process Clause. Therefore, courts can give meaning to the structural constitutional obligation on legislatures to meet minimal obligations of representation by recognizing liberty claims. Once such a claim is leveled, then the state brings forward its reasons and the Court considers whether these reasons are sufficient to accord with the equality guarantees of the Constitution. Thus, the Court brings to fruition the commitment to equality that led our polity to majority rule in the first place.

When the Court seeks to protect underlying constitutional values indirectly, as I have suggested it did with the representation-reinforcing approaches to judicial review of the Warren Court and the Rehnquist Court, and also with the accommodation of administrative agencies through invigorated enforcement of procedural due process guarantees, it does not just randomly choose constitutional standards to enforce. Rather, it identifies the kinds of harms that might be expected to emerge as a result of the structural compromises or malfunctions it has perceived, and the kinds of additional incentives needed to avert those harms. The protection of liberty as a safety net for the process of representation does just that.

Concerns over the structural integrity of the representative process center around whether the elected representatives are institutionally capable of doing the job of representation, in a setting in which accountability is diminished and special interests strong. When a Court insists that the outputs of a legislative process be supported by reasons, it encourages the representatives to take seriously the obligation to represent in a way that minimally respects the basic equality of citizens. The correlation between equality and reason-giving is substantive and logical.

While there may be nothing a court could or should do to embroil itself in the political thicket of legislative deliberation, the current state of representative politics provides grave reason to worry about whether the representative process is doing either the job of meaningfully effectuating self-government or the job of approximating government by consent. As these are two principal assumptions providing the foundation for the legitimacy of the constitutional democracy, they are, to say the least, a big loss. It is not only legitimate, therefore, but incumbent on the Court to seek to compensate for

these structural concerns in ways that are consistent with constitutional principle.

The logic of equality, traced through our commitment to majority rule and carried forward, without artificial restraints on how far it would be permitted to go, has brought us to the judicial protection, in at least some minimal way, of unenumerated rights. By taking this protection seriously, the Court should not be understood to throw down a "trump" card to overpower majority rule or deprive majorities of their right to govern as they see fit. Rather, it should be perceived as providing the consistency of principle that makes majority rule possible in a constitutional democracy committed to equality. By protecting liberty in the name of equality, therefore, the Court enables, rather than obstructs, democracy.